

FIRST SECTION

CASE OF **HACHETTE FILIPACCHI ASSOCIES** v. **FRANCE**

(Application no. 71111/01)

JUDGMENT

STRASBOURG

14 June 2007

FINAL

12/11/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of *Hachette Filipacchi Associés v. France*,

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

Mr C.L. Rozakis, *President*,

Mr L. Loucaides,

Mr J.-P. Costa,

Mrs N. Vajić,

Mr A. Kovler,

Mr D. Spielmann,

Mr S.E. Jebens, *judges*,

and Mr S. Nielsen, *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. 71111/00) 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 **Hachette** Filipacchi Associés, a company incorporated under French law with its registered office in Levallois-Perret (“the applicant company”), on 20 March 2001.

2. The applicant company was represented by Mr M.-C. de Percin, of the Paris Bar. The French Government (“the Government”) were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant company complained of a violation of its right to freedom of expression as guaranteed under Article 10 of the Convention.

4. By a decision of 2 February 2006, the Chamber declared the application admissible.

5. The applicant company and the Government each filed observations on the merits.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. In its 19 February 1998 edition the French weekly magazine *Paris-Match*, published by the applicant company, featured an article in its “News” section entitled 'La République assassinée' (The Murdered Republic), concerning the murder of the Prefect Claude Erignac in Ajaccio, Corsica, on 6 February 1998.

7. The article was illustrated by a photograph of the scene, taken moments after the murder, showing the prefect's body lying on the ground.

8. The article was published a week after the murder, by which time the news had been extensively covered and commented on in the media, both in the printed press and on television, including the national channels.

9. The magazine's two-page colour photograph showed Mr Erignac's lifeless body lying on the ground, his face turned partly towards the camera. In the right hand corner of the picture, under the headline 'La République assassinée', the following commentary could be read:

“On this Ajaccio pavement, on Friday 6 February at 9.15 p.m., Claude Erignac, Prefect of Corsica, wrote a tragic page in our history with his blood. No prefect had been killed in France since Jean Moulin in 1943

... In 1998 the bullets fired into the back of this unarmed man, who was on his way to listen to Beethoven's "Heroic Symphony", will shake all those who thought terror was something you get used to out of their stupor. In the book of condolences opened at the prefecture, many Corsicans, proud as they are reputed to be, will write their "shame". They will applaud President Chirac when, at the memorial in Ajaccio to all those who gave their lives for France, he reaffirms the values of the Republic. Values which, today, have become a challenge."

10. On 12 February 1998 Claude Erignac's widow and children lodged an urgent application against several companies (including the applicant company) seeking the seizure, under Article 809 of the new Code of Civil Procedure, of all copies of magazines containing the aforesaid photograph (including *Paris-Match*) and prohibition of their sale on penalty of fines. They also sought an award of damages in the sum of 150,000 French francs (FRF) payable jointly and severally by the defendants.

11. The claimants submitted that the purpose of publishing the photograph of the bloody, mutilated body of the Prefect of Corsica was by no means to inform the public but purely commercial, and constituted a particularly intolerable infringement of their right to respect for their private life.

12. The defendant companies replied that the picture of a person who died in a public place because of the post he occupied could not constitute either a violation of his family's right to respect for their private life or a manifestly unlawful infringement warranting the intervention of the urgent-applications judge when the picture had been published in the context of a political and judicial event that amounted to a national tragedy and, furthermore, had been published and disseminated by numerous other press agencies and television channels, including public ones.

13. By an order of 12 February 1998, the President of the Paris *tribunal de grande instance*, under Article 809 § 1 of the new Code of Civil Procedure, found against the applicant company and the other defendant companies for the following reasons:

"... the claimants contend that, in spite of being put on notice, the weekly magazines *Paris Match* and *VSD* published in their editions which went on sale on 12 February 1998 a photograph of the bloody, mutilated body of Claude Erignac, Prefect of Corsica, who was murdered in Ajaccio on 6 February 1998;

... it is established that the public's right to information authorises a newspaper to inform its readers, in words or in pictures, of any exceptional event that amounts, as in this case, to a national tragedy, drawing it to the attention of public opinion;

... this fundamental right has its limits only in a publication which is particularly intolerable, because the excessively serious nature of the text or picture is liable to cause the victims unbearable distress, the nature and extent of which are for the urgent-applications judge to determine, in keeping with the provisions of Article 809 § 1 of the new Code of Civil Procedure;

... in the instant case the publication of the photograph showing the dead body of Prefect Claude Erignac lying in the street cannot but constitute an intolerable injury to the feelings of the claimants, who have undergone a particularly serious emotional shock in view of the exceptional circumstances of the murder;

... the need for information cannot justify the existence of such an infringement – even if the photograph in issue, which was taken in a public place, was touched up and published by different news sources – without every effort being made to preserve the dignity of the murdered prefect's body and show a minimum of consideration for the feelings of the claimants, for whom time had not yet alleviated the horror of their ordeal;

... however ... a seizure order would be unenforceable in practice, and disproportionate to the nature of the infringement complained of, for which compensation could be sought in court ..."

14. The urgent-applications judge ordered the applicant company to publish the following statement at its own expense in the following issue of *Paris-Match*, in a box measuring fifteen centimetres by fifteen centimetres, under the heading "Court-ordered statement" in bold characters one centimetre high:

“By order of 12 February 1998, the Paris *tribunal de grande instance*, acting on an application in urgent proceedings, declared that the photograph published by *Paris Match* in its 19 February 1998 issue, showing the dead body of the Prefect Claude Erignac, caused Mrs Erignac and her children considerable distress.”

15. The applicant company appealed against that order, submitting that the measure concerned amounted to a violation of press freedom and the right to inform guaranteed under Article 10 of the Convention. It argued that the photograph in issue was the dark, subdued image of a historic event and, as such, could not constitute an intrusion into the Erignac family's private life. The applicant company also disputed the alleged indecency of the photograph.

16. In a judgment delivered on 24 February 1998 the Paris Court of Appeal upheld the interim order, but modified the content of the statement. Having had regard, in particular, to Article 10 of the Convention, the Court of Appeal ruled that:

“... under the provisions of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, exercise of the right to freedom of expression may be subject to such penalties as are prescribed by law and are necessary in a democratic society for the protection of the rights of others;

... Article 9 § 2 of the Civil Code embodies a penalty that meets the requirements of the aforesaid provisions, namely that judges may, without prejudice to a right to compensation for damage sustained, order any measures, such as seizure, attachment and others, that may prevent an intrusion into private life or cause it to cease; in the event of urgency such measures may be ordered on an interlocutory application.”

... in the instant case ... the offending photograph, as published ... by the weekly *Paris-Match*, clearly shows the body and face of Claude Erignac, lying on the ground in a street in Ajaccio in the moments following his murder on 6 February 1998;

... the publication of that photograph at a time when Mr Erignac's close family was still in mourning, as it was done without their consent, constituted a gross intrusion into their grief and, accordingly, the intimacy of their private life;

... in the presence of such an intrusion an urgent-applications judge who finds, as in the instant case, that he is unable materially to make the intrusion cease, by a seizure measure, for example, is empowered by the last of the laws mentioned above to prescribe any other appropriate measure;

... it follows that the measure of publishing a statement prescribed by the first judge is legally justified under the provisions of Article 9 § 2 of the Civil Code, provided that its purpose is to cause the intrusion into the Erignac family's private life to cease;

... in order to satisfy that requirement, the content of the statement should be modified in the manner prescribed in the operative provisions of this judgment, and the decision ordering its publication should be combined with a fine ...”.

17. The Court of Appeal ordered the publication, in the first issue of *Paris-Match* to be published after the judgment had been served, of a statement worded as follows:

“... in bold characters half a centimetre high, under the heading “Publication of court judgment”, in a box measuring 15 x 7.5 centimetres:

“In a judgment of 24 February 1998, the Paris Court of Appeal ordered the publication of the following statement:

The photograph of the body of Claude Erignac lying on the ground in a street in Ajaccio which appeared in edition 2543 of the weekly Paris Match, dated 19 February 1998, was published without the consent of Claude Erignac's family, who consider its publication as an intrusion into the intimacy of their private life”
...”

18. The applicant company lodged an appeal on points of law, claiming among other things that there had been a violation of Article 10 of the Convention.

19. In a judgment of 20 December 2000 the Court of Cassation dismissed the appeal for the following reasons:

“... having noted that the photograph published clearly showed the body and face of the murdered prefect lying on the ground in a street in Ajaccio, the Court of Appeal was able to rule that the picture concerned

showed disregard for human dignity and that its publication was illegal, its decision thus being legally justified with regard to the requirements of Article 10 of the European Convention and Article 16 of the Civil Code ...”.

20. The Erignac family brought no proceedings on the merits.

II. RELEVANT DOMESTIC LAW

A. The new Code of Civil Procedure

21. Article 808 reads as follows:

“In all urgent cases the President of the *tribunal de grande instance* may order any interim measures which are not seriously disputable or are justified by the existence of a dispute.”

22. Article 809 reads as follows:

“The president may order at any time, even in the event of a serious dispute, such measures to preserve or restore the present position as are necessary either to prevent imminent damage or to put an end to a manifestly unlawful infringement.

Where the existence of an obligation is not seriously disputable, he may award an advance to the entitled party, or order the execution of the obligation, even if it is an obligation to take action.”

B. The Civil Code

23. Article 9 provides:

“Everyone has the right to respect for his private life.

Judges may, without prejudice to a right to compensation for damage sustained, order any measures, such as seizure, attachment and others, that may prevent an intrusion into private life or cause it to cease; in the event of urgency such measures may be ordered on an interlocutory application.”

24. Article 16 of the Civil Code provides as follows:

“The law ensures the primacy of the person, prohibits any infringement of a person's dignity and guarantees respect for the human being from the beginning of life.”

C. The Freedom of the Press Act of 29 July 1881

25. Section 38, paragraph 3, of the version in force at the material time – which was repealed on 16 June 2000 – provided:

“[A fine of 25,000 French francs] shall be applicable in established cases of publication, by any means, of photographs, engravings, drawings or portraits reproducing all or part of the circumstances of any of the crimes and offences provided for in chapters I, II and VII of part II of book II of the Criminal Code.” [which cover murder, among other things].

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant company challenged the order requiring it, subject to a penalty for non-compliance, to publish a statement that the photograph of Mr Erignac had been published without his family's consent. It relied on Article 10 of the Convention, the relevant parts of which provide:

Article 10

“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 ...”

A. Existence of an interference

27. The Court considers that the obligation to publish a statement should be regarded as interference by the public authorities in the applicant publishing company's freedom of expression, which the respondent Government do not dispute.

28. Such interference will infringe Article 10 unless it satisfies the requirements of paragraph 2 of that provision. The Court must therefore determine whether it was “prescribed by law”, was directed towards one or more of the legitimate aims set out in that paragraph and was “necessary in a democratic society” to achieve them.

B. Whether the interference was justified

1. “Prescribed by law”

29. The applicant company considered that the impugned decisions had been taken under the influence of emotion, and not on any clear and foreseeable legal basis. The proof, it alleged, was that it had been found guilty at each level of jurisdiction for different and diverging reasons. The applicant company questioned in particular the reasons given by the appeal court, based on “the grief felt” by the close relatives of the murdered prefect, terms it considered did not amount to a foreseeable legal standard or establish an intrusion into the Erignac family's private life. It alleged that Article 809 of the new Code of Civil Procedure was vague and unclear, manifestly unforeseeable and a source of legal uncertainty. It claimed that paragraph 3 of section 38 of the Law of 29 July 1881 (see paragraph 25 above), which had been repealed in the meantime, had similarly been criticised by the national courts as ambiguous and an insufficient basis for the press to decide whether a publication was lawful or not.

30. The Government maintained, on the contrary, that the interference had been “prescribed by law”, namely Article 9 of the Civil Code and Article 809 of the new Code of Civil Procedure, and referred in that connection to the Court's case-law concerning previous orders to publish statements (see *Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 1 July 2003).

31. The Court reiterates that, according to its case-law, the relevant national law must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law that confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see, for instance, *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, pp. 71-72, § 37; *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III; and also *Prisma Press*, cited above).

32. The Court has already observed that Article 9 § 2 of the Civil Code gives the judges responsible for its application a power the framework of which is well defined and the aim of which is specifically to prevent an intrusion into private life or to make it cease. The fact that the measures the courts may adopt on that basis are not listed expressly or exhaustively by the provision concerned does not mean that they are unknown, particularly to the publishing

profession: seizures, injunctions, warnings, publications or statements are all measures widely employed in such cases. The wording of the law is flexible enough to have made it possible to develop the concept of “private life” and “the right to control the use of one's likeness”, itself born of an already well-established case-law, and to adapt it to the numerous practical situations that may arise and to changing customs, mentalities and techniques (see *Prisma Presse*, cited above).

33. As when it examined the relevant legal basis in the *Prisma Presse* decisions (cited above), the Court stresses that there exists an established case-law in the French courts that legitimises the impugned measure, which the French courts consider to be “one of the forms of reparation for damage caused through the medium of the press” (see also, *mutatis mutandis*, *Radio France and Others v. France*, no. 53984/00, § 30, ECHR 2004-II). That case-law thus meets the conditions of accessibility and foreseeability required to determine that this form of interference was “prescribed by law” within the meaning of Article 10 § 2 of the Convention.

2. “Legitimate aim”

34. The Government submitted that the interference had pursued a legitimate aim, namely “the protection of the rights and freedoms of others”, in accordance with Article 10 of the Convention.

35. The applicant company did not dispute that the impugned measure had pursued one of the “legitimate aims” referred to in Article 10 of the Convention.

36. The Court considers that the impugned interference did pursue the legitimate aim of “protecting the rights of others” referred to in Article 10. It points out that the rights protected in the instant case fall within the scope of Article 8 of the Convention, which guarantees the right to respect for one's private and family life.

3. “Necessary in a democratic society”

(a) Arguments before the Court

37. In the Government's submission, the interference complained of had been “necessary in a democratic society”. They emphasised that the order against the applicant company had been issued following careful, measured analysis of the offending publication by the national courts, on grounds which had been relevant and sufficient, and not at all divergent. They stressed the shock effects of the offending photograph, which had shown a lack of respect for the image of Prefect Erignac – a public figure – but had also intruded into the private life of his family, who were not public figures. The Court's case-law according to which the freedom of the press to inform might be even better protected if the information concerned a public figure would therefore not be fully applicable in the instant case in respect of the prefect's family, particularly, the Government alleged, in so far as Mr Erignac was to be considered more as a civil servant than as a politician (*Oberschlick v. Austria* (no. 2), judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, § 29). What was more, he had not been murdered in the course of his official duties. The interference was even justified under the terms of Article 8 of the Convention. The Government added that the court order had concerned only the publication of the prefect's picture (and *after* the event), not the accompanying article. It had also, they alleged, been a very mild measure at a time so close to Mr Erignac's death.

The Government concluded that in ordering the publication of the statement the authorities had not overstepped the margin of appreciation available to them in a case which, although it concerned a matter of public interest, affected both the dignity of a civil servant, which was

part of the “hard core” of his rights, and the private life of his family, in respect of whom journalists' duties and responsibilities were greater than towards a public figure.

38. The applicant company emphasised the relevance of the link between the news covered and the photograph published, alleging that the photograph had concerned a highly topical news item of public interest, without intruding into the private life of the deceased or his family. Moreover, at the time of publication the photograph had already been widely disseminated by other media outlets.

The applicant company submitted that the case-law of the Court of Cassation had since changed and it was plausible that, were that court to have to pronounce judgment on the same case today, it would reach a different judgment altogether from the one before the Court now. Lastly, it reiterated its conviction that the photograph in issue, which it said had been “taken from a distance and was blurred”, was by no means indecent and had been published without any sensationalistic intent.

(b) The Court's assessment

(i) Recapitulation of general principles

39. The Court must consider whether the order to publish the statement concerned was “necessary in a democratic society”.

40. The fundamental principles concerning this case, which are well-established in the Court's case-law, are as follows (see, for example, *Monnat v. Switzerland*, no. 73604/01, § 55, ECHR 2006-...):

“(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

(ii) The adjective “necessary”, within the meaning of Article 10 § 2, implies the existence of a “pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ...”

41. The Court reiterates that it is the duty of the press to impart – in a manner consistent with its “duties and responsibilities” – information and ideas on all matters of public interest; not only does the press have the task of imparting such information and ideas, but the public also has a right to receive them (see, among other authorities, *Colombani and Others v. France*, no. 51279/99, § 55, ECHR 2002-V).

42. In that connection, whoever exercises his freedom of expression undertakes “duties and responsibilities” the scope of which depends on his situation and the technical means he uses. The potential impact of those means must be taken into account when considering the proportionality of the interference. The safeguard afforded by Article 10 to journalists is

subject, because of those very “duties and responsibilities”, to the proviso that they provide reliable information in accordance with the ethics of journalism (see *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports* 1996-II, p. 500, § 39; *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; and *Colombani and Others*, cited above). So when photographs are published the protection of the rights and reputation of others takes on particular importance, especially when it involves large-scale dissemination of images containing very personal or even intimate “information” about an individual or his or her family (see *Von Hannover v. Germany*, no. 59320/00, § 59, ECHR 2004-VI).

43. The Court, therefore, in exercising its European supervisory duties, may have to verify whether the authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in this type of case, namely, on the one hand, the freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8 (see, to that effect, *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). Accordingly, when considering the impugned interference the Court must balance the public interest in the publication of a photograph and the need to protect private life.

44. The Court has already had the opportunity to explain that the nature of the penalty imposed must be taken into account when assessing the proportionality of the interference (see, among other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V), particularly in cases where it may have a deterrent effect on the exercise of the freedom concerned (see, for example, *Brasilier v. France*, no. 71343/01, § 43, 11 April 2006).

(ii) *Application to the present case*

45. In assessing the necessity of the measure in a democratic society the Court will consider the “duties and responsibilities” inherent in the exercise of freedom of expression and the potentially deterrent effect of the penalty imposed in the instant case.

(α) The “duties and responsibilities” inherent in the exercise of freedom of expression

46. The Court has already had an opportunity, under Article 8 of the Convention, to reiterate that certain events in the life of a family must be given particularly careful protection. The death of a close relative and the ensuing mourning are a source of intense grief and must sometimes lead the authorities to take the necessary measures to ensure that the private and family lives of the persons concerned are respected (see, *mutatis mutandis*, *Editions Plon*, cited above, § 47, and *Płoski v. Poland*, no. 26761/95, §§ 35-39, 12 November 2002).

47. The Court notes that in the instant case the offending photograph was published in a magazine dated 19 February 1998, only thirteen days after Prefect Erignac's murder and ten days after his funeral.

48. The Court considers that the grief felt by the victim's family should have led the journalists to show prudence and caution, as the circumstances of the death were violent and traumatic for the victim's family. It also attaches particular importance to the fact that the family had expressly objected to the publication of the photograph.

49. Its publication in a widely distributed magazine intensified the trauma suffered by the relatives as a result of the murder, so that they had legitimate reason to consider that their right to respect for their private life had been infringed.

50. Accordingly, it remains for the Court to determine whether the measure challenged before it had a deterrent effect on the applicant company's exercise of its right to freedom of expression.

(β) Deterrent effect of the impugned measure

51. The Court reiterates that the applicant company challenged the decision of the domestic courts, acting on an urgent application by Claude Erignac's family, ordering it to publish the following statement:

“... The photograph of the body of Claude Erignac lying on the ground in a street in Ajaccio which appeared in edition 2543 of the weekly Paris Match, dated 19 February 1998, was published without the consent of Claude Erignac's family, who consider its publication as an intrusion into the intimacy of their private life...”

52. The Court considers it particularly necessary, in view of the circumstances in the instant case, to examine the severity of the measure ordered by the domestic courts.

53. The Court notes that, in the reasons they developed, the domestic courts rejected the Erignac family's request to order the seizure of the magazine, which they considered disproportionate.

54. In the interim order issued on 12 February 1998 the Paris *tribunal de grande instance* justified its decision, *inter alia*, to order a publication measure in the following terms:

“... a seizure order would be difficult to enforce in practice, and disproportionate to the nature of the infringement complained of ...”

55. In the judgment delivered on 24 February the Paris Court of Appeal held that:

“... in the presence of such an intrusion [into the private life of the close relatives of Claude Erignac] an urgent-applications judge who finds, as in the instant case, that he is unable materially to make the interference cease, by a seizure measure, for example, is empowered by [Article 9 § 2 of the Civil Code] to prescribe any other appropriate measure...”

56. Like the first-instance court, the appeal court ordered the publication of a statement.

57. Moreover, and more importantly, the Court emphasises that the same appeal court decided to change the wording of the statement. The wording proposed by the court of first instance was the following:

“... the photograph ... caused Mrs Erignac and her children considerable distress.”

58. The appeal court, on the other hand, opted for the following wording:

“... The photograph ... was published without the consent of Claude Erignac's family, who consider its publication as an intrusion into the intimacy of their private life.”

This was the wording used in the statement which was eventually published.

59. The Court thus notes that the Court of Appeal, as was incumbent on it when ruling on an urgent application, decided to replace the statement prepared by the court below, which established an objective link between the publication and the Erignac family's distress, by a text which, without actually stating that there had been an intrusion into their private life, indicated that the Erignac family considered themselves the victims of such an intrusion.

60. The Court considers that this wording illustrates the attention the domestic courts pay to respecting *Paris-Match* magazine's editorial freedom, which is characterised in particular by the policy of illustrating stories with striking photographs.

61. That being so, the Court considers that, of all the sanctions permitted by domestic law, an order to publish a statement was that which, both in principle and as regards its content, least restricted the applicant company's rights, in particular in view of the interpretation of the provisions of Article 9 § 2 of the Civil Code by the French courts.

62. The Court accordingly finds that, under the circumstances in the instant case, the applicant company has not shown in what manner the statement described above may effectively have had a deterrent effect on the way in which the magazine exercised and continues to exercise its right to freedom of expression.

63. In the light of the above, the Court considers that the measure examined in the instant case, for which the domestic courts gave reasons which were both “relevant and sufficient”, was proportionate to the legitimate aim pursued and, accordingly, “necessary in a democratic society”.

64. The Court concludes from the above that there has been no violation of the rights of the applicant company guaranteed under Article 10 of the Convention in the instant case.

FOR THESE REASONS, THE COURT

Holds by five votes to two that there has been no violation of Article 10 of the Convention.

Done in French, and notified in writing on 14 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN Christos ROZAKIS
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:

- dissenting opinion of Mr Loucaides;
- dissenting opinion of Mrs Vajić.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE LOUCAIDES

I disagree with the judgment in this case for the following reasons.

First of all I would point out that I do not share the majority's view that the applicant company has not shown in what manner the judicial order obliging it to insert in its magazine the statement referred to in the judgment may have had a deterrent effect on its freedom of expression (see paragraph 62 of the judgment). That statement was to the effect that the publication of a photograph of the dead body of Claude Erignac lying on a street in Ajaccio "was made without the consent of his family, who consider its publication as an intrusion into the intimacy of their private life". The statement clearly implied that the newspaper was wrong to publish the photograph. I believe that obliging a newspaper to make such an admission against their will certainly discourages similar publications. The majority were wrong to speak in this context of the newspaper's freedom of expression in general terms. They should have confined themselves to examining whether such a statement would dissuade the newspaper from publishing material of this nature, not just any material

Secondly, and more importantly, I find unconvincing the approach of the majority that the right of Claude Erignac's family to respect for private life has been infringed to the extent that its protection should prevail over the freedom to publish a photograph which, undisputedly, was a matter of public interest. The majority based their conclusion on the fact that "[the publication of the photograph] in a widely distributed magazine intensified the trauma suffered by the relatives as a result of the assassination, so that they had legitimate reason to consider that their right to respect for their private life had been infringed" (see paragraph 49 of the judgment).

The majority proceeded on the premise that if the grief of the relatives of a deceased person is compounded by any action, there is an infringement of the right to privacy. I do not intend to embark on this question in this case but, proceeding myself on the same assumption, I must say that a person who complains of injury to his feelings as a result of the actions of another cannot automatically be considered a victim of the violation of the right to privacy. There should be an objective examination of the complaint in order to establish whether the specific act complained of could reasonably be considered as having injured the feelings of the person concerned to the extent of amounting to a violation of the right to respect for his private life. If no objective examination is carried out and one accepts without further consideration a complaint of injury to feelings simply on that basis, this will lead to absurd results and people will be at liberty to block freedom of expression and other legitimate activities simply by complaining that their feelings have been injured.

Applying an objective test in the present case, I personally consider that the publication of the photograph and accompanying comment should be taken as a clear condemnation of the assassination, an expression of sympathy for and solidarity with the family, and a general appeal to public opinion to share the horror of that act. That cannot in my opinion intensify "the trauma" of the family, a trauma which originated from the killing itself. I consider the family's reaction exaggerated. Apart from the judicial proceedings which led to the order in issue, they also claimed 150,000 French francs for the invasion of their private life caused by a photograph which was not, in itself, responsible for their grief. In any event, I would add that relatives of public figures like Prefect Erignac must be prepared to suffer the consequences of the publicity such personalities attract.

The evident effect of the photograph was to convey the full tragic impact of the assassination, correctly described in the accompanying comment as "a tragic page in [French]

history". It is in the general interest for such events to be publicised, in full detail, so that the public is informed about matters that affect society and the country as a whole. The public also has a right to receive that information, a right that cannot be overridden by the subjective feelings of the victim's family.

Many natural and other disasters such as earthquakes, tsunamis, fires, tidal waves, terrorist acts and armed conflicts result in deaths and the public must be informed of such disasters and all their catastrophic consequences in order to draw the necessary conclusions and act accordingly. Requiring newspapers or other mass media to publish statements such as the one under consideration in the instant case that imply misconduct on their part would certainly have a chilling effect on publications of public interest of this nature, at the expense of the right to freedom of expression and the right of the public to receive information. Nor can I accept that the relatives of the victims of such disasters can prevent the publication of photographs of their relatives by invoking their personal feelings.

In reaching my conclusions contrary to that of the majority, I have also taken into account the following:

a) At the time of publication, the photograph in question had already been widely published by other mass media, including national television channels, so that the relevant facts were already known to the public;

b) The photograph does not show the full face of the victim or any injuries to his body and cannot be considered as undignified, indecent or as in any way belittling the image of the victim. When looking at it one only feels shock at the act of murder which was the cause of the tragedy it depicts.

I believe that the judgment directly or indirectly establishes the principle that no photographs of victims of criminal acts or, for that matter, of any disaster such as those mentioned above, can be published if their relatives complain of injury to their feelings. I believe that such a principle is inherently wrong in a democratic society.

For the reasons I have explained above, I find that there has been a violation in this case of the freedom of speech safeguarded by Article 10 of the Convention.

DISSENTING OPINION OF JUDGE VAJIC

This case raises the question – in a particularly serious context – of the balance between freedom of information and protecting people's rights, in particular when pictures are published. The rights in issue here are Prefect Erignac's right to respect for his dignity after his death, and the rights of his family in mourning.

Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.

As stated in paragraph 41 of the judgment, it is the duty of the press to impart – in a manner consistent with its duties and responsibilities – information and ideas on all matters of public interest; 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 other authorities, *Colombani and Others v. France*, no. 51279/99, § 55, ECHR 2002-V). Prefect Erignac's murder was without doubt a matter of public interest (see *Tammer v. Estonia*, no. 41205/98, § 68, ECHR 2001-I) and a news item of major public concern (*Krone Verlag GmbH & Co. KG v. Austria*, no. 34315/96, § 37, 26 February 2002).

Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (*Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, p. 25, § 57). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (*Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38, and *Thoma v. Luxembourg*, no. 38432/97, §§ 45 and 46, ECHR 2001-III).

The Court has already considered the publication of photographs concerning public figures (*Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI) or political personalities (*Schüssel v. Austria (dec.)*, no. 42409/98, 21 February 2002). However, it has never before pronounced judgment on the publication of photographs concerning the political assassination of a public figure.

In those cases the Court has heard relating to the balance between the protection of private life and freedom of expression, it has always emphasised the contribution the publication of photographs or articles in the press made to the general debate (see *Tammer*, cited above, §§ 59 et seq.; *News Verlags GmbH & CoKG v. Austria*, no. 31457/96, §§ 52 et seq., ECHR 2000-I; and *Krone Verlags GmbH & CoKG*, cited above, §§ 33 et seq.).

In the present case it had to determine whether the publication of the photograph of Prefect Erignac's body made an essential contribution to a debate on a matter of general interest.

I believe that the murder of Prefect Erignac, the State's representative in Corsica, was undeniably a matter of public interest. It was an event with major political repercussions, a national tragedy even, an offence to the Republic itself, and the public had the right to be informed. It was a subject at the very heart of the news, extending beyond the realm of private life. Restrictions on freedom of expression in this area must be construed strictly (see, among other authorities, *Feldek v. Slovakia*, no. 29032/95, § 74, 12 July 2001) and the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of “public watchdog” (see, for example, *Bladet Tromsø and Stensaas v. Norway [GC]*, no. 21980/93, § 59, ECHR 1999-III).

Prefect Erignac's murder, by three bullets in the back, was the first murder of a Prefect in France since Jean Moulin was killed in 1943, and deeply shocked France. The photo itself

was (alas) neither more sensational nor more shocking than the murder it depicted. There is no denying that, in this day and age, news is often conveyed in pictures and often, as in this case, the picture makes the news. It should also be remembered that the offending photograph had been shown on national and international television before it appeared in *Paris Match*.

Moreover, there is no doubt that Prefect Erignac was targeted as a public figure and because of his office – that, highly symbolically, of representative of the French State in Corsica. Indeed, the offending publication was essentially a political comment, as witnessed by the title of the article (“The Murdered Republic”) and the tenor of the text that went with the photograph.

Furthermore, precautions were taken when the photograph was published. The body was visible only as a rather blurred, dark mass, face downwards, which made the picture less crude.

Also, more importantly, the case in point was indisputably a matter of public interest about which the press had a duty to inform and the public to be informed. The importance of the event in that sense outweighed the private interest of the family. The situation could, of course, have been different, for example if the photograph had been taken in a private place, or by devious means, but that was obviously not the case here.

I cannot agree with the argument concerning the proportionality and nature of the penalty, on which I find the judgment lays too much emphasis. Every penalty, by its very nature, has a deterrent effect (on the clearly “chilling” effect the fear of sanctions has on the exercise by journalists of their freedom of expression, see, *mutatis mutandis*, *Wille v. Liechtenstein* [GC], no. 28396/95, § 50, ECHR 1999-VII; *Nikula v. Finland*, no. 31611/96, § 54, ECHR 2002-II; *Goodwin*, cited above, p. 500, § 39; *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 714, 13 November 2003).

The chilling effect of the measure taken against the applicant company, even after the event, in so far as the Court stresses the fact that the family did not consent to the publication of the photograph, can be considered as a setback for our case-law and might – in the long run – place the press in a difficult position. They would always be obliged to publish statements or apologies and would ultimately find it hard to play their role as watchdog in a democratic society.

I hope the Court has not pronounced judgment here on a question of principle, for if it has, since the public interest rarely comes across as clearly as it does in the present case, the approach adopted by the majority could actually be detrimental to the interests of our democratic societies. I am thinking here of the numerous photographs of politicians or public figures – of the assassination of President Kennedy or Prime Minister Indira Gandhi, for example, or the attempted assassination of Pope John-Paul II – which might not be published in the future.

For the reasons I have explained above, I do not share the opinion of the majority that there was no violation of Article 10 in the present case.

With all due regard to the Erignac family's grief and with all the sympathy the facts of the case lead me to express towards them, I must say that if one day I were asked to cite a case judged by this Court with which I was familiar and which was related to freedom of information and affected an evident and undeniable public interest, I would cite this one.

HACHETTE **FILIPACCHI** ASSOCIES v. FRANCE JUDGMENT - DISSENTING OPINION OF JUDGE LOUCAIDES

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