IN THE EUROPEAN COURT OF HUMAN RIGHTS **App No. 11265/17**

GLEB VYACHESLAVOVICH PAYKACHEV
- v -
THE RUSSIAN FEDERATION

WRITTEN COMMENTS OF THE MEDIA LEGAL DEFENCE INITIATIVE

Introduction

1. This case is about the fundamental concept of "open justice".[1] It concerns the exclusion of the media from hearings held in defamation proceedings in Russia. The media perform an essential role in keeping the public informed about matters of public interest, including court proceedings. As a general rule (subject to well established exceptions) all hearings should take place in open court to which the public and the media have access. There are two dimensions to "open justice". The first is that the public are entitled to attend court proceedings to see what is going on. The second is the right of the media to report on court proceedings. In reality, very few members of the public attend court hearings. This means that public scrutiny of court proceedings is primarily performed by the media acting on behalf of the public. The role of the media is also essential in holding the judicial system to account and securing public confidence in the system.

2. The Media Legal Defence Initiative (the "Intervener") wishes to make the following three submissions to the Court in connection with the principle of "open justice":

   1) Member States must provide the media with physical access to judicial proceedings under Article 10 and Article 6 of the Convention;

   2) A public hearing is an essential feature of defamation law and, save in exceptional circumstances, hearings in defamation cases must be open to the media; and

   3) Denying the media access to defamation proceedings will amount to a disproportionate restriction on Article 10 of the Convention in circumstances where less restrictive measures could have adequately protected "legitimate aims" under Article 10(2) of the Convention.

I. Media Access to Judicial Proceedings

3. Judicial proceedings are necessarily matters of general public interest, and media access to both criminal and civil proceedings is essential in a modern society. This Court, in *Sunday Times v. the United Kingdom*, observed that the administration of justice "serves the interests of the

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[1] The Media Legal Defence Initiative submits these written comments pursuant to leave granted by the President of the Third Section under Rule 44(3) of the Rules of the Court. As set out in the letter dated 26 January 2018 from the Section Registrar, Mr. J. S. Phillips.

community at large and requires the co-operation of an enlightened public."[2] The Court went on to note that;

> *"[t]here is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest."*[3]

4. The public function that is discharged by the media's access to judicial proceedings is two-fold. Firstly, the media's access facilitates the exercise of their and the public's rights and duties under Article 10 of the Convention and, secondly, the media's ability to report judicial proceedings helps uphold the rule of law by exposing those proceedings to public scrutiny, thereby contributing to ensuring fair trial rights are upheld.

5. The "public watchdog" role the press plays in a democratic society ensures the public are informed, educated and aware of events of public interest or that should be open to public scrutiny.[4] As has been observed by this Court, not only does the press have a right to freedom of expression, it also has a "duty to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest."[5] This includes a duty to impart information and ideas related to judicial proceedings.

6. Judicial proceedings can be the subject of, or give rise to or invigorate, debates of considerable public interest. For instance, criminal and civil trials can lead to discussion on the workings of the judicial system. These discussions can educate the public on their own legal rights and obligations. Furthermore, a surprising conviction or a remarkable acquittal from a court may spur debate on law reform or the effectiveness of the judiciary. Accordingly, the openness of judicial proceedings facilitates public engagement and discussion on issues of public interest.

7. In practice, it is primarily through the media that the public can be informed about judicial proceedings. The common law jurisprudence on the principle of "open justice" has recognised that media reporting of legal proceedings is "an extension of the concept of "open justice," and is inseperable from it."[6] For example, in *McCarton Turkington Breen (a firm) v. Times Newspapers Ltd*, the House of Lords of the United Kingdom (the "House of Lords") noted that "[i]n a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of their society [...] It is very largely through the media [...] that they will be so alerted and informed."[7] In *Edmonton Journal v. Alberta (Attorney General)*, the Supreme Court of Canada observed that;

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2 European Court of Human Rights (the "ECtHR"), *The Sunday Times v. the United Kingdom (No. 1)*, Application No. 6538/74 (26 April 1979), par. 65. See also ECtHR, *Worm v. Austria*, Application No. 22714/93 (29 Augst 1997), par. 50; ECtHR, *Craxi v. Italy (No. 2)*, Application No. 25337/94 (17 July 2003), par. 63.

3 *Id.*

4 ECHR, *Bladet Tromso and Stensaas v. Norway*, Application No. 21980/93 (20 May 1999), par. 59.

5 ECHR, *Jersild v. Denmark*, Application No. 15890/89 (23 September 1994), par. 31.

6 UK Supreme Court, *Khuja v. Times Newspapers Limited and others*, [2017] UKSC 49, par. 16.

7 House of Lords (UK), *McCarton Turkington Breen (a firm) v. Times Newspapers Ltd*, [2001] 2 AC 277.

> *"[i]t is exceedingly difficult for many, if not most, people to attend a court trial […] Those who cannot attend rely in large measure upon the press to inform them about court proceedings - the nature of the evidence that was called, the arguments presented, the comments made by the trial judge […] It is only through the press that most individuals can really learn of what is transpiring in the courts. They as listeners or readers have a right to receive this information. Only then can they make an assessment of the institution."*[8]

8. The presence of the media in court also allows them to carry out their vital role in society with less risk that they will present inaccurate or misleading information on judicial proceedings. This Court has consistently stated that;

> *"[b]y reason of the 'duties and responsibilities' inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism."*[9]

9. A denial of access to judicial proceedings amounts to a significant impediment to a journalist being able to meet their "duties and responsibilities" under Article 10 of the Convention. This was observed by the House of Lords in *Attorney General v. Leveller*, where it was stated that "[a]s respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the ["open justice"] principle requires that nothing should be done to discourage this."[10]

10. Therefore, the denial of the media's access to judicial proceedings would inevitably dilute the media's right to provide information on those proceedings. The Supreme Court of the United States, in *Richmond Newspapers v. Virginia*, has gone so far as to state that;

> *"[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could […] be foreclosed arbitrarily […] [W]ithout the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'"*[11]

11. The freedom of the press to report on judicial proceedings, as guaranteed by Article 10 of the Convention, is also pivotal to the promotion and protection of the right to a fair trial under Article 6 of the Convention.[12] Article 6(1) of the Convention places an obligation on States, as an aspect of the right to a fair trial, to provide a "public hearing" in civil and criminal judicial proceedings. This Court has consistently clarified that;

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8 Supreme Court of Canada, *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326, per. Cory J. The US Supreme Court has also observed that "instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media." Supreme Court of the United States, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), p. 572 and 573.

9 ECtHR, *Bladet Tromsø and Stensaas v. Norway*, Application No. 21980/93 (20 May 1999), par. 65. See also, for example, ECtHR, *Flux v. Moldova*, Application No. 28702/03 (20 November 2007), par. 30; ECtHR, *Savitchi v. Moldova*, Application No. 11039/02 (11 October 2005), par. 46.

10 House of Lords, *Attorney General v. Leveller Magazine*, [1979] AC 440, p. 450.

11 Supreme Court of the United States, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), p. 576 to 580.

12 ECtHR, *Sutter v. Switzerland*, Application No. 8209/78 (22 February 1984), par. 26.

> *"[t]he public character of proceedings before the judicial bodies referred to in Article 6(1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6(1) namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention."*[13]

12. This Court has further noted that the media plays a crucial role in ensuring that the right to a "public hearing" can be met. For instance, in *Worm v. Austria*, the Court found that "reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement under Article 6(1) of the Convention that hearings be public."[14] Therefore, the media's ability to communicate information and ideas about judicial proceedings will promote the fair trial rights of the parties to those proceedings by subjecting the judiciary to public scrutiny,[15] and maintaining public confidence in the courts.

13. The ways in which the media's ability to report on judicial proceedings may promote the parties' fair trial rights has been extensively discussed in jurisprudence on the "open justice" principle in common law.[16]

14. Firstly, the openness of a trial, including the media's ability to attend and report on such a trial, has been consistently recognised as a safeguard against impropriety on the part of the courts. Placing a trial under public scrutiny gives a certain assurance that the proceedings will be conducted fairly to all concerned, and discourages decisions based on secret bias or partiality.[17] In the seminal case of *Scott v. Scott*, the House of Lords observed that "[w]here there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."[18]

15. Secondly, the openness of a trial can act as a safeguard against impropriety on the part of witnesses, by discouraging perjury and other misconduct.[19] The courts in England and Wales have explicitly noted the advantages in taking evidence in public, including that "witnesses are

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13 ECtHR, *Axen v. Germany*, Application No. 8273/78 (8 December 1983), par. 25.

14 ECtHR, *Worm v. Austria*, Application No. 22714/93 (29 August 1997), par. 50; ECtHR, *Craxi v. Italy (No. 2)*, Application No. 25337/94 (17 July 2003), par. 64.

15 The Committee of Ministers of the Council of Europe has stressed "the importance of media reporting in informing the public on criminal proceedings, making the deterrent function of criminal law visible as well as in ensuring public scrutiny of the functioning of the criminal justice system." See, Committee of Ministers of the Council of Europe, *Recommendation Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings*, adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers' Deputies.

16 The term can be found in common law jurisdictions such as the United Kingdom, South Africa, Canada, and Australia. In fact the courts of England and Wales, which have been instrumental in developing the principle of "open justice" under common law, has recognised that the approach adopted under this principle is much the same as that under Article 6 of the Convention. See, Court of Appeal of England and Wales, *Global Torch Ltd v. Apex Global Management Ltd*, [2013] EWHC 223 (Ch), par. 56.

17 Supreme Court of the United States, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), p. 569, quoting W. Blackstone, *Commentaries*, p. 372 to 373. See also, Supreme Court of Canada, *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, p. 883.

18 House of Lords (UK), *Scott v. Scott*, [1913] AC 417, p. 477, quoting J. Bentham, *Rationale of Judicial Evidence* (1827), p. 524.

19 Supreme Court of the United States, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), p. 569, quoting W. Blackstone, *Commentaries*, p. 372 to 373. See also, Supreme Court of Canada, *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, p. 883.

less likely to exaggerate or attempt to pass on responsibility" when they are subject to public scrutiny.[20] Taking witness testimony in public can also encourage other witnesses to come forward and other evidence becoming available, which ultimately benefits the proper administration of justice.[21]

16. Thirdly, a trial that is open to the public and the media helps maintain public confidence in the judiciary.[22] In *Scott v. Scott*, the House of Lords observed that "in [a] public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."[23] For example, an assessment of whether a court is acting with bias depends, in part, on the perception that they are acting impartially. If a trial is held out of the sight of the public and the media, it is not possible for the public to make an assessment of whether the court is acting with or without bias.

17. The above consideration has given rise to the fundamental rule of common law that "justice should not only be done, but should manifestly and undoubtedly be seen be to be done."[24] Trials that are held otherwise than in public can give rise to the public surmising that a "cover up" is taking place,[25] or that the court is otherwise not acting in the public's best interests. As was noted by the Court of Appeal of New Zealand in *Broadcasting Corporation of New Zealand v. Attorney General*;

> *"[j]udges speak and act on behalf of the community. They necessarily exercise great power in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to the facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that always will be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process may be regarded as fulfilling its purposes."*[26]

18. The Intervener notes that the right to a "public hearing" is not absolute under Article 6(1) of the Convention. According to Article 6(1) of the Convention, the public and the media may be excluded from all or part of a trial (i) in the interests of morals, public order or national security

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20 Divisional Court (UK), *R (Wagstaff) v. Secretary of State for Health*, [2001] 1 WLR 292, p. 319.

21 *Id.* See also, Court of Appeal of England and Wales, *R v. Legal Aid Board, Ex p Kaim Todner*, [1999] QB 966, par. 4.

22 See also ECtHR, *Diennet v. France*, Application No. 18160/91 (26 September 1995), par. 33; ECtHR, *Martinie v. France*, Application No. 58675/00 (12 April 2006), par. 39; ECtHR, *Gautrin and Others v. France*, Application Nos. 21257/93, 21258/93, 21259/93, 21260/93 (20 May 1998), par. 42; ECtHR, *Hurter v. Switzerland*, Application No. 53146/99 (15 December 2005), par. 26; ECtHR, *Lorenzetti v. Italy*, Application No. 32075/09 (10 April 2012), par. 30.

23 House of Lords (UK), *Scott v. Scott*, [1913] AC 417, p. 463.

24 High Court (England and Wales), *R v. Sussex Justices; Ex parte Macarthy*, [1924] 1 KB 256, p. 259.

25 High Court (England and Wales), *R (E) v. Chairman of the Inquiry into the Death of Azelle Rodney*, [2012] EWHC 563 (Admin), par. 26.

26 Court of Appeal of New Zealand, *Broadcasting Corporation of New Zealand v. Attorney General*, [1982] 1 NZ LR 120, p. 122. The Supreme Court of the United States in *Richmond Newspapers v. Virginia* noted that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case." Supreme Court of the United States, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), p. 572.

in a democratic society, (ii) where the interests of juveniles or the protection of the private life of the parties so require, or (iii) in special circumstances where publicity would prejudice the interests of justice. However, given the important role performed by the media in reporting on judicial proceedings, the Intervener submits that these exceptions to the general rule of openness under Article 6(1) of the Convention should be subject to careful scrutiny, and their applicability should be convincingly established, before they can be relied on to exclude the media from hearings. Furthermore, exclusion should be compatible with the case law applying the general principles under Article 10(1) of the Convention protecting the right to freedom of expression.[27]

II. Hearings in Defamation Cases Must Be Open to the Media

19. The principles outlined above apply to defamation proceedings. This Court itself recognised that the right to a "public hearing" applies to cases where a tribunal determines whether attacks upon an individual's good reputation is justified.[28] However, the Intervener notes that aspects of defamation proceedings justify even greater protection of the media's right to access and report on such proceedings.

20. Firstly, defamation proceedings are aimed at protecting against a harm that necessarily occurs in public. The legal act of defaming someone usually requires the publication, dissemination or making available of a defamatory statement. In other words, the statement must be made public. Indeed, this Court recently considered, *inter alia*, the "extent" to which allegedly defamatory comments had been published when assessing whether the attack on reputation attained the level of seriousness and prejudice necessary to engage the rights under Article 8 of the Convention.[29] The need for the defamatory statement to be made public flows from the fact that a finding of liability in defamation protects a personal interest of a public nature. It is aimed at protecting how an individual is perceived or thought of by others. There is, therefore, no reason why the relevant proceedings should not also be conducted in public. As one Canadian judge observed;

> *"[d]efamation is a claim that one's reputation has been lowered in the eyes of the public. To initiate an action for defamation, one must present oneself and the alleged defamatory statements before a jury and in open court. To be able to proceed with a defamation claim under a cloak of secrecy, strikes me as being contrary to the quintessential features of defamation law."*[30]

21. Secondly, if a court were to find that defamation has occurred, holding defamation proceedings in public can assist in vindicating the claimant's right to reputation. For instance, this can be achieved through "a judgment delivered in public which will refute unfounded allegations."[31] As

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27 For example, if the exclusion of the media is alleged to be for the purpose of protecting the private life of parties, the courts should conform with the criteria set out by this Court for balancing the right to respect for private life against the right to freedom of expression in ECtHR, *Axel Springer AG v. Germany*, Application No. 39954/08 (7 February 2012), par. 88 to 109.

28 ECtHR, *Isop v. Austria*, Application No. 808/60 (8 March 1962), par. 108. See also, ECtHR, *Madaus v. Germany*, Application No. 44164/14 (9 June 2016), concurring opinion of Judge Yudkivska.

29 ECtHR, *Tamiz v. the United Kingdom*, Application No. 3877/14 (19 September 2017), par. 80

30 Nova Scotia Court of Appeal, *AB v. Bragg Communications*, [2011] NSCA 26, par. 80. This judgment was partly overturned by the Supreme Court of Canada in *AB v. Bragg Communications*, [2012] 2 SCR 567. However, this observation from the Nova Scotia Court of Appeal was not directly addressed in the decision of the Supreme Court.

31 Court of Appeal of England and Wales, *R v. Legal Aid Board, Ex p Kaim Todner*, [1999] QB 966, par. 8.

was observed by one English judge, "[i]f the libel has been widely published, the claimant will want a judgment that is equally widely published, to demonstrate that he has cleared his name."[32] In the absence of a public judgment, defamation law in England and Wales has also acknowledged the power of open court proceedings in cases where parties have settled their dispute prior to judgment. In such cases, a party is entitled to apply to the court to make a "statement in open court," which will offer vindication to the party by allowing them to set out their position with the benefit of heightened press publicity and absolute privilege.[33] The need for public vindication in defamation cases can also be seen in other remedies, such as retraction[34] or a public apology.[35] In light of the above, the public nature of defamation proceedings can help provide public vindication for those found to be victims of defamation.

22. Thirdly, if a court were to find that an individual has not been defamed, it would be incoherent of the law to prevent the media from accessing the court to report on such proceedings. If the media were so prevented, the law would have effectively restricted the media from reporting on statements protected by the right to freedom of expression and the judicial proceedings concerning such statements.

III. Denying the Media Access to Defamation Proceedings Amounts to a Violation of Article 10 of the Convention

(i) Denying the media access to defamation proceedings will amount to an interference with Article 10 of the Convention

23. As mentioned above, the press plays a pre-eminent role as "public watchdog" in a democratic society. The press performs its "public watchdog" role by investigating, observing and reporting on matters of public interest. In its case law, the Court has protected specific forms of preparatory newsgathering activity, including communications with confidential sources,[36] interviews with third parties,[37] and access to certain kinds of information.[38] Moreover, the Court has recognised that "the gathering of information [...] is an essential preparatory step in journalism and is an inherent, protected part of press freedom."[39]

24. The media's ability to attend and report from court hearings is one way in which they gather information on stories of public interest. Moreover, it allows them to carry out their journalistic

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32 High Court (England and Wales), *ZAM v. CFW*, [2013] EWHC 662 (QB), par. 31.

33 High Court (England and Wales), *Sir Cliff Richard OBE v. the BBC and Chief Constable of South Yorkshire Police*, [2017] EWHC 1648 (Ch).

34 See, for example, ECtHR, *Verlagsgruppe Droemer Knaur GmbH & Co. KG v. Germany*, Application No. 35030/13 (19 October 2017), par. 59.

35 See, for example, *Gąsior v. Poland*, Application No. 34472/07 (21 February 2012).

36 ECtHR, *Goodwin v. The United Kingdom*, Application No. 17488/90 (27 March 1996), par. 39: "Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest."

37 ECtHR, *Jersild v. Denmark*, Application No. 15890/89 (23 September 1994), par. 35: the Court observed that the preparatory step of conducting interviews is "one of the most important means whereby the press is able to play its vital role of 'public watchdog'."

38 ECtHR, *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05 (14 April 2009); ECHR, *Youth Initiative for Human Rights v. Serbia*, Application No. 48135/06 (25 June 2013); ECHR, *Kenedi v. Hungary*, Application No. 31475/05 (26 May 2009).

39 ECHR, *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05 (14 April 2009), par. 27.

function of "obtaining first-hand and direct knowledge based on their personal experience of the events unfolding" in the courtroom.[40] As has been recommended by the Committee of Ministers of the Council of Europe, "[j]ournalists should be admitted to public court hearings and public pronouncements of judgements without discrimination and without prior accreditation requirements. They should not be excluded from court hearings, unless and as far as the public is excluded in accordance with Article 6 of the Convention."[41] The Committee of Ministers has even gone so far as to suggest that there is a positive obligation on States to "provide in courtrooms a number of seats for journalists which is sufficient in accordance with the demand, without excluding the presence of the public as such."[42]

25. Consistent with this approach, the Court has observed that the physical restriction on journalists accessing certain places is an interference with their journalistic activities, and therefore amounts to an interference with Article 10 of the Convention. This has been recognised by the Court in *Gsell v. Switzerland.*[43] This case concerned a journalist who was told by police to return home when he was travelling to an event being held near the World Economic Forum. The police argued that these steps were taken to protect locals and guests at the World Economic Forum. The applicant had identified himself as a journalist and had shown police his press card. In its judgment, the Court reasoned that;

> *"the legal measure in question was not directed specifically at the applicant in his capacity as a journalist, but he had been a victim of a ban imposed generally by the Cantons Police on all those who wanted to travel to Davos. Nonetheless, taking everything into account, according to the Court, the measure is an 'interference' in the exercise of his freedom of expression, because he wanted to travel to Davos in order to write an article on a particular subject."*[44]

26. In light of the above, and the requirement that hearings be held in public pursuant to Article 6(1) of the Convention, the Intervener submits that there is a presumption of openness in relation to court hearings. Therefore, there is a negative obligation on States not to prevent the media from attending and reporting from such hearings. However, in the alternative, the Intervener submits that the media's right to physically access court proceedings equally falls within their Convention right of access to state-held information according to the threshold criteria set by the Grand Chamber in *Magyar Helsinki Bizottság v. Hungary.* Firstly, attendance is necessary for the media to exercise their right to freedom of expression as it is the only way they can obtain a first-hand and direct account of judicial proceedings.[45] Secondly, as explained in more detail above, court hearings are necessarily matters of public interest.[46] Thirdly, the media are seeking access to court in order to carry out their capacity as a "public watchdog".[47] Fourthly, the information disclosed during judicial proceedings is "ready and available".[48]

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40 ECtHR, *Selmani and Others v. the former Yugoslav Republic of Macedonia*, Application No. 67259/14 (9 February 2017), par. 84.

41 Committee of Ministers of the Council of Europe, *Recommendation Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings*, adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers' Deputies, principle 12.

42 *Id.*, principle 13.

43 ECtHR, *Gsell v. Switzerland*, Application No. 12675/05 (8 October 2009).

44 *Id.*, par. 49 [translation from French].

45 ECtHR, *Magyar Helsinki Bizottság v. Hungary*, Application No. 18030/11 (8 November 2016), par. 158 and 159.

46 *Id.*, par. 160 to 163.

47 *Id.*, par. 164 to 168.

48 *Id.*, par. 169 and 170.

Consequently, refusing the media access to courtrooms can amount to an interference with the right to access state-held information.

(ii) The role of a plaintiff in defamation proceedings must be taken into account when balancing rights under Articles 10 and 6 of the Convention with Article 8 of the Convention

27. It will be rare that a plaintiff in defamation proceedings will be able to rely on their right to respect for a private life to justify the exclusion of the media from hearings. This is because a plaintiff knowingly lays themselves open to public scrutiny by instituting defamation proceedings before the courts. Under these circumstances, their rights under Article 8 of the Convention carry little weight because they do not have a "legitimate expectation" that those proceedings will be a private matter.[49] This Court has stated that;

> *"[t]here are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor."*[50]

28. In defamation proceedings, it is ultimately a matter for the plaintiff as to whether he or she wishes to institute proceedings. When they do decide to institute proceedings, they do so with the knowledge of the risk that the proceedings will be subject to publicity. As was observed by the Court of Appeal of England and Wales in *R v. Legal Aid Board, Ex p Kaim Todner*, "parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation."[51] The Court of Appeal implied that plaintiffs, by virtue of their very position, must be the most tolerant of all the parties to the embarrassment and damage that might flow from public proceedings;

> *"[i]t is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public."*[52]

(iii) Denying the media access to defamation proceedings will amount to a disproportionate restriction on Article 10 of the Convention

29. It is the consistent case law of the Court that measures restricting the media's right to freedom of expression under Article 10 of the Convention must be proportionate to the "legitimate aim" that is being pursued.[53] In order for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would

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49 See, for example, ECtHR, *Axel Springer AG v. Germany*, Application No. 39954/08 (7 February 2012), par. 101.

50 ECtHR, *P.G. and J.H. v. the United Kingdom*, Application No. 44787/98 (25 September 2001), par. 57. See also, ECtHR, *Magyar Helsinki Bizottság v. Hungary*, Application No. 18030/11 (8 November 2016), par. 193.

51 Court of Appeal of England and Wales, *R v. Legal Aid Board, Ex p Kaim Todner*, [1999] QB 966, par. 8.

52 *Id.*

53 See, for example, ECtHR, *Worm v. Austria*, Application No. 22714/93 (29 August 1997), par. 47; ECtHR, *Fressoz and Roire v. France*, Application No. 29183/95 (21 January 1999), par. 45.

interfere less seriously with the fundamental right concerned.[54] The Intervener submits that the complete exclusion of the media from attending judicial proceedings will rarely (if ever) be a proportionate measure because of its particularly drastic nature.[55]

30. A recent judgment of the Supreme Court of Ireland, in which it considered the circumstances under which hearings in a defamation case might be conducted in private, is particularly instructive in this regard. In *Sunday Newspapers Limited v. Gilchrist and Rogers*, O'Donnell J of the Supreme Court of Ireland reasoned that "any departure from the rule of hearing in public is an exception which must be strictly justified, it is in my view necessary to consider the matter incrementally, and to ask whether any lesser steps would meet any legitimate interests involved."[56]

31. Rather than excluding the media from all hearings in a defamation case, there are a variety of alternative measures that could be adopted in order to achieve the "legitimate aims" under Article 10(2) of the Convention in such a way that would be less restrictive on the right to freedom of expression. For example, an undertaking from the media not to publish certain sensitive information would be such a measure. In *Sunday Newspapers Limited v. Gilchrist and Rogers*, the Supreme Court of Ireland reasoned that "any lesser steps [that] would meet any legitimate interests involved [...] may involve considerations of anonymising witnesses or orders that witnesses may not be photographed or identified in any way, or whether any part of the hearing may be conducted in public, or whether it is possible in respect of any hearing in private, that a redacted transcript of proceedings can be released to the media."[57]

32. In assessing whether there are other means of achieving the same end, courts should take into account the principle that it is not for the courts to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists in their coverage of a court case.[58] Therefore, state bodies should give appropriate weight to the measures that journalists are willing to adopt when implementing less restrictive measures for the protection of others' rights or interests.[59]

MEDIA LEGAL DEFENCE INITIATIVE

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54 ECtHR, *Glor v. Switzerland*, Application No. 13444/04 (30 April 2009), par. 94; ECtHR, *Women On Waves and Others v. Portugal*, Application No. 31276/05 (3 February 2009), par. 41.

55 UK Supreme Court, *Khuja v. Times Newspapers Limited and others*, [2017] UKSC 49, par. 14; House of Lords, *Attorney General v. Leveller Magazine*, [1979] AC 440, p. 451 to 452.

56 Supreme Court of Ireland, *Sunday Newspapers Limited & Others v. Gilchrist and Rogers*, [2017] IESC 18 (23 March 2017), par. 44.

57 *Id.*

58 ECtHR, *Laranjeira Marques da Silva v. Portugal*, Application No. 16983/06 (19 January 2010), par. 51. See also, ECtHR, *Jersild v. Denmark*, Application No. 15890/89 (23 September 1994), par. 31; ECtHR, *De Haes and Gijsels v. Belgium*, Application No. 19983/92 (24 February 1997), par. 48.

59 See, for example, *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, Application No. 34124/06 (21 June 2012), par. 61: "the competent authorities should have allowed the applicant company to submit practical proposals to make sure the filming could go ahead without disturbing the smooth functioning of the prison or order and security there.