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

FIFTH SECTION

DECISION

Application no. 25239/13
Dieudonné M'BALA M'BALA
against France

[Extracts]

The European Court of Human Rights (Fifth Section), sitting on 20 October 2015 as a Chamber composed of:

Josep Casadevall, *President*,
Angelika Nußberger,
Boštjan M. Zupančič,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom,
Síofra O'Leary, *judges*,
and Milan Blaško, *Deputy Section Registrar,*

Having regard to the above application lodged on 10 April 2013,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Dieudonné M'Bala M'Bala, is a French national, who was born in 1966 and lives in Paris. He was represented before the Court by Mr J. Verdier, a lawyer practising in Aurillac.

2. The French Government ("the Government") were represented by their Agent, Mr F. Alabrune, director of the legal department, Ministry of Foreign Affairs.

A. The circumstances of the case

3. The applicant is a comedian, known by the stage name "Dieudonné". He has also engaged in political activities; *inter alia* he stood as a candidate in the European Parliament elections in 2004 ("EuroPalestine list") and 2009 ("anti-Zionist list").

4. On 26 December 2008 he staged a performance at the "Zénith" venue in Paris in the context of a show entitled "*J'ai fait l'con*" ("I've been a naughty boy").

5. At the end of the show he invited Robert Faurisson to join him on stage and to be applauded by the audience. Mr Faurisson has received a number of convictions in France for his negationist or revisionist opinions, mainly his denial of the existence of gas chambers in the Nazi concentration camps. In particular, he was convicted on 4 July 2007 by the Paris Court of Appeal for denial of a crime against humanity. The applicant called on an actor wearing a pair of striped pyjamas with a stitched-on star of David to award Mr Faurisson a "prize for unfrequentability and insolence".

6. The incident was recorded by the police, who also noted the presence of Jean-Marie Le Pen, then Chairman of the Front National party, who was watching the show from a wing, separated from the rest of the audience.

7. On 29 December 2008 the public prosecutor at the Paris *tribunal de grande instance* opened a preliminary investigation into the facts which he entrusted to the criminal investigation department of the police.

8. The investigators found footage of the relevant part of the show on an on-line video-sharing website. They transcribed the dialogue as follows:

> "Dieudonné: You know, the Zénith is always a pretty important event for me every year, so whenever I want to do it, it gets harder each time. I said to myself: I've still got to find an idea for the Zénith this time – an idea to slide it up 'em [*pour leur glisser une quenelle*] in a big way.
>
> Well I got thinking – it does happen sometimes – and found a bit of inspiration in the very complimentary review by Bernard H (inaudible – boos in the audience) who described the event at the Zénith, the show, that performance, that event at the Zénith, as the biggest anti-Semitic rally since the Second World War, so he clearly left me a bit of room for improvement, because I said to myself, I'll have to do better this time, won't I? So if you want to take part in what is called a collective 'up yours' [*glissage de quenelle*], I'm going to call up someone who's going to drive them bananas – you'd like that, wouldn't you? (noisy approval in audience). So the person who's about to come on stage is a scandal in his own right, I'm warning you already ... he's probably the most unfrequentable person in France (shouts in the room: 'Sarkozy'). Sarkozy, he's kosher, he's become frequentable – but tomorrow morning all that will be remembered of tonight's performance is the moment when this man came on stage; he was beaten up by the Israeli occupation militias, the BETAR and the LDJ, he was left for dead by the side of the road and the man, incidentally, who saved his life, who took him to hospital, that man was forced to apologise for what he did in the papers. This bloke – I didn't know him until a few years ago, and still don't know him very well – I know he's the most unfrequentable person, so I said to myself, if we want to do something, something big, because they're here, the press are with us, so tomorrow

... (boos in the audience). Listen, the best way to get back at them is to welcome a man who started out in poetry before expounding the ideas for which he is known. A big round of applause for Mr Robert Faurisson ... (applause) clap harder, harder, put more into it, more, more (Mr Faurisson enters, accolade with Dieudonné). Well, well, there's one thing that's clear, your applause will resound tomorrow morning in the media, quite a long way ... Robert I think you fully deserve this prize ... Yes, the sketch, the sketch, would not be complete – if Jacky, I'm going to ask Jacky, my loyal technician, to award Robert the prize for unfrequentability and insolence, Jacky, in his garment of light. Photographers shoot away ...! (an individual wearing a pair of check pyjamas with a star of David enters and hands Mr Faurisson an object bearing three apples). Just look at that scandal – like it – round of applause ... (shouts in the audience: 'Faurisson is right' 'he's a winner').

Robert Faurisson: A word, and maybe more than a word, '*zumbélélé*' to start with, to you Jacky, to Pierre Panet, to Sandra, I think. Listen, you've told us 'I've been a naughty boy'. No doubt ... but tonight you're really asking for it.

Dieudonné: Yeah, I think so, it's the stupidest thing I've ever done, probably. But life is short – very short – let's mess around and be disobedient as much as possible.

Robert Faurisson: Thanks, because I'm really not used to this kind of welcome – I'm supposed to be a gangster of history. It was *Le Monde* which said that and *Le Monde* is always right (shouts in the audience: 'Jacques Mesrine'). You're right anyway to say that I've been subjected to special treatment ten times. Including one time when I even almost got myself killed – and, can you believe it, the man who saved me without knowing who I was, when he found out, the next day, he told the police that he regretted having saved my life.

Dieudonné: He was beaten up by the Zionist militias, who are very busy. ... (shouts in the audience 'bastard!').

Robert Faurisson: Can I just add something ...

Dieudonné: Yes, no problem Robert, the musicians are getting ready, we're going to end with a *zumbélélé* by way of freedom of expression ...

Robert Faurisson: I can get you into trouble...

Dieudonné: Euh...Yes... you can ... Freedom of expression.

Robert Faurisson: We're going ... Well ... You don't know what I say or what I believe. Some of you or most of you don't know, or only know what the media dare to say about me, all those stupidities they attribute to revisionists. You know that in France there's a special law that will be used to send our friend to the seventeenth division before long, as it's been used against me – so many times I've lost count. I can simply tell you this, that I have no right to ... It's the law, as you were rightly saying.

I have no right to tell you what revisionism, what those people call negationism, actually is (applause) but I can tell you ... Yes, if they're so keen on calling me a negationist, I'll call them 'affirmationists' – and you can spell that word as you please (applause). That's it ... listen to me ... it's been for 34 years now, 1974-1998 [*sic*] that I've been treated in my country like a Palestinian. I've been treated like a Palestinian and I can't stop myself supporting their cause (shouts and applause in the audience). I have no political opinion but I found it moving what you said at the end about Palestine (shouts in the audience: 'long live Palestine').

> Dieudonné: I can confirm our undying support for Palestine; I'm going to ask the musicians now to get ready because unfortunately we're coming to the end. In any event, your presence here, our handshake, is already a scandal in itself – tomorrow it will be in the news and you'll be able, no doubt, to follow the debate. Freedom of expression – thank you all, thanks for your solidarity, I salute you all, I doff my hat to you. Freedom of expression. Thank you, thanks for your solidarity. All the best, hat tip to you all. Freedom of expression."

9. The investigators interviewed J.S., the sound and lighting technician during the show. He said that he would come on stage during each performance for a sketch in which the applicant reacted to a proposal by Nicolas Sarkozy, then President of France, to have every primary-school pupil in the CM2 class "sponsor" a child who died in the concentration camps. He added that, at this point in the show, he would come on stage wearing a pair of striped pyjamas with a sewn-on yellow star, but stated that he was not keen on wearing such a costume, finding it ridiculous. The applicant had told him "it's the law, ... a member of the theatre must wear the costume of a Jewish deportee, it's obligatory. Let's not forget that the Jews have suffered", to which J.S. had replied "Jews have suffered as much as the others" and the applicant had shown him "that they had suffered a lot more". The applicant had then explained that J.S. had been chosen to wear the costume because he was the "skinniest" and that he had asked him to say to the audience "never forget" before leaving the stage.

10. J.S. also explained that he had made the costume himself using a pair of pyjamas that he had bought at the Bazar de l'Hôtel de Ville, stating that he regretted that it resembled concentration-camp clothing but there was not much choice in the shop. He added that the applicant had intended and announced a "surprise" for the show at the Zénith on 26 December 2008. He said that he was not surprised to see Robert Faurisson called on stage, in view of the "direction taken by Dieudonné over the past two years in his public appearances (he took part in a 'blue, white and red' rally with Jean-Marie Le Pen on the evening of the first round of the presidential elections and asked Mr Le Pen to be godfather to his daughter)". J.S. further stated that he was to keep his deportee's costume when giving a prize to Robert Faurisson, who was supposed to "recite Céline" and to declare that he wished after his death to have his corpse stuffed and put on display at Saint-Lazare Station. He lastly claimed to have regretted acting the scene, as he had not appreciated the way the applicant had encouraged the audience to cheer the guest or the remarks made by the latter.

11. The detectives found on the Internet a recording of a performance of the applicant's show on 1 January 2009, during which he had a discussion with J.S. about the sketch in question. The applicant had made the following remarks in particular:

> "The *quenelle* I've just slid up 'em, ..., it's a makeshift media bomb of my own making ...

> For the material I had to do better than Le Pen ... Yeah, you can't strike twice with the same person. I'm not in the Front National, I don't give a damn about all that, but he's a nice bloke, we did have fun, but anyway ... so it wasn't easy to find someone as unfrequentable as Le Pen, in other words, almost totally unfrequentable ... I had to go round looking through all the rubbish heaps of show business, and it took me two months to find him: he was just there, all by himself in the middle of the lettuce leaves. A gem, the chosen one."

12. On 27 January 2009 the applicant was interviewed by the detectives. He explained that he had wanted his Zénith show to be memorable, by associating a symbol of unfrequentability with his own image of "media pariah". He said that he was aware of Robert Faurisson's "diabolical" reputation but had not initially known what had caused it. The only idea mentioned to him by Faurisson was the fact that the latter had questioned the deportation of black slaves in Gorée. He claimed that he had found out later, on the Internet, between his first meeting with Robert Faurisson and the latter's appearance on stage, that he also contested the existence of the gas chambers. He confirmed that the intention had been for his guest to express the wish for his corpse to be stuffed and displayed at Saint-Lazare Station and to recite Céline. He stated that he had nevertheless left him some freedom of expression and had not heard him say anything shocking, merely regretting that he had not been funny enough. He had wanted to have the prize for unfrequentability awarded to his guest by J.S. wearing a deportee's costume as it was a provocative image. Robert Faurisson had not been informed about it beforehand. As regards the candlestick with three apples given to the latter, the applicant stated that it was the most unfashionable and ridiculous idea he had found. Lastly, he explained that he had the impression of belonging to an under-class, in view of the public's lack of interest in Faurisson's contestation of the slave trade.

13. On 27 March 2009 the public prosecutor summoned the applicant to appear before the Paris *tribunal de grande instance* on a charge of proffering a public insult (*injure publique*) directed at a person or group of persons on account of their origin or of belonging, or not belonging, to a given ethnic community, nation, race or religion, by one of the means provided for in section 23 of the Law of 29 July 1881 on freedom of the press. The charge concerned his use, by gestures or speech on the stage of the theatre Le Zénith, of any offensive expression, contemptuous or insulting language, and specifically the following remarks:

> "You know, the Zénith is always a pretty important event for me every year, so whenever I want to do it, it gets harder each time. I said to myself: I've still got to find an idea for the Zénith this time – an idea to slide it up 'em [*pour leur glisser une quenelle*] in a big way.
>
> Well I got thinking – it does happen sometimes – and found a bit of inspiration in the very complimentary review by Bernard H (inaudible – boos in the audience) who described the event at the Zénith, the show, that performance, that event at the Zénith, as the biggest anti-Semitic rally since the Second World War.

So he clearly left me a bit of room for improvement, because I said to myself, I'll have to do better this time, won't I?"

The summons indicated that these remarks had to be understood in the light of the sketch consisting:

"– in calling onto the stage an actor disguised as a Jewish deportee, wearing a costume resembling that of the concentration-camp deportees (pyjamas and yellow star – bearing the word 'Jew' – sewn onto the chest);

– in order to award Robert Faurisson, supporter of negationism, whose ideas call into question the existence of the gas chambers and deny the reality of the Holocaust;

– a 'prize for unfrequentability and insolence', represented by a three-branch candlestick bearing three apples."

14. The association SOS Racisme-Touche pas à mon pote, the Mouvement contre le racisme et pour l'amitié entre les peuples (MRAP), the Ligue internationale contre le racisme et l'antisémitisme (LICRA), the Ligue pour la défense des droits de l'homme et du citoyen (LDH), the association J'accuse ! ... Action internationale pour la justice (AIPJ), the Union des étudiants juifs de France (UEJF), the associations Loge Hatikva B'Nai B'Rith, B'Nai B'Rith David Ben Gourion, Tsedek, Bureau national de vigilance contre l'antisémitisme (BNVCA), Agir ensemble pour la République dans la République, B'Nai B'Rith Deborah Sam Hoffenberg and HCCDA, together with the individuals J.B and G.P., applied to join the proceedings as civil parties.

15. On 27 October 2009 the Paris *tribunal de grande instance* found the applicant guilty as charged and sentenced him to a fine of 10,000 euros (EUR), awarding a token euro in damages to each of the eight civil parties whose applications to join the proceedings had been declared admissible. As an additional penalty the Court also ordered the publication, at the applicant's expense and not exceeding EUR 3,000, of a notice in the daily newspapers *Le Monde* and *Le Parisien-Aujourd'hui en France* to read as follows:

"In a judgment of 27 October 2009 of the Paris Criminal Court (Seventeenth Division/Press Division), Dieudonné M'Bala M'Bala was found guilty on a charge of proffering a public insult directed at a person or group of persons on account of their origin or of belonging, or not belonging, to a given ethnic community, nation, race or religion, in this instance persons of Jewish faith or origin, on account of remarks made publicly in the venue Le Zénith on 26 December 2008, the proceedings having been brought by the public prosecutor, sentenced him [*sic*] to a fine and awarded damages to various associations engaged in the combat against racism, as declared in their constitutions, and which had joined the proceedings as civil parties".

16. The court gave the following reasoning for its decision:

"In the impugned remarks, Dieudonné M'Bala M'Bala introduced what was to follow by explaining to his audience his underlying intention. Noting that the previous show he had done in the same venue had been described – by someone whose name was rendered inaudible by the boos in the audience, but whom the defendant has

identified as Bernard-Henri Levy – as the 'biggest anti-Semitic rally since the Second World War', he said that he had decided to 'do better' than on that previous occasion; he can be understood as meaning the opposite here and his stated ambition was in fact to do worse. Dieudonné M'Bala M'Bala went on to explain that his ultimate objective was to 'slide it up 'em [*pour leur glisser une quenelle*] in a big way'; this colourful expression conjures up – quite clearly, even though it appears to have been specifically coined by the defendant – imagery relating to scatology and sodomy.

He did not, however, explain who was supposed to be the victim of the '*glissage de quenelle*', to quote the expression he used a few seconds later, but told the audience that he was targeting the 'media' and that the '*quenelle*' was intended to undermine their 'foundation'.

It transpired from what followed, however, that he was in fact targeting a different group.

Dieudonné M'Bala M'Bala revealed his idea to the audience and explained that it would enable him to fulfil his aim of *doing worse* than the previous year, while remaining in the register, that had been attributed to him on that occasion, of extreme anti-Semitism. He announced that he had invited 'the most unfrequentable person in France', whom he presented as the victim of 'Israeli occupation militias*'* (he was later to say 'Zionist militias') and, in an encrypted expression, as the man who has 'develop[ed] the positions which have become his hallmark'. It was thus Robert Faurisson whom he introduced and had the audience applaud, before awarding him the 'prize for unfrequentability and insolence'.

In doing so, he could be referring only to what that former academic had become famous for, namely the negation of the genocide perpetrated against Jews by the Nazi regime.

Dieudonné M'Bala M'Bala stated, in that connection, in the course of the investigation conducted by the public prosecutor's office, then at the hearing, that he had been unaware that Robert Faurisson was, in France, one of the main supporters of negationist theories and in particular that he had been convicted for the offence provided for in section 24 *bis* of the Freedom of the Press Act. He stated that he had, on the contrary, been familiar with the man he had chosen as his guest for his contestation of the fact that the so-called slave house in Gorée, Senegal, had been the place where victims of the slave trade had embarked. That statement is, however, devoid of any likelihood, in view both of the notoriety of Robert Faurisson's negationism and of the defendant's stated objective.

Dieudonné M'Bala M'Bala cannot seriously claim that he was seeking to *do worse* in terms of anti-Semitism – as he announced to his audience in the offending remarks – and more generally to engage in the most extreme provocation – by looking for and finding a person 'more unfrequentable than Le Pen' to quote the words that he used on 1 January 2009 when commenting on his show at the Zénith, ... but that to that end he had invited someone who had only made some hypothetical comments to deny, not the reality of the Western slave trade, as he erroneously suggested, but the authenticity of one of its emblematic places.

Moreover, the very name given to the prize that he was awarding to Robert Faurisson reflects positive values in the view of the defendant – who presents himself as a victim, also being *unfrequentable*, of the powerful and of the supporters of commonly accepted ideas –, as in that of the audience, which was won over by that very stance.

Lastly, while a *mise en scène* cannot in itself constitute the medium of an insult, this means of publicity not being provided for by the above-cited section 23 of the law, it must also be pointed out that the defendant chose, for the awarding of a 'prize for unfrequentability and insolence' to Robert Faurisson, a person wearing a pair of striped pyjamas on which was stitched a yellow star bearing the word 'Jew' – and this star certainly does characterise, for its part, a written medium displayed in a public meeting, within the meaning of the statutory provision – and to give material form to that prize, an emblem which was also displayed to the audience, namely a three-branch candlestick with an apple placed on each branch.

Dieudonné M'Bala M'Bala admitted to the detectives that this deportee's costume, already used by the same actor in his show, had been chosen because it constituted the 'most effective' provocation, and that the candlestick was the 'most unfashionable' and 'most ridiculous' prop that he could find. He changed his statement at the hearing, however, claiming that the costume had been used for the sake of convenience and to avoid finding another one, and that the candlestick had been found in a dressing room.

As a professional entertainer ..., the defendant cannot, in any event, seriously contend that the circumstances had been left to chance and determined by purely material considerations. The double choice of, on the one hand, a candlestick – an object which, with seven branches, is an emblem of the Jewish religion and which was debased by being reduced to three branches, with apples substituted for candles – and, on the other, a costume resembling the clothing worn by Jewish deportees in Nazi concentration camps – moreover described as a 'garment of light' – meaningfully reflected, for the audience present at the public rally, the ambition expressly stated in the impugned remarks, as made just before the sketch, to attain a paroxysm of anti-Semitism.

The defendant's intention was thus to undermine the 'foundation' of the Jewish people – the real target of his so-called '*glissage de quenelle*' – when he welcomed on stage an individual known to the public solely for his negationist views, while introducing him as the hero of positive values and having him presented with an award, in the form of a debased emblem of that community, by a character casting ridicule on the Jewish victims of the very crimes that the person thus honoured had denied.

The offending remarks are, in those circumstances, and as the public prosecutor and the civil party have argued quite rightly, both contemptuous and insulting *vis-à-vis* persons of Jewish origin or faith.

It cannot be argued, as did the defendant at the outset, that those remarks contained the imputation of a precise fact, since the allegation in question, the "intention of organising an anti-Semitic rally", which is in fact a pertinent analysis of his own remarks, had been made against him – this being a fact that he attributes to himself, even though his is the defendant and not a civil party – rather than against persons of Jewish confession or faith, to whom no particular conduct was attributed.

The defence of provocation used by Dieudonné M'Bala M'Bala also has to be rejected, as he has failed to show that any person actually described one of his previous shows, two years before, as an anti-Semitic rally, or that such a value judgment, if indeed made, could be characterised as a provocation within the meaning of section 33, paragraph 2, of the Law of 29 July 1881 on freedom of the press, such as to explain or even justify the impugned insult, which by contrast had a precise target, namely individuals of Jewish origin or faith.

Nor can Dieudonné M'Bala M'Bala hide behind the pretext of comedy. Caricature and satire – even of a deliberately provocative or vulgar nature – clearly fall, in a democratic society, within the realm of freedom of expression and creation, involving the free communication of ideas and opinions. Moreover, it is not for the court – which cannot judge the quality of a performance, even though it would suggest that, according to the video-recording, the audience did not find the remarks particularly funny – to determine whether or not the impugned remarks sought to remain within the register of the comedy show that they were bringing to a conclusion. It must be pointed out, however, that the right to humour has certain limits, and in particular that of respect for the dignity of the human person.

In the present case, by announcing his wish to push anti-Semitic provocation to its paroxysm and by publicly paying tribute, to that end, to an individual known for his negationist ideas, calling him on stage to be awarded, by an actor representing a caricature of a Jewish deportee, an object ridiculing a symbol of Judaism, the defendant excessively overstepped the permissible limits of the right to humour.

Lastly, it should be observed that, contrary to what is suggested at various points during the impugned sketch, when mention is made of 'Israeli occupation militias', 'Zionist militias' and 'undying support for Palestine', the offending remarks do not fall within the free expression of a political view on the conflict between Israel and the Palestinians, since the target of the insult at issue was without doubt the entire people of Jewish origin or faith, who were insulted solely on account of their origin or religion, and regardless of any political positions on their part."

17. The applicant and, consecutively, the public prosecutor and seven civil parties appealed against the judgment.

18. In a judgment of 17 March 2011 the Paris Court of Appeal upheld the judgment as to the applicant's guilt and the sanctions imposed on him, merely amending the text of the court-ordered notice. The judges gave the following reasoning:

"Referring – as he does not deny – to the writer Bernard-Henri Lévy, who, he said, had accused him of organising at the Zénith 'the biggest anti-Semitic rally since the Second World War', Dieudonné M'Bala M'Bala set himself the goal of 'doing better this time'.

Accompanying his remarks on two occasions by a hand gesture, raising his right hand all the way up his left arm as far as the shoulder, Dieudonné M'Bala M'Bala told the audience that the idea was to 'slide it up 'em' [*leur glisser une quenelle*], a colourful expression clearly evoking sodomy: 'if it slides, it's softer, more pleasant than a slap', to quote his statement before this court.

The court cannot accept the defendant's submission that his message was not aimed 'at a group of people, namely the Jewish community, but to some of its representatives with whom he was engaged in a dispute, and in particular the columnist from the weekly magazine *Le Point*', as the remainder of his remarks and the *mise en scène* staged by him showed his wish to target the entire Jewish community.

He thus went on to announce the arrival of an individual who was 'going to drive them bananas', 'a scandal in his own right', 'the most unfrequentable person in France', adding that his guest had been 'beaten up by the BETAR and the LDJ', 'Zionist militias', and that he expounded 'the ideas for which he is known'.

There followed the arrival on stage of Robert Faurisson, notorious for his negationist views, for which he has received a number of convictions, to applause from the audience whipped up by Dieudonné M'Bala M'Bala, at which point the performance could no longer be seen as a form of entertainment but rather took on the characteristics of a rally.

As his aim had been to 'do better' in matters of anti-Semitism, the defendant could not seriously argue, as he did before the court below and this court, that he knew his guest only through his work casting doubt on the reality of the role played by the island of Gorée in Senegal at the time of the African slave trade.

Giving his introductory remarks their full meaning and significance, Dieudonné M'Bala M'Bala then arranged for the awarding to Robert Faurisson of a 'prize for insolence and unfrequentability' by an actor wearing a pair of pyjamas, which he described as a 'garment of light', and which clearly resembled the clothing worn by concentration-camp deportees; the addition of a yellow star bearing the word 'Jew' sewn onto it removed any ambiguity as to the aim pursued and the community targeted.

If that was not enough, the handing-over of the prize itself, a three-branch candlestick bearing an apple on each branch – ridiculing a symbol of the Jewish religion – completed the set-up.

The so-called '*glissage de quenelle*' announced to the audience, and which had the aim of doing 'better' in terms of anti-Semitism was then to take on its full meaning: to deliberately offend against the memory of a community by making a mockery, through speech, the yellow star – medium for the word 'Jew' – and the symbol of the candlestick handed over by a 'deportee' to a specialist in Holocaust denial, of the deportation and extermination of the Jews by the Nazis in the Second World War, thus constituting, as already found by the court below, a form of expression that was both insulting and contemptuous *vis-à-vis* all persons of Jewish origin or faith, such that the charge of insult is made out.

Moreover, while Dieudonné M'Bala M'Bala has relied on his right to freedom of expression and a kind of 'immunity' that should, in his view, be enjoyed by artistic creation with a comic aim, it should be pointed out that such rights, essential though they may be in a democratic society, are not limitless, particularly where respect for human dignity is at stake, as it was in the present case, and where theatrical acts give way to a demonstration which is no longer in the nature of a performance."

19. The applicant and three civil parties appealed on points of law.

20. In a judgment of 16 October 2012 the Court of Cassation declared inadmissible the appeal by the civil parties and dismissed that of the applicant. It referred to the Court of Appeal's finding that the fact of making a mockery of the deportation and extermination of the Jews by the Nazis in the Second World War, through speech, the yellow star – medium for the word "Jew" – and the symbol of the candlestick handed over by a "deportee" to a specialist in Holocaust denial, had constituted *vis-à-vis* all persons of Jewish origin or faith a form of expression that was both insulting and contemptuous, such that the charge of insult was made out. The Court of Cassation, adding that it was for the courts below to take note of any extrinsic circumstances which gave the remarks at issue an insulting or defamatory meaning, even if they did not have such a nature in

themselves, and which were capable of revealing their true meaning, found that the Court of Appeal had legally justified its decision.

...

COMPLAINTS

23. Relying on Articles 7 and 10 of the Convention, the applicant complained about his criminal conviction for proffering a public insult against persons of Jewish origin or faith. He submitted that he had arranged a *mise en scène* during his show and that neither he nor his guest on stage had uttered any remark that could be characterised as an insult or as defamation. He added that, for the first time, the French courts had taken the view that the insult did not stem from one of the means provided for in section 23 of the Law of 29 July 1881, but from a form of context based on an offensive *mise en scène*. He argued that this restriction of his freedom of expression was neither foreseeable nor necessary.

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

24. The applicant alleged that his conviction had breached Articles 7 and 10 of the Convention.

25. Being the master of the characterisation to be given in law to the facts of the case, the Court takes the view that the case should be examined solely under Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The parties' submissions

1. The Government

26. The Government disputed the applicant's argument. Principally, they requested that the Court find the application inadmissible pursuant to Article 17 of the Convention. They submitted that the applicant's remarks and acts had clearly revealed a racist objective, seeking, as the Paris Court of Appeal had noted, to "deliberately offend against the memory" of the Jewish people. They thus took the view that the applicant was attempting to deflect Article 10 from its real purpose by using freedom of expression for ends that were at odds with the Convention's fundamental values of justice and peace.

27. In the alternative, the Government took the view that Article 10 had not been violated in the present case; the interference was prescribed by law, served a legitimate purpose and was necessary in a democratic society. As regards, more specifically, the foreseeability of the conviction, they pointed out that, according to a longstanding precedent of the Court of Cassation (Criminal Division 23 November 1907), it was for the courts to note all the extrinsic factual circumstances which gave an offensive significance to writings or printed material not characterised as such in themselves and which were capable of revealing to the public the true meaning. They argued that in the present case the Court of Appeal had established the existence of an insult by noting the offensive significance of the remarks made by the comedian, on account of the *mise en scène* of which they formed part, and in particular the choice of having a negationist awarded a prize, consisting of a candlestick, by a person dressed in clothing resembling that worn by Nazi concentration-camp inmates and bearing a yellow star. In that connection they pointed out that the applicant was well aware that he was breaking the rules because he had admitted that this sketch was "the stupidest thing" he had ever done. The Government added that he had already been convicted for a racial insult: the plenary Court of Cassation had found, in a judgment of 16 February 2007, that a statement he had made ("Jews, they're a sect, a fraud. It's one of the most serious because it was the first") did not fall within the free criticism of religion contributing to a debate of general interest, but constituted an insult, targeting a group of people on account of their origin, the prohibition of which was a necessary restriction on freedom of expression in a democratic society.

2. The applicant

28. The applicant challenged the objection to admissibility under Article 17 of the Convention, arguing that he had not propagated any negationist or revisionist views. He argued that he had merely given a

platform to the "supporter of those views", who, in his opinion, had not expressed any reprehensible remarks and had not in fact been prosecuted in that connection. He explained that he did not know Robert Faurisson very well, in spite of his status as the "most emblematic representative" of negationism, thus showing that he was not a follower of that doctrine. He described as a farce the so-called "recognition" granted by the awarding of a ridiculous prize to his guest, by a Jewish deportee – a figure who, in that guest's eyes, was not supposed to have existed. He explained that the aim had been to highlight the fact that Robert Faurisson was ostracised and to show that freedom of expression was, for the press and the political class, very tightly circumscribed because such freedom did not apply in relation to the "absolute sacred status of the Jewish martyr".

29. Moreover, the applicant claimed that the interference with his right to freedom of expression was not foreseeable, as a *mise en scène* could not in his view constitute an insult in the absence of any specific provision to that effect in the legislation. He also argued that the domestic courts had disregarded factors that were external to his remarks and would have shown that his sketch was not to be interpreted in the first degree; he had sought to show that in France any allusion to the Holocaust which ran counter to the requisite respect for the latter was regarded as an aggression, whilst the questioning of other genocides was tolerated. He explained that the awarding of a prize by a deportee to a negationist had been intended to highlight the absurdity of the idea of having every school pupil "sponsor" a child who died in the concentration camps. He added that the costume worn by J.S. was not intended to show disrespect but to create a comic effect, and that the word "Jew" sewn onto the star, and which in his view was not visible to the audience, did not constitute an insult. He pointed out that the object handed over by way of a prize was not a candlestick but a set of three curved branches with apples on top, and regarded the comparison with the *menorah* – a symbol in the Jewish religion – as a false assumption about his real intentions. Lastly, he stated in his observations in reply that the choice of Robert Faurisson was a response to a provocation, after initially explaining in his application that he was responding to Bernard-Henry Lévy's criticism – which in his view was exaggerated – of his earlier show.

B. The Court's assessment

1. General principles

30. The Court would note at the outset that it is not called upon to examine the constituent elements of the offence under French law of proffering a public insult directed at a person or group of persons on account of their origin or of belonging, or not belonging, to a given ethnic community, nation, race or religion. It is in the first place for the national

authorities, especially the courts, to interpret and apply domestic law (see, among many other authorities, *Lehideux and Isorni v. France*, 23 September 1998, § 50, *Reports of Judgments and Decisions* 1998-VII). The Court's task is only to review under Article 10 the decisions delivered by the competent domestic courts pursuant to their power of appreciation. In so doing, it must satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts (see *Incal v. Turkey*, 9 June 1998, § 48, *Reports* 1998-IV, and *Molnar v. Romania* (dec.), no. 16637/06, § 21, 23 October 2012).

31. As regards freedom of expression, the Court reiterates its eminent and essential character in a democratic society, as enshrined in its case-law (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, and *Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103). The protection conferred by Article 10 also applies to satire, which is a form of artistic expression and social commentary and which, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care (see *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, § 33, 25 January 2007).

32. However, the Court's case-law has also laid down the limits to freedom of expression. In particular, the Court has held as follows (see *Lawless v. Ireland (no. 3)*, 1 July 1961, (Law part) § 7, Series A no. 3):

> "... the purpose of Article 17, insofar as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; whereas, therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms ...".

33. The Court has thus found that any "remark directed against the Convention's underlying values" is removed from the protection of Article 10 by Article 17 (see *Lehideux and Isorni*, cited above, §§ 47 and 53). In the case of *Garaudy*, concerning mainly the conviction for denying crimes against humanity of the author of a work which systematically called into question the crimes against humanity perpetrated by the Nazis against the Jewish community, the Court declared the applicant's complaint under Article 10 incompatible *ratione materiae* with the Convention. It based this conclusion on the observation that the main content and general tenor of the applicant's book, and thus its "aim", were markedly negationist and therefore ran counter to the fundamental values of the Convention, namely justice and peace. It concluded that the applicant had attempted to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which were contrary to the text and spirit of the Convention (see *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX; see also, *Witzsch v. Germany* (dec.), no. 7485/03, 13 December

2005). Prior to that, the European Commission of Human Rights had reached the same conclusion concerning the conviction of the author of a publication whose real aim, under cover of a scientific demonstration, was to deny that the gas chambers had been used for mass human extermination (see *Marais v. France*, no. 31159/96, Commission decision of 24 June 1996, Decisions and Reports 86, p. 194). Other decisions of the Court, particularly in the cases of *Norwood v. the United Kingdom* (no. 23131/03, ECHR 2004-XI) and *Ivanov v. Russia* (no. 35222/04, 20 February 2007), concerned the use of freedom of expression for Islamophobic and anti-Semitic aims, respectively.

2. Application of those principles in the present case

34. In the present case, the Court notes that the domestic courts convicted the applicant for proffering a racial insult. They found that he had publicly paid tribute to a person who was known for his negationist ideas, arranging for an actor dressed as a Jewish inmate of the Nazi concentration camps to award him a prize in the form of an object which mocked a symbol of the Jewish religion, after announcing by way of introduction that he intended to "do better" than in a previous show which had allegedly been described as the "biggest anti-Semitic rally since the Second World War". The judges took the view that the sketch, presented by the applicant as a "*quenelle*", an expression which, according to the Court of Appeal, evoked sodomy, had been addressed to persons of Jewish origin or faith as a community.

35. That finding by the domestic courts was based on an assessment of the facts with which the Court can agree. In particular, it has no doubt that the offending sketch in the applicant's show had a strong anti-Semitic content. It notes that the applicant paid tribute to a person who was known in France for his negationist ideas and who had a criminal record on that account, inviting the audience to applaud him "heartily" and staging the award of a "prize for unfrequentability and insolence". It notes, like the criminal court, that the applicant undoubtedly regarded those acts and remarks as positive in nature.

36. The Court observes that the applicant, far from distancing himself from his guest's speech, argued that the latter had not uttered any revisionist remarks during the sketch. The Court cannot accept this argument. It is of the view that the fact of calling "affirmationists" ("*affirmationnistes*") those who accused him of being a negationist, constituted for Robert Faurisson a clear incitement to put on the same plane "clearly established historical facts" (see *Lehideux and Isorni*, cited above, § 47) and an idea of which French law prohibits any expression and which is thus removed from the protection of Article 10 by Article 17 (ibid.). The Court further notes that the invitation to spell the word freely manifestly sought, through a word play, to incite the audience to consider the proponents of the historical truth

as being driven by "Zionist" ("*sionistes*") motives, this being a common way of thinking among negationists; that very term relates to a recurring theme in the applicant's discourse, as he has made anti-Zionism one of his main political commitments (see paragraph 3 above). It observes that the applicant indicated, during the investigation, that it had been agreed that Robert Faurisson's statements would be different in content (see paragraph 12 above). However, the planned quotation from a passage of Louis-Ferdinand Céline's work (see paragraphs 10 and 12 above), would not, in the context of the *mise en scène* described above, have had the effect of toning down the insulting nature of the sketch for persons of Jewish faith or origin. The Court further notes that the description of the concentration-camp clothing worn by J.S. as a "garment of light" at the very least showed the applicant's contempt for Holocaust victims, thus adding to the offensive dimension of the sketch as a whole.

37. The Court reiterates that, in the context of Article 10 of the Convention, offending comments should be examined in the light of the circumstances and the whole context (see, among many other authorities, *Lingens*, cited above, § 40, and *Morice v. France* [GC], no. 29369/10, § 162, 23 April 2015). In this connection, it does not share the applicant's argument that the domestic courts wrongly interpreted the "sketch" in the first degree, without considering any extrinsic elements that would suggest an opposite interpretation. It notes that the applicant is a comedian who has also displayed a strong political commitment by standing in a number of elections (see paragraph 3 above). It further finds that at the material time he had already been convicted for proffering a racial insult (see paragraph 27 above). It thus takes the view that neither the contextual elements nor the remarks actually made on stage were such as to indicate any intention on the part of the comedian to denigrate the views of his guest or to denounce anti-Semitism. It notes that, on the contrary, the actor playing the role of the concentration-camp inmate himself stated that he was not surprised by the decision to bring Robert Faurisson on stage, in view of the positions expressed over the past couple of years by the applicant, through his public appearances, and especially his collaboration with the then Chairman of the Front National party (see paragraph 10 above). The Court would also observe that the reactions of members of the audience showed that the anti-Semitic and revisionist significance of the sketch was perceived by them (or at least some of them), as it then was by the domestic courts, the remark "Faurisson is right" in particular having been shouted out (see paragraph 8 above).

38. Lastly, and above all, the Court finds that the applicant did not give any explanation in his observations in reply to those of the Government about his wish, as announced in his introduction to the offending sketch and highlighted by the national courts, to go further than in his previous show, which had allegedly been described by a commentator as the "biggest anti-

Semitic rally since the Second World War". It observes that this indication must necessarily have guided the audience's perception about what they were going to see and the sketch could only be interpreted in the light of its author's declared intention to "do better" in terms of anti-Semitism. It further notes that, before the domestic courts, the applicant merely alluded to that introduction in raising the defence of provocation, in order to justify the racial insult with which he had been charged. In his application he used that argument again, stating that he had responded to the "provocation" of the commentator in question, by repeating the wording of his criticism, which he considered exaggerated, and by inviting Robert Faurisson on stage.

39. The Court thus takes the view, like the Court of Appeal, that in the course of the offending sketch the show took on the nature of a rally and was no longer a form of entertainment. The applicant cannot claim, in the particular circumstances and having regard to the whole context, that he acted as an artist with an entitlement to express himself using satire, humour and provocation. Under cover of a comedy show, he invited one of the best known French negationists, who had been convicted a year earlier for denying crimes against humanity, in order to pay tribute to him and give him a platform. In addition, in the context of a preposterously grotesque *mise en scène* he arranged for an actor playing the role of a Jewish inmate of the Nazi concentration camps to award Robert Faurisson a prize. Having regard to the value thus attached to negationism, through the prominence of Robert Faurisson's role on stage and the degrading portrayal of Jewish deportation victims faced with a man who denies their extermination, the Court is of the view that this was a demonstration of hatred and anti-Semitism, supportive of Holocaust denial. It is unable to accept that the expression of an ideology which is at odds with the basic values of the Convention, as expressed in its Preamble, namely justice and peace, can be assimilated to a form of entertainment, however satirical or provocative, which would be afforded protection by Article 10 of the Convention.

40. In addition, the Court emphasises that while Article 17 of the Convention has, in principle, always been applied to explicit and direct remarks not requiring any interpretation, it is convinced that the blatant display of a hateful and anti-Semitic position disguised as an artistic production is as dangerous as a fully-fledged and sharp attack (see also, *mutatis mutandis*, *Marais*, cited above, for the use of an allegedly scientific demonstration). It thus does not warrant protection under Article 10 of the Convention.

41. Accordingly, since the impugned acts, both in their content and in their general tone, and thus in their aim, had a marked negationist and anti-Semitic character, the Court finds that the applicant has attempted to deflect Article 10 from its real purpose by seeking to use his right to freedom of expression for ends which are contrary to the text and spirit of the

Convention and which, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention (see *inter alia*, *mutatis mutandis*, the above-cited decisions in *Marais*, *Garaudy*, and *Witzsch*).

42. Accordingly, the Court finds that pursuant to Article 17 of the Convention the applicant cannot enjoy the protection of Article 10. It follows that the application must be rejected as incompatible *ratione materiae* with the provisions of the Convention, in accordance with Article 35 §§ 3 (a) and 4.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Done in French and notified in writing on 10 November 2015.

Milan Blaško
Deputy Registrar

Josep Casadevall
President