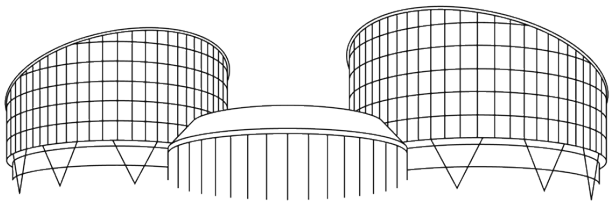

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF RTBF v. BELGIUM

(Application no. 50084/06)

JUDGMENT
[Extracts]

STRASBOURG

29 March 2011

FINAL

15/09/2011

This judgment has become final under Article 44 § 2 of the Convention.

In the case of RTBF v. Belgium,

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

Danutė Jočienė, *President*,
Françoise Tulkens,
Ireneu Cabral Barreto,
Dragoljub Popović,
Giorgio Malinverni,
Işıl Karakaş,
Guido Raimondi, *judges*,
and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 8 March 2011,

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

PROCEDURE

1. The case originated in an application (no. 50084/06) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Belgian autonomous public corporation, *Radio-télévision belge de la communauté française* (RTBF – "the applicant company"), on 30 November 2006.

2. The applicant company was represented by Mr J. Englebert, a lawyer practising in Brussels. The Belgian Government ("the Government") were represented by their Agent, Mr M. Tysebaert, Senior Adviser, Federal Justice Department.

3. The applicant company alleged, in particular, a violation of its right of access to a court under Article 6 of the Convention, and a violation of its right to freedom of expression and freedom of the press and its right to impart information under Article 10.

4. On 16 May 2008 the Vice-President of the Second Section decided to give notice of the application to the Government. It was also decided that the Chamber would examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company, a public broadcasting corporation serving the French Community in Belgium, produced a long-running monthly news and investigation programme called *Au nom de la loi* ("In the name of the law"), focusing in particular on legal matters in the broad sense of the term. The programme was described as follows on the RTBF website:

> "Right from the start, *Au nom de la loi* sought to operate on the basis of two main principles: standing up for the underdog, so that ordinary citizens were always given a say, and looking for the hidden agenda, so that its journalists' investigative skills came to the fore."

6. In 1999 Dr D.B., a specialist neurosurgeon, ran a neurosurgery practice together with a colleague, including an on-call service at Jolimont Hospital. A number of Belgian newspapers, both regional (*La Nouvelle Gazette* in December 2000 and May 2001) and national (*Le Soir* in December 2000 and *La Dernière Heure* in four articles between 7 and 28 December 2000), reported on complaints by various patients who had been operated on by Dr D.B. Only two of the articles mentioned his name. According to information provided by the parties, none of the articles prompted any reaction on the doctor's part.

7. The applicant company subsequently decided to devote a segment of its programme *Au nom de la loi* to medical risks and, more generally, communication and information problems encountered by patients and the rights available to them, using as an example the complaints by Dr D.B.'s patients as reported in the press.

8. While preparing the programme, journalists from the applicant company contacted a number of patients, medical specialists, representatives of the Council of the Medical Association (*Ordre des médecins*) and Dr D.B. himself. The doctor refused to give a televised interview but agreed to answer questions from the applicant company's journalists during a series of meetings lasting several hours, in the presence of his lawyers. The programme was scheduled to be broadcast on 24 October 2001.

9. By a summons served on 3 October 2001, Dr D.B. instituted proceedings against the applicant company before the President of the Brussels Court of First Instance, as the judge responsible for hearing urgent applications. He sought an injunction preventing the broadcast of the programme in question, with a penalty of five million Belgian francs each time it was shown on a television channel. In the alternative, should the injunction not be granted immediately, he sought an order requiring a videotape of the programme to be made available for advance viewing.

10. On 24 October 2001 the President of the Court of First Instance granted an interim injunction preventing the programme in question from being broadcast, with a penalty of two million Belgian francs each time it was shown on a Belgian television channel; the injunction was to remain in place until a decision was given on the merits, provided that the claimant himself instituted proceedings on the merits within one month of the injunction, failing which it would cease to have effect.

11. The injunction stated that there was no cause, on the face of it, to doubt the good faith and professionalism of the applicant company's journalists or the objective nature of their investigations, and that the claimant had a number of remedies by which to seek redress *ex post facto* for the damage sustained. It concluded that an application for prior restraint should not be granted unless it was established with certainty that the scheduled broadcast would damage the claimant's honour and reputation.

12. The injunction noted that it was not disputed that the complaints of the patients whom the applicant company intended to feature in the programme had yet to be considered by any court. As matters stood, no judicial proceedings had even been brought in respect of most of the complaints. Furthermore, professional confidentiality, which Dr D.B. had cited as his reason for refusing an interview, meant that he would be unable to give adequate answers, and his silence would at the very least raise doubts among the public as to his professional ability.

13. The injunction further pointed out that neurosurgery and the post-operative complications to which it might lead were complex matters and that, as a result, regard should be had to the difficulty in conveying an understanding of the subject to a non-specialist audience in a feature lasting well under an hour.

14. The court did not view the programme before giving its ruling. Dr D.B. had requested that a videotape of the programme be made available for viewing by the court's President, but the applicant company, in both its written and oral submissions, refused to accede to the request.

15. Dr D.B. arranged for the injunction of 24 October 2001 to be served the same day at 4.40 p.m.

16. In the event, the programme was not in fact cancelled, but the feature on the alleged medical errors by Dr D.B. was replaced by a discussion between a journalist and the programme's producer. During the discussion and the preceding news broadcast, the applicant company commented at length on the injunction of 24 October 2001, describing it as judicial censorship of press freedom. Dr D.B.'s name was mentioned several times. On 25 October 2001 Dr D.B. requested a right of reply, but the applicant company refused his request in a registered letter of 31 October 2001.

17. On 5 November 2001 the applicant company appealed to the Brussels Court of Appeal against the injunction.

18. On 6 November 2001 Dr D.B. instituted proceedings on the merits against the applicant company in the Brussels Court of First Instance, concerning the same subject matter as his urgent application. At the preliminary hearing the case was adjourned until further notice with a view to its preparation. By the date on which the application was lodged with the Court, the proceedings were still pending.

19. In an interlocutory judgment of 21 December 2001, the Court of Appeal, ruling on the appeal against the injunction, held that Article 25 of the Constitution was not applicable in the case as it related only to the print media and not the audio-visual media, and that neither Article 19 of the Constitution nor Article 10 of the Convention prohibited restrictions on the exercise of freedom of expression, provided that they had a basis in law. It observed that Article 22 of the Constitution and Article 8 of the Convention, which guaranteed the right to respect for private life, together with Articles 584 and 1039 of the Judicial Code, constituted the law in this regard and empowered the urgent-applications judge to order restrictions on freedom of expression as a preventive measure in "cases of flagrant violations of the rights of others". In the present case the press release announcing the programme had given reason to believe that the broadcast might damage Dr D.B.'s honour and reputation and interfere with his private life.

20. The Court of Appeal also ordered the resumption of the proceedings and directed the applicant company to produce the recording of the programme in issue.

21. It noted in that connection that "since prior restraints on freedom of expression entail considerable dangers, intervention by the urgent-applications judge will have ... democratic legitimacy only if it is limited to cases of flagrant violations of the rights of others", and held that the way in which the applicant company had "announced and described the programme in question indicated its intention to cause unnecessary harm to the honour, reputation and private life of [the respondent] through public disclosure of information that was inaccurate, unverified or lacking in objectivity".

22. A screening of the programme took place at a hearing on 10 January 2002. Besides the extracts from interviews with five patients who considered that they had reason to complain about Dr D.B., the programme comprised: an interview with a medical specialist, who explained the medical problem encountered and the anomalies found in the patients' medical records; Dr D.B.'s replies to these comments; extracts from interviews with specialists (a doctor belonging to the Council of the Medical Association, a lawyer specialising in medical law, and a Ministry of Health official); and, lastly, footage of a neurosurgical operation, with comments by another doctor.

23. In a second judgment, delivered on 22 March 2002, the Court of Appeal declared the applicant company's appeal unfounded. It held that

broadcasting the scheduled programme would be likely to damage Dr D.B.'s honour and reputation, thereby causing him serious non-pecuniary harm and, as a result, significant pecuniary loss. It concluded that the preventive measure of a ban had met a pressing social need, had been proportionate to the legitimate aim pursued and had been based on relevant and sufficient grounds.

24. More specifically, the Court of Appeal observed that the programme included footage of a series of interviews with patients on whom Dr D.B. had performed surgery, involving a total of five operations. The interviews were interspersed with explanatory comments: Dr Y.T. discussed the specific cases, the journalist who had spoken to Dr D.B. conveyed the answers he had received from him, a Medical Association representative discussed patients' rights and the difficulties faced by doctors working at several different sites in remaining available to see them, a lawyer explained patients' legal rights, and a senior adviser to the Minister of Health outlined the legislative initiatives being taken to ensure better protection for patients.

25. The Court of Appeal considered that the part of the programme concerning the five operations and their consequences was significantly more important than the part informing the audience about patients' rights *vis-à-vis* their doctor. It took the view that the clarification provided by the journalist during the programme, namely "[s]o, was there a medical error or not? ... We can only ask the question; we cannot give the answer", was unlikely to draw the audience's attention to the fact that there was no conclusive proof of a medical error. It further noted that there had been no mention of the experience of satisfied patients, and that there was no evidence that the five situations discussed were representative of the experiences of Dr D.B.'s patients as a whole. It observed that the applicant company had not referred to any other "serious" complaint registered by the Medical Errors Association (*Erreurs Médicales*), and held that the five experiences perceived as failures by the patients did not represent a sufficient number to justify targeting Dr D.B. in a programme relating to patients' rights in the event of medical errors or negligence. This number appeared all the more insufficient as only one lawsuit had been brought against the doctor concerned. In addition, the Court of Appeal noted that the operations referred to had been very different in nature, so that it was unreasonable to consider them all together, causing the audience to think that they revealed a common pattern of malpractice, which the average viewer, not being aware of the complexity of each individual case, might have tended to do.

26. Lastly, the Court of Appeal acknowledged that the programme in issue raised serious matters of public concern since it discussed the rights which patients could assert *vis-à-vis* their doctor, and since there was nothing to suggest that the interviewees had not given an accurate account of their own experiences. However, it considered that the applicant

company had lacked objectivity and had not taken into account the manner in which the average viewer was likely to perceive the information, and concluded that the applicant company could not rely on freedom of the press in arguing that the surgery performed by Dr D.B. deserved to be brought to the public's attention for consumer-protection purposes by giving dissatisfied patients the opportunity to air their views in a programme concerning patients' rights. In particular, it stated the following:

> "While it is clear that the programme in issue raises serious matters of public concern since it discusses the rights which patients may assert *vis-à-vis* their doctor, complaints by patients concerning the quality of treatment provided by a particular surgeon cannot be of interest to the community as a whole unless it can be established with sufficient certainty from the evidence available that the activities of the doctor in question entail serious health consequences.
>
> Quite apart from the fact that there do not, on the face of it, appear to be a significant number of complaints against [Dr D.B.], it has not been established that they are legitimate.
>
> There is nothing in the material produced to date by RTBF to support the conclusion that the interviewees have reasonable grounds to believe that they were not given the necessary or appropriate treatment, or that their accounts correspond to the objective truth; this is not disputed by RTBF.
>
> The brief report by the medical adviser on the complaints submitted to the Medical Errors Association, which contains more questions than answers, cannot serve as proof.
>
> No other investigative measures appear to have been taken or to have produced results.
>
> ...
>
> Although there is nothing to suggest that the interviewees did not give an accurate account of their own experiences as perceived by them, the credibility that can be attached to the patients' or their relatives' accounts is not sufficient, in the absence of conclusive evidence of medical errors or negligence, to justify putting these complaints together to form the main theme of a programme that places [Dr D.B.] in the spotlight and accuses him of professional incompetence and negligence in all respects of his practice (pre-operative counselling, quality of the operation, post-operative follow-up).
>
> It should also be noted that the programme lacks objectivity in that the journalist's comments are systematically aimed at reinforcing or provoking criticism of [Dr D.B.].
>
> ...
>
> Public confidence in a doctor's ability can be destroyed by a television programme that conveys the experiences of a few of his patients or their relatives where, as in the present case, all the experiences reported on are perceived negatively, the opinions expressed during the programme by medical specialists suggest that the surgery performed was unnecessary or inappropriate, there is no coverage of the experiences

> of satisfied patients and no mention of whether the surgery was of a delicate or routine nature, the degree of risk each operation entailed and the number of operations carried out by the doctor during the relevant period, and no information is provided as to the average failure rates of the types of surgery concerned.
>
> The damage that could potentially be caused by broadcasting the programme would be exacerbated by the fact that the programme is broadcast during prime time, it ... enjoys a serious reputation and, as a result, the audience will naturally be inclined to believe not only that the interviewees have objective reasons to complain about [Dr D.B.] but also that they represent a significant sample of his patients."

27. On 12 May 2003 the applicant company appealed on points of law against the two judgments of the Court of Appeal. It alleged a violation of Articles 8, 10 and 17 of the Convention and Articles 19, 22 and 25 of the Constitution.

28. In its first ground of appeal it contended that the judgment appealed against, in finding that the first paragraph of Article 25 of the Constitution did not apply to television programmes, had breached the provision in question. It submitted that at a time when radio and television reached a much wider audience than the print media, excluding the former from the scope of Article 25 of the Constitution amounted to depriving that Article of its essential element, namely protection of the freedom to impart ideas as opposed to the instrument used for that purpose. It added that, while it was true that freedom to express opinions was not absolute, it could not be subject to prior restraints but only to punitive measures. There should at the very least have been an opportunity to express the opinion, as the actual wording of Article 19 of the Constitution indicated ("when this freedom is used"). The applicant company inferred from this that Article 19 did not allow the authorities to subject the free expression of opinions on any subject to prior scrutiny, or to prohibit the broadcast of a television programme in advance.

29. The applicant company submitted a second ground of appeal in the alternative, should it be found that Article 19 of the Constitution did not prohibit all prior restraints on the exercise of freedom of expression and that Article 18, second paragraph, Article 19, second paragraph, and Articles 584 and 1039 of the Judicial Code, read in conjunction with Article 8 of the Convention and Article 22 of the Constitution, constituted a "law" within the meaning of Article 10 § 2 of the Convention. It argued that although Article 10 did not guarantee unrestricted freedom of expression, even with regard to media coverage of matters of serious public concern, and although the exercise of that freedom carried with it duties and responsibilities which were also applicable to the press and were liable to assume significance when there was a risk of undermining the reputation of private individuals or the rights of others, the mere interest – albeit undeniable – of the respondent in protecting his honour and professional reputation was not sufficient to prevail over the important public interest in preserving the

freedom of the press to impart information on matters of legitimate public concern.

30. In his submissions, the Advocate-General recommended that the Court of Appeal's judgments be quashed. Following a thorough analysis of the case-law of the Court of Cassation, the *Conseil d'Etat* and the Administrative Jurisdiction and Procedure Court (*Cour d'arbitrage*), he submitted that Article 19 of the Constitution guaranteed freedom of expression in general, which could not be hindered by prior censorship. He nevertheless pointed out that such freedom was not absolute and could be limited by general restrictions prescribed by law, provided that the imperative requirements of Article 10 § 2 of the Convention were satisfied. However, the wording of that Article made it impossible in his view to prohibit the dissemination of information on the basis of prior scrutiny, as such a measure would impair the very essence of freedom of expression. The Advocate-General observed that, in the particular context of freedom of expression, the courts' powers were limited by observance of the Constitution, which prohibited any preventive measure entailing prior restrictions on freedom of expression.

31. Nevertheless, the Advocate-General added that since freedom of expression was not an absolute right, it could not prevail over or negate respect for the other rights and freedoms safeguarded by the Constitution and international instruments. He noted in that connection that prior restrictions of a general nature could be framed in law, provided that they satisfied the requirements set forth in Article 10 § 2 of the Convention. Lastly, he expressed the view that Articles 1382 and 1383 of the Civil Code and Articles 18, 19, 584 and 1039 of the Judicial Code satisfied the accessibility and foreseeability requirements laid down by the Court.

32. In a judgment of 2 June 2006, the Court of Cassation dismissed the appeal on points of law.

33. Firstly, it upheld the Court of Appeal's judgment as regards the inapplicability of Article 25 of the Constitution, finding that television programmes were not forms of expression by means of printed matter. It held that the requirement for the applicant company to produce the recording of the programme in issue did not breach Article 19 of the Constitution since the urgent-applications judge had provisionally postponed the broadcast of the programme in order to ensure effective protection of the honour, reputation and private life of others. It further held that Articles 22 and 144 of the Constitution, Articles 8 and 10 of the Convention and Articles 584 and 1039 of the Judicial Code, which it had interpreted consistently, allowed the restrictions provided for in Article 10 § 2 of the Convention and were sufficiently precise to enable anyone, if need be with appropriate legal advice, to foresee the legal consequences of his or her acts.

34. In particular, the Court of Cassation held as follows:

"Under Article 144 of the Constitution, the judiciary is competent both to prevent and to redress unlawful infringements of civil rights.

Similarly, the judge dealing with urgent applications, as in the present case, is empowered under Articles 584 and 1039 of the Judicial Code to take any provisional measures in respect of the person responsible for such an infringement that may be necessary to protect personal rights if there are prima facie legal grounds for doing so.

In particular, where there is a serious threat of a violation of a right, the urgent-applications judge is authorised by Article 18 § 2 of the Judicial Code to order measures aimed at preventing such a violation."

35. Secondly, the Court of Cassation held as follows in relation to the objection that the applicant company's second ground of appeal was inadmissible in that it had failed to allege a violation of Article 584 of the Judicial Code:

"In upholding the respondent's claim, the impugned judgment of 22 March 2002 finds that the respondent 'has made out ... a sufficient prima facie case for obtaining an interim injunction prohibiting the broadcast of the programme in issue, which clearly and needlessly undermines his honour and reputation'.

The urgent-applications judge may order interim measures if there are prima facie legal grounds for doing so.

In merely examining the parties' prima facie rights without applying legal rules that could not form a reasonable basis for the interim measures ordered by him, the judge has not overstepped the limits of his powers.

The appellant cannot challenge the Court of Appeal's provisional assessment unless it alleges a violation of Article 584 of the Judicial Code, which it has not done."

II. RELEVANT DOMESTIC LEGISLATION AND CASE-LAW

A. The relevant provisions

1. The Constitution

36. Articles 19, 22, 25 (former Article 18) and 144 of the Constitution are worded as follows:

Article 19

"Freedom of worship, its public practice and freedom to manifest one's opinions on all matters are guaranteed, but offences committed when this freedom is used may be punished."

Article 22

"Everyone has the right to respect for his private and family life, except in the cases and conditions provided for by law. ..."

Article 25

"The press is free; censorship can never be introduced; no payment of security can be demanded of authors, publishers or printers.

Where the author is known and resident in Belgium, neither the publisher, nor the printer nor the distributor may be prosecuted."

Article 144

"Disputes about civil rights fall exclusively within the competence of the courts."

2. The Civil Code

37. The relevant provisions of the Civil Code are worded as follows:

Article 1382

"Any act that causes damage to another shall render the person through whose fault the damage was caused liable to make reparation for it."

Article 1383

"Everyone shall be liable for the damage he has caused not only by his own acts, but also by his negligence or carelessness."

3. The Judicial Code

38. Articles 18, 19, 584, 1039 and 1080 of the Judicial Code provide as follows:

Article 18

"The interest in bringing an action must be vested and present.

An action may be allowed where it has been brought, even for declaratory purposes, with a view to preventing a violation of a right that is seriously threatened."

Article 19

"A judgment is final when it exhausts the jurisdiction of the court in respect of a question in dispute, save for appeals provided for by law.

The judge may, before passing judgment, order a preliminary measure aimed at investigating the application or settling the parties' situation on an interim basis."

Article 584

"The President of the Court of First Instance shall, in respect of all matters except those which the law excludes from the jurisdiction of the courts of justice, give a provisional ruling in cases which he recognises as being urgent.

...

The matter shall be brought before the President by means of an urgent application or, in cases of absolute necessity, an *ex parte* application.

He may, among other things:

(1) appoint administrators;

(2) order certificates or expert reports for any purpose, even including the assessment of damage and the investigation of its causes;

(3) order any measures that are necessary for the protection of the rights of those who are unable to ensure such protection themselves, including the sale of movable property that has been neglected or abandoned;

(4) order the examination of one or more witnesses where one of the parties can show that this is of prima facie interest, even with a view to future litigation, provided that it is established that any delay in the hearing will necessarily prompt concerns that it will not be possible to take the evidence at a later stage."

Article 1039

"Orders for interim measures shall be made without prejudice to the merits. They shall be enforceable immediately, notwithstanding an application to set aside or an appeal, and without payment of a security, if the court has not ordered such payment.

If a party not appearing in court applies to have the order set aside, it shall not be entitled to appeal against the order made *in absentia*."

Article 1080

"The appeal on points of law, of which both the original and a copy must be signed by a lawyer authorised to practise in the Court of Cassation, shall include the appellant's grounds of appeal and submissions, together with an indication of the statutory provisions alleged to have been breached; failure to include any of the above shall render the appeal null and void."

B. Domestic case-law

1. The Court of Cassation and the ordinary courts

39. In a judgment of 9 December 1981, the Court of Cassation held[1]:

> "Neither television programmes nor cable broadcasts are forms of expression by means of printed matter ... Article 18 of the Constitution [current Article 25] is therefore inapplicable to them."

40. The judgment further stated:

> "Although Article 14 [current Article 19] of the Constitution, like Article 10 [of the Convention], guarantees freedom to manifest one's opinions on any subject and accordingly does not allow the authorities to make the exercise of these freedoms subject to prior scrutiny of the opinions in question, these provisions nevertheless do not safeguard this freedom to an unlimited extent and, in particular, do not preclude the regulation, or prohibition, of commercial advertising in cable television broadcasts, where such regulation or prohibition is compatible with the requirements of supranational law.
>
> ...
>
> There is no basis in law for the ground of appeal to the effect that Articles [19] and [25] of the Constitution prohibit all censorship, prior authorisation or advance prohibition of the expression of a particular opinion and its dissemination by any means whatsoever (Article [19] of the Constitution) or, more specifically, through the press (Article [25] of the Constitution)."

41. In a judgment of 29 June 2000, the Court of Cassation ruled on the power of the ordinary courts to prevent, restrict or regulate the distribution of press publications[2]. It held that this power was, in principle, acceptable on the basis of Article 144 of the Constitution, Articles 584 and 1039 of the Judicial Code and Article 1382 of the Civil Code. In the case before it, the urgent-applications judge had issued an injunction – subsequently upheld both on an application by a third party to set it aside and on appeal – ordering the withdrawal from sale of all copies of the weekly magazine *Ciné Revue* which had published notes confiscated from a judge by the chairman of a parliamentary commission of inquiry on child disappearances; the Court of Cassation held that this did not amount to censorship because the publication had already been in circulation.

42. In an order of 17 November 1981, the President of the Brussels Court of First Instance held that "where individual freedoms are concerned, in particular freedom of expression, prohibition of all preventive measures is the rule[3]. Accordingly, the application for an injunction banning,

1. *Pasicrisie belge (Pas.)*, 1982, I, 482.
2. *Journal des Procès (Jour. Proc.)*, 2000, no. 398, p. 25.
3. Brussels Court of First Instance (CFI) (civil), urgent application, 17 November 1981, *Journal des tribunaux* (JT), 1982, p. 374.

postponing or altering a broadcast is unfounded". That approach was confirmed in an order made by the same judge on 3 May 1985[1].

43. Three years later, in an order of 16 November 1988, while not expressly referring to Article 10 of the Convention, the President of the Brussels Court of First Instance relied on Article 584 of Judicial Code to justify prohibiting part of a programme from being broadcast[2].

44. On 25 October 1989 an *ex parte* injunction prohibited a broadcast without giving any further details as to the legal basis for that decision[3]. In an order of 12 October 1990 the Brussels urgent-applications judge dismissed an application for an injunction banning a book, relying in particular on Articles 19 and 25 of the Constitution and Article 10 of the Convention while also noting that, depending on the circumstances, he would be entitled under Article 584 of the Judicial Code to take the necessary steps to prevent any irreparable damage[4]. Several weeks later, in an order of 18 December 1990[5], the urgent-applications judge held that Article 584 of the Judicial Code in itself constituted a "law" within the meaning of Article 10 of the Convention. Conversely, in an order of 22 August 1991 he held that there was no basis in Belgian law, as it currently stood, for the judiciary to take preventive measures restricting freedom of expression[6].

45. In an order of 12 February 1992, while acknowledging that "it is true that no preventive measures as such exist in Belgian law in this sphere" (television), the urgent-applications judge nevertheless held again that Article 584 of the Judicial Code formed a sufficient basis for preventive intervention on his part[7]. Conversely, in an order of 8 January 1993 the urgent-applications judge of the Brussels Court of First Instance held that, in accordance with Article 10 of the Convention, the Belgian legal system prohibited prior restraints[8].

46. However, six months later, on 16 June 1993, the same urgent-applications division ordered restrictions on a broadcast as a preventive measure[9].

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1. Brussels CFI (civil), urgent application, 3 May 1985, *Revue de jurisprudence de Liège, Mons et Bruxelles* (JLMB), 1988, p. 1216.
2. Brussels CFI (civil), urgent application, 16 November 1988, JLMB, 1988, p. 1443, *Cahiers de droit judiciaire (Cah. Dr. Jud.)*, 1991, p. 172.
3. Brussels CFI (civil), President, 25 October 1989, *Jour. Proc.*, 1989, no. 159, p. 30, *Cah. Dr. Jud.*, 1991, p. 174.
4. Brussels CFI (civil), 12 October 1990, *Jour. Proc.*, 1990, no. 181, p. 27, and note by F. Jongen; *Cah. Dr. Jud.*, 1991, p. 175.
5. Brussels CFI (civil), urgent application, 18 December 1990, *Cah. Dr. Jud.*, 1991, p. 176.
6. Brussels CFI (civil), urgent application, 22 August 1991, *Cah. Dr. Jud.*, 1991, p. 177.
7. Brussels CFI (civil), urgent application, 12 February 1992, unreported, *H.I.T.S./RTBF*, *Rôle des référés* (RR) no. 53.001.
8. Brussels CFI (civil), urgent application, 8 January 1993, unreported, *Moortgat et Cts/BRTN*, RR nos. 55.063 and 55.066.

47. On 12 September 1994 the urgent-applications judge held that Article 584 of the Judicial Code and Article 1382 of the Civil Code, read in conjunction, formed a sufficiently precise legal basis for the purposes of Article 10 of the Convention[1] . On 16 November 1994 the President of the Brussels Court of First Instance issued an *ex parte* injunction prohibiting a broadcast on the basis of Article 584 of the Judicial Code[2] .

48. Two months later, in an order of 24 January 1995, the President of the Brussels Court of First Instance held, in complete contradiction to his previous decisions, that "as rightly argued by the defendant, Article 584 of the Judicial Code is a general provision conferring jurisdiction", which could not justify empowering the urgent-applications judge to take the measure sought, and that "the applicant is mistaken in basing ... the application on Article 1382 of the Civil Code, which concerns redress for existing damage"[3] . He nevertheless considered that Belgian law did indeed contain a "law" within the meaning of Article 10 of the Convention, namely "the other individual rights and freedoms protected by law". In an order of 6 April 1995 the same judge confirmed his previous decision, while taking care once again to point out that "it is true that, as regards restrictions on freedom of expression, Belgian law provides only for measures entailing retrospective sanctions"[4].

49. Two weeks later, on 25 April 1995, the urgent-applications judge found that Article 22 of the Constitution, "by way of exception", constituted the "law" within the meaning of Article 10 of the Convention[5].

50. Ten days later, on 3 May 1995, the same judge held that "on account of the balance to be struck between respect for freedom of expression and respect for the other individual rights and freedoms protected by the law (in the broadest sense), these other rights and freedoms, being enshrined in 'law', could be taken to be accessible to the citizens concerned by them and framed in precise terms, and their safeguarding and hence protection could be deemed to constitute restrictions prescribed by law within the meaning of

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1. Brussels CFI (civil), urgent application, 16 June 1993, *Rechtskundig Weekblad (RW)*, 1993/1994, p. 619, with a note by J. Ceuleers, "Kan de rechter in kort geding preventief ingrijpen in een voorgenomen televisieuitzending?", p. 620.
2. Brussels CFI (civil), urgent application, 12 September 1994, unreported, *Chez Pascal et Cts/RTBF*, RR no. 94/1383/c.
3. Brussels CFI (civil), President, 16 November 1994, unreported, *Van Bockstael*, RR no. 94/10974/b. Following an application by a third party to set the injunction aside, it was lifted on the ground that there was no extreme urgency (Brussels CFI (civil), urgent application, 5 January 1995, unreported, *Van Bockstael/RTBF*, RR no. 94/1855/c).
4. Brussels CFI (civil), urgent application, 24 January 1995, unreported, *Van Bockstael/RTBF*, RR no. 95/73/c.
5. Brussels CFI (civil), urgent application, 6 April 1995, *Jour. Proc.*, no. 284, 26 May 1995, p. 23, and note by M. Hanotiau, "Audiovisuel, presse et juge des référés: clarté et brouillard", p. 25.
6. Brussels CFI (civil), urgent application, 25 April 1995, unreported, *Sierra 21 et Cts/RTBF*, RR no. 5/685/c.

Article 10 [of the Convention]"[1]. He pointed out that Article 8 of the Convention, Article 22 of the Constitution and section 10 of the Copyright Act of 30 June 1994 were all "laws" for the purposes of Article 10 of the Convention.

51. However, less than a year later, in an order of 10 April 1996 on an *ex parte* application, the President of the Brussels Court of First Instance held, on the basis of Articles 19 and 25 of the Constitution, that the courts were precluded from taking any preventive measures in matters concerning freedom of expression[2]. A fortnight later, on 24 April 1996[3], the urgent-applications judge, while expressly ruling out the application of Article 584 of the Judicial Code, held that he was entitled to take preventive measures under Article 22 of the Constitution and Article 8 of the Convention, which together constituted the "law" within the meaning of Article 10 of the Convention. In an order of 18 September 1996[4] he confirmed that position and again justified his power to intervene on a preventive basis under Article 22 of the Constitution and Article 8 of the Convention.

52. Several weeks later, in an order of 6 November 1996, the same judge relied on the two above-mentioned provisions, but nevertheless added that regard should also be had to the right to protection of one's image, as established by the courts, and to Article 584 of the Judicial Code as to the means of exercising that right[5].

53. In the meantime, in an order of 18 October 1996, the urgent-applications judge had stated that where there was a risk of a flagrant breach of fundamental rights, there was nothing to prevent the urgent-applications judge from taking interim measures[6]. However, in an order of 9 January 1997[7], the same urgent-applications division ruled that an application for an injunction prohibiting the publication of information from an ongoing criminal investigation was at variance with Article 25 of the Constitution and declared it unfounded[8].

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1. Brussels CFI (civil), urgent application, 3 May 1995, unreported, *Lambert et Cts/RTBF*, RR no. 95/740/c.
2. Brussels CFI (civil), President, 10 April 1996, unreported.
3. Brussels CFI (civil), urgent application, 24 April 1996, unreported, *Sterop et Cts/RTBF*, RR no. 589/c.
4. Brussels CFI (civil), President, 18 September 1996, unreported.
5. Brussels CFI (civil), urgent application, 6 November 1996, *Jour. Proc.*, 1996, no. 316, pp. 31 et seq.
6. Brussels CFI (civil), urgent application, 18 October 1996, *Auteurs et Média (A&M)*, 1997, p. 83. On appeal, the court held that there was no longer any urgency since no proceedings had been instituted on the merits for the broadcast to be prohibited. It therefore declared the original application unfounded on the ground that it had ceased to be urgent (Brussels, 19 November 1997, *A&M*, 1998, p. 42).
7. Brussels CFI (civil), urgent application, 9 January 1997, *A&M*, 1997, p. 197.
1. "*Overeenkomstig artikel 25 van de Grondwet kan de censuur van drukpers niet worden ingevoerd. Deze vordering komt voor als ongegrond.*"

54. In a judgment of 30 June 1997, the Brussels Court of First Instance held that "the law is formed by a combined reading of Article 584 of the Judicial Code (which is a law conferring jurisdiction rather than a substantive law for the purposes of Article 10 of the Convention) and Article 8 of the Convention, which provides that everyone has the right to respect for his private and family life, his home and his correspondence". After noting that "on several occasions ... the urgent-applications judge has held that Belgian domestic legislation did indeed contain a 'law' allowing freedom of expression to be restricted for the purposes of Article 10 [of the Convention]", it nevertheless acknowledged that "the reasoning in decisions supporting intervention by the urgent-applications judge is not unequivocal as regards the provisions constituting the law"[1].

55. In an order of 12 November 1997, the urgent-applications judge developed this argument further, holding that "intervention by the urgent-applications judge as a preventive measure ... is possible under Article 584 of the Judicial Code (a rule of jurisdiction empowering him to intervene in any matter), in conjunction with the provisions relating to the rights and freedoms which would be infringed as a result of freedom of expression, such as, in this instance, Article 8 [of the Convention], Article 19 of the International Covenant on Civil and Political Rights and Article 22 of the Constitution ... [and] the right to protection of one's image"[2].

56. In an order of 26 May 1999, the Brussels urgent-applications judge dismissed an application for an injunction banning a book, although neither the parties nor the judge took Article 25 of the Constitution or Article 10 of the Convention into consideration[3].

57. In an order of 18 October 2001, the urgent-applications judge observed that Article 25 of the Constitution prohibited any prior restraints on freedom of expression, including in audio-visual matters[4]. Lastly, in an order of 4 June 2003, the Brussels urgent-applications judge ruled that Article 25, which prohibits censorship, was also applicable to the audio-visual media and therefore precluded the courts from taking any kind of preventive measures restricting freedom of expression[5].

58. In a judgment delivered on 14 January 2005 in the case of *Greenpeace Belgium v. Baggerwerken De Cloedt & Zoon and Others*, the Court of Cassation explicitly accepted that Article 6 of the Convention was in principle applicable to proceedings concerning urgent applications heard by the President of the Court of First Instance in accordance with

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2. Brussels CFI (civil), urgent application, 30 June 1997, JT, 1997, p. 710, *A&M*, 1998, p. 264.
3. Brussels CFI (civil), urgent application, 12 November 1997, JLMB, 1998, p. 775.
4. Brussels CFI (civil), urgent application, 26 May 1999, *A&M*, 2000, p. 108.
5. Brussels CFI (civil), urgent application, 18 October 2001, unreported, *Proximedia/VRT*, RR no. 2011/1713/c.
6. Brussels CFI (civil), urgent application, 4 June 2003, JLMB, 2004, pp. 790-93.

Article 584 of the Judicial Code[1]. In a second judgment delivered on the same day, the Court of Cassation did not give an explicit ruling on this issue but nevertheless did not declare a ground of appeal alleging a violation of Article 6 § 1 of the Convention inadmissible on this account.

2. The Conseil d'Etat

59. In a judgment of 28 August 2000, the *Conseil d'Etat* held that Articles 19 and 25 of the Constitution prohibited any prior scrutiny of the use of freedom of expression and freedom of the press[2]. The judgment stated as follows:

> "The provisions of the Constitution relied on by the applicant [Articles 19 and 25] do not preclude the punishment of press offences or offences committed in connection with the use of freedom of expression. They do, however, prohibit prior scrutiny of the use of these freedoms; in other words ... where printed matter cannot be distributed or opinions expressed until a public authority or other third party has determined whether they are lawful.
>
> In the instant case, the Post Office does in fact reserve the right to examine the content of certain forms of election material from the standpoint of the Racism Act and to refuse to distribute them where it concludes that there has been an offence, whether or not it has sought the opinion of the Centre for Equal Opportunities and Combating Racism. It therefore carries out prior censorship. Freedom of the press and freedom of expression are devoid of meaning unless they are accompanied by the possibility of distributing printed matter or imparting opinions."

3. The Administrative Jurisdiction and Procedure Court

60. In a judgment of 6 October 2004 on an application to set aside certain provisions of the Anti-Discrimination Act of 25 February 2003, the Administrative Jurisdiction and Procedure Court – which became the Constitutional Court on 7 May 2007 – held that the prohibition of preventive measures in general and of censorship in particular meant that intervention by the courts in banning the distribution of a publication was possible only where distribution had already begun[3]. It considered that in such cases, the court should ascertain whether the restriction of freedom of expression that might result from the application of section 19(1) of the Act of 25 February 2003 was necessary in the specific circumstances, whether it met a pressing social need and whether it was proportionate to the aim pursued by that provision. In accordance with section 19(1) of the Act in question, restrictions could therefore not be imposed on the right of citizens to express their opinions, even in the polemical tone that could typify public debate on social phenomena, and even where such opinions offended, shocked or disturbed the State or any sector of the population.

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1. *Pas*., I, 76, no. 24.
2. *A&M*, 2000, p. 450.
3. No. 157/2004, B.75.

THE LAW

...

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

76. The applicant company submitted that the advance viewing of the programme in issue by the Brussels Court of Appeal in order to monitor its content before it was broadcast, and the subsequent banning of the programme as a preventive measure, had infringed freedom of expression, freedom of the press and freedom to impart information, all of which were guaranteed by 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."

A. Admissibility

77. The Government contended, as their main submission, that the applicant company had not exhausted domestic remedies in that it had not pursued the proceedings on the merits. They submitted that the interim and preliminary nature of orders issued by the urgent-applications judge meant that they did not constitute *res judicata* with respect to the court dealing with the merits of the case, which accordingly was not bound by what the urgent-applications judge had decided. The urgent-applications judge simply adopted a protective measure preserving the applicant's rights so that the proceedings on the merits could take their normal course and their outcome would not be deprived of all practical purpose, the aim being essentially to safeguard the future. The injunction issued in the present case by the President of the Court of First Instance had not been a final decision but had been solely intended to address a temporary situation pending the final judgment on the merits; the court hearing the case on the merits remained at liberty to depart entirely from the urgent-applications judge's conclusions. The injunction had itself specified that its validity was limited to the period before a decision was delivered on the merits, provided that the

claimant instituted proceedings on the merits within one month, which Dr D.B. had done.

78. The Government asserted that the pursuit of proceedings on the merits had constituted – and still constituted – an accessible, effective and adequate remedy for ascertaining whether a judge could prohibit a television broadcast that allegedly infringed the rights of one of the parties. The court dealing with the merits was able not only to revise, vary or revoke the interim injunction by allowing the programme in question to be broadcast, but could also award damages if the measures ordered had been wrongly implemented and had caused harm. Article 747 of the Judicial Code, in its former wording, and former Article 751 of the same Code not only laid down precise time-limits but provided for the possibility for each party to request the prompt preparation of the case for hearing. The Government added that if the applicant company had availed itself of the option of pursuing the proceedings on the merits in parallel with the injunction proceedings, this would have enabled it to act as swiftly as possible and not to suffer any harm as a result of the length of the proceedings required to secure a final decision on the merits.

79. Although the courts hearing urgent applications and appeals against interim injunctions were bound only by the rules governing the urgent procedure, that did not limit their jurisdiction when hearing appeals against judgments on the merits. Indeed, such appeals were heard by a different bench from the one that had dealt with the urgent application. Moreover, it would be incorrect and hypothetical to maintain that the reasoning set out in the Court of Cassation's judgment of 2 June 2006 was applicable both to courts dealing with the merits and to the urgent-applications judge.

80. Relying on the *Editions Plon v. France* judgment (no. 58148/00, ECHR 2004-IV), the Government submitted that proceedings on the merits would have provided an opportunity, because of the additional time, to submit other evidence for the court's assessment concerning the applicant company's right to freedom of expression, not least because both the interim injunction and the judgment given on appeal had found the broadcast to be defamatory because it had made very little reference, if any, to objective aspects such as lawsuits against Dr D.B.

81. Lastly, the Government submitted that as the applicant company had claimed to be the victim of an unjustified difference in treatment, it should have asked the urgent-applications judge to defer his decision in order to seek a preliminary ruling from the Administrative Jurisdiction and Procedure Court as to the distinction created between the print and audio-visual media in the Court of Cassation's case-law.

82. The applicant company contended that proceedings on the merits did not constitute a remedy in respect of a decision on an urgent application. It was well established in Belgian law that proceedings concerning urgent applications were independent of the main proceedings. Any decision taken

on the merits had no retrospective effect on an interim injunction. The varying on appeal of a first-instance decision on an urgent application was the only means by which the decision could be annulled retrospectively, and was also the only basis on which a party could subsequently seek damages for any harm suffered as a result of the execution of the initial decision on the urgent application. Furthermore, the Court had consistently declared applications admissible where they had been lodged after the remedies under the urgent procedure alone had been exhausted.

83. The applicant company submitted that the Court of Cassation's judgment of 2 June 2006 had rendered illusory any prospect of success in proceedings on the merits. The judgment had been worded in general terms applicable both in urgent proceedings and in proceedings on the merits. Even if proceedings on the merits were to be counted as a remedy in respect of a decision on an urgent application, it would have been easy to foresee that their outcome would be unfavourable to the applicant company.

84. The applicant company asserted that the Government had deliberately neglected to mention that where a case was ready for hearing before either the Brussels Court of First Instance or the Brussels Court of Appeal, the parties still had to wait many months, or even years, before a date was set for the hearing, and then many months more before receiving a decision, as a result of an extremely serious backlog that had disrupted the operation of both courts at the time. The Government had also omitted to point out that they themselves had initiated the repeal of Article 751 of the Judicial Code by the Law of 26 April 2007 amending the Judicial Code with a view to tackling the courts' backlog, because the Article in question had been ineffective.

85. The applicant company submitted that it had not been required to seek a preliminary ruling from the Administrative Jurisdiction and Procedure Court since it was clear both from the special law concerning that court and from the case-law of the Court of Cassation that the Constitutional Court did not have jurisdiction to review whether the interpretation of the Constitution itself was constitutional.

86. Lastly, the applicant company submitted that in the light of the judgment in *Micallef v. Malta* ([GC], no. 17056/06, ECHR 2009), the Government's objection of failure to exhaust domestic remedies was devoid of purpose. Since urgent proceedings themselves had to comply with Article 6, they had to be considered independently of the proceedings on the merits, given that there was no guarantee that shortcomings in injunction proceedings could be rectified in the main proceedings.

87. The Court reiterates that, according to its case-law, the only remedies which Article 35 of the Convention "requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the

requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied" (see, in particular, *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198; *Dalia v. France*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I; *Civet v. France* [GC], no. 29340/95, ECHR 1999-VI; and *Gautrin and Others v. France*, 20 May 1998, § 38, *Reports* 1998-III). Furthermore, "[t]he rule [of exhaustion of domestic remedies] is neither absolute nor capable of being applied automatically. In reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This means amongst other things that the Court must take realistic account of the general legal and political context in which the remedies operate, as well as the personal circumstances of the applicant" (see *Menteş and Others v. Turkey*, 28 November 1997, § 58, *Reports* 1997-VIII).

88. Moreover, an applicant who has availed himself of a remedy that is apparently effective and sufficient cannot be required also to have tried others that were available but probably no more likely to be successful (see *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III).

89. In the present case, the Court considers that the applicant company exhausted all the remedies under the urgent procedure since it appealed against the interim injunction issued by the President of the Court of First Instance and subsequently appealed on points of law against the judgment given on appeal. Pursuing the proceedings on the merits, which the opposing party had instituted in order to maintain the injunction, would not have enabled the applicant company – even in the event of a favourable outcome – to repair the damage caused by prohibiting the broadcast. Given that it would not have been possible to reschedule the broadcast within a reasonable time, the proceedings on the merits – even assuming that they could be regarded as a remedy in respect of the injunction proceedings – did not constitute an effective remedy for the purposes of the Convention in the circumstances of the case. As the Court has noted, news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (see *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 32, ECHR 1999-VIII).

90. The Court further observes that in *Maurice v. France* ((dec.), no. 11810/03, 6 July 2004), where urgent proceedings had been concluded but two sets of proceedings on the merits were still pending, it dismissed a plea of non-exhaustion submitted by the Government, holding that a judgment of the *Conseil d'Etat* meant that any other remedy that the applicants might attempt was bound to fail.

91. With regard to the *Editions Plon* judgment (cited above) relied on by the Government, the Court observes that in that case it examined the injunction proceedings separately from the proceedings on the merits in determining whether there had been a violation of Article 10 of the

Convention. Similarly, in *Hachette Filipacchi Associés v. France* ((dec.), no. 71111/01, 2 February 2006) it declared the application admissible in a case where the decision complained of had been delivered under the urgent procedure and subsequently upheld by the Court of Appeal and the Court of Cassation, but no proceedings on the merits had been instituted.

92. The Court therefore considers that the applicant company provided the domestic courts with an opportunity to uphold and afford redress for its complaint, that is, the alleged violation of its right to freedom of expression. It accordingly satisfied the requirement of prior exhaustion of domestic remedies set forth in Article 35 § 1 of the Convention. The Government's objection must therefore be dismissed.

93. The Court further notes that the applicant company's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Whether there was interference

94. The Court observes that the Belgian courts granted an interim injunction preventing the applicant company from broadcasting part of a television programme covering topical legal matters. The ban was intended to remain in place until a decision was delivered on the merits. It is therefore clear – and it was not disputed by the parties – that there was "interference by public authority" with the exercise of the applicant company's right under Article 10 of the Convention.

95. Such interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It must therefore be determined whether it was "prescribed by law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve those aims.

2. Whether the interference was justified

(a) "Prescribed by law"

(i) The parties' submissions

96. The Government contended that it was legitimate to make a distinction between the print and audio-visual media. The latter, particularly in the applicant company's case, could not enjoy absolute freedom of expression, which would permit retrospective sanctions only. On no account could it be accepted that the only way of safeguarding the right to protection

of one's honour and to respect for private life in Belgium was through *ex post facto* redress, since this would deprive the urgent-applications judge of the power to prevent serious and imminent damage that could not easily be repaired.

97. The fundamental division which the Constitution sought to establish in Belgium between the print and audio-visual media resulted from an interpretation left to the discretion of the relevant authorities. Although the freedom of the audio-visual media was not protected by Article 25 of the Constitution, their freedom of expression and opinion nevertheless enjoyed protection under Article 19; this was in accordance with Article 10 of the Convention. Beyond the sphere of criminal law, the audio-visual media differed from the print media in terms of their nature and effects. The mere existence of a licensing system, linked to the very nature of the audio-visual media, in itself excluded such media from the scope of Article 25 of the Constitution, which did not allow any form of censorship, a concept that indisputably encompassed licensing. As regards effects, the *Jersild v. Denmark* judgment (23 September 1994, Series A no. 298) provided a clear illustration of how a prime-time television show could have a wide-ranging impact, thereby infringing the rights of others.

98. The Government submitted that the present case differed from the *Leempoel & S.A. ED. Ciné Revue v. Belgium* case (no. 64772/01, 9 November 2006) in that it concerned the audio-visual media in relation to Article 19 of the Constitution, rather than the print media in relation to Article 25. The extremely severe penalties referred to in the above-mentioned case were not applicable to the audio-visual media, whose freedom of expression was governed exclusively by Article 19 of the Constitution, a provision that did not prohibit censorship in such absolute terms as Article 25 did. That being so, Article 19 allowed a preventive system to operate with regard to freedom of expression, subject to certain fundamental conditions. In order to assess the level of acceptability of a preventive measure in a democratic State, a clear distinction had to be made between arbitrary intervention on the part of the executive and a situation where the courts were called upon to intervene at the request of a party in the context of a dispute between two private individuals, with a limit on the duration of any prior restraints.

99. The Government further submitted that the interference in issue had been "prescribed by law". Not only had the legal provisions on which the domestic courts had based their decisions been accessible, but the Court of Cassation's position had been entirely foreseeable. Its case-law concerning preventive and restrictive measures affecting the exercise of freedom of expression had been well established since the judgment of 9 December 1981 (see paragraph 39 above) and had been applied on many subsequent occasions. In addition, the Belgian Parliament had had occasion to enact a number of measures entailing general bans on expression, for example

through Articles 383 and 378 *bis* of the Criminal Code. A reading of Article 144 of the Constitution and Article 18, second paragraph, Article 19, second paragraph, and Articles 584 and 1039 of the Judicial Code, taken together, suggested that preventive measures affecting the exercise of freedom of expression could be taken by the urgent-applications judge on an interim basis, in the event of an emergency, to prevent the infringement of a civil right protected by the Constitution and the Convention, after the judge had weighed up the interests at stake, such measures being limited to cases involving flagrant violations of the rights of others. Lastly, the Court of Cassation had taken the view that only the provisions of the Judicial Code and Article 144 of the Constitution counted as the "law" forming the basis for the interference in issue, and not Article 8 of the Convention, which could serve solely as the legitimate aim that could be pursued by an interference with freedom of expression but not as the law on which the interference was based.

100. The applicant company submitted that neither Articles 22 and 144 of the Constitution, nor Article 8 of the Convention, nor Articles 584 and 1035 of the Judicial Code (nor Articles 18 and 19 of the same Code in the case of proceedings on the merits), nor Article 1382 of the Civil Code constituted a law within the meaning of the Convention authorising the courts to take a preventive measure entailing restrictions.

101. The applicant company asserted that the Government's arguments that the audio-visual media were subject to a prior licensing process were irrelevant in the present case, given that it agreed with the Advocate-General's interpretation of the relevant constitutional provisions in his submissions to the Court of Cassation (see paragraphs 30-31 above). The Constitution prohibited all measures entailing prior restraints on freedom of expression that were based on an analysis of the content of the opinion expressed, the interim injunction prohibiting the broadcast in the present case having been issued precisely because its contents might harm Dr D.B.'s interests. The applicant company emphasised that the Court of Cassation had consistently taken the view that Article 25 of the Constitution was merely the "corollary", in relation to freedom of the press, of Article 19, which concerned freedom of expression in general. On that account, Article 25 could not entail a more absolute prohibition on censorship than that enshrined in Article 19.

102. As to whether there was a law allowing prior restraints in Belgium, the applicant company asserted that this could not be the case; otherwise, the law would be in breach of Article 19 of the Constitution. This was illustrated by a judgment of 6 October 2004 in which the Administrative Jurisdiction and Procedure Court, ruling on a complaint against the Anti-Discrimination Act of 25 February 2003, had held that when issuing an injunction, a court should "have regard to the prohibition of preventive measures in general and of censorship in particular under Articles 19 and 25

of the Constitution; this implies that intervention by the courts is possible only where dissemination has already begun".

(ii) The Court's assessment

103. The Court reiterates that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 of the Convention unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. While certainty is desirable, it may bring in its train excessive rigidity; and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 41, ECHR 2007-IV).

104. The Court further reiterates that 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. 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. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. On this account they can be expected to take special care in assessing the risks that such activity entails (see, for example, *Cantoni v. France*, 15 November 1996, § 35, *Reports* 1996-V, and *Chauvy and Others v. France*, no. 64915/01, §§ 43-45, ECHR 2004-VI).

105. The Court has often pointed out that news is a perishable commodity and that to delay its publication, even for a short period, may well deprive it of all its value and interest. This danger also applies to publications other than periodicals that deal with a topical issue. Admittedly, Article 10 does not prohibit prior restraints on publication as such. This is borne out not only by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision, but also by the Court's judgments in The Sunday Times *v. the United Kingdom (no. 1)* (26 April 1979, Series A no. 30), and *markt intern Verlag GmbH and Klaus Beermann v. Germany* (20 November 1989, Series A no. 165). However, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. Accordingly, a legal framework is required, ensuring both tight control over the scope of any bans and effective judicial review to prevent potential abuses (see *Association Ekin v. France*, no. 39288/98, § 58, ECHR 2001-VIII).

106. The Court observes that in the instant case the Brussels Court of Appeal held that Article 18, second paragraph, Article 19, second paragraph, and Articles 584 and 1039 of the Judicial Code, read in conjunction with Article 8 of the Convention and Article 22 of the Constitution, allowed the courts to take preventive measures restricting freedom to broadcast a programme. The Court of Cassation, for its part, after pointing out that Article 22 of the Constitution and Article 8 of the Convention enshrined the right to respect for private and family life, which included the right to protection of one's reputation and honour, held that the above-mentioned Articles of the Judicial Code permitted the restrictions provided for in Article 10 § 2 of the Convention and were sufficiently precise to enable anyone, if need be with appropriate legal advice, to foresee the legal consequences of his or her acts.

107. As to whether the provisions empowering the urgent-applications judge to ban broadcasts – both in general and as applied in the present case – were accessible or foreseeable in their application, the Court notes that in Belgian law, freedom of expression is set forth firstly in Articles 19 and 25 of the Constitution, which guarantee freedom of opinion and freedom of the press, secondly in Articles 1382 and 1383 of the Civil Code, which punish abuses of this freedom, and thirdly in Articles 18, 19, 584 and 1039 of the Judicial Code, which define the various means of recourse to the judicial authorities to ensure that the rights in question are respected.

108. Nevertheless, the Court notes that Article 19 of the Constitution provides solely for the punishment of offences committed when the freedoms set forth therein are used, including freedom of expression; this implies that only retrospective sanctions can be imposed for errors and abuses committed while exercising this freedom. Articles 18, 19, 584 and 1039 of the Judicial Code, and Article 1382 of the Civil Code, read separately or in conjunction with Article 144 of the Constitution, are general provisions concerning the courts' jurisdiction and do not provide any clarification as to the type of restrictions allowed, their purpose, duration and scope or the possibility of reviewing them. It follows that there is not a sufficiently precise legal framework governing the scope of any bans, as required by the *Association Ekin* judgment (cited above).

109. The Court considers that the present case differs from both *Leempoel & S.A. ED. Ciné Revue* (cited above) and *De Haes and Gijsels v. Belgium* (24 February 1997, *Reports* 1997-I). In the former case, it held that the combined application of Article 1382 of the Civil Code and Article 18, second paragraph, and Article 584 of the Judicial Code should be taken to pursue the aim of limiting the scale of damage already caused by publication of an article, which meant that the measure complained of had been accessible and foreseeable; in the latter case, it held that Article 1382 of the Civil Code could constitute a law within the meaning of Article 10

§ 2 of the Convention. Both these cases, however, concerned retrospective restrictions on freedom of the print media.

110. The Court observes that in the judgment of 29 June 2000 in the context of the above-mentioned *Leempoel & S.A. ED. Ciné Revue* case (see paragraph 41 above), the Court of Cassation accepted that the urgent-applications judge was empowered to restrict or regulate audio-visual broadcasts or the distribution of printed matter on the basis of Article 144 of the Constitution, Articles 584 and 1039 of the Judicial Code and Article 1382 of the Civil Code. However, in a judgment of 28 August 2000 (see paragraph 59 above), the *Conseil d'Etat* held that Articles 19 and 25 of the Constitution prohibited any prior restraints on the use of freedom of expression and freedom of the press or, in other words, the possibility of postponing the distribution of printed matter or the expression of opinions until a public authority or other third party had determined whether they were lawful. Lastly, in a judgment of 6 October 2004, the Administrative Jurisdiction and Procedure Court (see paragraph 60 above) held that the prohibition of preventive measures in general and of censorship in particular meant that intervention by the courts in banning the distribution of a publication was possible only where distribution had already begun.

111. The Court notes more specifically that while Article 584 of the Judicial Code, read separately or in conjunction with Article 1382 of the Civil Code, allows intervention by the urgent-applications judge, there are discrepancies in the case-law as to whether the judge may take preventive measures, particularly as Articles 1382 and 1383 provide for a system of retrospective penalties.

112. The Court reiterates that the role of adjudication vested in the courts is to dissipate any doubts that may remain as to the interpretation of norms whose wording is not absolutely precise (see *Cantoni*, cited above, § 32).

113. There is certainly a body of substantive case-law, in particular decisions by urgent-applications judges, concerning judicial scrutiny of the press in Belgium, but it contains certain discrepancies. While the order issued in the present case stated that it had frequently been held that the urgent-applications judge could take preventive measures, an examination of other orders made on urgent applications indicates that there is no clear and consistent approach among the Belgian courts that would have enabled the applicant company to foresee, to a reasonable degree, the possible consequences of broadcasting the programme in question. The various orders of this kind, even those of different judges of the same court, are notable for the contradictions between them (see paragraphs 39-58 above).

114. However, judicial scrutiny by the urgent-applications judge of the dissemination of information – by whatever media – involving a balancing exercise between the various competing interests would be inconceivable without a framework laying down precise and specific rules on the

application of prior restraints on freedom of expression. In the absence of such a framework, there is a risk that this freedom might be threatened by the proliferation of complaints and the discrepancies in the solutions reached by urgent-applications judges. Firstly, information about television programmes is often provided in advance and published in the press, thus affording individuals who fear that they might face criticism the opportunity to apply to the courts before the scheduled broadcast; and, secondly, the discretion enjoyed by urgent-applications judges and the variety of solutions they have reached might result in a case-by-case approach to preventive measures in the audio-visual sphere, which would not be conducive to preserving the very essence of the freedom to impart information.

115. Admittedly, since it does not prevent States from requiring the licensing of audio-visual media, Article 10 of the Convention accepts the principle of a difference in treatment between the audio-visual and print media. However, the distinction made by the Belgian Court of Cassation on the basis of the medium by which information is conveyed – that is, the application of different Articles of the Constitution for the print and audio-visual media – does not appear decisive in the instant case. It does not ensure protection through a strict legal framework for the prior restrictions permitted by the Convention on the dissemination of information, ideas and opinions, especially as the domestic courts have not settled the question of the meaning of the notion of "censorship" as prohibited by Article 25 of the Constitution. In this connection, the Court notes that not only are there discrepancies in the approaches taken by urgent-applications judges in such matters in Belgium; there are also divergences in the case-law of the supreme courts (see paragraph 110 above). It would add that if prior restraints are required in the media sphere, they must form part of a legal framework ensuring both tight control over the scope of any bans and effective judicial review to prevent potential abuses (see *Association Ekin*, cited above, § 58).

116. In conclusion, the Court considers that the legislative framework in Belgium, together with the existing case-law of the domestic courts, as applied in the applicant company's case, did not satisfy the foreseeability requirement under the Convention and did not afford the company the sufficient degree of protection to which it was entitled under the rule of law in a democratic society. There has therefore been a violation of Article 10 of the Convention.

117. Having regard to the above conclusion, the Court does not consider it necessary to ascertain whether the other requirements of paragraph 2 of Article 10 were complied with in the present case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

118. Article 41 of the Convention provides:

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

A. Damage

119. The applicant company submitted firstly that it had sustained pecuniary damage as a result of the permanent loss of the programme in issue. Since the programme concerned a topical issue and had not been screened within a short time after being produced, it would now never be broadcast. However, it was difficult for the applicant company to put a precise figure on the damage sustained and to produce relevant supporting documents. That being so, the Court considers that the finding of a violation of the Convention will constitute sufficient redress for the damage sustained under this head, and the same applies to the non-pecuniary damage suffered by the applicant company as a result both of the restriction of its freedom to impart information and of the impact which the interference may have had on the programme's reputation for credibility.

120. In these circumstances, the Court holds that the finding of a violation is sufficient to compensate for the damage sustained by the applicant company.

B. Costs and expenses

121. The applicant company claimed 24,261.70 euros (EUR) in respect of its costs and expenses before the Belgian courts and EUR 17,752.70 for those incurred before the Court.

122. The Government left the matter to the Court's discretion.

123. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum in relation to the violations it has found. In the present case, the Court notes that the applicant company has produced detailed evidence of its costs before the domestic courts and the Court. It therefore decides to award it the sum claimed under this head in full, namely EUR 42,014.40, plus any tax that may be chargeable to it.

C. Default interest

124. 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;

...

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

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

5. *Holds*
   (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 42,014.40 (forty-two thousand and fourteen euros and forty cents) in respect of costs and expenses, plus any tax that may be chargeable to the applicant company;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant company's claim for just satisfaction.

Done in French, and notified in writing on 29 March 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Danutė Jočienė
President