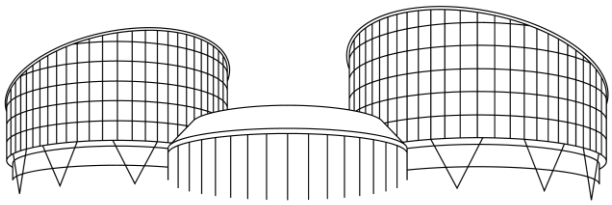

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF PETA DEUTSCHLAND v. GERMANY

(Application no. 43481/09)

JUDGMENT

STRASBOURG

8 November 2012

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of PETA Deutschland v. Germany,

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

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Boštjan M. Zupančič,
Ann Power-Forde,
Angelika Nußberger,
André Potocki, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 18 September 2012,

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

PROCEDURE

1. The case originated in an application (no. 43481/09) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by PETA Deutschland ("the applicant"), an association based in Germany, on 12 August 2009.

2. The applicant association was represented by Mr K. Leondarakis, a lawyer practising in Göttingen. The German Government ("the Government") were represented by their Agent, Mr H.-J. Behrens, of the Federal Ministry of Justice.

3. The applicant association complained, in particular, about a violation of its right to freedom of expression.

4. On 14 November 2011 the application was communicated to the Government.

5. The parties replied in writing to each other's observations. In addition, third-party comments were received from Mr S. Korn and the Central Council of Jews in Germany, both represented by Mr N. Venn, counsel, who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant association is the German branch of the animal rights organisation PETA (People for the Ethical Treatment of Animals). It pursues, *inter alia*, the aims of preventing animal suffering and of encouraging the public to abstain from using animal products.

7. In March 2004 the applicant association planned to start an advertising campaign under the head "The Holocaust on your plate". The intended campaign, which had been carried out in a similar way in the United States of America, consisted of a number of posters, each of which bore a photograph of concentration camp inmates along with a picture of animals kept in mass stocks, accompanied by a short text. One of the posters showed a photograph of emaciated, naked concentration camp inmates alongside a photograph of starving cattle under the heading "walking skeletons". Other posters showed a photograph of piled up human dead bodies alongside a photograph of a pile of slaughtered pigs under the heading "final humiliation" and of rows of inmates lying on stock beds alongside rows of chicken in laying batteries under the heading "if animals are concerned, everybody becomes a Nazi". Another poster depicting a starving, naked male inmate alongside a starving cattle bore the title "The Holocaust on your plate" and the text "Between 1938 and 1945, 12 million human beings were killed in the Holocaust. As many animals are killed every hour in Europe for the purpose of human consumption".

8. In March 2004, three individual persons, P.S., C. K. and S. Korn, filed a request with the Berlin Regional Court to be granted an injunction ordering the applicant association to desist from publishing or from allowing the publication of seven specified posters via the internet, in a public exhibition or in any other form. The plaintiffs were at the time the president and the two vice-presidents of the Central Jewish Council in Germany. All of them had survived the Holocaust when they were children; C.K. lost her family through the Holocaust. They submitted that the intended campaign was offensive and violated their human dignity as well as the personality rights of C. K.'s dead family members.

9. On 18 March 2004 the Berlin Regional Court granted the injunction. By judgment of 22 April 2004, that same court confirmed the interim injunction. The court considered that the plaintiffs had a claim to be granted injunctive relief under section 823 §§ 1 and 2 in conjunction with section 1004 of the Civil Code, sections 185 *et seq.* of the Criminal Code and Article 1 §§ 1 and 2 of the German Basic Law (see relevant domestic law, below). According to the Regional Court, the plaintiffs were concerned by the impugned statements in their capacity as former victims of the Holocaust.

10. The Regional Court further considered that the impugned representations constituted expressions of opinion and were thus protected under Article 5 of the Basic Law. This right protected expressions of opinion even if they were formulated in a polemic or offensive way. The depictions were particularly disturbing and drew a high degree of media attention because the pictures combined on the posters showed seemingly similar situations, which could only be discerned by the fact that one side showed coloured photographs of animals and the other black-and-white photos of humans, both alive and dead. Seen from the point of view of an ordinary spectator, the impugned posters had to be interpreted as putting the fate of the depicted animals and of the depicted humans on the same level.

11. There was no indication that the applicant association's primary aim was to debase the victims of the Holocaust, as the posters obviously intended to criticise the conditions under which animals were kept and to encourage the spectator to reflect upon these conditions. It followed that the expression of opinion related to questions of public interest and would thus generally enjoy a higher degree of protection when weighing the competing interests. However, in the instant case it had to be taken into account that concentration camp inmates and Holocaust victims had been put on the same level as animals. In the light of the image of man conveyed by the Basic Law, which put human dignity in its centre and only marginally referred to the protection of animals, this comparison appeared arbitrary because the Holocaust victims were confronted with their suffering and their fate of persecution in the interest of animal protection. The debasement of concentration camp inmates was thus exploited in order to militate for better accommodation of laying hens and other animals.

12. The Regional Court finally considered that the decision of the instant case did not depend on a weighing of competing interests, as the expression of opinion violated the plaintiffs' human dignity. The comparison offended the plaintiffs in their capacity as Holocaust victims by violating the respect for their human dignity. This violation was aggravated by the fact that the depicted persons were shown in a most vulnerable state.

13. On 27 August 2004 the Berlin Court of Appeal rejected the applicant's appeal.

14. On 2 December 2004 the Berlin Regional Court, in the main proceedings, confirmed its injunction. Further to the reasons given in the interim proceedings, the Regional Court considered that it was not its task to determine from a philosophical or ethical point of view whether the suffering of highly developed animals could be compared to human suffering, as the Basic Law put human dignity in its centre.

15. On 25 November 2005 the Berlin Court of Appeal rejected the applicant's appeal.

16. On 20 February 2009 the Federal Constitutional Court rejected the applicant's constitutional complaint. The Federal Constitutional Court

considered that the interpretation of the impugned pictures given by the civil courts was coherent and met the requirements imposed by the right to freedom of expression.

17. The Federal Constitutional Court expressed its doubts as to whether the intended campaign violated the human dignity of either the depicted persons or the plaintiffs. There was no doubt that the photographs depicted Holocaust victims in situations in which they were highly degraded by their torturers. However, this did not necessarily imply that the use of these pictures also amounted to a violation of the represented persons' human dignity. Having regard to the specific circumstances of the instant case, the court considered that the intended campaign did not deny the depicted Holocaust victims their personal value by putting them on a par with animals. Even though the applicant association might generally be convinced of the equality of human and animal suffering, the intended campaign did not pursue the aim to debase, as the pictures merely implied that the suffering inflicted upon the depicted humans and animals was equal.

18. However, the Federal Constitutional Court did not find it necessary to decide whether the intended campaign violated the plaintiffs' human dignity, as the impugned decisions contained sufficient arguments which justified the injunction without reference to a violation of the plaintiff's human dignity. It was, in particular, acceptable that the domestic courts based their decisions on the assumption that the Basic Law drew a clear distinction between human life and dignity on one side and the interests of animal protection on the other and that the campaign was banalising the fate of the victims of the Holocaust. It was, furthermore, acceptable to conclude that this content of the campaign affected the plaintiffs' personality rights. Referring to its earlier case law, the Federal Constitutional Court considered that it was part of the self-image of the Jews living in Germany that they belonged to a group which had been sampled out by their fate and that a special moral obligation was owed to them by all others, which formed part of their dignity.

19. The Federal Constitutional Court did not find it necessary to remit the case for re-examination to the lower courts, as there was no indication that the lower courts would come to a different conclusion in case of a remittal. When weighing the competing interests, the plaintiffs' legal position could be granted preference over the applicant association's right to freedom of expression even without relying on a violation of the plaintiffs' human dignity. The lower courts had put forward sufficient reasons to allow this conclusion. In particular, the courts had begun to weigh the competing interests. Furthermore, they had based their assumption that the impugned campaign violated the plaintiffs' human dignity on the fact that they considered the violation of the plaintiff's personal honour as particularly serious. As these considerations applied in a similar way to a violation of

the plaintiffs' personality rights, it had to be assumed that these principles would also guide the courts in case of a remittal.

II. RELEVANT DOMESTIC LAW

20. The relevant provisions of the German Basic Law read as follows:

Article 1

"(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."

Article 5

"(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour."

Article 20a

Protection of the natural foundations of life and animals

"Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."

21. The relevant provisions of the German Civil Code read as follows:

Section 823

"(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person, is liable to make compensation to the other party for the damage arising from this.

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person ..."

Section 1004

"(1) If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction."

Section 185 of the Criminal Code reads as follows:

"Insult shall be punished with imprisonment for not more than one year or a fine ..."

According to the constant case-law of the German civil courts, section 823 §§ 1 and 2 in conjunction with section 1004 (in analogous

application) of the Civil Code and section 185 of the Criminal Code grants any person whose personality rights concretely risk being violated by another person a claim to compel that other person to refrain from performing the impugned action.

III. LEGAL POSITION OF THE AUSTRIAN SUPREME COURT

22. In March 2004 the applicant association organised an exhibition in Vienna, where the same posters which form the subject matter of the instant proceedings were publicly displayed. A number of Austrian citizens of Jewish origin, who had allegedly survived the Holocaust and who were not identical with the plaintiffs in the proceedings before the German courts, filed a request with the Austrian Courts to be granted an injunction ordering the applicant association to desist from publishing the seven specified posters.

23. On 12 October 2006 the Austrian Supreme Court (no. 6 Ob 321/04f) rejected the request. That court expressed its doubts as to whether the plaintiffs were directly affected by the impugned poster campaign. It considered, in any event, that the impugned campaign was justified by the right to freedom of expression. The poster campaign did not debase the depicted concentration camp inmates. The court further considered that the poster campaign, besides addressing an important subject of general interest, had the positive effect of rekindling the memory of the national-socialist genocide. The concentration camp pictures documented the historic truth and recalled unfathomable crimes, which could bee seen as a positive contribution to the process of dealing with the past (*Vergangenheitsaufarbeitung*). The plaintiffs had only been affected to a limited degree by way of a collective insult. Conversely, the applicant association had a legitimate interest in publicly addressing its subject even in a drastic way.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

24. The applicant association complained that the civil injunctions violated its right to freedom of expression as provided in Article 10 of the Convention, which 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. This Article shall not

prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

25. The Government contested that argument.

A. Admissibility

26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant association's submissions

27. The applicant association submitted, in particular, that the impugned decision was based on a wrong assessment of the facts. It was not true that the impugned posters equalised the pictures of the Holocaust and the pictures of intensive mass animal farming, they merely showed disturbing similarities of the treatment of Holocaust victims and animals. Even if one should assume that the representations postulated equality between the depicted humans and animals, this was not suited to debase the depicted Holocaust victims. According to the applicant association's conviction, which was increasingly shared within society, animals had to be regarded as equal fellow creatures.

28. The poster campaign was in no way intended to debase or insult the persons represented on the posters and did not violate any of the plaintiffs' rights. It was neither trivialising the suffering, nor did it have any anti-Semitic background. The applicant association pointed out that the posters did not depict the applicants and that it was not even certain that all the persons depicted on the photographs were of Jewish Faith. Many persons of Jewish origin would not consider that such a comparison would violate their personality rights and had even made such comparisons in their own publications or had participated in the original planning of the campaign. Holocaust comparisons were not unlawful and had been widely used in public debate. The Supreme Court of Austria, in its decision given on 12 October 2006 (see paragraph 23, above) had rejected a request for

granting a civil injunction against the publication of the impugned posters in Austria.

29. The applicant association did not contest that the legal prerequisites for granting a civil injunction were laid down in the law as defined in the established case-law of the German courts. However, these prerequisites had not been met in the instant case. In particular, it had not been foreseeable for the applicant association that the publication of the impugned depictions would, in the domestic courts' view, violate the personality rights of the Jews living in Germany. Contrary to the Government's submissions, the question of whether the plaintiffs were concerned in this case was not clearly evaluated under German law. The case law quoted by the Government exclusively referred to the denial of the Holocaust, and was thus not applicable in the instant case. The decisions in this respect were devoid of any legal basis and had thus to be considered as being arbitrary.

30. The applicant association further submitted that the interference with their Convention rights had not been necessary in a democratic society. The domestic courts had failed to consider that, under the Court's case-law, freedom of expression constituted one of the essential foundations of a democratic society and that a special degree of protection was afforded to expressions of opinions which were made in the course of a debate on matters of public interest. The applicant association accepted that the historical background in Germany made it necessary to apply specific criteria enabling every person of Jewish origin to take steps against anti-Semitic discrimination. However, this approach was taken too far if every depiction of a person of Jewish origin was automatically considered collective insult.

31. The applicant association considered that it was thus not even necessary to strike a balance between any competing interests. Even if such a balance was to be struck, the applicant association's right to freedom of expression had to take precedence. The German courts had failed to weigh the competing interests, having particular regard to the fact that the applicant association pursued objectives of the highest ethical and moral standards, as was further supported by the fact that the protection of animal rights was expressly mentioned in Article 20 a of the German Basic Law. Due to sensory overload through commercials and advertisements, the applicant association was dependent on gaining attention for its cause in drastic ways. It thus did not matter that the applicant association would have had other means at its disposal to express its opinion.

2. The Government's submissions

32. The Government considered that the civil injunction was justified under Article 10 § 2 of the Convention. The German courts had struck a fair balance between the applicant association's right to freedom of expression

and the personality rights of the plaintiffs in the instant proceedings, thus staying within their margin of appreciation.

33. The interference with the applicant association's right to freedom of expression had been in accordance with the law and necessary in a democratic society in order to protect the plaintiffs' personality rights. The legal prerequisites for a civil injunction were clearly defined by the established domestic case-law. Under these provisions, it was irrelevant if the applicant association had the intention of violating the plaintiffs' personality rights.

34. The civil injunction pursued the legitimate aim of protecting the plaintiffs' personality rights and was necessary in a democratic society for the protection of those rights. The domestic courts had carefully weighed the conflicting interests, thereby taking into account the importance of the right to freedom of expression in a democratic society.

35. In contrast to the legal situation in Austria, there was no doubt under German law that the plaintiffs, in their capacity as Jews living in Germany, were entitled to rely on their own personality rights in the instant case. In its judgment of 18 September 1979 (no. VI ZR 140/78), which concerned the denial of the Holocaust, the Federal Court of Justice established that all persons of Jewish origin had the right to rely on their own personality rights, irrespective of the question if they had been born after the end of National Socialism and if all their ancestors were of Jewish descent. The Federal Constitutional Court had correctly applied these principles in the instant case.

36. The Government considered that they should be granted a wide margin of appreciation allowing a generous definition of the group of affected persons. This applied, in particular, in light of Germany's history, which meant that it was hardly conceivable that a German court would reach a similar conclusion as the Austrian Supreme Court (compare paragraph 23, above). Given its historical responsibility, it was Germany's duty to ensure that violations of personality rights could be claimed in connection with the Holocaust. The individuals depicted on the photographs were, almost without exception, unable to do this themselves.

37. It followed that it had to be assumed under the Convention that there was a sufficient direct connection between the applicant's poster campaign and the plaintiffs' personality rights. It was therefore irrelevant whether the individuals depicted on the photographs or their descendants would have wished the issue of the civil injunction. The attack on the personality rights did not consist in the depiction of specific persons in the photographs, but rather in the applicant's use of concentration camp photographs for their campaign. It was, furthermore, irrelevant if all of the persons depicted were of Jewish faith, as the Holocaust aimed to destroy all Jews living in Europe and the overwhelming majority of the victims during this period were of Jewish origin.

38. According to the Government, the domestic courts had given extensive and relevant reasons for letting the plaintiffs' personality rights prevail over the applicant's right to freedom of expression. They had, in particular, taken into account that the applicant association intended to express itself on a subject of public interest and that it did neither intend to debase the victims of the Holocaust nor to banalise their suffering. On the other hand, the domestic courts had taken into account the gravity of the violation of the plaintiffs' personality rights. Furthermore, it had to be considered that the sanction imposed on the applicant association had not been very severe and that the applicant association had numerous other possibilities to express their protest against mass animal farming.

3. The third parties' submissions

39. The third parties submitted that the intended poster campaign directly violated the rights of Mr S. Korn in his capacity as a Jew living in Germany and the Jews living in Germany, who were, by a majority, represented by the Central Council of Jews in Germany. They emphasised that it was accepted in the established case-law of the Federal Court of Justice and of the Federal Constitutional Court that the Jews living in Germany regarded themselves as a group singled out by fate, towards whom all others had a particular moral responsibility. Consequently, a denial or trivialisation of the genocide of Jews in the Third Reich violated the right of each member of this group. The direct violation of the rights of all Jews living in Germany was also recognised in simple legal standards and on a European level.

40. The direct effect on the Jews living in Germany was not dependent on the identification of the depicted Holocaust victims. There could be no serious doubt that such pictures were a symbol of the systematic persecution and murder of the Jews in Europe. Each one of the more than 100,000 Jews represented by the Central Council of Jews would affirm a violation of their personal rights. It became clear from the applicant association's submissions that they were not aware of the sensitivity of the subject matter.

41. In the eyes of a rational and unbiased public, the photographs combined with the accompanying texts allowed the only possible conclusion that the suffering of the depicted animals counted just as much as the suffering of the people pictured next to them. It did not matter in this context whether the applicant association intended to violate the personal rights and human dignity of the Jews living in Germany.

4. Assessment by the Court

42. The Court notes that it is common ground between the parties that the impugned measure constituted an "interference by [a] public authority" with the applicant's right to freedom of expression as guaranteed under

Article 10 of the Convention. The Court endorses this assessment. Such interference contravenes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. It therefore falls to be determined whether the interference was "prescribed by law", had an aim or aims that is or are legitimate under Article 10 § 2 and was "necessary in a democratic society" for the aforesaid aim or aims.

43. The Court notes that the interference had a legal basis in section 823 §§ 1 and 2 in conjunction with section 1004 of the Civil Code, and section 185 of the Criminal Code (compare paragraph 21, above). The Court observes that the applicant association did not contest that these provisions, under the established domestic case-law, grant any person whose personality rights risk being violated by another person a claim to compel that other person to refrain from performing the impugned action. There is no doubt that the relevant texts were accessible to the applicant association. As to the question of whether the domestic courts correctly applied these provisions, the Court reiterates that the application and the interpretation of the domestic law primarily fall within the competency of the domestic authorities which are, in the nature of things, particularly well placed to settle the issues arising in this connection (compare *inter alia Barthold v. Germany*, 25 March 1985, § 48, Series A no. 90). The Court observes that the applicant association's argument primarily evince its disagreement with the domestic courts' decisions. Accordingly, the Court is satisfied that the injunction complained of was "prescribed by law".

44. The Court is further satisfied that the interference pursued the legitimate aim of protecting the plaintiffs' personality rights and thus "the reputation or rights of others".

45. It thus remains to be determined whether the interference was "necessary in a democratic society". In the judgment of *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99 ECHR 2004-XI, the Court summarised the general principles in its case law as follows:

> "68. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V, and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII).
>
> 69. The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole, including the content of

the comments held against the applicants and the context in which they made them (see *News Verlags GmbH & Co. KG v. Austria*, no. 31457/96, § 52, ECHR 2000-I).

70. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient" and whether the measure taken was "proportionate to the legitimate aims pursued" (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, *Zana v. Turkey*, judgment of 25 November 1997, Reports 1997-VII, pp. 2547-48, § 51)."

46. The Court recalls that the domestic authorities have a variety of tools at their disposal allowing them to strike a fair balance between the various interests at stake. In assessing the proportionality of the measure at issue they have, beyond the complete prohibition or authorisation of the expression of an opinion, in particular the option of setting specific limits to the authorisation or to the prohibition. Moreover, freedom of expression is applicable to not only "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 78, 7 February 2012, with further references). Furthermore, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see, among other authorities, *Ceylan v. Turkey* [GC], no. 23556/94, § 33, ECHR 1999-IV; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, § 92, ECHR 2009 and *Mouvement raëlien v. Switzerland* [GC], no. 16354/06, § 61, 13 July 2012).

47. Turning to the circumstances of the instant case, the Court observes, at the outset, that the applicant association's intended poster campaign concerned battery animal-farming. Accordingly, as it related to animal and environmental protection, it was undeniably in the public interest (compare *Verein gegen Tierfabriken Schweiz, ibid.*). It follows that only weighty reasons can justify the interference with the applicant's right to freedom of expression in this context. The Court further observes that the domestic courts adjudicating the applicant's case carefully examined whether the issue of the requested civil injunction would violate the applicant association's right to freedom of expression. In doing so, the domestic courts applied the standards developed by the Court as set out above. They expressly accepted that the impugned representations constituted expressions of opinion and where thus protected under the right to freedom of expression. They further acknowledged that this right protected expressions even if they were formulated in a polemic or offensive way (compare paragraph 10, above) and that the impugned posters related to

questions of public interest, as they were obviously intended to criticise the conditions under which animals were kept (compare paragraph 11, above).

48. The Court further observes that the domestic courts considered that the intended poster campaign did not pursue the aim to debase the depicted concentration camp inmates, as the pictures merely implied that the suffering inflicted upon the depicted humans and animals was equal. The domestic courts considered, however, that the applicant association confronted the plaintiffs with their suffering and their fate of persecution in the interest of animal protection. It was this "instrumentalisation" of the plaintiffs' suffering that violated their personality rights in their capacity as Jews living in Germany and as survivors of the Holocaust. This violation was aggravated by the fact that the depicted Holocaust victims were shown in a most vulnerable state. Having regard to the seriousness of this violation, the courts considered that the applicant association's interests in publishing the impugned pictures had to cede. While expressing its doubts as to whether the intended campaign violated the human dignity of either the depicted persons or the plaintiffs, the Federal Constitutional Court endorsed the lower courts' assessment that the campaign banalised the fate of the Holocaust victims and that the violation of the plaintiffs' personal honour was particularly serious.

49. The Court considers that the facts of this case cannot be detached from the historical and social context in which the expression of opinion takes place (compare *Hoffer and Annen*, cited above, § 48 and *Rekvényi v. Hungary* [GC], no. 25390/94, §§ 46 *et seq*., ECHR 1999-III). It observes that a reference to the Holocaust must also be seen in the specific context of the German past (see *Hoffer and Annen*, *ibid.*) and respects the Government's stance that they deem themselves under a special obligation towards the Jews living in Germany (compare paragraph 36, above). In the light of this, the Court considers that the domestic courts gave relevant and sufficient reasons for granting the civil injunction against the publication of the posters. This is not called into question by the fact that courts in other jurisdictions might address similar issues in a different way (also compare *Müller v. Switzerland*, 24 May 1988, § 36 , Series A no. 133).

50. The Court further recalls that the nature and severity of any sanction imposed are also factors to be taken into account when assessing the proportionality of the interference (see, among other authorities, *Ceylan*, cited above, § 37 and *Annen II v. Germany* (dec.), nos. 2373/07 and 2396/07, 30 March 2010). Turning to the circumstances of the instant case, the Court notes that the proceedings at issue did not concern any criminal sanctions, but a civil injunction preventing the applicant association from publishing seven specified posters. The Court finally observes that the applicant has not established that it did not have other means at their disposal of drawing public attention to the issue of animal protection.

51. Having regard to the foregoing considerations and, in particular, to the careful examination of the case by the domestic courts, the Court accepts that the civil injunctions issued against the applicant association were a proportionate means to protect the plaintiffs' personality rights.

There has accordingly been no violation of Article 10 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

52. The applicant association further complained under Article 6 § 1 of the Convention that the domestic courts arbitrarily based their judgments on a false assessment of the facts and failed to take into account relevant case law of the Federal Constitutional Court. It finally complained under Article 14 of the Convention that it was stigmatised as being anti-Semitic.

53. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 10 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 8 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Zupancic joined by Judge Spielmann is annexed to this judgment.

D.S.
C.W.

CONCURRING OPINION OF JUDGE ZUPANČIČ, JOINED BY JUDGE SPIELMANN

1. We agree, obviously, with the outcome in this case. We beg to differ, however, with the reasoning of the majority such as essentially implied in § 49 of the judgment, where it says *"that the impact of an expression of an opinion [...] on another person's personality rights cannot be detached from the historical and social context in which the statement has been made and that a reference to the Holocaust must also be seen in the specific context of the German past."* (Citing *Hoffer and Annen*, § 48).

2. This, of course, is very true, yet it also implies the Court might agree to the impunity of an applicant's behaviour in a jurisdiction where the "historical and social context" is purportedly different.

3. Apart from that, the real question here is the relativisation of an unacceptable use of the freedom of expression. This relativisation is only a shade removed, if one considers mere appearances, from a Nazi kind of discriminatory pronouncement. One need only imagine that the poster was made from the opposite point of view; then one easily arrives at a converse impression that the inmates shown behind the barbed wire are to be compared with the pigs behind the bars. If such is the kind of statement covered by freedom of expression, one then finds it difficult to understand, what is not covered by freedom of expression.

4. The above relativisation is deeply problematic from a seemingly "democratic" point of view, where everything goes because everything is relative and everything is, to put it metaphorically, for sale. People only have opinions, but they lack convictions, let alone the courage of their convictions. The difference between good and evil, between what is right and what is clearly wrong is thus a matter of opinion, as if reasonable men could reasonably differ on a particular subject matter.

5. Here we may pause and ask, whether reasonable men could indeed or could not differ on the utterly distasteful and unacceptable comparison between pigs on the one hand and the inmates of Auschwitz or some other concentration camp, on the other hand. A few decades ago this kind of *Denkexperiment*, even in the American context, would only yield a result unfavourable to the applicants, because a few decades ago, reasonable persons could not possibly differ on the question we have before us in this case.

6. Apparently, things have changed to the extent that indeed both the Federal Constitutional Court in Germany, as well as our Court, are still able to say that such comparison is unacceptable, but only in the context of a country carrying a historical stigma concerning the concentration camps.

7. The Federal Constitutional Court, as we say in paragraph 48, endorsed the lower German courts' assessment to the effect that the campaign made banal the fate of the Holocaust victims and that the violation of the

plaintiffs' personal honour was particularly serious. We, on the other hand, seem to be even more "flexible" and we only maintain that the personality rights (*Persönlichkeitsrechte*) cannot be detached from the social context in which the poster statement has been made and moreover, that the reference to the Holocaust must also be seen in the specific context of the German past.

8. Quite apart from the fact that the German Federal Constitutional Court did not consider the issue under the constitutional norm concerning dignity, this was explained by technical reasons; there is a noticeable difference between the two positions. Thus, it is difficult to say whether that court, if such an attack were to occur; would indeed find it incompatible with human dignity. Personally, we have no doubts that it would.

9. If that were to be true, the position taken by the domestic constitutional court would be far more than ours a question of principle, i.e., the decision would not be taken in the German domestic context as a matter of cultural relativisation. On the other hand, the unfortunate implication of our own position seems to be that the same kind of "freedom of expression" in the Austrian cultural context would clearly be acceptable – let alone in other countries ranging from Azerbaijan in the east to Iceland in the west.

10. Moreover, since the judgment in this case, unless it goes to the Grand Chamber, will become a precedent, it will be de facto binding on all other countries, of course negatively – except on Germany. Because, what is unacceptable in Germany, is no longer unacceptable in Austria, with a similar historical concern, and a fortiori so in other countries. We do not believe that such an approach, were it to be reconsidered by the Grand Chamber, would be acceptable and confirmed.

11. If we now return to the opening theme and consider the difference between the principled and the relativistic positions, as in this case, we may be reminded, although tangentially, of H. L. A. Hart's distinction between prescriptive norms on the one hand and the instrumental norms on the other hand.

12. Because instrumental norms are relative to the prescriptive norm, they are in that sense relative, whereas the prescriptive norm is by counter distinction and juxtaposition, categorical and in that sense, absolute.

13. Here we are reminded of Immanuel Kant's categorical imperative. His position was that every human being must be treated as an end in himself. This perhaps coincides with the German constitutional concept of dignity.

14. But when human beings in their utter suffering and indignity are, as here, compared to hens and pigs for the lesser purpose of protecting otherwise legitimate advancement of animal rights, we are no longer in the position to maintain that the human beings seen in these pictures are treated as an end in themselves.

15. Clearly, these human beings, not only Jewish but of all nationalities, in a concentration camp, are here treated as an instrument for the advancement of animal rights. If their image is so instrumentalised, little is left of their human dignity, I'm certain, even in the context of German constitutional law.

16. Hart's distinction between prescriptive norms on the one hand and instrumental norms on the other hand, is in fact an analogy to the distinction between Kant's categorical imperative on the one hand and less categorical norms on the other hand.

17. In simple legalistic language, the question is therefore, where do we draw the line? Would these pictures be acceptable in Azerbaijan or Iceland, or in Austria, or would they not be acceptable?

18. Indeed, this is a question of varying cultural standards, which may or may not be shared in any of the 47 different cultural contexts. In turn, the European Court of Human Rights is put in a position whereby it may or it may not relegate the issue to the so-called margins of appreciation.

19. According to that logic, what is acceptable in any other country may not be acceptable in Germany, etc. We see, that this is simply a different kind of relativisation of the same issue, i.e., of our own refusal to draw the line. If the line cannot be drawn here, one is entitled to ask where it would be drawn. It would be difficult to find anything more shocking, as Justice Frankfurter of the U.S. Supreme Court would have said, to human conscience.