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

SECOND SECTION

CASE OF ÉDITIONS PLON v. FRANCE

(Application no. 58148/00)

JUDGMENT

STRASBOURG

18 May 2004

FINAL

18/08/2004

In the case of Editions Plon v. France,

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

Mr L. LOUCAIDES, *President*,
Mr J.-P. COSTA,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 27 May 2003 and 27 April 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 58148/00) 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 Editions Plon, a company incorporated under French law with its registered office in Paris ("the applicant company"), on 9 June 2000.

2. The applicant company was represented before the Court by Mr J.-C. Zylberstein and Ms A. Boissard, of the Paris Bar. The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

4. By a decision of 27 May 2003, 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

A. Background to the case

6. On 8 November 1995 the applicant company acquired the publishing rights for a book entitled *Le Grand Secret* ("The Big Secret") from a Mr Gonod, a journalist, and a Dr Gubler, who had been private physician to President Mitterrand for several years. The book gave an account of the relations between Dr Gubler and the President, describing how the former had organised a medical team to take care of the latter, who had been diagnosed with cancer in 1981, a few months after he had first been elected President of France. It recounted in particular the difficulties Dr Gubler had encountered in concealing the illness, given that President Mitterrand had undertaken to issue a health bulletin every six months.

The book was due to be published in mid-January 1996, while President Mitterrand was still alive. However, following the President's death on 8 January 1996, the authors and Editions Plon decided to postpone its publication.

7. On 10 January 1996 the daily newspaper *Le Monde* published an article which revealed that President Mitterrand had been suffering from prostate cancer since the beginning of his first seven-year term of office and pointed out that the public had not been officially informed about his illness until 1992. The article also stated that President Mitterrand had dismissed Dr Gubler in 1994, choosing instead to be treated with medicine described by the applicant company as "alternative".

Those revelations were the subject of extensive comment in the media. Questions were asked, in particular, about the quality of the treatment received by President Mitterrand.

A former cultural adviser to President Mitterrand had already claimed in a book entitled *L'Année des adieux*, published by Flammarion in June 1995, that the President had not received proper treatment. In addition, shortly after the President's death, one of his brothers made similar allegations. The head of the cancer treatment department at the Pitié-Salpêtrière Hospital did likewise, in particular asserting on the radio station Europe 1 that "for years [President Mitterrand had been] given nothing but magical cures, and these techniques were completely ineffective in treating his illness".

On 12 January 1996, however, *Le Monde* published a statement by the President of the National Council of the *ordre des médecins* (Medical Association) to the effect that "according to the information in [his] possession, the President [had] received perfectly appropriate treatment".

Furthermore, on 11 January 1996 the President's widow and children had issued a statement emphasising that they maintained their trust in the medical team that had looked after him.

8. As Dr Gubler considered that his reputation had been called into question, it was decided to publish *Le Grand Secret* on 17 January 1996. The following text appeared on the back cover:

> "On 10 May 1981 François Mitterrand was elected President of France.
>
> On 16 November 1981, six months later, medical examinations revealed that the head of State was suffering from cancer. Statistically, he had between three months and three years to live.
>
> A handful of doctors resolved to fight the illness, driven by the obsession to save the President and to obey his instruction that the French public should know nothing about the matter. It became a State secret.
>
> Only Claude Gubler, private physician to François Mitterrand during his two terms of office, could have provided us with the astonishing account of how the President cheated death for years, taking each day at a time.
>
> These revelations will transform our image of a man who led France for fourteen years."

B. The injunction proceedings

9. On an urgent application lodged on 17 January 1996 by President Mitterrand's widow and children, who complained of a breach of medical confidentiality, an invasion of President Mitterrand's privacy and injury to his relatives' feelings, the President of the Paris *tribunal de grande instance* issued an injunction on 18 January 1996 prohibiting the applicant company and Dr Gubler from continuing to distribute *Le Grand Secret*, on penalty of 1,000 French francs (FRF) per book distributed, and instructed a bailiff "to procure all documents containing details of the print run and the number of copies in circulation".

The urgent-applications judge based her decision on the following grounds:

> "All people, regardless of their rank, birth or function, have the right to respect for their private life.
>
> This protection extends to their relatives where the relatives are justified in asserting their right to respect for their own private [and] family life.
>
> What is in issue in the instant case are disclosures by President François Mitterrand's private physician, who treated and attended to him for more than thirteen years and in whom the patient and his family placed their trust.
>
> ...

They were made in breach of provisions that lay down a duty of professional confidentiality, all the more strictly where medical confidentiality is concerned, and the person who made them may be liable to the penalties provided for in Article 226-13 of the Criminal Code.

By their very nature, they constitute a particularly serious intrusion into the intimate sphere of President François Mitterrand's private family life and that of his wife and children.

The resulting interference is especially intolerable in that it has occurred within a few days of President Mitterrand's death and burial.

Since this is a case of blatant abuse of freedom of expression resulting in a manifestly unlawful infringement of the claimants' rights, it is within the power of the urgent-applications judge to order measures capable of putting an end to the infringement or limiting its scope."

10. In a judgment of 13 March 1996, the Paris Court of Appeal upheld the injunction and gave the claimants one month to apply to a court with jurisdiction to examine the merits of the case, indicating that if such an application was made, the injunction and penalty for non-compliance would remain in force until a ruling was given on the merits, but that if no such application was made, those measures would cease to have effect on the expiry of the one-month period.

The judgment began by noting the definition of medical confidentiality in Article 4 of the Code of Conduct for Medical Practitioners, and emphasised that "the death of the patient does not release a medical practitioner from the duty of confidentiality". It went on to quote the text on the back cover and identified some twenty disclosures made in the book, together with page references, about facts "of which Mr Gubler had become aware in the performance of his professional duties as physician to François Mitterrand" and which "as such ... [were] manifestly covered by the rules of medical confidentiality". The judgment stated:

"...

... the disclosure, through publication of the book *Le Grand Secret*, of facts covered by the duty of medical confidentiality by which the co-author of the book is bound is manifestly unlawful.

The innermost feelings of Mrs Mitterrand and of François Mitterrand's children have been offended by this public disclosure of information pertaining both to the character and private life of their husband and father and to their own sphere of intimacy by the private physician to the late French President, in whom the latter had placed his trust, under the protection of a lawfully established duty of professional confidence of which all medical practitioners are solemnly reminded when the Hippocratic oath is read out on their admission to the profession.

...

... prohibition of the distribution of a book can only be an exceptional measure.

However, in view of the space they occupy, the above passages from *Le Grand Secret*, which disclose facts covered by the duty of medical confidentiality by which the co-author of the book is bound, cannot be separated from the rest of the book without depriving it of its fundamental content and thereby disfiguring it.

Accordingly, the decision by the first-instance judge to prohibit the [applicant] company and Mr Gubler from continuing to distribute the book *Le Grand Secret* was based on a precise assessment of the interim measure likely to put an end to the manifestly unlawful infringement resulting from such disclosures.

...

Although the first edition of the book in question was marketed before the date of the injunction appealed against, and although information published in the book has been divulged by various media since the injunction was issued, the ensuing circumstances are not capable of putting an end to the manifestly unlawful infringement that would necessarily result from resumed distribution of the book.

Consequently, the injunction issued by the first-instance judge should remain in force.

However, the necessarily temporary nature of such a measure dictates that its validity should be limited in time by such means as to afford the parties an opportunity to submit argument in the dispute between them, within a reasonable time, before a court with jurisdiction to examine the merits of the case.

To that end, the respondents should be given one month, from the date of delivery of this judgment, to bring their dispute before such a court. It should further be specified that if an application for an examination of the merits is made within this period, the injunction will remain in force, unless the court in question rules otherwise, until the delivery of its decision, but that if no such application is made within this period, the injunction will immediately cease to have effect."

11. In a judgment of 16 July 1997, the Court of Cassation dismissed appeals on points of law by the applicant company and Dr Gubler against the judgment of 13 March 1996.

The Court of Cassation considered that the Court of Appeal had established the existence of a manifestly unlawful infringement by holding that disclosures made in the book about the development of François Mitterrand's condition had been in breach of medical confidentiality, and that it had been exclusively within the Court of Appeal's jurisdiction to rule that the injunction prohibiting the continued distribution of the book, as an interim measure valid for a limited period only, was the only means of putting an end to the infringement pending a decision on the merits.

C. The criminal proceedings

12. In the meantime, on 19 April 1996, the Paris public prosecutor had summoned Dr Gubler to appear in the Paris Criminal Court on a charge of

breaching professional confidence during May and June 1995, November and December 1995 and January 1996 by having disclosed information to Mr Gonod and Mr Olivier Orban, the managing director of Editions Plon, about President Mitterrand's health and the treatment he had been prescribed. Mr Gonod and Mr Orban had also been summoned to answer a charge of aiding and abetting that offence. President Mitterrand's widow and three children had applied to join the proceedings as civil parties but had not filed claims for damages.

In a judgment of 5 July 1996, the Criminal Court found Dr Gubler guilty of breaching professional confidence and Mr Gonod and Mr Orban guilty of aiding and abetting the same offence. It sentenced Dr Gubler to four months' imprisonment, suspended, and fined Mr Gonod and Mr Orban FRF 30,000 and FRF 60,000 respectively. The judgment emphasised, in particular, that by signing a publishing contract on 8 November 1995, and subsequently by delivering his manuscript with a view to its publication, Dr Gubler had publicly disclosed confidential information entrusted to him, and that "publication of an entire book based on a breach of medical confidentiality amounted, on Mr Claude Gubler's part, to a serious breach of his professional duties, calling for a stern reminder of the law".

13. As no appeal was lodged, the judgment became final on 5 September 1996.

D. The civil proceedings on the merits

14. Alongside those proceedings, on 4 April 1996 President Mitterrand's widow and three children had brought proceedings against Dr Gubler and Mr Orban (both in his personal capacity and as the statutory representative of the applicant company) in the Paris *tribunal de grande instance*, seeking an order prohibiting resumption of the publication of *Le Grand Secret* or, in the alternative, deleting certain pages and paragraphs. They also sought an award of damages. They argued, in particular, that the book contained disclosures that breached medical confidentiality and invaded President Mitterrand's privacy in such a way as to interfere with the feelings and personal life of his widow and children. They further submitted that some of these "indiscretions" amounted to direct personal attacks on their own sphere of intimacy.

In a judgment of 23 October 1996, the Paris *tribunal de grande instance* ordered Dr Gubler, Mr Orban and the applicant company jointly and severally to pay damages of FRF 100,000 to Mrs Mitterrand and FRF 80,000 to each of the other claimants, and maintained the ban on distribution of *Le Grand Secret*. The judgment stated, *inter alia*:

> "...
>
> *Merits of the applications*

A reading of the book *Le Grand Secret* reveals that its contents include:

(a) a description of the President's 'health regime' at the time when arrangements were being made for the 'medical care' with which he was to be provided throughout his time in office (pages ...);

(b) a reference to the initial symptoms of his illness (page ...) and an account of the medical examinations which he underwent in November 1981 (page ...);

(c) the results of these examinations and the subsequent discussions between François Mitterrand and his doctors (pages ...);

(d) a description of the medical examination carried out on François Mitterrand by Professor [S.] on 16 November 1981, and an account of the conversation in which Professor [S.] and Claude Gubler informed François Mitterrand of the nature of his illness and the forms of medical treatment it required (pages ...);

(e) a description of a treatment protocol prescribed by Professor [S.] and Claude Gubler and the manner in which the treatment was administered to François Mitterrand (pages ...);

(f) an indication of the pseudonym under which biological tests concerning François Mitterrand were carried out by a private laboratory (page ...) and of the frequency and nature of such tests (pages ...);

(g) a description of certain physical disorders that affected François Mitterrand and an indication of the medicine he was given in order to treat them and prevent their recurrence (pages ...);

(h) a description of anxiety attacks suffered by François Mitterrand (pages ...);

(i) a description of the side-effects of the medical treatment received by François Mitterrand (page ...);

(j) information on developments in François Mitterrand's health and the impact of such developments on his behaviour (pages ...);

(k) a description of the circumstances in which certain health bulletins on François Mitterrand were drawn up (pages ...);

(l) a description of other medical practitioners' dealings with François Mitterrand and the power struggles between various members of his medical team (pages ...);

(m) an account of the operation performed on François Mitterrand on 16 July 1994 (pages ...);

(n) a description of the medical treatment which François Mitterrand received and the medical examinations he underwent in late 1994 (pages ...);

...

The events described in the above passages from *Le Grand Secret* became known to Claude Gubler in the performance of his professional duties as physician to François Mitterrand or members of his entourage. Although they do not relate directly to medical facts, Claude Gubler could only have become aware of them while practising his profession; accordingly, they were manifestly covered by the duty of medical confidentiality by which he was bound. They were disclosed unlawfully, firstly when Claude Gubler, wishing to provide the public with a 'chronological account' of the head of State's illness, contacted the journalist Michel Gonod and wrote the manuscript for the book in conjunction with him; subsequently, when the manuscript was submitted to Olivier Orban in November 1995 with a view to its publication by Editions Plon; and finally, when the book went on sale a few days after François Mitterrand's death, the publisher laying emphasis in the text on the back cover on the fact that only Claude Gubler, through his privileged position in relation to the head of State, could have written this 'astonishing account'.

Neither Claude Gubler's alleged desire to restore the truth by informing the public about facts that had been kept from them for several years ... nor the fact that while François Mitterrand was alive incomplete bulletins about his health were published, which the physician nonetheless agreed to sign, serve as justification for the disclosures in question. The duty of medical confidentiality is general and absolute and does not allow medical practitioners to transform themselves into guarantors of the proper functioning of State institutions or into historical witnesses.

Furthermore, nothing can release medical practitioners from their obligation to remain silent, since the duty of professional confidence exists not only to protect the interests of those who confide in them, but also to guarantee the reputation that medical practitioners must enjoy among all those who require medical assistance.

Although a practitioner whose competence or integrity has been called into question may be required to breach the duty of confidence in order to prove the quality of his treatment or his good faith, this is subject to the condition that such disclosure is limited to the strict requirements of his defence in court and does not, as in the instant case, take the form of deliberate public divulgence of information.

...

Redress

The specific purpose of civil liability is to restore as precisely as possible the balance that has been upset by the damage and to return the victim, at the expense of the party held liable, to the position in which he or she would have been had the prejudicial act not occurred. This principle means that, when affording redress for non-pecuniary damage, the courts are able not only to award damages to the victim in compensation for the harm already sustained, but also to prevent any subsequent damage by ordering the elimination of its cause.

The offence caused to the Mitterrands and Ms Pingeot by the disclosure of their own doctor's deliberate breaches of the necessary confidentiality of his relations with both François Mitterrand and themselves over many years, the publisher's desire to draw attention to the book in a spectacular manner by rushing to print and sell it immediately after the announcement of François Mitterrand's death (the possibility of a mere coincidence of events cannot be seriously entertained), the advance communication of extracts from the book to certain sections of the press for obvious

promotional purposes, and the book's substantial initial print run (40,000 copies were distributed and sold from 17 January 1996) justify an award of damages to the claimants as set out in the operative provisions of this judgment ... and the continuation of the prohibition on the distribution of the book ordered by the urgent-applications judge.

In this connection, ... prohibition of the distribution of a piece of writing entailing an infringement of human rights ... [is], regard being had to the principles governing civil liability, [a] legally acceptable means of redress designed to put an end to the injury suffered by the victim and to prevent the recurrence of the damage that would necessarily result from resumption of the distribution of the piece of writing.

...

Contrary to what Claude Gubler maintained in his submissions, the time that has elapsed since François Mitterrand's death cannot have had the effect of definitively putting an end to the infringement observed when the book was published and rendering lawful the distribution of a book purporting to be a 'witness account of the historical truth about the President's two terms of office, to which the French people should have access' ..., when the defendant is not authorised to give a historical analysis of facts which became known to him in the performance of duties in which he was bound by absolute confidentiality.

Although, in spite of the injunctions of 18 January and 13 March 1996 prohibiting distribution of the book, information contained in *Le Grand Secret* has been divulged through various media, the ensuing situation is not capable of preventing the injury and damage that would result for the claimants from resumed distribution of the book, with the particular light which the comments of a doctor shed not only on relations with members of the family circle with whom he was in close contact, but also on the most intimate reactions of François Mitterrand to his illness.

In view of the space they occupy, the above passages from *Le Grand Secret*, which disclose facts covered by the rules of medical confidentiality, cannot be separated from the rest of the book without depriving it of its fundamental content and thereby disfiguring it ...”

15. On an appeal by the applicant company, Dr Gubler and Mr Orban, the Paris Court of Appeal gave judgment on 27 May 1997. It cleared Mr Orban on the ground that the production and sale of *Le Grand Secret* did not constitute a separate tort from the one attributable to the applicant company. It also declared inadmissible the action brought by the Mitterrand family in so far as it concerned the protection of President Mitterrand's private life, pointing out in that connection that “the possibility for anyone to prohibit any form of disclosure about [their private life] is only open to the living”. As to the alleged invasion of the privacy of the Mitterrands themselves, the Court of Appeal noted that certain passages from the book in issue “entail[ed] invasions of the Mitterrands' privacy”, but considered that such infringements could not, “regrettable though they may have been, justify – regard being had, in particular, to their sporadic occurrence in the book – prohibiting publication of the book as a whole”.

However, holding that Dr Gubler had breached the duty of medical confidentiality by which he was bound, the Court of Appeal ordered him and the applicant company jointly and severally to pay damages in the amount determined in the first-instance judgment, and upheld the decision to maintain the ban on distribution of the book. The judgment of 27 May 1997 stated, in particular:

"...

The breach of medical confidentiality

It was established in the judgment [of the Paris Criminal Court] of 5 July 1996, which has become final and binding on the civil courts, that Mr Gubler breached the duty of medical confidentiality by which he is bound.

It was rightly observed in that decision that breach of professional confidence was made a criminal offence not only in the public interest but also in the interests of private individuals, in order to guarantee the security of the confidential information which they are required to entrust to certain persons on account of their status and profession. The duty of medical confidentiality is founded on the relationship of trust essential to the provision of medical treatment, whereby patients are assured that anything they tell their doctor or cause him to see, hear or understand, as a person in whom such information must be confided, will not be disclosed by him.

Article 4, second paragraph, of the Code of Conduct for Medical Practitioners provides that medical confidentiality covers 'everything that has come to the attention of medical practitioners in the practice of their profession, that is, not only what has been confided in them but also what they have seen, heard or understood'.

Since Mr Gubler was in the company of Mr François Mitterrand solely on account of his position as his doctor, all the information he recounts in his book, which he learned or observed while practising his profession, is covered by the duty of medical confidentiality by which he is bound *vis-à-vis* his patient, although it may also constitute interference with the patient's private life or sphere of intimacy.

The Mitterrand family have inherited from Mr François Mitterrand the right to bring proceedings against the appellants. Although *Le Grand Secret* was published after François Mitterrand's death, it should be noted that the book was in fact the subject of a publishing contract signed on 8 November 199[5], prior to his death.

Accordingly, the Mitterrands have inherited from the deceased the right both to obtain redress for the breaches of medical confidentiality resulting from the disclosure of confidential information to Mr Gonod in May and June 1995 and to Mr Orban in November 1995, as the criminal court held, and to obtain compensation for the consequences of the decision taken on 8 November 1995 to publish the book; this possibility is not excluded by the judgment of 17 July 1995 and is not contrary to the principle of *res judicata* in relation to that judgment.

Redress

The exercise of freedom of expression, a principle with constitutional status set forth in Article 10 of the Convention ..., carries with it duties and responsibilities; it

may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, for example for the protection of health, for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence.

In the instant case the prohibition of the book complained of is necessary since it is the only means of putting an end to the damage sustained and to the criminal offence which it constitutes ..."

16. In a judgment of 14 December 1999, the Court of Cassation dismissed an appeal on points of law by Mr Orban and the applicant company. In response to their ground of appeal based on Article 10 of the Convention, it held:

"... the Court of Appeal held that all the information published had been obtained by Mr Gubler in the performance of his professional duties as private physician to François Mitterrand, so that it was covered by the rules of medical confidentiality, although it could also constitute interference with the right to respect for private life. After observing that the breach of medical confidentiality had been established by a criminal court, the Court of Appeal, pointing out that the exercise of freedom of expression could be subject to certain restrictions, in particular for the protection of the rights of others, justified its decision in law in holding, in the exercise of its exclusive jurisdiction, that discontinuing the distribution of the book was the only means of putting an end to the criminal offence and the damage sustained, its assessment of which is not subject to appeal ..."

However, partly allowing an appeal on points of law by the Mitterrands, the Court of Cassation quashed and annulled the judgment of 27 May 1997 in so far as it had cleared Mr Orban, and remitted the case, on that point, to a differently constituted bench of the Paris Court of Appeal. The outcome of that aspect of the proceedings has not been specified by the parties.

17. The parties have stated that an electronic version of the text of *Le Grand Secret* is available on the Internet. They have not indicated who decided to disseminate the text in this form or the date when it became available.

II. RELEVANT DOMESTIC LAW

18. The obligation of medical confidentiality incumbent on medical practitioners is set forth in the following provisions of the Code of Conduct for Medical ¨Practitioners:

Article 4

"The duty of professional confidentiality, established in the interests of patients, shall apply to all medical practitioners as provided by law.

Such confidentiality shall cover everything that has come to the attention of medical practitioners in the practice of their profession, that is, not only what has been confided in them but also what they have seen, heard or understood."

Article 72

"Medical practitioners must ensure that persons who assist them in their practice are informed of their obligations regarding professional confidence and comply with them.

They must ensure that those around them do not breach the confidentiality attaching to their professional correspondence."

Article 73

"Medical practitioners must protect from any indiscretion the medical documents concerning persons whom they have treated or examined, irrespective of the content or form of such documents.

The same shall apply to any medical information that may be in their possession.

When using their own experience or documents for the purposes of academic publishing or teaching, medical practitioners must ensure that individuals cannot be identified. Failing this, the consent of the persons concerned must be obtained."

19. Breaching professional confidence is a criminal offence under Article 226-13 of the Criminal Code, which provides:

"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."

The Court of Cassation has held that "what the law intended to guarantee is the security of confidential information which individuals are required to disclose to persons whose position or profession makes it necessary, in the general public interest, to confide such information in them" (Criminal Division of the Court of Cassation (*Cass. crim.*), 19 November 1985, *Bulletin criminel* (*Bull. crim.*) no. 364). The Court of Cassation has further held that "the obligation of professional confidence, as set forth in Article 226-13 of the Criminal Code in order to ensure the necessary trust in the practice of certain professions or the performance of certain duties, is incumbent on medical practitioners, save where the law provides otherwise, as a duty inherent in their position [and], subject only to this proviso, is general and absolute" (*Cass. crim.*, 8 April 1998, *Bull. crim.* no. 138), and that "no one is entitled to release them from it" (*Cass. crim.*, 5 June 1985, *Bull. crim.* no. 218). In a case concerning a lawyer, it has held that "the obligation of professional confidence, as set forth in Article 226-13 of the Criminal Code, is incumbent on lawyers as a duty inherent in their position [and that] knowledge by others of facts covered by the confidentiality rule does not mean that they are no longer confidential and secret" (*Cass. crim.*, 16 May 2000, *Bull. crim.* no. 192).

Article 226-14 of the Criminal Code (in its wording resulting from Law no. 2002-73 of 17 January 2002) provides:

> "Article 226-13 shall not apply in cases where the law requires or authorises disclosure of confidential information. Nor shall it apply to:
>
> (1) persons who inform the judicial, medical or administrative authorities of acts of deprivation or ill-treatment, including sexual assault, of which they have knowledge and which have been inflicted on a minor under 15 years of age or a person unable to protect himself or herself because of his or her age or physical or mental condition;
>
> (2) medical practitioners who, with the victim's consent, bring to the attention of a public prosecutor acts of ill-treatment which they have noted in the practice of their profession and which cause them to suspect that sexual assault of any nature has been committed;
>
> (3) health or welfare professionals who inform the prefect, or, in Paris, the Commissioner of Police, of the danger posed to themselves or others by persons who consult them and whom they know to be in possession of a weapon or to have indicated their intention to acquire one.
>
> No disciplinary measures may be taken where a medical practitioner has reported acts of ill-treatment to the relevant authorities in accordance with this Article."

20. The Court of Cassation has held that, although professional confidentiality is a strict obligation, it cannot prohibit medical practitioners whom a patient has attempted to involve in fraud by causing them, through deception, to issue a certificate falsely attesting to the existence of illness or disability from proving that they acted in good faith by giving evidence, in judicial proceedings relating to the fraud, about the means used to falsify their examination and impede their judgment, thereby causing them to issue the certificate (*Cass. crim*., 20 December 1967, *Bull. crim.* no. 338). The Government pointed out, however, that that was possible only on condition that the disclosure was limited to the strict requirements of the medical practitioner's defence in court and did not take the form of a deliberate public disclosure; they referred in that connection to a *Watelet* judgment delivered by the Criminal Division of the Court of Cassation on 19 December 1885, although they did not produce it or cite its publication reference. The applicant company produced a judgment of 22 May 2002 in which the First Civil Division of the Court of Cassation held that "pursuant to Article 901 of the Civil Code [by which 'persons making a donation ... must be of sound mind'], which amounts to authorisation within the meaning of Article 226-14 of the Criminal Code, practitioners are released from their obligation not to disclose facts which become known to them in the practice of their profession; since the purpose of professional confidence is to protect the non-professional who confided such facts in the professional, they may be disclosed not only to the non-professional but also to persons with a legitimate interest in ensuring this protection". The

Court of Cassation inferred from this that the trial courts could rule that an expert appointed in proceedings for the determination and partition of an estate should have access to the deceased's medical records without being blocked on grounds of medical confidentiality by the practitioner in possession of the records.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

21. The applicant company alleged a violation of its right to freedom of expression. It submitted that the domestic courts' injunctions prohibiting it from distributing the book *Le Grand Secret* had not been prescribed by law, had not pursued a legitimate aim and had not been "necessary in a democratic society"; it further complained that the "exorbitant" award of damages which it had also been ordered to pay had not been proportionate to the aim pursued. It relied on Article 10 of the Convention, which provides:

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

A. Whether there was interference

22. The Court notes that the French courts prohibited the applicant company – initially on a temporary basis, and later permanently – from continuing to distribute a book it had published and ordered it to pay damages on account of the publication. It is clear, therefore, that the applicant company has suffered "interference by public authority" with its exercise of the right guaranteed by Article 10 of the Convention; indeed, that was not disputed between the parties. In this connection, the Court considers it necessary to point out that publishers, irrespective of whether

they associate themselves with the content of their publications, play a full part in the exercise of freedom of expression by providing authors with a medium (see, among other authorities, *mutatis mutandis*, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, ECHR 1999-IV; see also *C.S.Y. v. Turkey*, no. 27214/95, § 27, 4 March 2003).

23. Such interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It must therefore be determined whether it was "prescribed by law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve those aims.

B. Whether the interference was justified

1. "Prescribed by law"

(a) The parties' submissions

24. The applicant company submitted, in essence, that the interference complained of had not been "prescribed by law". It argued that, under the law as it had stood, it had not been possible to foresee either that the content of the book breached medical confidentiality or that François Mitterrand's heirs were entitled to bring an action against the company in the civil courts, seeing that the book had been published after his death.

The applicant company submitted, firstly, that although medical confidentiality was indisputably protected by Article 226-13 of the Criminal Code and that breaching it was a criminal offence, it was not apparent that patients were unable to release their doctor from that obligation. According to legal opinion, the confidentiality rule could not be used against the wishes of either patients or, in principle, their heirs (it referred in this connection to a publication by Professor P. Kayser, *La protection de la vie privée par le droit*, Economica, 3rd edition, § 214, and to the "convergent opinions" of Mr N.J. Mazen, *Gazette du Palais* 1975, pp. 468-74, and Mr R. Savatier, *Dalloz* 1957, pp. 445-47). President Mitterrand had officially released Dr Gubler from his obligation by asking him to publish health bulletins on him for years, had expressed the wish, more generally, to make public all matters pertaining to his health and, when asked by another doctor how his illness should be reported, had replied: "Do as you see fit; announce what you want" (here, the applicant company referred to an interview with Professor Bernard Debré, published in January 1996 by the weekly magazine *VSD*). Medical confidentiality was, moreover, not as general and absolute as the Government had maintained. For example, the First Civil Division of the Court of Cassation had held that "pursuant to Article 901 of the Civil Code [by which 'persons making a donation ... must

be of sound mind'], which amount[ed] to authorisation within the meaning of Article 226-14 of the Criminal Code, practitioners [were] released from their obligation not to disclose facts which [became] known to them in the practice of their profession" (judgment of 22 May 2002).

Secondly, the applicant company argued, the courts had accepted that medical practitioners who had come under attack were entitled to defend themselves, notwithstanding the duty of medical confidentiality by which they were bound (*Cass. crim.*, 20 December 1967, *Bull. crim.* no. 338), and indeed, Dr Gubler's competence and reputation had been called into question by the media (the applicant company produced an article from the 11 January 1996 edition of *Le Monde* reporting the criticism by the President's brother of the treatment which the President had received).

Thirdly, the applicant company submitted, where victims of an offence died before bringing an action for damages themselves, their entitlement to claim damages, which had entered into their estate prior to their death, was passed on to their heirs. However, it was "highly debatable" that a patient's heirs were entitled to bring a civil action to complain of a breach of medical confidentiality occurring after the patient's death. In such cases, as in privacy cases, the right to bring a civil action – as opposed to a prosecution – lapsed on the death of the person concerned, who alone had the capacity to initiate proceedings. In the instant case the book in issue had been published after François Mitterrand's death.

25. The Government took the opposite view. They maintained that the applicant company could not have been unaware – in view of the extensive case-law concerning medical confidentiality, the rules of medical ethics and Article 226-13 of the Criminal Code – that the book by Dr Gubler, which had described, among other things, the progress of the illness suffered by President Mitterrand, to whom he had been private physician, the medical treatment and operations the President had undergone and his conversations with Dr Gubler and other practitioners, contained disclosures that were covered by the rules of medical confidentiality and could therefore lead to prosecution and the institution of civil proceedings, including by the head of State's heirs.

(b) The Court's assessment

26. The Court reiterates that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are

vague and whose interpretation and application are questions of practice (see, among other authorities, The Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 31, § 49, and *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports of Judgments and Decisions* 1998-VI, pp. 2325-26, § 35).

27. The Court notes that Article 4 of the Code of Conduct for Medical Practitioners provides that the duty of professional confidentiality by which medical practitioners are bound, "established in the interests of patients, shall apply to all medical practitioners as provided by law" and covers "everything that has come to the attention of medical practitioners in the practice of their profession, that is, not only what has been confided in them but also what they have seen, heard or understood". Breaching professional confidence is an offence punishable under Article 226-13 of the Criminal Code. The Court of Cassation has held that "what the law intended to guarantee is the security of confidential information which individuals are required to disclose to persons whose position or profession makes it necessary, in the general public interest, to confide such information in them" (*Cass. crim.*, 19 November 1985, *Bull. crim.* no. 364). Accordingly, under the law as it stood, the applicant company could undoubtedly have foreseen that by publishing a book by the former private physician to President Mitterrand, which described, among other things, the progress of his illness and contained information about the medical treatment and operations he had undergone and his conversations with medical practitioners, it was publishing disclosures likely to be covered by the rules of medical confidentiality.

28. The Court further notes that French law imposes on medical practitioners a strict duty of professional confidence, save in exceptional circumstances which are prescribed by law and must themselves be construed exhaustively. That is apparent from Article 226-14 of the Criminal Code, which provides: "Article 226-13 shall not apply in cases where the law requires or authorises disclosure of confidential information." However, the law does not provide that a medical practitioner may be released from the duty of confidentiality by a patient or, in general terms, by a "legitimate interest". The Court of Cassation has further held that "the obligation of professional confidence, as set forth in Article 226-13 of the Criminal Code in order to ensure the necessary trust in the practice of certain professions or the performance of certain duties, is incumbent on medical practitioners, save where the law provides otherwise, as a duty inherent in their position [and], subject only to this proviso, is general and absolute" (*Cass. crim.*, 8 April 1998, *Bull. crim.* no. 138) and that "no one is entitled to release them from it" (*Cass. crim.*, 5 June 1985, *Bull. crim.* no. 218).

The applicant company cannot rely on the judgment of the Criminal Division of the Court of Cassation of 20 December 1967 or on the judgment

of the First Civil Division of the Court of Cassation of 22 May 2002 to argue in substance that the law as it stood, applied to the facts of the instant case, was not foreseeable as to its effect in this regard. The two judgments in question concern circumstances bearing no relation to those of the instant case (see paragraph 20 above, from which the differences can be clearly seen).

29. Furthermore, under French law a breach of medical confidentiality does not only constitute an offence under the criminal law and the Code of Conduct for Medical Practitioners. It also gives rise to civil liability for negligence, on the basis of Article 1382 of the Civil Code, by which "[a]ny act that causes damage to another shall render the person through whose fault the damage was caused liable to make reparation for it". Where the damage occurred while the victim was still alive but the victim died before bringing an action for damages, the right to bring such an action, which had entered into the victim's estate prior to his death, is passed on to his heirs, who may accordingly institute proceedings on the deceased's behalf (Court of Cassation, Joint Bench, 30 April 1976, *Bull. crim.* no. 135). It appears from the reasoning of the judgment of 27 May 1997 that the Paris Court of Appeal applied this principle in holding that François Mitterrand's heirs were entitled to compensation for the effects of the book's publication, the decision to publish having been taken on 8 November 1995, the date of the publishing contract – that is, before the President's death.

30. Lastly, under the first paragraph of Article 809 of the New Code of Civil Procedure, the urgent-applications judge "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".

31. In short, the applicant company cannot maintain that it was unable to foresee "to a reasonable degree" the likely legal consequences of the publication of *Le Grand Secret*, including the question of civil liability and the possibility of an injunction being issued. The Court therefore concludes that the interference in issue was "prescribed by law" within the meaning of the second paragraph of Article 10 of the Convention.

2. Legitimate aim

(a) The parties' submissions

32. The applicant company submitted that the interference in issue had not pursued a "legitimate aim"; firstly, the aim relating to the "social function" of medical confidentiality could not justify a ruling in favour of a person's heirs, and secondly, the protection of François Mitterrand's private interests could not be relied on since the right to institute civil proceedings had lapsed on his death.

33. The Government again took the opposite view. They argued that the measures taken had been intended to ensure medical confidentiality and hence to "protect the reputation or rights of others" and to prevent "the disclosure of information received in confidence". The Government pointed out that the rule of medical confidentiality was based on the interests of patients, who should be able to confide in practitioners without any hesitation and should be protected from the disclosure of information relating to their sphere of intimacy and private life. It thus followed that the rule was intended to preserve society's general interest in protecting the relationship of trust underlying the practice of the medical profession.

(b) The Court's assessment

34. The Court notes that the decisions to maintain the ban on distributing *Le Grand Secret* and to order the applicant company to pay damages were taken by the civil courts following an action in respect of the non-pecuniary damage sustained by François Mitterrand and his heirs, on the ground that the contents of the book breached medical confidentiality. The earlier injunction by the urgent-applications judge, however, was a temporary measure aimed at putting an end to the injury thus caused, which was held at the time to be "manifestly unlawful".

It is apparent both from the reasoning of the judgments of the domestic courts, in particular the Court of Appeal's judgment of 27 May 1997, and from the Government's submissions before the Court that the judicial authorities based their decisions on a combination of two of the "legitimate aims" listed in paragraph 2 of Article 10 of the Convention, namely "preventing the disclosure of information received in confidence" (information covered under the national legislation by the rules of medical confidentiality) and protecting the "rights of others" (those of the President, and of his widow and children, to whom they were transferred on his death).

It is not for the Court to determine whether the civil liability incurred on account of the breach of medical confidentiality comes, in abstract terms, under the first of these legitimate aims, the second or both at once. It is sufficient for it to note that in the instant case the measures complained of, namely the interim injunction and the decision on the merits to keep the ban in force, were intended to protect the late President's honour, reputation and privacy, and that the national courts' assessment that these "rights of others" were passed on to his family on his death does not appear in any way unreasonable or arbitrary. Moreover, it is precisely because much of the information disclosed in the book was classified in law as secret, and was therefore *a fortiori* received in confidence, that it was capable in practical terms of infringing the rights of others, the protection of which is deemed legitimate in paragraph 2 of Article 10.

Accordingly, the interference in issue pursued at least one of the "legitimate aims" set out in the second paragraph of Article 10 of the Convention.

3. "Necessary in a democratic society"

(a) The parties' submissions

(i) The Government

35. In the Government's submission, the interference complained of had been "necessary in a democratic society". They considered that the domestic courts had properly weighed up the interests at stake: on the one hand, the right to impart and receive information on matters of public interest, and on the other hand, the breach of medical confidentiality, a principle which likewise served the public interest. The courts had accordingly noted that the book contained the following: very detailed information of a strictly medical nature concerning the symptoms of François Mitterrand's illness; an account of the medical examinations which he had undergone and their outcome and frequency; a description of a treatment protocol and the manner in which the treatment had been administered; an indication of the medicines used; a description of physical disorders and the side-effects of the treatment; an account of an operation; an account of conversations between Dr Gubler and his patient; a description of operations, consultations and treatment carried out by other practitioners; a description of the circumstances in which certain health bulletins concerning François Mitterrand were drawn up; and information about the private life of his wife and children. The courts had also emphasised that, even where the events recounted in the book did not directly relate to medical facts, they were covered by the rules of medical confidentiality in that they could only have become known to Dr Gubler in the practice of his profession.

The Government pointed out that in a judgment of 5 July 1996 the Paris Criminal Court had found Dr Gubler guilty of breaching professional confidence and Mr Gonod and Mr Orban – the applicant company's statutory representative – guilty of aiding and abetting the same offence. That judgment, which had become final in the absence of an appeal, had been binding on the civil courts.

In the Government's submission, the applicant company had known as soon as the publishing contract had been signed that the manuscript mainly contained information obtained in accordance with the rules of medical confidentiality. It could not therefore claim to have acted in good faith.

36. The Government stated that they realised the importance of a public debate on the right of the electorate to receive information about the physical and intellectual capacities of its leaders. They considered, however,

that such a debate did not justify the publication of a book which essentially described the stages of President Mitterrand's illness, the treatment he had received and the attitude of his relatives, particularly as it had been published after the President's death, a fact which, in the Government's submission, made the issue less "pressing".

37. The Government added that, because medical confidentiality was not only intended to protect patients' individual interests but also the general interest of society, it was a general and absolute obligation and patients themselves could not release their doctor from it. The applicant company was therefore not entitled to argue that François Mitterrand had waived the requirement of medical confidentiality.

38. The Government acknowledged that the media had revealed, even before the book in question was published, that François Mitterrand had died of cancer, from which he had been suffering since 1981. However, that did not in any way alter the fact that the book disclosed medical information of a considerably more precise nature, which had become known to Dr Gubler solely in the practice of his profession. The fact that the book had been disseminated on the Internet did not affect the unlawfulness of the information it contained. Its dissemination in that form had been possible only as a result of its having been on sale for one day and, as most of the sites concerned were hosted on foreign servers, it was impossible for the French authorities to "take legal action".

39. Lastly, the Government submitted that the measures taken by the domestic courts had been "proportionate to the aims pursued". They pointed out that the ban had not concerned the publication of the book itself but its continued distribution. On the one hand, that measure had been intended to afford redress for the damage caused by the breach of medical confidentiality, and, on the other hand, the criminal conviction in the applicant company's case for aiding and abetting a breach of medical confidentiality had been binding on the civil courts in their assessment of the issue of negligence. In the Government's submission, in view of the space they occupied, the passages which disclosed facts covered by the rules of medical confidentiality could not be separated from the rest of the book without depriving it of its fundamental content and thereby disfiguring it; prohibition of the continued distribution of the book in its entirety had therefore been the only means of stopping the damage. In addition, the particular circumstances noted by the domestic courts had justified the amounts awarded to François Mitterrand's heirs in damages. The size of those amounts should in any event be seen in relative terms, given that the applicant company had made a substantial profit through the sale of 40,000 copies of the book and, having been ordered to pay damages jointly and severally with Dr Gubler, had only actually had to pay 50% of the award.

(ii) The applicant company

40. The applicant company submitted, on the contrary, that the interference in question had not been "necessary in a democratic society". It pointed out, firstly, that the book complained of had raised issues of general interest; it had contributed both to the right of citizens – towards whom President Mitterrand had voluntarily assumed a duty of "medical transparency" – to receive information about a "State lie", and to a more general debate about the health of serving leaders. The extent of the disclosures made in the book did not detract from that; the applicant company submitted in that connection that it had been for Dr Gubler and his publisher to decide what information to impart to the public about the President's health (it referred on that point to *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I). It further argued that the debate had not become any less pressing after François Mitterrand's death; indeed, many public figures had continued to talk about the matter long after the book had been published. Secondly, the applicant company submitted that the information in the book had already been very widely disseminated: there had been an "advance publication" of extracts in the 16 January 1996 issue of the magazine *Paris-Match*, of which one million copies had been sold; 40,000 copies of the book had been sold before the urgent-applications judge had ordered the discontinuation of its distribution; and by 13 March 1996, when the Court of Appeal had decided to maintain the injunction, the book had been disseminated on the Internet and had been the subject of considerable media comment. Relying on *Vereniging Weekblad* Bluf! *v. the Netherlands* (judgment of 9 February 1995, Series A no. 306-A), it concluded that the prohibition on the book's distribution had not been justified.

41. In the applicant company's submission, the interference in issue had in any event been disproportionate since it had amounted to a general and absolute prohibition on publication, with no limit as to its period of validity; furthermore, a sizeable amount of damages had been awarded, with the aim not of providing redress for an offence against the public interest (such redress having already been afforded by the Criminal Court's judgment of 5 July 1996) but of protecting the private interests of the "victim's relatives". The applicant company pointed out in particular that, contrary to what the Government had maintained, the civil courts had not been bound by the criminal conviction of its managing director for aiding and abetting a breach of medical confidentiality. The civil courts had been required to consider private interests alone; their sole task had been to assess and make good the damage sustained by François Mitterrand up to the date of his death as a result of the invasion of his privacy through the breach of medical confidentiality. A person's right to institute court proceedings in the event of such interference lapsed on his death; such differential treatment of the right to receive and impart information according to whether or not the invasion

of the deceased's privacy had occurred by means of a breach of medical confidentiality was not based on any "objective grounds" within the meaning of *Du Roy and Malaurie v. France* (no. 34000/96, ECHR 2000-X). The applicant company considered it "particularly perverse" for the Government to argue that a blanket ban on distribution was justified by the fact that merely removing the passages that breached medical confidentiality would have effectively deprived the book of its fundamental content and disfigured it. Such an argument amounted to justifying the wholesale censorship of a piece of writing by the fact that partial censorship infringed its author's right under the Code of Intellectual Property not to have his work distorted. Lastly, the applicant company pointed out that the civil courts had awarded François Mitterrand's heirs FRF 340,000 in damages, an extremely large amount seeing that they had not directly sustained the damage and an interim injunction had been issued prohibiting the distribution of the book.

(b) The Court's assessment

(i) General principles

42. The Court would first reiterate the fundamental principles established by its case-law on Article 10 (see, among other authorities, The Sunday Times *(no. 1)*, cited above, pp. 40-41, § 65, and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII).

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, 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 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.

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.

The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of

appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or 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".

Article 10 does not prohibit prior restraints on publication or bans on distribution as such; however, the dangers which restrictions of that kind pose for a democratic society are such that they call for the most careful scrutiny on the part of the Court, which it will apply in its examination of the instant case.

43. The Court has also repeatedly emphasised the essential role played by the press in a democratic society. In particular, it has held that although the press must not overstep certain bounds, for example in respect of the rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them (see, among many other authorities, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, §§ 59 and 62, ECHR 1999-III, and *Colombani and Others v. France*, no. 51279/99, § 55, ECHR 2002-V). The national margin of appreciation is circumscribed by the interests of a democratic society in enabling the press to exercise its vital role of "public watchdog" (see, for example, Bladet Tromsø *and Stensaas*, cited above, § 59).

These principles also apply to the publication of books or pieces of writing other than those which are to be published, or have been published, in the periodical press (see, in particular, *C.S.Y. v. Turkey*, cited above, § 42), in so far as they concern matters of public interest.

(ii) Application to the present case

44. Among the measures taken in the present case, the French civil courts prohibited the applicant company, initially on a temporary basis and then permanently, from continuing to distribute *Le Grand Secret*. The book, by Mr Gonod, a journalist, and Dr Gubler, private physician to President Mitterrand for a number of years, gave an account of relations between Dr Gubler and the President, describing how the former had organised a medical team to take care of the latter, who had been diagnosed with cancer in 1981, a few months after he had first been elected President of France. In particular, it described the difficulties Dr Gubler had encountered in trying to conceal the illness, given that President Mitterrand had undertaken to issue a health bulletin every six months.

The Court considers that the book was published in the context of a wide-ranging debate in France on a matter of public interest, in particular

the public's right to be informed about any serious illnesses suffered by the head of State, and the question whether a person who knew that he was seriously ill was fit to hold the highest national office. Furthermore, the secrecy which President Mitterrand imposed, according to the book, with regard to his condition and its development, from the moment he became ill and at least until the point when the public was informed (more than ten years afterwards), raised the public-interest issue of the transparency of political life.

As freedom of the "press" was thus at stake, the French authorities had only a limited margin of appreciation to decide whether there was a "pressing social need" to take the measures in question against the applicant company. The Court must therefore determine whether such a need existed.

45. That said, the Court considers that a distinction should be made between the interim injunction and the measures taken in the main proceedings. It reiterates in this connection that the need to interfere with freedom of expression may be present initially yet subsequently cease to exist (see, on this point, Observer *and* Guardian *v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216).

(α) The interim injunction

46. On an urgent application lodged on 17 January 1996 by President Mitterrand's heirs, who complained, in particular, of a breach of medical confidentiality, the President of the Paris *tribunal de grande instance* issued an interim injunction on 18 January 1996 prohibiting the applicant company and Dr Gubler from continuing to distribute the book *Le Grand Secret*. The injunction was upheld by the Paris Court of Appeal in a judgment of 13 March 1996, in which the claimants were given one month to apply to a court with jurisdiction to examine the merits, failing which the measure would cease to have effect on the expiry of that period.

To justify this interim measure, the Court of Appeal, after identifying numerous passages from *Le Grand Secret* that recounted facts "manifestly covered by the rules of medical confidentiality", noted that the disclosure of such facts through the distribution of the book was "manifestly unlawful" and had caused an infringement within the meaning of Article 809 of the New Code of Civil Procedure of the rights of President Mitterrand's heirs. The court was also careful to point out that prohibition of the distribution of a book was an exceptional measure whose effects had to be limited in time.

47. The Court considers that these reasons were "relevant and sufficient" in the circumstances of the case. It notes that the urgent-applications judge gave her ruling on 18 January 1996, the day after publication of *Le Grand Secret*, which itself had taken place barely ten days after President Mitterrand's death. Clearly, the distribution so soon after the President's death of a book which depicted him as having consciously lied to the French people about the existence and duration of his illness and – as the Paris

Court of Appeal noted in detail in its judgment of 13 March 1996 – constituted a prima facie breach of medical confidentiality could only have intensified the grief of the President's heirs following his very recent and painful death. Moreover, the President's death, after a long fight against his illness and barely a few months after he had left office, certainly aroused strong emotions among politicians and the public, so that the damage caused by the book to the deceased's reputation was particularly serious in the circumstances. The Court further observes that the interim injunction did not prejudge the outcome of the subsequent dispute between the parties on the merits. In particular, as her injunction was based on the "manifestly unlawful infringement", the urgent-applications judge, like the Court of Appeal when it reviewed the injunction, was not required to enter into a discussion of the legally delicate issue of whether the right to bring an action relating to a prohibition on disclosing information was vested only in the living. On an application by the widow and children of the President, who had died a few days previously, the urgent-applications judge, in this context of grief, had to order a measure that was likely to put an end to the infringement. In view of the date on which the injunction was issued and its temporary nature, the discontinuation of the distribution of the book in question until such time as the relevant courts had ruled whether it was compatible with medical confidentiality and the rights of others, was justified by the legitimate aim or aims pursued.

The Court also considers that the interference was "proportionate" to this aim or these aims, since the Court of Appeal was careful, in upholding the injunction issued by the urgent-applications judge, to place a reasonable time-limit on it, specifying in particular that it would cease to have effect if no application for a decision on the merits was made within one month.

48. In short, the Court considers that, in the circumstances of the case, the interim injunction by the urgent-applications judge discontinuing the distribution of *Le Grand Secret* may be regarded as having been "necessary in a democratic society" for the protection of the rights of President Mitterrand and his heirs. Accordingly, there has been no violation of Article 10 of the Convention in this respect.

(ß) The measures ordered in the main proceedings

49. In a judgment of 23 October 1996, the Paris *tribunal de grande instance* ordered the applicant company to pay damages to François Mitterrand's widow and children and maintained the ban on distribution of *Le Grand Secret*. The judgment was upheld in that respect by the Paris Court of Appeal on 27 May 1997, and the Court of Cassation dismissed an appeal on points of law against the appeal court's judgment (see paragraph 16 above).

Those measures were taken in order to afford redress for the damage caused to François Mitterrand and his heirs on account of the breach of the

duty of medical confidentiality by which Dr Gubler was bound in relation to him, resulting in particular from the information published in *Le Grand Secret*. The applicant company incurred civil and not criminal liability as a result of the publication of the book.

The Court notes that the measures in question, by definition, were no longer temporary in nature and that their validity was not limited in time.

50. It reiterates that while, by providing authors with a medium, publishers participate in the exercise of freedom of expression, this means that they are vicariously subject to the "duties and responsibilities" which authors take on when they disseminate their writing (see, *mutatis mutandis*, *Sürek (no. 1)*, cited above, § 63).

Accordingly, the measures by which the applicant company incurred civil liability on account of the publication of *Le Grand Secret* and was ordered to pay damages are not as such incompatible with the requirements of Article 10 of the Convention.

They were also based on relevant and sufficient reasons in the instant case. In this connection, the Court is satisfied by the considerations and reasoning that prompted the civil courts to hold that the contents of *Le Grand Secret* were incompatible with the duty of medical confidentiality incumbent on Dr Gubler under domestic law. It refers, in particular, to the meticulous analysis of the book in relation to the requirements of confidentiality by the Paris *tribunal de grande instance* in its judgment of 23 October 1996 (see paragraph 14 above). It also refers to the Paris Court of Appeal's judgment of 27 May 1997 in so far as it states that "[s]ince Mr Gubler was in the company of Mr François Mitterrand solely on account of his position as his doctor, all the information he recounts in his book, which he learned or observed while practising his profession, is covered by the duty of medical confidentiality by which he is bound *vis-à-vis* his patient".

51. The Court has, however, reached the conclusion that, even though the continued ban on distribution of *Le Grand Secret* was based on relevant and sufficient reasons, it no longer met a "pressing social need" and was therefore disproportionate to the aims pursued.

52. According to the judgment of 23 October 1996, the decision to maintain indefinitely the ban on distribution was intended to "put an end to the injury suffered by the victim and to prevent the recurrence of the damage that would necessarily result from resumption of the distribution of the piece of writing". The court held that the time that had elapsed since François Mitterrand's death could not have had the effect of "definitively putting an end to the infringement observed when the book was published and rendering lawful [its] distribution", and the fact that information contained in *Le Grand Secret* had been divulged by the media was not "capable of preventing the injury and damage that would result for the claimants from resumed distribution of the book". The court added that the

only means of achieving this was to ban the book; it pointed out in this connection that "[i]n view of the space they occupy, the above passages from *Le Grand Secret*, which disclose facts covered by the rules of medical confidentiality, cannot be separated from the rest of the book without depriving it of its fundamental content and thereby disfiguring it".

53. The Court is not persuaded by such reasoning. It notes that by 23 October 1996, when the Paris *tribunal de grande instance* gave judgment, François Mitterrand had been dead for nine and a half months. Clearly, the context was no longer the same as on 18 January 1996, when the urgent-applications judge issued the interim injunction prohibiting the distribution of *Le Grand Secret*. The judge issued the injunction the day after the book's publication, which itself had taken place barely ten days after President Mitterrand's death; as the Court has already held, distribution of the book so soon after the President's death could only have intensified the legitimate emotions of the deceased's relatives, who inherited the rights vested in him (see paragraph 47 above). In the Court's opinion, as the President's death became more distant in time, this factor became less important. Likewise, the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand's two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality. This certainly does not mean that the Court considers that the requirements of historical debate may release medical practitioners from the duty of medical confidentiality, which under French law is general and absolute, save in strictly exceptional cases provided for by law. However, once the duty of confidentiality has been breached, giving rise to criminal (and disciplinary) sanctions against the person responsible, the passage of time must be taken into account in assessing whether such a serious measure as banning a book – a measure which in the instant case was likewise general and absolute – was compatible with freedom of expression.

Furthermore, by the time of the civil court's ruling on the merits, not only had some 40,000 copies of the book already been sold, but it had also been disseminated on the Internet and had been the subject of considerable media comment. Accordingly, by that stage the information in the book was to a large extent no longer confidential in practice. Consequently, the preservation of medical confidentiality could no longer constitute an overriding requirement (see, *mutatis mutandis*, *Weber v. Switzerland*, judgment of 22 May 1990, Series A no. 177, p. 23, § 51; Observer *and* Guardian, cited above, p. 33, §§ 66 et seq.; *Vereniging Weekblad* Bluf!, cited above, p. 20, § 41; and *Fressoz and Roire*, cited above, § 53).

54. The measure appears all the more disproportionate to the "legitimate aim" pursued, namely the protection of the rights of François Mitterrand and his heirs, in that it was imposed in addition to the order requiring the applicant company to pay damages to the President's heirs.

55. In conclusion, on 23 October 1996, when the Paris *tribunal de grande instance* gave judgment on the merits, there was no longer a "pressing social need" justifying the continued ban on distribution of *Le Grand Secret*. There has therefore been a violation of Article 10 of the Convention from that date onwards.

56. The applicant company submitted that there had been a further infringement of its right to freedom of expression in that it had been ordered, jointly and severally with Dr Gubler, to pay an "exorbitant" amount in damages to Mrs Mitterrand and the three other claimants.

57. Having regard to the conclusion it has reached (see paragraph 55 above), the Court considers that it is not necessary to examine separately this aspect of the complaint, whose relevance, moreover, is not apparent.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

59. The applicant company argued that, if it had been able to continue distributing *Le Grand Secret*, it could have expected to sell 250,000 copies and make a profit of 1,237,869 euros (EUR), a sum based on the cover price (EUR 14.94 per copy), minus discounts to booksellers and distribution and delivery services, royalties, production costs and general overheads. It contended that books about "major" world figures systematically aroused lively public interest, and that the press coverage of Dr Gubler's revelations before the book's publication and the sale of 40,000 copies in twenty-four hours had indicated that it would be a success. It sought compensation for this "loss of earnings".

60. The Government observed that the applicant company had been able to sell 40,000 copies of the book, thereby making a not insignificant profit. In their submission, its claim before the Court for "loss of earnings" was based on a "purely speculative" analysis, since there was no evidence that it would have sold 250,000 copies of the book if its distribution had not been prohibited. The Government considered that, in those circumstances, the Court's finding of a violation would constitute sufficient just satisfaction.

61. The Court considers it wholly plausible that sales of *Le Grand Secret* might have exceeded 40,000 copies in the absence of the interim injunction,

which was issued twenty-four hours after the book had been published and some ten days after President Mitterrand's death.

It should be reiterated, however, that only damage sustained as a result of Convention violations found by the Court may give rise to the award of just satisfaction (see, among other authorities, *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, § 24, 14 May 2002). In the instant case the Court has held that the injunction prohibiting the continued distribution of *Le Grand Secret* was in accordance with Article 10 of the Convention in so far as it was ordered as an interim measure; the Court's finding of a violation of Article 10 relates solely to the civil court's decision in the main proceedings to maintain the ban after 23 October 1996. It is impossible to say whether by that date, nine and a half months after President Mitterrand's death, the public would still have been interested in buying the book, especially as it was available on the Internet. Furthermore, as 40,000 copies had been sold, the book had already attained a considerable overall readership, in excess of that figure.

Since the applicant company's claim for pecuniary damage is therefore extremely speculative, the Court concludes that it should be dismissed.

B. Costs and expenses

62. The applicant company sought reimbursement of the costs and expenses incurred before the domestic courts, amounting to EUR 106,767.46, inclusive of value-added tax (VAT). It produced a detailed breakdown of its costs and expenses, drawn up by its accountant on 4 July 2003, and a large number of bills.

The applicant company also sought payment of the costs and expenses incurred in presenting its case before the Court. It produced two bills, dated 14 June 2000 and 14 January 2003, for 35,880 French francs (EUR 5,469.87) and EUR 5,980 respectively, inclusive of VAT.

63. The Government submitted that only the costs and expenses incurred in the proceedings before the Court could be taken into consideration, provided that they were substantiated.

64. The Court notes that, in accordance with Rule 60 § 2 of the Rules of Court, the applicant company submitted itemised particulars of its claims, together with the relevant supporting documents.

It further reiterates that, where it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts for the prevention or redress of the violation (see, among other authorities, *Zimmermann and Steiner v. Switzerland*, judgment of 13 July 1983, Series A no. 66, p. 14, § 36, and *Hertel*, cited above, p. 2334, § 63), and that it has the task of assessing whether the costs and expenses claimed were actually and necessarily incurred for that purpose

and are reasonable as to quantum (see, among other authorities, *Wettstein v. Switzerland*, no. 33958/96, § 56, ECHR 2000-XII).

In the instant case, the issue at stake in the domestic proceedings, both before the urgent-applications judge and on the merits, was the applicant company's right to respect for its freedom of expression, a right which the Court has held to have been infringed, albeit solely on account of the decision by the civil court in the main proceedings to maintain the ban on the book, more than nine months after its publication. The Court concludes from the foregoing that the applicant company is entitled to claim reimbursement of the costs of its representation in the national courts, with the exception, however, of those incurred in the injunction proceedings. That said, the Court finds the amount claimed excessive and considers it reasonable to award the applicant company EUR 15,000, inclusive of VAT, under that head.

On the other hand, the applicant company's claim should be allowed in its entirety in so far as it relates to the proceedings before the Court.

The Court therefore awards the applicant company EUR 26,449.87, inclusive of VAT, for costs and expenses.

C. Default interest

65. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 10 of the Convention on account of the interim injunction by the urgent-applications judge prohibiting the continued distribution of the book *Le Grand Secret*;

2. *Holds* that there has been a violation of Article 10 of the Convention on account of the decision by the civil court in the main proceedings to keep the prohibition in force after 23 October 1996;

3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 26,449.87 (twenty-six thousand four hundred and forty-nine euros eighty-seven cents) for costs and expenses, inclusive of value-added tax;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in French, and notified in writing on 18 May 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

L. LOUCAIDES
President