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

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The conviction of a lawyer for public comments contesting the ethnic origin of members of an assize court jury violated his freedom of expression

In today's **Chamber** judgment[1] in the case of Ottan v. France (application no. 41841/12) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case originated in the acquittal in 2009 of a gendarme who had killed a young man from a community of foreign origin, living in a working class neighbourhood, during a car chase in 2003. A few minutes after the verdict, in response to a question from a journalist, the applicant, a lawyer who had been representing the victim's father, stated that the acquittal was not a surprise, given the ethnic composition of the jury, which was exclusively composed of "whites". The Montpellier Court of Appeal imposed a disciplinary penalty, namely a warning, finding that the lawyer had failed to comply with his professional ethical obligations of sensitivity and moderation.

The Court found in particular that the contested remarks had been made as part of a debate on the functioning of the criminal justice system, in the context of media coverage of a case. Taken in their context, they did not amount to an insulting or racially motivated accusation, but concerned the impartiality and representative nature of the assize court jury; in other words, the lawyer had made a general statement about the organisation of the criminal courts. Capable of causing offence, these remarks were nonetheless a value judgment with a sufficient factual basis, and formed part of the defence of the lawyer's client.

Lastly, the Court considered that the sentence, consisting in the lightest possible penalty – a warning, had nonetheless been disproportionate and had not been necessary in a democratic society.

Principal facts

The applicant, Alain Ottan, is a French national who was born in 1955 and lives in Lunel (France).

Mr Ottan, a lawyer, had been acting in legal proceedings for the civil party, the father of a 17-year-old youth who came from a community of foreign origin and lived in a working class neighbourhood. In the night of 2 March 2003 the young man was killed by a gendarme during a car chase. The gendarme, who had been sent for trial before an assize court on charges of manslaughter, having fired multiple gunshots resulting in death, was acquitted on 1 October 2009. In the minutes which followed the delivery of the verdict, the applicant told journalists that he had "*always known that [this verdict] was possible. A white, exclusively white, jury, in which not all communities are represented ... given that the door was wide open to acquittal, it's not a surprise*".

On 2 April 2010 Mr Ottan was summoned to appear before the disciplinary board of the Bars attached to the Montpellier Court of Appeal "for having, in the public lobby outside the

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

courtroom ..., seriously breached the essential professional ethics of lawyers, specifically the duty of sensitivity and moderation, by publicly making comments which imputed racist and xenophobic bias to the court and jury". However, he was acquitted on 11 June 2010.

Following an application by the principal public prosecutor, the Court of Appeal held, in a judgment of 17 December 2010, that the facts constituted a breach of the lawyer's professional obligation. The Court of Appeal considered that the contested remarks did not contribute to the exercise of the rights of defence and referred only to the racial origin of the jury members, and that the term "white", used in a repetitive and affirmative manner, had a racial connotation casting aspersions and suspicion on the integrity of the jurors, and had not been intended to open a discussion or reflection on the matter. In view of the nature and degree of the charge, the Court of Appeal issued a warning – the lightest penalty – to Mr Ottan. On 5 April 2012 the Court of Cassation dismissed his appeal on points of law, finding, in particular, that lawyers were not covered outside the courtroom by the judicial immunity that was applicable in the course of their duties.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), the applicant complained that the penalty imposed by the domestic courts on account of his remarks had amounted to an unjustified infringement of his right to freedom of expression.

The application was lodged with the European Court of Human Rights on 21 June 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

Angelika **Nußberger** (Germany), *President*,
Erik **Møse** (Norway),
André **Potocki** (France),
Síofra **O'Leary** (Ireland),
Mārtiņš **Mits** (Latvia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Lado **Chanturia** (Georgia),

and also Milan **Blaško**, *Deputy Section Registrar.*

Decision of the Court

Article 10

The Court considered that the penalty amounted to an interference with the exercise of the right to freedom of expression. The penalty had been prescribed by law and pursued the aims of "protecting the reputation or rights of others" and maintaining "the authority and impartiality of the judiciary".

With regard to the "necessity" of the interference in a "democratic society", the Court noted that Mr Ottan had not been protected by the judicial immunity enjoyed by every lawyer in respect of "conduct in the courtroom". Nonetheless, outside the courtroom, a client's defence could, in certain circumstances, be continued through the media: if the remarks did not constitute gravely damaging attacks on the action of the courts, if they did not overstep the permissible expression of comments without a sound factual basis, if they were made as part of a public-interest debate, and if the lawyer had made use of the remedies available, in his or her client's interest.

The Court noted, firstly, that the lawyer's statement contributed to the task of representing his client, given that the civil party could not appeal against the decision to acquit the gendarme[2]. The Court considered that the contested statement was part of an analytical approach that could possibly contribute to persuading the principal public prosecutor to lodge an appeal against the acquittal, as he was entitled to do under the law.

Secondly, with regard to the nature of the remarks in question, the Court added that they did not reflect personal animosity on the part of Mr Ottan towards a specifically named juror or a professional judge. Nor did it appear that the applicant had wished to accuse the jurors of racial bias. His comments drew attention to a wider discussion on the issue of diversity in jury selection and formed a value judgment with a sufficient factual basis: on the one hand, they were in line with discussions at national level – how to conduct judicial proceedings in respect of members of the police involved in criminal cases – to which, moreover, the public prosecutor had referred in his pleadings before the Court of Cassation, and, further afield, with public debates in European countries and North America; on the other hand, they had a sufficiently close connection with the facts of the case, having regard to its social and political context.

While recognising that the reference to the jurists' origins or to the colour of their skin could offend some members of the public and the judicial authorities, the Court considered that the remarks 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 jury or the assize court.

Thirdly, with regard to the particular circumstances of the case, the Court considered, firstly, that it was necessary to take account of the tense situation in which the verdict had been delivered, and, secondly, that the facts did not support the conclusion that there had been an attack on the authority and impartiality of the judiciary such as to justify the applicant's conviction.

Lastly, the Court considered that although the penalty imposed was the lightest possible – namely, a "simple warning" -, this was nevertheless not a trivial matter for a lawyer. The fact that the national authorities had opted for the lightest possible sanction could not suffice, in itself, to justify the interference with the applicant's freedom of expression. The conviction had therefore to be regarded as disproportionate interference with the applicant's right to freedom of expression, and had not been necessary in a democratic society.

In consequence, the Court held that there had been a violation of Article 10 of the Convention.

Just satisfaction (Article 41)

The Court held that the finding of a violation constituted in itself sufficient just satisfaction.

The judgment is available only in French.

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[2] The Court relied on the judgment in the case of *Morice v. France* ([GC], no. 29369/10, ECHR 2015.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.