



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

FIRST SECTION

DECISION

Application no. 3877/14
Payam TAMIZ
against the United Kingdom

The European Court of Human Rights (First Section), sitting on 19 September 2017 as a Chamber composed of:

Linos-Alexandre Sicilianos, *President*,

Aleš Pejchal,

Krzysztof Wojtyczek,

Ksenija Turković,

Pauliine Koskelo,

Tim Eicke,

Jovan Ilievski, *judges*,

and Abel Campos, *Section Registrar*,

Having regard to the above application lodged on 31 December 2013,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the comments submitted by Article 19, Google Inc. and Media Legal Defence Initiative,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Payam Tamiz, is a British national, who was born in 1989 and lives in Maidstone. He was represented before the Court by Withers LLP, a firm of solicitors based in London.

2. The United Kingdom Government (“the Government”) were represented by their Agent, Mr P. McKell of the Foreign and Commonwealth Office.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. *The background facts*

(a) **Blogger.com**

4. Google Inc. is a corporation registered in the United States and with its principal place of business there. It provides an Internet blog-publishing service via Blogger.com, a platform that allows any Internet user in any part of the world to create an independent blog free of charge. It includes design tools to help users create layouts for their blogs and, if they do not have their own web address, enables them to host their blogs on Blogger.com web addresses.

5. Blogger.com operates a “Content Policy” which sets out restrictions on what users can do using the service. This makes clear that content such as child pornography, or promoting race hatred, is prohibited. The policy is explained in the following terms:

“Blogger is a free service for communication, self-expression and freedom of speech. We believe that Blogger increases the availability of information, encourages healthy debate and makes possible new connections between people.

We respect our users’ ownership of and responsibility for the content they choose to share. It is our belief that censoring this content is contrary to a service that bases itself on freedom of expression.

In order to uphold these values, we need to curb abuses that threaten our ability to provide this service and the freedom of expression it encourages. As a result, there are some boundaries on the type of content that can be hosted with Blogger. The boundaries we have defined are those that both comply with legal requirements and that serve to enhance the service as a whole.”

6. In addition, Google Inc. operates a “Report Abuse” feature. There are eight grounds for reporting abuse, including “Defamation/Libel/Slander”. If the user selects ‘Defamation/Libel/Slander’, a second screen is displayed which makes it clear that the Blogger.com service is operated in accordance with US law, and that defamatory material will only be taken down if it has been found to be libellous (i.e. unlawful) by a court. According to Google Inc., the reason for this policy is that, given the volume of content uploaded by users of the Blogger.com service, it is usually not practicable for it to remove content without first receiving a court’s determination that the content is, in fact, libellous. Google Inc. is not in a position to adjudicate such disputes itself.

(b) The post on the “London Muslim” blog

7. On 27 April 2011 a piece appeared on the “London Muslim” blog, a blog hosted on the Blogger.com website. It contained a photograph of the applicant and the following text:

“Payam Tamiz a Tory Muslim council candidate with a 5 o’clock shadow has resigned from the party after calling Thanet girls ‘sluts’.

Tamiz who on his Twitter page describes himself as an ‘ambitious British Muslim’ is bizarrely studying law so one would have thought this Tory prat with Star Trek Spock ears might have engaged the odd brain cell before making these offensive remarks.”

8. A number of anonymous comments were subsequently posted in response to the publication. Eight of the approximately forty-six comments are set out, as originally posted, in the following paragraphs.

9. Comment A:

“I know Mr Tamiz very well and am surprised that it has taken this long for all this to come out, Payam is a known drug dealer in thanet and has been taken to court for theft from his employers tescos in Ramsgate. His whole family are criminals his mother Mrs [L.] has several convictions for theft and shoplifting and got sentenced at maidstone crown court

28 April 2011 14:53”

10. Comment B:

“Can’t deny what he said is true but isn’t this the same Payam Tamiz that use to take girls back to his ‘houseparties’ practically every weekend with his friends and sleep with them? Hypocritical much?

30 April 2011 12:28”

11. Comment C:

“The blokes a class A prat not only for the comments he recently made. He may have a few half wits as a following but I speak for the people that have known payam for several years and have been on the reciving end of his abuse a disrespect and his not such a nice person. I’m sure we’ll be hearing alot more from his past which will paint a true picture of him.

28 April 2011 23:04”

12. Comment D:

“So Mr Whacker is a violent racist, certainly doesn’t like white people does he?!

If you’d ever been to Margate you would find the majority are white women, even those from the Eastern bloc. To tar all Margate women with the word slut is very derogatory, how does he know? Does he make a habit of chasing women around? Or as someone implies above, does he sell drugs to them?

28 April 23:51”

13. Comment E:

“I’ve only read that Payams claiming to be 21, I’m sure he told me that his older than that. Fake asylum claim was it. The good old home office and all us wankers that pay tax for waste of spaces like him.

29 April 2011 01:09”

14. Comment F:

“Before Payam starts to call women sluts it might be an idea for him to look closer to home, how many brothers and sisters has he got, all with different fathers. I thought Muslim men were the one who were meant to have more than one wife, not the women with more than one husband. Is there not a 30 year gap between the ages of his younger to older brother and sister. Look closer to home pal.

29 April 2011 09:40”

15. Comment G:

“The only reason his callig girls slags is cos he aint getting none himself. And he blames a relationship breakup for his comments, but the only problem with that being is that Payams never had a girlfriend since I known him and thats been a couple of years, that makes him single at the time.

Poor little Payam, has you giving it the large one to your friends blown up in your face and back fired.

It couldn’t have happened to a better person, his a little snake and he knows it. I’d put my money on him still being a virgin, not being funny but you only got to look at his picture to work that out.

29 April 2011 21:26”

16. Comment H:

“And his brothers girl friend is an escort girl, [L.], look closer to home pal.

29 April 2011 18:43”

(c) The applicant’s response to the blog post

17. According to the applicant, on 28 or 29 April 2011 he used the “report abuse” function to indicate that he considered certain comments on the blog to be defamatory.

18. On 29 June 2011 he sent a letter of claim to Google UK Ltd (a United Kingdom subsidiary of Google Inc.), which was received on 5 July. In his letter he complained about the blog itself and about comment A. The letter was passed by Google UK Ltd to Google Inc., which responded by email on 8 July 2011 seeking clarification of whether the comment was said to be untrue, since that was not apparent from the terms of the letter. The applicant responded on the same day confirming that comment A was “false and defamatory” and introducing a complaint about comment B.

19. On 19 July 2011 the “Blogger Team” at Google Inc. sent the applicant an email seeking permission to forward his complaint to the

author of the blog page and confirming that they would not themselves remove the impugned comments. The applicant gave the necessary permission on 22 July 2011 and complained that comments C, D, E, F and G were also defamatory.

20. On 11 August 2011 Google Inc. forwarded the letter of claim to the blogger.

21. On 14 August 2011 the post and all the comments were removed by the blogger. The applicant was informed the following day.

2. The domestic proceedings

(a) The High Court

22. Meanwhile, the applicant sought to bring a claim in libel against Google Inc. in relation to comments A to G. On 10 August 2011 he sent a letter of claim, together with the relevant particulars of claim, to the court and on 22 September 2011 permission was granted to serve the claim form on Google Inc. in the United States. The applicant subsequently incorporated a complaint about comment H into the particulars of claim and served them on Google Inc.

23. Google Inc. sought to have the permission to serve the claim out of jurisdiction set aside and asked the High Court to declare that it had no jurisdiction to try the claim. It argued that:

- i. the claim form did not allege that the comments had been accessed by a substantial number of readers in the jurisdiction. There was therefore no “real and substantial” tort (see paragraphs 50-53 below);
- ii. Google Inc. was not a publisher for the purposes of the English law of defamation, but merely a neutral service provider which did not create and had no control over the content users posted on their blogs; and
- iii. even if Google Inc. were to be regarded as a publisher, it would be protected from liability by Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 (“the 2002 Regulations” – see paragraph 49 below).

24. On 2 March 2012 the High Court held that it should decline jurisdiction and that the order for service out of the jurisdiction should be set aside.

25. The judge first considered whether there was any evidence of a “real and substantial tort” within the jurisdiction. He considered each of the comments individually and while he characterised comments C, E, F, G and H as “mere vulgar abuse” to which no sensible person would attach much, if any, weight, he accepted that comments A, B and D were arguably defamatory.

26. On the question of whether Google Inc. was the “publisher”, the judge noted that the applicant did not allege that it could be liable for the comments complained of before he notified it of their potential unlawfulness. Consequently, the judge only considered it necessary to assess potential legal liability from the point of notification.

27. The judge considered it relevant, although not determinative as a matter of law, that Google Inc. promulgated and attempted to follow a well-known policy of not removing offending material on the basis that it was not in a position to investigate or come to a decision upon any legal challenge. This was partly a question of principle and partly a matter of sheer practicality: on the one hand, Google Inc. regarded itself as providing a platform for the free exchange of information and ideas and would not wish to be seen as a censor; on the other hand, the blogs on Blogger.com contained more than half a trillion words and 250,000 new words were added every minute. It would therefore be virtually impossible for the corporation to exercise editorial control over content.

28. The judge further noted that one should guard against imposing legal liability in restraint of Article 10 of the Convention where it was not necessary or proportionate to do so. In this regard, he considered the possibility of an action against the authors of the comments and possibly the author of the blog. While he accepted that this approach “may be regarded as more theoretical than real due to problems of anonymity”, it was an argument that could not simply be ignored. However, the important question was not whether the applicant could identify the authors or bloggers in question, but rather whether he was in a position to establish against Google Inc. the necessary attributes of a publisher.

29. The judge concluded:

“38. Google Inc. accepts the responsibility of notifying (albeit not always with great promptitude) the blogger(s) in question. It does not, however, accept that it should investigate every complaint received, whether by way of establishing the facts or obtaining advice on the relevant domestic law or laws that may be applicable. The fact that an entity in Google Inc.’s position may have been notified of a complaint does not immediately convert its status or role into that of a publisher. It is not easy to see that its role, if confined to that of a provider or facilitator beforehand, should be automatically expanded thereafter into that of a person who authorises or acquiesces in publication. It claims to remain as neutral in that process after notification as it was before. It takes no position on the appropriateness of publication one way or the other. It may be true that it has the technical capability of taking down (or, in a real sense, censoring) communications which have been launched by bloggers or commentators on its platform. Yet that is not by any means the same as saying that it has become an author or authoriser of publication. It is no doubt often true that the owner of a wall which has been festooned, overnight, with defamatory graffiti could acquire scaffolding and have it all deleted with whitewash. That is not necessarily to say, however, that the unfortunate owner must, unless and until this has been accomplished, be classified as a publisher.

39. It seems to me to be a significant factor in the evidence before me that Google Inc. is not required to take any positive step, technically, in the process of continuing the accessibility of the offending material, whether it has been notified of a complainant's objection or not. In those circumstances, I would be prepared to hold that it should not be regarded as a publisher, or even as one who authorises publication, under the established principles of the common law. As I understand the evidence its role, as a platform provider, is a purely passive one ... I would rule that Google Inc. is not liable at common law as a publisher. It would accordingly have no need to rely upon a defence (statutory or otherwise)."

30. Finally, the judge said that if, contrary to that view, Google Inc. was to be regarded as a "publisher", section 1 of the Defamation Act 1996 ("the 1996 Act" – see paragraphs 45-48 below) provided it with a defence, notably because it took reasonable care in passing the complaint on to the blogger once it had been notified. In reaching this conclusion, he accepted that the period between notification and the removal of the offending post was so short as to give rise to potential liability on the part of Google Inc. only for a very limited period with the consequence that its potential liability, if any, would be so trivial as not to justify the maintenance of the proceedings. Alternatively, regulation 19 of the 2002 Regulations would provide Google Inc. with a defence if it were otherwise needed.

(b) The Court of Appeal

31. The applicant sought leave to appeal to the Court of Appeal. He argued that the High Court was wrong to conclude that Google Inc. was not a "publisher" at common law; that Google Inc. had an unanswerable defence under section 1 of the 1996 Act; and that Google Inc. had an unanswerable defence under regulation 19 of the 2002 Regulations. Although his arguments primarily focused on domestic law, at the end of his written grounds he argued that in interpreting regulation 19 of the 2002 Regulations, the right to freedom of expression in Article 10 of the Convention was not to be prioritised, that reputation was among the rights protected by Article 8, and that Article 8 and 10 rights were to be accorded equal weight.

32. Leave to appeal was granted and on 14 February 2013 the Court of Appeal dismissed the appeal.

33. With regard to the date of notification, the applicant had submitted that between 29 April 2011 and the letter of claim he had made various telephone calls to Google UK Ltd and sent two letters to that company's office. However, the Court of Appeal noted that the transcript of the High Court hearing made it "tolerably clear" that he had been content to proceed on the basis that the date of notification of the complaint to Google Inc. fell between 5 July 2011 (when Google UK Ltd received his letter) and 8 July 2011 (when Google Inc. first contacted him by email). The court refused to admit fresh evidence in the form of the letters allegedly sent to Google UK

Ltd since these documents could have been submitted for use at the hearing below.

34. The court further accepted the High Court's findings as to the nature of the comments and agreed with its conclusion that comments A, B and D were arguably defamatory.

35. On the question of whether Google Inc. was a publisher, the court noted that the applicant's pleaded case related to the period after Google Inc. had been notified of the complaint. It considered the High Court judge to have been wrong to regard Google Inc.'s role during this period as a purely passive one and to attach the significance he did to the absence of any positive steps by Google Inc. in relation to continued publication of the comments in issue. It explained:

"24. By the Blogger service Google Inc. provides a platform for blogs, together with design tools and, if required, a URL; it also provides a related service to enable the display of remunerative advertisements on a blog. It makes the Blogger service available on terms of its own choice and it can readily remove or block access to any blog that does not comply with those terms ... As a matter of corporate policy and no doubt also for reasons of practicality, it does not seek to exercise prior control over the content of blogs or comments posted on them, but it defines the limits of permitted content and it has the power and capability to remove or block access to offending material to which its attention is drawn.

25. By the provision of that service Google Inc. plainly facilitates publication of the blogs (including the comments posted on them). Its involvement is not such, however, as to make it a primary publisher of the blogs. It does not create the blogs or have any prior knowledge of, or effective control over, their content. It is not in a position comparable to that of the author or editor of a defamatory article. Nor is it in a position comparable to that of the corporate proprietor of a newspaper in which a defamatory article is printed. Such a corporation may be liable as a primary publisher by reason of the involvement of its employees or agents in the publication. But there is no relationship of employment or agency between Google Inc. and the bloggers or those posting comments on the blogs: such people are plainly independent of Google Inc. and do not act in any sense on its behalf or in its name ..."

36. The court was also very doubtful that Google Inc.'s role was that of a secondary publisher, facilitating publication in a manner analogous to a distributor. It concluded that, in any event, such an argument could get nowhere in relation to the period prior to notification of the complaint in light of a long-established line of authority that a person involved only in dissemination was not to be treated as a publisher unless he knew or ought by the exercise of reasonable care to have known that the publication was likely to be defamatory. Since it could not be said that Google Inc. knew or ought reasonably to have known of the defamatory comments prior to notification by the applicant, Google Inc. could not be viewed as a secondary publisher prior to such notification. The court further found that even if it could be so regarded, it would have an unassailable defence during that period under section 1 of the 1996 Act.

37. As to Google Inc.'s position after notification, the Court of Appeal took a different view from the High Court. It considered that if Google Inc. allowed defamatory material to remain on a blog after it had been notified of the presence of that material, it might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of that material on the blog and thereby to have become a publisher of the material. However, such an inference could not properly be drawn until Google Inc. had had a reasonable time to remove the defamatory comments. The court considered it open to argument that the time taken to remove the comments after notification – over five weeks as regards comments A and B – was sufficiently long to give rise to such an inference. The claim could therefore not be dismissed on the ground that Google Inc. was clearly not the publisher.

38. It was accordingly necessary to consider the defence under section 1 of the 1996 Act. Here, while the Court of Appeal accepted that the conditions in subsections 1(a) to (c) were plainly satisfied in relation to the period prior to notification of the complaint, it was not persuaded that in the period after notification Google Inc. did not know, and had no reason to believe, that what it did caused the publication of a defamatory statement. The court was therefore not satisfied that, if Google Inc. were considered to be a publisher, it would have an unassailable defence under section 1 of the 1996 Act.

39. Nevertheless, the Court of Appeal found that the High Court was plainly right to conclude that the claim should not be allowed to proceed because both the damage and any eventual vindication would be minimal and the costs of the exercise would be out of all proportion to what would be achieved (in other words, that there had been no “real and substantial tort”). It explained:

“50. ... The allegedly defamatory comments were posted between 28 and 30 April, soon after the initial blog of 27 April. By the very nature of a blog, they will have been followed by numerous other comments in the chain and, whilst still accessible, will have receded into history. As I have indicated, the earliest point at which Google Inc. could have become liable in respect of the comments would be some time after notification of the complaint in respect of them. But it is highly improbable that any significant number of readers will have accessed the comments after that time and prior to removal of the entire blog. It follows ... that any damage to the appellant's reputation arising out of continued publication of the comments during that period will have been trivial; and in those circumstances the [High Court] judge was right to consider that ‘the game would not be worth the candle’. I do not accept [the] submission that various other features of the claim, including the fact that the appellant's name is relatively uncommon and distinctive in this jurisdiction, undermined the judge's conclusion.”

40. It followed that the appeal failed and, in the circumstances, it was unnecessary to consider whether Google Inc. would have had a defence under regulation 19 of the 2002 Regulations.

(c) The Supreme Court

41. The applicant sought permission to appeal to the Supreme Court. He argued that the judgment of the Court of Appeal did not strike the correct balance between Articles 6, 8 and 10 of the Convention and unlawfully denied him access to a court and deprived him of the means to vindicate his Article 8 rights.

42. On 1 July 2013 the Supreme Court refused permission to appeal on the basis that the applicant did not raise an arguable point of law.

B. Relevant domestic law

1. Defamation

43. In order to become legally responsible for the publication of a defamatory statement, and therefore potentially liable in the tort of defamation, English law requires, as a minimum, knowing involvement in the process of publication of the relevant words: *Bunt v. Tilley* [2007] 1 WLR 1243. Accordingly, a person whose role is confined to the process of disseminating allegedly objectionable content is not to be treated as a “publisher”, in the sense required to give rise to potential liability in defamation, unless he knew or ought by the exercise of reasonable care to have known that the publication was likely to be defamatory.

44. In the context of defamation claims brought against information society service providers (“ISSPs”), the English courts have distinguished between ISSPs whose role is automatic and/or amounts to no more than acting as a passive medium for communication of third-party content transmitted between Internet users; and ISSPs which operate services and platforms on which third-party defamatory content is stored, in a manner which is more than merely transient or temporary, and thereby made accessible to other Internet users. ISSPs whose services fall within the latter category may potentially become liable for third-party content under the principles of defamation by omission or acquiescence; for example, if they fail to take down defamatory content after being alerted to its existence, if they have power to remove the content and it can be inferred from the circumstances of the case that their failure to do so constituted consent to or authorisation of continued publication.

2. Relevant defences

(a) The Defamation Act 1996

45. The Defamation Act 1996 amended the law of defamation. Section 1 is headed “responsibility for publication” and provides, in subsection (1), that a person has a defence in defamation proceedings if he shows that:

- “(a) he was not the author, editor or publisher of the statement complained of,
- (b) he took reasonable care in relation to its publication, and
- (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.”

46. Pursuant to section 1(2), “author”, “editor” and “publisher” have the following meanings:

“‘author’ means the originator of the statement, but does not include a person who did not intend that his statement be published at all;

‘editor’ means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and

‘publisher’ means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.”

47. Section 1(3)(e) provides that a person shall not be considered the author, editor or publisher of a statement if he is only involved as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

48. Pursuant to section 1(5), in determining whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard must be had to:

- “(a) the extent of his responsibility for the content of the statement or the decision to publish it,
- (b) the nature or circumstances of the publication, and
- (c) the previous conduct or character of the author, editor or publisher.”

(b) The Electronic Commerce (EC Directive) Regulations 2002

49. Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002, which implemented the provisions of Article 14 of Directive 2000/31/EC of the European Parliament and of the Council dated 8 June 2000 relating to electronic commerce (see paragraph 55 below), provides:

“Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where–

- (a) the service provider–
 - (i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.”

3. *The requirement of “a real and substantial tort”*

50. Under English law, a claimant normally requires the national courts’ permission to serve proceedings on a defendant who is domiciled outside the jurisdiction. A claimant may apply to the court for permission without giving notice to the prospective defendant. However, if permission is granted, the foreign defendant may apply to have the order set aside.

51. In *Dow Jones & Co Inc v. Yousef Abdul Latif Jameel* [2005] EWCA Civ 75 the Court of Appeal held that an application to set aside permission to serve defamation proceedings out of the jurisdiction could be granted on the basis that the publications complained of did not, individually or collectively, amount to “a real and substantial tort”. Although jurisdiction was no longer in issue in that case, the court further noted that it would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where little was seen to be at stake.

52. In reaching this conclusion, the court observed:

“There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more pro-active. The second is the coming into effect of the Human Rights Act. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, insofar as it is possible to do so. Keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant’s reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.”

53. In *Mohammed Hussein Al Amoudi v. Jean Charles Brisard And Jcb Consulting International Sarl* [2006] EWHC 1062 (QB) the High Court found no basis for concluding that a claimant in a libel action on an Internet publication was entitled to rely on a presumption of law that there had been substantial publication. Rather, the claimant had to prove publication from the Internet either to identifiable third parties or by asking the court to draw an inference based upon facts admitted or proved.

C. Relevant international law and practice

54. On 28 May 2003, at the 840th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe adopted a Declaration on freedom of communication on the Internet. According to Principle 6,

“In cases where the functions of service providers are wider and they store content emanating from other parties, member states may hold them co-responsible if they do not act expeditiously to remove or disable access to information or services as soon as they become aware, as defined by national law, of their illegal nature or, in the event of a claim for damages, of facts or circumstances revealing the illegality of the activity or information.”

55. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) provides, insofar as relevant:

“Article 14 – Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Article 15 – No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.”

56. A Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, adopted on 21 December 2005, stated the following:

“No one should be liable for content on the Internet of which they are not the author, unless they have either adopted that content as their own or refused to obey a court order to remove that content.”

COMPLAINTS

57. In the applicant’s submission the respondent State was in breach of its positive obligation under Article 8 of the Convention to protect his right to reputation, since defamatory allegations had been published for a period of three and a half months on a website hosted by Google Inc. but the domestic courts had refused to grant him a remedy for the resulting damage.

58. He further asserted that by applying the test of “no real or substantial tort”, the domestic courts had denied him access to a remedy for the serious interference with his Article 8 rights caused by the publication of the comments.

THE LAW

A. Alleged violation of Article 8 of the Convention

59. The applicant complained that in refusing him permission to serve a claim form on Google Inc., the respondent State was in breach of its positive obligation under Article 8 of the Convention to protect his right to reputation. Article 8 of the Convention provides as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

1. The parties’ submissions

(a) The Government

60. The Government submitted that the applicant’s Article 8 complaint should be rejected as manifestly ill-founded.

61. First of all, the Government argued that the extent to which the applicant's Article 8 rights had been engaged required careful scrutiny. In his application to the Court, he purported to rely on all the comments posted underneath the blog. However, the High Court judge concluded that comments C, E, F, G and H were examples of "mere vulgar abuse" of the sort which regularly appears on the Internet and to which no sensible person would attach much, if any, weight. Although the applicant challenged the judge's ruling in respect of comments C, E and G before the Court of Appeal, the same challenge was not renewed in his application to the Supreme Court. Moreover, while the Government accepted that comments A and D were potentially capable of reaching the high threshold identified by the Court before a reputational attack could fall within the scope of Article 8 (that is, they were of such a seriously offensive nature that their publication had a direct effect on the applicant's private life – see *Karako v. Hungary*, no. 39311/05, 28 July 2009 and *A v. Norway*, no. 28070/06, § 64, 9 April 2009), they considered it "questionable" whether the matters alleged by comment B reached that threshold.

62. With regard to the question of whether a fair balance had been struck, the Government argued that the decision of the national courts to prevent the applicant maintaining a claim against Google Inc. was manifestly proportionate, since allowing the claim to proceed in circumstances where he could only hope to recover trivial damages would have represented a disproportionate and unnecessary interference with the Article 10 rights of Google Inc. and its users.

63. In this regard, the Government noted that where the balancing exercise between Articles 8 and 10 has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, it would require "strong reasons" to substitute its own views for that of the national courts. In the present case, the laws applied by the national courts – notably, the "real and substantial tort" test – were designed to maintain an effective balance between the rights of those whose reputation had been defamed on online platforms and those of ISSPs and their users; that is, to carefully weigh the competing rights of the applicant under Article 8 of the Convention against the Article 10 rights of Google Inc. and its users.

64. Furthermore, the balance struck by the domestic courts in distinguishing between Google Inc.'s potential liability before and after notification was in accordance with the approach to ISSP liability found in EU law and was entirely consistent with the judgment of the Grand Chamber in *Delfi AS v. Estonia* [GC], no. 64569/09, §§ 115-116, ECHR 2015. Against this backdrop, the decisions of the national courts were clearly based on "relevant and sufficient reasons".

65. Finally, with regard to the elements identified in *Delfi*, cited above, § 142, as relevant to the assessment of proportionality, the Government submitted that: it would not have been impractical or impossible for the

applicant to have pursued a remedy against the authors of the comments and, in any event, the practical difficulties in doing so did not compel the domestic courts to upset the delicate balance drawn by domestic and EU law by imposing liability on Google Inc. from the outset; in the circumstances of this case, Google Inc. had operated a “notice-and-take-down” process, taking reasonable care in respect of continued publication once notice had been received; and imposing liability on Google Inc. prior to notification would have constituted a manifestly disproportionate interference with the Article 10 rights of both it and its users and could have had deleterious consequences for the important role played by the Internet in facilitating the free and frank exchange of information, opinion and ideas.

(b) The applicant

66. The applicant, on the other hand, contended that the publication of comments A to H constituted a public attack on his person which constituted an interference with his Article 8 right to respect for his private life. Although the judge at first instance found that comments C, E, F, G and H were not “defamatory”, this was not determinative of the question of whether their publication interfered with his right to reputation.

67. The applicant confirmed that his complaint was focused on the national courts’ finding that no “real and substantial tort” had been committed. He did not, therefore, contend that they should have held Google Inc. liable in respect of the entire period of publication, or that there should be unlimited liability on ISSPs. However, he argued that the finding of no “real and substantial tort” was not “necessary in a democratic society” within the meaning of Article 8 § 2 of the Convention. Although he accepted that the national courts enjoyed a very wide margin of appreciation where they had balanced Articles 8 and 10 in accordance with the criteria established by the Court, he submitted that in the present case the courts had not conducted such a balancing exercise since at no point had there been any hearing on the merits. As the courts were only concerned with whether the “threshold criteria” had been met, they did not investigate any factual issues and Google Inc. was not required to produce evidence concerning the extent to which the comments complained of had been viewed by third parties.

68. In these circumstances, he argued that the national courts’ conclusion that no “real and substantial tort” had been committed required particularly careful scrutiny. However, he considered “unsustainable” the conclusion that his Article 8 rights did not require vindication, even allowing for their finding that Google Inc. was only potentially liable for publication following notification. Furthermore, he contended that the national courts had failed to give relevant and sufficient reasons for concluding that his reputation had not suffered substantial damage. First of all, no reasons were given for limiting the period of Google Inc.’s potential

liability to five weeks, when the applicant's pleaded case was that he had used the "report abuse" feature on 28 or 29 April 2011. Secondly, the domestic courts found it "highly improbable" that any significant number of readers would have accessed the comments after they were made, but no reasons were given for this view and there was no evidence on the point, even though Google Inc. would have known what the figures were.

69. With regard to the *Delfi* criteria, the applicant submitted that the relevant comments had been statements of fact which were plainly defamatory, seriously damaging to his reputation, and did not contribute to a debate of public interest; that a *Norwich Pharmacal* application was often a difficult and protracted procedure and, in any event, the question of whether he could have brought proceedings against the authors of the comments was irrelevant since placing responsibility on Google Inc. as an intermediary would not be a disproportionate interference with its Article 10 rights; although Google Inc. had operated a "notice-and-take-down" process, it was inadequate in his case since four months elapsed between his "reporting abuse" and the content being removed; the comments had a severe and adverse impact on his reputation, which he had no means of vindicating; and finally, finding a violation would not have a "chilling effect" since safeguards existed to protect companies such as Google Inc. where they could not reasonably be said to have known of the content or where they acted expeditiously to remove it once they knew of its existence.

(c) The third party interveners

(i) Google Inc.

70. According to Google Inc., its Blogger.com platform enabled the authors of blogs and comments to exercise their right to freedom of expression while facilitating the rights of others to receive information on a wide range of political, social and cultural topics. Therefore, the Article 10 rights of both Google Inc. and the millions of individuals using the Blogger.com platform every day were engaged by the present application.

71. Google Inc. contended that a requirement to filter comments prior to publication would impose a disproportionate and unfeasible burden on ISSPs. Furthermore, holding ISSPs liable from the moment the first letter of complaint was received, without allowing a reasonable period of time to investigate the merits of a complaint, to contact the author of the blog or comment, and take the necessary technical and practical steps to facilitate removal, would also result in a disproportionate interference with the ISSP's Article 10 rights. In order to strike a fair balance between the interests of the aggrieved person and the provider of the blogging platform, an ISSP must be afforded a reasonable period of time to investigate and evaluate a request to remove a comment and, where appropriate, to implement removal. To find otherwise would effectively compel ISSPs to remove comments

immediately following a complaint, without first considering its merits, and this would likely stifle legitimate speech and suppress the publication of information on important matters of public interest.

(ii) *Media Legal Defence Initiative (“MLDI”)*

72. MLDI submitted that intermediaries hosting third-party content provide the “digital space” for individuals to exercise their right to freedom of expression, and the promotion and preservation of this “digital space” was the principal rationale for restricting their liability. However, due to the prominence of many intermediaries and the anonymity of many persons exercising their right to freedom of expression on the Internet, intermediaries are easy targets for persons aggrieved about information published online and, consequently, are highly vulnerable to attempts to stifle freedom of expression. Appropriate safeguards and strict limitations on intermediary liability are therefore essential if intermediaries are to keep “digital spaces” open. Such safeguards ranged from conditional to absolute immunity for intermediaries; requirements that courts and not intermediaries arbitrate on the lawfulness of material posted by end users; a requirement for actual knowledge of illegality based on appropriate notice; no obligation to monitor; and the existence of jurisdictional thresholds – preventing courts from hearing either frivolous defamation cases or claims by persons without sufficient connection to their jurisdiction – to prevent libel tourism.

73. MLDI further emphasised the importance of considering the Article 10 rights of not only the intermediaries but also the end users of their services. Without protection being afforded to intermediaries, there is a risk that they may be forced to act as censors – and thus threaten their end users’ right to freedom of expression – to pre-empt the risk of liability. This risk would be heightened if intermediaries were required to arbitrate on the lawfulness of content, as they would likely err on the side of caution and over-censor content that might in fact represent a lawful exercise of their users’ Article 10 rights. In view of these considerations, MLDI submitted that intermediaries should only be held liable for information they host where they have failed to comply with an order of the court or other competent body compelling the taking down or blocking of information. This would ensure that the Article 10 rights of an end user would only be restricted where there was an appropriate legal basis for doing so.

74. In the alternative, MLDI submitted that, as a minimum, intermediaries should be required to have actual knowledge before liability could arise from a failure to take down or block impugned content. However, it was important to recall that in *L’Oreal v. eBay*, Case C-234/09 the Court of Justice of the European Union emphasised that notification of allegedly illegal content did not automatically connote actual knowledge, since notification could be insufficiently precise or inadequately substantiated.

(iii) *Article 19*

75. Article 19 invited the Court to have regard to the fact that, in today's interconnected digital world, millions of Internet users post comments online on a daily basis and many express themselves in ways that might be regarded as defamatory. However, the majority of comments made by private individuals, particularly comments in response to blogs or posts on social media, are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage to another person's reputation.

76. In light of this, Article 19 considered it particularly important that national legislatures and courts require claimants to show "significant" or "serious" harm to their reputation in order for a claim in defamation to proceed or succeed. Such threshold tests may be applied to decisions regarding the appropriate jurisdiction for bringing a claim, or to applications to strike out a claim as an abuse of process. In the opinion of Article 19, if reasonably interpreted and applied, these tests will result in outcomes which strike an appropriate balance between the protection of reputation under Article 8 and freedom of expression under Article 10. Such a view was entirely consistent with the jurisprudence of the Court, which has repeatedly held that the reputational element of Article 8 will only be engaged where an attack on a person's reputation attains a minimum level of seriousness.

2. *The Court's assessment*

77. The Court has accepted that the right to respect for private life under Article 8 of the Convention encompasses a person's right to the protection of his or her reputation (see, for example, *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012; *Delfi*, cited above, § 137, ECHR 2015; and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, § 57, 2 February 2016). As the right to respect for private life requires not only that the State refrain from interfering with private life but also entails certain positive obligations (see, for example, *Mosley v. the United Kingdom*, no. 48009/08, § 106, 10 May 2011), it follows that Article 8 encompasses a positive obligation on the Contracting States to ensure the effective protection of the right to respect for reputation to those within their jurisdiction (see *Pihl v. Sweden* (dec.), no. 74742/14, § 28, 7 February 2017).

78. However, the notion of "respect" in Article 8 is not clear-cut, and can normally be secured by a number of possible methods (see *Mosley*, cited above, § 107 and *Karakó v. Hungary*, no. 39311/05, § 19, 28 April 2009). Consequently, the choice of measures designed to secure compliance with the Contracting States' positive obligation in the sphere of the relations between individuals in principle falls within their margin of appreciation

(see, *inter alia*, *Mosley*, cited above, § 107, and *Odièvre v. France* [GC], no. 42326/98, § 46, ECHR 2003-III).

79. The Court has identified a number of factors to be taken into account when determining the breadth of the margin of appreciation to be accorded to the State in such cases: the nature of the activities involved – including the gravity of the interference with private life; the existence or absence of a consensus across the Contracting States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it; and, in cases where the measures which an applicant claims are required pursuant to positive obligations under Article 8 would have an impact on freedom of expression, the fair balance that has to be struck between the competing rights and interests arising under Article 8 and Article 10 (*Mosley*, cited above, §§ 108-111). Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case-law, the Court will require strong reasons to substitute its view for that of the national courts (see, for example, *Delfi*, cited above, § 139, ECHR 2015, *Axel Springer*, cited above, § 88, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012).

80. Turning to the facts of the case at hand, in considering the gravity of the interference with the applicant’s Article 8 rights, the Court recalls that an attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to the personal enjoyment of the right to respect for private life (see *Delfi*, cited above, § 137 and *Axel Springer*, cited above, § 83). This threshold test is important: as Article 19 noted in their intervention, the reality is that millions of Internet users post comments online every day and many of these users express themselves in ways that might be regarded as offensive or even defamatory. However, the majority of comments are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage to another person’s reputation (see paragraph 75 above).

81. In deciding whether that threshold has been met in the present case, the Court is inclined to agree with the national courts that while the majority of comments about which the applicant complains were undoubtedly offensive, for the large part they were little more than “vulgar abuse” of a kind – albeit belonging to a low register of style – which is common in communication on many Internet portals (see *Magyar Tartalomszolgáltatók Egyesülete*, cited above, § 77) and which the applicant, as a budding politician, would be expected to tolerate (see, among many examples, *Gaunt v. the United Kingdom* (dec.), no. 26448/12, § 45, 6 September 2016, and *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 121, ECHR 2015 (extracts)). Furthermore, many of those comments (such as comments B, D, and E) which made more specific – and potentially

injurious – allegations would, in the context in which they were written, likely be understood by readers as conjecture which should not be taken seriously.

82. Moreover, the Court notes that this is not a case in which no measures were in place to enable the applicant to protect his Article 8 rights. On the contrary, following publication of the impugned comments on the “London Muslim” blog, he had at least three options available to him to protect any perceived damage to his reputation. First of all, he could have brought libel proceedings against the authors of the comments. While this option would not have been without its difficulties, as the authors were unlikely to be readily identifiable, there was the possibility of making a *Norwich Pharmacal* application to seek disclosure of their identities from Google Inc. Secondly, he could have pursued a claim against the author of the “London Muslim” blog. Thirdly, there was the option the applicant elected to pursue; namely, an action against Google Inc. as the owner of Blogger.com. Although the applicant was ultimately prevented from serving proceedings on Google Inc., this was not because such an action was inherently objectionable to the national courts. Rather, having assessed the evidence before them, they concluded that the applicant’s claim did not meet the “real and substantial tort” threshold required to serve defamation proceedings outside the jurisdiction.

83. This conclusion was based, to a significant extent, on the courts’ finding that Google Inc. could only, on the most generous assessment, be found responsible in law for the content of the comments once a reasonable period had elapsed after it was notified of their potentially defamatory nature.

84. The approach of the national courts is entirely in keeping with the position in international law. Indeed, the Council of Europe, the European Union, the United Nations and the Organisation for Security and Co-operation in Europe have all indicated that ISSPs should not be held responsible for content emanating from third parties unless they failed to act expeditiously in removing or disabling access to it once they became aware of its illegality (see paragraphs 54-56 above). Indeed, the EU Directive on Electronic Commerce expressly provides that Member States shall neither impose a general obligation on ISSPs which are storing information provided by a recipient of their services to monitor the information which they store, nor a general obligation actively to seek facts or circumstances indicating illegal activity (see paragraph 55 above).

85. Moreover, although the applicant relied heavily on *Delfi* (cited above), the Court finds nothing in the judgment of the Grand Chamber that would cast doubt on that position. In *Delfi* the Grand Chamber was concerned with a large, professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them; it expressly stated that it did not concern other

Internet fora, such as a social media platform where the platform provider does not offer any content and where the content provider may be a private person running a website or blog as a hobby (*Delfi*, cited above, §§ 115-116).

86. It is true that the national courts did not expressly balance the applicant's right to respect for his reputation against the right to freedom of expression of both Google Inc. and its end users. However, the applicant's arguments before those courts primarily concerned issues of domestic law, with Article 8 only being referenced in cursory terms towards the end of his grounds of appeal to the Court of Appeal (see paragraph 31 above). The relevant Convention complaints were raised more fully in his grounds of appeal to the Supreme Court; however, as permission to appeal to the Supreme Court is only granted in a small percentage of cases which raise an arguable point of law of general public importance, this is generally not considered to be an appropriate forum for introducing new grounds.

87. In any case, it is clear from *Dow Jones & Co Inc v. Yousef Abdul Latif Jameel* that the primary purpose of the "real and substantial tort" test was to ensure that a fair balance was struck between Articles 8 and 10; in other words, in applying this test the national courts were, in fact, ensuring that there would be no interference with Google Inc.'s right to freedom of expression in a case where the interference with the applicant's reputation was "trivial". Furthermore, while the domestic proceedings in the present case preceded delivery of the Grand Chamber judgment in *Delfi*, in substance the national courts addressed the specific aspects of freedom of expression identified therein as relevant for the concrete assessment of the interference in question (see by analogy *Delfi*, cited above, §§ 142-143): namely, the nature of the comments and the context in which they were made (see paragraphs 25 and 34 above), the action taken by Google Inc. following notification (see paragraphs 27, 35 and 37 above), the potential liability of the actual authors of the comments (see paragraph 28 above), and the consequences of the domestic proceedings for both the applicant's reputation and for Google Inc.'s role as the provider of a platform for the free exchange of information and ideas (see paragraphs 27 and 35 above).

88. The applicant makes two specific complaints about the findings of the national courts. First, he suggests that they did not give relevant and sufficient reasons for finding that Google Inc. was only notified of his complaints in early July 2011, when he used the "report abuse" feature on 28 or 29 April 2011, and subsequently sent letters to Google UK Ltd. However, he appears to have accepted in the proceedings before the High Court that Google Inc. was only notified of his concerns about the content of the comments sometime between 5 July 2011 and 8 July 2011 (more than two months after they were first published), and he cannot now seek to reopen the issue (see paragraph 33 above). Secondly, he complains that the national courts did not give relevant and sufficient reasons for finding it

“highly improbable” that a significant number of readers would have accessed the impugned comments some two months after they were first published. Nevertheless, it is clear from the judgment in *Mohammed Hussein Al Amoudi v. Jean Charles Brisard And Jcb Consulting International Sarl* that it is for the claimant in an Internet libel action to prove that there had been “substantial publication” (see paragraph 53 above). The applicant does not appear to challenge the burden of proof under domestic law, and as he did not produce any evidence of “substantial publication”, either in the domestic proceedings or before this Court, the national courts’ findings on this issue cannot now be impugned.

89. The Court is therefore satisfied that the appropriate balancing exercise was conducted by the national courts, and that the reasons given for their decision were both “relevant and sufficient”.

90. In light of the above considerations, and having particular regard to the important role that ISSPs such as Google Inc. perform in facilitating access to information and debate on a wide range of political, social and cultural topics, the Court considers that the respondent State’s margin of appreciation in the present case was necessarily a wide one. Furthermore, having discerned no “strong reasons” which would justify substituting its own view for those of the national courts (see, for example, *Delfi*, cited above, § 139, ECHR 2015, *Axel Springer*, cited above, § 88, and *Von Hannover v. Germany (no. 2)*, cited above, § 107), it finds that they acted within this wide margin of appreciation and achieved a fair balance between the applicant’s right to respect for his private life under Article 8 of the Convention and the right to freedom of expression guaranteed by Article 10 of the Convention and enjoyed by both Google Inc. and its end users.

91. Accordingly, the applicant’s Article 8 complaint must be rejected as manifestly ill-founded pursuant to Article 35 (3) (a) of the Convention.

B. Alleged violation of Article 13 read together Article 8 of the Convention

92. The applicant further asserted that by applying the test of “no substantial tort”, the domestic courts had denied him access to a remedy for the serious interference with his Article 8 rights caused by the publication of the comments.

93. Article 13 of the Convention provides as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

94. In view of its conclusion at paragraph 91 above, the Court finds that the applicant’s Article 8 complaint did not give rise to any arguable claim of

a breach of a Convention right. Accordingly, Article 13 of the Convention does not apply (*Boyle and Rice v. the United Kingdom*, 27 April 1988, Series A no. 131). This complaint must therefore be rejected as incompatible *ratione materiae* with the provisions of the Convention in accordance with Article 35 § 4.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 12 October 2017.

Abel Campos
Registrar

Linos-Alexandre Sicilianos
President