

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

FIFTH SECTION

CASE OF OTTAN v. FRANCE

(Application no. 41841/12)

JUDGMENT

STRASBOURG

19 April 2018

FINAL

19/07/2018

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Ottan v. France,

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

Angelika Nußberger, *President,*
Erik Møse,
André Potocki,
Síofra O'Leary,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lado Chanturia, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 27 March 2018,

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

PROCEDURE

1. The case originated in an application (no. 41841/12) 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 a French national, Mr Alain Ottan ("the applicant"), on 21 June 2012.

2. The applicant was represented by Mr P. Expert, a lawyer practising in Nîmes. The French Government ("the Government") were represented by their Agent, Mr F. Alabrune, Director of Legal Affairs at the Ministry of European and Foreign Affairs.

3. The applicant is a lawyer. He alleged that the disciplinary penalty imposed on him breached Article 10 of the Convention.

4. On 26 June 2015 the Government were given notice of the complaint concerning Article 10 and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and lives in Lunel.

6. The applicant, a lawyer at the Montpellier Bar since 1978, acted for M.B., who was a civil party in the context of a judicial investigation opened in Nîmes following the death of his minor son. The latter was killed on the night of 2 March 2003 by F.C., a gendarme who used his firearm.

7. In an indictment and partial discharge order of 26 June 2007 the investigating judge committed F.C. for trial before the Gard Assize Court on a charge of manslaughter. The investigating judge did not accept as justification either self-defence within the meaning of Articles 121 or 122 of the Criminal Code, or the use of firearms in accordance with the legislation or regulations under Article 174 of the Decree of 20 March 1903 (see, as regards those provisions, *Guerdner and Others v. France*, no. 68780/10, §§ 37 and 41 et seq., 17 April 2014). The judge also committed two of F.C.'s colleagues for trial before the Assize Court for having lied in their statements to him, given under oath.

8. On 26 November 2007 the Investigation Division of the Nîmes Court of Appeal upheld the order but ordered that the two gendarmes charged with giving false testimony stand trial before the Nîmes Criminal Court rather than the Assize Court.

9. The trial at the Assize Court began on 28 September 2009 and lasted for five days. The advocate-general requested a five-year prison term for the accused. It is not clear from the information available to the Court whether or not the sentence was to be suspended.

10. In a judgment of 1 October 2009 the Assize Court acquitted F.C.

11. Immediately after the verdict, at the exit from the courtroom, the journalists reporting on the case for, among others, *France Bleu*, RTL and the *Midi Libre* put questions to the parties' lawyers, and in particular to the applicant. Some of the coverage was streamed live on the Internet. The applicant first stated as follows:

> "... the verdict is received by the victims and by the community to which they belong, it is patently obvious that this is disastrous in terms of social peace."

12. Asked by one journalist whether it was a "licence to kill", he replied as follows:

> "Well, I'm not sure you can say that. It's not necessarily a licence to kill. It's a refusal to face up to the reality in this country and to the existence of a two-speed society; not just a two-speed justice system, but actually a two-speed society at all levels. People are living in tower blocks cut off from city centres. For some, prosecution ends in conviction while others are acquitted. The entire social system needs to be revamped: we've turned into a real American-style society which is on the brink of civil war."

13. When asked by an RTL journalist "But weren't you expecting this verdict? Without really commenting on the verdict, weren't you afraid this would happen?", the applicant made the following statement:

> "Yes, of course. I always knew it was a possibility. With a white – all-white – jury on which not all communities are represented, combined with, let's face it, a very weak prosecution and a trial that was conducted in an extremely biased fashion, the door was wide open for an acquittal, it's no surprise."

14. These last remarks were the subject of a letter from the Principal Public Prosecutor at the Montpellier Court of Appeal, dated 6 October 2009,

to the chairman of the Montpellier Bar, seeking the latter's opinion "in view of the outcry caused by this statement in judicial circles in Nîmes".

15. On 1 December 2009, after the chairman of the Bar had found that the applicant's remarks were not offensive and did not go beyond the bounds of free criticism of a court decision, the Principal Public Prosecutor informed him of his decision to initiate disciplinary proceedings against the applicant under Article 188 of the Decree of 27 November 1991 on the organisation of the legal profession (see paragraph 29 above).

16. On 11 January 2010 the applicant gave evidence to the rapporteur of the Montpellier Bar Council. In particular, he stressed the need to put his remarks in context, as this was a sensitive case that had led to rioting in the working-class district where the victim had lived. He highlighted the length of the investigation, the fact that the gendarme had not been held in pre-trial detention and the disjoinder of the proceedings for false testimony concerning members of the gendarmerie patrol present on the day of the events, as well as the tensions during the five days of the hearing before the Assize Court. He denied making an accusation of racial and xenophobic bias, arguing that he had merely noted the absence of certain communities making up the French nation, in whose name criminal justice was administered. He added that he had not targeted the Assize Court, the prosecution or the defence.

17. The President of the Assize Court and the advocate-general who had participated in the proceedings refused a request from the rapporteur to hear evidence. However, the rapporteur was able to hear evidence from one of the lawyers for the acquitted gendarme, Mr N.-P. The latter confirmed the atmosphere of heightened pressure and tension throughout the trial, which had also been experienced by the lawyers of the civil parties. He observed that when the verdict had been delivered there had been a tremendous outcry, with the cameramen rushing to capture the scene. All the lawyers had been very emotional and the applicant had no doubt used an unfortunate turn of phrase, intending only to point to the lack of representation of certain communities in the criminal-justice system.

18. In parallel, in a judgment of 1 March 2010, the Nîmes Criminal Court sentenced the other two gendarmes to a one-month suspended term of imprisonment and a fine of 1,000 euros (EUR) for giving false testimony under oath. The court noted in particular that the false statements had been repeated over time, including before the investigating judge, and had been liable to influence the judge's decision in that they concerned essential circumstances pertaining to the charges or at least circumstances of relevance to the case.

19. On 19 March 2010 the rapporteur sent her disciplinary investigation report to the chairman of the disciplinary board, the chairman of the Bar and the Principal Public Prosecutor.

20. On 2 April 2010 the applicant was summoned to appear before the disciplinary board on the basis of Article 183 of the above-mentioned Decree of 27 November 1991 (see paragraph 29 below), "for having, in the public lobby outside the courtroom of the Nîmes Court of Appeal, seriously breached the essential ethical principles of the legal profession, and specifically those of discretion and moderation, by publicly making the following comments accusing the court and jury of racist and xenophobic bias".

> "I always knew it was a possibility. With a white – all-white – jury on which not all communities are represented ..., the door was wide open for an acquittal, it's no surprise."

21. The disciplinary board of the Bar associations attached to the Montpellier Court of Appeal, sitting in plenary session, held its hearing on 21 May 2010. Reiterating his statements, the applicant relied in particular on Article 10 of the Convention, arguing that his remarks had been made in the context of the defence of his client's interests as a civil party and within the ten-day period during which the Principal Public Prosecutor could appeal against the acquittal.

22. On 11 June 2010 the disciplinary board delivered its decision. It found that the applicant's conduct had not been culpable and acquitted him. The disciplinary board considered that the remarks had to be placed in the dual context of the full statement and the circumstances in which they had been made. The words "a white – all-white – jury" had been supplemented by "on which not all communities are represented", and had not accused the jury of racial or xenophobic bias but, together with other factors, had stated the obvious truth that "the social background of jurors contribute[d], even unconsciously and without their integrity and intellectual honesty being in question, to their decision, which necessarily ha[d] an element of subjectivity". The disciplinary board stressed that the statements had been devoid of personal animosity and had reflected "ideas, opinions and information apt to contribute to a discussion or debate of public interest ... as part of a broader commentary on the decision of the Assize Court ..."; this came "within the scope of protection of the right to freedom of expression under Article 10 of the Convention". The disciplinary board further considered that the impugned statements had formed part of the defence of the interests of the applicant's client, since only the Principal Public Prosecutor could appeal against the acquittal verdict. They had therefore been intended "to stimulate a public debate apt to influence the Principal Public Prosecutor's thinking ... and his decision whether or not to appeal against that verdict". Lastly, the disciplinary board noted that the statements had been "made orally ... during an on-screen interview. In the interests of efficiency and given the brevity of the broadcasts and the speaking time, it [had been] necessary to use concise or even 'shocking' and caricaturised language".

23. The Principal Public Prosecutor appealed against the disciplinary board's decision. He requested that the applicant be barred from practising for three to six months.

24. In his pleadings before the Court of Appeal the applicant argued that his remarks had been directed at the jury rather than at the reputation, integrity and intellectual honesty of its members (who, moreover, had not brought any proceedings against him), based on the sociologically indisputable fact that the jury did not represent the diversity of the entire national community although its decision necessarily involved an element of subjectivity. His role as a lawyer had not ended with the delivery of the verdict, since it was up to the Principal Public Prosecutor to decide whether to lodge an appeal. Lastly, the applicant regretted that the prosecutor had chosen to prosecute him for comments that formed part of a debate of public interest and were not contrary to public policy, rather than appealing against the acquittal decision as his client and the public had hoped.

25. The Court of Appeal held, in a judgment of 17 December 2010, that the facts constituted a breach of the duties of discretion and moderation. It found as follows:

> "Outside the courtroom, lawyers are not protected by immunity [of judicial speech] and the appropriate degree of their freedom of speech is no longer assessed in relation to the requirements of the exercise of the rights of the defence, but only in relation to freedom of expression."

The Court of Appeal noted that the statements had been made in public, inside the court building, but before the press and not in the course of judicial proceedings; at that juncture, the verdict had been known and the hearing was over. In the court's view, the cries from the public at the end of the hearing had been directed at the justice system, and the applicant had had a duty to exercise caution.

The Court of Appeal went on to find that, since all the members of the jury were French citizens, references to the colour of their skin did not relate to their social background or nationality but rather to their racial background. The term "white", used in a repetitive and affirmative manner and without the intention to open a discussion or reflection on the matter, had racial connotations which cast aspersions and suspicion on the integrity of the jurors. The court further found as follows:

> "As the members of the jury form part of the Assize Court, composed of three professional judges and nine lay jurors, this amounts to discrediting the entire court and consequently the judiciary itself, by disregarding the other three members of the Assize Court and especially the collegial spirit whose very purpose is to avoid bias and afford enhanced procedural guarantees."

In the Court of Appeal's view, the remarks did not form part of the exercise of the rights of the defence, in the absence of any mention of the possibilities of appeal against the decision of the Assize Court. "In view of

the nature and degree of the offence", the Court of Appeal imposed "the lightest possible disciplinary penalty – a warning" on the applicant.

26. The applicant lodged an appeal on points of law. In addition to the defence arguments already presented before the disciplinary body and the Court of Appeal, he argued that the latter had wrongly held that the statement had targeted the judiciary and the entire Assize Court, as the words "... combined with – let's face it – a very weak prosecution and a trial that was conducted in an extremely biased fashion ..." had not been mentioned in the indictment (see paragraphs 13 and 20 above).

27. The advocate-general at the Court of Cassation concluded in his opinion that the judgment should be quashed on the basis of Article 10 of the Convention. In particular, he stated that the remarks had not disclosed any attack or personal animosity but rather had constituted, in the immediate aftermath of a highly contested acquittal, an irrepressible outburst based on the factual observation of the jury's composition and echoing more general debates within society. Among those debates he mentioned the courts' treatment of police officers implicated in criminal proceedings, stating as follows:

> "We need only recall the judicial ramifications of two cases that caused a sensation and attracted widespread media coverage at the time of the proceedings resulting in the acquittal of gendarme C: [after] the pursuit and death of Zyed B and Bouna T in 2005 [triggered riots for weeks, the decision of the Paris Court of Appeal on 27 April 2011 to dismiss the case revived the debate], and the death of Ali Z in 2009. Following those events, in a report published on 2 April 2009, Amnesty International expressed concern about an increase in police violence and a lack of judicial action against the perpetrators. In addition to the 'low rate of prosecution of alleged perpetrators', according to the non-governmental organisation, there was a certain 'laxity' in the sentences imposed, leading to real impunity for the offences."

28. In a judgment of 5 April 2012 the Court of Cassation dismissed the applicant's appeal in the following terms:

> "Firstly, the complaint alleging that the disciplinary body exceeded the scope of its jurisdiction is inadmissible for failure to produce the indictment.
>
> Secondly, having stated explicitly that, outside the courtroom, lawyers were not protected by the immunity conferred by section 41 of the Law of 29 July 1881, the Court of Appeal found that the impugned remarks had racial connotations casting aspersions and suspicion on the integrity of the jurors and thus amounted to a breach of the duties of moderation and discretion. It provided a legal basis for its decision merely to issue a warning to the lawyer, without laying itself open to any of the other complaints raised in the ground of appeal."

II. RELEVANT DOMESTIC LAW AND PRACTICE

29. The relevant provisions of the Decree of 27 November 1991 on the organisation of the legal profession, as amended, read as follows:

Article 180

"Except in Paris, the disciplinary board shall be constituted as stipulated below.

After each re-election as provided for by section 15 of the above-mentioned Law of 31 December 1971, the Bar Council shall appoint the following members to sit on the disciplinary board:

(i) one full member and one substitute member from those Bar associations in which the number of lawyers entitled to vote is between eight and forty-nine;

(ii) two full members and two substitute members from those Bar associations in which the number of lawyers entitled to vote is between fifty and ninety-nine;

(iii) three full members and three substitute members from those Bar associations in which the number of lawyers entitled to vote is between one hundred and two hundred.

...

Every Bar association with over two hundred lawyers entitled to vote shall appoint an additional representative and substitute for each two hundred lawyers. However, the members of that Bar association may not comprise more than half the membership of the Court of Appeal disciplinary board.

Lawyers entitled to vote are those who are on the Bar Council roll on the date of 1 September preceding the re-election of the Bar Council. ..."

Article 183

"Any contravention of statutes or regulations, infringement of professional rules or breach of the duties of integrity, honour or discretion, even relating to non-professional matters, shall render the lawyer in question liable to the disciplinary sanctions listed in Article 184."

Article 184

"The disciplinary penalties shall be:

1. warning;
2. reprimand;
3. temporary disbarment not exceeding three years;
4. striking off the roll or withdrawal of honorary status.

..."

Article 188

"In the cases provided for in Article 183 the chairman of the Bar to which the lawyer in question belongs, or the Principal Public Prosecutor, shall formally refer the case to the disciplinary authority, giving reasons, either directly or following an ethical standards investigation. He or she shall give advance notice to the authority that is not instigating the disciplinary proceedings.

The referral shall be notified to the lawyer by the authority instigating the disciplinary action, by registered letter with recorded delivery.

A copy shall be sent to the Bar Council with which the lawyer is registered, for the purpose of appointing a rapporteur

Within fifteen days of notification the Bar Council with which the lawyer is registered shall appoint one of its members to investigate the case. ...”

Article 191

“The rapporteur shall send the investigation report to the chairman of the disciplinary board ... no later than four months after being appointed. ...

A copy shall be sent to the chairman of the Bar and the Principal Public Prosecutor if the latter has instigated the disciplinary proceedings.

The date of the hearing shall be set by the chairman of the disciplinary board ...”

Article 192

“No disciplinary penalty may be imposed unless the lawyer in question has given evidence or been called at least eight days previously ...”

Article 197

“The lawyer who is the subject of the disciplinary decision, the Principal Public Prosecutor and the chairman of the Bar may appeal against the decision to the Court of Appeal, which shall rule under the conditions laid down in Article 16, after hearing evidence from the Principal Public Prosecutor. The proceedings shall be conducted in public in accordance with Article 194.

The chief registrar of the Court of Appeal shall notify all the parties of the appeal in a registered letter with recorded delivery, indicating the date on which the appeal will be heard.

The time allowed for an interlocutory appeal shall be fifteen days following notification of the appeal in the main proceedings.

The Principal Public Prosecutor shall be responsible for the enforcement and supervision of the disciplinary penalties imposed.”

30. Under Article 380-2 of the Code of Criminal Procedure, only the Principal Public Prosecutor is entitled to appeal against an acquittal judgment. The Assize Court is composed of three professional judges and a jury made up of six citizens drawn by lots at first instance, and nine on appeal. Only the accused or his or her lawyer, and the public prosecutor, have the right to challenge jurors; the civil party may not do so. For a description of the procedure before the Assize Court with a lay jury, the Court refers to its judgment in *Agnelet v. France* (no. 61198/08, §§ 29 et seq., 10 January 2013).

31. In France, the question of the “racial” or ethnic representativeness of the jury is not debated because recognition of the existence of groups within the population is contrary to the Constitution. Thus, in a decision of 9 May 1991 (no. 91-290 DC), the Constitutional Council held that the reference made by the legislature to the Corsican people, as a group within the French nation, was contrary to the Constitution, “which recognise[d] only the

French nation, composed of all French citizens without distinction as to origin, race or religion". Similarly, in a decision of 15 November 2007 (no. 2007-557 DC), the Constitutional Council held that "ethnic statistics" were not permitted on the grounds that they breached Article 1 of the Constitution, according to which "France ... shall ensure equality before the law for all citizens without distinction as to origin, race or religion". The Constitutional Council held as follows:

> "... while the processing operations necessary for carrying out studies on the degree of diversity of people's origins, discrimination and integration may concern objective data, they will be in breach of the principle set out in Article 1 of the Constitution if they are based on ethnic origin or race. ..."

32. The removal of the word "race" from the French Constitution has been the subject of debate for a number of years. A draft law to that effect tabled in 2013 was not adopted. The legislature has replaced the word "race" with the term "declared race" in the following provisions of the Criminal Code: Article 225-1 which defines discrimination (Law of 18 November 2016 on the modernisation of justice in the twenty-first century); Articles 132-76 and 222-13 which set out the aggravating circumstances of a crime or offence (Law of 27 January 2017 on equality and citizenship); and Article R. 625-7 concerning non-public provocation, defamation and insults (Decree of 3 August 2017 on non-public provocation, defamation and insults of a racist or discriminatory nature). The note accompanying this decree emphasises that the word "race" "is not applicable to human beings".

III. COMPARATIVE LAW AND PRACTICE

33. The Court notes that the issue of the diversity and representativeness of the judiciary is the subject of debate in several Council of Europe member States, some of which have chosen to address the issue in a very different way to that chosen by France. In the United Kingdom, for instance, the under-representation of women and persons from visible minority groups among judges, especially in the higher courts, prompted the authorities to implement a proactive policy to promote diversity, with the creation in 2013 of a Judicial Diversity Committee under the authority of the Lord Chief Justice. In April 2017 the Committee published its first official statistics on the composition of the judiciary, together with an action plan to encourage greater diversity (Judicial Diversity Committee of the Judges' Council – Report on Progress and Action Plan 2016-17, 13 April 2017). In the Netherlands the Council for the Judiciary, as far back as 2007, commissioned a study into the representation of ethnic minorities in the judiciaries of several traditional and more recent immigration countries (the Netherlands, Germany, France, Canada and the United States). A handbook published by the Council for the Judiciary in 2015 on reforming the process

for the selection, recruitment and training of judges set out the clear objective of ensuring that the diversity within society was reflected in the judiciary ("Judicial reform in the Netherlands: A new process for the recruitment, selection and training of judges", *Scientific Magazine for the Judiciary Organisation of the Netherlands,* 2015).

34. By way of comparison, in North America the diversity of juries and its impact on decision-making is the subject of numerous studies and court decisions. For example, in the United States the Supreme Court held in its decision in *Batson v. Kentucky* (476 US 79 (1986)) that the right of defence and prosecution lawyers to challenge jurors could not be exercised on the basis of "racial" criteria (see also, for a recent example, *Timothy Throne Foster v. Bruce Chatman* (578 U.S. – (2016)). In the Supreme Court's decision in *Peters v. Kiff* (407 US 493 (1972)) regarding the systematic exclusion of African Americans from juries, Justice Thurgood Marshall issued a dissenting opinion in which he argued that removing a large part of the community from the jury reduced the diversity of human experiences and qualities that could be expressed during the deliberations. In Canada, in several recent cases, individuals accused of murdering "Aboriginal" people have been acquitted by juries with no Aboriginal members. These judgments triggered a debate on the representativeness of Canadian juries and the need to reform jury selection in order to promote the participation of members of Aboriginal communities; in particular, a former Supreme Court judge delivered a report in 2013 concerning the province of Ontario. In 2015 the Supreme Court ruled (*R v. Kokopenace*, 2015 SCC 28) that provinces had an obligation to make "reasonable efforts" to provide "a fair opportunity for a broad cross-section of society to participate in the jury process". However, they are not required to ensure that the final composition of the jury accurately and proportionately reflects the different groups making up the Canadian population.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

35. The applicant alleged that the disciplinary penalty imposed on him breached 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. ...
>
> 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, ... for the protection of

the reputation or rights of others, ... for maintaining the authority and impartiality of the judiciary."

A. Admissibility

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

B. Merits

1. The parties' submissions

(a) The applicant

37. The applicant submitted that the interference had not pursued the legitimate aim of protecting the rights and freedoms of others. The remarks in question had not demonstrated any personal animosity towards the members of the jury and had not called into question their honesty or integrity. Furthermore, the aim of maintaining the authority and impartiality of the judiciary did not justify the interference, as lawyers' freedom of expression, even if it sometimes entailed criticism of the courts, was apt to contribute to improving and strengthening the judiciary.

38. The applicant maintained that the remarks had formed part of a debate of public interest concerning the functioning of the judiciary, which called for a high level of protection of freedom of expression with a particularly narrow margin of appreciation. He referred in that regard to the opinion of the advocate-general at the Court of Cassation (see paragraph 27 above).

39. The remarks concerning the composition of the jury constituted a statement of fact, the objective reality of which was beyond dispute. In any event, if the Court were to consider that the remarks had been accompanied by a value judgment, they had a very solid factual basis. They had been made at the end of the hearing and had been inextricably linked to the case in which he had been representing his client's interests. In the applicant's view, they could not be viewed in isolation, as the remarks preceding them had also pointed to the risks of a two-speed society and the need to prevent segregation in society and between communities. They had described, in the heat of the moment and at a time when the judicial decision had not been final, a situation that was widespread in the country and especially in the *département* in which the Assize Court had been sitting.

40. Thus, in the applicant's view, his remarks were sociological and political in nature rather than racial or racist. He contested the assumption of which the Government complained, to the effect that the skin colour of a

jury determined the verdict of the Assize Court; the reference to a "white" jury had been just one factor among others (the conduct of the proceedings, the passive role of the prosecution) in his conclusion that the acquittal verdict had not been a surprise.

41. Lastly, the applicant argued that his remarks had to be placed in context. He noted the Government's acknowledgement of the exceptionally tense context in which the trial had been held. Furthermore, as a lawyer for the civil party, he did not have the right to challenge jurors. After the challenges had been exercised, jurors were no longer just private individuals but constituted an organ of the judiciary which had to be seen to be impartial. As soon as the verdict had been delivered he had questioned the prosecution's representative about his intentions, since, unlike the prosecution, the civil party had no means of challenging an acquittal verdict. The prosecutor had replied that the possibility of an appeal should be discussed within the Principal Public Prosecutor's Office at the Montpellier Court of Appeal. Given the conduct of the trial, and in particular the refusal of the President of the Assize Court to question the two gendarmes accused of lying to the investigating judge, and the hesitant attitude of the prosecution's representative, he had realised that an appeal was unlikely and had tried to influence the prosecutor's choice. Although the proceedings had ended he had decided, from his position on the civil party's bench in the courtroom, still in his robes and alongside the defence lawyer who was being questioned in the same circumstances by other journalists, that he could not in all conscience shirk his duty as a lawyer in view of the reluctant attitude of the prosecution.

(b) The Government

42. The Government submitted that the interference at issue had been prescribed by law and had pursued the legitimate aims of protecting the reputation or rights of others – the members of the Assize Court jury – and maintaining the authority and impartiality of the judiciary.

43. In view of the considerable media coverage of the case from the outset, the Government accepted that the applicant's statement, which had concerned the functioning of the judiciary and the conduct of the trial, had formed part of a debate of public interest.

44. The remarks had constituted value judgments casting doubt on the impartiality and fairness of the Assize Court jurors because of the "community" to which they belonged. The applicant had made remarks about the judicial system, outside the courtroom, that were so serious as to overstep the permissible expression of comments without a sound factual basis. In so doing he had imposed an assumption or an abstract correlation between jurors' skin colour and the thrust of the deliberations; this was liable to undermine public confidence in the justice system.

45. The Government acknowledged that the context had been tense and not conducive to calm reflection on the proper course of justice. Nevertheless – and however understandable the applicant's disappointment – he should not have given vent to his anger in answering the journalist's questions about a case that had not been finally determined.

46. If the applicant had hoped to influence the prosecution's decision as to whether to appeal against the acquittal, making such a statement was not the only means of asserting the rights of the defence: the correct approach would have been to speak to the public prosecutor at the end of the hearing. Instead the applicant, overstepping the limits of criminal defence, had engaged in outright condemnation not only of professional judges but also, primarily, of the jurors on account of their racial background and colour.

47. The Government observed that the penalty imposed on the applicant had been the lightest possible and had had no repercussions on his professional activity.

48. They concluded, for the reasons given by the Court of Appeal, that the interference had been necessary in view of the immoderate and imprudent nature of the applicant's comments. Given the content of his remarks, their dissemination in the press, the context, the applicant's status as a lawyer and the mild nature of the penalty, the Government were of the view that there had been no violation of Article 10 of the Convention.

2. The Court's assessment

49. The Court considers that the disciplinary penalty imposed on the applicant constituted interference with the exercise of his right to freedom of expression, and observes that the parties agree on this point. Such interference will breach Article 10 of the Convention unless it is "prescribed by law", pursues one or more of the "legitimate aims" listed in paragraph 2 of Article 10, and is "necessary in a democratic society" in order to fulfil the said aim or aims.

(a) Prescribed by law

50. The Court agrees with the national courts that the interference was "prescribed by law", namely by Article 183 of the Decree of 27 November 1991.

(b) Legitimate aim

51. The parties disagreed as to whether the interference had pursued a legitimate aim or aims (see paragraphs 37 and 42 above).

52. The Court considers that the applicant's arguments concern the assessment of whether the interference was necessary, as regards the aim of "protection of the reputation or rights of others". It accepts the Government's view that the interference pursued such an aim, as the

individual jurors may have felt directly targeted by the reference to their skin colour. Lastly, it considers that the interference was also aimed at maintaining "the authority and impartiality of the judiciary", of which the jury, alongside the professional judges, forms a part.

(c) Necessity in a democratic society

53. The Court refers to the general principles which it has reiterated many times since its judgment in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24), and which it restated more recently in *Morice v. France* ([GC], no. 29369/10, §§ 124-27, ECHR 2015).

54. It also refers to the latter judgment as regards the principles relating to the status and freedom of expression of lawyers, with emphasis on the distinction it draws between remarks made by lawyers inside and outside the courtroom (§§ 132-38).

55. In the present case the Court notes that, although the applicant was inside the court building when he made the impugned remarks, his statement was made in reply to a question from a journalist, after the acquittal verdict had been given and the Assize Court hearing had ended. Consequently, in the light of the distinction referred to above, the Court considers that the statements in question did not form part of "conduct in the courtroom" and should be regarded as those of a lawyer speaking outside the courtroom. It observes that the Court of Appeal took a similar view and concluded that the judicial immunity enjoyed by lawyers under domestic law in relation to "conduct in the courtroom" did not apply.

56. With regard to remarks made outside the courtroom, the Court has previously held that a client's defence may, in certain circumstances, be pursued through the media if the remarks do not constitute gravely damaging attacks on the action of the courts, if the lawyers are speaking in the context of a debate of public interest concerning the functioning of the justice system and in connection with a case that has aroused media and public interest, if they do not overstep the permissible expression of comments without a sound factual basis, and if they have made use of the available remedies on their client's behalf (see *Morice*, cited above, §§ 138, 139 and 174). The Court specified in that case that lawyers were protagonists in the justice system, directly involved in its functioning and in the defence of a party, and could not be equated with external witnesses whose task it was to inform the public (ibid., § 148).

57. In examining the complaint before it the Court will take into account the criteria it adopted in *Morice*, namely the applicant's status and the role played by his statement in the task of defending his client; the contribution to a debate of public interest; the nature of the impugned remarks; the specific circumstances of the case; and the nature of the sanction imposed.

(i) The applicant's status as a lawyer

58. The Court reiterates that the defence of a client by his or her lawyer must be conducted not in the media, save in very specific circumstances, but in the courts of competent jurisdiction, and that this involves using any available remedies (see *Morice*, cited above, § 171). In the present case, although the acquittal verdict had been delivered, the judgment was not yet final. The Principal Public Prosecutor had a period of ten days in which to appeal against the decision, unlike the civil party – whom the applicant was representing – who did not have that right. The Court agrees with the disciplinary board of the Bar associations attached to the Montpellier Court of Appeal (see paragraph 22 above) that the statement made at the exit from the courtroom had been part of an analytical approach that was apt to help persuade the Principal Public Prosecutor to appeal against the decision to acquit. It also notes the Government's assertion that there was nothing in the file to demonstrate that this means of expression was the only means available to the applicant in order to defend his client's interests (see paragraph 46 above). It observes that, in choosing this form of words, the Government were criticising the use of the impugned remarks rather than the applicant's assertion that they were aimed at defending the interests of the civil party. The Court therefore considers that, in making his statement, the applicant sought an opportunity to continue his client's defence by pursuing the proceedings before an enlarged assize court of appeal (see, *mutatis mutandis*, *Mor v. France*, no. 28198/09, § 59, 15 December 2011).

(ii) Contribution to a debate of public interest

59. The applicant referred to his right to inform the public about a matter of public interest such as the courts' treatment of police officers implicated in criminal proceedings. The Government accepted that the applicant's remarks had related to the functioning of the judiciary and to a matter of public interest, particularly in view of the wide media coverage of the case.

60. The Court notes that this factor was not taken into account by the Court of Appeal, which confined its examination to the conformity of the applicant's remarks with lawyers' duties of moderation and discretion.

61. In this regard the Court notes, firstly, that the trial took place in an atmosphere of considerable tension that had led to rioting in the district where the victim had lived (see paragraphs 16 and 17 above) and that it had a significant impact at local and national level, as attested to and heightened by the presence of the audiovisual media when the verdict was delivered. The Court reiterates, secondly, that the public has a legitimate interest in the provision and availability of information about criminal proceedings, and that remarks concerning the functioning of the judiciary relate to a matter of public interest (see *Morice*, cited above, § 152, and *Bédat v. Switzerland* [GC], no. 56925/08, § 63, 29 March 2016). In the present case the Court considers that the applicant's remarks, which concerned the functioning of

the judiciary, and in particular proceedings before an assize court sitting with a lay jury and the conduct of a criminal trial relating to the use of firearms by law-enforcement agents, were part of a debate on a matter of public interest. Accordingly, it was first and foremost for the national authorities to ensure a high level of protection of freedom of expression, with a particularly narrow margin of appreciation being afforded to them.

(iii) The nature of the impugned remarks

62. The Court observes that the Court of Appeal – and, accordingly, the Court of Cassation – did not make reference in its judgment to the applicant's clearly articulated criticisms of the way in which the prosecution and the trial had been conducted. The interference of which the applicant complained was therefore based solely on his assessment of the Assize Court jury.

63. The Court notes that the applicant's remarks did not reflect any personal animosity on his part towards a specifically named juror or a professional judge. Hence, it regards them not as condemnation but as a general assertion concerning the potential link between the composition of the jury and the gendarme's acquittal.

64. The Court stresses that in using the expression "all-white" to describe the jury in order to make the point that, combined with other circumstances, this factor had made the acquittal possible, the applicant referred to an ethnic characteristic that has been the subject of debate, criticism and even prohibition because of the historical tragedies with which it has been linked and the discrimination which it still frequently entails. However, it does not appear to the Court that the applicant was seeking to accuse members of the jury of racial bias. Rather, the Court considers that the applicant's statement reflected a widely held view that the impartiality of judges, whether professional or lay judges, is a virtue that does not exist in a vacuum but is the result of considerable efforts to shake off unconscious bias rooted, in particular, in geographical and social background and liable to arouse fears in persons being tried of being ill-understood by persons of different appearance to them (see, as regards the impartiality of the courts in cases of allegations of racism on the part of a juror, the Court's judgments in *Remli v. France*, 23 April 1996, *Reports of Judgments and Decisions* 1996-II; *Gregory v. the United Kingdom*, 25 February 1997, *Reports* 1997-I; and *Sander v. the United Kingdom*, no. 34129/96, ECHR 2000-V). In the Court's view, this interpretation follows from the applicant's remarks as seen in their proper context. Those remarks also made reference to "[a] jury on which not all communities are represented", and were preceded by a social commentary on the impact of the verdict, to the effect that "the verdict [was] ... disastrous in terms of social peace" and that there existed a "two-speed society". In this connection the applicant stated as follows:

> "People are living in tower blocks cut off from city centres. For some, prosecution ends in conviction while others are acquitted. The entire social system needs to be revamped ..." (see paragraphs 11 and 12 above).

It should likewise be observed that the applicant, who also referred to the manner in which the prosecution and the trial had been conducted, did not assert that the acquittal had been certain but that he had "always [known] it was a possibility". This is closer to a critical discussion than to an accusation of systematic bias amounting to holding in contempt a jury he suspected of racism, something that would be incompatible with proper respect for the justice system.

65. The Court is mindful of the fact that the spoken reference by the applicant to the origins or skin colour of the jurors concerned an issue that is particularly sensitive in the respondent State, whose laws prohibit consideration of "racial" or ethnic origin (see paragraphs 31 and 32 above). It appreciates that the reference may therefore have offended some members of the public and of the judiciary. Nevertheless, it considers that the reference to the "community" to which the members of the jury belonged cannot be construed simply as an intention to accuse them of racial bias, but called for a wider debate on the issue of diversity in jury selection and, as pointed out by the disciplinary body, on the link between their origins and the decision taken (see paragraphs 22, 27, 33 and 34 above).

66. Against this background the Court considers that the impugned statement can be regarded as a general assertion concerning the organisation of the criminal-justice system by a lawyer "echoing more general debates within society" (see paragraph 27 above) and constituted a value judgment. The Court reiterates in that regard that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact (see *Paturel v. France*, no. 54968/00, § 37, 22 December 2005, and *Boykanov v. Bulgaria*, no. 18288/06, § 37, 10 November 2016).

67. It remains to be determined whether the factual basis for that value judgment was sufficient. The Court is of the view that this condition was fulfilled in the present case. It observes, firstly, that the statement in question was fully in line with the national debate to which the advocate-general referred before the Court of Cassation (see paragraph 27 above) and, further afield, with the political and academic debate on the justice system taking place in various countries (see paragraphs 33 and 34 above). Secondly, it considers that the remarks were sufficiently closely linked to the facts of the case, in view of the social and political background to the proceedings.

68. In sum, although the impugned remarks had a negative connotation, the Court considers that they were more akin to a general criticism of the functioning of the criminal-justice system and social relations than to an insulting attack on the lay jury or the Assize Court as a whole. The Court reiterates in this connection that freedom of expression "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” (see *Morice*, cited above, § 161).

(iv) The specific circumstances of the case

(α) The need to take account of the overall background

69. The Court observes that the remarks in issue were made against a background of heightened social tension. It also notes that the investigation established that some of the gendarme’s colleagues had given false statements seeking to exonerate him – for which they were subsequently convicted – and that the case was followed closely by the media and the public, a fact which contributed to the tense atmosphere throughout the trial. The tension reached a peak six months after the events when the gendarme who had fired the fatal shots was acquitted. In these circumstances the Court accepts the applicant’s assertion that his remarks should be placed in the context of the troubled atmosphere in which the verdict was delivered. Thus, as regards the wording of the impugned statement, the Court notes that it was made immediately after the delivery of the Assize Court’s verdict and in the context of a rapid oral exchange of questions and answers, so that there was no possibility of reformulating, refining or retracting the statements before they were made public (see, among other authorities, *Otegi Mondragon v. Spain*, no. 2034/07, § 54, ECHR 2011).

(β) Maintaining the authority of the judiciary

70. The Court notes that the Court of Appeal held that the remarks concerning the lay jury had sought to discredit the Assize Court as a whole – as the applicant had omitted to mention the fact that the deliberations took place on a collegiate basis – and hence the entire judiciary.

71. As jurors and professional judges deliberate on an equal footing on the verdict and sentence, the Court considers that the limits of acceptable criticism of the former, when they are involved in trying criminal offences, are the same as those applicable to judges (see *Morice*, cited above, §§ 128 and 168). Thus, in the present case, the fact that the applicant mentioned only the lay jury in his remarks did not mean that his right to criticise the judicial authority extended beyond the limits outlined above.

72. That being said, the Court agrees with the Court of Appeal that the applicant’s remarks were directed at the Assize Court as a whole. This is true of the reference to an “all-white jury”, but also and especially of the remarks that followed (“the door was wide open for an acquittal, it’s no surprise”). The Court reiterates in that regard the importance, in a State governed by the rule of law and in a democratic society, of maintaining the authority of the judiciary. The proper functioning of the courts would not be possible without relations based on consideration and mutual respect

between the various protagonists in the justice system, at the forefront of which are judges and lawyers (see *Morice*, cited above, § 170). Nevertheless, for the reasons set out above (see paragraphs 64 to 67), the Court considers that the facts of the case do not support the conclusion that there was an attack on the authority and impartiality of the judiciary such as to justify the judgment against the applicant.

(e) The sanction

73. The Court notes that the penalty imposed on the applicant was the lightest possible in disciplinary proceedings – "merely ...[a] warning" according to the Court of Cassation. Nevertheless, it observes that this is not a trivial matter for a lawyer (see paragraph 77 below) and that even when the penalty is the lightest possible, that fact cannot suffice in itself to justify the interference with the applicant's freedom of expression (see *Morice*, cited above, § 176, and the case-law cited therein).

(f) Conclusion

74. The Court considers that the impugned remarks by the applicant constituted criticism of the jury and judges of the Assize Court which had delivered the acquittal verdict, but that they formed part of a debate of public interest concerning the functioning of the criminal-justice system, in the context of a case that had attracted wide media coverage. While they were capable of shocking, they nevertheless amounted to a value judgment with a sufficient factual basis made in the context of his client's representation in criminal proceedings.

75. In view of the foregoing the Court considers that the judgment against the applicant is to be regarded as disproportionate interference with his right to freedom of expression and was therefore not "necessary in a democratic society". Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. 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

77. Basing his claim on the sum awarded to the applicant in *Morice*, the applicant claimed EUR 15,000 in respect of non-pecuniary damage. He argued that the disciplinary proceedings had resulted in widespread media

coverage in the area covered by the Nîmes Court of Appeal and in virulent comments on the Internet that were liable to damage his reputation and honour. He added that the Court of Cassation judgment had received maximum publicity (in the official reports of the Criminal Division's decision, the Court of Cassation's news bulletin and on the court's website), producing a considerable impact within the judicial circles in which he worked.

78. The Government considered that sum to be excessive, pointing out that the applicant had received the lightest possible disciplinary penalty. They also observed that, in the case of *Bono v. France* (no. 29024/11, § 60, 15 December 2015), which concerned a heavier disciplinary penalty imposed on a lawyer, the Court had awarded EUR 5,000 in respect of non-pecuniary damage. In their submission, an amount of EUR 4,000 would be sufficient.

79. The Court considers that in the circumstances of the case the finding of a violation in this judgment constitutes in itself sufficient just satisfaction.

B. Costs and expenses

80. The applicant did not submit any claim in respect of costs and expenses. Accordingly, the Court makes no award under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

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

Done in French, and notified in writing on 19 April 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President