CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF DUPUIS AND OTHERS v. FRANCE

(Application no. 1914/02)

JUDGMENT

FINAL

12/11/2007

STRASBOURG

7 June 2007

This judgment is final but may be subject to editorial revision.

In the case of Dupuis and Others v. France,

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

Mr B.M. ZUPANČIČ, *President*,
Mr C. BÎRSAN,
Mr J.-P. COSTA,
Mrs E. FURA-SANDSTRÖM,
Mrs A. GYULUMYAN,
Mr DAVID THÓR BJÖRGVINSSON,
Mrs I. BERRO-LEFÈVRE, *judges*,

and Mr S. NAISMITH, *Deputy Section Registrar*,

Having deliberated in private on 15 May 2007,

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

PROCEDURE

1. The case originated in an application (no. 1914/02) 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 two French nationals, Mr Jérôme Dupuis and Mr Jean-Marie Pontaut, together with Librairie Arthème Fayard, a company incorporated under French law ("the applicants"), on 17 December 2001.

2. The applicants were represented by Mrs C. Waquet, of the *Conseil d'Etat* and Court of Cassation Bar. The French Government ("the Government") were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. On 26 August 2005 the Government were given notice of the application. It was also decided, having regard to Article 29 § 3 of the Convention, that the admissibility and merits of the case would be examined at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. By a decree of 17 March 1982, a "Mission for coordination, information and action against terrorism" was set up. This "anti-terrorist unit" at the Elysée Palace operated from 1983 to March 1986 within the office of the French President, engaging in telephone tapping and recording.

5. In November 1992 a weekly magazine published a handwritten note dated 28 March 1983, under the letterhead of the President's Office, containing indications that telephone lines, in particular those of certain journalists and lawyers, had been tapped.

In the same year a list of the people who had been placed under surveillance was published in the press.

6. The case aroused considerable media interest and a judicial investigation was opened in February 1993.

In the course of the proceedings G.M., deputy director of the French President's private office at the time of the surveillance, was placed under formal investigation on a charge of invading the privacy of others.

7. On 25 January 1996, a few days after President Mitterrand's death, the publishers Arthème Fayard published a book entitled *Les Oreilles du Président* ("The President's Ears"), which had been written by the first two applicants, both journalists, on the subject of the monitoring operations at the Elysée Palace.

8. On 1 February 1996 G.M. lodged a criminal complaint, with an application to join the proceedings as a civil party, against Mr Pontaut and Mr Dupuis, accusing them of handling documents obtained through a breach of professional confidence, of knowingly deriving an advantage from such a breach and of handling stolen property. In his complaint G.M. noted that appendix 1 of the book consisted of six "facsimile telephone-tap transcripts" which were identical to documents in the case file and that the other three appendices (list of individuals under surveillance) were also based on information from the file. He further cited thirty-six passages from the work which reproduced officially-recorded statements made to the investigating judge by the individuals under investigation or witnesses.

9. In the ensuing judicial investigation the applicants denied having obtained their information illegally. They refused to reveal their sources and claimed that many of the people examined by the judge had since publicly disclosed the content of their statements. As regards the facsimile telephone-tap transcripts and the content of the official records, the applicants argued that they had been circulating among journalists well before the opening of the judicial investigation.

10. In a judgment of 10 September 1998 the Paris *tribunal de grande instance* found that both the facsimiles and the record extracts came from the judicial investigation file, which was only accessible to persons bound by the secrecy of the judicial investigation or by a duty of professional confidence. The court considered that, regardless of how the documents in question had been transmitted, they could not have fallen into the applicants' hands without an offence being committed. In the court's opinion, experienced journalists could not have been unaware of that fact. Observing that all the elements of the offence of handling illegally-obtained items (*recel*) were sufficiently established, the court found Mr Pontaut and Mr Dupuis guilty of the offence of handling information obtained through a breach of the secrecy of the investigation or through a breach of professional confidence, under Articles 226-13, 226-31, 321-1 and 321-9 to 321-12 of the Criminal Code, and ordered each of them to pay a fine of 5,000 francs (equivalent to 762.25 euros (EUR)). The court further ordered them, jointly and severally, to pay 50,000 francs (EUR 7,622.50) in damages and found the company Librairie Arthème Fayard civilly liable. The applicants' book continued to be published and no copies were seized.

11. The applicants appealed. They claimed, among other things, that Article 6 § 2 and Article 10 of the Convention had been breached and argued that the judgment against them could not be regarded as necessary in the light of the Convention.

12. On 16 June 1999 the Paris Court of Appeal upheld the judgment, for the following reasons in particular:

> " ... The quantity, diversity and accuracy of the sources used by the defendants show that they were actually in possession of reproductions of documents from the judicial investigation file, as mere transcriptions or oral accounts would not have enabled them to make such systematic use of the material in that file ... The defendants could only therefore have obtained the documents through the intermediary of persons involved in the proceedings, who can be divided into two groups. The first group is bound by the secrecy of the investigation (judges and prosecutors, clerks, police officers, etc.), any breach of which will constitute a criminal offence. The second group consists of persons who are entitled to obtain copies of documents but who are not bound by the secrecy of the investigation, namely lawyers and the parties themselves ... These clear and coherent provisions show that compliance with certain conditions ensuring the secrecy of the investigation forms an integral part of the duty of professional confidence. To be sure, the rights of the defence must not be impaired by that duty. ... Thus the documents used by the defendants were necessarily obtained illegally and the precise classification of the offence has no bearing on the unlawfulness of their origin, which is the necessary and sufficient basis of the statutory characterisation of the offence of handling (*recel*), as is confirmed by the case-law of the Court of Cassation. ..."

13. As regards Article 10 of the Convention, the Court of Appeal held as follows:

> "Even though the actual object of the handling specifically consists of elements of the judicial investigation, it should first be observed that the offence of handling

provided for under Article 321-1 of the Code of Criminal Procedure corresponds to a commonly used characterisation. ... Accordingly, whilst proceedings in their current form may not be very numerous, they are based on clear and established provisions, which have been implemented in foreseeable conditions.

Under paragraph 2 of the above-mentioned Article 10, the exercise of freedom of expression may be subject to restrictions, in particular for the protection of the reputation or rights of others or for maintaining 'the authority and impartiality of the judiciary'.

It has been established that, by obtaining a number of the confidential documents from proceedings in which [G.M.] had been placed under judicial investigation, the defendants interfered with his private life and with his defence rights as an individual under judicial investigation. That action further demonstrated a wilful disregard for the rules governing the functioning of the judicial authority. In addition, the act of publication, which was the avowed objective of Mr Pontaut and Mr Dupuis, was bound to prejudice the presumption of innocence, a right which must be guaranteed for every person against whom criminal proceedings are brought.

... An obligation to comply with the basic rules governing the functioning of courts and the practices of persons involved in the administration of justice contributes to maintaining the democratic features of society. Accordingly, the rules concerning respect for the secrecy of the judicial investigation, like those concerning the duty of professional confidence, have the effect of protecting the judicial authority from excessive pressure, as well as protecting essential interests of those involved in the proceedings.

The restrictions to which freedom of expression is subject are therefore necessary, particularly because it has not been established that the constraints imposed in the present case really had an adverse effect on the informing of public opinion, having regard to the articles published on the subject, any more than it has been established that there was a breakdown in the administration of justice of which public opinion had to be informed."

14. The applicants appealed on points of law.

15. In a judgment of 19 June 2001 the Criminal Division of the Court of Cassation dismissed their appeal.

16. The Court of Cassation rejected the ground of appeal in which the applicants alleged, among other things, that there had been a violation of Article 6 § 2 of the Convention, finding as follows:

"In finding guilty the defendants, who had denied having obtained the information unlawfully, but had refused to reveal their sources, the Court of Appeal notes that the book contained facsimile telephone-tap transcripts which are exact copies of pages from the investigating judge's case file, and of official records of statements drawn up by the judge. The court adds that, absent any evidence to support the hypothesis of accidental disclosure, the source could only have been a professional bound by a duty of confidence, whether one of the persons required to respect the secrecy of the judicial investigation or a lawyer bound by a duty of professional confidence under Article 160 of the decree of 27 November 1991 on the organisation of the legal profession. The court infers from the foregoing that, regardless of how the documents in question were transmitted, they could not have fallen into the hands of the

defendants without an offence being committed. It adds that experienced journalists could not have been unaware of this fact.

In the light of that reasoning as it stands, based on a discretionary assessment of the circumstances of the case, the Court of Appeal, which established that the defendants had knowingly possessed and published photocopies of material from the judicial investigation in progress, duly substantiated its decision ...".

17. The Court of Cassation, reasoning as follows, also dismissed the applicants' ground of appeal, based on a violation of Article 10 of the Convention, in which they submitted that the simple fact that the telephone tapping described in the book was the subject of a judicial investigation was not sufficient to justify the interference with their freedom of expression and that the judgment against them did not fulfil any necessity:

"In dismissing the complaint that there had been a violation of Article 10 of the European Convention on Human Rights, the Court of Appeal, by reasoning of its own and espousing that of the court below, notes that the essential subject matter of the offending work consists of the actual case file from the judicial investigation in progress; that the book reproduces, among other things, numerous passages from interviews with individuals examined by the investigating judge; and that this information was used in some detail in the authors' observations on the functioning of the monitoring system set up within the French President's Office. The court explains that the defendants found themselves in possession of confidential information on [G.M.] to which they had no right of access, thus interfering with a legitimate interest of the latter. The court adds that the limits to which freedom of expression is subject are necessary, particularly because it has not been established that the constraints applied in the present case caused any real prejudice to the informing of public opinion or that there was any breakdown in the administration of justice of which public opinion had to be informed.

Having regard to the foregoing findings, from which it transpires that the defendants were prosecuted for disclosing the content, that remained confidential, of material from a judicial investigation in progress, and that such a measure was justified by the necessity of protecting the rights of others, one such right being the presumption of innocence, and by the need to prevent disclosure of confidential information and to maintain the authority and impartiality of the judiciary, the Court of Appeal duly substantiated its decision for the purposes of Article 10 of the European Convention on Human Rights.

...

In awarding damages to the civil party, on the ground that the publication by the defendants of confidential information concerning that party had directly contributed to the damage he had sustained, the Court of Appeal substantiated its decision for the purposes of Article 2 of the Code of Criminal Procedure."

18. In a judgment of the Paris Criminal Court dated 9 November 2005, G.M. was given a suspended six-month prison sentence and fined EUR 5,000.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

19. The relevant provisions of the Criminal Code read as follows:

Article 226-13

"The disclosure of confidential information by persons who are entrusted with it either on account of their position or profession or on account of a temporary function or assignment shall be punished by one year's imprisonment and a fine of 15,000 euros."

Article 321-1

"The offence of handling (*recel*) is constituted by the concealment, possession or transmission of a thing, or by the fact of acting as an intermediary with a view to its transmission, in the knowledge that the said object was obtained by means of a serious crime (*crime*) or other major offence (*délit*).

The offence of handling is also constituted by the fact of knowingly deriving an advantage, by any means, from the product of a serious crime or other major offence. Handling shall be punished by five years' imprisonment and a fine of 375,000 euros."

20. Recommendation Rec(2003)13 of the Committee of Ministers of the Council of Europe to member States, on the provision of information through the media in relation to criminal proceedings, reads as follows:

"...

Recalling that the media have the right to inform the public due to the right of the public to receive information, including information on matters of public concern, under Article 10 of the Convention, and that they have a professional duty to do so;

Recalling that the rights to presumption of innocence, to a fair trial and to respect for private and family life under Articles 6 and 8 of the Convention constitute fundamental requirements which must be respected in any democratic society;

Stressing the importance of media reporting in informing the public on criminal proceedings, making the deterrent function of criminal law visible as well as in ensuring public scrutiny of the functioning of the criminal justice system;

Considering the possibly conflicting interests protected by Articles 6, 8 and 10 of the Convention and the necessity to balance these rights in view of the facts of every individual case, with due regard to the supervisory role of the European Court of Human Rights in ensuring the observance of the commitments under the Convention;

...

Desirous to enhance an informed debate on the protection of the rights and interests at stake in the context of media reporting relating to criminal proceedings, and to foster good practice throughout Europe while ensuring access of the media to criminal proceedings;

...

Recommends, while acknowledging the diversity of national legal systems concerning criminal procedure, that the governments of member states:

1.take or reinforce, as the case may be, all measures which they consider necessary with a view to the implementation of the principles appended to this recommendation, within the limits of their respective constitutional provisions,

2.disseminate widely this recommendation and its appended principles, where appropriate accompanied by a translation, and

3.bring them in particular to the attention of judicial authorities and police services as well as to make them available to representative organisations of lawyers and media professionals.

Appendix to Recommendation Rec(2003)13 - *Principles concerning the provision of information through the media in relation to criminal proceedings*

Principle 1 - Information of the public via the media

The public must be able to receive information about the activities of judicial authorities and police services through the media. Therefore, journalists must be able to freely report and comment on the functioning of the criminal justice system, subject only to the limitations provided for under the following principles.

Principle 2 - Presumption of innocence

Respect for the principle of the presumption of innocence is an integral part of the right to a fair trial. Accordingly, opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused.

...

Principle 6 - Regular information during criminal proceedings

In the context of criminal proceedings of public interest or other criminal proceedings which have gained the particular attention of the public, judicial authorities and police services should inform the media about their essential acts, so long as this does not prejudice the secrecy of investigations and police inquiries or delay or impede the outcome of the proceedings. In cases of criminal proceedings which continue for a long period, this information should be provided regularly.

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

21. The applicants complained that the judgment against them did not meet a pressing social need and had therefore breached their right to freedom of expression. The fact that the case had not been initiated by the public prosecutor was proof of this, in their view. The applicants further claimed that the offending book had caused no prejudice to G.M.'s presumption of innocence, it being publicly known that he was under judicial investigation. In this connection they invoked their right to impart information in the context of an affair of state and argued that this public debate concerned the exercise of power, with its excesses and its checks and balances, and that the debate pre-dated the book's publication, the purpose of which was not to impede the investigation. The applicants relied on Article 10 of the Convention, of which the relevant part 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. ...
>
> 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 preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

22. The Government contested the applicants' arguments.

A. Admissibility

23. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It moreover considers that no other ground for declaring it inadmissible has been established and therefore declares it admissible.

B. Merits

1. The parties' submissions

(a) The applicants

24. The applicants argued in particular that the interference was not necessary. In their submission, the secrecy of the judicial investigation was binding only on the participants in the investigation but not on the parties.

Disclosure was not prohibited and there were no facts that were specifically precluded from being imparted to third parties.

25. Moreover, the applicants considered that they had not prejudiced the protection of the rights of others. Even though there had not yet been a judgment in the case when the book was published, the judicial investigation had been ongoing for the previous three years and a further ten years had then elapsed before the judgment of the Paris Criminal Court. In such a context, the publication of a book to report once again on what was an affair of state, whilst the judicial system was being particularly slow, did not contravene any fundamental principle and especially not the secrecy of the judicial investigation. When an investigation lasted for such a long period, and when testimony, evidence and elements could have disappeared in the meantime, it was, on the contrary, praiseworthy and in the interest of democracy for investigative journalists to disclose what they discovered through their own investigations. In the present case, it had no longer been a question of protecting evidence but, on the contrary, of preventing its disappearance by bringing into the public domain what the judicial system had struggled to bring to light.

26. In this connection, the public interest prevailed over the interest of G.M. and it could not be argued that his right to presumption of innocence had been prejudiced in such a way that the criminal court had been unable to pass judgment, ten years later, with totally unfettered discretion in the assessment of his guilt.

(b) The Government

27. The Government did not dispute the fact that the applicants' conviction for the offence of handling information protected by the secrecy of a judicial investigation or by a duty of professional confidence constituted interference with their right to freedom of expression. In their opinion, that interference was prescribed by law, namely by Articles 226-13 and 321-1 of the Criminal Code, which fulfilled the conditions of accessibility and foreseeability required by the Court (see *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I). The Government considered, however, that the interference constituted a measure that was necessary in a democratic society for the protection of the reputation or rights of others and for maintaining the authority and impartiality of the judiciary. Without disputing the fact that the aim of the applicants' work had been to inform the general public about an affair of state that was of interest to public opinion, they considered that it prejudiced the presumption of innocence in respect of G.M. The publication of the book just a few days after the death of François Mitterrand had given it a certain commercial and media impact, thereby increasing the prejudice sustained by G.M. Moreover, the affair had been a very sensitive one and the book had contained precise reproductions of a number of documents from the case file.

28. In the Government's view, the interference was in fact proportionate to the aim pursued. The prohibition on producing documents from an investigation file was limited to the period of the judicial investigation itself and covered only the acts of handling and disclosure of actual documents from the case file; therefore it did not prevent journalists from imparting information on a case that was the subject of an ongoing judicial investigation or from engaging in their own investigations, interviewing parties to the proceedings, witnesses or lawyers, or even from making critical comments about judicial activity.

29. The Government lastly considered that the present case had to be distinguished from that of *Fressoz and Roire* (cited above). The secrecy of the judicial investigation and respect for the presumption of innocence, which protected collective and public interests, could not be placed on the same footing as confidentiality in tax matters, which protected purely private interests. Moreover, the French courts had adduced sufficient reasons in support of their decisions after a precise examination. The public's right to information on the "Elysée eavesdropping" affair had not been impaired, the publication of the book had continued and no copies had been seized. The public had, moreover, continued to be informed extensively by the media. In addition, the applicants had been given a "token sentence", far less than the statutory maximum.

2. The Court's assessment

30. The Court observes that the applicants were ordered to pay a fine and damages on account of the use and reproduction in their book of elements from the judicial investigation file. It is not in dispute that the applicants sustained "interference" with their right to freedom of expression under Article 10 of the Convention. Such interference will be in breach of Article 10 unless it fulfils the requirements of paragraph 2 of that Article. It therefore remains to be determined whether the interference was "prescribed by law", pursued one or more of the legitimate aims referred to in that paragraph and was "necessary in a democratic society".

(a) "Prescribed by law"

31. The Court notes that the offences with which the applicants were charged had been provided for, like the penalties imposed, in the Criminal Code. Moreover, the applicants did not dispute the foreseeability and accessibility of the applicable statutory provisions. The interference was thus prescribed by law.

(b) Legitimate aim

32. The Court observes that the domestic courts based their decisions on a breach of professional confidence or of the secrecy of the judicial

investigation. The interference thus had the aim, among others, of guaranteeing respect for the right of a person who had not yet stood trial to be presumed innocent. It also had the aim of ensuring the proper administration of justice by preventing any extraneous influence on that administration. These aims correspond to the protection of "the reputation or rights of others" and to the maintaining of "the authority and impartiality of the judiciary", in so far as the latter safeguard has been construed as encompassing the rights enjoyed by individuals as litigants in general (see *Ernst and Others v. Belgium*, no. 33400/96, § 98, 15 July 2003).

Accordingly, the Court considers that the reasons adduced by the domestic courts were consonant with the legitimate aim of protecting G.M.'s right to a fair trial, with due respect for presumption of innocence.

(c) "Necessary in a democratic society"

(i) Reminder of general principles

33. Freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are therefore of particular importance (see, among other authorities, *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, p. 23, § 31; *Worm v. Austria*, judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V, p. 1550-51, § 47; and *Fressoz and Roire*, cited above, § 45).

34. The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of information received in confidence, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, pp. 233-234, § 37; Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III; *Thoma v. Luxembourg*, no. 38432/97, §§ 43-45, ECHR 2001-III; and *Tourancheau and July v. France*, no. 53886/00, § 65, 24 November 2005).

35. In particular, it would be inconceivable to consider that there can be no prior or contemporaneous discussion of the subject matter of judicial proceedings elsewhere, be it in specialised journals, in the general press or amongst the public at large. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them. However, it has to be taken into account that everyone is entitled to the enjoyment of the guarantees of a fair trial set out in Article 6 § 1 of the Convention, which in criminal proceedings include the right to an impartial tribunal (*Tourancheau and July*, cited above, § 66). As the Court has already had occasion to point out, "[t]his must be borne in mind by journalists when commenting on pending criminal proceedings since the

limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice" (ibid., and *Worm*, cited above, § 50).

36. As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In the present context of the press, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued (see, to the same effect, *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports* 1996-II, pp. 500-501, § 40; *Worm*, cited above, § 47; and Bladet Tromsø *and Stensaas*, cited above, § 59).

37. The Court's task, in exercising its supervisory function, is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, among other authorities, *Goodwin*, cited above, and *Du Roy and Malaurie v. France*, no. 34000/96, § 27, ECHR 2000-X). Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under Article 6 § 2 of the Convention individuals have a right to be presumed innocent of any criminal offence until legally proved guilty (see *Du Roy and Malaurie*, cited above, § 34, and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 78, ECHR 2004-XI).

38. It is therefore for the Court to determine whether the interference complained of met a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it appear "relevant and sufficient".

(ii) Application to the present case

39. The Court observes at the outset that the subject of the book was an issue of considerable public interest. The book made a contribution to a matter that was an affair of state, as the Government acknowledged, and of interest to public opinion, providing certain information and considerations about the prominent figures whose telephone lines had been illegally monitored, about the conditions in which the operations had taken place and about the identity of the instigators. It is moreover noteworthy that the list

of the "two thousand individuals under surveillance" included the names of numerous figures who were particularly prominent in the media.

40. The Court reiterates that Article 10 § 2 of the Convention leaves little scope for restrictions on freedom of expression in the area of political speech or in matters of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV). Furthermore, the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 42; *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1567, § 54; *Feldek v. Slovakia*, no. 29032/95, § 74, ECHR 2001-VIII; and *Brasilier v. France*, no. 71343/01, § 41, 11 April 2006). The promotion of free political debate is a fundamental feature of a democratic society. The Court attaches the highest importance to freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for freedom of expression in general in the State concerned (see *Feldek*, cited above, § 83). In the present case, the speech complained of concerned G.M., one of President François Mitterrand's closest aides. Although G.M., who initiated the proceedings and judgment against the applicants, could not himself be described, strictly speaking, as a politician, he nevertheless had all the characteristics of an influential public figure, being clearly involved in political life and at the highest level of the executive.

41. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them (see, among many other authorities, Observer *and* Guardian *v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, p. 30, § 59; *Jersild*, cited above, p. 23, § 31; and *De Haes and Gijsels*, cited above, p. 234, § 39). This was particularly true in the present case, concerning as it did an illegal system of telephone tapping and recording directed against many prominent figures from civil society and organised at the highest echelon of the State. The revelation of these facts aroused a considerable degree of emotion and concern among public opinion. The offending book, like reports on court cases, satisfied a concrete and sustained public demand in view of the increasing interest shown nowadays in the day-to-day workings of the courts. The public therefore had a legitimate interest in the provision and availability of information about these proceedings and, in particular, about the facts reported in the book.

42. The importance of the media's role in the area of criminal justice is, moreover, very widely recognised. In particular, the Court has previously

found that "[p]rovided that it does not overstep the bounds imposed in the interests of the proper administration of justice, reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement under Article 6 § 1 of the Convention that hearings be public" (*Worm*, cited above, § 50). The Council of Europe's Committee of Ministers, for its part, has adopted Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings. It rightly points out that the media have the right to inform the public in view of the public's right to receive information, and stresses the importance of media reporting on criminal proceedings in order to inform the public and ensure public scrutiny of the functioning of the criminal justice system. In addition, the appendix to that Recommendation states that the public must be able to receive information about the activities of judicial authorities and police services through the media and that journalists must therefore be able to report freely on the functioning of the criminal justice system.

43. Admittedly, those who exercise freedom of expression, including journalists, undertake "duties and responsibilities" the scope of which depends on their situation and the technical means they use (see, *mutatis mutandis*, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49 *in fine*). In the present case the domestic courts considered, in view of the nature of the documents reproduced in the book or used in support of certain passages in the book, that the authors, as experienced journalists, could not have been unaware that the said documents came from the judicial investigation file and were protected, depending on the person who instigated their disclosure, by the secrecy of the judicial investigation or by a duty of professional confidence. While recognising the vital role played by the press in a democratic society, the Court emphasises that journalists cannot, in principle, be released from their duty to abide by the ordinary criminal law on the basis that Article 10 affords them protection. Indeed, paragraph 2 of Article 10 defines the boundaries of the exercise of freedom of expression. It falls to be decided whether, in the particular circumstances of the case, the interest in the public's being informed outweighed the "duties and responsibilities" the applicants had as a result of the suspect origin of the documents that had been transmitted to them.

44. The Court must more specifically determine whether the aim of protecting the secrecy of a judicial investigation provided relevant and sufficient justification for the interference. It is legitimate for special protection to be afforded to the secrecy of a judicial investigation, in view of the stakes of criminal proceedings, both for the administration of justice and for the right of persons under investigation to be presumed innocent. However, in the circumstances of the present case, the Court considers that, at the time when the offending book was published, in January 1996, in

addition to there being very wide media coverage of the so-called "Elysée eavesdropping" case, it was already publicly known that G.M. had been placed under investigation in this case, in the context of a pre-trial judicial investigation which had started about three years earlier, and which ultimately led to his conviction and suspended prison sentence on 9 November 2005, that is to say just over nine years and nine months after the book was published. Moreover, the Government have failed to show how, in the circumstances of the case, the disclosure of confidential information could have had a negative impact on G.M.'s right to the presumption of innocence or on his conviction and sentence almost ten years after that publication. In actual fact, following the publication of the impugned book and while the judicial investigation was ongoing, G.M. regularly commented on the case in numerous press articles. In those circumstances, the protection of the information on account of its confidentiality did not constitute an overriding requirement.

45. In this connection it is noteworthy that, while the applicants' conviction for the offence of handling was based on the reproduction and use in their book of documents which had come from the investigation file and which, accordingly, were found to have been communicated in breach of the secrecy of the judicial investigation or in breach of professional confidence, that conviction inevitably concerned the disclosure of information. It is open to question, however, whether there was still any need to prevent disclosure of information that was already, at least partly, available to the public (see *Weber v. Switzerland*, judgment of 22 May 1990, Series A no. 177, p. 23, § 51, and *Vereniging Weekblad* Bluf! *v. the Netherlands*, judgment of 9 February 1995, Series A no. 306-A, p. 15, § 41) and might already have been known to a large number of people (see *Fressoz and Roire*, cited above, § 53) having regard to the media coverage of the case, on account of the facts and of the celebrity of many of the victims of the telephone tapping in question.

46. The Court further considers that it is necessary to take the greatest care in assessing the need, in a democratic society, to punish journalists for using information obtained through a breach of the secrecy of an investigation or a breach of professional confidence when those journalists are contributing to a public debate of such importance and are thereby playing their role as "watchdogs" of democracy. Article 10 protects the right of journalists to divulge information on issues of public interest provided that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (see *Goodwin*, cited above, § 39; *Fressoz and Roire*, cited above, § 54; and *Colombani and Others v. France*, no. 51279/99, § 65, ECHR 2002-V). In the present case, it transpires from the applicants' undisputed allegations that they acted in accordance with the standards governing their profession as journalists, since the impugned publication was relevant not

only to the subject matter but also to the credibility of the information supplied, providing evidence of its accuracy and authenticity (see *Fressoz and Roire*, cited above, § 55).

47. Furthermore, as regards the penalties imposed, the Court reiterates that the nature and severity of the penalty are also factors to be taken into account when assessing the proportionality of interference (see *Sürek (no. 1)*, cited above, § 64; *Paturel v. France*, no. 54968/00, § 47, 22 December 2005; and *Brasilier*, cited above, § 43).

48. The Court first notes that the two authors were fined EUR 762.25 each and were also ordered jointly to pay EUR 7,622.50 in damages to G.M. In addition, the applicant company was found to be civilly liable. However, no order to destroy or seize the book was issued and its publication was not prohibited (see *Paturel*, cited above, § 48). That being said, the amount of the fine, although admittedly fairly moderate, and the award of damages in addition to it, do not appear to have been justified in the circumstances of the case (see *Brasilier*, cited above, § 3, and *Paturel*, cited above, § 49). Moreover, as the Court has stated on numerous occasions, interference with freedom of expression might have a chilling effect on the exercise of that freedom (see, *mutatis mutandis*, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 114, ECHR 2004-XI) – an effect that the relatively moderate nature of a fine would not suffice to negate.

49. In conclusion, the Court considers that the judgment against the applicants constituted a disproportionate interference with their right to freedom of expression and that it was therefore not necessary in a democratic society.

Accordingly, there has been a violation of Article 10 of the Convention.

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

50. The applicants further complained, additionally relying on Article 6 § 2 of the Convention, that the domestic courts had failed to respect the principle of presumption of innocence since, in their view, no evidence had been adduced to show that the documents had come into their possession fraudulently. Article 6 § 2 reads as follows:

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

51. In view of its finding of a violation under Article 10 of the Convention, the Court considers that the complaint under Article 6 § 2, which should be declared admissible, is based on the same facts and that therefore no separate question arises under Article 6 § 2 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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."

53. As the applicants did not submit any claims for just satisfaction, the Court considers that no award should be made to them under that head (see, among other authorities, *Brasilier*, cited above, § 46).

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 no separate question arises under Article 6 § 2 of the Convention.

Done in French, and notified in writing on 7 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley NAISMITH
Deputy Registrar

Boštjan M. ZUPANČIČ
President