

In the European Court of Human Rights

Rita PAL

Applicant

-v-

The United Kingdom

Respondent

WRITTEN COMMENTS OF THE THIRD-PARTY INTERVENER

Introduction

1. These written comments are submitted by Media Defence, hereafter ‘the Intervener’, pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court.¹
2. The present application concerns the arrest and prosecution of the applicant, a journalist, pursuant to the Protection from Harassment Act 1997, on suspicion of harassment after she published a news article and posted several Tweets about an individual online. The applicant was arrested, handcuffed, and driven from her home in Birmingham to a police station in London. She was detained for approximately seven hours before being released on bail. Criminal proceedings were initiated and subsequently discontinued. When the applicant sued for unlawful arrest, false imprisonment, assault and breach of her article 10 rights, the domestic courts found her rights under article 10 not to be engaged.
3. The Intervener welcomes the opportunity to submit written comments in this case which raises important issues relating to the nature of journalistic activity, the use of criminal laws in that context, and the protections from criminal sanction that should properly be afforded to journalists in the course of their activities.
4. States are required to create a favourable environment for public debate and for the expression of opinions and ideas without fear.² Despite this, journalists engaged in newsgathering or reporting on matters of public interest within the territory of the Council of Europe are faced with an increase in the use or threat of criminal sanctions, and many state authorities have failed to maintain an effective framework of protections for media freedom.³
5. This Court has consistently recognised that the imposition of criminal sanctions on speech has serious implications for the media’s ability to carry out its role as a ‘public watchdog’. This concern is heightened in circumstances where law enforcement authorities are empowered to make subjective assessments as to the lawfulness of different aspects of journalistic practice. Such an approach often fails to accommodate the right to freedom of expression and can lead to judicial or other types of censorship, and prior restraint, both of which are contrary to article 10.
6. In these submissions, the Intervener provides the Court with observations on the following matters:

¹ These written comments are submitted pursuant to Rule 44(3) of the Rules of Court of 1 January 2016, following permission granted by the President of the Fourth Section of the European Court of Human Rights (the “ECtHR”) in a letter dated 3 December 2020.

² ECtHR, *Dink v Turkey*, nos. 2668/07 and 4 others 14 September 2010, §137; See also, Committee of Ministers, [Recommendation CM/Rec \(2016\) 4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors](#) (13 April 2016), §2: “Member States should put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear”; Parliamentary Assembly of the Council of Europe, [Resolutions 2137 \(2020\) Threats to media freedom and journalists’ security in Europe](#) (28 January 2020), §6: “The Assembly calls on member States to create an enabling and favourable media environment and review to this end their legislation, seeking to prevent any misuse of different laws or provisions which may impact on media freedom – such as those on defamation, anti-terrorism, national security, public order, hate speech, blasphemy or memory laws – which are too often applied to intimidate and silence journalists”.

³ Council of Europe, [Hands Off Press Freedom: Attacks on Media in Europe Must Not Become a New Normal](#), Annual Report by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists (April 2020).

- The full range of journalistic activity must be given strong protection under article 10;
- Journalists in the Council of Europe region are increasingly facing threats of criminal sanction for doing their job;
- The threat of criminal sanction has a chilling effect on journalism;
- The use of criminal laws in respect of allegations of harassment, stalking and other related activity must be subject to the strictest scrutiny.

Article 10 protection for journalistic activity

7. Protecting the right to freedom of expression is essential in order to ensure the free flow of ideas and information. The Court has described the right to freedom of expression as “one of the essential foundations of (a democratic) society, one of the basic conditions for its progress and the development of every man . . . applicable not only for ‘information or ideas’ that are favourably received . . . but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society”.⁴ Applying this principle to the press, the Court has emphasised “the pre-eminent role of the press in informing the public and imparting information and ideas on matters of public interest in a State governed by the rule of law”.⁵ Reflecting this approach, the UN Human Rights Committee has stated that, “communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.”⁶
8. In order to fulfil its role as public watchdog, journalists must sometimes engage in behaviour that can be characterised as intrusive and insistent. Reporting techniques that might be characterised as aggressive (making repeated calls, making allegations, trying to convince an unwilling source to provide information or go on the record) are typical methods of newsgathering and often essential in investigative reporting.⁷ Persistence in putting allegations to a subject prior to publication, for example to provide an opportunity for comment or correction, is often considered an integral component of ‘responsible journalism’.⁸ Such efforts are routinely undertaken notwithstanding the risk of an interim court order restraining publication.⁹
9. This Court has recognised that the techniques of reporting, including the tone and editorial decisions about content, are matters for the media and not for a court to determine.¹⁰ In that respect, it has stated that journalists enjoy the freedom to choose which news items that come

⁴ *Handyside v the United Kingdom*, 7 December 1976, §49, Series A no. 24.

⁵ ECtHR, *Mosley v the United Kingdom*, no. 48009/08, §112, 10 May 2011.

⁶ UN Human Rights Committee, *General Comment 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, [CCPR/C/21/Rev.1/Add/7](#), 12 July 1996, §25.

⁷ See, for example, exceptions to Clause 3 (Harassment) in [The Editors’ Code of Practice](#), Independent Press Standards Organisation (2019). Note also, Lord Nicholls’ observation that “The press discharges vital function as a bloodhound as well as a watchdog”: *Reynolds v Times Newspapers Limited and Others* (1999) 3 WLR 1010 (Lord Nicholls).

⁸ ECtHR, *Mosley v the United Kingdom*, no. 48009/08, 10 May 2011.

⁹ See, for example, *Mosley v the United Kingdom*, in which the Court observed that one of the main reasons, if not the only reason, for the defendant newspaper failing to seek comment from the subject of its story “was to avoid the possibility of an injunction being sought and granted”: no. 48009/08, §128, 10 May 2011.

¹⁰ See, for instance, ECtHR, *Jersild v Denmark*, 23 September 1994, §31, Series A no. 298; ECtHR, *Fressoz and Roire v France* [GC], no. 29183/95, §52, ECHR 1999-I; ECtHR, *MGN Limited v the United Kingdom*, no. 39401/04, §145, 18 January 2011.

to their attention they will deal with and how they will report on them.¹¹ Connected to this, the Court has recognised the importance of protecting journalists' newsgathering activities, which are conducted prior to publication, as a corollary to the right to freedom of expression and freedom of the press. For example, the press must be free to gather, collect and assess information and ideas of public interest in order to perform its 'public watchdog' role in an effective way.¹² In this context, this Court has consistently recognised that "the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom".¹³

10. In its case law, it has protected different forms of preparatory newsgathering activity, including communications with confidential sources,¹⁴ interviews with third parties,¹⁵ and access to certain kinds of information.¹⁶ The importance of ensuring protection for newsgathering in order to protect press freedom is also reflected in the UN Special Rapporteur's definition of journalism. In his report to the UN Human Rights Council in 2012, he noted that individuals carrying out a journalistic function "observe and describe events, document and analyse events, statements, policies, and any propositions that can affect society, with the purpose of systematizing such information and gathering of facts and analyses to inform sectors of society or society as a whole".¹⁷
11. The fundamental importance of newsgathering to the exercise of the right to freedom of expression has also been recognised in the jurisprudence of a number of courts around the world, including in the United Kingdom,¹⁸ Canada,¹⁹ South Africa,²⁰ Colombia²¹ and Japan.²² Therefore, any measure that interferes with the newsgathering activities of individuals carrying out a "public watchdog" role will necessarily interfere with the right to freedom of expression under Article 10 of the Convention. Where that interference involves the use of criminal sanctions courts must be especially vigilant.

Criminal laws should be used against journalists only in the most exceptional circumstances

¹¹ ECtHR, *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§31, 139, ECHR 2015 (extracts).

¹² ECtHR, *Dammann v. Switzerland*, no. 77551/01, §52, 25 April 2006; ECtHR, *Shapovalov v. Ukraine*, no. 45835/05, §68, 31 July 2012; ECtHR, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, §130, 8 November 2016.

¹³ ECtHR, *Dammann v. Switzerland*, no. 77551/01, §52, 25 April 2006; ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, §128, 27 June 2017.

¹⁴ ECtHR, *Goodwin v. the United Kingdom*, 27 March 1996, *Reports of Judgments and Decisions* 1996-II.

¹⁵ See ECtHR, *Jersild v. Denmark*, 23 September 1994, §35, Series A no. 298, in which 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'."

¹⁶ ECtHR, *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009; ECHR, *Youth Initiative for Human Rights v. Serbia*, no. 48135/06, 25 June 2013; ECHR, *Kenedi v. Hungary*, no. 31475/05, 26 May 2009.

¹⁷ United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/20/17* (4 June 2012), §3-4.

¹⁸ United Kingdom House of Lords, *R v. Shayler* [2002] UKHL 11 (21 March 2002), §21; United Kingdom House of Lords, *Reynolds v. Times Newspapers Ltd*, [2001] 2 AC 127 (28 October 1999), §205 (Lord Nicholls).

¹⁹ Supreme Court of Canada, *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41 (22 October 2010), §56.

²⁰ South African Constitutional Court, *South African Broadcasting Corporation Limited v. National Director of Public Prosecutions and Others*, [2006] ZACC 15 (21 September 2006), §96.

²¹ Colombia Constitutional Court, *Radio Cadena Nacional S.A. - RCN v. Consejo de Estado*, Sentencia T-391/07 (22 May 2007), §4.1.1.

²² Supreme Court of Japan, *Kaneko v. Japan*, Sup. Ct. Keishu 23-11-1490 (26 November 1969).

12. International human rights law clearly prescribes that states should use the least intrusive measure when interfering with the right to freedom of expression.²³ Consistent with this principle, criminal sanctions for speech have been regarded as an *ultimum remedium* to be used only in exceptional circumstances such as hate speech and incitement to violence. In the context of criminal laws being used by the state to stifle criticism, this Court has noted that: “[t]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media”.²⁴
13. This Court has frequently stated that criminal sanctions are disproportionate when civil remedies are available, and, in the context of criminal defamation laws, noted that complaining parties should seek “recourse to means of civil law which, in the Court’s view, are appropriate in cases of defamation”.²⁵ Specifically this Court has stated that “the assessment of the proportionality of an interference with the rights protected thereby will in many cases depend on whether the authorities could have resorted to means other than a criminal penalty, such as civil and disciplinary remedies”.²⁶
14. Other international bodies reflect this position. The UN Human Rights Committee has for instance commented that restrictions on freedom of expression must not be “overbroad” and must be the “least intrusive instrument amongst those which might achieve their protective function”.²⁷ It has further commented that restrictions “must be proportionate to the interest to be protected”.²⁸ The Inter American Court of Human Rights has held that criminal sanctions can only be used in the narrowest circumstances possible in order to avoid abusive exercise of the punitive power of the state.²⁹
15. This Court has consistently recognised that the most careful scrutiny is called for when criminal measures or sanctions are applied in a way that is capable of discouraging the participation of the press in debates over matters of legitimate public concern.³⁰ Notably, the Court has repeatedly held that “imposing criminal sanctions on someone who exercises the right to freedom of expression can be considered compatible with Article 10 ... only in exceptional circumstances, notably where other fundamental rights have been seriously

²³ The UN Human Rights Committee has for instance commented that restrictions of freedom to expression must not be “overbroad” and must be the “least intrusive instrument amongst those which might achieve their protective function”: UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, [CCPR/C/GC/34](#), 12 September 2011, §34.

²⁴ ECtHR, *Castells v. Spain*, 23 April 1992, §46, Series A no. 236.

²⁵ ECtHR, *Raichinov v. Bulgaria*, no. 47579/99, §50, 20 April 2006. See also ECtHR, *Lehideux and Isorni v. France*, 23 September 1998, p. 2886 §51 *in fine* and p. 2887 §57, *Reports of Judgments and Decisions* 1998-VII, and *mutatis mutandis*, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §115, ECHR 2004-XI.

²⁶ ECtHR, *Raichinov v. Bulgaria*, no. 47579/99, §50, 20 April 2006.

²⁷ UN Human Rights Committee, *General Comment 34*, above n 23, §34.

²⁸ *Ibid.*

²⁹ “In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State”: Inter-American Court of Human Rights, *Kimel v. Argentina*, IACHR Series C no 177, IHR 3051, 2 May 2008, §76.

³⁰ ECtHR, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, §64, ECHR 1999-III

impaired” [emphasis added].³¹ It has clarified that such “exceptional circumstances” include “cases of hate speech or incitement to violence.”³²

Criminalisation of journalistic activity in the Council of Europe region

16. The criminalisation of journalistic activity has increased significantly across the Council of Europe region in recent years. It is widely documented that journalists have been subject to warnings, arrest, prosecution or conviction, or the threat of having these sanctions imposed on them as a result of conduct undertaken in the course of reporting.³³ In a recent Recommendation, the Committee of Ministers stated that “It is alarming and unacceptable that journalists and other media actors in Europe are increasingly being threatened, harassed, subjected to surveillance, intimidated, arbitrarily deprived of their liberty, physically attacked, tortured and even killed because of their investigative work, opinions or reporting”.³⁴
17. According to the Council of Europe’s Media Platform, which documents threats to media freedom, there has been a significant rise in “spurious and politically motivated legal threats and judicial or administrative harassment”.³⁵ The platform has documented criminal investigations against media workers in Austria, Belgium, Bulgaria, Finland, Germany, Poland, the Russian Federation, and Turkey. The charges ranged from accusations of justifying terrorism, to pressure to reveal confidential sources. There are many other examples of high-profile cases of journalists charged with criminal offences and prosecuted.³⁶ Reporters and photographers are often caught up in police actions as they cover public demonstrations.³⁷ Journalists have also been subject to criminal enforcement powers pursuant to laws aimed at preserving public order or preventing crime without proper consideration of their article 10 rights.³⁸
18. However, journalists are also regularly subjected to less high-profile interference from state authorities, often in circumstances where they are not arrested, or where criminal charges are brought and then dropped. The Intervener would emphasise the deleterious impact of an arrest on article 10 rights, even where charges are dropped or dismissed. As this Court has consistently recognised, the improper use of criminal law enforcement powers can profoundly affect the exercise of article 10 rights even in the absence of subsequent prosecution or conviction.³⁹ It has held that both criminal charges and prosecutions may,

³¹ ECtHR, *Gavrilovici v. Moldova*, no. 25464/05, §60, 15 December 2009; ECtHR, *Cumpăna and Mazăre v. Romania* [GC], no. 33348/96, §115, ECHR 2004-XI; ECtHR, *Mahmudov and Agazade v. Azerbaijan*, no. 35877/04, §50, 18 December 2008.

³² ECtHR, *Cumpăna and Mazăre v. Romania* [GC], no. 33348/96, §50, ECHR 2004-XI; see also, ECtHR, *Mahmudov and Agazade v. Azerbaijan*, no. 35877/04, §50, 18 December 2008.

³³ Council of Europe, *Hands Off Press Freedom*, above n 3.

³⁴ Committee of Ministers, *Recommendation CM/Rec (2016) 4 on the protection of journalism and safety of journalists and other media actors*, above n 2, §1.

³⁵ Council of Europe, *Hands Off Press Freedom*, above n 3, p. 10.

³⁶ See: Committee to Protect Journalists, ‘[Russian court convicts, fines journalist Svetlana Prokopyeva in terrorism trial](#)’, 6 July 2020; Bethan McKernan, ‘[Turkey sentences journalist Can Dündar to 27 years in jail](#)’, *The Guardian*, 23 December 2020; Committee to Protect Journalists, ‘[Journalist Afgan Sadygov detained since May in Azerbaijan](#)’, 17 July 2020.

³⁷ Council of Europe, *Hands Off Press Freedom*, above n 3, p. 20; see also: *Pentikäinen v. Finland* [GC], no. 11882/10, ECHR 2015.

³⁸ Council of Europe, *Hands Off Press Freedom*, above n 3, p. 17.

³⁹ ECtHR, *Yaşar Kaplan v. Turkey*, no. 56566/00, § 35, 24 January 2006.

even where a prosecution is abandoned or discontinued, amount to a violation of article 10.⁴⁰ In practical terms, arrests immediately halt newsgathering activity and contemporaneous reporting of events. They are often accompanied by the confiscation of equipment including cameras, film and digital media files, preventing images from being published and events being reported on in a timely manner, and effecting a prior restraint.⁴¹ Charges may not be dropped and equipment and digital files returned for some time.⁴² As noted below, this type of law enforcement also deters journalists from relying on aggressive reporting techniques that are essential to investigative work.

19. Some recent incidents where journalists have been subject to harassment from the authorities simply for doing their job illustrate the extent of the challenges faced by journalists throughout the Council of Europe region: In Hungary in October 2020, following a complaint from a businessman, two journalists were summoned to police station after reporting on two military-grade armoured vehicles parked on the estate of a company owned by him. The journalists were summoned as witnesses in a criminal probe into suspected 'illicit data collection', a criminal offense punishable with a maximum prison sentence of three years⁴³; In Bulgaria in September 2020, journalist Martin Georgiev, a crime reporter at the local newspaper Sega, was summoned for questioning by the police after he emailed the Ministry of Interior for comment on alleged police brutality during recent anti-government protests. At the police station, he was told his request for comment was being treated as a criminal complaint and questioned him about the protests and asked him to provide an official statement⁴⁴; In January 2019, a journalist, Taha Bouhafs, was taken into police custody in France after he filmed President Macron at a theatre and posted the images on Twitter⁴⁵; In August 2018 a TV crew working for the public broadcaster ZDF's investigative programme were detained by police in Germany after a complaint by a participant at a demonstration against Prime Minister Merkel Dresden. Police detained the journalists for about 45 minutes, stating they were required to investigate when there is a suspicion a crime has been committed.⁴⁶ While incidents of this type may not be followed by arrest (or charges may be dropped prior to prosecution) this in turn makes them less readily subject to judicial oversight.⁴⁷

Threats of criminal sanction have a chilling effect on journalism

20. As noted above, journalists are routinely subject to arrest and detention, prosecution and conviction, as well the threat of criminal sanctions being imposed, as a result of conduct undertaken in the course of their work.⁴⁸ Concerns arising from a threatened or potential criminal prosecution can have a chilling effect on journalists. This chilling effect represents

⁴⁰ ECtHR, *Murat Vural v. Turkey*, no. 9540/07, §52, 21 October 2014; ECtHR, *Güzel v Turkey*, no. 29483/09, §27, 13 September 2016.

⁴¹ ECtHR, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §111, ECHR 2004-XI.

⁴² In this regard the Court should note that freelancers and citizen journalists are particularly vulnerable: see Council of Europe, *Hands Off Press Freedom*, above n 3, p. 16.

⁴³ Council of Europe, '[Police Question Journalists over an Article](#)' (no. 129/2020), *Platform to promote the protection of journalism and safety of journalists*, 29 October 2020.

⁴⁴ Council of Europe, '[Bulgarian Reporter Martin Georgiev Summoned for Questioning over Request for Comment](#)' (no. 182/2020), *Platform to promote the protection of journalism and safety of journalists*, 24 September 2020.

⁴⁵ Council of Europe, '[Journalist Taha Bouhafs Taken into Custody](#)' (no. 5/2020), *Platform to promote the protection of journalism and safety of journalists*, 20 January 2020.

⁴⁶ Council of Europe, '[Reporters Detained by Police after Complaint by Anti-Merkel Protester](#)' (no. 84/2018), *Platform to promote the protection of journalism and safety of journalists*, 19 August 2018.

⁴⁷ See for example in the context of the US, Ronald J. Krotoszynski, Jr. *The Disappearing First Amendment* (Cambridge University Press, United Kingdom: 2019), p. 195.

⁴⁸ Council of Europe, *Hands Off Press Freedom*, above n 3.

an interference not only with a journalist's right to freedom of expression, but also with the right of that journalist's potential readership to freely receive the information that would otherwise have been published. Further, measures that have a chilling effect on a particular journalist in a particular case have the potential to have a more general negative effect on other journalists.⁴⁹ As the Court noted in a different context, a law that gives rise to uncertainty as to the possibility of sanctions being imposed can entail "a chilling effect on freedom of expression and self-censorship".⁵⁰ It may also be the case that other measures resulting in detention or the imposition of fines, whether administrative or regulatory, can also have a chilling effect.⁵¹

21. The Committee of Ministers has, through its recommendations, emphasised the effect of criminal sanctions on journalists, noting that "[a] chilling effect on freedom of expression arises when an interference with this right causes fear, leading to self-censorship and ultimately the impoverishment of public debate, which is to the detriment of society as a whole. Accordingly, State authorities should avoid taking measures or imposing sanctions that have the effect of discouraging participation in public debate". It went on to say that State authorities are obliged to "guarantee the substantive liberty of everyone within its jurisdiction and to that end must ensure that journalists and other media actors are not subjected to arbitrary arrest, unlawful detention or enforced disappearance."⁵²
22. The OSCE has emphasised that even short-term detention of members of the media presents a form of harassment and intimidation and a very real and serious risk to freedom of expression and the rights of the media and the wider public.⁵³

The use of criminal laws in respect of allegations of harassment, stalking and other related activity must be subject to the strictest scrutiny

23. The enactment of criminal laws directly addressing harassment and stalking is a relatively new phenomenon. One of the first jurisdictions to enact modern harassment and stalking related legislation was the US state of California, in 1990.⁵⁴ Within three years, almost all US states enacted similar legislation.⁵⁵ Shortly thereafter Canada, and Australia had enacted legislation in response to public concern about stalking. The UK and New Zealand followed in 1997. Many of these laws cover both criminal and civil harassment, either in the same statute or separately. Most of these laws were introduced in response to the perceived inability of existing laws to protect victims of harassment and stalking, often in the context of domestic violence or where people in the public eye complained about the level of unwanted attention they were receiving.⁵⁶

⁴⁹ ECtHR, *Dilipak and Karakaya v. Turkey*, nos. 7942/05 and 24838/05, 4 March 2014.

⁵⁰ ECtHR, *Vajnai v. Hungary*, no. 33629/06, §54, ECHR 2008.

⁵¹ ECtHR, *Dupuis and Others v. France*, n. 1914/02, 7 June 2007.

⁵² Committee of Ministers, *Recommendation CM/Rec (2016) 4 on the protection of journalism and safety of journalists and other media actors*, above n 2, §33, 25.

⁵³ Office of the Representative on Freedom of the Media, Organization for Security and Co-operation in Europe (OSCE), *Safety of Journalists Guidebook* (2nd ed, 2014), p. 69.

⁵⁴ California Penal Code, Title 15, *Chapter 2 (Of Other and Miscellaneous Offenses)*, §646.9; California Civil Code, Division 3 (Obligations), §1708.7.

⁵⁵ See, for example, Nevada Revised Statutes, *Chapter 200 (Crimes against the Person)*, 200.571-200.601; Florida, Title XLVI, *Chapter 784 (Assault; Battery; Culpable Negligence)*, 784.048; New York Consolidated Laws, Penal Law, Title N, *Article 240 (Offenses Against Public Order)*, ss 240.25-31.

⁵⁶ Centre for Comparative and Public Law, *Study on the Experience of Overseas Jurisdictions in Implementing Anti-Stalking Legislation: Final Report* October 2013).

24. Other states across the Council of Europe region have recently enacted criminal legislation to deal with harassment and stalking.⁵⁷ According to one study, prior to this, states did not think it necessary to introduce harassment and stalking laws because these activities were not considered a societal problem and were not the subject of public debate. In addition, these states took the view that existing criminal laws, such as those relating to assault, threats and coercion, provided adequate protection.⁵⁸ That these laws have now been brought into existence is in part due to requirements set out in the Council of Europe Convention on preventing and combating violence against women and domestic violence 2013.⁵⁹ This convention specifically addresses violence against women and obliges states to criminalise stalking.⁶⁰ The proliferation of harassment laws across the Council of Europe region was therefore designed to remedy or provide relief for a particular mischief, that of stalking.
25. However, these laws are capable of being, and have been, deployed in other contexts and have the potential to have a chilling effect on journalists engaged in newsgathering, investigative journalism and other related activities. This concern is particularly relevant where these laws include speech as conduct capable of amounting to harassment.⁶¹ The debate in the UK at the time of enactment of the Protection from Harassment Act about its potential impact on journalists is instructive.⁶² It was noted by one commentator at the time that the act would have “serious implications for investigative journalists, freelancers, or anyone who may persist in contacting an unwilling subject over a relatively short period of time”.⁶³
26. While journalists must not overstep boundaries, including in relation to the privacy rights of others, they have a responsibility to impart information and ideas on matters of public interest.⁶⁴ Where journalists are subject to the threat of criminal sanction for a legitimate journalistic act in circumstances where legislation designed to be applied in a different context might characterise that act as amounting to criminal conduct, this is bound to have a

⁵⁷ This includes Malta (harassment 2005, stalking 2015), Germany (2007), Hungary (2008 with further amendment in 2013), Czech Republic (2010), Finland (2014), Romania (2015): Suzan van der A, [‘New Trends in the Criminalization of Stalking in the EU Member States’](#) (2018) 24 *European Journal on Criminal Policy and Research*, 315-33.

⁵⁸ Modena Group on Stalking, [Protecting women from the new crime of stalking: A comparison of legislative approaches within the European Union](#) (Modena: University of Modena and Reggio Emilia, 2007).

⁵⁹ Council of Europe, [The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence](#), 11.V.2011, (Istanbul 2011).

⁶⁰ Ibid, Article 34: “Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalized.” The accompanying explanatory report to the Convention explains that ‘the threatening behaviour may consist of repeatedly following another person, engaging in unwanted communication with another person or letting another person know that he or she is being observed’: [Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence](#), above n 59, par 182.

⁶¹ *Protection from Harassment Act 1997*, s 7(4).

⁶² See, for example, the parliamentary debate before the bill became law: [HC Deb 17 December 1996, vol 287, cc 781-862](#).

⁶³ M Davies, ‘Good news all round? The Protection from Harassment Act 1997’ (1997) 8(6) *Entertainment Law Review*, 191. Journalists’ associations raised similar concerns regarding draft anti-stalking legislation in Germany, fearing that it failed to protect investigative journalists: [‘German Anti-Stalking Law Takes Shape’](#), DW (11 August 2005).

⁶⁴ ECtHR, *Von Hannover v. Germany*, no. 59320/00, §58, ECHR 2004-VI; *Observer and Guardian v. the United Kingdom*, 26 November 1991, §59, Series A no. 216; *Colombani and Others v. France*, no. 51279/99, §56, ECHR 2002-V.

chilling effect.⁶⁵ At the time of enactment of the UK legislation the government noted that legitimate journalistic activity was “similar to the actions that amounted to stalking”.⁶⁶ Taking the UK’s legal regime relating to harassment as an example, following a complaint a harassment warning can be served on a journalist by the police, warning them, without engaging in any assessment of the facts, that their alleged conduct can constitute a criminal offence.⁶⁷ This can have a chilling effect, prohibiting a journalist from further engaging in conduct related to their work. It can also amount to a form of prior restraint.⁶⁸

27. Journalists are entitled to “certain increased protections under article 10 of the Convention”⁶⁹ and measures that are capable of discouraging the participation of the press in public debate on matters of public concern must be subject to “careful scrutiny.”⁷⁰ In the case of *Cumpănă and Mazăre v. Romania* the Grand Chamber, referring to the states obligations, put it as follows: “Prior restraints on the activities of journalists call for the most careful scrutiny on its part and are justified only in exceptional circumstances”.⁷¹
28. When applying this strict scrutiny to the arrest and/or prosecution of journalists, a court should be satisfied that (i) an arrest and detention was in compliance with Article 5(1) of the Convention, (ii) that there were relevant and sufficient reasons demonstrating the necessity to arrest and prosecute the journalist in order to achieve a legitimate aim, and (iii) the domestic authorities and courts took into account the “public watchdog” role performed by the journalist.
29. In relation to the first factor, the arrest and detention must be based on a reasonable suspicion that the individual had committed an offence under domestic law, or that it was reasonably considered necessary to prevent the individual committing an offence or fleeing after having done so. The authorities must show that the arrest and detention was made pursuant to either of these considerations. Where they fail to do so, the arrest and detention will be unlawful and in violation of article 5(1) of the Convention. It would follow that, in these circumstances, the arrest and detention of the individual carrying out a journalistic function would also amount to a violation of article 10 of the Convention because such an interference will not have been ‘prescribed by law’.
30. A court must also consider whether measures adopted are ‘relevant’ to the achievement of a legitimate aim under article 10(2). This provides an important safeguard against measures, such as arrest and detention, being imposed arbitrarily against journalists. Measures adopted in the context of allegations of harassment might be justified with reference to ‘the reputation or rights of others’. In such cases, which often require the right to respect for private life to

⁶⁵ Recognising this problem, some jurisdictions have provided an explicit defence for journalists, see for example Victoria, Australia: *Crimes Act 1958*, [s 21A\(4A\)\(a\)](#).

⁶⁶ HC Deb 781, above n 62.

⁶⁷ See *Crawford v. Crown Prosecution Services* [2008] EWHC 854 (Admin), §38.

⁶⁸ With regard to the potential “chilling effect” measures may have on those who may wish to exercise their right to freedom of expression, the ECtHR has held that it will “exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern.”: ECtHR, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §111, ECHR 2004-XI.

⁶⁹ Committee of Ministers, [Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors](#), (30 April 2014), par. 6.

⁷⁰ ECtHR, *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, §26, 14 April 2009.

⁷¹ ECtHR, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §118, ECHR 2004-XI.

be balanced against the right to freedom of expression, domestic courts must have regard to this Court's well-established criteria, as set out in *Van Hannover v. Germany (No. 2)*.⁷²

31. Where this justification is relied upon by the government for measures taken against a journalist, the Court should have particular regard to whether such measures were based on a reasonable assessment of the facts.⁷³ In circumstances where a journalist is engaged in legitimate journalistic activity, the arrest and detention of that journalist cannot be based on a reasonable assessment of the facts.⁷⁴
32. Finally, the Court should have regard to whether the domestic authorities and courts took into account the 'public watchdog' role performed by an individual when determining whether a measure imposed against them was necessary in a democratic society. In a case concerning the arrest, detention and conviction of a journalist who had attended a protest with the intention of collecting information and photographic images relating to the event, the Court held that he could rely on the protection afforded to the press under article 10 of the Convention. In connection with this finding, the Court criticised the authorities and domestic courts for not adequately assessing "whether [the applicant's] alleged actions were excusable or otherwise mitigated, given his argument that he had been acting as a journalist."⁷⁵ It can be inferred from this that in circumstances where journalists, or other individuals carrying out a 'public watchdog' role, are arrested, detained and/or convicted, or subject to any form of related administrative measure, the domestic authorities are obliged to consider that role when determining whether such measures are necessary and proportionate.
33. The importance of an adequate assessment by state authorities of the journalistic function performed by an individual has been emphasised by the OSCE Representative on Freedom of the Media in her 2020 Report, in which she highlighted that "[s]enior officials responsible for police conduct have a duty to ensure that officers are adequately trained about the role and function of journalists".⁷⁶

Conclusion

34. Restrictions on the right to freedom of expression must be construed strictly and the need for restrictions must be convincingly established. Such restrictions must be necessary and proportionate. The Interveners submit that criminal penalties in freedom of expression cases are rarely proportionate. In speech-related offences, they are also often not necessary as they are not the least restrictive effective remedy to secure the legitimate aim sought. The threat of a criminal record, a penal sentence or even a suspended sentence, all impose an onerous and unnecessary burden on journalists for trying to do their job. Even where these measures are not applied, the problem of 'chilling effect' remains. In any consideration of a case where a sanction is imposed on a journalist engaged in legitimate journalistic activity, the starting position should be that such sanctions are not necessary.

⁷² ECtHR [GC], nos. 40660/08 and 60641/08, §108-113, ECHR 2012.

⁷³ ECtHR, *Selmani and Others v. the former Yugoslav Republic of Macedonia*, no. 67259/14, § 76, 9 February 2017.

⁷⁴ See, for example, *Butkevich v. Russia*, no. 5865/07, §131-134, 13 February 2018.

⁷⁵ *Butkevich v. Russia*, no. 5865/07, §132, 13 February 2018.

⁷⁶ Office of the Representative on Freedom of the Media, OSCE, [Special Report: Handling of the Media During Public Assemblies](#) (22 October 2020), p. 6.

