

IN THE EUROPEAN COURT OF HUMAN RIGHTS

App No. 39449/21

BETWEEN:

Grzegorz Zenon MALKIEWICZ and Others

Applicants

and

THE UNITED KINGDOM

Respondent

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WRITTEN COMMENTS OF THE THIRD-PARTY INTERVENER

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9 January 2023

## Introduction

1. These submissions are filed by Media Defence (the ‘Intervener’), pursuant to leave granted by the President of the Court in accordance with Rule 44 of the Rules of Court.<sup>1</sup>
2. The applicants in this case were sued in 2015 over an article published in a Polish language newspaper based in London. The domestic legal proceedings lasted 6 years and when the case was finally settled the applicants faced a costs bill of over €650,000. In 2022, the first and second applicants’ former solicitors secured an order in the High Court to sell their family home to cover the firm’s legal bill.<sup>2</sup> They had already sold their only other real asset, an investment property, to fund their defence.
3. This case highlights a fundamental shortcoming of the United Kingdom’s (‘the UK’) legal system that stems from its failure to provide adequate procedural protections to individuals who are sued in defamation and privacy cases.<sup>3</sup> The UK’s costs regime facilitates an asymmetry between parties where the outcome of the proceedings can depend, to a significant degree, on their financial circumstances. The consequences of this regime lead to gross and serious interferences with freedom of expression and cannot be considered necessary and proportionate to the legitimate aim pursued.
4. The focus of these submissions is on the serious impact of the UK’s costs regime on press freedom. They are made against the backdrop of increasing concern about the impact SLAPP lawsuits are having on the ability of journalists to do their job.<sup>4</sup> While the protection of reputation is a legitimate aim, without adequate procedural protections in defamation and privacy cases the prospect of facing a substantial costs bill can deter journalists from reporting on matters of public interest and have a chilling effect on press freedom. The operation of costs regimes can therefore have a significant impact on the ability of journalists to exercise their Article 10 rights. This is particularly the case where that costs regime operates in an overly complex legal system, such as the defamation system in this case. Small publishers and individual journalists are particularly affected by the cost regimes applicable to defamation and privacy actions. Where there are differences between costs regimes in different states, this can have implications for press freedom not just within that state, but elsewhere in the territory of the Council of Europe.
5. To assist the Court in its determination, the Intervener (i) provides examples of legal costs for defending defamation and privacy cases across jurisdictions in Europe, which shows that the UK is the most expensive jurisdiction in which to be sued; (ii) discusses the adverse impact that the UK costs regime has on small publishers and individual journalists reporting on matters of public interest; and (iii) submits that Article 10 requires the costs burden imposed in defamation and privacy proceedings to be proportionate to the applicant’s means and the outcome of the proceedings.

## Comparative legal costs for defending defamation and privacy cases in Europe

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<sup>1</sup> By way of letter dated 12 December 2022, the Intervener was granted leave to submit written comments. As stipulated in that letter, these written comments address only the general principles applicable to the determination of the case.

<sup>2</sup> Law Society Gazette, ‘Carter Ruck gets sale order over former clients’ home’, 21 April 2022, available at: <https://www.lawgazette.co.uk/news/carter-ruck-gets-sale-order-over-former-clients-home/5112262.article>

<sup>3</sup> The UK has three separate legal systems: England and Wales, Scotland, and Northern Ireland. The issues identified by the Intervener concern mainly the legal system in England and Wales.

<sup>4</sup> SLAPP stands for Strategic Litigation against Public Participation. See also, Human Rights Comment by the Council of Europe Commissioner for Human Rights - available at <https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps>

6. As part of its emergency defence programme the Intervener provides funding to lawyers representing journalists and media houses engaged in public interest journalism.<sup>5</sup> It has provided financial support for hundreds of SLAPP cases. The Intervener receives applications for funding from journalists operating in countries all over the world, including the UK. These applications often concern the work of journalists who operate outside the UK (including in other Member States) but are nonetheless sued within the UK. Journalists are acutely aware of the implications of being sued in the UK, where they can be drawn into lengthy and ruinously costly proceedings. For individuals outside that jurisdiction who want to avoid scrutiny, threatening legal action in the UK can be an effective way of chilling speech.<sup>6</sup> This is the case even though the UK's Defamation Act 2013 purported to deal with the problem of 'libel tourism'<sup>7</sup> by introducing a higher threshold before claimants could sue in defamation a defendant who is not domiciled in the UK.<sup>8</sup>
7. Defamation cases are not always brought in the UK to secure reputational vindication.<sup>9</sup> A claimant with substantial resources might issue legal proceedings to tie a journalist or media organisation up in protracted, exceptionally stressful, and extremely expensive litigation.<sup>10</sup> According to a leading UK defamation lawyer, commenting in 2021 on the cost of defamation proceedings that had not yet reached trial, "A libel trial as an absolute floor is £500,000, most of them start at about £1million."<sup>11</sup> The same lawyer estimated the cost of preliminary proceedings in that case for one of the parties amounted to "around £60,000, maybe £70,000."<sup>12</sup> In July 2022, the UK's Deputy Prime Minister noted that "huge costs are the single greatest factor in intimidating and silencing opponents in SLAPPs cases – especially when cynically targeted at individual journalists and campaigners, rather than the organisations they work for."<sup>13</sup>

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<sup>5</sup> See Media Defence Annual Report 2021 and 2022 available at: <https://www.mediadefence.org/wp-content/uploads/2022/05/Media-Defence-Annual-Report-2021.pdf>; and <https://www.mediadefence.org/wp-content/uploads/2021/05/Media-Defence-Annual-Report-2020.pdf>.

<sup>6</sup> See The Foreign Policy Centre, 'London Calling': *The issue of legal intimidation and SLAPPs against media emanating from the United Kingdom*, April 2022, pp. 66-68, available at: <https://fpc.org.uk/publications/london-calling-the-issue-of-legal-intimidation-and-slapps-against-media-emanating-from-the-united-kingdom/>

<sup>7</sup> See explanatory notes to the Defamation Act 2013, which states that one purpose of the Defamation Act 2013 is to prevent libel tourism, available at <https://www.legislation.gov.uk/ukpga/2013/26/notes/division/5/9>

<sup>8</sup> Defamation Act 2013 S.9 Action against a person not domiciled in the UK or a Member State etc.

<sup>9</sup> See for example, Public Inquiry Report: Daphne Caruana Galizia, A Journalist Assassinated on 16 October 2017, 29 July 2021, at p.378, "The Board heard how at the time of her death, there were at least 47 libel suits pending against Caruana Galizia, five of which of a criminal nature, some of which from the Leader of the Opposition too. Sometime before her death, she had discovered for example that Henley & Partners, through their legal representative Christian Kalin, with the approval of Prime Minister Muscat, his Chief of Staff, Minister Owen Bonnici and Jonathan Attard who was the CEO of Identity Malta in charge of the Passport Scheme, together had planned to prosecute the journalist in England with the aim of causing her very serious financial repercussions. This was one of the SLAPP actions referred to by Caruana Galizia in her interview and which were planned to crush her and ruin her financially" (underlining added). Available at <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2021/12/public-inquiry-report-en.pdf>.

<sup>10</sup> See for example Court of Appeal (Civil Division), *Soriano v Forensic News and others* [2021] EWCA Civ 1952, 21 December 2021, where the claimant sued in relation to data protection, libel, misuse of private information, harassment, and malicious falsehoods. The jurisdiction question has now been considered at the High Court and the Court of Appeal, resulting in a significant costs burden on the defendants before the substantive issue has even been heard. See also Index on Censorship, *Fifteen organisations condemn lawsuit against Forensic News, deeming it a SLAPP*, 18 February 2022, available at <https://www.indexoncensorship.org/2022/02/organisations-condemn-forensic-news-lawsuit-as-slapp/>

<sup>11</sup> Daily Mail, *Rachel Riley's legal bill could be more than £1MILLION in fees after losing latest round of libel battle against pro-Corbyn blogger who called the Countdown star a 'serial abuser', expert says*, 15 May 2021, available at: <https://www.dailymail.co.uk/news/article-9581105/Rachel-Riley-spend-1MILLION-legal-fees-libel-case.html>

<sup>12</sup> *Ibid.*

<sup>13</sup> Ministry of Justice, *Strategic Lawsuits Against Public Participation (SLAPPs) Government Response to the Call for Evidence*, 20 July 2022, p. 5, available at:

8. Relying on its extensive experience working with lawyers and journalists facing defamation claims in Europe, as well as reports and studies from prominent freedom of expression organisations and academia, the Intervener provides the following examples to illustrate the legal costs in defamation, privacy and related actions in other jurisdictions in the Council of Europe:
  - (i) Belgium – An investigative news outlet reported on the close relationship between a real estate developer and members of the local city council, which it alleged had resulted in the developer securing a series of lucrative contracts. The developer sued the outlet and the journalists. In 2021 the defamation claim was dismissed at the first instance court. The legal fees amounted to over €25,000.<sup>14</sup>
  - (ii) Italy - Two freelance journalists were sued over a documentary that exposed labour exploitation and other unlawful activity within the Church of Scientology. The church sued in defamation, seeking damages. The journalists won at the court of first instance and the lawyers’ legal fees amounted to approximately €7,000.
  - (iii) Poland - Grzegorz Rzekowski, an investigative journalist working at Polityka, a Polish weekly news magazine, faces multiple defamation actions after publishing investigations into a wiretapping scandal. In three ongoing cases the estimated legal costs have amounted to £6,725, £11,625, and £19,360.
  - (iv) Spain - Maldita.es, a fact-checking organisation, was sued by a website that regularly publishes stories that are subsequently debunked. The claim was brought to the Madrid Court of First Instance alleging interference with the website’s economic rights. The claim was dismissed by the first instance court. The lawyer’s fees were estimated as €3,327.50.
  - (v) Switzerland - In 2021, Gotham City, a weekly newsletter funded solely by its subscribers, published a story about corruption, fraud and money laundering on an international scale by a high-profile businessman. The businessman’s lawyers were granted an emergency injunction preventing publication of the article. The journalists succeeded in their defence and the injunction was lifted. The journalist’s legal fees amounted to approximately €2,600.
  
9. Compared to other European countries, in the UK defamation law remains procedurally complex and highly technical, and cases can last years before their resolution.<sup>15</sup> This procedural complexity increases legal costs, making defending defamation and privacy claims prohibitively expensive, which in turn has a chilling effect.<sup>16</sup> The findings of a 2008 study of costs in defamation proceedings across Europe, which was considered by this Court in *MGN Ltd v. UK* (“MGN”),<sup>17</sup> remain relevant today.<sup>18</sup> That report estimated that legal costs in UK cases were four times higher than the next most expensive jurisdiction, Ireland, which, in turn, was ten times more expensive than Italy. When the UK and Ireland were excluded from the calculation of the average legal costs across all jurisdictions, the UK legal costs were found to be 140 times more expensive than the average figure.<sup>19</sup>

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1093987/SLAPPs-call-for-evidence-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1093987/SLAPPs-call-for-evidence-response.pdf)

<sup>14</sup> Article 19, *SLAPPs against journalists across Europe - Media Freedom Rapid Response*, March 2022, p. 37, available at: <https://www.article19.org/wp-content/uploads/2022/03/A19-SLAPPs-against-journalists-across-Europe-Regional-Report.pdf>

<sup>15</sup> The Foreign Policy Centre, ‘*London Calling*’: *The issue of legal intimidation and SLAPPs against media emanating from the United Kingdom*, April 2022, p. 73, available at: <https://fpc.org.uk/publications/london-calling-the-issue-of-legal-intimidation-and-slapps-against-media-emanating-from-the-united-kingdom/>

<sup>16</sup> *Ibid.*

<sup>17</sup> ECtHR, *MGN Limited v UK*, App No. 39401/04, 18 April 2011, §186.

<sup>18</sup> University of Oxford, *A Comparative Study of Costs in Defamation Proceedings across Europe, Programme in Comparative Media Law and Policy*, The Centre for Socio Legal Studies, December 2008, available at:

<https://www.yumpu.com/en/document/view/11615181/a-comparative-study-of-costs-in-defamation-proceedings-the->

<sup>19</sup> *Ibid.*, p.3

10. The Intervener recognises the difficulty in comparing costs regimes in different countries that have different legal systems and procedures in specific cases. It does not seek to present the Court with an analysis of costs on a ‘like for like’ basis. However, the above examples illustrate why there is broad agreement among legal practitioners, policy makers and others, including the UK government, that costs in defamation cases in the UK far exceed the costs in every other jurisdiction in Europe.<sup>20</sup>

### **The emerging legislative and policy consensus on the impact that the costs regime in the UK has on the abilities of journalists to report on matters of public interest**

11. This Court has consistently emphasised the public’s interest in receiving information to facilitate participation in informed debate and deliberation.<sup>21</sup> Informed opinion emerges when the public is able to access information on matters of public concern and controversy.<sup>22</sup> For that information to be available the press must be able to publish it. In Europe, journalists routinely face threats of legal action from well-resourced parties who want to shut down reporting on public interest matters such as corruption or human rights abuses.<sup>23</sup> Many of those threats come from law firms based in the UK.<sup>24</sup> The prospect of being sued in the UK has a significant impact on a journalist or media organisation’s decision on whether to defend a claim that should be fought, may pressure them to settle otherwise valid claims at an early stage, and, further, can represent a deterrent to publishing material that is properly in the public interest.<sup>25</sup> These outcomes are directly antithetical to the animating principles underpinning the rights guaranteed by Article 10.
12. The UK’s Defamation Act 2013 was introduced in order to “modify some of the common law rules which were seen unduly to favour the protection of reputation at the expense of freedom of expression”.<sup>26</sup> The Act introduced a ‘serious harm’ threshold and a single publication rule, codified a number of defences, provided that a judge would decide the ‘natural and ordinary’ meaning of a publication (the artificial ‘single-meaning’ rule), and,

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<sup>20</sup> Recognising the effect of the UK’s excessive costs regime, the UK Secretary of State for Justice said the following in Parliament during a discussion on SLAPPs, “That is the harm we must guard against - publishers and authors forced to hesitate before publishing properly grounded stories, and legitimate, well-researched investigative reporting reined in, or perhaps not begun in the first place, for fear of the crushing legal costs. The most serious and surreptitious danger in all this is that SLAPPs then have a chilling effect on the transparency that is essential to a healthy democracy.” (underlining added) - UK Parliament, *Strategic Lawsuit Against Public Participation*, Volume 710: debated on Thursday 17 March 2022, available at <https://hansard.parliament.uk/commons/2022-03-17/debates/294F53A7-AD78-4ACC-B4B6-FC556CBA93B1/StrategicLawsuitsAgainstPublicParticipation>. See also, Article 19, *SLAPPs against journalists across Europe (Regional Report)*, March 2022, available at: <https://www.article19.org/wp-content/uploads/2022/03/A19-SLAPPs-against-journalists-across-Europe-Regional-Report.pdf>

<sup>21</sup> See ECtHR, *Von Hannover v Germany (no. 2)* [GC], App No. 40660/08 and 60641/08, 7 February 2012, §109.

<sup>22</sup> See, for example, ECtHR, *The Sunday Times v. the United Kingdom (no. 2)*, 26 November 1991, § 50, Series A no. 217. This position finds support in other jurisdictions and contexts; see UN General Assembly, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc No. A/68/362, 4 September 2013, available at: <https://undocs.org/A/68/362>, §19.

<sup>23</sup> See Article 19, *SLAPPs against journalists across Europe (Regional Report)*, March 2022, available at: <https://www.article19.org/wp-content/uploads/2022/03/A19-SLAPPs-against-journalists-across-Europe-Regional-Report.pdf>; See also, Article 19, *Europe: Journalists speak of the devastating impact of SLAPPs*, 20 September 2022, available at: <https://www.article19.org/resources/europe-journalists-speak-impact-slapps/>

<sup>24</sup> See for example, the case of Maltese journalist Daphne Caruana Galizia who, on the day she was murdered, received a letter threatening legal action from a London based law firm. She had also received threatening pre-action protocol letters from another London based law firm. See generally, Susan Coughtrie, *Unsafe for Scrutiny: Examining the pressures faced by journalists uncovering financial crime and corruption around the world*, Foreign Policy Centre, November 2020, available at: <https://fpc.org.uk/publications/unsafe-for-scrutiny/>

<sup>25</sup> The Foreign Policy Centre, *‘London Calling’: The issue of legal intimidation and SLAPPs against media emanating from the United Kingdom*, pp. 66-70, April 2022, available at: <https://fpc.org.uk/publications/london-calling-the-issue-of-legal-intimidation-and-slapps-against-media-emanating-from-the-united-kingdom/>

<sup>26</sup> The Supreme Court, *Lachaux v. Independent Print Ltd & anor* [2019] UKSC 27, 12 June 2019, at §1



as noted above, sought to restrict so-called ‘libel tourism’.<sup>27</sup> Despite these changes to the law, claimants continue to bring defamation claims in the UK in circumstances where they have only a tenuous link to that jurisdiction.<sup>28</sup> The UK’s costs regime, in the context of lengthy and complex proceedings, where the burden of proof lies with the defendant, means the threat of litigation is often enough to prevent publication.<sup>29</sup> The impact of the costs regime applies therefore not just to litigation, but also at the pre-action stage, where it can have a chilling effect.<sup>30</sup>

13. The legal costs of defending defamation and privacy cases, the risk of being held liable for significant costs amounts, and the consequences for press freedom have been the subject of extensive legislative debate in both the UK and European Union recently.<sup>31</sup> Two recent high-profile cases before the English High Court illustrate these concerns.
14. The first case concerned an action brought against the author of the book, ‘Putin’s People’.<sup>32</sup> Just before the expiry of the one year statute of limitations on defamation claims Russian oligarchs mentioned in the book, and who were subsequently sanctioned by the UK government,<sup>33</sup> brought five separate sets of legal proceedings against the author and her publishing house, in the UK courts.<sup>34</sup> When giving evidence before a parliamentary inquiry into the use of the UK’s courts to harass and intimidate the press, Ms Belton stated that, “The system is stacked in favour of deep-pocketed litigants from the outset. My cases are now pretty well known, but they are just the tip of an iceberg; there are journalists who have been censoring themselves, particularly about the activities of Russian oligarchs, for a very long time.”<sup>35</sup> The costs of defending the five claims amounted to £1.5 million.<sup>36</sup>
15. The second case concerned a defamation claim brought against journalist and author, Tom Burgis. He was sued by a company over passages in his book, ‘Kleptopia’, relating to allegations of murder. The case was dismissed in early 2022.<sup>37</sup> Mr Burgis also appeared at the parliamentary inquiry and gave a vivid account of the levels of harassment and intimidation he endured prior to the book’s publication, mainly by London-based law firms.<sup>38</sup> He noted that, despite that case, and a related case, being dismissed, the litigation

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<sup>27</sup> See Section 1 (Serious Harm) and Section 8 (Single Publication Rule) of the Defamation Act 2013.

<sup>28</sup> See for example, England and Wales High Court (QBD), *Kumlin and anor v Jonnson and others* [2022] EWHC 1095 (Admin) 11 May 2022, where a Swedish citizen based in Monaco sued a Swedish business news website in the UK over a number of Swedish language publications, available at: [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2022/1095.html&query=\(realtid\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2022/1095.html&query=(realtid))

<sup>29</sup> See for e.g. Press Gazette *Future of Media, UK is SLAPP tourism capital of Europe but scale of ‘iceberg’ problem is not fully known*, 1 June 2022, available at: <https://pressgazette.co.uk/media-law/uk-slapp-libel-tourism-capital-europe/>.

<sup>30</sup> *Ibid.*

<sup>31</sup> See for e.g. UK Parliament Hansard, *Lawfare and UK Court System*, Volume 707: debated on Thursday 20 January 2022, available at: <https://hansard.parliament.uk/commons/2022-01-20/debates/4F7649B7-2085-4B51-9E8C-32992CFF7726/LawfareAndUKCourtSystem>. See also English Pen, *UK Anti-SLAPP Coalition: Model Anti-SLAPP Law*, available at: <https://www.englishpen.org/posts/campaigns/uk-anti-slapp-coalition-model-anti-slapp-law/>

<sup>32</sup> Catherine Belton, *Putin’s People*, published by William Collins, 2020. Claims were also brought against the publisher.

<sup>33</sup> See the UK Sanctions List, available at: <https://www.gov.uk/government/publications/the-uk-sanctions-list>

<sup>34</sup> See for example the case of *Abramovich v HarperCollins Publishers Ltd and Catherine Belton* [2021] EWHC 3154 (QB)

<sup>35</sup> House of Commons, *Foreign Affairs Committee – oral evidence: Use of strategic lawsuits against public participation*, HC 1196, 15 March 2022, p.4, available at: <https://committees.parliament.uk/oralevidence/9907/pdf/>

<sup>36</sup> *Ibid.*, p.4

<sup>37</sup> *Ibid.*

<sup>38</sup> House of Commons, *Foreign Affairs Committee – oral evidence: Use of strategic lawsuits against public participation*, HC 1196, 15 March 2022, p.9, available at: <https://committees.parliament.uk/oralevidence/9907/pdf/>

had a substantial financial impact on his publisher.<sup>39</sup>

16. These cases highlight the challenges faced by journalists sued in the UK. In both cases, the journalists concerned were able to rely on the financial support of large publishing houses. That support is not available for independent journalists and publishers, such as the applicants in this case.<sup>40</sup> Related to that concern, there are less high-profile instances where journalists were threatened but not sued, or where proceedings were issued and then dropped, because the journalist could not afford to defend a case and so acceded to a demand not to publish a story they knew to be true.<sup>41</sup>
17. In March 2022, the UK government launched a ‘Call for Evidence’ in connection with its consultation on SLAPPs.<sup>42</sup> In their various submissions, media organisations, NGOs, academics, and legal practitioners identified the key issue affecting their ability to publish public interest stories as the risk of being sued, and thereby incurring excessive legal costs, particularly because such legal costs escalate rapidly early in the proceedings.<sup>43</sup> Among the main concerns identified by free speech organisations in the UK is the fact that the costs regime takes no account of the means of the journalist being sued<sup>44</sup>, and ignores a key principle, developed through this Court’s Article 10 case law, that the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the right to freedom of expression.<sup>45</sup> As noted below, this Court has considered excessive costs to amount to a penalty in the context of an unjustified interference with Article 10 rights.<sup>46</sup>
18. Following the UK government’s indication that it would introduce legislation to address the problem of SLAPPs,<sup>47</sup> these organisations published a Model Anti-SLAPP Law which, in its draft provisions, highlights three objectives of reform: (i) the disposal of abusive law suits as quickly as possible, (ii) the exercise of tight control over the conduct of cases to minimise costs, and (iii) the structuring of the costs regime in a way that disincentives abusive law suits.<sup>48</sup> Clause 5 of the Model Law states:  
“Even if no features of abuse are identified, or if an abusive lawsuit against public

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<sup>39</sup> *Ibid* pp.9 and 16.

<sup>40</sup> For an overview of additional, interconnected, challenges faced by journalists in the UK see, The Foreign Policy Centre, ‘*London Calling*’: *The issue of legal intimidation and SLAPPs against media emanating from the United Kingdom*, April 2022, pp. 41-49, available at: <https://fpc.org.uk/publications/london-calling-the-issue-of-legal-intimidation-and-slapps-against-media-emanating-from-the-united-kingdom/>.

<sup>41</sup> Susan Coughtrie, *The UK as a key nexus for protecting media freedom and preventing corruption globally*, FPC, 9 December 2020, <https://fpc.org.uk/the-uk-as-a-key-nexus-for-protecting-media-freedom-and-preventing-corruption-globally/>

<sup>42</sup> Ministry of Justice, *Strategic Lawsuits Against Public Participation – A call for Evidence*, 17 March – 19 May 2022, available at: [https://consult.justice.gov.uk/digital-communications/strategic-lawsuits-against-public-participation/supporting\\_documents/slappscallforevidencewebsite.pdf](https://consult.justice.gov.uk/digital-communications/strategic-lawsuits-against-public-participation/supporting_documents/slappscallforevidencewebsite.pdf)

<sup>43</sup> Ministry of Justice, *Strategic Lawsuits Against Public Participation (SLAPPs) – Government Response to the Call for Evidence*, 20 July 2022, available at: <https://consult.justice.gov.uk/digital-communications/strategic-lawsuits-against-public-participation/results/slapps-call-evidence-response.pdf>, see §36: “It was noted, by multiple Defendant and media respondents, that costs can reach hundreds of thousands of pounds before a case even reaches trial. Many respondents agreed that it would be helpful for reforms to offer levers to control costs and provide greater costs certainty in these cases.”

<sup>44</sup> Rule 44.4(3) of the Civil Procedure Rules sets out the factors a court must consider when deciding on the amount of recoverable costs. It fails to mention the means of the defendant. Available at - <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs#rule44.3>

<sup>45</sup> ECtHR, *Cumpănă and Mazăre v. Romania* [GC], App. No. 33348/96, 17 December 2004, §111

<sup>46</sup> See §§22-25 below.

<sup>47</sup> See announcement of the Secretary of State for Justice in the House of Commons, 17 March 2022, available at: <https://hansard.parliament.uk/commons/2022-03-17/debates/294F53A7-AD78-4ACC-B4B6-FC556CBA93B1/StrategicLawsuitsAgainstPublicParticipation>.

<sup>48</sup> UK Model Anti-SLAPP Law, available at <https://www.indexoncensorship.org/wp-content/uploads/2022/11/Model-UK-Anti-SLAPP-Law-Final-Version.docx.pdf>

participation successfully passes the merits threshold, it is still crucial for acts of public participation to be protected against excessive costs. This is because such costs can themselves work to deter acts of public participation, and in many cases will prevent defendants from fighting such cases.”<sup>49</sup>

19. The European Union has also identified the prevalence of SLAPPs as a serious threat to democracy.<sup>50</sup> In April 2022, the EU Commission launched its proposal for an anti-SLAPP Directive. The Directive focuses on costs, with an emphasis on the difficulties cross-border litigation has on defendants, noting that “where cross-border implications exist, they add an extra layer of complexity and costs, with even more adverse consequences for defendants. The fact that online media content is accessible across jurisdictions may open the way for forum shopping and hamper effective access to justice and judicial cooperation.”<sup>51</sup>

### **The role of legal costs in defamation and privacy cases in the interpretation and application of Article 10**

20. This Court has consistently held that Article 10 of the Convention requires member states to safeguard the right to freedom of expression by creating a favourable environment for participation in public debate and establishing an effective system of protection of journalists.<sup>52</sup> One aspect of creating a favourable environment for the expression of opinions and ideas is the state’s role in ensuring procedural fairness and equality of arms in defamation and privacy proceedings. This also invokes the application of fair trial rights under Article 6(1) of the Convention. This Court has considered the interaction between Articles 6 and 10 rights on two occasions, both involving the UK. In both cases, the Court found a violation of Article 10 because of the chilling impact that excessive legal costs and inequality of arms in defamation and privacy proceedings had on freedom of expression.
21. As discussed above, despite adopting certain reforms, the costs burden associated with defamation and privacy proceedings in the UK continues to raise concerns about the impact such costs have on press freedom, particularly for small publishers and individual journalists. Having regard to this Court’s case law under Article 6 and Article 10, a costs regime that permits costs orders in defamation and privacy proceedings that are so excessive they have the effect of forcing journalists to settle rather than pursuing meritorious defences is not compatible with the Convention because of the chilling effect on press freedom. The costs burden imposed in such proceedings should be proportionate to the applicant’s means and resources, and to the outcome of the proceedings.

#### *Interaction Between Article 10 and Article 6 Rights*

22. In its 2011 judgment in *MGN*, this Court had to balance the rights provided for under Articles 6 and 10 of the Convention and concluded that a costs order that included success fees violated Article 10. In that case, the applicant, a publisher, was ordered to pay substantial success fees, having unsuccessfully defended an action concerning an invasion of privacy, which ultimately settled. The Court accepted that success fees under Conditional

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<sup>49</sup> *Ibid*, pp. 6-7.

<sup>50</sup> See Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee of the Regions 2021, Rule of Law Report – The rule of law situation in the European Union, CM/2021/700 final, 20 July 2022, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1634551652872&uri=CELEX%3A52021DC0700>

<sup>51</sup> European Commission, *Proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings* (“Strategic lawsuits against public participation”) 27 April 2022, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0177&from=EN>

<sup>52</sup> ECtHR, *Dink v Turkey*, App No. 2668/07, 14 September 2010, §137; ECtHR, *Khadija Ismayilova v Azerbaijan*, App Nos. 65286/13 and 57270/14, 10 January 2019, §158; ECtHR, *Özgür Gündem v Turkey*, App No. 23144/93, 16 March 2000, §43.



Fee Agreements (“CFAs”) within the UK costs regime were introduced to achieve the widest public access to courts and legal representation through the use of private funds, a legitimate aim under Article 6.<sup>53</sup> However, it concluded that the UK’s scheme permitting recovery of success fees from an unsuccessful defendant violated the applicant’s Article 10 rights and constituted interference with freedom of expression that was disproportionate and not “necessary in a democratic society.”<sup>54</sup>

23. In doing so, the Court made extensive reference to and relied on the 2010 findings of Lord Justice Jackson’s wide-ranging review of the UK civil litigation costs system (“Jackson Review”), which expressed concerns about the role and impact of recoverable success fees in defamation proceedings.<sup>55</sup> The “depth and nature of the flaws... accepted in important respects by the Ministry of Justice” led this Court to conclude that the “impugned scheme exceeded even the broad margin of appreciation to be accorded to the State in respect of general measures pursuing social and economic interests.”<sup>56</sup> The Court had regard to the finding that a system of recoverable success fees had a “blackmail” or “chilling” effect, where the cost burden was “so excessive that often a party was driven to settle early despite good prospects of a successful defence.”<sup>57</sup>
24. This Court has therefore already found that recoverable success fees under the UK costs regime are an undue interference with free speech, insofar as they expose journalists to the risk of substantial cost burdens that force journalists either to refrain from publishing material of public importance or settle cases brought against them. The Court has also applied the “most careful scrutiny” to measures capable of “discouraging the participation of the press in debates over matters of legitimate public concern.”<sup>58</sup> Consequently, any costs measure that can cause a chilling effect on freedom of expression and public debate constitutes a violation of Article 10.
25. Subsequently, in its 2015 judgment in *Steel and Morris v UK*, this Court recognised that a violation of Article 6 rights also gave rise to a violation of Article 10.<sup>59</sup> In that case, the applicants, individuals associated with a campaign group, were denied legal aid in defamation proceedings brought by McDonald’s. The Court considered that the denial of legal aid deprived them of the opportunity to defend the defamation proceedings effectively and “contributed to an unacceptable inequality of arms” in violation of Article 6.<sup>60</sup> Although defamation proceedings constituted a legitimate interference with Article 10 rights, the procedural inequality between the parties meant that the interference with the applicants’ Article 10 rights was not proportionate, having regard to the general interest in promoting the free circulation of information and the possible “chilling” effect on others.<sup>61</sup> Consequently, where defamation proceedings are unfair and are in breach of Article 6, this will also give rise to a breach of Article 10.<sup>62</sup>
26. The principles from these cases were contextualised in Recommendation CM/Rec(2016)4 on the protection of journalism, which the Committee of Ministers of the Council of Europe adopted in 2016. The Principles to that Recommendation state:

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<sup>53</sup> ECtHR, *MGN Limited v UK*, App No. 39401/04, 18 April 2011, §197.

<sup>54</sup> *Ibid.*, §§ 198-220.

<sup>55</sup> *Ibid.*, §§ 207-210.

<sup>56</sup> *Ibid.*, §217.

<sup>57</sup> *Ibid.*, §209.

<sup>58</sup> *Ibid.*, §201, citing ECtHR, *Jersild v. Denmark*, App No. 15890/89, 23 September 1994, § 35; ECtHR, *Bladet Tromsø and Stensaas v Norway*, App No. 21980/93, 20 May 1999, § 64.

<sup>59</sup> ECtHR, *Steel and Morris v UK*, App No. 68416, 15 February 2015, § 95.

<sup>60</sup> *Ibid.*, § 72.

<sup>61</sup> *Ibid.*, § 95.

<sup>62</sup> *Ibid.*, § 95.

“The frivolous, vexatious or malicious use of the law and legal process, with the high legal costs required to fight such law suits, can become a means of pressure and harassment, especially in the context of multiple law suits. ... In this respect, it should be recalled that it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side. States are therefore required to take appropriate measures, which could include the institution of a legal aid scheme, in order to ensure that each side is afforded a reasonable opportunity to present his or her case.”<sup>63</sup>

#### *Developments in the UK Since MGN*

27. Following the Jackson Review, the UK Parliament passed the Defamation Act 2013 with the specific purpose of rebalancing the competing interests of the right to freedom of expression and the protection of reputation.<sup>64</sup> One of the aims of the Act was to “offer more effective protection for freedom of speech and to stop the threat of long and costly libel proceedings being used to stifle responsible investigative reporting.”<sup>65</sup> Further to this Court’s finding in *MGN*, in April 2019, the UK Government also implemented reforms such that success fees are no longer recoverable from unsuccessful defendants in defamation and privacy claims.<sup>66</sup>

28. Despite these reforms, the recent legislative and policy concerns around the threats that SLAPPs pose to freedom of speech and a free press demonstrate that the UK costs regime still permits costly legal proceedings to be used to interfere with freedom of expression and silence responsible journalism. Even though success fees under CFAs are no longer recoverable in defamation proceedings, prohibitively high costs can be incurred early on in proceedings through the (mis)use of legal processes, because costs are uncapped.<sup>67</sup>

#### *Relevant Case Law on Procedural Fairness and Equality of Arms Under Articles 6 and 10*

29. This Court held in *Steel and Morris* that procedural unfairness in defamation proceedings under Article 6(1) of the Convention also gives rise to a violation of Article 10 rights. Consequently, this Court’s Article 6 jurisprudence is also relevant to the interpretation and application of Article 10 in cases concerning the role and impact of legal costs.

30. Where Article 6(1) is concerned, the Court has employed an effects-based approach, assessing the impact of the measures or restrictions on the applicant, considering their financial standing and the resources available to them.<sup>68</sup> This Court has found violations of Article 6 when court fees required to commence legal proceedings are excessively large in light of the financial resources available to the applicant.<sup>69</sup> It has also found that the

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<sup>63</sup> Council of Europe, *Committee of Ministers’ Recommendation CM/Rec(2016)4 to member States on the protection of journalism and the safety of journalists and other media actors*, Adopted by the Committee of Ministers on 13 April 2016 at the 125<sup>th</sup> meeting of the Ministers’ Deputies, § 36, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016806415d9#\\_ftn1](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1)

<sup>64</sup> See Defamation Act, Originated in the House of Commons, Session 2012-13, available at: <https://bills.parliament.uk/bills/983#:~:text=Summary,and%20the%20protection%20of%20reputation.>

<sup>65</sup> Commons 3rd reading, 2 Sep 2012 : Column 367, available at: [https://publications.parliament.uk/pa/cm201213/cmhansrd/cm120912/debtext/120912-0003.htm#column\\_366](https://publications.parliament.uk/pa/cm201213/cmhansrd/cm120912/debtext/120912-0003.htm#column_366)

<sup>66</sup> See Costs protection in defamation and privacy claims: the Government’s proposals, available at: <https://consult.justice.gov.uk/digital-communications/costs-protection-in-defamation-and-privacy-claims/>

<sup>67</sup> *Ibid.*, See Impact on SLAPPs recipients.

<sup>68</sup> ECtHR, *Cindrić And Bešlić V Croatia*, App No. 72152/13, 6 September 2016, §98.

<sup>69</sup> ECtHR, *Weismann and Others v. Romania*, App No. 63945/00, 4 May 2006, §40 (“In contrast, the Court holds that the amount claimed from the applicants in order to lodge their action was excessive. As a result, they were **implicitly obliged to abandon the action**, which deprived them of the right to have their case heard by the court”); ECtHR, *Teltronic-CATV v Poland*, App No. 48140/99, 10 January 2006, §63. See also ECtHR, *Podbielski and PPU Polpure v Poland*, App No. 39199/98, 26 July 2005, § 66-69.

imposition of a considerable financial burden after the conclusion of proceedings,<sup>70</sup> or requiring an applicant to bear costs of a counterparty's representation,<sup>71</sup> are both inconsistent with Article 6 where the imposition of such costs is disproportionate to the applicant's financial means and has "unacceptable consequences"<sup>72</sup> or "impaired the very essence of the applicant's right of access to court."<sup>73</sup> This is significant when assessing the proportionality of the interference under Article 10.<sup>74</sup>

31. This approach is consistent with this Court's case law under Article 10 itself. The assessment of proportionality under Article 10 also considers the size of any award made in defamation proceedings. This Court has required that, in cases concerning the award of damages for defamation, there be a "reasonable relationship of proportionality to the injury to reputation suffered" and the amounts awarded.<sup>75</sup> In determining whether a given sanction met the proportionality requirement under Article 10, both the principal liability (in that case a criminal sanction) and the legal costs must be taken into account.<sup>76</sup>
32. Based on these cases, the Intervener submits that a costs regime permitting excessive costs burdens in defamation and privacy cases, having regard to the resources available to the applicant, is a disproportionate interference with Article 10. Consistent with *Steel and Morris*, where legal costs are so high that they are likely to force journalists to settle rather than pursue meritorious defences in defamation proceedings, this constitutes a restriction on the right to access a court under Article 6(1), which in turn has a chilling effect on the media and press freedom in violation of Article 10. It is therefore necessary to scrutinise the costs burden imposed on defendants in defamation and privacy claims, considering their financial standing and resources available to them and the outcome of the proceedings, so as to assess the impact of the costs burden on both their Article 6 and 10 rights.

## Conclusion

33. Restrictions on the right to freedom of expression must be construed strictly and their need must be convincingly established. Restrictions that are imposed because of a costs regime that applies in the context of an overly complex legal system cannot be considered necessary or proportionate within the meaning of Article 10(2). The Intervener submits that the costs in UK defamation and privacy cases are rarely proportionate. They are also unnecessary as they are not required to vindicate a competing right. Their effect extends beyond the UK, resulting in the unjust interference with the Article 10 rights of journalists throughout the territory of the Council of Europe. This Court has recognised that the press is entitled to 'enhanced protection'.<sup>77</sup> In the UK context, that protection can only be effective where there are procedural safeguards in place to ensure a proportionate costs regime applies to defamation and privacy cases.

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<sup>70</sup> ECtHR, *Klauz v Croatia*, App No. 28963/10, 18 July 2013

<sup>71</sup> ECtHR, *Stankov v Bulgaria*, App No. 68490/01, 12 July 2007, §51-67; see also ECtHR, *Cindrić and Bešlić v. Croatia*, App No. 72152/13, 6 September 2016, §122.

<sup>72</sup> ECtHR, *Klauz v. Croatia*, App No. 28963/10, 18 July 2013, §96.

<sup>73</sup> *Ibid.*, §97.

<sup>74</sup> ECtHR, *Steel and Morris v. UK*, App No. 68416, 15 February 2015, § 95.

<sup>75</sup> ECtHR, *Tolsay Miloslavsky v. UK*, App No. 18139/91, 13 July 1995, §49.

<sup>76</sup> ECtHR, *Ileana Constantinescu v Romania*, Request No. 32563/05, §49. "... [g]iven the severity of a criminal sanction coupled with an award of damages, plus the reimbursement of legal costs, the Court considers that the means employed were disproportionate to the aim pursued, namely 'the protection of the reputation or rights of others'."

<sup>77</sup> ECtHR, *The Sunday Times v. the United Kingdom (no. 2)*, App No. 13166/87, 26 November 1991, §50.