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

SECOND SECTION

CASE OF CHAUVY AND OTHERS v. FRANCE

(Application no. 64915/01)

JUDGMENT

STRASBOURG

29 June 2004

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

In the case of Chauvy and Others v. France,

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

Mr A.B. BAKA, *President*,
Mr J.-P. COSTA,
Mr L. LOUCAIDES,
Mr Mr K. JUNGWIERT,
Mr Mr V. BUTKEVYCH,
Ms W. THOMASSEN,
Mr M. UGREKHELIDZE, *judges*,
and Mr T.L. EARLY, *Deputy Section Registrar*,

Having deliberated in private on 23 September 2003 and 8 June 2004,

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

PROCEDURE

1. The case originated in an application (no. 64915/01) 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 three French nationals, Mr Gerard Chauvy, Mr Francis Esmenard and the Albin Michel publishing company ("the applicants"), on 13 December 2000.

2. The applicants were represented by Mr Bigot of the Paris Bar (from the Bauer, Bigot, Felzenszwalbe Law Firm). The respondent Government ("the Government") were represented by Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The applicants alleged a breach of their right to freedom of expression within the meaning of Article 10 of the Convention.

4. 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.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 52 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

6. By a decision of 23 September 2003, the Chamber declared the application partly admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The first applicant, Gérard Chauvy, was born in 1952 and lives at Villeurbanne. The second applicant, Francis Esmenard, was born in 1936 and lives in Paris. Both are French nationals. The third applicant, Editions Albin Michel S.A., is a company formed under French law whose registered office is in Paris.

9. The first applicant, who is a journalist and writer, is the author of a book entitled *Aubrac-Lyon 1943* which was published in 1997 by Editions Albin Michel (the third applicant), a company chaired by the second applicant.

10. In his book, the first applicant reconstructed the chronology of events involving the Resistance movements in Lyons in 1943 and took stock of the various archive materials that were available on that period. One of the principal mysteries surrounding this period is the Caluire meeting, an event of particular significance to the history of the French Resistance and a major episode of the Second World War. On 21 June 1943 Klaus Barbie, the regional head of the Gestapo, arrested the main Resistance leaders at a meeting in Caluire in the Lyons suburbs. Among those arrested were Jean Moulin, General de Gaulle's representative in France and the leader of the internal Resistance, and Raymond Aubrac, a member of the Resistance movement who managed to escape in the autumn of 1943. The truth about how the Resistance leaders came to be arrested in Caluire has still not been established. A member of the Resistance, René Hardy, who is now dead, was accused of being the "traitor" and put on trial. However, he was not convicted after two separate trials. A majority of the court voted in favour of a conviction in one of the trials, but the rules of criminal procedure in force at the time required a majority of at least two votes for a guilty verdict to be returned.

11. The first applicant recounted this major event "using the Aubracs as a prism". He claimed that his book put to the test "the official truth as related at length in the media, notably by the Aubracs, and in a film that sings their praises".

12. The book sparked off a fierce debate in public opinion in France and the newspaper Libération organised a round-table conference at which historians were invited to discuss the issue in the presence of Mr and Mrs Aubrac.

13. An unabridged version of the written submissions – known as the "Barbie testament" – which were signed by Klaus Barbie and lodged by Mr Vergès, his lawyer, on 4 July 1990 with the investigating judge investigating Barbie's treatment of members of the Lyons resistance was

appended to the book. Many of the questions raised by the first applicant were based on a comparison of that document with the "official" version of history. In the conclusion to his book, he said that there was no evidence in the archives to substantiate the accusation made by Klaus Barbie against Raymond Aubrac, but that their examination had shown that: "unreliable accounts [had] being given at times". He followed this up with two pages of questions that cast doubt on Raymond Aubrac's innocence.

14. On 14 May 1997 Mr and Mrs Aubrac brought a private prosecution by direct summons in the Seventeenth Division of the Paris *tribunal de grande instance*. The summons contained fifty extracts from the book (eighteen from Barbie's submissions and thirty-two from the first applicant's own text). The three applicants were summoned in their capacities as author, accomplice and a party liable for defamation under the civil law. Mr and Mrs Aubrac relied on section 31 of the Freedom of Press Act of 29 July 1881 and the Court of Cassation's judgment of 4 October 1989 in the case of *Pierre de Bénouville*. The relevant parts of the summons read as follows:

> "When ... Klaus Barbie was brought to France in 1983 he chose to defend himself by seeking to discredit those of his victims who had survived and were still able to make accusations against him by accusing them of treachery. He suggested that Raymond and Lucie Aubrac might be among their number. However, when Raymond Aubrac attended Barbie's trial after being called as a witness by him, neither Barbie, nor his counsel Mr Vergès, asked him the slightest question, made the least remark or produced any document capable of supporting this vile accusation which remained extremely vague.
>
> At the same time, by a judgment of 30 April 1987 followed by a judgment of 10 February 1988 which has become final, Raymond Aubrac secured Mr Vergès's conviction for defamation after Mr Vergès had chosen to relay and even to back up his client's insinuations in a film by Mr Claude Bal. ...
>
> The [first applicant's] book was published in March 1997 with the title "Aubrac, Lyon 1943". A banner wrapped around the cover proclaimed: "A legend put to the test of history".
>
> There cannot, therefore, be any doubt that this book is aimed almost exclusively at the Aubracs and purports to use rigorous historical method to destroy their so-called 'legend' as members of the Resistance."

15. Mr and Mrs Aubrac then set out those of the applicants' allegations which they considered defamatory and their reasons for so considering them:

> "A. The circumstances of Raymond Aubrac's arrest in March 1943
>
> The first falsehood of which the Aubracs are accused is that Raymond Aubrac was arrested on 13 March 1943 and not on 15 March; this enables Barbie to assert on the basis of this 'established fact' that the only way Raymond Aubrac, who had been arrested on 13 March, was able to attend the meeting on 15 March in the rue de l'hôtel de ville in Lyons was under the control of the French police. ...

B. The allegations relating to Raymond Aubrac's release in May 1943

An order for Raymond Aubrac's release was made on 10 May 1943. However, in an autobiographical account published in 1984, his wife puts the date of his release at 14 May while Raymond Aubrac himself hesitates between 14 and 15 May in a deposition made on 21 August 1948 in connection with the second Hardy trial.

... For [the first applicant], there can be but one explanation for this discrepancy between the dates: Raymond Aubrac spent four days collaborating with the divine Barbie who compelled the French judicial authorities to release him. This was confirmed by Lucie Aubrac's assertion that she had warned the public prosecutor not to oppose release, while the [the first applicant] feigns surprise at the lack of concrete evidence of the application. ...

C. Escape from Antiquaille Hospital

... this entire chapter returns to the alleged statement by Lucie Aubrac that she secured her husband Raymond's inclusion not only among the four members of the Resistance who were arrested on 15 March 1943, but also among those who were freed on 24 May, with the sole aim of challenging the account of those who took part in that escape and branding them liars. ...

... [The first applicant's] inability to rank the documents he cites in order of importance is a cause for consternation here. He considers it a nigh certainty that Aubrac's wife 'hid' her husband following his release by Barbie, but chooses to ignore the fact that [the circumstances of] his release [were] immediately examined by Frenay, head of the 'Combat' movement and subsequently, as was to be expected, subjected to close scrutiny at General de Gaulle's headquarters in London, and, in particular, the remark made by Frenay – despite its inclusion in the record of his interview in London on 30 June 1943 – that '*There is no doubt that Aubrac is a fellow who is beyond all suspicion'*. ...

D. The defamatory allegations about Caluire

... Although the debate still rages over the extent to which René Hardy was a willing collaborator and the unnecessary risks taken by the leaders of the 'Combat' movement in sending Hardy to Caluire to defend the prerogatives of their leader, prior to Barbie in 1989 no one had ever suggested that Raymond and Lucie Aubrac had played the slightest role in Jean Moulin's arrest on 21 June, or its authentification by René Aubry on 25 June after four days of torture, it again being stressed that Hardy did not know Jean Moulin.

... [The first applicant] had no hesitation in asserting (page 130):

It is certain that Raymond Aubrac appears no longer to recollect the meeting with Lassagne and Aubry at the Lonjarets' home on 19 June 1943, although in 1948 he fully admitted that such a meeting had taken place.

In so doing, [the first applicant] lends credence to the notion that on 19 June 1943 Raymond Aubrac knew all about the proposed meeting in Caluire ...

E. The deliberate confusion between Hardy and Aubrac

In two transitional chapters (Chapters XI and XII), [the first applicant], without citing a single piece of documentary evidence, seeks to cause deliberate confusion by recounting the misfortunes of René Hardy (who, once again, no one doubts helped the Germans although it is not known to what extent he did so voluntarily) and Raymond and Lucie Aubrac, whom no one has ever accused of such collaboration, for good reason. ...

... [The first applicant's] aim is still the same: to lead people to believe that Aubrac is lying and that what he clearly stated at the material time no longer matters, as he does not repeat it in identical terms fifty years on. ...

F. The offences of defamation are made out

Both the publication of the 'Barbie testament' and the comments of [the first applicant] in support of that document render [the applicants] liable for defamatory statements in the form of precise allegations, although sometimes in the form of innuendo, against two specific persons, Raymond and Lucie Aubrac, whose honour and reputation have been considerably tarnished by the said allegations.

The most harmful allegations in a book whose entire content is defamatory are as follows:

A. Allegations against Raymond Aubrac

1. Raymond Aubrac was the French officer whom the Germans used to infiltrate the leaders of the Secret Army upon its formation.

2. Raymond Aubrac was a member of the Resistance whom Barbie turned into one of his department's agents on his arrest in March 1943.

3. Raymond Aubrac lied about the date of his first arrest: it took place on 13, not 15, March 1943 .

4. Raymond Aubrac, who was controlled by the French police, was not in fact arrested on 15 March 1943, when the French police went to one of his homes.

5. Raymond Aubrac was responsible for the 'mousetraps' that were set for members of the Resistance movement in Lyons between 13 and 15 March 1943.

6. Raymond Aubrac was not released on 10 May 1943 pursuant to a freely made decision of the investigating judge..., but because the German authorities had compelled the French judicial authorities to release him.

7. Raymond Aubrac lied about the date of his release following his first arrest in order to hide the fact that for four days, between 10 and 14 May 1943, he had remained at the disposal of Barbie, the Head of the Gestapo.

8. After being informed on Saturday 19 June 1943 of the time and venue of the meeting due to take place in Caluire of various Resistance leaders including Jean Moulin, Raymond Aubrac had informed his wife, who was thus able to inform the Head of the Gestapo.

9. Raymond Aubrac was released voluntarily by the Germans on 21 October 1943, when English agents took part in an operation to free one of their agents, Jean Biche, and Barbie, who had been informed of the operation, seized the opportunity to allow his agent Raymond Aubrac to escape.

10. In general, Raymond Aubrac's conduct with regard to the German authorities in Lyons in 1943 was similar to that of René Hardy, whom the Germans were using at that time.

B. Allegations against Lucie Aubrac

1. Lucie Aubrac had concealed the fact that her husband was released on 10 May 1943, not as a result of action she had taken, but by virtue of an order of the investigating judge ... acting on the instructions of Barbie, the head of the Gestapo.

2. It was not Lucie Aubrac who had arranged the operation that had enabled three members of the Resistance, who had been arrested at the same time as Raymond Aubrac, to escape from Antiquaille Hospital on 24 May 1943.

3. After being informed by her husband of the time and place of the meeting at Dr Dugoujon's home in Caluire on 21 June 1943, Lucie Aubrac had communicated the information to Barbie, the regional head of the Gestapo, on Sunday 20 June.

4. Lucie Aubrac, whose controlling officer was Floreck, Barbie's deputy, had agreed to act as liaison officer between her husband and ... Barbie to avoid *giving her husband away*.

5. Lucie Aubrac could only have gained access to the premises used by the Gestapo if she was a Gestapo agent.

6. It was with the full agreement of the Gestapo, and more specifically Barbie, that Lucie Aubrac was able to arrange her husband's 'escape' in an operation that was organised not by her, but by the Intelligence Service, on 21 October 1943.

Each of these defamatory statements ... must give rise to liability under section 31 of the Act of 29 July 1881.

These defamatory statements, which accuse [the Aubracs] of treachery and of concealing treachery, constitute a direct assault on their status as founding members and organisers of the Freedom (*Libération*) Resistance network and, in Raymond Aubrac's case, as the military commander of the Secret Army. ...

This reference to section 31 of the Act of 29 July 1881 is inescapable since, as the Criminal Division of the Court of Cassation reiterated in a judgment of 4 October 1989 (in the case of *Pierre de Bénouville*): '... By virtue of a combination of sections 30 and 31 of the Freedom of Press Act and section 28 of the Act of 5 January 1951 the protection against defamation afforded to certain recognised Resistance movements which are likened to the Army and Navy extends to the members of these movements if the defamatory statement concerns their status or actions as members".

16. In a judgment of 2 April 1998, the *tribunal de grande instance* began by examining the various alleged defamatory statements in the chronological order of the underlying events and by comparing Klaus

Barbie's signed written submissions with the first applicant's text, as it considered that the very purpose of the first applicant's book was to:

> "compare the allegations of these 'written submissions' with the account of events given by Mr and Mrs Aubrac on various occasions and the other oral and documentary evidence relating to that period. ... The entire book thereafter focuses on this (major) charge of treachery".

17. The *tribunal de grande instance* thus examined the circumstances of Raymond Aubrac's initial arrest in March 1943, his release in May 1943, the escape from Antiquaille Hospital, the Caluire episode, events post-Caluire and the escape from Boulevard des hirondelles, and concluded:

> "Thus ..., without formally corroborating the direct accusations made in 'Barbie's written submissions', the [first applicant] sets about sowing confusion by combining a series of facts, witness statements and documents of different type and varying degrees of importance which together serve to discredit the accounts given by the civil parties; he also questions the motives for their deception and lies, and – despite the reservations expressed by the author – surreptitiously renders plausible the accusation of treachery and manipulation made in 'Barbie's written submissions' that constitutes the underlying theme of the entire book. ...
>
> The civil parties are therefore right to consider that the entire book, and particularly the passages [reproduced in the judgment], tarnish their honour and reputation.
>
> The publication of the written submissions signed by Klaus Barbie and the quotation in various parts of the text of extracts from them constitutes defamation by reproduction of libellous accusations or allegations, an offence expressly provided for by section 29, paragraph 1, of the Press Act.
>
> As for the author's comments, they constitute defamation by innuendo in that they encourage the reader to believe that very grave questions exist over Mr and Mrs Aubrac's conduct in 1943 that outweigh the certainties that have been hitherto accepted; they thus lend credence to Barbie's accusations."

18. The *tribunal de grande instance* then considered which section of the Freedom of the Press Act was applicable in the case and, referring to the Act of 5 January 1951 and the Court of Cassation's case-law, stated that the likening of recognised Resistance movements to the Army and Navy also applied to members of those movements. It noted that for Convention purposes "law" included both legislation passed by Parliament and judicial interpretation of that legislation, provided it was sufficiently settled and accessible. It accordingly found that section 31 of the Act of 29 July 1881 was applicable.

19. It went on to explain that the defamatory statements were deemed to have been made in bad faith and that the burden of proof was on the accused to provide sufficient justification to establish that they had acted in good faith. They had to show that there had been a legitimate interest in publication unaccompanied by personal animosity, that a proper inquiry had been carried out and that the tone was measured:

"While the work of historians, who must be permitted to go about their work with total liberty if the historical truth is to be established, may on occasion lead them to make critical assessments containing defamatory accusations against the actors – both living and dead – of the events they are studying, it can only be justified if the historian proves that he has complied with his scientific obligations. ...

As soon as they came into the hands of the investigating judge and even though only the specialists knew what they contained, *Barbie*'s written submissions received a degree of publicity that encouraged rumours to spread. There was, therefore, an argument for full publication, provided it was accompanied by an explanation of the historical background and a critical analysis that would enable the reader to form a considered opinion on the weight to be attached to the last statements of the former Nazi officer."

With that requirement in mind, the *tribunal de grande instance* found that the characteristic features of the applicant's book were the excessive importance given to Barbie's submissions, a manifest lack of adequate documentation on the circumstances of Raymond Aubrac's first arrest on 15 March 1943 and his release, a failure to rank the sources of information on the escape from Antiquaille Hospital in order of importance, insufficient qualification of his remarks on Caluire and the escape of 21 October, a lack of critical analysis of the German sources and documents as such and its neglect of the statements of those who took part in the events.

The *tribunal de grande instance* set out in detail and gave reasons for each of these assertions and concluded:

"... judges are required by the nature of their task not to abdicate when confronted with the scholar (or someone claiming to be such) and to decide the case in law, thereby contributing in their own way to the regulation of relations in society.

Thus, judges cannot, in the name of some higher imperative of historical truth, abandon their duty to protect the right to honour and reputation of those who were thrust into the torment of war and were the unwilling but courageous participants therein.

Immortalised by their contemporaries as illustrious myths, these men and women have not for all that become mere subjects of research, shorn of their personality, deprived of sensibility or divested of their own destinies in the interests of science.

Because he has forgotten this and has failed to comply with the essential rules of historical method, the accused's [the author of the book's] plea of good faith must fail."

20. The *tribunal de grande instance* therefore found the first two applicants guilty, as principal and accomplice respectively, of the offence under sections 29 (1) and 31 (1) of the Act of 29 July 1881 of public defamation of Mr and Mrs Aubrac in their capacity as members of a recognised Resistance movement.

It sentenced the first applicant, as the principal, to a fine of 100,000 French francs and the second, as an accomplice, to a fine of FRF 60,000. It also found them jointly and severally liable with the third

applicant to pay Mr and Mrs Aubrac damages of FRF 200,000 each. It dismissed an application for an order for the book's destruction, but made an order for publication of a statement in five daily newspapers and for each copy of the book to carry a warning in like terms. Lastly, it found the third applicant liable under the civil law.

21. The applicants appealed against that decision.

22. In a judgment of 10 February 1999, the Paris Court of Appeal dismissed objections of nullity that had been made by the applicants and, on the merits, examined the following questions in turn: whether the prosecution was lawful, legitimate and necessary, whether the remarks were defamatory, whether the defendants had acted in good faith and whether section 31 of the Act of 29 July 1881 was applicable.

23. As to whether the remarks were defamatory, the Court of Appeal adopted the reasoning of the court below and added that there were a number of factors which indicated that the author and publisher had decided to make the Aubracs alleged betrayal the subject of their publication; these included the editorial presentation, the general structure of the book, the wraparound banner that juxtaposed 'legend' and 'history', and the conclusion to the book which was on the same theme.

24. With regard to the question of defamation by innuendo, the Court of Appeal rejected the criticism of the *tribunal de grande instance*'s reasoning, stated:

> "Having thus decided how the book would be balanced: systematic doubt where the Aubracs are concerned and the use of Barbie's document as a reference – albeit one to be treated with caution – [the first applicant] proceeds, in circumstances that are accurately described in the judgment, systematically to refuse to accord any credit to Mr and Mrs Aubrac's account.
>
> To take the two episodes to which the defence refer: as regards the escape from Antiquaille, the author is not merely being irreverent but clearly makes accusations of inaccuracy, contradiction (page 268) and of misrepresenting the truth (page 80): there is no better way of insinuating that someone is lying."

25. The Court of Appeal then examined the applicants' plea that they had acted in good faith and rejected it.

It did not deny that there could be an interest in analysing major events in the history of the Resistance and found that although some of the expressions used in the book were unpleasant they did not suffice to establish the existence of personal animosity. However, it concluded that the first applicant had failed to act with the necessary rigour for the following reasons:

> "Anyone who alleges a specific fact must first seek to verify its accuracy. Although this requirement is general, it is especially justified when the accusation is particularly serious – such as of an act of treachery leading to the death of the main Resistance leader – and when, as a historian, its maker is accustomed to questioning sources."

The Court of Appeal then proceeded to identify the factors from which it had concluded that that requirement had not been complied with: the first applicant's failure to consult the file on the investigation that was conducted after the arrests in March 1943, even though it would have enabled him to establish the date of Raymond Aubrac's arrest and whether he was already in custody when his home was searched, his lack of interest in the testimony of direct witnesses from that period who were still alive when the book was written, and his failure to investigate certain documents. Noting repeated failures by the first applicant to exercise sufficient caution (he had published the Barbie document without subjecting it to genuine critical analysis, had directly accused the civil party of lying and had dismissed the Boulevard des hirondelles operation by members of the Resistance led by Lucie Aubrac as a sham), the Court of Appeal rejected his plea of good faith.

26. As regards the decision to apply section 31 of the Act of 29 July 1881, the Court of Appeal referred to section 28 of the Act of 5 January 1951 and to two judgments of the Court of Cassation and found that the civil parties had been defamed exclusively with regard to their activities as members of the Resistance "since the [the first applicant's] entire thesis conveyed to the reader the notion that they were guilty of treachery". It rejected an argument regarding the quality of the statute that had been applied in the case before it, noting that it was some forty years old and had been the subject matter of "settled and unambiguous case-law of the supreme court for some twenty years".

27. Finding that the sentences that had been handed down were just and proportionate, the Court of Appeal upheld all the provisions of the judgment of the court below.

28. The applicants appealed to the Court of Cassation, pleading *inter alia* Articles 7 and 10 of the Convention on the basis that the statutory provision that had been applied was neither clear nor precise and that its interpretation by the courts was inaccessible, unforeseeable and too wide. In their final two grounds of appeal they alleged that the Court of Appeal had failed to give reasons for its decision to hold the applicants civilly and criminally liable for public defamation.

29. In a judgment of 27 June 2000, the Court of Cassation dismissed the appeal, holding *inter alia* that the court below had properly justified their decision. It found that the Court of Appeal had applied the law correctly:

> "By virtue of a combination of section 28 of the Act of 5 January 1951 and sections 30 and 31 of the Act of 29 July 1881, firstly, these provisions afford protection against defamation to certain recognised Resistance movements which are likened to the regular Army and, secondly, this protection extends to members of these movements if the defamatory statement concerns their status or actions as members."

It examined the final two grounds of appeal together and dismissed them, holding:

"The Court of Cassation is satisfied from the wording of the judgment and its examination of the procedural documents that the Court of Appeal has, for reasons which are neither insufficient nor self-contradictory, firstly, correctly analysed the meaning and scope of the impugned statements and thus identified all the constitutive elements of fact and intent of the offence of which it found the accused guilty and, secondly, used its unfettered discretion to analyse the special circumstances and concluded that the accused's plea of historical criticism in good faith had to be rejected."

II. RELEVANT DOMESTIC LAW

30. The relevant provisions of the Freedom of the Press Act of 29 July 1881 (as worded at the material time) provide:

Section 29

"Any allegation or accusation of a factual nature that tarnishes the honour or reputation of the person or body against whom the accusation is made shall constitute defamation. It shall be an offence to publish such an allegation or accusation directly or by replication, even in a sceptical manner or in respect of a person or body that is not expressly named but is identifiable from the terms of the impugned speech, shouts, threats, manuscript or printed text, notices or posters.

Offensive expressions, scornful remarks or invectives that are devoid of any factual accusation shall constitute insults."

Section 30

"A person who by one of the means set out in section 23 makes a statement that is defamatory of a court of first instance or of appeal, the Army, Navy or Air Force, a constitutional body or a public authority shall be liable on conviction to between eight days' and one-year's imprisonment and a fine of between 300 and 300,000 francs, or to one only of these sentences."

Section 31

"A person who by like means makes a statement that is defamatory of the functions or status of one or more members of a ministry, one or more members of either House, a civil servant, a person holding public office, a public official, a minister of a religion in receipt of a stipend from the State, a citizen entrusted with a public mission or mandate, whether temporary or permanent, a juror or a witness shall be liable on conviction to a like sentence.

Statements that are defamatory of the private lives of such people come within section 32 below."

Section 32

"A person who by any of the means set out in sections 23 and 28 makes a statement that is defamatory of private individuals shall be liable on conviction to between five days' and six-months' imprisonment and a fine of between 150 and 80,000 francs, or to one only of these sentences... ."

Section 28 of Law no. 51-19 of 5 January 1951

"For the purposes of section 30 of the Act of 29 July 1881, recognised Resistance movements and networks shall be deemed to form part of the Army and Navy."

Extracts from the Court of Cassation's case-law

Judgment of 12 January 1956

"The originating summons referred only to section 32 of the Act of 29 July 1881, which makes it an offence to make statements that are defamatory of private individuals; the statements which the tribunals of fact found to be defamatory amounted, on the contrary, to offences under sections 30 and 31 of the Act, as the allegations were made against a Resistance group that was likened to the regular Army, or against its leader acting in that capacity and in respect of his functions."

Judgment of 13 November 1978

"When the defamatory accusation is made against the leader of a Resistance group that is likened to the regular Army acting in that capacity and with respect to his functions ..., a charge will lie only under section Article 31 ..."

Judgment of 4 October 1989 (*Pierre de Bénouville*)

"By virtue of a combination of sections 30 and 31 of the Freedom of Press Act and section 28 of the Act of 5 January 1951 the protection against defamation afforded to certain recognised Resistance movements which are likened to the Army and Navy extends to the members of these movements if the defamatory statement concerns their status or actions as members."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

31. The applicants complained of the lack of quality, foreseeability and accessibility of the statutory provisions that had resulted in the imposition of a penalty that was not "prescribed by law" and was disproportionate. They 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 an interference

32. The Government did not dispute that there was "interference by public authority" with the exercise of the applicant's freedom of expression.

33. The Court notes that such interference will infringe the Convention unless it satisfies the requirements of paragraph 2 of Article 10. It 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 "necessary in a democratic society" to achieve them.

B. Justification for the interference

1. Whether the interference was prescribed by law

(a) Submissions of the parties

34. The applicants submitted, firstly, that the combination of sections 30 and 31 of the Press Act of 29 July 1881 and the Act of 5 January 1951 could not satisfy the requirements as to the quality, foreseeability and accessibility of law imposed by Article 10 § 2 of the Convention.

35. They maintained that at the time the book was published, the French legislation did not make it possible to affirm that public defamation of a member of the Resistance fell within section 31 rather than section 32 of the Act of 29 July 1881.

Nevertheless, the court's sentencing powers and the remedies available to the victims depended on which section was applicable. The applicants considered that it was common ground that no French legislation existed in which a member of the Resistance had been likened to any of the persons referred to in section 31 and said that by applying that provision in the instant case the domestic courts had adopted a wide interpretation by analogy.

36. They went on to argue that the decisions in which that wide interpretation had been used were not sufficiently accessible or foreseeable:

the Court of Cassation's judgment of 12 January 1956 was indexed in the official law reports of the Court of Cassation's decisions (*bulletin officiel des arrêts de la Cour de cassation*) with keywords that made no reference to defamation of members of the Resistance or to the Act of 5 January 1951, nor was there any reference to that Act in the text of the judgment; the Court of Cassation's judgment of 13 November 1978 was published in the same set of reports under the reference "leader of a Resistance group", but there was no mention of the Act of 5 January 1951; the judgment of 4 October 1989 was not reported in the *Bulletin officiel des arrêts de la Cour de cassation*. The applicants further submitted that mere publication of an extract of the judicial decision in a review published by a trading company could not be regarded as satisfying the condition as to foreseeability and accessibility.

37. They added that, in terms of quantity, three decisions did not suffice to constitute foreseeable case-law.

38. The Government submitted that, under the Court's case-law, the law had to be sufficiently accessible and foreseeable, which meant that the public had to be able to have an indication that was adequate in the circumstances of the legal rules applicable to a given case and the law formulated with sufficient precision to enable the citizen to regulate his conduct. They referred in that connection to the cases of *Sunday Times v. the United Kingdom (no. 1)* (judgment of 26 April 1979, Series A no. 30, § 49) and *Goodwin v. the United Kingdom* (judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II, § 31).

39. They maintained that the Court of Cassation's construction of sections 30 and 31 of the Act of 29 July 1881 and section 28 of the Act of 5 January 1951 was long-standing and settled and said that, in their view, the applicants must have been aware when they were prosecuted that the Court of Cassation considered that section 31 of the 1881 Act applied to cases in which a member of a Resistance movement or network had been defamed. The Government submitted that the requirement regarding the clarity of the law had therefore been satisfied in the instant case.

40. They further argued that those two Acts and the decisions holding that section 31 of the Act of 29 July 1881 applied to members of Resistance networks, which had been published in various legal journals, satisfied the condition as to accessibility.

41. The Government submitted, lastly, that, through their profession, the applicants must have been aware of the provisions on defamation in the Press Act, a statute which regulated a substantial part of media law. Furthermore, since the book attacked former members of Resistance networks, the applicants could have acquainted themselves with the case-law that supplemented the Press Act. Each of the applicants had been assisted by a lawyer who would, in principle, have been familiar with that case-law.

42. The Government therefore considered that the law as applied in the present case complied with the conditions of clarity, accessibility and foreseeability required by Article 10 of the Convention.

(b) The Court's assessment

43. 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. Again, 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, *Sunday Times v. the United Kingdom* (no. 1) judgment of 26 April 1979, Series A no. 30, § 49; and *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, § 35).

44. The scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed (see *Cantoni v. France*, judgment of 15 November 1996, *Reports* 1996-V, p. 1627, § 35). A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among other authorities, *Tolstoy Miloslavsky v. the United Kingdom,* judgment of 13 July 1995, Series A no. 316-B, p 71, § 37; and *Grigoriades v. Greece*, judgment of 25 November 1997, *Reports* 1997-VII, p. 2587, § 37).

45. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see *Cantoni v. France* cited above, § 35).

46. With specific regard to the question of the accessibility and foreseeability of the law, the Court notes that the applicants in the instant case are respectively a journalist, a publisher and a publishing company.

47. The relevant law comprised two pieces of legislation (the Acts of 29 July 1881 and 5 January 1951) and three Court of Cassation decisions (of 12 January 1956, 13 November 1978 and 4 October 1989) which interpreted the legislation consistently and which those engaged in the press and publishing sectors must have been aware of.

48. The Court accordingly finds that, as professional book publishers, the publisher and the publishing house at least must have been familiar with the legislation and settled case-law that was applicable in this sphere and could have sought advice from specialist counsel. In view of the nature of the book, they could not have been unaware of the risks to which the author's challenging of previously undisputed historical facts exposed them. They were accordingly in a position to assess the risks and to alert the author to the risk of prosecution if the book was published as it stood.

Furthermore, the publisher and, through him, the author should have known that it was settled law that a failure to exercise caution and care when collecting historical evidence and drawing conclusions therefrom could be treated by the domestic courts as a constitutive element of the offence of defamation of persons whose honour or reputation risked being tarnished by publication.

49. In conclusion, the Court considers that the applicants' contention that they were unable to foresee "to a reasonable degree" the consequences which publication of the book was liable to have for them in the courts is untenable. It therefore finds that the interference in issue was "prescribed by law" within the meaning of the second paragraph of Article 10.

2. Legitimate aim

50. The applicants expressed no view on this point.

51. The Government argued that the domestic courts' decisions were intended to protect Mr and Mrs Aubrac from defamation in a case in which the damage to their reputation was considerable given the accusation of treachery that had been levelled against them. The decisions were thus aimed at "the protection of the reputation or rights of others" and the interference had pursued a legitimate aim for the purposes of paragraph 2 of Article 10 of the Convention.

52. The Court finds that the aim of the relevant decisions in the present case was indisputably to protect the reputation of Mr and Mrs Aubrac, whose activities as members of the Resistance have made them public figures since the Second World War.

53. Consequently, the interference complained pursued at least one of the "legitimate aims" set out in paragraph 2 of Article 10.

3. "Necessary in a democratic society"

A. Submissions of the parties

54. The applicants stressed that the book was a historical work and submitted that the general public's right to know its own history had to be take into account and entailed different approaches by the journalist and the historian.

55. They criticised the stance taken by the domestic courts which authorised judicial intervention in historical debate and the judicial scrutiny of any historical work, thereby prohibiting all historical conjecture, denying the right to debate the official version of history that was generally accepted in France and depriving the applicants of all freedom of expression on historical matters.

They submitted that the French courts had conclusively decide to regard Mr and Mrs Aubrac as valiant members of the Resistance and refused to permit any historian to examine their conduct in order to assess the role they had played in the events that had culminated in the meeting at Caluire on 21 June 1943. Consequently, the applicants argued that there had been no "pressing social need" that justified removing that episode from the scope of historians' freedom of opinion.

56. The applicants went on to explain that the author of the book had relied on authentic sources that had been cross-checked and that Klaus Barbie's submissions had been just one of a number of sources, all of which had been read critically. Their approach had been systematically to treat Klaus Barbie's accusations with caution. They added that they had also taken into account the statements of two members of the Resistance who had been direct witnesses of the matters which they had researched. They stressed, lastly, that the book was written in measured tones and contended that it was legitimate for a historian with doubts about an assertion to regard it as an "unverifiable" accusation if he had not been able to assemble all the documentation on the issue.

57. The applicants submitted that in those circumstances there had been a breach of their rights guaranteed by Article 10 of the Convention on account both of their convictions by the domestic courts and of the severity of the sentences.

58. The Government maintained that the domestic courts had correctly weighed up the various interests at stake by carrying out a detailed examination of the structure of the book and analysing each individual basis for the accusation made against Mr and Mrs Aubrac.

It had become apparent from that examination that the author had devoted the majority of the book to criticism of the Aubracs, his main accusation being their role in Jean Moulin's arrest at Caluire.

59. The point which the domestic courts criticised in their decisions was the central role which Klaus Barbie's submissions had been allowed to play as a basis for challenging Mr and Mrs Aubrac's version of events – despite the fact that he had been shown to be an unreliable source – without any precaution being taken with regard to presentation, any reference to the official documents or any questioning of those direct witnesses who were still alive when the book was written.

60. The Government submitted that by constructing his argument in that way, the first applicant had failed to comply with a fundamental ethical rule

of journalism that required the provision of "information that is accurate and creditworthy in compliance with the journalist's code of conduct".

61. The Government emphasised, lastly, that the penalties imposed on the applicants could not be regarded as particularly severe and that the book containing the author's ideas continued to be accessible to the public.

(b) The Court's assessment

62. The Court reiterates the fundamental principles established by its case-law on Article 10 (see, among many other authorities, the aforementioned *Sunday Times (no. 1)* judgment, § 65; and *Association Ekin v. France*, judgment of 17 July 2001, no. 39288/98, § 56, ECHR 2001-VIII).

63. 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 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.

64. 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 a 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.

65. When exercising its supervisory jurisdiction, the Court's task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they delivered in the exercise of their discretion. 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".

66. Article 10 does not in terms prohibit the imposition of prior restraints on movement or all bans on dissemination, but the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court.

67. The Court has on many occasions stressed the essential role the press plays in a democratic society. It has *inter alia* stated that although the press must not overstep certain bounds, in particular 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 the press have the task of imparting such information and ideas: the public also has a right to receive them (see, among many other authorities, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, ECHR 1999-III, §§ 59 and 62; and *Colombani and Others v. France*, no. 51279/99, § 65, ECHR 2002-V, § 55). 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, among other authorities, the *Bladet Tromsø and Stensaas* judgment cited above, § 59).

68. These principles apply to the publication of books or other written materials such as periodicals that have been or are due to be published (see, in particular, *C.S.Y. v. Turkey*, no. 27214/95, 4 March 2003, § 42), if they concern issues of general interest.

69. The Court considers that it is an integral part of freedom of expression to seek historical truth and it is not the Court's role to arbitrate the underlying historical issue, which is part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation. As such, and regardless of the doubts one might have as to the probative value or otherwise of the document known as the "Barbie submissions" or "testament", the issue does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision is removed from the protection of Article 10 by Article 17 (see *Lehideux and Isorni v. France*, judgment of 23 September 1998, *Reports* 1998-VII, § 51; and *Garaudy v. France*, decision of 24 June 2003; as regards Jean Moulin's arrest at Caluire, see paragraph 10 above). However, the Court must balance the public interest in being informed of the circumstances in which Jean Moulin, the main leader of the internal Resistance in France, was arrested by the Nazis on 21 June 1943, and the need to protect the reputation of Mr and Mrs Aubrac, who were themselves important members of the Resistance. More than half a century after the events there was a risk that there their honour and reputation would be seriously tarnished by a book that raised the possibility, albeit by way of innuendo, that they had betrayed Jean Moulin and had thereby been responsible for his arrest, suffering and death.

70. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicants and the context in which they made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the

reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, 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 based their decisions on an acceptable assessment of the relevant facts (see, among many other authorities, *Zana* v. *Turkey*, judgment of 25 November 1997, *Reports* 1997-VII, pp. 2547-2548, § 51).

In addition, in the exercise of its European supervisory duties, the Court must 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, freedom of expression protected by Article 10 and, on the other, the right of the persons attacked by the book to protect their reputation, a right which is protected by Article 8 of the Convention as part of the right to respect for private life.

71. In the present case, in order to come to a guilty verdict, the Paris *tribunal de grande instance* performed a three-part examination.

It began by looking at the alleged defamatory accusations in the chronological order of the underlying events and comparing the text of the Klaus Barbie's signed submissions with the text of the first applicant's book, noting that the very purpose of the book was to:

> compare the allegations of these 'written submissions' with the account of events given by Mr and Mrs Aubrac on various occasions and the other oral and documentary evidence relating to that period. ..."

72. The *tribunal de grande instance* thus examined the circumstances of Raymond Aubrac's initial arrest in March 1943 and of his release in May 1943, the escape from Antiquaille Hospital, the Caluire episode, events post-Caluire and the escape from Boulevard des hirondelles (see paragraph 17 above):

> "Thus ..., without formally corroborating the direct accusations made in 'Barbie's written submissions', the [first applicant] sets about sowing confusion by combining a series of facts, witness statements and documents of different type and varying degrees of importance which together serve to discredit the accounts given by the civil parties; he also questions the motives for their deception and lies...
>
> As for the author's comments, they constitute defamation by innuendo in that they encourage the reader to believe that very grave questions exist over Mr and Mrs Aubrac's conduct in 1943 that outweigh the certainties that have been hitherto accepted; they thus lend credence to Barbie's accusations."

73. After considering which statutory provisions were applicable, the *tribunal de grande instance* turned to the issue the applicants' good faith, which is of central importance in defamation cases.

With regard to that issue, the *tribunal de grande instance* found that the characteristic features of the applicant's book were the excessive importance given to Barbie's submissions, a manifest lack of adequate documentation on the circumstances of Raymond Aubrac's first arrest on 15 March 1943

and his release, a failure to rank the sources of information on the escape from Antiquaille Hospital in order of importance, insufficient qualification of his remarks on Caluire and the escape of 21 October, a lack of critical analysis of the German sources and documents as such and its neglect of the statements of those who took part in the events.

It explained and gave reasons for each of these assertions and concluded that the author's plea of good faith had to be rejected (see paragraph 19 above).

74. The Paris Court of Appeal adopted the Paris *tribunal de grande instance*'s reasoning as regards the defamatory nature of the statements. It added with regard to the question of defamation by innuendo (see paragraph 24 above):

> "Having thus decided how the book would be balanced: systematic doubt where the Aubracs are concerned and the use of Barbie's document as a reference – albeit one to be treated with caution – [the first applicant] proceeds, in circumstances that are accurately described in the judgment, systematically to refuse to accord any credit to Mr and Mrs Aubrac's account."

75. It rejected the plea of good faith on the grounds that the first applicant had repeatedly failed to exercise sufficient caution.

76. The Court observes that the domestic courts carried out a detailed and very thorough examination of the book and, in particular, the manner in which the facts and arguments were presented before concluding that the applicants were guilty of public defamation of Mr and Mrs Aubrac, in their capacity as members of a recognised Resistance movement.

77. It considers that the convictions in the instant case were based on relevant and sufficient reasons. In that connection, it finds convincing the evidence and reasoning which persuaded the civil courts, both at first instance and on appeal, to find that the author had failed to respect the fundamental rules of historical method in the book and had made particularly grave insinuations. It refers in particular to the meticulous analysis of the book by both the Paris *tribunal de grande instance* in its judgment of 2 April 1998 and the Court of Appeal in its judgment of 10 February 1999. It therefore sees no reason to disagree with the domestic courts' analysis of the case or to find that they construed the principle of freedom of expression too restrictively or the aim of protecting the reputation and the rights of others too extensively.

78. As to the sentences which were imposed, the Court reiterates that, in assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account (see, for example, *Sürek v. Turkey* (no. 1), judgment of 8 July 1999, § 64).

It notes, firstly, that no order was made for the book's destruction or prohibiting its publication (see, *mutatis mutandis* and by converse implication, *Société Plon v. France*, judgment of 18 May 2004, § 53).

Further, the Court notes that, contrary to what has been suggested by the applicants (see paragraph 57 above), the levels of the fines and orders for damages (see paragraphs 20 and 27 above) appear to have been relatively modest (see by converse implication *Tolstoy Miloslavsky v. the United Kingdom*, cited above) and the sums the applicants were thus required to pay justified in the circumstances of the case. Nor, lastly, does the requirement to publish a statement in five periodicals and to include a warning in like terms in each copy of the book appear unreasonable or unduly restrictive of freedom of expression.

79. In addition, the Court reiterates that just as, by providing authors with a medium for publication, publishers participate in the exercise of the freedom of expression, as a corollary thereto they are vicariously subject to the "duties and responsibilities" which authors take on when they disseminate their opinions to the public (see, *mutatis mutandis*, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 63, ECHR 1999-IV).

Thus, the fact that the third applicant was found jointly and severally liable in tort with the first two applicants and ordered to pay damages to the civil parties is not in itself incompatible with the requirements of Article 10 of the Convention.

80. In conclusion, the Court finds that the interference with the applicants' freedom of expression in the instant case was not disproportionate to the legitimate claim pursued. Consequently, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 10 of the Convention.

Done in French, and notified in writing on 29 June 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY	A.B. BAKA,
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Ms Thomassen is annexed to this judgment.

A.B.B.
T.L.E.

CONCURRING OPINION OF JUDGE THOMASSEN

Along with the other members of the Chamber, I voted in favour of finding that there has been no violation of Article 10 of the Convention in the present case.

However, I do not agree with every aspect of the Chamber's reasoning, in particular the significant importance it attaches to the fact that "the author ... failed to respect the fundamental rules of historical method in the book" (see paragraph 77 of the judgment).

Over and beyond the fact that the Chamber does not explain which rules of historical method were applicable, in my view such rules cannot in any event be the decisive factor in determining the scope of freedom of expression. Just like anyone else, historians are entitled to freedom of expression. For this reason I also disagree with the applicants' submission (see paragraph 54 of the judgment) that it should be acknowledged that there are "different approaches by the journalist and the historian".

In my opinion, the most decisive factor in determining the scope of freedom of expression is the importance of other interests, which may justify restrictions on any publication. While it is true that the book that was published an the instant case was on a subject of general interest, the Chamber gave precedence to protection of the reputation, which is part of the concept of private life that is protected by Article 8 of the Convention (see paragraph 70 of the judgment). I agree with that conclusion because the book is little more than pure conjecture and constitutes a direct assault on the integrity and identity of Mr and Mrs Aubrac that robs them of their dignity. It is necessary to reaffirm respect for human dignity as one of the most important Convention values and one which historical works must also foster.