CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF TV VEST AS & ROGALAND PENSJONISTPARTI v. NORWAY

(Application no. 21132/05)

JUDGMENT

STRASBOURG

11 December 2008

FINAL

11/03/2009

This judgment may be subject to editorial revision.

In the case of TV Vest As & Rogaland Pensjonistparti v. Norway**,**

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni*, judges,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 26 June and 20 November 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 21132/05) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by TV Vest AS (Ltd.), a television broadcasting company and the Rogaland Pensioners Party (Rogaland Pensjonistparti) ("the applicants"), on 12 May 2005.

2. The applicants were represented by Mr. K. Eggen, a lawyer practising in Oslo. The respondent Government were represented by their Agent, Ms T. Steen, Attorney General's Office (Civil Matters).

3. The applicants alleged, in particular, that the imposition by the Media Authority of a fine on the first applicant for having breached a statutory prohibition on political advertising in respect of such broadcasts on behalf of the second applicant, had given rise to a violation of Article 10 of the Convention.

4. By a decision of 29 November 2007 the Court declared the application admissible.

5. Subsequently, third-party comments were received from the Governments of Ireland and the United Kingdom, which had been granted leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 26 June 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms T. STEEN, Attorney-General's Office, *Agent*,
Mr H. HARBORG, Advokat, *Counsel*,
Mr S. FAGERNÆS, Adviser, Ministry of Culture and Church Affairs,
Ms. I. CONRADI ANDERSEN, Norwegian Media Authority, *Advisers*;

(b) *for the applicants*
Mr K. EGGEN, *Advokat*, *Counsel*.

The Court heard addresses by Mr Eggen and Mr Harborg.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant, TV Vest AS (Ltd.), is a television broadcasting company located in Stavanger in the County of Rogaland, on the west coast of Norway. The second applicant, Rogaland Pensjonistparti, is the regional branch of the Pensjonistpartiet, which will be referred to hereinafter as "the Pensioners Party". This is a small political party, which, in the local and regional elections held on 15 September 2003, obtained 1.3% of the votes nationally, while the Rogaland branch obtained 2.3% of the votes in Rogaland.

A. The disputed advertising of the Pensioners Party by TV Vest and administrative sanction

8. With a view to the above-mentioned elections the Party asked to purchase advertising time from TV Vest in order to broadcast political advertisements. In the Spring of 2003 TV Vest, considering that the broadcast would be lawful, agreed to broadcast three different advertisements, with a duration of fifteen seconds each, seven times per day over eight days during the period from 14 August to 12 September 2003, and for which the Party would pay a fee of 30,000 Norwegian kroner (NOK). The short broadcasts sought to portray the values of the Pensioners Party and encouraged viewers to vote for them:

Advertising film 1:

Egil Willumsen, Pensioners Party: "We want this splendid property here to be given back to the people of Stavanger and Rogaland as a specialised hospital for the elderly and chronically ill. Vote for the Pensioners Party."

Picture with text:

"We need your vote on 15 September! Vote for the Pensioners Party."

Advertising film 2:

Åshild Bjørnevoll, Pensioners Party: "Young people are our future. Some of them live in difficult circumstances and need help and support. If they do not receive the assistance they require, it may have major consequences for us all. Vote for the Pensioners Party for a better future."

Picture with text:

"We need your vote on 15 September! Vote for the Pensioners Party."

Advertising film 3:

Tor Kristian Rønneberg, Pensioners Party: "A sufficient number of good nursing home places. Secure jobs, particularly for older workers, and decent pension schemes. If you are interested in any of this, vote for the Pensioners Party."

Picture with text:

"We need your vote on 15 September! Vote for the Pensioners Party."

9. On 12 August 2003 the first applicant notified the State Media Authority (*Statens medieforvaltning* – the "Media Authority") of its intention to broadcast the political advertisements and argued that such broadcasting was protected by Article 10 of the Convention.

10. The first applicant broadcast the political advertisements on 14, 15, 16, 18, 28, 29 and 30 August and on 1, 3, 12 and 13 September 2003. According to a public statement by the second applicant dated 30 August 2003, although it had been made aware of the statutory prohibition of political advertising on television, it had nonetheless decided to advertise for a number of reasons:

"The Pensioners Party in Rogaland has found it difficult to gain the attention of the media. We regard this as a 'golden opportunity' to highlight the party's values and political priorities.

The bigger parties are given very wide leeway in connection both with debates and with various initiatives in radio, television and the press. In this regard, the Pensioners Party often feels excluded and has very limited opportunities to make itself heard.

In addition, the Party is never identified in national or local opinion polls, but is included in the group 'Others'.

> We in the Pensioners Party took responsibility for the content of the messages and chose three themes which best reflected the Party's values and basic attitudes at local level ...".

11. On 27 August 2003 the Media Authority warned TV Vest that they were considering issuing a fine against the company for violating the ban on political advertising on television. TV Vest answered the letter on 4 September 2003.

12. On 10 September 2003 the Media Authority decided to impose a fine of NOK 35,000 on TV Vest, under section 10-3 of the Broadcasting Act 1992 and section 10-2 of the Broadcasting Regulations, for violation of the prohibition on political advertising in television broadcasts as provided in section 3-1(3) of the Act.

B. Extent of other coverage of the Pensioners Party in television broadcasts

13. The applicants provided the following information on the extent to which the Rogaland Pensioners Party had been the subject of editorial coverage during the period August-September 2003 by the three broadcasters indicated below:

(i) TV2 (privately owned broadcasting company) had informed them that in the course of 2003 the Pensioners Party as such had been given editorial coverage on three occasions: once when TV Vest had brought an action against the Norwegian State to challenge the legality of the fine imposed for the broadcasting of the political advertisements at issue; a second time concerning the party's electoral list cooperation with three other small parties; and lastly in connection with the actual election results. In none of these instances had the local Rogaland Pensioners Party been specifically mentioned.

(ii) The NRK ("The Norwegian Broadcasting Corporation", national public broadcaster) had stated that there were two short items (studio comments) that had been broadcast during the election campaign period, respectively on 27 August and 10 September 2003, both of which had concerned the issue in the present case of political advertising.

(iii) TV Vest had informed them that the Rogaland Pensioners Party had been referred to three times: on 12 August 2003 when the decision to air the advertisement at issue had been taken, on 27 August 2003 in connection with notification of the State's reaction against these advertisements, and on 10 September 2003 regarding the actual fee. None of the said items had been full features and none of them had focused on the Rogaland Pensioners Party's politics.

C. Judicial appeal by TV Vest

14. TV Vest appealed against the decision of 10 September 2003 to Oslo City Court (*Oslo tingrett*). TV Vest did not dispute that the content was political advertising and thus fell foul of the above-mentioned prohibition in the Broadcasting Act but submitted that this provision was incompatible with the right to freedom of expression in Article 100 of the Constitution and Article 10 of the Convention.

15. By a judgment of 23 February 2004 the City Court upheld the Media Authority's decision.

16. TV Vest appealed against the City Court's judgment to the Supreme Court (*Høyesterett*), challenging its application of the law. The Supreme Court granted leave to appeal under Article 6 (2) of the Code of Civil Procedure. The second applicant acted as a third-party intervener (*hjelpeintervenient*).

17. In a judgment of 12 November 2004 the Supreme Court, by four votes to one, upheld the Media Authority's decision.

18. In his opinion, to which three other members subscribed, Mr Justice Oftedal Broch disagreed with the first applicant's submission that the case raised an issue at the heart of freedom of expression. The most central aspect of the case was that the legislature had addressed certain issues for the democratic process concerning the limits to be imposed on the use of television for paid communication in the course of a political debate. Thus there was stronger reason to emphasise the legislature's intention in this area than to dwell on the protection of the content in question. The political bodies were better placed than the courts to assess what measures were suitable for heightening the level of political debate. The rationale for the prohibition of political advertising on television was that it was likely to lead to an inappropriate form of political debate. An advertisement containing a political message could easily give a distorted picture of complex issues. Opening the possibilities for such advertisements would mean that financially powerful groups would have greater opportunities for marketing their opinions than less resourceful parties or interest organisations.

19. Thus, Mr Justice Oftedal Broch observed, concerns about quality and pluralism in political debate were central and formed the basis of the national courts' assessment. It was not the content but the form and medium of the expression that was being regulated and the Pensioners Party, like other parties, had many other means for addressing the electorate. There was hardly any reason to consider that the prohibition in section 3-1(3) of the Broadcasting Act was incompatible with freedom of expression as protected by Article 100 of the Constitution either in its version as applicable at the material time or in its amended version of 30 September 2004.

20. As regards the issue of necessity under Article 10 § 2 of the Convention Mr Justice Oftedal Broch had particular regard to the Court's judgments in *Vgt Verein gegen Tierfabriken v. Switzerland* (no. 24699/94, ECHR 2001-VI) and *Murphy v. Ireland* (no. 44179/98, ECHR 2003-IX), concerning restrictions on political broadcasts relating respectively to animal protection and to the rearing of animals (on television) and to the promotion of religious gatherings (on the radio). Mr Justice Oftedal Broch found, *inter alia*, as follows:

> "(60) In the light of these two judgments, how should we assess the Norwegian prohibition of political advertising on television? Neither of the cases is completely parallel to the situation now at hand. The main difference from the *VgT* case is that the latter concerned a group – the Association against Animal Factories – which focused on a topic of current interest: the protection of animals in connection with the industrial production of meat. The association wished to participate in the debate on this issue by showing a film. In this respect, there is a greater parallel between the Pensioners Party and the case of *Murphy v. Ireland* in terms of its wish to make its existence and manifesto known to a broad public. What distinguishes the present case from the *Murphy* case is the fact that religious issues in Ireland must be regarded as far more controversial and could presumably cause greater social unrest than political movements in Norway. Having said this, however, I find a considerable degree of parallelism between the Court's arguments in *Murphy* and my own views on the Norwegian prohibition in relation to Article 10.
>
> (61) A decisive difference in the Court's approach between the two cases is that in the *VgT* case the Court found that the State's margin of appreciation was narrow, whereas its margin of appreciation in the *Murphy* case was broad. A factor that was emphasised in the *Murphy* case, and that also applies in our case, is that there is no European consensus on political advertising. There are major differences in the rules currently in force in European countries. There is a group of countries, including Norway, Sweden, Denmark, France, Germany and Ireland, which have prohibited political advertising to varying degrees. Other countries, such as Hungary, Lithuania, Poland, Romania, Netherlands and Finland, basically have no such barrier. This difference has a further dimension in that the rules in many countries now appear to be undergoing revision. But the draft amendments point in different directions, thereby underscoring the diversity of views. In some countries, the rules are being liberalised, while other countries, like Denmark, are tightening the prohibitions that already exist. In Norway, the Government has announced its intention to present a Bill under which political advertising will be accepted within certain limits. At the same time, we have seen that the right to continue to impose a prohibition is being maintained through the amendment to Article 100 of the Constitution of Norway. In other words, the rules governing political advertising are subject to constant change, which should mean that States have considerable freedom to choose their own form of regulation.
>
> (62) The type of interference concerned in this case also suggests a broad margin of appreciation. The regulation of political advertising is less a question of the individual's freedom of expression and far more a question of how best to promote political debate and ensure good frameworks for the democratic electoral process. In this light, our political bodies have – hitherto – deemed that political advertising on television promotes an unfavourable simplification of political issues, as well as giving financially powerful groups a greater opportunity to put forward their views.

These considerations have a direct bearing on the desire to ensure quality in the political process. In this area, it is essential that institutions vested with democratic legitimacy be given a broad margin of appreciation based on their assessment of national conditions. Parliament's evaluation as regards expediency should be applied unless – as stated in the *Kjuus* case – it appears to be unfounded or otherwise objectively weak. On the other hand, this limitation is important, and particularly in the present case, which has to do with a majority in Parliament determining the general conditions for political debate. This means that the courts should give particularly close consideration to whether the solution has a discriminatory effect. In the present case, the grounds cited by Parliament in support of the prohibition of advertising cannot be said to be of a discriminatory nature. On the contrary, it is argued that political advertising will give large, affluent parties a further advantage to the detriment of small parties.

(63) In assessing the specific circumstances of the present case, questions can nevertheless be raised as regards the significance that should be attached to the fact that the Pensioners Party, far from having the financial strength to abuse the power of advertising, on the contrary and unlike the more established parties, believed that it needed the advertising precisely to be able to establish a channel to a broad public during the period prior to the municipal elections. Even if this point of view is accepted *per se*, in my opinion no importance can be placed on it in assessing the prohibition of advertising in relation to the Convention. The reason for this is that it is not democratically possible to differentiate between the various political parties – least of all just before an election. And if our basic premise is that all political parties must be treated alike with regard to paid television advertising, the possibility of small parties being overshadowed by large ones cannot be excluded.

(64) I have mentioned that there currently appears to be a majority in Parliament in favour of relaxing the prohibition of advertising, that solutions in European countries vary and that in many countries the attitude towards political advertising is now being reassessed – with differing results. I have underscored this very situation as an argument in support of allowing States a broad margin of appreciation. Now one might ask whether the change in the Parliamentary majority's political views on the prohibition of advertising entails that neither the will of the legislature nor the democratic roots of the statute can militate any longer in favour of maintaining the current statutory prohibition on the basis of a broad margin of appreciation. In my opinion, this cannot be the case. It would mean that the legislature had renounced its margin of appreciation despite clear statements to the effect that it did not wish to bind future developments to a specific solution.

(65) In sum, therefore, it is my view that a prohibition or regulation of political advertising on television must primarily be seen as the establishment of limits for political debate. These are decisions that should be taken by a country's democratic institutions, and consequently an area in which a country's political bodies must be given great freedom of action in relation to Article 10. The fact that there is no European consensus, but on the contrary a wide range of national solutions in this field, strengthens this view.

(66) In view of all the channels that political parties can use to communicate their message to a broad public, the prohibition of political advertising on television appears to be a limited interference that is not disproportionate to the purposes the interference aims to achieve. In this light, the grounds underlying the provision in section 3-1(3) of the Broadcasting Act are relevant and sufficient. If the special

circumstances of the present case are examined more closely, this becomes even clearer. The prohibition of advertising was applied to a political party immediately prior to an election. At such a time, it is particularly important to ensure a 'fair climate of debate', and some countries have limited their ban on advertising precisely to this period. The possibility that a broad interpretation of the prohibition of political advertising on television may conflict with Article 10 of the Convention, as illustrated by the Court's *VgT* judgment, is, in my opinion, of no significance for the application of Article 10 to the facts of our case, which lies within the core area of the prohibition.

(67) In the light of the foregoing, it is my view that there has been no violation of Article 10 of the Convention."

21. The dissenting judge, Mr Justice Skoghøy, stated:

"(70) ... I have concluded that the Media Authority's administrative decision to impose a fine on TV Vest is an unlawful interference with the right to freedom of expression under Article 10 of the Convention, and that the appeal by TV Vest AS must therefore be allowed. ...

(75) In deciding whether there is a sufficiently pressing need for interference in the right to freedom of expression, the Court has granted national authorities and courts a certain margin of appreciation. The reason for this is that national authorities and courts will often be in a better position to assess the necessity of an interference and have greater insight into any special circumstances that might apply in the individual countries, and the fact that it is the States Parties to the Convention that have the primary responsibility for protecting and enforcing human rights (see Lorenzen et al.: *Den Europæiske Menneskerettighedskonvention med kommentarer* [The European Convention on Human Rights with comments], 2nd edition (2003), p. 23, and Harris/O'Boyle/Warbrick: *Law of the European Convention on Human Rights* (1995), p. 14). The part of the grounds that states that national authorities will often be in a better position to assess the necessity of an interference also applies, by and large, to the relationship between national courts of law and national legislatures, and against this background the principle has been adopted in Norwegian case-law that when Norwegian courts examine the question whether Norwegian legislation breaches international human rights conventions, they should accord the Norwegian legislature a similar margin of appreciation, see for example *Norsk Retstidende* ("*Rt*" - Norwegian Supreme Court Reports) 1999-961. This is not necessary for the purposes of the Convention; nor does the Convention preclude it. As mentioned earlier, however, freedom of expression is one of the fundamental pillars of democracy, and it is therefore important that small political groups are also able to make themselves heard. For this reason, strong objections are raised against attaching too much importance to the opinion of the political majority at any given time as regards how far freedom of expression on political issues should go. The Court's case-law is also based on the idea that States' margin of appreciation is relatively narrow in cases regarding expressions of political opinion; see *VgT*, § 67, and *Murphy*, § 67. ....

(76) The main grounds for the Broadcasting Act's prohibition of political advertising on television is that if such advertising were to be permitted, it could result in financially powerful groups having a greater opportunity than others to disseminate their views to the detriment of parties and special-interest organisations with fewer resources, thereby impairing democratic equality, and in the expression of political opinions through advertising easily becoming sloganised and manipulative and leading to an unfavourable form of debate. The prohibition has been limited to television because this medium is presumed to be particularly effective and to have a

greater ability to influence the public than other media (see Proposition No. 58 (1998-1999) to the *Odelsting* [the larger division of Parliament], p. 12).

(77) The reasons cited for not allowing political advertising on television are legitimate in relation to Article 10 § 2 ('protect the rights ... of others'), but as the appellant has forcefully argued, there are also weighty arguments in favour of permitting such advertising. Editorial television broadcasts can easily become dominated by the most influential political parties. Smaller parties do not have the same possibilities of making themselves seen and heard. Allowing advertising for political parties would also help to promote direct communication with the voters – without the filtering that takes place through the media's editorial staff. This is a consideration that is heavily emphasised by the Norwegian Government Commission on Freedom of Expression in *Norges Offentlige Utredninger* ("*NOU*" Official Norwegian Report) 1999:27, pp. 140-141. It is pointed out in the report that complaints that the media to a certain extent 'set the agenda' appear to be justified, and that as a result of the filtering that takes place through the media's editorial processes, the political parties must adopt a strategic approach to the media to ensure that their message is communicated. This situation has been accentuated by the fact that television, which for many reasons must be more 'toughly edited' than newspapers, has become the dominant vector for the general public.

(78) With regard to the argument concerning the form of debate, the fact is that the medium of television has contributed towards making political debate more slogan-oriented and agitational, and as the Norwegian Commission on Freedom of Expression points out, it is doubtful whether allowing political television advertising will change the character of political communication to any appreciable degree (see Official Norwegian Report NOU 1999:27, p. 140). The eventuality that financially powerful groups might dominate political debate on television, and that the latter might become overly characterised by slogans and trivialised can be counteracted in other ways, for instance by limiting the extent of, and broadcast time for, political advertising on television. As the Commission pointed out, in a democratic society it is not necessarily illegitimate to appeal to feelings.

(79) In my opinion, in the light of the above, there cannot be deemed to be a sufficiently pressing social need for a total prohibition of political advertising on television. A total ban is not proportionate to the purposes sought to be achieved. Even if the reasons advanced in support of prohibiting such advertising are legitimate, they are not sufficiently weighty to justify a total ban.

(80) The fact that a total prohibition on political advertising on television is incompatible with Article 10 of the Convention is, in my opinion, also evident from the Court's judgment in the case of *VgT v. Switzerland*. In paragraph 75 of this judgment the Court states that it cannot exclude that a ban on political advertising may be compatible with Article 10 in certain situations. However, the Court pointed out that in order for such a prohibition to be acceptable, it must be based on grounds that meet the requirements set out in paragraph 2 of Article 10. The case in question concerned a ban on political advertising on radio and television. In paragraph 74 the Court points out that a prohibition of political advertising that is limited to certain media does not appear to be of a particularly pressing nature.

(81) As the first voting judge has mentioned, the *VgT* case concerns a television advertising campaign presented by an animal protection organisation, and the State has asserted that the judgment must be deemed to be limited to idealistic advertising,

in opposition to commercial advertising, and that the scope of the judgment has in any event been narrowed down by the *Murphy* judgment. I disagree with these arguments. The grounds in paragraph 75 of the *VgT* judgment concern political advertising in general, and there are no grounds for contending that it is limited to idealistic counter-advertising against commercial advertising. Nor are there any grounds in the *Murphy* judgment for arguing that it aims to deviate from or limit the scope of the *VgT* judgment. On the contrary, in paragraph 67 of the *Murphy* judgment, it is emphasised that as far as political speech or debate of questions of general interest are concerned, there is little scope for restrictions under paragraph 2 of Article 10. When the Court concluded in the *Murphy* judgment that there was no violation of Article 10, this was based on the explicit grounds that the *Murphy* case – contrary to the case of *VgT* – concerned the expression of religious beliefs, and that in such cases national States should have a greater margin of appreciation (see paragraph 67 of the *Murphy* judgment). Reference was made in the specific grounds to the extreme sensitivity of the question of broadcasting of religious advertising in Ireland (paragraph 73). Inasmuch as the Court in *Murphy* accentuates the difference between political and religious advertising, and underscores the special considerations that apply in the case of the expression of religious beliefs in Ireland, the *Murphy* judgment in my opinion serves not to weaken, but to strengthen and further underpin the view regarding political advertising on television expressed by the Court in the *VgT* judgment.

(82) In paragraph 75 of *VgT*, the Court emphasised that the animal protection association, which was the applicant in the case concerned, was not a financially powerful group, and this argument has been invoked by the appellant in respect of the Pensioners Party. However, as I pointed out earlier, I do not believe that the arguments justifying the legal basis for interference necessarily apply in full to the present case. In my opinion, it would be totally unacceptable if the right of political parties to use television advertising were to depend on the financial situation of the individual parties.

(83) On the other hand, when assessing whether there is a sufficiently pressing social need for a total prohibition of political advertising on television, great importance must in my opinion be attached to the fact that, in connection with the amendment of Article 100 of the Constitution of Norway in 2004, the majority in Parliament's Standing Committee on Scrutiny and Constitutional Affairs was in favour of abolishing the current total prohibition and instead introducing regulating restrictions. ...

(84) ... TV Vest has argued that a total prohibition of televised political advertising will be contrary to Article 100 of the Constitution, as it reads following the constitutional amendment adopted on 30 September 2004. I see no reason to address this question, as it appears to be somewhat unclear whether the majority in the Standing Committee on Scrutiny and Constitutional Affairs considered that the right to political advertising on television derived from the new Article 100, or whether such a right had to be enacted first. In relation to the question whether a total prohibition of political advertising on television is compatible with Article 10 § 2 of the Convention, however, the position taken by the majority in the Standing Committee, in connection with the constitutional amendment, is of considerable interest, in any event. Since the majority in the Standing Committee found the current total prohibition of televised political advertising to be 'unfortunate from the point of view of freedom of expression' and in the underlying grounds overruled the main arguments that were adduced in support of the prohibition at the time it was adopted, I cannot see that it can be claimed with any particular degree of credibility that there is

such a pressing social need for such a prohibition that it can be accepted as compatible with paragraph 2 of Article 10. In this connection, I find it necessary to emphasise that the change in the Parliamentary majority's attitude was not caused by changes in society, but is solely due to the fact that the majority has realised that there is no sufficiently pressing social need for such interference with the right to freedom of expression.

(85) The Media Authority's administrative decision of 10 September 2003 to impose a fine on TV Vest was taken under section 3-1(3) (see also section 10-3) of the Broadcasting Act. The advertisements concerned in this case were aired during the election campaign for municipal and county elections in 2003. I see no reason to address the question whether prohibiting political advertising on television during election campaigns is compatible with paragraph 2 of Article 10 of the Convention. The norm that constitutes the legal basis for the administrative decision of the Media Authority contains a total prohibition of political advertising on television. As Lorenzen et al. (op. cit. p. 51) points out, when examining the question whether an interference in the exercise of a human right is compatible with the Convention, it is necessary to 'assess whether the national legal basis meets the human rights requirements as regards quality of law in relation to the powers of interference that derive from the Convention and the Court's case-law'. When examining the question whether the national norm that provides legal authority for interference satisfies the requirements set out in the Convention, the question whether the national legal authority for interference is circumscribed sufficiently narrowly so as to satisfy the requirement of proportionality must also be examined. Since the prohibition of political advertising on television, which constitutes the legal basis for the Media Authority's decisions, is not circumscribed sufficiently narrowly so as to satisfy the proportionality requirement set out in paragraph 2 of Article 10, the decision that was made pursuant to this provision must, in my opinion, be found to conflict with the Convention, even though the Convention might authorise the prohibition of political advertising on television during an election campaign. If the Norwegian legislature should wish to have such a prohibition, it would in such cases have to be the subject of special consideration, and relevant, sufficiently weighty and convincing grounds would have to be provided. The grounds adduced by the legislature for the existing total prohibition cannot justify a limited prohibition of this nature.

(86) On this basis it is my conclusion that the Norwegian Media Authority's administrative decision to impose a fine on TV Vest AS is invalid (see section 3 and also section 2, of the Human Rights Act). ...”

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. Section 3-1(3) of the Broadcasting Act 1992 reads:

“Broadcasters shall not transmit advertisements for life philosophy or political opinions through television. This applies also to teletext.”

23. The Government submitted that in 2005 the Media Authority had found that an advertisement broadcast by TV2 for an anti-terrorism group named the European Security Advocacy Group (ESAG) contained a political message which clearly fell within the meaning of the Broadcasting Act (section 3-1(3)). However, the Authority had concluded that the prohibition could not be enforced because to do so would violate Article 10

of the Convention. The Authority distinguished the facts from the Supreme Court's ruling in the *TV Vest* case. The ESAG advertisement had to be regarded as a contribution to a general public debate on how to fight terrorism, it had been transmitted outside the election period, and had not been connected to any political party or political organisation, but to a (social) interest group. Accordingly, the Authority found more similarities with the Court's judgment in the *VgT* case and, by applying a narrower margin of appreciation, that the interference could not be said to be necessary for the purposes of Article 10 § 2.

III. COMPARATIVE LAW

24. The respondent Government produced a copy of a survey performed by the Secretariat of the European Platform of Regulatory Authorities ("23rd EPRA Meeting, Elsinore, Denmark, 17-19 May 2006, Background paper - Plenary, *Political advertising: case studies and monitoring*") on the basis of answers to a questionnaire, received from the authorities of 31 countries, i.e., Austria, Belgium (x2), Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, the Isle of Man, Israel (x2), Italy, Latvia, Lithuania, Luxembourg, FYROM, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden and Switzerland (x2). The report included the following observations:

> "**• Countries with a ban on paid political advertising**
>
> Paid political advertising is statutorily forbidden in the vast majority of Western European countries such as Belgium, Denmark, France, Germany, Ireland, Malta, Norway, Portugal, Sweden, Switzerland, and the UK. Several countries from central and Eastern Europe such as the Czech Republic and Romania, also have a prohibition of paid political advertising.
>
> The most traditional justification for this prohibition is that rich or well-established parties would be able to afford significantly more advertising time than new or minority parties – thus amounting to a discriminatory practice. Another rationale invoked for the restriction or the ban is that it may lead to divisiveness in society and give rise to public concern. It has also been suggested, albeit less frequently, that a prohibition would preserve the quality of political debate.
>
> **• Countries allowing paid political advertising**
>
> Paid political advertising is allowed in many central and Eastern countries such as Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Macedonia, Poland, and the Baltic States: Estonia, Latvia and Lithuania. In a few countries such as in Bosnia-Herzegovina (60 days prior to Election Day), and Croatia, political advertising is only permitted during the election period.

It is often overlooked that several countries in Western Europe, such as in Austria, Finland, Luxembourg (for the moment, this will change shortly) and the Netherlands also allow paid political advertising.

In Italy, until 2003 paid political advertising, i.e. self-managed spaces, was allowed also for national broadcasters, provided that they also transmitted 'political communications spaces' (*spazi di comunicazione politica*), i.e. discussion programmes with the participation of political representatives; now it is allowed only for local broadcasters and has to cost no more than 70% of the price applied to commercial advertisements, whereas national broadcasters may only broadcast them for free.

In Greece, while there is a permanent and wide-ranging ban on the political advertisement of persons, paid political advertising of political parties is not prohibited.

In Spain, while the ban of political advertising applies permanently for television broadcasters, the Spanish Electoral Code permits paid electoral advertising on commercial radio stations, only during the election period.

The main rationale for paid political advertising is that it may enable new candidates to obtain recognition and a profile. It is also often argued that the right to political advertising is an integral part of the right to freedom of expression and information.

...

• **Countries allocating free airtime for political parties and/or candidates**

In the vast majority of countries, such as Belgium (French Speaking Community), Czech Republic, Estonia, France, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, Malta, parties are usually granted free airtime to present their programmes, sometimes in the format of short advertising spots. The broadcasters are usually reimbursed for their technical costs either by the State or directly by the parties.

...

• **Countries with no system of allocation of free airtime.**

Several countries have no specific provisions concerning free airtime for political parties. In a few countries, such as Belgium (Flemish speaking Community), Bulgaria, Norway, Sweden, parties are not granted any free airtime to present their programmes. In other countries such as Switzerland, Finland or Cyprus, this is a matter left to the broadcasters, who sometimes allow this practice on a voluntary basis."

25. Recommendation No. R (99) 15 of the Council of Europe's Committee of Ministers on measures concerning media coverage of election campaigns provided as follows:

5. Paid political advertising

"In member States where political parties and candidates are permitted to buy advertising space for electoral purposes, regulatory frameworks should ensure that:

- the possibility of buying advertising space should be available to all contending parties, and on equal conditions and rates of payment;

- the public is aware that the message is a paid political advertisement.

Member States may consider introducing a provision in their regulatory frameworks to limit the amount of political advertising space which a given party or candidate can purchase."

26. The Explanatory Memorandum to that Recommendation included the following comments in relation to the above:

Paid political advertising

"Paid political advertising in the broadcast media has traditionally been prohibited in many Council of Europe member States, whilst it has been accepted in others. One of its major advantages is the opportunity which it provides for all political forces to widely disseminate their messages/programmes. On the other hand, it may give an unfair advantage to those parties or candidates who can purchase important amounts of airtime.

In view of the different positions on this matter, the Recommendation does not take a stance on whether this practice should be accepted or not, and simply limits itself to saying that if paid advertising is allowed it should be subject to some minimum rules: one, that equal treatment (in terms of access and rates) is given to all parties requesting airtime, and two, that the public is aware that the message has been paid for.

It may also be considered important to set limits on the amount of paid advertising that can be purchased by a single party. Nevertheless, the Recommendation does not specify whether it is desirable to do so nor does it set any precise limits on the amount of paid advertising, as it is considered that the decision on this matter should be taken at the national level."

27. The Committee of Ministers, on 7 November 2007, adopted recommendation Rec(2007)15, which entailed a revision of Recommendation No. R (99) 15. In so far as the above provisions were concerned it may be noted that the Draft Explanatory Memorandum ((2007) 155 add) included the following addition:

"78. In view of the different positions on this matter, Recommendation CM/Rec(2007)... does not take a stance on whether this practice should be accepted or not, and simply limits itself to saying that if paid advertising is allowed it should be subject to some minimum rules, in particular that equal treatment (in terms of access and rates) is given to all parties requesting airtime."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

28. The applicants complained that the fine imposed by the Media Authority on 10 September 2003, upheld by the Supreme Court at last instance on 12 November 2004, constituted a violation of Article 10 of the Convention, of which the relevant part reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others, ... or for maintaining the authority and impartiality of the judiciary."

29. The parties shared the view that the impugned measure amounted to an interference with the applicants' right to freedom of expression as guaranteed by paragraph 1 of the above provision. They further agreed that the measure was prescribed by law, namely sections 3-1(3) and 10-3 of the Broadcasting Act, and pursued the legitimate aim of protecting "the rights of others" within the meaning of paragraph 2 of Article 10. The Court sees no reason to hold otherwise.

On the other hand, the parties were in disagreement as to whether the interference was necessary in a democratic society.

A. Submissions of the parties

1. The applicants

30. The applicants maintained that the existence of an absolute prohibition of political advertising on television combined with the absence of rules providing for party political broadcasts had had the effect that the Pensioners Party had been prevented from communicating directly with its electorate on television. The absolute prohibition was neither supported by sufficient reasons nor proportionate to the aims pursued.

31. They submitted that in Norway political advertising was allowed without any limitation in all media other than television and that no weighty reasons could justify such different treatment of television broadcasting.

32. The broadcast advertisements had focused on the Pensioners Party's core values and did not contain any statements that could reasonably be viewed as distorting or reducing the quality of political debate.

33. The Pensioners Party was a small political party, without powerful financial means or support from strong financial groups. It seldom received any coverage in editorial television broadcasting and thus had a real need to establish direct communication between itself and the electorate.

34. This need had been especially pressing, since, unlike the situation in many other European States, including the United Kingdom, there was no system of party political broadcasts providing for free airtime with a possibility for political parties to present their statements directly to the electorate. As confirmed by the survey conducted by the ERPA Secretariat (see paragraph 24 above) Norway was one of very few Contracting States that not only prohibited political advertising on television but also failed to regulate party political broadcasts, which was important to bear in mind in determining the scope of the margin of appreciation. This state of affairs in effect meant that political speech on television was channelled through broadcasters' editorial staff functioning as gate keepers. Such a regulation favoured established political parties and established politicians, while small political parties such as the Pensioners Party suffered and were in fact prevented from gaining efficient access to public space through television. A total ban on all forms of political advertising on television had an opposite effect to that of creating an equal playing field between the political parties.

35. As shown by the ERPA Survey, many countries had been able to regulate paid political advertising by less stringent means than an absolute prohibition. This cast doubt on the Government's argument that a prohibition was the only possible way of achieving the legitimate aims pursued. The Government's contention that a finding of a violation of Article 10 in the present case would affect important aspects of Norwegian democracy, such as the structure and size of political parties, party financing and the conduct of election campaigns, was unsubstantiated.

36. Since the instant case concerned the publication of political speech for a political party before a political election, the speech at issue fell within the core protection area of Article 10 of the Convention. Whereas in the above cited *VgT* judgment the Court had applied a strict margin of appreciation relating to speech of "general interest", an even stricter standard should be applied to political speech emanating from political parties. Unlike the finding in the *Murphy* judgment, there were no country-specific sensitivities in the instant case that could justify a special margin of appreciation or relevance being given to the potency and pervasiveness of the broadcasting media.

37. The applicants did not dispute that the lack of European consensus could be a relevant factor when determining the extent of the Contracting States' margin of appreciation. However, this was only one of many factors to be taken into account. The Court's Article 10 case-law, notably that relating to defamation, illustrated that a lack of consensus had not prevented

it from applying a narrow margin. Both the *VgT* and the *Murphy* judgments showed that it was the nature of the speech in question which was decisive for the scope of the margin and that it was narrow in the area of political speech.

38. In asserting that it had a wide margin, the majority of the Supreme Court had only made reference to general circumstances that obtained in some of the Contracting States. While the Supreme Court had held that considerable weight should be given to Parliament's decision to prohibit political advertising, it was wrong to consider that a political majority at any given time should be given a wide margin of appreciation when it came to regulations governing the political process. As rightly stressed by the dissenting member of the Supreme Court, the core idea behind fundamental free speech protection was to protect a political minority against being subjected to free speech restrictions imposed by the majority.

39. As a result of its erroneous approach, considering that Parliament's opinion on the matter should prevail unless it appeared unfounded or lacking in objectivity, the Supreme Court had failed to examine the necessity of the prohibition in the concrete circumstances of the case.

40. In the light of the above, the applicants submitted that the reasons relied on by the Supreme Court were not sufficient, nor proportionate, to justify the interference as being necessary in a democratic society.

2. The Government

41. The case did not primarily engage the protection of freedom of expression but first and foremost the integrity of the democratic process and specifically the public's – the voters'- right to fair democratic elections, a right protected by the Universal Declaration of Human Rights and the First Protocol to the Convention. The very essence of democracy was fair elections in which all parties could compete on an equal footing without anyone being able to buy an undue advantage in the form of television advertising.

42. At issue in this case was political advertising in the strict sense: advertisements by a political party in an election period, aimed at influencing the outcome of the elections. It struck at the core of the prohibition in section 3-1(3) of the Broadcasting Act. The impugned prohibition was limited to television advertising owing to the powerful and pervasive impact of this medium. Since no such restrictions applied with regard to other media, the prohibition had limited consequences for freedom of expression. A number of much used and effective alternatives for political advertising were available, such as the print media, radio, the Internet, billboards, leaflets, and so on.

43. The prohibition of political advertising on television was not in any way aimed at restricting political speech or debate on questions of public interest. Its purpose was to guarantee political expression by ensuring

fairness and equality, as well as preserving the quality of political debate. Such advertising would typically be conveyed without opposition, correction or filtering in the form of critical journalism and would have a distinctly partial objective. It would often paint a manufactured picture of the candidate and his political message, not unlike the tone or substance frequently found in propaganda in totalitarian regimes. The possibility of advertising on television would clearly benefit the wealthier and/or established interests in society. There was thus a need to avoid *de facto* discrimination, distorting democratic processes in favour of the wealthy and powerful.

44. The prohibition ensured the political impartiality of television broadcasting. It also had the effect of limiting the total amount of money spent on election campaigns by political parties and interest groups, reducing their dependence on wealthy donors and ensuring a level playing-field in elections. The prohibition was aimed at supporting the integrity of the democratic process, to obtain a fair framework for political and public debate, and to avoid a situation where those who could afford it obtained an undesirable advantage by using the most potent and pervasive medium. The right to freedom of expression had therefore to be considered in the light of the right to free elections provided by Article 3 of Protocol No. 1 to the Convention. The Norwegian prohibition, like those in several other Contracting States, was aimed at securing the "free expression of the opinion of the people in the choice of the legislature". The prohibition thus achieved a very important aim for democracy.

45. The question at issue was inevitably interlocked with the framework for the Norwegian democratic electoral process. A negative outcome of this case would affect important aspects of Norwegian democratic society, such as the structure and size of political parties, political parties' financing and how the election campaigns were carried out. This also militated in favour of a wider margin of appreciation, as held by the Court, *inter alia*, in *Bowman v. the United Kingdom* (19 February 1998, § 43, *Reports of Judgments and Decisions* 1998-I).

46. In Norway the elected representatives had found it highly necessary only to prohibit political advertising on television, which undoubtedly was a unique medium with regard both to its pervasiveness and to the resources necessary to purchase airtime. As pointed out by the Court in *Murphy* (cited above, § 69) the potential impact of the medium of expression concerned was an important factor in the consideration of the proportionality of an interference. The Court had acknowledged that account ought to be taken of the fact that the audio-visual media had a more immediate and powerful effect than the print media. Reference could also be made to the Council of Europe's recommendation No. R (99) 15 on "Measures concerning media coverage of election campaigns", where the Committee of Ministers had emphasised "the need to take into account the significant differences which

exist[ed] between the print and the broadcast media". Hence, based on this commonly acknowledged premise, the question before the Court was whether there was a pressing social need to prohibit political advertising on television in Norway.

47. The general existence of such a pressing social need was clearly illustrated by the fact that numerous Contracting States had found it necessary to ban all political advertising on television.

48. Whilst the applicants implied that an exception from the ban should be made for parties or groups with little means, this approach was unsustainable. As the Court had recognised in the *Murphy* case with respect to religious advertising, a case-by-case approach would be difficult to apply fairly, objectively and coherently; thus a total ban would generate less discomfort than by filtering the amount and content of expression by such groupings. Nor would limitations on duration and frequency of advertising and/or on related expenditures guarantee equality of arms to the same extent as an absolute ban. Apart from the difficulties involved in defining limits that were fair, circumventing them would be easy and ensuring their effective implementation when it really mattered, in the run-up to an election, would be problematic. Transgressions could always be discovered later but after the elections it would be too late.

49. In the view of the Government, the national elected, representative bodies were better equipped than national courts to evaluate the relevant pressing social needs, particularly as the aim of the prohibition was to secure the integrity of the national democratic process. This was even more true with regard to an international court with further distance from and less knowledge of the functioning of the democracy in the State in question. National parliaments were in direct and continuous contact with the vital forces in their countries in this respect. What was more, securing and promoting democracy was a core responsibility for the elected representatives in the Contracting States.

50. The Norwegian prohibition had been thoroughly assessed on several occasions, most recently in May 2006, by the Government and by Parliament, which had found it to be a necessary measure for preserving central elements of Norwegian democracy. The Government invited the Court not to adhere to its findings in its *VgT* judgment, which was unclear and based on the specific facts of that case and in any event distinguishable. Rather, it should follow the general reasoning in its *Murphy* judgment and, in particular, its approach in *Mathieu-Mohin and Clerfayt v. Belgium* (2 March 1987, Series A no. 113) and *Bowman v. the United Kingdom* (cited above, § 43) in relation to Article 3 of Protocol No. 1.

51. There was no uniform European conception of the requirements of the protection of the rights of others in relation to broadcasting political advertisements on television. Nor was there any legislative consensus as to the need to single out broadcast, as distinct from non-broadcast, political

advertising for special regulation, whether within or outside an election period. There was no given solution to the issue of political advertising as indeed the differences throughout Europe showed. Every country had its history and traditions and this might lead to different views on the necessity of a ban. According to the Court's case-law, the Contracting States should therefore enjoy a wider margin of appreciation in regulating such advertisements.

3. Third parties

52. The Irish Government supplied information relating to the Irish legislative framework, notably about the application of section 10(3) of the Radio and Television Act 1988, which had been at issue in the above-mentioned *Murphy* case and which read as follows:

> "No advertisement shall be broadcast which is directed towards any religious or political end or which has any relation to an industrial dispute."

53. Referring to the Irish Supreme Court's rulings in *Murphy v. IRTC* ([1999] 1 IR 12) and *Colgan v. IRTC* ([2002] IR 490), the Irish Government submitted that where the prohibition on religious and political advertising stemmed from the same or similar concerns regarding sensitivities as to divisiveness and offensiveness, it was inappropriate to apply differing margins of appreciation. This was particularly so as the dividing line between political and religious advertising was not always clear, as the decision on abortion in the *Colgan* case demonstrated. Consequently, the Irish Government invited the Court to apply a wide margin of appreciation equally to political advertising, preferring the *Murphy* approach to that followed in *VgT*. Furthermore, the Court's acceptance in *Murphy* that a filtering process was inappropriate and that a blanket prohibition was preferable was a better approach than that followed in *VgT*, where it had held that a prohibition on political advertising might *in certain situations* (though not in the *VgT* case) be compatible with Article 10.

54. The United Kingdom Government provided information about the legal position in the United Kingdom, where political advertising had been prohibited on radio and television by all legislation since the Television Act 1954 first created commercial television. When enacting the Communications Act 2003, Parliament had taken the view that it was important to maintain the prohibition because: (1) Broadcasting was a particularly powerful and pervasive medium and impartiality was of fundamental importance; (2) Without the prohibition there would be an unacceptable danger that the agenda of political debate would be unfairly distorted in favour of the views held by those wealthy enough to spend most on broadcast advertising. Those with a different point of view would either have to find rich backers to pay for equal time, or allow the case to go unanswered; (3) The prohibition applied to all political advertising,

irrespective of content. There was no discrimination by reference to the content of the message.

55. The UK Government invited the Court "to confine *VgT* to its factual circumstances or alternatively to depart from its reasoning". In that case the Court had rejected without explanation or analysis the contention that the potency and pervasiveness of the broadcast media justified special restrictions on political advertising not applicable to other media. The Court had also omitted to take account of the significance of the availability of alternative means of allowing the applicant to pursue its political objectives. Nor had it addressed the point that advertising could damage the impartiality of the broadcaster – an argument which it had accepted in *Murphy* with respect to religious advertising. The Court appeared to have misunderstood the justification for a ban on political advertising, namely the fact that such a ban could not distinguish between different groups by reference to the power, funds or influence which they happened to have at a particular time. The legislature was entitled to conclude that there was no workable basis for such a partial prohibition. Nor had the Court addressed, far less answered, the point that the legislature was seeking to protect a fundamental interest of a democratic society: that political debate and the political process should not be altered by those who were able and willing to spend large sums of money propagating their political views through the potent medium of broadcasting. In *Bowman*, the Court had recognised this as a legitimate aim which could justify restrictions on freedom of political speech. In *VgT* the Court had also omitted to refer to the fact that Switzerland was far from an isolated example of a State with legislation prohibiting the broadcasting of political advertising when such restrictions were not applied in other media.

56. Like *Bowman*, the present case did not simply concern restrictions on political speech; it concerned a balance between freedom of expression for political speech and the need to preserve the integrity of the democratic process in the public interest, a matter in which the State had a margin of appreciation. In any event, there was no clear distinction in this context between religion and morals, on the one hand, and politics on the other.

57. The UK Government submitted a copy of a judgment handed down by the House of Lords on 12 March 2008 ([2008] UKHL 15) dismissing an appeal by Animal Defenders International, finding that the prohibition on the broadcasting of political advertising in the UK under the Communications Act 2003 was consistent with Article 10 of the Convention.

B. Assessment by the Court

1. General principles

58. The test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 62, Series A no. 30). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10.

59. In this connection, according to the Court's case-law there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see *Lingens v. Austria*, 8 July 1986, §§ 38 and 42, Series A no. 103; *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V; *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV; *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45, *Reports* 1998-I; *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 46, ECHR 1999-VIII; *Vgt Verein gegen Tierfabriken*, cited above, § 66; and *Murphy*, cited above, § 67).

60. Moreover, the Court has held that the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference. The Court has acknowledged that account must be taken of the fact that the audio-visual media have a more immediate and powerful effect than the print media (see *Jersild v. Denmark,* 23 September 1994, § 31, Series A no. 298, and *Murphy*, cited above, § 69).

61. It should also be pointed out that in the above-mentioned *Bowman* judgment, concerning certain electoral law limitations on pre-election expenditure, the Court held (see paragraph 41) that in such a context it was necessary to consider the right to freedom of expression under Article 10 in the light of the right to free elections protected by Article 3 of Protocol No. 1 to the Convention, which provides:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

Moreover, in that case the Court held as follows:

> "42. Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system (see the *Mathieu-Mohin and Clerfayt v. Belgium* judgment of 2 March 1987, Series A no. 113, p. 22, § 47, and the *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, p. 26, §§ 41–42). The two rights are inter-related and operate to reinforce each other: for example, as the Court has observed in the past, freedom of expression is one of the 'conditions' necessary to 'ensure the free expression of the opinion of the people in the choice of the legislature' (see the above-mentioned *Mathieu-Mohin and Clerfayt* judgment, p. 24, § 54). For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.
>
> 43. Nonetheless, in certain circumstances the two rights may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the 'free expression of the opinion of the people in the choice of the legislature'. The Court recognises that, in striking the balance between these two rights, the Contracting States have a margin of appreciation, as they do generally with regard to the organisation of their electoral systems (see the above-mentioned *Mathieu-Mohin and Clerfayt* judgment, pp. 23 and 24, §§ 52 and 54)."

62. In sum, the Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

2. Application of these principles

63. Turning to the particular circumstances of the instant case, the Court observes at the outset that the disputed decision by the Media Authority of 10 September 2003 to impose a fine on TV Vest was taken on the ground that TV Vest had broadcast political advertisements for the Pensioners Party in breach of the prohibition of political advertising on television laid down in section 3-1(3) of the Broadcasting Act. The prohibition was permanent and absolute and applied only to television, whilst political advertising through all other media was permitted.

64. The impugned advertisements consisted of a short portrayal of the Pensioners Party and encouraged viewers to vote for the Party in the forthcoming elections. Irrespective of the fact that it was presented as a paid advertisement rather than as part of journalistic coverage of a political debate, the content of the speech in question was indisputably of a political nature. Thus, as was also the case in *VgT*, the impugned advertisement obviously fell outside the commercial context of product marketing, an area in which States traditionally have enjoyed a wide margin of appreciation (see VgT, cited above, § 69; *markt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, § 33, Series A no. 165, and *Jacubowski v. Germany*, 23 June 1994, § 26, Series A no. 291-A). Moreover, unlike the situation in *Murphy* (cited above, § 67), there is nothing to suggest that the advertisements included any content that might

be liable to offend intimate personal convictions within the sphere of morals or religion. For these reasons alone, the Court is unable to share the opinion held by the Supreme Court's majority that the present case was more akin to *Murphy* than *Vgt* (see paragraphs 60-61 of the Supreme Court's judgment, cited at paragraph 20 above). On the contrary, it agrees with the minority (see paragraphs 80-81 of the Supreme Court's judgment, cited at paragraph 21 above) that the political nature of the advertisements that were prohibited calls for strict scrutiny on the part of the Court and a correspondingly circumscribed national margin of appreciation with regard to the necessity of the restrictions (see *VgT*, cited above, § 71; and *Murphy*, cited above, § 67).

65. In this connection, the Court has also taken note of the Government's observations, made with reference to the Court's case-law under Article 3 of Protocol No. 1 (see paragraphs 44 and 50 above), arguing that the Contracting States enjoyed a wide margin of appreciation in striking a fair balance between, on the one hand, freedom of expression and, on the other hand, the need to place restrictions thereon in order to secure the free expression of the opinion of the people in the choice of the legislature. As already recognised in the Court's case-law (see references at paragraph 61 above), a lack of consensus between the States making up the Convention community with regard to the regulation of the right to vote and the right to stand for election may justify according them a wide margin of appreciation in this area.

66. However, while it is true that the broadcasts at issue had been aired between 14 August and 13 September 2003 in the run-up to the local and regional elections that year, it should be noted that the advertising ban under section 3-1(3) of the Broadcasting Act was absolute and permanent and did not apply specifically to elections. In these circumstances, the Court does not find it appropriate in the instant case to attach much weight to the various justifications for allowing States a wide margin of appreciation with reference to Article 3 of Protocol No. 1. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the privileged position of free political speech under Article 10 of the Convention.

67. The Court has further considered whether, going beyond the arguments drawn from Article 3 of Protocol No. 1, the differences between domestic systems with regard to television broadcasting of political advertising could warrant a wide margin of appreciation. According to the comparative law reports compiled by the EPRA, out of the 30 European countries examined, (1) in 13 a statutory ban on paid political advertising in broadcasting applied, (2) in 10 such advertising was permitted; (3) in 11 there were provisions for free airtime for political parties and candidates during election campaigns (five of these were among the 13 under item (1)); (4) in several countries there was no system of allocation of free airtime (see

paragraph 24 above). In so far as this absence of European consensus could be viewed as emanating from different perceptions regarding what is "necessary" for the proper functioning of the "democratic" system in the respective States, the Court is prepared to accept that it speaks in favour of allowing a somewhat wider margin of appreciation than that normally accorded with respect to restrictions on political speech in relation to Article 10 of the Convention.

68. The Court also takes note of the difference of opinion in the Supreme Court as to how much importance should be attached to the opinion of the legislature, i.e., the political majority at any given time, as to the scope of freedom of expression on political issues (see paragraph 18 above, compare paragraph 75 of the judgment quoted at paragraph 21). The applicants emphasised that the shifting political majority should not be left a wide margin of appreciation to decide on the limits of such speech. However, it is not for the Court to take a stance on such issues of national constitutional law, which fall to the Contracting States to solve within their own domestic legal systems. As stated above, its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken in the exercise of their power of discretion.

69. It is against this background that the Court will examine the justifications for the disputed interference in this case; whether it was supported by relevant and sufficient reasons and was proportionate to the legitimate aim pursued, regard being had to the balance to be struck between the applicants' freedom of expression, on the one hand, and the reasons adduced by the Norwegian authorities for the prohibition of political advertising, on the other.

70. In this regard, the Court notes that the rationale for the statutory prohibition of broadcasting of political advertising on television was, as stated by the Supreme Court, that the use of such a form and medium of expression was likely to reduce the quality of political debate generally. In this way complex issues might easily be distorted and groups that were financially powerful would have greater opportunities for marketing their opinions than those that were not. Pluralism and quality were central considerations, as was the fact that it was the legislature which had addressed the relevant issues for the democratic process, the legislature being better placed than any other State organs to assess how best to achieve those objectives. The Government pointed out that the ban had been limited to political advertising on television owing to the powerful and pervasive impact of this type of medium. Moreover, the prohibition had contributed to limiting election campaign costs, to reducing participants' donor dependence and ensuring a level playing field in elections. It was aimed at supporting the integrity of democratic processes, to obtain a fair framework for political and public debate and to ensure that those who could afford it did not obtain

an undesirable advantage through the possibility of using the most potent and pervasive medium. Also, it helped to preserve the political impartiality of television broadcasting. These are undoubtedly relevant reasons (see *VgT*, cited above, § 73).

71. However, the Court is not convinced that these objectives were sufficient to justify the interference complained of.

72. In the first place, there is nothing to suggest that the Pensioners Party fell within the category of parties or groups that were the primary targets of the disputed prohibition, namely those which, because of their relative financial strength, might have obtained an unfair advantage over those with less resources by being able to spend more on television advertising (see *VgT*, cited above, § 75).

73. On the contrary, while the Pensioners Party belonged to a category for whose protection the ban was, in principle, intended, the Court, unlike the majority in the Supreme Court (see paragraph 62 of its judgment, quoted at paragraph 20 above), is not persuaded that the ban had the desired effect. In contrast to the major political parties, which were given a large amount of attention in edited television coverage, the Pensioners Party was hardly mentioned. Therefore, paid advertising on television became the only way for the Pensioners Party to put its message across to the public through that medium. By being denied this possibility under the law, the Pensioners Party was at a disadvantage compared with major parties which had obtained edited broadcasting coverage, and this could not be offset by the possibility available to it to use other, less potent, media.

74. The Court further notes that it has not been contended that the specific advertising at issue contained elements that were capable of lowering the quality of political debate (see *VgT*, cited above, § 76).

75. Moreover, as mentioned above, it does not appear that the advertising could give rise to sensitivities as to divisiveness or offensiveness, making a relaxation of the prohibition difficult. In this regard, as already stated, the case under consideration is distinguishable from that of *Murphy*, where it was such sensitivities that led the Court to accept that the filtering by a public authority, on a case-by-case basis, of unacceptable or excessive religious advertising would be difficult to apply fairly, objectively and coherently, and that a blanket ban would generate less discomfort (§§ 76-77). In *VgT*, however, where there were no such sensitivities at stake and the issues were more akin to those in the present instance, the Court struck down the blanket ban on political advertising as applied in that case.

76. In these circumstances, the fact that the audio-visual media has a more immediate and powerful effect than other media (see *Jersild*, cited above, § 31), although an important consideration in the assessment of proportionality (see *Murphy*, cited above, § 69), could not justify the

disputed prohibition and fine imposed in respect of the broadcasting of the political advertisements at issue (see *VgT*, cited above, § 74).

77. The view expounded by the respondent Government, supported by the third-party intervening Governments, that there was no viable alternative to a blanket ban must therefore be rejected.

78. In sum, there was not, in the Court's view, a reasonable relationship of proportionality between the legitimate aim pursued by the prohibition on political advertising and the means deployed to achieve that aim. The restriction which the prohibition and the imposition of the fine entailed on the applicants' exercise of their freedom of expression cannot therefore be regarded as having been necessary in a democratic society, within the meaning of paragraph 2 of Article 10, for the protection of the rights of others, notwithstanding the margin of appreciation available to the national authorities. Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

80. The applicants submitted a claim for just satisfaction outside the time-limit fixed for this purpose. Accordingly, the Court considers that there is no call to award the applicants any sum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds* that there is no call to award the applicants any sum by way of just satisfaction.

Done in English, and notified in writing on 11 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Christos Rozakis President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge Jebens is annexed to the judgment.

C.L.R.
S.N.

CONCURRING OPINION OF JUDGE JEBENS

1. I agree that the imposition of a fine on TV Vest because of its broadcasting of political advertisements for the Pensioners Party violated Article 10 of the Convention. My finding of a violation is, however, not based on the prohibition of political broadcasting on television as such, but on the particular context in which it was applied in the present case, namely the Pensioners Party's general lack of access to the medium of television broadcasting.

2. My starting point is that political speech is at the very centre of the right to freedom of expression, protected by Article 10 of the Convention. The Court's case-law confirms this, by leaving little room under Article 10 § 2 for the Contracting States to put restrictions on political speech (see, for instance, *Lingens*, cited in the judgment). However, in order to ensure that political elections reflect the opinion of the people, it may be necessary to impose some restrictions as to which means should be allowed for the transmission of political messages. The right to freedom of expression in Article 10 must therefore be considered in the light of the right to free elections protected by Article 3 of Protocol No. 1 to the Convention (see *Bowman*, cited in the judgment).

3. On the basis of such considerations, I fail to see why restrictions on paid political advertisements could not be acceptable under Article 10, provided that political parties and interest groups are otherwise afforded reasonable access to the media. It should be noted that neither the *Vgt* case nor the *Murphy* case (both cited in the judgment), concerned advertisements for political parties. The fact that the Court reached different conclusions in the two cases illustrates the variety of situations in this field, which calls for individual solutions. It would therefore, in my opinion, seem to be of little value to compare the present case with either of those two cases with the aim of finding the right solution. The correctness of taking an individual approach with regard to political advertisements is confirmed by the Court's case-law**;** see, for instance, paragraph 75 of the *Vgt* judgment, where the Court stated that a ban on political advertisements might be compatible with Article 10 in certain situations, provided that it was based on grounds that met the requirements in paragraph 2 of Article 10.

4. Turning to the present case, it should be noted firstly that the prohibition laid down in section 3-1(3) of the Broadcasting Act was limited to political advertising on television. The rationale for the prohibition was that such advertising was likely to reduce the quality of political debate by distorting complex issues, taking into account the powerful and pervasive impact of television. It thus transpires that the prohibition was meant to secure pluralism and quality in the political debate. Another important consideration was to prevent financially powerful groups from dominating the political forum, by being able to buy airtime on television which other, less powerful groups, could not afford. Furthermore, and in line with this, the prohibition was aimed at securing the political independence of the television broadcasters.

5. The reasons outlined above are in my view clearly relevant with respect to Article 10 § 2. Bearing in mind that the Contracting States should have a certain margin of appreciation when balancing the right to freedom of expression against the need to secure free elections, the prohibition on political advertising could not in itself be said to create a violation of Article 10 of the Convention.

6. However, when assessing whether the above restriction met the requirement of being necessary in a democratic society in the sense of Article 10 § 2, a broader evaluation is called for. It should be noted in this respect that Norway, according to the survey by the ERPA (see paragraph 24 of the judgment) had failed to regulate party political broadcasts, unlike the majority of European States. As a consequence, it was for the broadcasters' editorial staff to decide whether to give political parties the possibility of presenting themselves to the electorate. I agree with the applicants that the lack of rules which could have secured political parties access to television is highly relevant when determining the scope of the State's margin of appreciation.

7. Turning to the Pensioners Party's situation, it is important to note that, according to information provided after the public hearing, it was granted very sparse coverage on television prior to the local and regional elections in 2003. It is revealing that, while the Pensioners Party was mentioned several times on Norwegian television channels in connection with the legal action brought by TV Vest concerning the legality of the fine imposed for a breach of the ban on advertising, the party was given no coverage at all with respect to its politics. Nor were any of its members invited to political debates on television. Thus, the prohibition of political advertising on television prevented the Pensioners Party from availing itself of its only

opportunity to have access to the most important forum for communication of ideas, and placed the party at a disadvantage, compared with the established political parties in Norway.

8. This, furthermore, shows that the restriction on advertising not only interfered with the right to freedom of expression, but was also not in harmony with the need to secure pluralism in editorial coverage of political campaigns. I refer in this connection to "the obligation to cover electoral campaigns in a fair, balanced and impartial manner in the overall programme services of broadcasters" (see the Appendix to Recommendation No. R (99) 15 of the Committee of Ministers to member States, on measures concerning media coverage of election campaigns).

9. For the reasons explained above, I conclude that the restriction of the right to freedom of expression in the present case was not proportionate to the aims pursued. The interference was therefore not necessary in a democratic society, for which reason there has been a violation of Article 10.