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

SECOND SECTION

CASE OF RADIO FRANCE AND OTHERS v. FRANCE

(Application no. 53984/00)

JUDGMENT

STRASBOURG

30 March 2004

In the case of Radio France and Others v. France,

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

Mr A.B. BAKA, *President*,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI, *judges*,
Mr P. TRUCHE, ad hoc *judge*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 23 September 2003 and 9 March 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 53984/00) 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 the national radio broadcaster Radio France, a company incorporated under French law ("the applicant company"), Mr Michel Boyon ("the second applicant") and Mr Bertrand Gallicher ("the third applicant"), both French nationals, on 21 July 1999.

2. The three applicants were represented before the Court by Mr B. Ader, a lawyer practising in Paris, and Mr A. de Chaisemartin, a lawyer at the *Conseil d'Etat* and the Court of Cassation. The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr J.-P. Costa, the judge elected in respect of France, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr P. Truche to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

4. By a decision of 23 September 2003[1], the Chamber declared the application partly admissible.

5. The applicants and the Government each filed observations on the merits of the case (Rule 59 § 1).

1. *Note by the Registry*. Extracts of the decision are reported in ECHR 2003-X.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant company has its registered office in Paris. The other two applicants were born in 1946 and 1957 respectively and live in Paris and Saint-Cloud.

7. In its issue no. 1272, dated 1 February 1997, the weekly magazine *Le Point* published an "investigation" headlined "Vichy: Around the Papon Case". Several pages focused on Mr Michel Junot, under the headline "1942-1943 Revelations: Michel Junot, deputy to mayor Jacques Chirac on the Paris City Council from 1977 to 1995, was Deputy Prefect at Pithiviers in 1942 and 1943. In that capacity, he was responsible for maintaining order in the two internment camps in his district, Pithiviers and Beaune-la-Rolande". The article included the following passages:

> "'*It has to be said that, all political consideration set aside, Vichy's civil servants gave a remarkable example of efficient, skilful and honest administration.*' That good-conduct citation, awarded in 1981, does not come from Maurice Papon, who has now been committed to stand trial in the Bordeaux Assize Court for 'complicity in crimes against humanity'. Those are the exact words used in *L'illusion du bonheur*, a book published ... by Michel Junot, a deputy mayor when Jacques Chirac ran Paris City Council between 1977 and 1995, who knows his subject, since he was Deputy Prefect in Pithiviers, in the *département* of Loiret, in 1942 and 1943. In that capacity he supervised the maintenance of order in the camp of that town, where thousands of Jews were interned before being deported to Auschwitz. Unlike Maurice Papon – and this is a significant difference between the two cases – he did not order anyone to be arrested, interned or transferred to Drancy.
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> After the war Michel Junot enjoyed a brilliant career in France's highest administrative spheres before turning to politics. He was to become a member of parliament for Paris from 1958 to 1962, giving his allegiance to the CNI, which he never left. But it was on Paris City Council, where he served as mediator from 1977 to 1989 that he spent the longest part of his career. He is a former MEP and since 1978 has been the president of the Maison de l'Europe in Paris.
>
> Until now, he has always maintained that the internment camps in his district, Pithiviers, and Beaune-la-Rolande some twenty kilometres away, were not under his control. His main duties were to inspect the local districts and to compile '*general and confidential information*' files on local dignitaries. The Pithiviers camp? '*it was not under my jurisdiction. I never set foot in it*' he told *L' Express* magazine in 1990.
>
> An outright denial which is, however, inconsistent with several documents not previously published which *Le Point* has managed to obtain. Documents which clarify his field of activity.
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> ... when he was appointed Deputy Prefect at Pithiviers on 9 June 1942 ... the camps at Pithiviers and Beaune-la-Rolande, originally intended for German prisoners of war,

were already being used as internment camps prior to their inmates being deported, the first having left on 8 May 1942.

Michel Junot, who was to remain in office for exactly a year to the day, took up his post in Pithiviers on 24 August 1942, that is, less than a month before the departure, on 20 September 1942, of a fresh transport of Jewish deportees.

On that day a thousand detainees arrested during house-to-house searches in the Paris region, including 163 children under 18, were put on transport no. 35 and shipped off to Auschwitz via Drancy, the camp to the north of Paris.

On the eve of their departure, Michel Junot informed the Prefect of his concerns about maintaining order. '*I hereby inform you that I have just been notified of the entrainment of a thousand Jews from the Pithiviers camp tomorrow from 5 p.m. onwards at Pithiviers railway station, and that all the gendarmes in my district apart from one officer per squad are therefore required to assist with the entrainment ... .*' ...

Two days later, on 22 September, Junot did not hide his satisfaction when sending the Prefect the following report: '*The day of 20 September 1942 went very smoothly throughout my district. The limited police presence planned for the afternoon of 20 September could not be deployed ... because all the gendarmes in the area, except for one officer per squad, were required for the entrainment of the Jewish detainees of the Pithiviers camp, whose departure I was suddenly notified of on 19 September at 3 p.m. The entrainment was to take place between 4 and 7 p.m. at Pithiviers station at the far end of the avenue de la République where the communists had called on ... the inhabitants of Pithiviers to demonstrate at 6.30 p.m., and I was concerned that some incidents might occur which could disrupt an orderly departure. But nothing of the sort happened and the town remained perfectly calm.*' ...

Then, in a '*monthly report*' drafted eight days later for his superiors, he scrupulously went over the events again.

On 30 September 1942 he reported in detail on the situation in the two '*internment camps*', as he headed the third paragraph of his report. '*The Beaune-la-Rolande camp, which has been empty since the end of August, has been cleaned*', Junot stated. '*The conditions there are now excellent. Two transports of Jews passed through and spent twenty-four hours there before leaving for Drancy. There are only about twenty detainees left at the camp, doing maintenance work.*'

Michel Junot went on: '*The Pithiviers camp had been occupied since the end of August by 1,800 Jewish internees of all categories, French and foreign, men, women and children, some arrested during the August and December 1941 round-ups, others for having infringed the regulations of the occupying forces (demarcation line, wearing the star of David, etc.). All of them, except those married to Aryans and a few mothers of young children, were placed on trains bound for Germany on 20 September. Finally the last internees left Pithiviers in the evening of the 24th for Beaune-la-Rolande so as to clear the camp, which was due to receive communist internees. In fact this last Jewish transport spent only twenty-four hours in Beaune before being sent on to Drancy on the orders of the occupying forces.*'

Drancy was the last stop in France before they were deported to Germany and the final solution: their physical destruction. ...

On reading this dry civil servant's prose, the Acting Prefect of Loiret, Jacques Marti-Sane, expressed his satisfaction in writing. He was pleased with the orderliness which had prevailed during the entrainment of the deportees, who until then had been crammed into huts surrounded by barbed wire and picked out by searchlight beams from the watchtowers.

In an internal memorandum dated 1 October 1942 – another document not previously published – the Acting Prefect informed the head of the first division of the prefecture, who was responsible for organisation and surveillance: '*The Pithiviers Deputy Prefect may be called upon to intervene in the matter of the camps in an emergency and on my express instructions. In any event, in his capacity as the government representative in Pithiviers, he has the right to monitor the proper functioning of the camps. Accordingly, it seems to me essential that all instructions sent to the camp commandant should be copied to the Pithiviers Deputy Prefect, so that he is not bypassed*.' ...

No fewer than seven transports left from camps in Loiret between June and September 1942, the last one under Junot's responsibility.

In his October report, the Deputy Prefect expressed his concerns over the difficulty in maintaining order in Beaune-la-Rolande, which was full of '*French and foreign Jews who have contravened the regulations of the occupying forces (in particular, attempts to cross the demarcation line) and whom the German police have sent to the Beaune camp*'. As a conscientious official, Michel Junot went so far as to suggest: '*If there is a further rise in the number of internees, we should make plans to strengthen the security arrangements.*'

In the same report, he pointed out that communists were gradually replacing the Jews in Pithiviers, though there were still 1,574 of the latter on 30 October 1942 compared with 1,798 on 26 September.

'*The presence of this camp inside my district means that the sub-prefecture is receiving a number of letters asking for leave to visit and even for people to be released. I have had some standard-form replies drafted explaining that I have no power to take such measures and that only the Prefect who took the internment decision has any authority in that respect. There is nothing to report from the camp, which is guarded most efficiently by a detachment of gendarmes*', he wrote.

...

On the day of the liberation of Orléans, 16 August 1944, Michel Junot was present. He waved the tricolour from the balcony of Loiret's prefecture. And he stood at the head of the prefecture steps to welcome André Mars, the *commissaire de la République* sent by General de Gaulle. But that did not stop him being swept away in the subsequent purge. On 14 December 1945, ten months after awarding Junot a 'certificate of participation in the Resistance', de Gaulle signed a decree removing him from office. The hero of Free France was acting in response to a decision of the National Purification Commission based on a report from the Loiret departmental liberation committee stating that Junot was 'a typical careerist, devoid of all moral scruples, not to be allowed to hold any kind of public office'.

> However, like many servants of the French State, Junot claimed to have been playing a double game. He explained that he had worked for a 'network' of the Central Intelligence and Action Bureau ... citing his activity on behalf of General de Gaulle's intelligence service in London under the Occupation and the medals he had received as a result. He must have been persuasive, because when peace returned he was to be found once more as permanent secretary to various Ministers, before becoming a deputy prefect again in 1956 and then prefect in 1957. ...”

8. An interview with Mr Junot was also published as part of the investigation. It included the following statement by him:

> “... It was only when I reported to the Prefect of Loiret that I discovered the existence of the camps. At that time I did not know who was interned there. There had been communists, at the time of the breaking of the Germano-Soviet pact. And there were foreign Jews. We did not know their ultimate destination. We only knew that they were going to Drancy. Rumour had it that they were being sent to work in salt mines in Poland. We obviously knew that they were not going off on a pleasant holiday. But I did not learn of the existence of the extermination camps until April 1945 when the first deportees returned.
>
> When I took up office, on 24 August 1942, all the transports except one had already left.”

When the interviewer asked Mr Junot if he thought this “renewed interest in those dark years” was “necessary for the young generations” he replied: “If Frenchmen in those days made mistakes, or sometimes committed war crimes, I think there is the discreet veil of history...”

9. At 5 p.m. on 31 January 1997 the third applicant, who is a journalist with France Info (a radio station controlled by the applicant company), broadcast the following report:

> “According to the weekly magazine *Le Point*, a former deputy mayor of Paris supervised the deportation of a thousand French and foreign Jews in 1942. Michel Junot, now aged 80, was Deputy Prefect of Pithiviers at the time. He admits that he organised the departure of a transport of deportees to Drancy. Michel Junot, whom General de Gaulle removed from office at the end of the war, claims to have been in the Resistance and subsequently rose through the ranks of the civil service. In his defence, the former deputy mayor of Paris between 1977 and 1995 maintains, like Maurice Papon, that he knew nothing of the fate of the deported Jews and says that the discreet veil of history should be drawn over the crimes of those days.”

The way in which France Info operates is for the presenter to broadcast live, with two news bulletins and two news flashes per half-hour. He then breaks for an hour to update his information before going on air again. The above-mentioned broadcast was accordingly repeated by the third applicant and by other journalists sixty-two times between 6 p.m. on 31 January and 11.04 a.m. on 1 February, in either the same or a slightly different form. However, the broadcasts systematically specified that the report was based on an article published in *Le Point.* After 11 p.m., a number of news bulletins and flashes mentioned the fact that, “unlike Maurice Papon”, Michel Junot had never issued any orders for anyone to be arrested, interned

or transferred to Drancy, sometimes adding that he was “responsible only for keeping order”.

On 1 February 1997, from 5.45 a.m. onwards, several news bulletins and flashes (broadcast at 6.45, 7, 7.15, 8, 8.15, 8.23, 8.30, 8.45 and 9.33 a.m.) mentioned that Mr Junot denied the allegations published in *Le Point*. According to the applicants, this point was made systematically after 11.04 a.m.

10. Mr Junot brought proceedings in the Paris Criminal Court against the second applicant, who is publishing director of the applicant company (the publisher), the third applicant and the applicant company as principal, accessory and civilly liable respectively for the offence of public defamation of a civil servant, contrary to sections 29, first paragraph, and 31, first paragraph, of the Freedom of the Press Act of 29 July 1881 (“the 1881 Act”).

In their defence, the applicants argued that the case under section 31 of the 1881 Act was inadmissible, because Mr Junot had been retrospectively stripped of his status as a civil servant at the time of the Liberation. They also contended that the prosecution's case against the second applicant was inadmissible: the disputed statement had been broadcast live and its content could not therefore be construed as having been “fixed prior to being communicated to the public” within the meaning of section 93-3 of the Audiovisual Communication Act of 29 July 1982 (“the 1982 Act”). Moreover, they submitted that the third applicant had acted in good faith. In that connection, they argued that public interest in the period of the Occupation had been revived by the news of the Papon trial; that the third applicant had been in possession of the article published in *Le Point* on the previous day along with three agency dispatches; that it had been reasonable to link the cases of Mr Junot and Mr Papon because both men had held high public office during the Occupation and had subsequently enjoyed brilliant political careers; that the use of the conditional tense and the absence of any personal comment about Mr Junot demonstrated the journalist's caution; and that France Info had reported Mr Junot's denials from 6 a.m. on 1 February onwards.

11. By a judgment of 25 November 1997, the Paris Criminal Court (Seventeenth Division) found the second and third applicants guilty as principal and accessory respectively of the offence of public defamation of a civil servant. It fined them 20,000 French francs (FRF) each and ordered them jointly to pay FRF 50,000 in damages. It also found the applicant company civilly liable and ordered by way of civil remedy that an announcement informing the public of the content of its judgment be broadcast on France Info every thirty minutes during a twenty-four hour period in the month following the date on which the judgment became final.

With regard to the defamatory nature of the disputed allegations, the judgment reads as follows:

"Mr Junot is alleged ... to have personally played an active role in the deportation of Jews in his capacity as Deputy Prefect of Pithiviers. This allegation, which undoubtedly damages the honour of the civil party, is moreover aggravated by the connection made between the case of Mr Papon – who has been committed for trial before the Gironde Assize Court to answer charges that he participated in crimes against humanity – and that of Mr Junot, with the suggestion that the latter was seeking to evade responsibility for the crimes committed during that period, over which he believes that 'the discreet veil of history should be drawn'.

The fact that it was specified that, 'unlike Maurice Papon', Michel Junot 'did not issue any orders for anyone to be arrested, interned or transferred to Drancy' in no way detracts from the seriousness of the charge levelled at the civil party; the same can be said of the use of the conditional tense throughout the broadcasts.

The allegations in question also cast doubt on Mr Junot's membership of the Resistance, which was reported as a mere 'claim' on his part, and suggested that he had been stripped of his status by General de Gaulle at the end of the war. These words also damage the civil party's honour and reputation."

The court found that Mr Junot had never lost the rank of Deputy Prefect, and that he should be considered as having been acting in that capacity in Pithiviers at the time of the facts alleged against him and accordingly to have been exercising public authority. It found that section 31 of the 1881 Act was therefore applicable.

With regard to the good faith of the third applicant, the court found as follows:

"There being a presumption that defamatory statements are made in bad faith, it is for the defendants to prove their good faith.

It should first be noted that the repetition of defamatory statements already published in another medium does not in any way provide the person who repeats them with a defence; such journalistic practice is particularly to be deprecated, because it means that a statement that has not been verified by anyone subsequently reporting it acquires the appearance of an absolute certainty.

This is what happened with Mr Junot: having assumed that the enquiries made by his fellow journalists at *Le Point* were reliable, Bertrand Gallicher simply repeated the magazine's allegations against the civil party without checking them.

As evidence that he had carried out a serious investigation, Bertrand Gallicher told the Court that he had been in possession of the article published in *Le Point* on the previous day, and of three agency dispatches; however these dispatches, which simply quoted large sections of the magazine article, could not, without more, provide the journalist with a legal defence.

The journalist also produced the documents mentioned in *Le Point*: the Prefect's memorandum of 1 October 1942, Michel Junot's notes of 19 and 22 September 1942 and the monthly reports for September and October 1942; however, these documents did not give him grounds for asserting that Michel Junot, Pithiviers Deputy Prefect, had supervised the deportation of a thousand Jews or that he had admitted having organised the departure of a transport of Jewish deportees.

Neither the memorandum from the Prefect of Loiret dated 1 October 1942 specifying that the Pithiviers Deputy Prefect must be copied in on all the instructions given to the camp commandant, nor the memorandum of 19 September 1942 to the Prefect signed by Michel Junot and expressing his concerns about keeping order on 20 September 1942 in the event of communist demonstrations because all the gendarmes in the district had been drafted in to help with the 'entrainment of a thousand Jews', nor the report drawn up by Michel Junot on 22 September 1942 on the events of the day, which had been 'perfectly calm', prove that Michel Junot, Deputy Prefect, had played a personal part in the organisation and departure of that transport for Drancy. In fact, what these documents show is that he complained of having been notified only belatedly of the 'entrainment of a thousand Jews', that he did not receive copies of all the instructions sent to the camp commandant, a memorandum from the Prefect having been required to ensure that he was not 'bypassed' and that his concern was to maintain order outside the camps.

Michel Junot's monthly reports for September and October 1942 do not carry any more evidential weight in this respect; while the first mentions that most of the Jews in the Pithiviers camp had been 'entrained' on transports bound for Germany on 20 September 1942; while both report on the occupancy rate of the two internment camps situated in his district and thus establish his 'responsibility in principle' for the camps (using Mr Serge Klarsfeld's formula); while they keep the Prefect informed of relations with the German forces and the circumstances in which the anti-Jewish laws were being applied and certainly show that Mr Junot was performing his functions of Deputy Prefect under the Occupation with zeal and determination, and without being troubled by too many scruples, they nonetheless do not prove that he played a personal part in the deportation of Jews or that he organised the departure of a transport of Jewish deportees.

Turning to the other documents cited by the defence, namely a letter dated 19 September 1942 from the secretary-general for the police on the *Conseil d'Etat* to the Orléans Regional Prefect and the latter's reply dated 21 September 1942, and a memorandum dated 19 September 1942 from the Pithiviers Deputy Prefect to the captain of the gendarmerie and police superintendent, they cannot be regarded by the Court as having any evidential weight, since they are merely summarised on a plain sheet of paper.

In short, the documents in Bertrand Gallicher's possession did not give him grounds for alleging that Mr Junot was guilty of having participated in crimes against humanity.

Nor did these documents entitle the presenters who came on air after 0.33 a.m. on 1 February to repeat the allegation that the plaintiff had supervised the Jewish internment camps of Pithiviers and Beaune-la-Rolande and the maintenance of order in both camps.

Lastly, the testimony of Mrs Mouchard-Zay recounting the dramatic circumstances of the various round-ups of Jewish men, women and children, the conditions in which they were transferred to and arrived in the two camps of Pithiviers and Beaune-la-Rolande, and the dramatic change in public opinion which coincided with these events, does not prove that Mr Junot played any part in the organisation of these deportations.

> While being aware of the professional constraints imposed by the need to break news rapidly, which is inherent in the very nature of radio, the Court notes that the journalists, far from merely reporting raw news objectively, endorsed the interpretation adopted by some of their fellow journalists, while going further by making a connection with the 'Papon case', no doubt with the intention of making the story more sensational.
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> The disputed broadcasts were therefore particularly careless and contributed to the spread of rumour by repeating defamatory allegations.
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> In relation to the allegation that Mr Junot was not a genuine member of the Resistance, the Court finds that the evidence produced by the defence is insufficient to cast doubt on his Resistance activities, which in any event have been vouched for by Jean-Claude Aaron, the leader of the Masséna network, by Colonel Rémy and by several people of Jewish descent who described the help he had given them during the Occupation.
>
> For all of the above reasons, the Court is unable to accept that [the third applicant] acted in good faith."

The court found the second applicant, in his capacity as publishing director, not liable for the first broadcast, which had been made live by the third applicant on 31 January at 6 p.m. It found, however, that the same statement had been repeated either in full or in condensed form by the various presenters who subsequently went on air, and considered that such "systematic repetition of the disputed statements" should be construed as "rolling broadcasting" within the meaning of section 93-3 of the 1982 Act. The court concluded as follows:

> "[The second applicant], as publishing director, whose duty it is to control what is broadcast on the channel for which he is responsible, is therefore liable in law as principal for the offence of defamation."

12. On appeal by the applicants, the Paris Court of Appeal (Eleventh Criminal Appeal Division) upheld the judgment of 25 November 1997 by a decision of 17 June 1998.

On the question of the defamatory nature of the offending bulletin's content, it ruled as follows:

> "Words may be defamatory as the result of an insinuation, a question or an assertion. In addition, words must be assessed both in terms of their intrinsic meaning and in the light of their context.
>
> Attributing to Mr Junot responsibility for supervising the deportation of a thousand Jews and organising their despatch to Drancy was plainly an attack on his honour and dignity. The defence arguments ... tending towards proving the truth of the facts is not relevant here, quite apart from the fact that no evidence to that effect has been adduced. Moreover, comparing Mr Junot's position to that of Mr Papon, who had indeed just been committed for trial in the Bordeaux Assize Court, also necessarily had a defamatory resonance.

The same defamatory classification must also be given to the passage '[Mr Junot] ... claims to have been in the Resistance'. Coming as it does between the reference to his being sacked by General de Gaulle and the comparison to Mr Papon, this can only insinuate that Mr Junot's assertion was false."

On the question of good faith, the judgment said:

"Calumnious imputations are deemed to be in bad faith unless it can be established that they were made in pursuit of a legitimate aim, without any personal animosity, after a serious investigation and in temperate language.

There is no doubt that providing information about the attitude of administrative officials during the period of the Occupation, particularly as regards one of the main dramas of that time, the deportation and extermination of Jews, is perfectly legitimate.

Nothing in the file reveals any particular animosity on the journalist's part towards the civil party.

On the other hand, the preliminary investigation was singularly lacking in rigour. The civil party has rightly observed that Mr Gallicher began to broadcast his remarks at 6 p.m. on 31 January, in other words when the issue of *Le Point* dated 1 and 2 February had just come out.

In seeking to establish their good faith the defence cite three dispatches (AFP, AP and Reuters) which mentioned the article in *Le Point* and the content of a television programme in which Mr Junot had taken part. But the use of agency dispatches as one's main source, especially when they are purely repetitive and reproduce an article that has already been published does not constitute evidence that an attempt has been made, if not to conduct an investigation, then at least to check the information. In addition, the wholly gratuitous assertion that Mr Junot admitted his culpability is particularly reprehensible from both the criminal and the ethical points of view.

As regards the debate about whether Mr Junot had been a member of the Resistance, the Criminal Court rightly noted that the documents produced by the defence were not sufficient evidence to the contrary, whereas his participation has been attested to by the leader of the Masséna network, Jean-Claude Aaron, by Colonel Rémy and by a number of persons of Jewish origin who have drawn attention to Mr Junot's courageous attitude.

Moreover, the imputations contained in the message sent out were disproportionate in relation to the objective material that the accused maintained they had at their disposal, and here it should be noted, as clarification of this point may be helpful, that neither the use of the conditional tense pleaded in defence, nor the mention – very late in the day – of Mr Junot's denials, affect the gravity of the allegations made in dispatches broadcast several dozen times.

The content of the documents which the defendants learned of in *Le Point* is not convincing in terms of the construction that has been placed upon them if they are to be considered to reflect Deputy Prefect Junot's attitude at the time of the departure of the last transport of Jewish deportees on 20 September 1942.

The memo of 19 September from the deputy prefect to his prefect ... said: 'I have just been notified of the entrainment of a thousand Jews ... tomorrow', and he

complained that he would therefore not have sufficient manpower to control a communist demonstration.

The same deputy prefect sent a memo, dated 22 September, informing the prefect that there had been no incidents on account of the demonstration and that the departure of the transport had been orderly.

The memo of 1 October 1942 from the Prefect of Loiret seems to echo his subordinate's concerns about being informed in stipulating that the deputy prefect 'in his capacity as the government representative ..., has the right to monitor the proper functioning of the camps'.

The reports sent by Michel Junot to his prefect in September and October 1942 describe the situation in the camps but do not reveal that he had any power over them or initiative regarding them.

The witness evidence heard in court did not provide any additional information about Mr Junot's duties.

As to the other documents produced in court, the Criminal Court rightly found, for reasons which the Court of Appeal endorses, that they did not appear to have been in the defendants' possession at the time when the statement was broadcast. Moreover, they do not necessarily weaken Mr Junot's argument, since they include one memo he wrote on 15 April 1943 to the Prefect of Orléans about improving the food and bedding in the camps. It ends with the following sentence: 'Although the management and administration of the camps does not form any part of my duties, I wish to bring this state of affairs to your attention ...'

All these texts portray an official dedicated to fulfilling his functions of maintaining public order and defending the political interests of the government. They do not support, without overstating the case, an assertion that Mr Junot supervised the camps or played a role in the deportation of the Jews.

The plea of good faith is accordingly rejected."

The Court of Appeal noted the following in relation to the liability of the second applicant under section 93-3 of the 1982 Act:

"... This section is intended to absolve the publishing director of an audiovisual operator of liability for live broadcasts whose contents he is unable effectively to monitor and control. But this cannot be said of a rolling news bulletin whose content may be monitored and controlled by making the necessary arrangements to that effect. It is significant in this respect that such steps were taken from the morning of 1 February onwards, when the content of the offending statement was amended. Moreover, it would be stretching the concept of prior fixing to contend that it must involve mechanical recording. Content may also be fixed by a communication method based on repetition which effectively requires it to be fixed but not necessarily by mechanical means. Therein lies the difference from 'live' broadcasting involving no repetition."

Moreover, by way of civil remedy, the court ordered the following announcement to be read out on France Info every two hours during a

twenty-four hour period in the month following the date when the judgment became final:

> "By a judgment of the Paris Court of Appeal (Eleventh Division – Section A), Mr Bertrand Gallicher, journalist, and Mr Michel Boyon, publishing director of Radio France, were each fined FRF 20,000 and ordered to pay damages for having defamed Mr Michel Junot, former Deputy Prefect of Pithiviers. This judgment follows the broadcasting, on 31 January and 1 February 1997, of news bulletins falsely alleging that Mr Michel Junot had played a part in the deportation of a thousand Jews and wrongly casting doubt on his membership of the Resistance."

On the subject of the broadcasting of the above announcement, the judgment reads as follows:

> "The Court is minded to uphold the order for the broadcasting of an announcement by France Info, which seems to be a remedy proportionate to the damage suffered but which the defence considers to be contrary to the provisions of Articles 6 and 10 of [the Convention] ...
>
> The Court does not agree, because freedom of expression under Article 10 of [the Convention] may be subject to such restrictions as may be necessary ... for the protection of the reputation of others, which is the case here. It is true that the effect of this order, as indicated by the defence, will be to reduce the 'editorial space' available to France Info, but the written press are already in the same position and it is difficult to find a justification for discriminating between the various media in that respect.
>
> Lastly, it would be wrong to deny the claimant, whose rights are equally important, the concrete remedy of broadcasting an announcement purely on the ground that the audiovisual medium is different from the traditional medium of the written press.
>
> Further, nothing in the order to broadcast an announcement may be construed as infringing the right to a fair trial within the meaning of Article 6 of the Convention ..."

13. The applicants appealed on points of law. They submitted that the Court of Appeal had failed to apply the principle whereby the criminal law must be strictly interpreted, in that it had extended the scope of the presumption raised by section 93-3 of the 1982 Act (whereby the publishing director is liable as principal where "the content of the offending statement has been fixed prior to being communicated to the public") to cover a "communication method based on repetition". Relying in particular on Articles 6 and 10 of the Convention , they also complained of the order in the disputed ruling to broadcast the above announcement on France Info, the essence of their argument being that "there [was] no basis in legislation for the publication of a judicial announcement, which [was] nothing less than punishment for a civil wrong".

By a judgment of 8 June 1999, the Court of Cassation (Criminal Division) dismissed the appeal for the following reasons, *inter alia*:

> "... In finding the publishing director liable as principal for the offence created by section 93-3 of the Audiovisual Communication Act of 29 July 1982, the Court of Appeal both for its own and for adopted reasons ruled that the broadcasts containing the offending remarks had been, with the exception of the first bulletin, systematically

broadcast on a rolling basis in exactly the same or in condensed form over a twenty-four hour period.

It further found that this type of broadcasting allowed the publishing director to exercise control over the content before it was broadcast to the public.

The court applied the law correctly in so ruling.

The content of an announcement which is broadcast on a rolling basis must properly be construed as having been fixed prior to being communicated to the public within the meaning of section 93-3 [cited above]. ...

... although the criminal courts may order the publication of their judgments by way of penalty only if they are expressly authorised to do so by law, they may issue such an order by way of a remedy at the request of the civil party. Such a remedy, when ordered in a form achievable under the technical constraints of the medium in which publication is ordered, [does not breach] the Convention provisions cited in the appeal."

14. The announcement referred to in paragraph 12 above was broadcast on France Info between 31 July and 1 August 1999.

II. RELEVANT DOMESTIC LAW

15. The relevant provisions of Chapter IV of the Freedom of the Press Act of 29 July 1881 (as amended) are as follows:

Section 29

"It shall be defamatory to make any statement or allegation of a fact that damages the honour or reputation of the person or body of whom the fact is alleged. The direct publication or reproduction of such a statement or allegation shall be an offence, even if expressed in tentative terms or if made about a person or body not expressly named but identifiable by the terms of the disputed speeches, shouts, threats, written or printed matter, placards or posters.

It shall be an insult to use any abusive or contemptuous language or invective not containing an allegation of fact."

Section 31

"Defamation 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 discharging a public mandate, a member of a jury or a witness on the basis of his witness statement [in speeches, shouts or threats made or uttered in public places or meetings, or in written or printed matter, drawings, engravings, paintings, emblems, images or any other written, spoken or pictorial medium sold or distributed, offered for sale or exhibited in public places or meetings, or on placards or posters on public display, or in any audiovisual medium] shall be punishable [by a fine of 45,000 euros].

Defamatory statements about the private lives of the above persons shall be punishable under section 32 below."

Section 41

"The following persons shall be liable, as principals, in the following order, to penalties for offences committed via the press:

1. Publishing directors and publishers, irrespective of their occupation or title ..."

16. Section 93-3 of the Audiovisual Communication Act of 29 July 1982 states:

"In the event of one of the offences provided for in Chapter IV of the Freedom of the Press Act of 29 July 1881 being committed by an audiovisual operator, the publishing director ...shall be prosecuted as the principal offender provided that the content of the offending statement has been fixed prior to being communicated to the public.

...

When the ... publishing director is prosecuted, the maker of the statement shall be prosecuted as an accessory.

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 § 1 OF THE CONVENTION

17. The applicants complained that the criminal law had been extensively applied in that, when finding that "the content of the offending statement [had been] fixed prior to being communicated to the public" despite the fact that all the news bulletins and flashes concerned had been broadcast live, the domestic courts had based their finding of the second and third applicants' criminal responsibility on an interpretation by analogy of section 93-3 of the Audiovisual Communication Act (Law no. 82-652 of 29 July 1982 – "the 1982 Act"). They relied on Article 7 § 1 of the Convention, which provides:

"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."

18. The Government submitted that in the field of audiovisual communication the presumption of the publishing director's responsibility

established by section 93-3 of the 1982 Act applied only to cases in which the content of a defamatory statement had been fixed prior to its communication to the public, where "prior fixing" of the statement enabled the publishing director to check its content before it was broadcast. In the case of a live broadcast that presumption did not in principle apply. In accordance with the rules of ordinary law, the prosecution had to prove that the publishing director had personally participated in broadcasting the statement.

By ruling that there was "prior fixing" where a statement was broadcast repeatedly, the courts had merely interpreted that concept. They had by no means adopted reasoning to the accused's detriment by analogy. In the Government's submission, the applicants' argument amounted to equating the concept of "prior fixing" with that of "recording", only a prior "recording" being capable of enabling the publishing director to exercise his power of supervision. Yet in the present case the criminal courts had exonerated the second applicant, the publishing director of Radio France, of all responsibility for the first bulletin, broadcast live on France Info; the applicants' convictions had been based on the later bulletins only. In doing so the courts had made a reasonable interpretation of the concept of "prior fixing", adapting the case-law to the changing situation, through reasoning which was purely teleological and devoid of any analogy. The Government further submitted that the text of section 93-3 of the 1982 Act made no distinction between live broadcasts and pre-recorded programmes. It followed that the domestic courts had not extended the normal scope of that provision to cover a situation not provided for in the legislation. Parliament had deliberately used the concept of "prior fixing" rather than that of "prior recording", the former being broader than the latter. The word "*fixation*" in the French language referred to "what is determined in advance", which could therefore be checked. In short, the courts had not created a new charge or autonomous offence by analogy.

In addition, the Government submitted that the interpretation of the term "prior fixing" in the present case had been "consistent with the essence of the offence". Firstly, the intention had been to adapt the text to "new circumstances", as France Info, the first European radio station to broadcast news programmes round-the-clock, had not been set up until 1987, quite some time after the enactment of the 1982 Act. Secondly, it was a reasonable reflection of the way the offence had originally been framed, since it was based on the possibility of supervision by the publishing director whenever a statement was repeated, whether live-to-air or not.

Lastly, the Government said that the interpretation complained of had been foreseeable. They pointed out in that connection that, as a lawyer and media professional, the second applicant could not have been unaware of the provisions of section 93-3 of the 1982 Act; by taking appropriate advice

if necessary, he could reasonably have been expected to foresee how they would be interpreted.

19. The applicants replied that legal theorists writing in that specialist field had all equated the concept of a statement's "prior fixing", within the meaning of section 93-3 of the 1982 Act, with its "prior recording", and excluded live broadcasts from the scope of that provision. They referred in that connection to the following two publications: *Communication audiovisuelle*, J. Francillon and B. Delcros, *Juris-Classeur pénal, Annexe V° communication audiovisuelle*, vol. 2, 1990, §§ 47-48, and *Droit des médias*, C. Debbasch (ed.), 1999, no. 2509. By applying section 93-3 of the 1982 Act in the context of the repetition of a statement in a live broadcast, even though in such circumstances the presenter remained the sole judge of its content and the advisability of repeating or adapting it, the domestic courts had departed from the legislature's intentions, as confirmed by the prevailing legal theory, and created "by analogy" a new category of offence.

20. The Court reiterates that Article 7 § 1 of the Convention requires offences to be "clearly defined in law". That condition 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 liable (see, for example, *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 22, § 52).

It is true that, in the context of audiovisual communication, the words "fixed prior to being communicated to the public" may seem to indicate that a publishing director cannot be convicted of an offence under section 93-3 of the 1982 Act unless the offending statement has been recorded before being broadcast. Thus construed, section 93-3 cannot form the basis for the successful prosecution of a publishing director where the "statement" has been broadcast live. The Court notes moreover that the Government have not supplied any evidence that before the applicants' trial the domestic courts had applied section 93-3 in circumstances similar to those of the present case.

Nevertheless, Article 7 of the Convention does not outlaw 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 *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II).

The Court notes that the presumption of the publishing director's responsibility established by section 93-3 of the 1982 Act is the corollary of the latter's duty to check the content of the "statements" put out through the medium for which he works. The reason, therefore, why the publishing director's responsibility is engaged only where the content of the offending "statement" has been "fixed" prior to being broadcast is that he is deemed

on account of that "prior fixing" to have been placed in a position to apprise himself of its content and check it before it is broadcast.

Moreover, it is clear – and the parties did not disagree on this point – that there has been "prior fixing" where the offending "statement" has been recorded with a view to its being broadcast, and that, conversely, there has been no prior fixing where such a statement has been broadcast live. In the Court's opinion, the facts of the present case fall halfway between recording and live broadcasting. On the one hand, the offending statement was not recorded; on the other, in view of the way France Info operated, it was intended to be repeated live-to-air at regular intervals. As there had been no "prior fixing", the criminal courts absolved the publishing director of all responsibility in respect of the first of the bulletins broadcast on France Info; on the other hand, they held that that first broadcast had constituted a "prior fixing" of the statement's content as regards subsequent broadcasts. They therefore ruled that from the second broadcast onwards the publishing director could be considered to have been placed in a position to check its content beforehand. The Court considers that, in the particular context of the way France Info operated, that interpretation of the concept "prior fixing" was consistent with the essence of the offence concerned and "reasonably foreseeable".

There has accordingly been no violation of Article 7 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 2 OF THE CONVENTION

21. The applicants asserted that section 93-3 of the 1982 Act established an irrebuttable presumption of the publishing director's responsibility, which was automatically and necessarily inferred from his function, notwithstanding any evidence to the contrary he might seek to adduce, relating to his conduct or the conditions in which information was published or broadcast. The domestic courts had thus inferred the second applicant's criminal responsibility from the existence of a repeated statement and his status as publishing director. In the applicants' submission, that had infringed the right to the presumption of innocence, guaranteed by Article 6 § 2 of the Convention in the following terms:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The applicants further complained that, as interpreted by the domestic courts, section 93-3 of the 1982 Act entailed a breach of equality of arms in that the publishing director's guilt was automatically inferred from the mere objective fact that a statement had been broadcast repeatedly, the prosecution not being required to prove that he intended to commit the offence, whereas the defendant was deprived of the possibility of

establishing facts "capable of exonerating him". They relied on Article 6 § 1 of the Convention, which provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

22. The Government submitted that section 93-3 of the 1982 Act did not establish an irrebuttable presumption of the publishing director's responsibility. Firstly, the prosecution was still obliged to prove the objective element of the offence, namely the broadcasting of a defamatory statement; it was merely absolved from the obligation to prove the mental element. Secondly, defendants could still deny the facts or challenge their classification. Thirdly, once the facts had been established, the presumption did not prevent defendants, whether principals or accessories, from presenting a defence. On this last point, the Government admitted that by section 35 of the 1881 Act defendants could not seek to establish proof of the truth of the defamatory statement where, as in the present case, the events concerned had taken place more than ten years before. However, they could plead good faith, which was a valid defence. The second and third applicants had indeed put forward that defence in the criminal courts, and the fact that their arguments were not accepted did not mean that proof of good faith was impossible. It was also open to defendants to plead compliance with a statutory requirement (*l'ordre de la loi*) or necessity (*force majeure*), both defences under ordinary law. The Government argued on that basis that the second applicant could have put forward legal arguments other than a claim not to be the publishing director as an effective defence.

The Government further submitted that the Convention did not prohibit presumptions of fact or of law provided that they were kept within reasonable limits which took into account the gravity of what was at stake and maintained the rights of the defence. The presumption in section 93-3 of the 1982 Act respected such limits. Firstly, it came into play only with regard to the offences defined in Chapter IV of the 1881 Act, concerning the offences of defamation and insult. Secondly, the legal responsibility of each defendant was determined in strict proportion to the part he or she had actually played, with a legal distinction being drawn according to whether or not the content of the information had been fixed prior to its communication to the public. Where that was not the case, the publishing director, not having been in a position to intervene to prevent the broadcast, could not be prosecuted as a principal. Lastly, the Government submitted that the way in which section 93-3 of the 1982 Act had been applied in the present case had been compatible with the presumption of innocence. Firstly, the domestic courts had fully established the defamatory nature of the statements broadcast. Secondly, they had clearly proved the existence of intent on the part of the third applicant, after meticulously examining the

documents and witness evidence he had adduced to prove his good faith. Thirdly, the second applicant's conviction as principal did not infringe the "principle of individual responsibility", since the criminal responsibility contemplated in section 93-3 arose not from producing the statement but from publishing or broadcasting it, which formed part of the responsibilities of the publishing director; above all, in the present case, by emphasising that "a rolling news bulletin may be monitored and controlled ... by making the necessary arrangements to that effect", the Paris Court of Appeal had in a sense established intent on the part of the second applicant even though in law it did not actually need to do so in order to find him guilty.

23. The applicants contested the Government's argument that a publishing director could escape liability by proving his good faith; the established case-law – which moreover drew the consequences of the strict liability provided for in section 93-3 of the 1982 Act – proved the opposite (they referred in that connection to the following judgments of the Court of Cassation, Criminal Division: *Cass. crim.*, 22 December 1976, *Bulletin* no. 379, p. 961, and *Cass. crim.*, 8 July 1986, *Bulletin* no. 233, p. 596). The presumption of responsibility established by that section was indeed therefore irrebuttable. According to the Court's case-law, Article 6 § 2 of the Convention required States to keep presumptions of fact and of law within reasonable limits which took into account the gravity of what was at stake and maintained the rights of the defence; but there was no criminal policy consideration of any particular gravity which militated in favour of the presumption in issue in the present case. Moreover, although the applicants did not deny that necessity was a defence under ordinary law capable of qualifying the irrebuttable character of a presumption of responsibility, they could not see what might constitute a case of *force majeure* excluding the publishing director's responsibility under section 93-3 of the 1982 Act.

24. The Court points out at the outset that the complaint under Article 6 § 1 overlaps with the complaint under Article 6 § 2, so that it is not necessary to examine the facts complained of from the standpoint of the first paragraph of Article 6 taken alone (see *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, p. 18, § 31).

The Court next observes that the Convention does not prohibit presumptions of fact or of law in criminal cases. Nevertheless, it requires States "to remain within certain limits in this respect": they must "confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence" (see *Salabiaku*, cited above, pp. 15-16, § 28).

The result of section 93-3 of the 1982 Act and section 29 of the 1881 Act is that in the field of audiovisual communication a publishing director is criminally responsible – as principal – for any defamatory statement made on air, where the content of that statement has been "fixed prior to being communicated to the public". In such a case, as soon as the statement's

defamatory character has been established, the offence is made out as regards the publishing director – the maker of the statement being prosecuted as an accessory – without it being necessary to prove *mens rea* on his part. As pointed out above, section 93-3 is intended to punish a publishing director who has failed to perform his duty of overseeing the content of remarks made on air in those cases where he would have been able to exercise such oversight before they were broadcast.

A number of elements have to be proved before the publishing director can be convicted: he must have the status of publishing director; the offending statement must have been broadcast and must be defamatory; and the content of the statement must have been fixed before it was broadcast. The Government have stated that where there has been no "prior fixing" responsibility is no longer presumed and the rules of ordinary law apply instead, so that the prosecution has to prove that the publishing director had a personal hand in the broadcasting of the offending statement.

The Court takes the view that the difficulty in the present case stems from the fact that this presumption is combined with another, namely that defamatory remarks are presumed to have been made in bad faith. However, this second presumption is not irrebuttable; although defendants cannot seek to establish the truth of defamatory statements where, as in the present case, the events concerned have taken place more than ten years before (section 35 of the 1881 Act), they may overturn that presumption by establishing their good faith. Thus, as the Paris Court of Appeal observed in its judgment of 17 June 1998, the applicants could have established the third applicant's good faith by proving that the allegations complained of had been made in pursuit of a legitimate aim, without any personal animosity, after a serious investigation and in temperate language.

Therefore, as the Government submitted, a publishing director has a valid defence if he can establish the good faith of the person who made the offending remarks or prove that their content was not fixed before being broadcast; moreover, the applicants raised such arguments in the domestic courts.

That being the case, and having regard to the importance of what was at stake – effectively preventing defamatory or insulting allegations and imputations being disseminated through the media by requiring publishing directors to exercise prior supervision – the Court considers that the presumption of responsibility established by section 93-3 of the 1982 Act remains within the requisite "reasonable limits". Noting in addition that the domestic courts examined with the greatest attention the applicants' arguments relating to the third applicant's good faith and their defence that the content of the offending statement had not been fixed in advance, the Court concludes that in the present case they did not apply section 93-3 of the 1982 Act in a way which infringed the presumption of innocence.

There has accordingly been no violation of Article 6 § 2 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

A. The parties' submissions

25. The applicants complained of an infringement of their right to the freedom to "impart information" as a result of the penalties and measures imposed on them by the domestic courts. They relied on Article 10 of the Convention, which provides:

> "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."

26. The Government accepted that there had been "interference by public authority" with the applicants' exercise of their freedom of expression. They contended, however, that that interference satisfied the requirements of the second paragraph of Article 10.

In the first place, they submitted that it was "prescribed by law". The criminal convictions of the second and third applicants had been founded on sections 29 and 31 of the 1881 Act and section 93-3 of the 1982 Act. The order requiring the applicant company to broadcast an announcement by way of reparation for the damage caused to the civil party had been founded on Article 1382 of the Civil Code, relating to criminal liability, and on established case-law to the effect that the trial courts alone are empowered to decide what form reparation should take, being free to choose reparation in kind or pecuniary reparation (the Government referred to the following judgments: *Cass.*, First Civil Division, 14 May 1962, *Bulletin* no. 241; *Cass.*, Second Civil Division, 17 February 1972, *Bulletin civ. II* no. 50; *Cass. crim.*, 9 April 1976, *Bulletin* no. 108; *Cass.*, Third Civil Division, 9 December 1981, *Bulletin civ. II* no. 209; *Cass.*, Second Civil Division, 11 October 1989, *Bulletin* no. 177; *Cass. soc.*, 25 January 1989, *Bulletin civ.* no. 64; *Cass. com.*, 5 December 1989). The Government submitted that this type of measure had already been used by the courts as a means of

reparation in the context of audiovisual communication, citing – though without providing either a copy or a reference – a judgment given by the Paris *tribunal de grande instance* on 10 June 1983 requiring a television channel to broadcast an announcement.

The Government went on to say that the interference complained of had been intended to punish and provide a remedy for conduct which had damaged the reputation and honour of a person vested with public authority. They argued on that basis that it pursued two of the legitimate aims listed in the second paragraph of Article 10, namely protection of the reputation or rights of others and prevention of disorder.

Lastly, the Government submitted that, in respect of the three applicants, the interference in issue had been "necessary in a democratic society", being based on grounds which were "sufficient and relevant" as regards the aims pursued and proportionate to those aims. On the first point, the Government said that the domestic courts had conducted a detailed examination of the case and the parties' arguments before finding that the information broadcast on France Info had damaged Mr Junot's honour and good name. In particular, the order requiring Radio France to broadcast an announcement by way of civil reparation had appropriately reflected the circumstances of the case. On the second point, the Government argued that the conviction of the second and third applicants had been proportionate on account of the particular gravity of the damage to Mr Junot's honour and good name – the bulletin complained of had been broadcast a large number of times on a station with a very large audience, it had incautiously referred without comment to unverified facts and it had suggested a parallel with the Papon case (which betrayed a lack of impartiality) – and of the moderate nature of the fines and the awards of damages. Nor was the order against Radio France disproportionate: the domestic courts had limited its obligation to the requirement that it broadcast the announcement every two hours for twenty-four hours (a total of twelve times, as compared with around sixty repetitions of the offending statement), and the content of the announcement had responded point by point to the defamatory imputations broadcast on France Info. The applicants' argument that this measure had unduly reduced the editorial space of France Info was invalid, since news was broadcast round the clock on that channel. Moreover, since the operation of France Info depended on public funds, it could not be affected by the broadcasting of a dozen announcements over a period of twenty-four hours.

27. The applicants did not accept that the order requiring Radio France to broadcast announcements about the conviction of the second and third applicants had been "prescribed by law". They pointed out that it followed from the fact that the trial courts alone had power to decide what form reparation should take that the Court of Cassation did not have jurisdiction to review such decisions, so that the terms of an order like the one in issue were completely unforeseeable. They further submitted that the effect of

this had been to allocate air-time which should have been used to inform the public for the sole benefit of Mr Junot.

They observed in particular that in *Thoma v. Luxembourg* (no. 38432/97, § 64, ECHR 2001-III; also cited by the Government) the Court had held that 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 was not reconcilable with the press's role of providing information on current events, opinions and ideas.

They submitted that the bulletins broadcast on France Info pointed out that the information they contained came from the weekly magazine *Le Point*, and that from 11.04 a.m. on 1 February 1997 onwards they mentioned the fact that Mr Junot denied the accusations against him. The question of the role of the French State in the deportation operations during the Occupation was a question of general interest to society which lay "at the heart of contemporary debate". The bulletins complained of had not been intended to damage Mr Junot's reputation but to shed further light on a period of history of interest to the public. The applicants also emphasised the fact that the article published in *Le Point* to which the bulletins referred had been based on serious documentary material made up of official correspondence written by Mr Junot "which revealed his participation in operations to maintain order around the camps at the time when the deportation transports were being put together". In those circumstances, they submitted, "the channel had no obligation to 'distance itself' from the article in *Le Point*".

B. The Court's assessment

28. The Court notes that the French courts convicted the second applicant (the applicant company's publishing director) and the third applicant (a journalist working for France Info), as principal and accessory respectively, of defaming a civil servant in news bulletins broadcast on France Info, fined them FRF 20,000 each and ordered them to pay FRF 50,000, jointly, in damages. The applicant company was ordered, by way of civil reparation, to broadcast a number of times on France Info an announcement about the judgment. It is therefore quite obvious that the applicants suffered "interference by public authority" with the exercise of the right guaranteed by Article 10; that point, moreover, is not in dispute between the parties.

Such interference will breach the Convention if it fails to satisfy the criteria set out in the second paragraph of Article 10. The Court must therefore determine whether it was "prescribed by law", whether it pursued one or more of the legitimate aims listed in that paragraph and whether it was "necessary in a democratic society" in order to achieve that aim or aims.

1. "Prescribed by law"

29. The parties agreed that the interference was "prescribed by law" as regards the criminal penalties imposed on the second and third applicants and the order that they pay damages.

30. On the other hand, the applicants submitted that the opposite was true of the order requiring the applicant company, by way of civil reparation, to broadcast on France Info an announcement about the conviction of the second and third applicants. As stated above, they argued that it followed from the fact that the trial courts alone had power to decide what form reparation should take that the Court of Cassation did not have jurisdiction to review such decisions, so that the terms of an order like the one in issue were completely unforeseeable.

The Court does not agree. It considers that, as its case-law requires (see, for example, *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, pp. 71 et seq., §§ 37 et seq.), that measure had a basis in domestic law and was foreseeable. Firstly, the applicant company's civil liability for defamatory remarks broadcast on the radio channels it runs is founded on Article 1382 of the Civil Code, which provides: "Any act committed by a person that causes damage to another shall render the person through whose fault the damage was caused liable to make reparation for it". Secondly, it is established French case-law that the trial courts alone have power to determine the manner in which damage is to be made good and that they may order reparation in kind. On this last point, although the Government have not established that the courts regularly order measures of this type in cases involving audiovisual communication – they merely mentioned a first-instance judgment but did not provide a copy or a reference – the publication of announcements about judicial decisions is nevertheless, in France, one of the usual forms of reparation for damage caused through the medium of the press (see, *mutatis mutandis*, *Prisma Presse v. France* (dec.), no. 71612/01, 1 July 2003).

In addition, the Court has previously held that "national laws concerning the calculation of damages for injury to reputation must make allowance for an open-ended variety of factual situations" and that accordingly the words "prescribed by law" do not require that a party to judicial proceedings should be able to "anticipate with any degree of certainty the quantum of damages that could be awarded in his particular case" (see *Tolstoy Miloslavsky*, cited above, p. 73, § 41). It considers that a similar approach may be followed, *mutatis mutandis*, where reparation in kind is concerned.

In short, the order requiring the applicant company, by way of civil reparation, to broadcast on France Info an announcement about the conviction of the second and third applicants was "prescribed by law".

2. Legitimate aim

31. The Court considers that the interference undoubtedly pursued one of the aims listed in Article 10 § 2, namely "protection of the reputation or rights of others" (see, among other authorities, *Tolstoy Miloslavsky*, cited above, p. 74, § 45); in any event, the parties did not disagree on that point.

The Court would observe that the right to protection of one's reputation is of course one of the rights guaranteed by Article 8 of the Convention, as one element of the right to respect for private life.

3. "Necessary in a democratic society"

32. The Court wishes to reiterate in the first place the fundamental principles established by its case-law (see, among many other authorities, *Hertel v. Switzerland,* judgment of 25 August 1998, *Reports of Judgments and Decisions* 1998-VI, pp. 2329-30, § 46).

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". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

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.

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 the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole 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". In doing so, 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 relied on an acceptable assessment of the relevant facts.

33. The Court has also emphasised on numerous occasions the essential role played by the press in a democratic society. It has pointed out that, although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, and that not only does the press have the task of imparting such information and ideas, the public also has a right to receive them (see among many other authorities, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, §§ 59 and 62, ECHR 1999-III, and *Colombani and Others v. France*, no. 51279/99, § 55, ECHR 2002-V).

The national authorities' margin of appreciation is thus circumscribed by the interest of democratic society in enabling the press to play its vital role of "public watchdog" (see, for example, Bladet Tromsø *and Stensaas*, cited above, § 59).

Although formulated in the first instance for the written press, these principles are applicable to the audiovisual media (see in particular *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, pp. 23-24, § 31).

34. In the present case, the applicants were convicted by the French courts on account of the broadcasting on France Info on 31 January and 1 February 1997 of a number of news bulletins reporting information published in the weekly magazine *Le Point* to the effect that Mr Junot, when Deputy Prefect at Pithiviers from September 1942 to August 1943, had supervised the deportation of a thousand French and foreign Jews.

There is no doubt that the attitude of senior French administrative officers during the Occupation is a question commanding the highest public interest and that the broadcasting of information about it forms an integral part of the task allotted to the media in a democratic society. Moreover, the information published in *Le Point* and the news bulletins complained of was a contribution to a public debate which was already going on at the material time and was focused on the trial of Maurice Papon, the chief executive officer at the prefecture of Gironde from May 1942 to August 1944, for aiding and abetting arbitrary arrests, false imprisonment, murders and attempted murders all constituting crimes against humanity.

Since the freedom of the press was thus in issue, the French authorities had only a limited margin of appreciation in determining whether there was a "pressing social need" to take the measures in question against the applicants. Consequently, the Court will examine in scrupulous detail the proportionality of these measures in relation to the legitimate aim pursued.

35. The Court observes that the original version of the offending statement was worded as follows:

> "According to the weekly magazine *Le Point*, a former deputy mayor of Paris supervised the deportation of a thousand French and foreign Jews in 1942. Michel Junot, now aged 80, was Deputy Prefect of Pithiviers at the time. He admits that he organised the departure of a transport of deportees to Drancy. Michel Junot, whom General de Gaulle removed from office at the end of the war, claims to have been in the Resistance and subsequently rose through the ranks of the civil service. In his defence, the former deputy mayor of Paris between 1977 and 1995 maintains, like Maurice Papon, that he knew nothing of the fate of the deported Jews and says that the discreet veil of history should be drawn over the crimes of those days."

This item was broadcast for the first time at 5 p.m. on 31 January 1997 and repeated by the third applicant and other journalists sixty-two times between 6 p.m. on 31 January and 11.04 a.m. on 1 February, either in the same form or with slightly different wording, but in each case it was pointed out that the information concerned had been published in *Le Point*. From 11 p.m. onwards a number of bulletins and newsflashes included the information that, "unlike Maurice Papon", Mr Junot had not ordered anyone to be arrested, interned or transferred to Drancy, sometimes adding that he had only been responsible for "maintaining order". Beginning at 5.45 a.m. on 1 February, a number of newsflashes and bulletins (broadcast at 6.45, 7, 7.15, 8, 8.15, 8.23, 8.30, 8.45 and 9.33 a.m.) mentioned that Mr Junot denied the accusations in *Le Point.* According to the applicants, that detail was systematically included after 11.04 a.m.

36. In its judgment of 17 June 1998, the Paris Court of Appeal held that in imputing to Mr Junot supervision of the deportation of a thousand Jews and the organisation of their dispatching to Drancy, in comparing his situation to that of Maurice Papon – who had just been committed for trial in the Assize Court – and in insinuating that he had not been a member of the Resistance, the above bulletin had damaged his honour and dignity and was consequently defamatory. The Court of Appeal went on to say: "Calumnious imputations are deemed to be in bad faith unless it can be established that they were made in pursuit of a legitimate aim, without any personal animosity, after a serious investigation and in temperate language", and found that, although the first two of those conditions had been satisfied, the same was not true of the other two. As regards the third condition, the Court of Appeal found that the third applicant had broadcast the bulletin complained of when *Le Point* had only just come out, had used as his only sources three press agency dispatches reporting the article in that publication – a fact which did not show that he had checked the information – and a television programme in which Mr Junot had taken part, and had gratuitously asserted that Mr Junot admitted that his conduct had been blameworthy. As regards the fourth condition, the Court of Appeal held that the imputations contained in the information broadcast had been disproportionate in relation to the objective material which the applicants claimed to have had at their disposal. It considered that the use of the conditional tense and "the mention – very late in the day – of Mr Junot's

denials" did not attenuate "the gravity of the allegations made in dispatches broadcast several dozen times", and that the content of the documents quoted in *Le Point* did not justify the construction that had been placed upon them in the news bulletins. On that point, it said: "All these texts portray an official dedicated to fulfilling his functions of maintaining public order and defending the political interests of the government. They do not support, without overstating the case, an assertion that Mr Junot supervised the camps or played a role in the deportation of the Jews."

37. The Court reiterates that by reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, 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, for example, Bladet Tromsø *and Stensaas*, cited above, § 65, and *Colombani and Others*, cited above, § 65). Nevertheless, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see, in particular, Bladet Tromsø *and Stensaas*, cited above, § 59). Moreover, 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).

The bulletins complained of reported on a detailed article, backed up by documentary research, and an interview, to be published in a weekly magazine whose standing as a serious publication is not open to doubt, and they systematically included an acknowledgment of that source. It cannot therefore be validly maintained that merely by broadcasting those bulletins the third applicant failed to discharge his obligation to act in good faith. In that respect the Court finds the Paris Court of Appeal's reasoning unpersuasive.

38. It notes, however, that the France Info bulletins contained an assertion that had not appeared in Le Point, namely that Mr Junot "admits that he organised the departure of a transport of deportees to Drancy". While it is true that the article stated that a transport of a thousand interned Jews had left Pithiviers on 20 September 1942 "under Junot's responsibility", there was nothing in it – any more than there was in the interview with Mr Junot – to indicate that he had admitted organising the departure of that transport.

The Court does not believe that this can be taken as an example of the "degree of exaggeration" or "provocation" which is permissible in the exercise of journalistic freedom. It considers that it amounted to the dissemination of incorrect information about the content of the article and the interview published in *Le Point*.

Although in other respects the bulletins, as was right and proper, went no further than repeating the information published by *Le Point* and systematically attributed it to that source, they summarised in that way in a few sentences a six-page feature article, highlighting its most striking parts. That gave the account of the conduct imputed to Mr Junot a categorical tone not present to the same extent in the original publication.

Admittedly, more nuanced wording, and eventually the information that Mr Junot denied the allegations, were gradually introduced into the text of the bulletins. However, by that time, in any event, the previous version had already been broadcast repeatedly.

39. It is not for the Court to substitute its views for those of the press as to what technique of reporting should be adopted by journalists; Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Jersild*, cited above, pp. 23-24, § 31).

It considers, however, that in the present case the extreme gravity of the conduct imputed to Mr Junot and the fact that the France Info bulletin was intended to be broadcast repeatedly – as indeed it was – required the third applicant to exercise the utmost care and particular moderation.

That was all the more relevant in the Court's opinion because the bulletin was put out over the radio on a channel which could be received throughout French territory. In that connection, it reiterates that in considering the "duties and responsibilities" of a journalist, the potential impact of the medium concerned is an important factor, and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media (ibid.).

Within those limits, the Court considers that the reasons given by the Court of Appeal for its ruling that Mr Junot's honour and dignity had been damaged and its judgment against the applicants were "relevant and sufficient".

40. As regards the "proportionality" of the interference complained of, the Court notes that the second and third applicants were found guilty of an offence and ordered to pay a fine, so in that respect alone the measures imposed on them were already relatively serious (see, *mutatis mutandis*, *Lehideux and Isorni v. France*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2887, § 57). However, in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued.

That being so, the Court notes that the amount of the fine imposed on the second and third applicants was moderate: FRF 20,000 each, equivalent to 3,048.98 euros (EUR). The same is true of the damages they were jointly ordered to pay Mr Junot: FRF 50,000, or EUR 7,622.45.

The applicant company was ordered, by way of civil reparation, to broadcast on France Info every two hours for twenty-four hours an announcement about the conviction of the second and third applicants. The Court considers that in so doing the domestic courts quite clearly intended to find the appropriate level of reparation for the damage caused to Mr Junot by the defamation that they had found him to have suffered. Be that as it may, the Court considers that the obligation to broadcast a 118-word announcement twelve times formed only a moderate restriction on France Info's editorial freedom.

Having regard to the extreme gravity of the conduct imputed to Mr Junot and the fact that the bulletin in question was, in its successive versions, broadcast sixty-two times by a radio station which could be received throughout French territory, the Court considers that the measures taken against the applicants were not disproportionate to the legitimate aim pursued.

41. In the light of the preceding considerations, the interference complained of may be regarded as "necessary in a democratic society". There has accordingly been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 7 § 1 of the Convention;

2. *Holds* that there has been no violation of Article 6 § 2 of the Convention;

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

Done in French, and notified in writing on 30 March 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

A.B. BAKA
President