van noodweerexces en daaraan een halt willen toeroepen. Dat valt te billijken. Minder gerust ben ik op de in zo algemene termen opgestelde afwijzing van noodweerexces bij politieambtenaren. Het had het Hof gesierd zich meer te verdiepen in noodweerexces in de verschillende verdragsstaten. Dan had het Hof ofwel tot een andere, meer genuanceerde afweging kunnen komen, ofwel met betere argumenten kunnen komen om noodweerexces bij politieambtenaren in geval van vuurwapengebruik af te keuren. Het Hof bewijst de ontwikkeling van noodweerexces met deze uitspraak niet echt een goede dienst.

J.M. ten Voorde
Universitair hoofddocent straf(proces)recht aan de Universiteit Leiden

122

Europees Hof voor de Rechten van de Mens
14 maart 2013, nrs. 26261/05 en 26377/06
(Berro-Lefèvre (President), Steiner, Hajiyev, Lazarova Trajkovska, Laffranque, Turković, Dedov)
Noot P. de Morree

Verenigingsvrijheid. Lidmaatschap verboden islamitische politieke vereniging. Verbod misbruik van verdragsrechten. Grenzen bescherming verdragsrechten voor politieke organisaties.

[EVRM art. 7, 9, 10, 11, 17]

De internationale islamitische organisatie Hizb ut-Tahrir al-Islami (De Partij van de Islamitische Bevrijding, hierna: Hizb ut-Tahrir) pleit voor omverwerping van de huidige regeringen in het Midden-Oosten en het stichten van een Islamitische Staat op basis van de islamitische regelgeving in de sharia. Op 14 februari 2003 heeft het Russische Hooggerechtshof Hizb ut-Tahrir aangemerkt als een terroristische organisatie en haar activiteiten op Russisch grondgebied verboden. Kasymakhunov en Saybatalov zijn beiden lid van deze organisatie en zij zijn de oprichters van een lokale afdeling van Hizb ut-Tahrir in respectievelijk Moskou, en Tyumen en Tobolsk (Siberië). Door een lokale rechtbank werden zij veroordeeld wegens medeplichtigheid aan terrorisme en het stichten van een criminele organisatie. Deze veroordeling bleef tot aan het Russische Hooggerechtshof in stand. Voor het Straatsburgse Hof voerden zij in de eerste plaats aan dat hun veroordeling in strijd is met het beginsel 'geen straf zonder wet' (nulla poena sine lege, art. 7 EVRM). Daarnaast klaagden zij dat hun veroordeling een schending betekent van hun godsdienstvrijheid (art. 9), vrijheid van meningsuiting (art. 10) en verenigingsvrijheid (art. 11 EVRM).

Voor wat betreft hun beroep op art. 7 EVRM voeren Kasymakhunov en Saybatalov aan dat hun veroordeling was gebaseerd op voor hen niet voorzienbare gronden. De uitspraak waarin het Russische Hooggerechtshof Hizb ut-Tahrir verboden verklaarde was ten tijde van hun activiteiten voor deze organisatie niet officieel gepubliceerd (par. 69). Het Hof beoordeelt de klacht voor beide klagers verschillend. Met betrekking tot de eerste klager concludeert het Hof dat de bepalingen uit het Russische Wetboek van Strafrecht inzake de oprichting van en deelname aan een terroristische organisatie (art. 205.1 en 210) die ten grondslag liggen aan zijn veroordeling niet vereisen dat de betreffende organisatie door de rechter is verboden (par. 84). Voor de tweede klager ligt dit anders. De bepaling uit het Russische Wetboek van Strafrecht die ten grondslag ligt aan zijn veroordeling (art. 282.2) stelt wel degelijk een gerechtelijk verbod van de betreffende organisatie als voorwaarde voor de strafbaarheid van het lidmaatschap ervan (par. 90). In zijn geval oordeelt het Hof dan ook dat hij door het ontbreken van een officiële publicatie van de uitspraak van het Hooggerechtshof niet kon voorzien dat zijn lidmaatschap van Hizb ut-Tahrir strafbaar zou zijn. Het Hof concludeert daarom dat in het geval van de tweede klager wel sprake is van een schending van art. 7 EVRM (par. 95).

Vervolgens behandelt het Hof de klacht van Kasymakhunov en Saybatalov dat hun veroordeling een schending betekent van hun godsdienstvrijheid (art. 9 EVRM), vrijheid van meningsuiting (art. 10 EVRM) en verenigingsvrijheid (art. 11 EVRM). Het Hof herhaalt hierbij zijn eerdere conclusie dat Hizb ut-Tahrir vanwege zijn antisemitische en gewelddadige uitlatingen op grond van art. 17 EVRM (de misbruikclausule) niet kan profiteren van de bescherming van art. 11 EVRM (Hizb Ut-Tahrir e.a. t. Duitsland, EHRM 12 juni 2012, nr. 31098/08 «EHRC» 2012/201 m.nt. De Morree). Het verspreiden van de politieke ideeën van Hizb ut-Tahrir door Kasymakhunov en Saybatalov moet in navolging daarvan volgens het Hof ook worden aangemerkt als een activiteit die valt binnen de werking van art.

17 EVRM. Het beroep van beide klagers op de art. 9, 10 en 11 EVRM wordt daarom niet-ontvankelijk verklaard.

Kasymakhunov en Saybatalov
tegen
Rusland

THE LAW

I. Joinder of the applications

68. The Court notes at the outset that both applicants complained that the law provisions which had served as a basis for their convictions were not foreseeable in their application, taking into account that the judgment of the Supreme Court banning Hizb ut-Tahrir had not been officially published at the time when the acts attributed to them had been committed. They also complained that their convictions for the membership of Hizb ut-Tahrir had violated their freedoms of religion, expression and association. Finally, they both complained of discrimination on account of their religious beliefs. Having regard to the similarity of the applicants' grievances, the Court is of the view that, in the interests of the proper administration of justice, the applications should be joined in accordance with Rule 42 § 1 of the Rules of Court.

II. Alleged violation of Article 7 of the Convention

69. The applicants complained that the Supreme Court's decision banning Hizb ut-Tahrir had not been officially published. The law provisions which had served as a basis for their convictions were therefore not foreseeable in their application, contrary to the requirements of Article 7 of the Convention. That Article reads as follows:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. Admissibility

70. 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. Submissions by the parties

71. The Government conceded that the Supreme Court's decision of 14 February 2003 had not been officially published prior to the applicants' conviction. That was because at the material time Russian law had not established a publication procedure or any procedure for keeping an official list of banned terrorist organisations. It was not until March 2006 that such a procedure had been provided for by law (see paragraph 64 above) and not until July 2006 that the official list of banned terrorist organisations had been published (see paragraph 10 above). However, the information about the banning of Hizb ut-Tahrir and other organisations had been divulged on 14 and 15 February 2003 by many traditional and Internet media outlets. Referring to the Supreme Court's decision of 18 June 2003 (see paragraph 9 above), the Government argued that as a result of those publications, society had been sufficiently informed about the banning of Hizb ut-Tahrir.

72. The Government further referred to the legal principle "ignorance of the law is no excuse" and submitted that, in any event, the domestic courts had established that the applicants had known about the banning of Hizb ut-Tahrir. Indeed, the applicants, their co-defendants and witnesses had admitted to knowing that the organisation had been banned when questioned by the investigator. Moreover, leaflets criticising the decision to ban Hizb ut-Tahrir had been found in the second applicant's flat. Accordingly, the applicants had possessed information about the Supreme Court's decision of 14 February 2003 and could therefore have foreseen that their membership of Hizb ut-Tahrir was criminally punishable under Articles 205.1, 210 and 282.2 of the Criminal Code.

73. The first applicant submitted that the Supreme Court's decision of 14 February 2003 had been an essential element in establishing his guilt under Articles 205.1 and 210 of the Criminal Code. In particular, the domestic courts had based their finding that Hizb ut-Tahrir was a "criminal organ-

isation" within the meaning of Article 210 on the Supreme Court's decision of 14 February 2003 by which Hizb ut-Tahrir had been declared a terrorist organisation. The fact that his conviction under Article 205.1 had later been set aside following an amendment to the Criminal Code (see paragraph 25 above) had not deprived him of victim status because there had been no acknowledgment of a violation of his rights. In any event, his conviction under Article 210 of the Criminal Code – which, as argued above, had been essentially based on the Supreme Court's decision of 14 February 2003 – still stood.

74. The first applicant further submitted that the Supreme Court's decision of 14 February 2003, taken *in camera* and in the absence of the organisation's representatives, had never been officially published, as acknowledged by the Government. The reference to that decision in the media could not compensate for the absence of an official publication. Firstly, the media had not published the full text of the decision or at least its operative part or a summary of its reasoning. Secondly, the press articles referred to by the Government had been published immediately after the decision had been adopted and before it had become final. Some publications had mentioned that the decision was still amenable to appeal. No mention of the decision's entry into force had been made in the media. The first applicant could not therefore have learned from the media reporting whether the Supreme Court's decision was enforceable and, accordingly, whether Hizb ut-Tahrir had indeed been officially banned by a final judicial decision.

75. The second applicant maintained his claims.

2. The Court's assessment

(a) General principles

76. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 92, 17 September 2009).

77. Article 7 § 1 of the Convention goes beyond prohibition of the retrospective application of criminal law to the detriment of the accused. It also sets forth, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability (see *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996 V; *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000 VII; and *Sud Fondi S.r.l. and Others v. Italy*, no. 75909/01, §§ 107 and 108, 20 January 2009).

78. As a consequence of the principle that laws must be of general application, the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. That means that many laws are inevitably couched in terms which, to a greater or lesser extent are vague, and their interpretation and application depend on practice. Consequently, in any system of law, however clearly drafted a legal provision may be, including a criminal law provision, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development

is consistent with the essence of the offence and could reasonably be foreseen (see *Scoppola (no. 2)*, cited above, §§ 100 and 101). A law may still satisfy the requirement of "foreseeability" where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Achour v. France* [GC], no. 67335/01, § 54, ECHR 2006 IV, and *Huhtamäki v. Finland*, no. 54468/09, § 44, 6 March 2012).

(b) Application to the present case

79. In the light of the above principles, the Court observes that it is not its task to rule on the applicants' individual criminal responsibility, that being primarily a matter for the assessment of the domestic courts, but to consider, from the standpoint of Article 7 § 1 of the Convention, whether the criminal offences for which the applicants were convicted were defined with sufficient accessibility and foreseeability by Russian law.

80. The essence of the dispute between the parties is whether the domestic law provisions which served as a basis for the applicants' convictions were foreseeable in their application, taking into account that the judgment of the Supreme Court declaring that Hizb ut-Tahrir was a terrorist organisation had not been officially published at the time when the acts attributed to them had been committed. The Court must thus examine whether the provisions in question fulfil the foreseeability requirement.

(i) The first applicant's case

81. The first applicant was convicted of incitement to participate in the activities of a terrorist organisation, an offence under Article 205.1 of the Criminal Code, and of founding a criminal organisation, an offence under Article 210 of the Criminal Code.

82. Examining the wording of Article 205.1 of the Criminal Code, the Court observes that no definition of a "terrorist organisation" is contained in that Article. A definition may, however, be found in the Anti-Terrorism Act, which defines a "terrorist organisation" as an organisation created with the aim of carrying out terrorist activities or admitting the possibility of recourse to terrorism as part of its activities (see paragraph 62 above). The Anti-Terrorism Act also specifies which actions may be regarded as amounting to "terrorism" and "terrorist activities" (see paragraphs 60 and 61 above). A similar definition of "terrorism" is contained in Article 205 of the Criminal Code (see paragraph 54 above). The Court considers that Article 205.1, read in conjunction with Article 205 and with the provisions of the Anti-Terrorism Act, is formulated with sufficient precision to enable an individual to know, if need be with appropriate legal advice, what acts and omissions will make him criminally liable.

83. Similarly, the wording of Article 210 of the Criminal Code is also precise. Article 210 defines a criminal organisation as an organisation created for the commission of serious and especially serious offences, while Article 15 of the Criminal Code determines which offences are considered serious and especially serious (see paragraphs 56 and 57 above).

84. It is significant that a conviction for incitement to participate in the activities of a terrorist organisation under Article 205.1 or for founding a criminal organisation under Article 210 has not been made conditional on the existence of a prior judicial decision banning that organisation on the ground of its terrorist, extremist or otherwise criminal nature. It is sufficient for the trial court to establish, on the basis of the evidence provided by the parties, that the organisation in question possesses all the characteristics of a terrorist or criminal organisation as defined by the above-mentioned provisions of the Criminal Code and the Anti-Terrorism Act.

85. Turning to the circumstances of the first applicant's case, the Court notes that the domestic courts found all the constituent elements of the offences under Articles 205.1 and 210 in the first applicant's acts. Thus, it was established that the local section of Hizb ut-Tahrir founded by him was a terrorist, and therefore criminal, organisation. It is true that when making that finding the domestic courts relied on, *inter alia*, the Supreme Court's decision of 14 February 2003 banning Hizb ut-Tahrir on the ground of its terrorist aims. However, the Supreme Court's decision was not the sole basis for that finding. The domestic courts also relied on the leaflets and brochures found in the first applicant's flat and distributed by him. After a detailed assessment of their contents, the domestic courts concluded that they called for a violent overthrow of non-Muslim governments and advocated and glorified warfare against non-Muslim States. The fact that the guidelines on the

use of weapons, explosives and poisons were found among the above-mentioned leaflets and brochures was also relied upon by the courts as a basis for their finding that the local section of Hizb ut-Tahrir founded by the first applicant was terrorist in nature. The Court is therefore not convinced by the first applicant's argument that the Supreme Court's decision of 14 February 2003 was an essential element for his conviction under Articles 205.1 and 210 of the Criminal Code.

86. In view of the above, the fact that the Supreme Court's decision of 14 February 2003 was not officially published at the material time did not deprive the legal provisions which served as a basis for the first applicant's conviction of their accessibility and foreseeability. The Court considers that Articles 205.1 and 210 of the Criminal Code, read in conjunction with Articles 15 and 205 of that Code and the provisions of the Anti-Terrorism Act, met the Convention's "quality of law" requirements.

87. There has therefore been no violation of Article 7 of the Convention in respect of the first applicant.

(ii) The second applicant's case

88. The second applicant was convicted of incitement to participate in the activities of a terrorist organisation, an offence under Article 205.1 of the Criminal Code, and of founding and membership of an extremist organisation, an offence under Article 282.2 of the Criminal Code.

89. The Court has already found that Article 205.1 is formulated with sufficient precision to enable an individual to regulate his conduct. It remains to be examined whether Article 282.2 was also foreseeable in its application at the time when the acts attributed to the second applicant were committed.

90. The Court observes that under Article 282.2 of the Criminal Code, the founding or membership of an extremist organisation constitutes a criminal offence only if that organisation has been previously dissolved or banned by a final judicial decision on the ground of its extremist activities (see paragraph 58 above). Such a judicial decision was therefore an essential element for a conviction under Article 282.2.

91. The Supreme Court's decision of 14 February 2003 banning Hizb ut Tahrir has never been officially published, as acknowledged by the Government, and is therefore not accessible to the public. Nor was the official list of banned extremist organisations published until July 2006, long after the commission of the offences of which the second applicant was accused.

92. The Court takes note of the Government's argument that, despite the lack of an official publication, the second applicant knew about the Supreme Court's decision because information about it had been widely reported in the media. It is, however, not convinced by that argument. It considers that journalistic reporting of the Supreme Court's decision cannot substitute for official publication of the text of the decision, or at least of its operative part. Only a publication emanating from an official source can give an adequate and reliable indication of the legal rules applicable in a given case.

93. It follows that, in the absence of an official publication of Supreme Court's decision of 14 February 2003, the second applicant could not reasonably have foreseen that his membership of Hizb ut-Tahrir would make him criminally liable under Article 282.2.

94. Finally, it is relevant that the second applicant's conviction under Article 282.2 resulted in a heavier penalty for him as compared to the penalty that would have been imposed had he been convicted under Article 205.1 only (see paragraph 41 above, and compare *Moiseyev v. Russia*, no. 62936/00, § 242, 9 October 2008). In these circumstances, the Court concludes that the second applicant's conviction for founding and membership of an extremist organisation, an offence under Article 282.2 of the Criminal Code, was incompatible with the principle "*nulla poena sine lege*" embodied in Article 7.

95. There has therefore been a violation of Article 7 of the Convention in respect of the second applicant.

III. Alleged violation of Articles 9, 10 and 11 of the Convention

96. The applicants complained that their convictions for membership of Hizb ut-Tahrir had violated their rights under Article 9, 10 and 11 of the Convention, which provide:

Article 9

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom,

either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Article 10

"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."

Article 11

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Submissions by the parties

97. The Government submitted that the applicants had not been convicted for their religious beliefs but for their membership of a terrorist organisation, Hizb ut-Tahrir al-Islami. In particular, they had distributed leaflets and brochures promoting the superiority of Muslims over adherents of other religions, calling for a confrontation between Islamic fundamentalists and all others, for the violent overthrow of non-Muslim governments and for universal Islamisation of mankind. Hizb ut-Tahrir rejected the possibility of participating in the democratic political process and chose to conduct its activities in an illegal and clandestine manner. The interference with the applicants' freedoms of religion, expression and association had therefore been "necessary in a democratic society". Moreover, given the terrorist and extremist nature of the organisation and its intention to create hostility between adherents of different religions, to foster disunity in society and to undermine the constitutional foundations of the Russian Federation, the applicants' actions within that organisation had been aimed at destroying the rights and freedoms set forth in the Convention. Referring to Article 17 of the Convention, the Government argued that the applicants could not therefore claim the protection afforded by Articles 9, 10 and 11.

98. The first applicant submitted that his conviction had interfered with his freedoms of religion, expression and association. Given that the Supreme Court's decision of 14 February 2003 banning Hizb ut-Tahrir had not been officially published, that interference had been based on legal provisions which did not meet the criteria of accessibility and foreseeability. Nor had the interference met a "pressing social need". Indeed, the Supreme Court's decision banning Hizb ut-Tahrir was vague and did not refer to any facts justifying the finding that Hizb ut-Tahrir was a terrorist organisation. The judgments convicting the first applicant had not contained any evidence of terrorist activities either. Although he had never been accused of any violent acts, he had been sentenced to eight years' imprisonment for the mere fact of his membership of Hizb ut-Tahrir. Such a severe sanction had been obviously disproportionate to the gravity of the acts attributed to him, which consisted in nothing more than keeping Islamic literature at home, spreading Islamic propaganda and recruiting new members of Hizb ut Tahrir.

99. As regards Article 17 of the Convention, the first applicant submitted that that Article had been mainly applied to applications concerning anti-Semitic statements or lodged by anti-Semitic groups (he referred to *Garaudy v. France* (dec.),

no. 65831/01, ECHR 2003-IX; *W.P. and Others v. Poland* (dec.), no. 42264/98, ECHR 2004-VII; and *Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007). It had also been occasionally applied in cases concerning xenophobic statements (he cited *Norwood v. the United Kingdom* (dec.), no. 23131/03, ECHR 2004 XI), whereas in other cases involving similar statements the Court had found that the application of Article 17 was not justified and that the case should be examined on the merits (he referred to *Leroy v. France*, no. 36109/03, 2 October 2008, and *Féret v. Belgium*, no. 15615/07, 16 July 2009). As regards applications lodged by Muslim groups advocating the introduction of sharia, the Court had never found that, by virtue of Article 17 of the Convention, such groups could not benefit from protection under the Convention. All such applications had been examined on the merits (he cited *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003 II; *Fazilet Partisi and Kutan v. Turkey* (dec.), no. 1444/02, 30 June 2005; and *Erbakan v. Turkey*, no. 59405/00, 6 July 2006). The Government had not explained into which of the above categories of cases potentially covered by Article 17 the present application could fall, instead limiting their submissions under that Article to arguing that Hizb ut-Tahrir had been banned in Russia on the ground of its intention to overthrow the constitutional foundations of the Russian Federation.

100. The first applicant conceded that Hizb ut-Tahrir had been accused by some international experts of expressing anti-Semitic views. It also indisputably advocated the introduction of sharia, which had been found to be incompatible with the Convention. However, neither the Supreme Court's decision banning Hizb ut-Tahrir nor the judgments convicting the first applicant had relied on any anti-Semitic, racist or otherwise xenophobic statements attributable to the organisation in general or the first applicant in particular. The thrust of the accusations levelled against the first applicant was his membership of an organisation whose aim was to establish Islamic rule by reviving a "Worldwide Islamic Caliphate". It should be taken into account that Hizb ut-Tahrir was not active in Russia, concentrating its activities in Muslim States, such as Uzbekistan. It could not therefore realistically seize power and start creating a legal regime contrary to the Convention. The application of Article 17 was therefore not justified in the first applicant's case.

101. The second applicant maintained his claims.

B. The Court's assessment

102. The Court will first examine whether Article 17 of the Convention is applicable to the present case. That Article states:

"Nothing in [the] Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

103. The general purpose of Article 17 is to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention (see *Norwood*, cited above). Although to achieve that purpose it is not necessary to take away every one of the rights and freedoms guaranteed from groups and persons engaged in activities contrary to the text and spirit of the Convention, the Court has found that the freedoms of religion, expression and association guaranteed by Articles 9, 10 and 11 of the Convention are covered by Article 17 (see, among other authorities, *W.P. and Others v. Poland*, cited above; *Garaudy*, cited above; *Pavel Ivanov*, cited above; and *Hizb ut-Tahrir and Others v. Germany* (dec.), no. 31098/08, §§ 72-75 and 78, 12 June 2012).

104. Indeed, the possibility cannot be excluded that a political party or other association, in pleading the rights enshrined in Article 11 and also in Articles 9 and 10 of the Convention, might attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention and thus bring about the destruction of democracy. In view of the very clear link between the Convention and democracy, no one may be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society. In that context, the Court considers that it is not at all improbable that totalitarian movements might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history (see *Refah Partisi (the Welfare Party) and Others*, cited above, § 99).

105. The Court has accordingly defined as follows the limits within which political organisations can continue to enjoy the protection of the Convention while conducting their activities. It has found that a political organisation may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political organisation whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds (ibid., §§ 97 and 98).

106. Turning to the circumstances of the present case, the Court notes that both applicants were members of Hizb ut-Tahrir and were engaged in spreading its ideology by distributing its literature and recruiting new members. It has already found that, by reason of Article 17 of the Convention, that organisation cannot benefit from the protection of Articles 9, 10 and 11 of the Convention because of its anti-Semitic and pro violence statements, in particular statements calling for the violent destruction of Israel and for the banishment and killing of its inhabitants and repeated statements justifying suicide attacks in which civilians are killed. The Court has held that Hizb ut-Tahrir's aims are clearly contrary to the values of the Convention, notably the commitment to the peaceful settlement of international conflicts and to the sanctity of human life (see *Hizb ut-Tahrir and Others*, cited above, §§ 73-75 and 78).

107. The Court does not see any reason to depart from this finding in the present case. Indeed, during the meetings of the local section of Hizb ut Tahrir chaired by the second applicant, statements calling for violence against Jews were made (see paragraph 35 above). There is also evidence that, when recruiting new members, the first applicant urged them to fight the unfaithful with weapons (see paragraph 14 above). Moreover, the experts who examined the leaflets and brochures distributed by the applicants were unanimous in finding that they contained statements calling for violence. Thus, the experts noted that Hizb ut-Tahrir's literature advocated and glorified warfare in the form of jihad, a term which was mainly used in its meaning of "holy war", to establish the domination of Islam. Some of the documents in question also stated that it was permissible to kill any citizen of enemy States, among which were named, besides Israel, the United States of America, the United Kingdom, France and Russia (see paragraphs 21 and 37 above). In view of the above, the Court is not convinced by the applicants' assertions that Hizb ut-Tahrir is an organisation which rejects the possibility of recourse to violence.

108. Furthermore, it is significant that the experts also noted that, although Hizb ut-Tahrir clearly aspired to gain political power in order to overthrow non-Muslim governments and impose Islamic rule worldwide, it rejected any possibility of participating in the democratic political process. The terminology used in Hizb ut-Tahrir's literature to refer to the methods to be employed to gain political power was so ambiguous as to give cause to believe that recourse to violent methods was envisaged (see paragraphs 21 and 37 above; see also the reports on the ideology of Hizb ut-Tahrir by reputed international NGOs cited in paragraphs 44-50 above). It follows from the above that the means which Hizb ut-Tahrir plans to use in order to gain power and to promote a change in the legal and constitutional structures of the States where it is active cannot be regarded as legal and democratic.

109. Nor are the changes in the legal and constitutional structures of the State proposed by Hizb ut-Tahrir compatible with the fundamental democratic principles underlying the Convention. The Court notes that the regime which Hizb ut-Tahrir plans to set up after gaining power is described in detail in its documents. An analysis of these documents reveals that Hizb ut-Tahrir proposes to establish a regime which rejects political freedoms, such as, in particular, freedoms of religion, expression and association, declaring that they are contrary to Islam. For example, Hizb ut Tahrir intends to introduce capital punishment for apostasy from Islam and to ban all political parties which are not based on Islam (see paragraph 51 above).

110. Furthermore, in its literature Hizb ut-Tahrir clearly states its intention to introduce a plurality of legal systems, that is, a distinction between individuals in all fields of private and public law, with different rights and freedoms afforded de-

pending on religion. Thus, according to Hizb ut-Tahrir's Draft Constitution (see paragraph 51 above), only Muslims will have the right to vote and to be elected, to become State officials or to acquire membership of political parties. Different tax rules and family laws will be applicable to Muslims and to adherents of other religions. The Court has already found that such a system cannot be considered to be compatible with the Convention system because it undeniably infringes the principle of non-discrimination on the ground of religion (see *Refah Partisi (the Welfare Party) and Others*, cited above, § 119). Similarly, some provisions of the Draft Constitution promote differences in treatment based on sex, for example providing that women cannot take up high-ranking official positions. These provisions are hard to reconcile with the principle of gender equality, which has been recognised by the Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 115, ECHR 2005 XI).

111. Lastly, the Court observes that the regime that Hizb ut-Tahrir intends to set up will be based on sharia. However, it has previously found a regime based on sharia to be incompatible with the fundamental principles of democracy, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. An organisation whose actions seem to be aimed at introducing sharia in a State Party to the Convention can hardly be regarded as complying with the democratic ideal that underlies the whole of the Convention (see *Refah Partisi (the Welfare Party) and Others*, cited above, § 123).

112. It is significant that the activities of Hizb ut-Tahrir are not limited to promoting religious worship and observance in private life of the requirements of Islam. They extend outside the sphere of individual conscience and concern the organisation and functioning of society as a whole. Hizb ut-Tahrir clearly seeks to impose on everyone its religious symbols and conception of a society founded on religious precepts (ibid., § 128; see also *Leyla Şahin*, cited above, § 115).

113. In view of the above considerations, the Court finds that the dissemination of the political ideas of Hizb ut-Tahrir by the applicants clearly constitutes an activity falling within the scope of Article 17 of the Convention. The applicants are essentially seeking to use Articles 9, 10 and 11 to provide a basis under the Convention for a right to engage in activities contrary to the text and spirit of the Convention. That right, if granted, would contribute to the destruction of the rights and freedoms set forth in the Convention and referred to above.

114. It follows that the applicants' complaints under Articles 9, 10 and 11 are incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

IV. Other alleged violations of the Convention

115. Lastly, the applicants complained under Article 14 of the Convention, taken in conjunction with Articles 9, 10 and 11, that they had been discriminated against on account of their religious beliefs.

116. The Court has found that that the applicants are precluded by Article 17 of the Convention from relying on Articles 9, 10 and 11 of the Convention in respect of their convictions for membership of Hizb ut-Tahrir and dissemination of its ideas. It follows that they cannot allege a violation of Article 14 of the Convention taken in conjunction with these same Articles (see *Hizb ut-Tahrir and Others*, cited above, § 89).

117. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

V. Application of Article 41 of the Convention

118. 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."

119. The second applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

For these reasons, the Court unanimously

1. *Decides* to join the applications;

2. *Declares* the complaint concerning the conviction on the basis of legal provisions that were allegedly neither accessible nor foreseeable in their application admissible and the remainder of the applications inadmissible;
3. *Holds* that there has been no violation of Article 7 of the Convention in respect of the first applicant;
4. *Holds* that there has been a violation of Article 7 of the Convention in respect of the second applicant.

NOOT

1. De klagers in de onderhavige zaak doen een beroep op zowel art. 7 EVRM (geen straf zonder wet) als op art. 9 (godsdienstvrijheid), art. 10 (vrijheid van meningsuiting) en art. 11 EVRM (verenigingsvrijheid). In het navolgende zal enkel aandacht worden besteed aan het beroep op deze laatste verdragsrechten, waarbij het Hof door toepassing van art. 17 EVRM de klagers de bescherming van de art. 9, 10 en 11 EVRM ontneemt. De centrale vraag waar het Hof zich hier in het kader van de toepassing van art. 17 EVRM voor ziet gesteld is wanneer een politieke organisatie een dusdanig gevaar vormt voor de democratische waarden waarop het verdrag is gestoeld dat de leden daarvan een beroep op de politieke vrijheden in het verdrag moet worden ontnomen.
2. Hizb ut-Tahrir is een fundamentalistische islamitische organisatie met afdelingen over de hele wereld, waaronder in Nederland. De organisatie pleit voor omverwerping van de huidige regeringen in het Midden-Oosten en de stichting van één islamitische staat op basis van de sharia. Hierbij richt Hizb ut-Tahrir haar pijlen met name op Israël, dat volgens de organisatie geen bestaansrecht heeft. Door haar tegenstanders wordt de organisatie ervan beschuldigd aan te sturen op een gewelddadige confrontatie tussen islamitische fundamentalisten en de rest van de mensheid.
3. Dit is de tweede keer in relatief korte tijd dat het Hof een zaak krijgt voorgelegd die betrekking heeft op Hizb ut-Tahrir. In de zomer van 2012 moest het Hof zich al eens uitspreken over een verbod van Hizb ut-Tahrir in Duitsland (*Hizb Ut-Tahrir e.a.* t. *Duitsland*, EHRM 12 juni 2012, nr. 31098/08 «EHRC» 2012/201 m.nt. De Morree). Toen betrof het een ontvankelijkheidsbeslissing waarin het Hof oordeelde dat Hizb ut-Tahrir geen bescherming geniet van de verenigingsvrijheid. De organisatie werd beschuldigd van antisemitische en gewelddadige uitlatingen, met name waar zij opriep tot de vernietiging van de staat Israël en zijn inwoners. Door de verenigingsvrijheid in te zetten voor doeleinden die beslist indruisen tegen de waarden van het verdrag, met name de belofte van een vreedzame oplossing van internationale conflicten en de onschendbaarheid van het menselijk leven, poogde de vereniging volgens het Hof af te wijken van de werkelijke bedoeling van art. 11 EVRM. Aldus kon Hizb ut-Tahrir zich, gelet op het bepaalde in art. 17 EVRM, niet beroepen op de verenigingsvrijheid van art. 11 EVRM.
4. Waar het in 2012 een klacht betrof van de organisatie zelf, draait het in de onderhavige zaak om twee leden van Hizb ut-Tahrir die zijn veroordeeld wegens hun betrokkenheid bij deze organisatie. Desalniettemin besteedt het Hof veel aandacht aan de aard en doeleinden van Hizb ut-Tahrir (par. 106-112). Pas in de laatste paragrafen koppelt het Hof zijn bevindingen omtrent Hizb ut-Tahrir terug naar de positie van Kasymakhunov en Saybatalov. Het Hof geeft aan geen reden te zien om af te wijken van zijn standpunt omtrent Hizb ut-Tahrir uit 2012 (par. 107). Vervolgens concludeert het Hof dat de verspreiding van de ondemocratische politieke ideeën van Hizb ut-Tahrir door de klagers duidelijk is aan te merken als een activiteit in de zin van art. 17 EVRM. De klagers doen volgens het Hof een beroep op de art. 9, 10 en 11 EVRM ter rechtvaardiging van activiteiten die indruisen tegen de tekst en de geest van het verdrag. Dit kwalificeert het Hof als misbruik van deze verdragsrechten en de klacht wordt op dit punt niet-ontvankelijk verklaard (par. 113-114).
5. Art. 17 EVRM neemt in het verdrag een bijzondere plaats in. Het verbiedt misbruik van de rechten en vrijheden in het verdrag. De bepaling is sterk ingegeven door de historische context waarin het verdrag tot stand kwam. De vrees voor een opleving van het nationaalsocialisme en het fascisme en de dreiging van het communisme waren de aanleiding voor deze bepaling, die moet voorkomen dat groepen of individuen die zich richten tegen de democratische waarden die ten grondslag liggen aan het verdrag bescherming genieten van het EVRM (H. Cannie & D.

Voorhoof, "The abuse clause and freedom of expression in the European Human Rights Convention: an added value for democracy and human rights protection?", *NQHR* vol. 29/1, 2011, p. 56-57). In het verleden heeft art. 17 EVRM een aantal keer in de weg gestaan aan een beroep op één of meerdere verdragsrechten. In dit verband valt onder meer te wijzen op het ontkennen van de Holocaust of het rechtvaardigen van het nazibeleid tijdens de Tweede Wereldoorlog (*Garaudy* t. *Frankrijk*, EHRM 24 juni 2003 (ontv. besl.), nr. 65831/01, «EHRC» 2003/69; *Witzsch* t. *Duitsland*, EHRM 15 december 2005 (ontv. besl.), nr. 7485/03), antisemitisme (*W.P. e.a.* t. *Polen*, EHRM 2 september 2004 (ontv. besl.), nr. 42264/98; *Pavel Ivanov* t. *Rusland*, EHRM 20 februari 2007 (ontv. besl.), nr. 35222/04, «EHRC» 2007/68) en sommige vormen van hate speech (*Norwood* t. *Verenigd Koninkrijk*, EHRM 16 november 2004 (ontv. besl.), nr. 23131/03). Zoals gezegd paste het Hof art. 17 EVRM vorig jaar eveneens voor het eerst toe op Hizb ut-Tahrir, een islamitische politieke organisatie.

6. In de onderhavige zaak past het Hof art. 17 EVRM alleen toe op het beroep van de klagers op de art. 9, 10 en 11 EVRM en niet op het beroep dat zij doen op art. 7 EVRM. Dit is gelet op de jurisprudentie van het Hof niet verrassend. In de zaak *Lawless* uit 1961 kwam de vraag in hoeverre een beroep op art. 7 EVRM kan afketsen op de misbruikclausule in art. 17 EVRM al eens aan de orde. Deze zaak draaide om een lid van de *Irish Republican Army* (IRA). In 1939 was de IRA door het Ierse parlement aangemerkt als illegale organisatie en op basis van de *Offences against the State Act* beschikte de *Minister of State* over bevoegdheden om personen die een bedreiging vormden voor de openbare vrede en orde zonder proces in detentie te houden (*Lawless* t. *Ierland*, EHRM 1 juli 1961, nr. 332/57, par. 7-8 en 8-13). Dit overkwam Lawless toen hij werd gearresteerd wegens zijn lidmaatschap van de IRA. Voor het Hof deed hij een beroep op art. 5 (recht op vrijheid), art. 6 (recht op een eerlijk proces) en art. 7 EVRM (geen straf zonder wet). De Ierse overheid betoogde dat Lawless vanwege zijn betrokkenheid bij de IRA geen beroep op deze rechten toekwam. Het Hof concludeerde echter dat op basis van art. 17 EVRM hem niet de bescherming van de art. 5, 6 en 7 EVRM kon worden ontnomen. Art. 17 EVRM beoogt te voorkomen dat totalitaire groepen in hun eigen belang de rechten en vrijheden in het verdrag exploiteren, maar daarvoor is het niet nodig om een individu dat heeft deelgenomen aan activiteiten zoals bedoeld in art. 17 EVRM *al* zijn rechten te ontnemen. Lawless deed geen beroep op de art. 5, 6 en 7 EVRM met het doel het verdrag teniet te doen, maar om te klagen over de omstandigheden van zijn veroordeling. Volgens het Hof dekt art. 17 EVRM alleen die rechten die, indien zij succesvol worden ingeroepen, daadwerkelijk een poging om de rechten en vrijheden in het verdrag te vernietigen zouden faciliteren (*Lawless* t. *Ierland*, reeds aangehaald, par. 6). Dit wordt in de literatuur ook wel het 'koppelingsvereiste' genoemd (Y. Arai (rev.), "Prohibition of abuse of the rights and freedoms set forth in the convention and of their limitation to a greater extent than is provided for in the convention (Article 17)", in: P. van Dijk e.a. (red.), *Theory and practice of the European Convention on Human Rights*, vierde druk, Antwerpen/Oxford: Intersentia 2006, p. 1088-1089). In de praktijk betekent dit dat art. 17 EVRM vooral relevant is in zaken die betrekking hebben op de zogenaamde 'politieke vrijheden' in de art. 9, 10 en 11 EVRM (zie ook par. 103).

7. Met deze nieuwe uitspraak staat de teller van zaken waarin een klacht op basis van art. 17 EVRM door het Hof niet-ontvankelijk is verklaard op zeven (zie *Garaudy* t. *Frankrijk*; *W.P. e.a.* t. *Polen*; *Norwood* t. *Verenigd Koninkrijk*; *Witzsch* t. *Duitsland*; *Pavel Ivanov* t. *Rusland*; *Hizb Ut-Tahrir e.a.* t. *Duitsland*; alle reeds aangehaald). Nieuw in de onderhavige zaak is in de eerste plaats dat het Hof verscheidene rapporten van non-gouvernementele organisaties (ngo's) betrekt in de afweging omtrent de toepassing van art. 17 EVRM. Het Hof refereert uitgebreid aan rapporten van de *International Crisis Group*, *Human Rights Watch*, de Russische ngo *SOVA Centre for Information and Analysis*, en een rapport van het door de Europese Commissie gefinancierde onderzoeksproject *Transnational Terrorism, Security, and the Rule of Law*, waarin de aard en activiteiten van Hizb ut-Tahrir worden geanalyseerd. Het gebruik van dergelijke bronnen is op zich niet zo bijzonder, ook op andere gebieden maakt het Hof in het kader van *fact finding* gebruik van de analyses die zijn gedaan door ngo's, bijvoorbeeld in asielzaken op basis van art. 3 EVRM (zie bijv. *M.S.S.* t. *Griekenland en België*, EHRM 21 januari 2011 (GK), nr.

30696/09, «EHRC» 2011/42 m.nt. Woltjer). Het Hof lijkt in deze rapporten steun te zoeken voor zijn beoordeling van het mogelijke gevaar van Hizb ut-Tahrir voor de democratische uitgangspunten van het verdrag. Uit de besproken rapporten blijkt dat Hizb ut-Tahrir de democratie als staatsvorm afwijst en pertinent de mogelijkheid verwerpt om haar doelen via democratische weg te realiseren (par. 44 t/m 50). Hoewel niet bewezen kan worden dat de organisatie op enig moment geweld heeft gebruikt of terroristische activiteiten heeft ontplooid, lijkt Hizb ut-Tahrir volgens het Hof de mogelijkheid dat de strijd tegen de democratie door middel van geweld wordt gevoerd niet te verwerpen.

8. In de tweede plaats is nieuw dat het Hof in deze zaak bij de toepassing van art. 17 EVRM aanhaakt bij de grenzen waarbinnen politieke organisaties bescherming van het EVRM kunnen genieten zoals eerder geformuleerd in de zaak *Refah Partisi*. In *Refah Partisi* oordeelde het Hof destijds dat om succesvol een beroep te kunnen doen op de verenigingsvrijheid in art. 11 EVRM een politieke organisatie aan twee vereisten moet voldoen: ten eerste moeten de middelen die de organisatie aanwendt om haar doelen te bereiken legaal en democratisch zijn; ten tweede moeten ook de door de organisatie voorgestelde veranderingen verenigbaar zijn met de fundamentele democratische principes van het verdrag (*Refah Partisi e.a.* t. *Turkije*, EHRM 13 februari 2003 (GK), nrs. 41340/98, 41342/98, 41343/98 en 41344/98, «EHRC» 2003/28 m.nt. Janssen, par. 97-98). In de onderhavige zaak past het Hof deze criteria, die zijn ontwikkeld met betrekking tot art. 11 EVRM, ook toe op de beoordeling van een politieke organisatie in het licht van art. 17 EVRM.

9. Uit het eerste vereiste volgt dat politieke organisaties die aanzetten tot geweld niet kunnen profiteren van de bescherming van het verdrag (par. 105). De vraag of Hizb ut-Tahrir geweld zou gebruiken om haar doelen te bereiken kwam in de zaak uit 2012 ook al aan de orde, maar dit keer onderzoekt het Hof deze vraag uitgebreid aan de hand van de hierboven genoemde rapporten en de verklaringen van getuigen en deskundigen tijdens de nationale procedures. Op basis hiervan concludeert het Hof dat Hizb ut-Tahrir de jihad propageert en verheerlijkt. Ook zou tijdens één van de bijeenkomsten van de lokale afdeling van Hizb ut-Tahrir, die door Saybatalov werd voorgezeten, zijn opgeroepen tot geweld tegen joden (par. 107). Bovendien zou Kasymakhunov nieuwe leden aansporen om ongelovigen met wapens te bestrijden. Ook in de pamfletten die in de appartementen van de klagers waren gevonden wordt opgeroepen tot geweld. Het Hof is er daarom niet van overtuigd dat Hizb ut-Tahrir de mogelijkheid geweld te gebruiken afwijst. De middelen die Hizb ut-Tahrir inzet om de macht te grijpen en een verandering van het juridische en constitutionele bestel te realiseren kunnen daarom volgens het Hof niet als legaal en democratisch worden beschouwd.

10. Hoewel het Hof probeert bewijs te vinden voor zijn standpunt dat de aard en doeleinden van Hizb ut-Tahrir de toepassing van art. 17 EVRM rechtvaardigen, slaagt het daar mijns inziens niet helemaal in. De redenering van het Hof komt er op neer dat het er *niet* van overtuigd is dat Hizb ut-Tahrir *geen* geweld zal gebruiken. Ik betwijfel of een dergelijke negatief geformuleerde conclusie voldoende is om tot toepassing van art. 17 EVRM over te gaan. Immers is hiermee niet bewezen dat Hizb ut-Tahrir wel geweld gebruikt. De gevolgen van de toepassing van art. 17 EVRM zijn dusdanig verstrekkend dat de bepaling alleen bij hoge uitzondering, in extreme gevallen dient te worden toegepast (*Paksas* t. *Litouwen*, EHRM 6 januari 2011 (GK), nr. 34932/04, «EHRC» 2011/47 m.nt. De Lange, par. 87). Van een dusdanig extreme situatie kan op basis van het onderliggende bewijs in mijn ogen niet worden gesproken. Het vereiste van een proportionele toepassing van art. 17 EVRM komt daarmee onder druk te staan. In de zaak *Refah Partisi* bestond eveneens onduidelijkheid over de mate waarin deze politieke partij geweld accepteerde als middel tot de macht (*Refah Partisi e.a.* t. *Turkije*, reeds aangehaald, par. 129-131). In die zaak ging het Hof echter niet in op art. 17 EVRM en beoordeelde de mogelijke schending van art. 11 EVRM op basis van de beperkingsvereisten in het tweede lid van dat artikel. Een dergelijke aanpak behoorde ook in de onderhavige zaak tot de mogelijkheden en had gelet op de zwak gefundeerde overtuiging van het Hof wellicht meer in de rede gelegen.

11. Wat betreft het tweede vereiste, de veranderingen in de rechtsorde die Hizb ut-Tahrir voorstaat, concludeert het Hof dat ook deze niet verenigbaar zijn met de fundamentele democra-

tische beginselen van het verdrag. Op basis van de beschikbare documenten in de nationale procedure stelt het Hof dat "Hizb ut-Tahrir proposes to establish a regime which rejects political freedoms, such as, in particular, freedoms of religion, expression and association, declaring that they are contrary to Islam" (par. 109). Ook het pluralistische rechtssysteem gebaseerd op de islamitische wetgeving van de sharia dat Hizb ut-Tahrir propageert acht het Hof, net als in de zaak *Refah Partisi*, onverenigbaar met het verdrag (par. 110-112; zie ook *Refah Partisi e.a.* t. *Turkije*, reeds aangehaald, par. 117-128).

12. Kort samengevat biedt deze uitspraak twee interessante nieuwe inzichten inzake de toepassing van art. 17 EVRM. In de eerste plaats onderzoekt het Hof in deze zaak uitgebreider dan voorheen het gevaar van Hizb ut-Tahrir voor de democratische uitgangspunten van het verdrag. Het Hof probeert deze beoordeling zoveel mogelijk te staven met rapporten van ngo's over de aard en activiteiten van Hizb ut-Tahrir. Hoewel deze rapporten mijns inziens onvoldoende steun bieden voor de toepassing van art. 17 EVRM, doet het Hof een poging om art. 17 EVRM een serieuze rol te geven in het kader van de bescherming van de democratische uitgangspunten van het verdrag. In de tweede plaats gaat het Hof uitgebreid in op de vraag of Hizb ut-Tahrir geweld zou gebruiken om haar doelen te bereiken en beziet het dit in het licht van de grenzen van politieke organisaties om de bescherming van het verdrag te genieten. Daarmee laat het Hof zien dat de vereisten voor politieke organisaties die oorspronkelijk zijn ontwikkeld in het licht van art. 11 EVRM ook een rol kunnen spelen bij de vraag of een politieke organisatie misbruik heeft gemaakt van het verdrag zoals bedoeld in art. 17 EVRM.

P. de Morree
Promovenda staatsrecht Universiteit Utrecht

123

Europees Hof voor de Rechten van de Mens
14 maart 2013, nr. 24117/08
(Berro-Lefèvre (President), Steiner, Hajiyev, Lazarova Trajkovska, Laffranque, Sicilianos, Møse)

Privacy. Belastinginspectie. Doorzoeking bedrijfsgegevens. Inbeslagneming gegevens op server. Voorzien bij wet. Procedurele waarborgen. Margin of appreciation.

[EVRM art. 8]

Bernh Larsen Holding AS (hierna: B.L.H.) is een bedrijf dat samen met twee andere ondernemingen kantoor houdt in hetzelfde pand. De drie bedrijven delen een server voor hun elektronische archieven en e-mailverkeer. In januari 2003 kondigde de belastingdienst een audit bij B.L.H. aan over het belastingjaar 2001. In 2004 bezochten verschillende medewerkers van de belastingdienst B.L.H., waarbij zij de medewerkers een aantal vragen voorlegden en verzochten om een volledige kopie te mogen maken van de gegevens op de server. De directeur van B.L.H. weigerde dit omdat er ook gegevens van de andere bedrijven op de server stonden, net als de eigenaar van de server. Uiteindelijk stemde B.L.H. echter wel in met het overdragen van een back-upkopie van de servergegevens aan de belastingdienst. Daarover diende B.L.H. wel meteen een klacht in bij het hogere gezag van de belastingdienst, het Directorate of Taxation. Het Directorate of Taxation bevestigde de stelling van de belastingdienst dat toegang moest worden verleend tot de server. De server moest worden beschouwd als onderdeel van het archief van het bedrijf, zodat daartoe onder de geldende wetgeving zonder belemmeringen toegang moest worden verstrekt. Wel zou alleen inzage hoeven te worden gegeven tot documenten die relevant zouden zijn voor de belastingdienst; pure privégegevens hoefden dus niet te worden geopend. Daarop stelde B.L.H. beroep in bij de rechter waarbij werd verzocht om teruggave van de back-upkopie, maar dit beroep werd afgewezen, net als het hoger beroep. Het Supreme Court van Noorwegen wees het beroep uiteindelijk eveneens af, waarbij het erop wees dat voor het doel van de belastinginspectie alle gegevens moesten worden bekeken die relevant zouden kunnen zijn voor de belastingopgave. Daarom moest toegang worden verschaft tot al die gege-