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

THIRD SECTION

CASE OF JULY AND SARL LIBÉRATION v. FRANCE

(Application no. 20893/03)

JUDGMENT
[Extracts]

STRASBOURG

14 February 2008

FINAL

14/05/2008

In the case of July and SARL Libération v. France,

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

Boštjan M. Zupančič, *President*,
Corneliu Bîrsan,
Jean-Paul Costa,
Alvina Gyulumyan,
Davíd Thór Björgvinsson,
Ineta Ziemele,
Isabelle Berro-Lefèvre, *judges*,
and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 24 January 2008,

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

PROCEDURE

1. The case originated in an application (no. 20893/03) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Serge July, a French national, and SARL Libération, a company incorporated in France of which he was the manager ("the applicants"), on 26 June 2003.

2. The applicants were represented by Mr Leclerc and Ms Brouquet-Canale, lawyers practising in Paris. The French Government ("the Government") were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicants alleged that there had been a violation of Articles 6 and 10 of the Convention.

4. On 9 December 2005 the President of the Second Section decided to give notice of the application to the Government. He also decided that the merits of the application would be examined at the same time as its admissibility (Article 29 § 3 of the Convention).

5. On 19 January 2007 the Court changed the composition of its Sections (Rule 25 § 4). This case was assigned to the newly composed Third Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The first applicant, Mr Serge July, was born in 1942 and lives in Paris. He was the publication director of the national daily newspaper *Libération*. The second applicant, the private limited company SARL Libération, was represented by Mr July, who was its manager at the time.

A. Background to the case

7. On 19 October 1995 Mr Bernard Borrel, a French judge who at the time had been seconded as technical adviser to the Djiboutian Minister of Justice, was found dead 80 km from the city of Djibouti. His half-naked and partially burnt body was lying some 20 m below a remote road. In early November 1995 the investigation by the local gendarmerie concluded that he had committed suicide by self-immolation.

8. In November 1995 a judicial investigation was opened in Toulouse "to establish the cause of death", and the judge's body, on its repatriation to France, was interred in Toulouse. In February 1996 an autopsy was carried out on the judge's remains and its conclusion, notified to his widow on an unspecified date, was that he had committed suicide after dowsing himself in petrol.

9. In February 1997 the widow of the deceased judge, disputing that finding, filed a complaint as a civil party against a person or persons unknown for premeditated murder. In April 1997 a judicial investigation was opened on that basis. In July 1997 a private forensic report, commissioned by the civil party, concluded that in view of the total absence of burn residue in the judge's lungs, he must already have been dead when his body caught fire. The judicial investigation was subsequently transferred to Paris, where the case was assigned in late October 1997 to two investigating judges at the Paris *tribunal de grande instance*, namely Ms Moracchini, assisted by Mr Le Loire.

10. In March 1999 the investigating judges visited Djibouti without the civil parties.

11. While Mrs Borrel was challenging the suicide conclusion towards which the judicial investigation seemed to be heading, a witness – a former member of the Djiboutian Presidential Guard who had found asylum in Belgium – came forward in December 1999 and lent support to the theory of premeditated murder, implicating the former chief of staff of the President of Djibouti, the then incumbent President Ismaël Omar Guelleh. His testimony proved highly controversial and was widely reported in the press and other media. In January 2000 the investigating judge,

Ms Moracchini, interviewed this witness in Brussels, after which he challenged her impartiality, alleging that she had put pressure on him to withdraw his testimony. Lastly, in early March 2000, the investigating judges, accompanied by the director of the Paris Institute of Forensic Medicine and the Deputy Public Prosecutor of Paris, paid another visit to Djibouti in order to stage a reconstruction at the scene, without the civil parties being present. They had requested to attend but had been refused visas. In the context of the judicial investigation in respect of the premeditated murder charge, three judges' unions, including the Union of Prosecutors and Judges (*Union syndicale des magistrats* – "the USM"), had applied on 2 February 2000 to be joined to the case as civil parties. For that purpose, the Chairman of the USM, Mr Valéry Turcey, sent a letter to Ms Moracchini and attached the USM's decision taken by a vote of 28 January 2000 to apply for civil-party status in the proceedings. The decision was signed by Mr Riolacci, in his capacity as a member of the USM's national council.

12. It was in these circumstances that, on 13 March 2000, a press conference was held in Paris for the purpose of publicising a request sent to the Minister of Justice by Mrs Borrel's lawyers for an investigation to be carried out by the General Inspectorate of Judicial Services concerning the above-mentioned investigating judges. During the press conference Mrs Borrel, her lawyers Mr Morice and Mr de Caunes, and a number of judges acting in the context of their union duties made public certain questions and criticisms about the way the judicial investigation was being handled.

13. On 14 March 2000 the national daily newspaper *Libération* published an article entitled "Death of a judge: widow attacks judges and police". This article, signed by Ms Brigitte Vidal-Durand, reported on the press conference held the day before.

14. The article in issue read as follows:

> "'With one death, two orphans and a widow, what more do they want? Who are they protecting? I don't understand. I no longer understand anything.' Five and a half years after the discovery of his charred body on 19 October 1995 in Djibouti, Elisabeth Borrel still has no idea 'why or how' her husband, Judge Bernard Borrel, died. Challenging the official and increasingly unsound version that he committed suicide, she has made public a request for the case to be investigated by the General Inspectorate of Judicial Services at a time when the investigating judges, Roger Le Loire and Marie-Paule Moracchini, have actually just come back from Djibouti.
>
> ***Bias***. Sent yesterday to the Minister of Justice by her lawyers Olivier Morice and Laurent de Caunes, the request concerns the conditions in which the judicial investigation is being carried out. She complains that the judges showed bias in the examination of a witness, a former member of the Presidential Guard, who had come forward to lend support to the murder theory.

At her press conference in Paris yesterday, Elisabeth Borrel was flanked by Dominique Matagrin, Chair of the Professional Association of Judges and Prosecutors [*Association professionnelle des magistrats*] (APM, right-wing), and Anne Crenier, Chair of the Union of the National Legal Service [*Syndicat de la magistrature*] (SM, left-wing), which are civil parties in the case together with the Union of Prosecutors and Judges [*Union syndicale des magistrats*] (USM, moderate).

Accumulation. The conduct of the judicial investigation in the Borrel case had been 'farcical' [*rocambolesque*], Dominique Matagrin alleged, while Anne Crenier denounced 'the accumulation of anomalies'. Herself a judge, Elisabeth Borrel commented yesterday that her 'husband's character [had] been investigated, in the search for evidence of paedophilia and corruption', adding 'they've tried to dig up a mistress, they've gone through his accounts – and I'm talking about the action of the police'.

As regards the judges' action, her comments were equally as harsh, because they have been slow: it was four months before an autopsy was performed, more than a year before they obtained the report, eighteen months before the first visit of a judge to Djibouti, two years before testimony was taken from a witness (except from herself and a chaplain), two years before a second forensic report was ordered. At the start of the judicial investigation the local judges 'questioned our cleaning ladies and the children in the street. But not my husband's minister' (Judge Borrel had been seconded to the Minister of Justice of Djibouti). The reconstruction? Elisabeth Borrel says she 'doesn't understand' it: 'my husband is supposed to have climbed down a five-metre cliff, on foot, covered in petrol'. 'Holding a lighter in his hand, because he was in his underwear,' adds Oliver Morice.

Flood. Then there are some obvious gaps. Her husband's medical records seem to have 'disappeared' in a 'highly selective flood', because the same hospital still has the records for one of the couple's children. Gone too are the military checkpoint and register of persons entering the secure area, 80 km north of Djibouti, where Bernard Borrel's body was found.

In their request for an inspection, the lawyers accuse the two judges of 'discussing more with the media than with the civil party'. They claim that they read on 3 March in [the newspaper] *France Soir* that the two judges were leaving for Djibouti. On Sunday night they saw, on the programme *Capital* on [the French television channel] M6, Roger Le Loire taking part in a reconstruction in another case in Djibouti [concerning the murder of a French serviceman], with journalists present.

When contacted yesterday, neither the Ministry, nor Roger Le Loire, who in the meantime had returned to Paris, wished to comment. But the Djiboutian embassy in Paris was quick to put things straight. It explained yesterday in a press release that the two judges' assignment 'will mainly have the result of dispelling any doubt' after 'unfounded accusations'."

B. Defamation proceedings against the applicants following the publication of the offending article

15. On 14 March 2000 the investigating judges concerned brought proceedings against Mr July, in his capacity as publication director, and the

newspaper *Libération*, for being civilly liable, directly summoning them to appear before the Nanterre Criminal Court for committing the criminal offence of public defamation against public officials, as provided for by sections 23, 29(1) and 31(1) of the Act of 29 July 1881 and punishable under section 30 of that Act. This was on account of the publication of the newspaper article of which the following four passages were considered defamatory:

> "1. Bias. She (Mrs Borrel) complains that the judges showed bias.
>
> 2. The conduct of the judicial investigation had been 'farcical' (*rocambolesque*), Dominique Matagrin alleged.
>
> 3. While Anne Crenier denounced 'the accumulation of anomalies'.
>
> 4. Because they [the investigating judges] have been slow."

16. In June 2000 the case was withdrawn from the two investigating judges and transferred to another investigating judge.

17. In a judgment of 4 July 2000, the Criminal Court dismissed the request to include in the proceedings the whole of the file from the judicial investigation that had been criticised. The case was set down for hearing successively on 26 September 2000, 12 December 2000 and 14 February 2001. At that last hearing, the accused, Mr July, who had initially called a number of witnesses in the context of his offer to adduce evidence, finally refrained from relying on the veracity of the defamatory comments and used the defence of good faith.

18. In a judgment of 13 March 2001, the Criminal Court acquitted the two defendants. The court began by setting out as follows the judicial context in which the article had been published:

> "Bernard Borrel, a judge, died in Djibouti where he had been posted for a few months, on 18 or 19 October 1995.
>
> The circumstances of the death of Mr Borrel, whose charred body was found at the bottom of a cliff, with a lighter in his hand, have not been elucidated to date. ...
>
> In the judicial investigation which has since been opened on a charge of premeditated murder, against a person or persons unknown, it appears that Mrs Borrel has for several years refused to accept the theory of suicide and supports the hypothesis of a political crime potentially implicating senior officials in Djibouti.
>
> At the time of the publication of the offending article, the case had already received a certain amount of media coverage because of the broadcasting on [the French television channel] TF1 of an interview with a witness lending support for the criminal hypothesis.
>
> It was in February 2000 that the investigating judges learnt from an Agence France Presse newswire of an application from Mrs Borrel's lawyers to have the case withdrawn from them.

> A few days before the press conference was held, the two investigating judges, together with an expert, went to Djibouti to carry out acts within their remit in the absence of the civil party and her lawyers, who had not been invited to attend.
>
> It was following this investigative measure, of which the civil party and her lawyers were very disapproving, that a press conference – without [the investigating judges] being notified – was held on 13 March 2000 and gave rise the next day to an article in the daily newspaper *Libération*. ...”

19. The court then considered that three of the offending passages were not defamatory. As regards the judicial investigation being “*rocambolesque*” (farcical), the court observed that this adjective was derived from “Rocambole”, the name of a character featuring in serialised novels by Ponson du Terrail, and that it was used to describe a farcical situation, full of extraordinary ins and outs, as one might find in those novels. After noting that Mr Matagrin had, in a number of letters, contrary to the various statements given during the proceedings, denied using that term, but had not questioned the good faith of the journalist who wrote the article, the court found that the offending word was unquestionably polemical in nature but did not constitute in itself an attack on the honour and reputation of judges and that, whilst the expression undermined the image of a dispassionate judicial system, it was an example of polemical language falling within the free democratic debate surrounding judicial life that the judiciary could not oppose, unless one were to prohibit any criticism about the course of a judicial investigation. The reference to an “accumulation of anomalies” was found not to be related to the person in charge of the judicial investigation but to the anomalies identified in the case file and strongly conveyed the dissatisfaction of the civil parties. As to the “slowness attributable to the investigating judges”, the court considered that this criticism fell squarely within the public debate on the functioning of the judicial system and on its sluggishness, adding as follows:

> “... judges have to accept free public scrutiny, and more specifically that of parties to proceedings and of the press, *vis-à-vis* their action, provided that criticism – harsh though it may be – does not contain any precise accusation impugning their intellectual honesty, professional integrity or devotion to public service. In the present case there can be no serious charge – to the extent of falling within the scope of criminal law – on account of the reproduction of a complaint against judges for being slow that was made at a press conference held four and a half years after the discovery of Mr Borrel’s body, and during which the judge’s widow lamented that she still had no idea how or why her husband had died.”

Accordingly, the only passage regarded as manifestly damaging to the judges’ honour and reputation was the one that concerned the civil party’s complaint that “the judges had shown bias”.

20. However, the court accepted the applicants’ defence of good faith, having regard to the four conditions to be satisfied (pursuit of legitimate aim, absence of personal animosity, use of prudent and dispassionate language, requisite quality and seriousness of investigation), considering

that the newspaper, by reporting on the criticism of the judicial investigation into the death of Judge Borrel, had simply been fulfilling its mission to inform the public. The court unequivocally recognised the legitimacy of the aim pursued (interest for public opinion, publicising of request for inspection by judicial inspectorate) and the absence of personal animosity. As regards the use of prudent and dispassionate language, the court, in view of the blatant antagonism between the civil parties and the investigating judges, remarked upon the vehemence of the comments, but considered that the journalist had taken the necessary distance by using the conditional tense in the only passage recognised as defamatory. Finally, as regards the last requirement, the court found that, by refraining from approving the offending expressions reported and by taking the requisite distance, the newspaper had avoided creating any confusion in readers' minds between the speaker's original comments and the analysis by that newspaper.

21. In submissions filed with the Eighth Criminal Division of the Versailles Court of Appeal, on an appeal by the applicants, the civil parties relied on the four allegations already examined and sought recognition that they were defamatory. They further complained that the court had failed to impugn the lack of prudent and dispassionate language, in so far as journalists were supposed to convey objective and documented information and as they had a duty of preliminary investigation in order to ensure the reliability and accuracy of their information. The public prosecutor, for his part, left the matter to the discretion of the Court of Appeal.

22. At the hearing set down for 10 July 2001, the Versailles Court of Appeal adjourned the case until a hearing of 26 September 2001. In a judgment of 14 November 2001, the Eighth Criminal Division of the Versailles Court of Appeal, presided over by Judge Riolacci (with Judges Renauldon and Quancy-Jacquemet also on the bench), partly set aside the judgment of acquittal, finding defamatory, in addition to the allegation of bias on the part of the judges, the accusation that the "conduct of the Borrel investigation had been 'farcical' (*rocambolesque*)", and ruling as follows:

> "It appears from the examination of witnesses before the court and from the attestation provided by Dominique Matagrin, Chair of the Professional Association of Judges and Prosecutors [*Association professionnelle des magistrats*], that he had used this word in a quite different formulation, which had not reflected an unequivocal desire to denounce his colleagues' manner of investigation.
>
> That being said, the adjective 'farcical' [*rocambolesque*], when applied to the manner in which a judicial investigation was conducted, went beyond the context of a simple debate since its aim was to denounce a practice that was unconventional and bizarre, of course alluding to the adventures of an unscrupulous and scheming character who lived by his wits, but above all implying that the judicial investigation had been flying in the face of common sense, without any rationality."

23. As to the allegations concerning an "accumulation of anomalies" and "slow judges", the court endorsed the grounds adopted by the court below and upheld the judgment in that respect.

24. The Versailles Court of Appeal also set aside the judgment appealed against in so far as it had admitted the first applicant's defence of good faith, finding as follows:

> "As to the defence of good faith
>
> ... The parties agree that the newspaper *Libération* was pursuing a legitimate aim in informing its readers about a press conference on a subject that had taken on a national dimension on account of its developments; furthermore, [the investigating judges] have never claimed that the article's author showed any personal animosity towards them.
>
> In addition, it should be observed, first of all, that Article 10 § 2 of the European Convention on Human Rights provides, with regard to the freedom to hold opinions and the freedom to impart information, that the exercise of those freedoms may be subject to certain formalities, conditions, restrictions or penalties.
>
> In the present case, the relative 'inexperience' alleged by the journalist, claiming that reporting on court cases was not her strong point, cannot seriously be argued since she had already dealt with this subject.
>
> The author clearly preferred not to report on the subject in the form of an interview and opted for a compromise solution involving the use of inverted commas, which considerably facilitated her task.
>
> She had a duty to assess the full impact of the most suggestive terms used, such as 'bias' and 'farcical', and of their visual prominence in the article.
>
> She was not unaware of the fact that the criminal case about which the press conference was held had entered into a phase of acute conflict, involving a particularly serious attack on the investigating judges; in choosing a certain manner of informing her readers, albeit indirectly, about the status of an ongoing judicial investigation of a particularly sensitive nature, the journalist had a duty to take certain precautions and to carry out a particularly serious investigation, since she could not have been unaware of the aim pursued by the civil parties.
>
> In particular, by distorting Dominique Matagrin's comments, to give them a completely different emphasis, the author of the article acted irresponsibly.
>
> Moreover, she cannot seriously claim not to have managed to get in contact with the two judges concerned: Joëlle Lecoz, an investigating judge's assistant, has stated that she cannot remember any call from the journalist. In any event, the journalist, who had some knowledge about judicial issues, was under an obligation, in view of the deadline for the paper to go to press, to gather various items of information beforehand, even before the press conference, and also to indicate in her article that, in the following days, she would ensure that the persons thus criticised had the opportunity to reply.

By choosing, as to the form, to report it by adopting a style other than that of an interview, the author could not have been unaware that the parts of the article not placed between inverted commas could be attributed to her.

Contrary to the reasoning given on this point by the courts below, the impugned article does not strike a balance between the respective positions. To be sure, by failing to ask either the public prosecutor's office or the main parties concerned about the factors that might have affected the progress of the investigation, the journalist logically did not put herself in a position to strike such a balance, in particular as in the presentation of the article's paragraphs a significant amount of space was left for the positions of other judges representing their unions.

This flagrant breach of the duty to ensure accuracy, seriousness and prudence, with mistakes in the dates, cannot be justified by the alleged urgency. The publication director, being well-informed about issues of society, had an obligation to scrutinise the article more stringently, especially as he was aware of the author's relative lack of experience. ..."

25. The Court of Appeal found the first applicant guilty and held that the second applicant was civilly liable. It gave the first applicant an indictable-offence sentence in the form of a fine of 10,000 French francs (FRF) (about 1,500 euros (EUR)), also awarding FRF 10,000 in damages to each of the civil parties, and ordered the publication in the newspaper and another national daily of the operative provisions of the judgment, for a cost not exceeding FRF 15,000 (about EUR 2,286). It further ordered the applicants, jointly and severally, to pay the civil parties FRF 20,000 (about EUR 3,000) for costs not covered by the State.

26. The applicants appealed on points of law, relying in particular on Article 10 of the Convention.

27. In a judgment of 14 January 2003, the Court of Cassation dismissed the appeal on points of law against the judgment of 14 November 2001, ruling as follows:

"In refusing to accept the defendant's defence of good faith, after rightly finding defamatory the criticism of the investigating judges for conducting their investigation in a biased and farcical manner, the second-instance court gave its ruling on the grounds now set out by the appellant.

Having regard to those grounds, as they stand, the Court of Appeal justified its decision under sections 29 and 31(1) of the Act of 29 July 1881 and under Article 10 § 2 of the European Convention on Human Rights.

Only attacks of a theoretical and general nature may benefit from the freedom attached to criticism of the operation of the basic institutions of the State.

Whilst it is legitimate to inform the public about the operation of the courts, the aim thus pursued does not exempt journalists from the duties of prudence, caution and objectivity in the expression of thought; the right of free criticism cannot extend to personal attacks. ..."

C. Other relevant facts and proceedings

28. In parallel to those proceedings, Mr Morice, the lawyer acting for Mrs Borrel, was prosecuted for aiding and abetting public defamation against the investigating judge responsible for the "Borrel case" at the material time, following the publication by the national daily newspaper *Le Monde*, which was prosecuted as the principal offender, of an article dated 7 September 2000 entitled "Borrel: Judge Moracchini's impartiality called into question".

29. In a judgment of the Nanterre Criminal Court dated 4 June 2002, he was found guilty, given an indictable-offence sentence in the form of a fine and ordered to pay damages. In the appeal proceedings, before the Versailles Court of Appeal, Mr Morice found out that the judge presiding over the Eighth Criminal Division of that court was Judge Riolacci. Acting as counsel for Mrs Borrel, and thus having access to the investigation file, he found, on reading the attendance list for the meeting of the USM's national council on 28 January 2000 when its members had decided to apply to join the Borrel proceedings as a civil party, that Judge Riolacci had signed it in his capacity as a member of the national council. On 27 February 2003 Mr Morice filed an application with the President of the Versailles Court of Appeal seeking the judge's replacement, arguing that the case could not be heard by a judge who had personal knowledge of the Borrel file and who had participated in his union's decision to join the proceedings as a civil party.

30. That application was not examined on the merits. In an order of 19 March 2003, the Court of Appeal found that the claim had become devoid of object as Judge Riolacci had withdrawn for "personal reasons" which prevented him from sitting in the appeal hearing set down for 27 March 2003. These facts were the subject of the application in *Morice v. France* (no. 36427/03), which on 17 January 2006 was declared inadmissible for lack of victim status by a committee of three judges set up in accordance with Article 27 of the Convention.

31. On 16 October 2005 *Libération* published an article entitled "Appeal for the truth about the murder of Judge Borrel":

> "A French judge was murdered on 19 October 1995 in Djibouti. For fear of losing a French military base and the capacity to intervene in a geopolitically sensitive area, everything has been done to make this crime look like suicide. For some ten years now, there has been no end to the pressure and manipulation designed to cover up the truth. Only the courage and determination of Elisabeth Borrel, and the support she has received, have prevented this case from being swept under the carpet once and for all.
>
> On 19 October 1995, 80 km from Djibouti, the partly burnt body of the French judge Bernard Borrel, adviser to Djibouti's Minister of Justice, was discovered at the foot of a cliff. This death soon became one of those 'exquisite corpses' about which the official truth must hastily be announced, that of suicide. Unfortunately for the instigators of this theory, the various shortcomings in the initial investigation (no

autopsy, missing X-rays, etc.) and judicial investigation up to June 2000, as revealed by the judge's widow, Elisabeth Borrel, and her lawyers, with the support of the Union of the National Legal Service [*Syndicat de la magistrature*], have been publicly denounced. The withdrawal of the case from the two investigating judges in June 2000 was to mark a turning point in the judicial investigation.

The hypothesis that Bernard Borrel was murdered has now been confirmed by the developments in the investigation and by forensic medical and technical examinations following a fact-finding visit to the scene in February 2002. The discovery of a head injury caused by a dangerous instrument and an injury sustained in self-defence, namely a fractured arm, together with the detection of a second inflammable liquid from a container other than the jerrycan found at the scene, clarify once and for all that it was murder.

Reasons of State versus Justice

Progress in the judicial investigation has also been delayed and hindered by the government's direct acts of blockage and pressure when requests have been made for the declassification of documents held by the DGSE [the French external intelligence agency] and the DST [the French domestic intelligence agency]. Those attempts at obstruction, combined with a barrage of legal actions against Elisabeth Borrel's lawyers, the Union of the National Legal Service and material witnesses who have dared to implicate the President of Djibouti's entourage, suggest that further intimidation can be feared. A judicial investigation was opened in Versailles in early 2003 for the offence of procuring a person to give false evidence, after detailed statements by Djiboutian witnesses implicating high-ranking officials in the country, especially the current Public Prosecutor of Djibouti and the Head of Secret Services.

The announcement on 29 January by the Ministry of Foreign Affairs that the French case file was to be handed over to the Djiboutian authorities, in breach of the principle of the separation of powers, did not meet with any protest from the Minister of Justice, Dominique Perben, whereas the investigating judge had previously denied the request of his Djiboutian counterpart, taking the view that it would be an abuse of procedure in view of the possible involvement of Djiboutian officials. The new Minister of Justice has now undertaken not to hand over the case file against the will of the investigating judge. It is a shame that such mobilisation was necessary simply to get the Minister of Justice ... to observe the law.

This cynicism was taken a step further with the reception of the Djiboutian Head of State by Jacques Chirac on 17 May 2005. Whilst Ismaël Omar Guelleh had been summoned to appear as a witness by the judge investigating Judge Borrel's murder, the Ministry of Foreign Affairs let it be known that he did not need to respond to the summons because of his immunity as Head of State. For his part, Jacques Chirac openly renewed his support for President Guelleh and called the courts to order, drawing attention in particular to the excessive length of the proceedings.

Borrel investigation: mission impossible?

Another cause for concern is the increase in criminal proceedings against journalists and the press for being 'guilty' of countering the official position that prevailed until June 2000 – that of suicide. In addition to the barrage of actions against *Libération*, *Le Monde*, *Golias*, Canal Plus and the *Canard enchaîné*, in 2005 there were two acts of

censorship, this time by the administration of an emblematic radio station – with its international audience – RFI [Radio France Internationale].

Information on Franco-African affairs is not part of a 'reserved domain' of communication emanating from the Ministry of Foreign Affairs or the President. The French government must now refrain from any attempt to restrict the freedom of journalists to report on developments in the Borrel case.

Everything must now be done to allow the investigating judge to pursue his enquiries without having to fear government pressure. The French State itself must remove the various obstacles in the proceedings, in particular by handing over to the investigating judge all documents in the authorities' possession that may have a bearing on this murder case."

32. On 28 June 2006 Mrs Borrel's lawyer announced that genetic fingerprints had been found on the judge's shorts and that they might belong to the murderers. On 19 October 2006 the investigating judge in the case delivered two arrest warrants against two Djiboutian nationals suspected of being the perpetrators, in order to compare their DNA with the genetic fingerprints found on the judge's clothing.

33. On 14 February 2007 the investigating judge summoned the President of Djibouti, Omar Guelleh, to appear as a witness, just before he was due to arrive in France for the Africa-France summit held in Cannes on 16 and 17 February 2007.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

34. The relevant provisions of Chapter IV of the Freedom of the Press Act of 29 July 1881 (as amended) read as follows.

Section 29

"The making of any factual allegation or imputation that damages the honour or reputation of the person or body to whom the fact in question is attributed shall constitute defamation (*diffamation*). The direct publication or reproduction of such an allegation or imputation shall be punishable, even where it is expressed in sceptical terms or made about a person or body that is not expressly named but is identifiable by the terms of the offending speeches, shouts, threats, written or printed matter, placards or posters.

The use of abusive or contemptuous language or invective not containing an allegation of any fact shall constitute an insult (*injure*)."

Section 30

"Anyone who, by one of the means set out in section 23, makes a statement that is defamatory of a court, the army, navy or air force, a State institution or a public authority shall be liable on conviction to a fine of 45,000 euros."

Section 31

"Where defamation is committed by the same means by reference to the functions or capacity of one or more ministers or ministry officials, one or more members of one of the two legislative chambers, a civil servant, a representative or officer of the law, a minister of religion in receipt of a State salary, a citizen temporarily or permanently responsible for a public service or holding public office, a juror or a witness on the basis of his witness statement, the offence shall be punishable by the same penalty.

..."

Section 42

"The following persons shall be liable, as principals and in the following order, to penalties for serious crimes (*crimes*) or other major offences (*délits*) committed through the press:

(1) publication directors or publishers, whatever their profession or title and, in the circumstances defined in section 6(2), joint publication directors;

(2) in the absence of any of the foregoing, the actual offenders;

(3) in the absence of the authors, the printers;

(4) in the absence of the printers, the vendors, distributors and billstickers.

In the cases provided for in the second paragraph of section 6, the joint and several liability of the persons referred to in paragraphs 2, 3 and 4 of the present section shall be engaged as if there were no publication director, when, contrary to the provisions of the present Act, a joint publication director has not been appointed."

35. The relevant provisions of the Code of Criminal Procedure read as follows.

Section 662

"In matters within the jurisdiction of the Assize Court, the Criminal Court or the Police Court, the Criminal Division of the Court of Cassation may remove a case from any judicial authority responsible for pre-trial investigation or any trial court and transfer it to another judicial authority of the same order on grounds of a reasonable suspicion of bias.

An application for transfer may be made either by Principal State Counsel attached to the Court of Cassation or by the prosecutor of the court dealing with the case, or by the parties.

The application shall be served on all the parties concerned, who shall have ten days within which to file their observations in the Registry of the Court of Cassation.

The lodging of an application shall not have any suspensive effect unless the Court of Cassation orders otherwise."

Section 668

"An application for a judge's withdrawal from a case may be based on any of the following grounds:

(1) where the judge or his/her spouse is a blood relative or relative by marriage of one of the parties or of a party's spouse up to and including the degree of first cousin once removed;

The judge's withdrawal may be sought even after divorce or the spouse's death where the judge had been a relative by marriage of one of the parties, up to and including relatives of the [civil-law] second degree.

(2) where the judge or his/her spouse, or a person in respect of whom he/she acts as guardian (*tuteur*), auxiliary guardian (*subrogé tuteur*) or court-appointed administrator, or a company or association in whose management or supervision he/she takes part, has an interest in the dispute;

(3) where the judge or his/her spouse is a blood relative or relative by marriage, to the degree indicated above, of the guardian, supervisory guardian or court-appointed administrator of one of the parties or of an executive or non-executive director or manager of a company that is a party to the proceedings;

(4) where the judge or his/her spouse is in a situation of dependence *vis-à-vis* one of the parties;

(5) where the judge has dealt with the case as a judge, prosecutor, arbitrator or legal adviser, or where he/she has given evidence as a witness relating to the facts of the case;

(6) where there has been litigation between the judge, his/her spouse or their lineal blood relatives or relatives by marriage and one of the parties, his/her spouse or lineal blood relatives or relatives by marriage;

(7) where the judge or his/her spouse is litigating in a court of which one of the parties is a judge;

(8) where the judge or his/her spouse or their lineal blood relatives or relatives by marriage have a dispute over an issue similar to that existing between the parties;

(9) where there has been, between the judge or his/her spouse and one of the parties, any manifestation serious enough to cast doubt on his/her impartiality."

36. On 10 July 2003, at the 848th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe adopted Recommendation Rec(2003)13 to member States on the provision of information through the media in relation to criminal proceedings. The appendix to that Recommendation sets out eighteen guiding principles, of which the first reads as follows:

Principle 1 – Information of the public via the media

"The public must be able to receive information about the activities of judicial authorities and police services through the media. Therefore, journalists must be able to freely report and comment on the functioning of the criminal-justice system, subject only to the limitations provided for under the following principles."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

37. The applicants argued that the judgment against them for public defamation of civil servants was in breach of their right to freedom of expression, as guaranteed by Article 10 of the Convention, which provides 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."

A. Admissibility

38. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. The Court notes, moreover, that no other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. The merits

1. The parties' submissions

(a) The Government

39. The Government, after summarising the principles of the Court's relevant case-law on Article 10 of the Convention, pointed out that whilst the Court had established the right of the general public to receive information, it had also imposed on journalists an obligation of "good faith", requiring that they provide "reliable and precise information in accordance with the obligations of journalism". Citing the Grand Chamber cases of 17 December 2004 of *Cumpănă and Mazăre v. Romania* ([GC], no. 33348/96, ECHR 2004-XI) and *Pedersen and Baadsgaard v. Denmark* ([GC], no. 49017/99, ECHR 2004-XI), the Government referred to the Court's finding that the stronger the criticism, the stricter the obligation of scrutiny had to be. In assessing the necessity of a limit to freedom of expression, the Court had also taken into account the scope of the debate referred to in the article in question and the capacity of the victim. On that point, it was necessary, according to the case-law (see *Lingens v. Austria*, 8 July 1986, Series A no. 103, and *Thoma v. Luxembourg*, no. 38432/97, ECHR 2001-III), to make a distinction between politicians, who inevitably and knowingly laid themselves open to close scrutiny of their every word and deed by both journalists and the public at large, and civil servants, who should not be treated on an equal footing with politicians when it came to criticism of their conduct.

40. In the present case, the Government sought to show that interference in freedom of expression was prescribed by law, pursued a legitimate aim and was necessary in a democratic society, within the meaning of Article 10 of the Convention.

41. As to the foreseeability of the interference, the Government observed that the Court had previously found that the French Act of 29 July 1881 was accessible and foreseeable (see *Chauvy and Others v. France*, no. 64915/01, ECHR 2004-VI). As regards the applicants' argument that the term "*rocambolesque*" (farcical) had been interpreted differently by the Court of Appeal and the court below, they took the view that this factor could not constitute a violation of Article 10 of the Convention, as the Court had never found that for a right to be foreseeable it could not give rise to a particular interpretation. To find otherwise would be to negate the very function of the law and the act of adjudication. The operation of characterisation was part of the very nature of the judge's activity and was not a mechanical process. As regards the alleged disregard of French law in relation to the document in question, the Government considered this part of

the complaint to be inoperative, since the criticism concerned not the judicial investigation as a whole but the particular conduct of two judges.

42. As to the legitimate aim pursued, the Government argued that the aim was twofold in the present case: firstly, the protection of the reputation or rights of others and, secondly, the maintaining of the authority and impartiality of the judiciary, as the offending remarks were directed against judges in the performance of their duties.

43. The Government then contended that the necessity of the restriction on freedom of expression did not relate only to the particular seriousness of the remarks and accusation, but also to a failure to comply with the requirements of good faith and the ethics of journalism. They pointed out that the journalist, in addition to the fact that she had made mistakes in dates, had not even tried to make contact with one of the investigating judges or a member of the public prosecutor's office, and that in reporting comments by a representative of the union she had distorted them, had not struck the requisite balance between the different positions and had not carried out any research into the facts. Contrary to the applicants' assertions, the Court did not exempt journalists from that duty of verification, since it had described this as an "ordinary" or "usual" obligation from which the media could be dispensed only on "special grounds" (see *Pedersen and Baadsgaard*, cited above, § 78), and had found that the more serious the allegation, the more solid the factual basis had to be. In this connection, it was appropriate to point out that the definition of "*partialité*" (bias), according to the *Petit Robert* dictionary, indicated about a person that they took a position for or against someone or something without any concern for justice or truth, and that the use of the term "*rocambolesque*" referred to a character described as "villainous" by the Encyclopædia Universalis. In the Government's submission, the applicants had wrongly claimed that French case-law on interviews would be applicable, firstly because the offending article was not an interview but a report, and secondly because the case-law cited (Court of Cassation, Second Civil Division, 27 March 2003), concerning the prudence required of journalists reporting remarks by third parties, was pertinent only for journalists who were not actually the authors of the reported remark. It remained the case that a newspaper was not entitled to publish all kinds of remarks on the ground that they had been made by a third party, as the person liable for defamation under French law was the publication director or editor – in other words the person disseminating the defamatory statement. In those circumstances the case-law in *Thoma* (cited above) was not pertinent because the person prosecuted in that case was a journalist – the principal for the offence under Luxembourg law being the author of the offending article – and the Court had found a violation of Article 10 because the journalist had not been, and had not purported to be, the author of the statement. It could not be argued, as the applicants had done, that when any comment whatsoever had been

made by a third party and reported with basic textual precautions, such as the use of inverted commas or the conditional tense, it was not reprehensible. Such reasoning would render paragraph 2 of Article 10 meaningless. In any event, the Government took the view that the newspaper *Libération* – contrary to other daily newspapers, such as *Le Monde*, from which they produced an article of 16 May 2000 – had not complied with the requirements of good faith or with the rules of ethics in journalism, by using bold type for the word "*partialité*" and thus deliberately drawing attention to the defamatory statement.

The Government lastly took the view that the penalty imposed had been proportionate in view of the insignificant amount of the sums in question and since the company SARL Libération had been found vicariously liable for acts of the publication director.

(b) The applicants

44. The applicants began by emphasising that the interference in their right to freedom of expression was totally lacking in legitimacy and observed that the offending remarks had not impugned the judiciary's impartiality, no more than they had damaged the reputation or rights of others. They observed that the remarks had not hindered the judges' action in seeking to establish the truth, nor had they led to a breach of the secrecy of the judicial investigation or of the right to be presumed innocent.

45. The applicants then submitted that the interference had not been "prescribed by law" within the meaning of Article 10 of the Convention. Whilst recognising that domestic courts had a margin of appreciation as to whether the offending comments were defamatory or not, they complained, firstly, about the unforeseeable and contradictory nature of the solutions found for the interpretation of the adjective "*rocambolesque*", the description of the judges as "slow" and the expression "accumulation of anomalies", and about the legal uncertainty thus created. Secondly, they complained about the fact that the author of the article had been criticised for not having produced it in the form of an interview, and argued that the form chosen – an account of a press conference – had been unfairly interpreted as lacking in good faith. They added that the journalist had imparted information, by reporting on the organisation and content of a newsworthy media event, without any bias or animosity, as the Paris *tribunal de grande instance* had found, and submitted that the domestic courts had thus disregarded domestic case-law and French legislation, rendering them both unforeseeable.

46. As to the necessity of the interference, the applicants took the view that the Government's assertions ultimately amounted to considering that where particularly serious accusations were made, any good faith on the part of the journalist or publication director was to be ruled out, and argued that this would contravene both the Act of 29 July 1881 and the Court's case-

law and would not address the argument that the form of expression and substance of the information imparted had to benefit from specific protection. They observed that the Government had not shown how the penalty imposed had met a pressing social need, and submitted that the *Pedersen and Baadsgaard* case-law had little to do with the present dispute, but in fact allowed the violation of Article 10 to be characterised. They explained that, in the present case, the domestic courts had not taken into account the nature of the document in question – a press report – or the field with which the article was concerned, namely the role and operation of fundamental State institutions. They pointed out that the journalist and the publication director had not espoused the offending expressions as their own, and had not sought to convince the reader of the veracity of the criticisms, but had simply reported on the existence of the latter. They submitted that the journalist had distanced herself in her report by using the conditional tense and inverted commas, and by referring to each of the sources without emphasising certain accusations.

47. In this connection they were surprised by the Court of Appeal's finding that the journalist had distorted Mr Matagrin's remarks, even though he had admitted using the term "*rocambolesque*" and had taken part in a press conference held precisely to point out shortcomings in the judicial investigation. The journalist had duly reproduced the most significant terms used in the press conference, thus conveying the tone of the event. The case did not therefore concern the dissemination of inaccurate information, as in *Radio France and Others v. France* (no. 53984/00, ECHR 2004-II), but the existence of the journalist's freedom of expression, without even entailing a need for her to use a degree of exaggeration or provocation, as permitted by the Court's case-law. In finding otherwise, the domestic courts, which were not to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists, according to the case-law (*Jersild v. Denmark*, 23 September 1994, Series A no. 298), had breached the Convention. On that point, as Article 10 protected both the content and the form of the expression, it was shocking for the applicants that the Court of Appeal had seen fit to judge the use of discretion as to the most appropriate journalistic form by concluding that the author of the press article had "preferred not to report on the subject in the form of an interview". Moreover, they observed that the journalist, even though she had a deadline to meet, had nevertheless sought to obtain the reaction of the Ministry and of Judge Le Loire, but that the Court of Appeal, unlike the court below, had refused to take this into consideration, on the ground that an investigating judge's assistant had "stated that she [could] not remember any call from the journalist", further requiring that she should have gathered information before the conference and, if appropriate, should have afforded the criticised parties the right to reply in the following days. They claimed that the offending articles had not been directed at the private lives of public

figures but at their conduct and attitudes in the performance of their duties. The press conference had been held by the civil parties and the individuals who had expressed themselves on that occasion had been seeking to make public the questions and criticisms about the manner in which the case was being handled. Three months later, moreover, the investigating judges had been withdrawn from the case. The facts described by the participants could not therefore be regarded as untrue. Lastly, the applicants claimed that neither the domestic courts nor the Court had made any distinction between the conviction of a journalist and that of the person disseminating the statement, because the good faith of the author entailed that of the principal.

48. As to the penalty imposed, the applicants took the view that their punishment for having imparted information that was highly newsworthy and relevant to a debate on fundamental State institutions was disproportionate.

2. The Court's assessment

49. It is established that the judgment against the applicants constitutes "interference by public authorities" in their right to freedom of expression. Such interference breaches the Convention if it does not meet the requirements of paragraph 2 of Article 10. The Court must therefore determine whether it was "prescribed by law", was directed towards one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve them.

(a) "Prescribed by law"

50. The Court reiterates that the expressions "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be accessible to the persons concerned and formulated with sufficient precision to enable them to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among many other authorities, *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I). In particular, for a norm to be "foreseeable" it must afford a measure of legal protection against arbitrary interference by public authorities.

51. The scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed (see *Cantoni v. France*, 15 November 1996, § 35, *Reports of Judgments and Decisions* 1996-V). A law may still satisfy the requirement of foreseeability even if 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, for example, *Grigoriades v. Greece*, 25 November 1997, § 37, *Reports* 1997-VII).

52. This is particularly true in relation to persons carrying out a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see *Cantoni*, cited above, § 35, and *Chauvy and Others v. France* (dec.), no. 64915/01, 23 September 2003).

53. In the present case, the Court observes that the judgment against the applicants for the offence of public defamation of civil servants has its legal basis in sections 23, 29(1), 30 and 31(1) of the Freedom of the Press Act of 29 July 1881.

54. It reiterates its previous case-law to the effect that these provisions fulfilled the requirements of accessibility and foreseeability within the meaning of Article 10 § 2 of the Convention (see the judgment in *Chauvy and Others*, cited above, §§ 45-49; *Brasilier v. France*, no. 71343/01, § 28, 11 April 2006; *Mamère v. France*, no. 12697/03, § 18, ECHR 2006-XIII; and, *mutatis mutandis*, *Abeberry v. France* (dec.), no. 58729/00, 21 September 2004), and thus does not see any reason to depart from its case-law on this point.

55. It must be taken into consideration, moreover, that the first applicant, who at the time was the publication director of the national daily newspaper *Libération* and manager of the second applicant (the company SARL Libération), is a well-informed professional in press circles who had previously had to appear before competent domestic courts in respect of such offences (see *Tourancheau and July v. France*, no. 53886/00, 24 November 2005 and, more recently, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, ECHR 2007-IV). The applicants must therefore have been familiar with the legislation and significant amount of case-law that was applicable in this sphere and could have sought advice from specialist counsel.

56. As to the question of the unforeseeable and contradictory nature of the solutions found to the interpretation of the word "*rocambolesque*" (farcical) in particular, the Court found, like the Government, that the process of characterisation and interpretation of the law in which the domestic court engaged was undoubtedly within its remit and could not therefore be the subject of a complaint, as such, under Article 10 of the Convention, except in the event of manifest arbitrariness. The Court discerns no such element in the instant case. It observes that this question relates more to whether the reasons adduced by the domestic courts to justify the impugned interference in respect of the applicants were relevant and sufficient. The question will thus be examined in the context of an assessment of the "necessity" of the interference.

57. In conclusion, the applicants' contention that they were unable to foresee "to a reasonable degree" the consequences publication of the article was liable to have for them in the courts is untenable. The Court therefore concludes that the interference in issue was "prescribed by law" within the meaning of the second paragraph of Article 10 of the Convention.

(b) Legitimate aim

58. In the Government's view, the aim of the interference was, firstly, to protect the reputation or rights of others, and secondly, to maintain the authority and impartiality of the judiciary – an aim that the applicants dispute.

59. For its part, the Court finds that the impugned decisions had the aim of protecting from defamation the investigating judges in question, in their capacity as civil servants, and by doing so also to protect from defamation a "court, public authority or a State institution" within the meaning of section 30 of the Act of 29 July 1881. Those aims correspond to the protection of "the reputation and rights of others" and to the maintaining of "the authority and impartiality of the judiciary", within the meaning of Article 10 § 2 (see *Tourancheau and July*, cited above, and *Ernst and Others v. Belgium*, no. 33400/96, § 98, 15 July 2003).

(c) "Necessary in a democratic society"

(i) General principles

60. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

61. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of 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.

62. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review

under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

63. The Court has on many occasions stressed the essential role the press plays in a democratic society. It has stipulated that, although the press must not overstep certain bounds, regarding in particular the protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest.

64. The national margin of appreciation is thus circumscribed by the interests of a democratic society in enabling the press to exercise its vital role of "public watchdog" (see, for example, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III).

(ii) Application of the above-mentioned principles to the instant case

65. In the present case the Court observes that the applicants were convicted for publishing an article about the organisation and content of a press conference held – the day before the article was published – by civil parties who were critical of a criminal investigation, of interest to the media, concerning the conditions and causes of the death, in suspicious circumstances, of a French judge posted to Djibouti. It further notes that the purpose of the press conference was to make public a request – submitted on 13 March 2000 by one of the civil parties (the judge's widow) and addressed to the Minister of Justice – for an examination by the General Inspectorate of Judicial Services of the conditions in which the judicial investigation was being handled.

66. The Court reiterates that the public have a legitimate interest in the provision and availability of information about criminal proceedings. In this connection Recommendation Rec(2003)13 of the Committee of Ministers to member States (see paragraph 36 above) on the provision of information through the media in relation to criminal proceedings stresses the importance of reports on criminal proceedings to inform the public and allow it to exercise a right of scrutiny over the functioning of the criminal-justice system. To be more precise, the first of the guiding principles in the appendix to that Recommendation states that the public are entitled to receive information about the activities of judicial authorities and police services through the media, which means that journalists must be able to report and comment freely on the functioning of the criminal-justice system. The questions of public interest reported by the press thus undoubtedly include those concerning the functioning of the system of justice, an

institution that is essential for any democratic society (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports* 1997-I). The press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 34, Series A no. 313).

67. This was particularly true in the present case, as the remarks made at the press conference directly concerned an investigation into a sensitive criminal case which has received, from the outset to the present day, particularly significant media coverage. The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern (see Bladet Tromsø *and Stensaas*, cited above, § 64, and *Jersild*, cited above, § 35). The Court infers from the above that the margin of appreciation afforded to the authorities in order to assess the "necessity" of the impugned measure was thus a narrow one.

68. With that in mind, the Court finds that, in convicting the applicants, the Versailles Court of Appeal took the view that two passages of the impugned article damaged the "honour and reputation" of the two judges initially responsible for the case, in that the passages accused the judges of showing "bias" when taking evidence from a material witness in the case and of conducting an investigation in a manner described as "*rocambolesque*" (farcical), those accusations being regarded as defamatory within the meaning of sections 29, 30 and 31 of the Act of 29 July 1881. That being said, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.

69. The Court observes that the Court of Appeal and the Court of Cassation did not uphold the applicants' defence of good faith, on the ground of a flagrant failure to fulfil their duties of prudence and objectivity. It reiterates that protection of the right of journalists to impart information on issues of general interest requires that they act in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism. As regards the responsibility borne by journalists in the publication of information supplied to them by third parties, the Court reiterates the principle whereby "[t]he punishment of a journalist for assisting in the dissemination of statements made by another person ... would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so" (see *Thoma*, cited above, § 62, and *Jersild*, cited above, § 35). The safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to

the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see, among other authorities, Bladet Tromsø *and Stensaas*, cited above, § 65).

70. The Court observes that the Court of Appeal, in rejecting the defence of good faith, criticised the journalist, firstly, for "preferr[ing] not to report on the subject in the form of an interview", pointing out that she had "opted for a compromise solution" which "facilitated her task" and that she should have indicated that "she would ensure that the persons thus criticised had the opportunity to reply", whereas – the Court emphasises – it is not for the domestic courts to substitute their own views for those of the press as to the reporting technique that should be adopted by journalists to impart information, as Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Stoll v. Switzerland* [GC], no. 69698/01, § 146, ECHR 2007-V).

71. Secondly, the Court of Appeal found that by "choosing, as to the form, to report [the press conference] by adopting a style other than that of an interview, the author could not have been unaware that the parts of the article ... could be attributed to her", whereas a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas (see *Thoma*, cited above, § 64, and *Radio France and Others*, cited above). Accordingly, the Court is not persuaded by the reasons given by the Versailles Court of Appeal.

72. That court further observed that the "particularly serious attack on the investigating judges" imposed a duty on the journalist – and thus on the applicants – to take certain precautions and to show the highest level of seriousness.

73. The Court is not persuaded by this argument either. It takes the view that the impugned article is a report of a press conference held on 13 March 2000 in a case that had already been covered by the media and was known to the public. Concerning the precautions taken, the Court observes that the article properly uses the conditional tense, with inverted commas in various places in order to avoid any confusion in the reader's mind between the source of the remarks and the newspaper's analysis, citing each time the names of the persons speaking for the reader's information, such that it cannot be maintained, as the Court of Appeal did, that some passages were imputable to the journalist, and therefore to the applicants. In addition, the article does not reveal any personal animosity towards the above-mentioned investigating judges, as the trial and appeal courts recognised.

74. Moreover, the offended individuals are members of the judiciary. Consequently, whilst it cannot be said that they knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the

latter when it comes to the criticism of their actions (see *Janowski v. Poland* [GC], no. 25716/94, § 33, ECHR 1999-I), civil servants acting in an official capacity, as in the present case, may nevertheless be subject to wider limits of acceptable criticism than ordinary citizens (see, among other authorities, *Mamère*, cited above, § 27). The Court thus concludes that the reasons given by the Court of Cassation to dismiss the applicants' appeal on points of law were not relevant or sufficient, because they are incompatible with the above-mentioned principle. The offended individuals, both civil servants belonging to "fundamental State institutions", were subject in that capacity to personal criticism within the "admissible" limits, and not only in a theoretical and general manner.

75. The Court lastly refers to the argument raised by the Court of Appeal to the effect that the remarks of one of the speakers at the press conference had been distorted, as regards the use of the adjective "*rocambolesque*", and that this showed the applicants' lack of good faith. Whilst that word was actually used at the press conference, the Court observes that there is still some doubt as to its precise formulation. The Court of Appeal was of the view that the remark, as made by the person concerned, "had not reflected an unequivocal desire to denounce his colleagues' manner of investigation". The Court notes in particular that the use of this adjective, which is admittedly not very complimentary, but which has for a long time been part of everyday language, was attributed by the article to one of the participants in the press conference and was not assumed personally by the journalist.

76. In any event, the Court takes the view that the applicants, in publishing the article, did not even have recourse to a degree of "exaggeration" or of "provocation", which is nevertheless permitted in the exercise of journalistic freedom in a democratic society, and thus did not overstep the permissible limits of such exaggeration or provocation. The Court does not find the offending remarks – which were reported – to have been "manifestly abusive" in respect of the judges in question (compare *Lindon, Otchakovsky-Laurens and July*, cited above, § 66), in particular as regards the adjective "*rocambolesque*" (farcical). In its view, the reasons given by the domestic courts on this point for their finding of a lack of good faith are not easy to reconcile with the principles relating to the right to freedom of expression and to the role of the press as "watchdog" (see *Mamère*, cited above, § 26).

77. In the light of the above, and in particular the context in which the impugned comments were uttered, the judgment against the applicants for the offence of defamation cannot be considered proportionate and therefore "necessary in a democratic society" within the meaning of Article 10 of the Convention. There has accordingly been a violation of that provision.

...

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

86. 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."

A. Damage

87. The applicants claimed the reimbursement, under the head of pecuniary damage, of the sums that they had been ordered to pay, namely 3,000 euros (EUR) for the expenses not covered by the State (for which they were jointly liable), EUR 3,000 in damages paid to the two civil parties, and EUR 1,500 for the fine. The first applicant further claimed EUR 80,000 for non-pecuniary damage, characterised by the stress suffered on account of the proceedings against him.

88. The Government, as regards pecuniary damage, observed that the applicants had not proved that they had paid the sums of which they were seeking the reimbursement, and argued that in those circumstances the claim should not be upheld. As regards non-pecuniary damage, they took the view that in any event there was no causal link between the alleged damage and a violation of the Convention.

89. The Court is persuaded that there is a sufficient causal link between the alleged pecuniary damage and the violation found under Article 10 of the Convention. It is bound to note that the applicants were ordered to pay the above-mentioned sums under a final and enforceable judicial decision that was contrary to Article 10 of the Convention. It is thus appropriate to grant them full reimbursement of the said sums that they had to pay, by way of redress for their pecuniary damage, for a total of EUR 7,500. Moreover, the Court does not rule out the possibility that the first applicant may have sustained, on account of the violation of Article 10, some non-pecuniary damage. It considers, however, that in the circumstances of the case the finding of a violation in this judgment constitutes in itself sufficient just satisfaction (see *Paturel v. France*, no. 54968/00, § 55, 22 December 2005).

B. Costs and expenses

90. The applicants sought EUR 10,297.57 for the costs and expenses they had incurred in the proceedings before the domestic courts. The breakdown of that sum was as follows: EUR 7,234.58 in fees for the proceedings before the Paris *tribunal de grande instance* and the Versailles Court of Appeal, and EUR 2,750.80 in fees for the proceedings before the Court of Cassation. In addition, they claimed EUR 3,588 for the fees

incurred in the proceedings before the Court. The applicant produced the fee statements and a detailed table of costs and expenses dated 3 July 2006 entitled "account of case payments".

91. The Government observed that the first-instance court had acquitted the applicants of the charges against them and that, if there had been a violation of the Convention, it could only have occurred on their appeal. In those circumstances, they took the view that the applicants were entitled to seek reimbursement only of the expenses incurred for their appeal to the Court of Cassation, that is to say the sum of EUR 2,750.80. The Government further noted that the applicants sought the sum of EUR 7,234.58 for the first-instance and appeal proceedings, plus the sum of EUR 3,588 for the proceedings before the Court, whereas it could be seen from the documents produced by the applicants that the sum of EUR 7,234.58, which had been paid to the lawyer, included that of EUR 3,588 paid on 17 September 2003. Accordingly, the Government proposed that the amount of the procedural costs should be fixed, on an equitable basis, at EUR 5,000.

92. In accordance with the Court's case-law, an award can be made to an applicant in respect of costs and expenses only in so far as they have been actually and necessarily incurred and are reasonable as to quantum. In addition, where the Court finds that there has been a violation of the Convention, it will award applicants their costs and expenses before the national courts only in so far as they were incurred for the prevention or redress of the violation.

The Court finds that this condition was fulfilled in the present case, as the first applicant was summoned directly by the complainants before the Paris *tribunal de grande instance* to stand trial for defamation and later, on an appeal by the civil parties, he had to defend his case before the Versailles Court of Appeal. The Court notes that the applicants have produced relevant invoices and fee statements, together with a summary table of the sums paid. It can be seen from those documents that the expenses incurred before the Court were paid in two stages: on 17 September 2003 and 3 July 2006 for a total sum of EUR 7,176, to which should be added EUR 2,750.80 for the proceedings before the Court of Cassation and EUR 3,646 for the proceedings before the trial and appeal courts. Accordingly, the Court awards the applicants, jointly, the sum of EUR 13,572.80 in respect of all costs and expenses.

C. Default interest

93. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible in respect of the complaint under Article 10 of the Convention ...;

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

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the first applicant;

4. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros) for non-pecuniary damage and EUR 13,572.80 (thirteen thousand five hundred and seventy-two euros and eighty cents) for costs and expenses, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in French, and notified in writing on 14 February 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Boštjan M. Zupančič
President