

THIRD DISTRICT COURT OF THE CITY OF VILNIUS

Claimant:

Public Enterprise Republican Vilnius Mental Hospital

Respondents:

1. Public Enterprise Human Rights Monitoring Institute
2. Public Enterprise Global Initiative on Psychiatry
3. Viltis: Lithuanian Welfare Society for People with Mental Disability
4. Public Enterprise Vilnius Centre for Psychological and Social Rehabilitation

COMPLAINT

Concerning the discredit of a legal person and awarding of non-pecuniary damages of 50,000 Lt

ARTICLE 19 SUBMISSION AS A THIRD PARTY INTERVENOR

Application by prospective Intervenor

1. **ARTICLE 19** makes application to the Third District Court of the City of Vilnius for permission to intervene in the above complaint, which concerns allegedly defamatory statements made in a project report entitled *Human Rights Monitoring in Closed Mental Health Care Institutions*¹ and which was prepared by the Respondents

¹ Published Vilnius, May 2005.

following a two stage inspection of publicly run institutions within the mental health care system of Lithuania.

2. The intervention sought by ARTICLE 19 is limited to written arguments. ARTICLE 19 does not seek permission to attend before the Court for oral argument.²

3. ARTICLE 19 is an international non-governmental organisation (NGO) dedicated to the defence of freedom of expression and human rights. ARTICLE 19 takes its name from Article 19 of the Universal Declaration of Human Rights. ARTICLE 19 is an international human rights organisation that works globally to protect and promote the right to freedom of expression. It is based in London, has offices in different regions of the world, and has active programmes in Europe (including western Europe), Latin America, the Middle East, Asia and Africa. ARTICLE 19 cooperates with international bodies such as the United Nations Special Rapporteur on Freedom of Opinion and Expression and the Organisation for Security and Cooperation in Europe Representative on Freedom of the Media to help develop international standards on freedom of expression, and sits as an observer member on several Council of Europe Expert Committees. ARTICLE 19 is well known for its authoritative work in elaborating the implications of the guarantee of freedom of expression, including in the area of defamation.³ ARTICLE 19 regularly intervenes in court proceedings at national, European and other international court levels.⁴

² The proposed Intervenor seeks no order as to costs or financing.

³ Its leading publication in this area, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London: ARTICLE 19, 2000), for example, was endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression. See Report of the Special Rapporteur on the promotion

Admissibility of Intervention

4. Interventions by third parties in cases which involve issues of fundamental rights and public policy are increasingly permitted and encouraged in different jurisdictions. The overriding reason for this is that Intervenors, by focusing on issues of wider public importance to the case, can bring information to the Court that would not otherwise be available to it.

5. The *European Convention on Human Rights* (ECHR)⁵ allows interventions as an important system to ensure that the Court has high-quality material before it, highlighting public policy implications raised by the case or by providing specific expertise, including on international and comparative law. Article 36 of the ECHR permits “any person concerned” to intervene if this is considered to be “in the interest of the proper administration of justice”, and in practice, human rights organisations regularly intervene in cases where the issues concern their areas of independent expertise.⁶ In addition, Protocol 14 to the Convention⁷ makes specific provision for intervention by the Commissioner for Human Rights. The aim of this, again, is to

and protection of the right to freedom of opinion and expression, 13 February 2001, UN Doc. E/CN.4/2001/64, para. 48.

⁴ ARTICLE 19 has intervened in several cases before the European Court of Human Rights, including in *The Observer and Guardian v. the United Kingdom*, 26 November 1991, Application No. 13585/88; *Prager and Oberschlick v. Austria*, 26 April 1995, Application No. 15974/90 and *Incal v. Turkey*, 9 June 1998, Application No. 22678/93. We recently intervened before the Inter-American Court of Human Rights in *Ulloa v. Costa Rica*, Series C No. 107, of 2 July 2004.

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 5, in force 3 September 1953.

⁶ See, for example, European Roma Rights Centre in *Chapman v UK*, 18 January 2001, Application No. 24882/94; Interights in *MC v Bulgaria*, 14 December 2003, Application No. 39272/98; Amnesty and Justice in *Chahal v UK*, 15 November 1996, Application No. 22414/93.

⁷ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, C.E.T.S. No. 194, not yet in force.

allow information to be put before the Court concerning wider public policy implications raised by the case.

6. A number of European domestic courts also allow interventions by independent third parties. In the United Kingdom, for example, interventions are accepted in superior courts of record under procedural rules developed as a result of courts' willingness to be assisted by NGOs in matters of fundamental rights of national and international importance.⁸ The usefulness of interventions was underlined in a recent appellate case, in which the Court noted: "The most apparent value of interventions is ... where aspects of the public interest in a legal issue of general importance may be represented by neither of the two parties before the court. Both NGOs and ministers may play a valuable role here". It was also stated that "where there is likely to be a strong policy element in the decision, the perspective of bodies representative of the differing interests involved may be extremely helpful in enabling the court to strike the right balance between the various policy considerations."⁹

7. A similar observation was recently made by the Argentinean Supreme Court, allowing a third party intervention despite there being no provision for this in legal procedure because the case before it raised issues of "transcendental interest".¹⁰ Similarly, in a recent Irish case,¹¹ the United Nations High Commissioner for

⁸ For example, 17 different organisations including the Commonwealth Lawyers Society and Amnesty International were heard as intervenors in a recent case involving the question whether evidence obtained through torture might be accepted by a court. See *A and X v. Secretary of State for the Home Department*, [2005] UKHL 71.

⁹ Lady Hale in *Roe v Sheffield City Council*, 2003 EWCA Civ 1.

¹⁰ SC Case 28/204.

¹¹ *I v. Minister for Justice Equality and Law Reform*, (2003) IESC 42.

Refugees was permitted to intervene in the absence of specific rules permitting this, because of the advantage to the court in determining the wider issues before it which in an adversarial contest between two parties might not otherwise be available.

8. The utility of interventions by independent third parties has been an established feature of the justice systems in the USA and Canada for several years, and is a developing feature of justice in European jurisdictions where human rights issues are involved, whether through the exercise of the courts inherent power to regulate its process or through statutory amendment. The domestic jurisdictions of the Czech Republic,¹² Bulgaria and Poland accept interventions on human rights issues.

ARTICLE 19 has had an intervention on freedom of expression accepted in Poland¹³ and the international human rights organisation 'Interights' has intervened in discrimination cases in Bulgaria where the courts have exercised their inherent right to regulate their own processes in the absence of specific procedural rules.

9. In Member States of the Council of Europe, subject to the jurisdiction of the European Court of Human Rights and other international treaties which are the foundation of the jurisprudence of human rights, there is strong appreciation of the *universality* of human rights issues and the international importance of domestic decisions in promulgating and advancing the understanding and application of essential human rights related principles. This appreciation has resulted in

¹² S69(2) of Act on Constitutional Court 1993 provides for the Public Protector of Rights to intervene on human rights issues.

¹³ *Kwasniewski v. Zycie*, 1998. The case was litigated all the way to the Supreme Court.

interventions being accepted from governmental and non-governmental bodies which are capable of assisting courts on specific issues.

10. We understand that Lithuanian domestic law does not yet include specific procedural rules for intervention but, at the same time, we appreciate that the Lithuanian justice system (including the Constitutional Court) is fully committed to the principles of international human rights law to which it has been committed since ratifying the *European Convention on Human Rights*¹⁴ and the *International Covenant on Civil and Political Rights*.¹⁵ We are equally aware that Lithuania has a history of liberal compliance on Convention rights, having also enshrined them in written constitutional principles.

11. ARTICLE 19 is a reputable international organisation which is independent of and not associated with the Claimant or the Respondents in this case. Its interest in this case relates exclusively to the issues raised regarding the appropriate scope of limitations on the right to freedom of expression in the context of public debate which the Court is being asked to assess.

12. Within this context, we submit that on the basis of the principles of intervention codified by Article 36 of the European Convention, and the increasing acceptance of interventions on human rights issues by the domestic courts of other Council of

¹⁴ On 20 June 1995.

¹⁵ On 20 February 1992. UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

Europe Member States, the proposed Intervenor should be permitted to assist the Court in the present claim.

Summary of the Intervenor's Arguments

13. The right to freedom of expression, which includes the right to both disseminate and to receive information, is internationally recognised as one of the most fundamental rights in a democratic state. This case raises important issues regarding freedom of expression and information in Lithuania. The Court's ruling will have implications for future debate on matters of public interest, and for NGOs and charities wishing to safeguard the interests of vulnerable people, such as those detained in mental institutions.
14. This case involves an NGO being sued by the State, in the form of a Government-funded hospital that falls under the direction of a government ministry, for publishing a report concerning a matter of crucial public importance and interest in Lithuania, namely how Lithuanian psychiatric hospitals, in general, tend to treat their inmates and whether this treatment accords with international best practice.
15. The Intervenor submits that the Claimant's interpretation of Article 2.24 of the Law on Public Information, on which it bases its claim, is at odds with internationally recognised principles and the jurisprudence of the Lithuanian Constitutional Court concerning the right to freedom of expression.

16. The Claimant suggests that the only defence open to the Respondents is to prove the precise truth of each and every one of the statements of fact and statements of opinion in their Report. This claim contravenes the well-established principle, recognised repeatedly by the European Court of Human Rights, that no person can be required to prove the truth of an opinion. The Claimant also takes no account of the important role ‘civil society’ (which includes NGOs such as the Respondents) plays as watchdog, particularly over public institutions such as hospitals, and in ensuring that they carry out their responsibilities appropriately. To fulfil that role, NGOs must be able to research and publish reports that contribute to public debate on issues of concern. As a result, we submit that the statements in contention in this case should be held to be protected by the guarantee of freedom of expression.

17. Furthermore, the Intervenor notes that the Claimant is claiming 50,000 Lt in damages (the equivalent of approximately EUR 15,000). The Intervenor submits that such an award would be disproportionate, even were the Court to find that the Claimant’s substantive claim is justified. We submit that, in case the Court holds the Respondents liable in defamation, as a public body, the Claimant should only be able to recover actual losses in damage.

18. Further, the Intervenor notes that at page 8 of its Complaint the Claimant details the reason for requesting this quantum, *inter alia*, as follows:

Non-pecuniary damages were incurred in the form of... efforts thereof to ensure appropriate conditions of treatment and residence during the treatment of the patients.

We submit that the Claimant appears to be holding contradictory positions. On the one hand, its Complaint alleges that the Respondents' allegations in the Report are unfounded; yet it simultaneously argues that it has had to expend money correcting the breaches alleged in the Report.

19. For these reasons, the Intervenor argues that the action should be dismissed. Should the Court find that the report was defamatory, the Intervenor submits that the Court should limit itself to granting only damages as correspond to actual losses proven by the Claimant.

Applicable Principles

20. The Intervenor submits that Article 2.24 of the Law on Public Information, on which the Complaint is based, must be interpreted in light of Article 25 of the Lithuanian Constitution and Article 10 of the ECHR. If it cannot be so interpreted, Article 2.24 as a whole should be found to be unconstitutional, as provided for in Article 7 of the Constitution, in conjunction with Article 6.

21. The Lithuanian Constitution clearly places a high value on freedom of expression. The Constitution guarantees, *inter alia*, the right of individuals to express convictions and impart information. Permissible restrictions on this right are expressly set out and narrowly defined in Article 25:

Individuals shall have the right to have their own convictions and freely express them. Individuals shall not be hindered from seeking, obtaining or disseminating information or ideas.

Freedom to express convictions, as well as to obtain and disseminate information, may not be restricted in any way other than as established by law, when it is necessary for the safeguard of the health, honour and dignity, private life, or morals of a person, or for the protection of constitutional order.

Freedom to express convictions or impart information shall be incompatible with criminal actions – the instigation of national, racial, religious or social hatred, violence or discrimination, the dissemination of slander, or misinformation.

Citizens shall have the right to obtain any available information which concerns them from State agencies in the manner established by law.

22. This follows very closely the text of Article 10 of the European Convention on

Human Rights, which guarantees freedom of expression in the following terms:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

23. Article 25's recognition of the importance of freedom of expression is bolstered by the Preamble to the Constitution, which recognises the importance of the rule of law and democratic principles in Lithuanian society; Article 44 of the Constitution, which prohibits censorship of the mass media; and Article 33 of the Constitution, which recognises the constitutional right of citizens to criticise State institutions.

24. The Lithuanian Constitutional Court has repeatedly held that Article 10 of the ECHR is relevant to interpretation of Article 25.¹⁶ Article 138 of the Lithuanian Constitution establishes the principle of the direct effect of international law, which means that the international standards set out in Article 10 of the ECHR can be invoked directly before Lithuanian courts.

25. These constitutional rights are also recognised in statutory form. The Law on Provision of Information to the Public 1996¹⁷ states:

Article 4

Every person shall have the right to freely express his ideas and convictions. This right encompasses freedom to maintain one's opinion, to seek, receive and disseminate information and ideas in accordance with the conditions and procedure set out in the laws.

Article 9

Every person shall have the right to publicly criticise the activities of state and municipal institutions and agencies as well as officials. Persecution for criticism shall be prohibited in the Republic of Lithuania.

26. The right to freedom of expression is not absolute. The Constitutional Court has recognised that it may, in certain circumstances, be limited. The principles can be summarised as follows:

The restrictions of rights and freedoms of the person are considered to be grounded if: firstly, they are legitimate, i.e. a possibility to restrict rights and freedoms of the person is provided for by the laws which have been publicly promulgated, while their norms are formulated sufficiently distinctly; secondly, they are necessary in a democratic society; thirdly, they have to be aimed at the defence of such values as state security, territorial integrity or the protection of society, interests of public order, health or morals of people, etc.

The Constitutional Court has held in its rulings more than once that, under the Constitution, human rights and freedoms, thus, the right to obtain and impart information may be restricted if the following conditions are not observed: it is done by the law; the restrictions are necessary in a democratic society in order to protect the rights and freedoms of other persons and values entrenched in the Constitution, as well as constitutionally significant objectives; the restrictions do not deny the

¹⁶ See, for example, the rulings of the Constitutional Court dated 26 January 2004 and 19 December 2004.

¹⁷ Amended in 2004.

nature and the essence of rights and freedoms; the constitutional principle of proportionality is observed.

It has also to be noted that the European Convention on Human Rights and Fundamental Freedoms also provides for possibilities to restrict this right to obtain and impart information.¹⁸

The Court has also stated:

However, the protection of common interests in a democratic state may not deny the human right to information as such. The doctrine of human rights and freedoms, as well as the international and national law which are based on the former, links the solution of this issue with the rational relation of legal values which guarantees that the essence of the respective human right is not violated. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms guaranteeing the right for the individual to hold opinions, to receive and impart information and ideas provides for an opportunity to restrict this freedom under these conditions: 1) providing it is necessary in a democratic society, 2) providing it is provided for in national law, and 3) providing it is sought to protect by restrictions such values as national security, territorial integrity, public safety, prevention of disorder or crime, the protection of health or morals, etc. Most states follow these standards....

[Articles 25(3) and (4) were cited by the Court]

... These provisions of the Constitution circumscribing restrictions of the human right to information are the main criterion of legal regulation of protection relations of classification, use and making public of the information which is considered a state secret. The legislator determining how the information which is considered a state secret must be protected is obligated to decide on such legal measures whereby to groundlessly restrict the right of the individual to information would be impossible.¹⁹

27. It is clear from the content of Article 25 of the Constitution that restrictions on freedom of expression may be legitimate only where three conditions are met: the restriction must be established by law, it must serve one of the list of legitimate interests and it must be absolutely necessary to protect that interest. This accords very closely with the international standards spelled out in Article 10(2) of the ECHR, as elaborated by the European Court of Human Rights.

¹⁸ Ruling of the Constitutional Court, 26 January 2004 (page 7 of 30 of the transcript).

¹⁹ Ruling of the Constitutional Court, 19 December 1996 (pages 3-4 of 14 of the transcript).

28. The European Court of Human Rights has established a number of basic principles

regarding Article 10 of the ECHR. In *Hertel v. Switzerland*, the Court held:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which – as the Court has already said above – must, however, be construed strictly, and the need for any restrictions must be established convincingly...

(ii) The adjective 'necessary,' within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.²⁰

29. The European Court has also repeatedly emphasised the overwhelming importance in

a democratic society of the right to freedom of expression. In that light, it attaches

particular importance to the ability of the media and others to comment on matters of

public interest, and to criticise public figures. In *Lingens v. Austria*, the Court stated:

These principles [in article 10] are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, inter alia, for the 'protection of the reputation of others', it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. In this connection, the court cannot accept the opinion, expressed in the judgment of the Vienna Court of Appeal, to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader.

Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt article 10(2) enables the reputation of others--that is to say, of

²⁰ 25 August 1998, Application No. 25181/94, para. 46.

all individuals-- to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues ...²¹

The Court has rejected any distinction between political debate and other matters of public interest, stating that there is “no warrant” for such distinction.²²

30. In the *Lingens* case, the Court emphasised the important difference between statements of fact, the truth of which can be established, and statements of opinion or value judgments, the truth or falsity of which can never be proven. The Court said:

In the court's view, a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The court notes in this connection that the facts on which Mr Lingens founded his value judgments were undisputed, as was also his good faith.

Under paragraph 3 of article 111 of the [Austrian] Criminal Code, read in conjunction with paragraph 2, journalists in a case such as this cannot escape conviction for the matters specified in paragraph 1 unless they can prove the truth of their statements.

As regards value judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by article 10 of the Convention.²³

31. Finally, recent European Court of Human Rights jurisprudence has emphasised that the principle of equality of arms is an important consideration in assessing the ‘fairness’ of defamation cases, particularly when coupled with an unfair requirement to prove the truth of an allegation. In *Steel and Morris v. the United Kingdom*, the Court stated:

It is true that large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who

²¹ 8 July 1986, Application No. 9815/82, paras. 41-2. See also *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 38.

²² *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 64.

²³ Note 20, para. 46.

manage them, the limits of acceptable criticism are wider in the case of such companies (see *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, § 75). However, in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good. The State therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation (see *Markt Intern Verlag GmbH and Beerman v. Germany*, judgment of 20 November 1989, Series A no. 165, §§ 33-38).

If, however, a State decides to provide such a remedy to a corporate body, it is essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for. The Court has already found that the lack of legal aid rendered the defamation proceedings unfair, in breach of Article 6 § 1. The inequality of arms and the difficulties under which the applicants laboured are also significant in assessing the proportionality of the interference under Article 10. As a result of the law as it stood in England and Wales, the applicants had the choice either to withdraw the leaflet and apologise to McDonald's, or bear the burden of proving, without legal aid, the truth of the allegations contained in it. Given the enormity and complexity of that undertaking, the Court does not consider that the correct balance was struck between the need to protect the applicants' rights to freedom of expression and the need to protect McDonald's rights and reputation. The more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible "chilling" effect on others are also important factors to be considered in this context, bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion (see, for example, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, § 44, *Bladet Tromsø* § 64, *Thorgeir Thorgeirson* § 68). The lack of procedural fairness and equality therefore gave rise to a breach of Article 10 in the present case.²⁴

Application of these Principles to the Case Before the Court

32. The Intervenor submits, first, that the relevant principles developed under Article 10 of the ECHR, as described in the previous paragraphs, must be applied to the present case. Article 10 has been applied in previous Constitutional decisions and must be at the centre of the Court's decision as to whether a finding in favour of the Claimants, and restricting freedom of expression, would be "necessary in a democratic society". Given the status of the respective parties, the fact that the report clearly deals with matters of public importance, the recognition of the fundamental importance of

²⁴ 15 February 2005, Application No. 68416/01, paras. 94-5.

freedom of expression including the right to criticise, and the circumstances in which the Claimant was accidentally named, the Intervenors submit that a correct interpretation of the European case law must lead to the dismissal of the present claim.

The ability of NGOs to research and publish on matters of concern

33. The Defendants in the present case are all highly respectable Lithuanian NGOs. The authors include Dr. Dainius Puras, one of the foremost reformers of psychiatry in Europe. They are primarily concerned with the treatment of persons with mental disabilities. They are understandably concerned to ensure that there are no human rights abuses of the mentally disabled in hospitals to which they have been admitted. The comprehensive report authored by them disclosed a number of serious shortcomings in the care provided in a number of Lithuanian mental health institutions. The defendants published their findings, thereby exercising one of the most important functions of Article 10 of the Convention, namely participating in debate on matters of public concern.

34. The right to criticise freely the State and State-run institutions is central to the right protected by Article 10 and is explicitly recognised in Article 33 of the Lithuanian Constitution. The European Court of Human Rights has recognised the important contribution NGOs make to public debate. The case of *Vides Aizsardzibas Klubs v. Latvia*, like the present case, involved an NGO which had reported alleged illegal

activities and which had in turn been found liable in defamation. In that case, Court noted:

[T]he main aim of the [NGO report] had been to draw the public authorities' attention to a sensitive issue of public interest, namely malfunctions in an important sector managed by the local authorities. As a non-governmental organisation specialised in the relevant area, the applicant organisation thus exercised its role of "watchdog" ... That kind of participation by an association is essential in a democratic society and is similar to the role of the press, the importance of which has often been emphasised in the Court's case law. Consequently, in order to perform its task effectively an association has to be able to impart facts of interest to the public, give them its assessment and thus contribute to the transparency of the activities of public authorities.²⁵

The Court went on to find a violation of the NGOs right to freedom of expression.

35. The present case bears a striking resemblance to the *Vides Aizsardzibas Klubs* case.

The report complained of in the present case addressed a matter of clear social concern, important not only to the NGOs who prepared it but to the State and people of Lithuania itself. The Respondents' aim was to bring areas of concern to the notice of the government and others about matters which lay within their field of expertise. We note from the Respondent's defence (page 3 of the translation) that within a month of the report being made available, the Health Ministry itself published a report criticising the health care system in similar terms.²⁶ This indicates the bona fides of the Respondents' report, which clearly was not to defame or otherwise act maliciously. It also indicates that the Respondents' report was a valid contribution to public debate, which it can be said to have started.

²⁵ 27 May 2004, Application No. 57829/00, para. 42.

²⁶ In a report entitled 'State Mental Health Strategy Project'.

36. It is inevitable in reports on human rights and human rights abuses that critical opinions on matters of public concern are voiced. The freedom to make such criticisms without fear of legal action is a fundamental requirement for the effective operation of the right to freedom of expression, and of particular importance to NGOs reporting on matters within their field of expertise.

37. The Intervenor also submits that the Court should specifically take into account the fact that the Respondents do not have formal legal representation. As the European Court of Human Rights held in the case of *Steel and Morris v the United Kingdom*, this is an important factor relating to the fairness of the proceedings. While the Respondents are competent NGOs in their own sphere of competence, they nevertheless operate on very small budgets. As the European Court pointed out in the *Steel and Morris* case, it is not in the public interest to require such bodies to prove the absolute truth of every allegation made by them.²⁷

The claimant's standing to sue in defamation

38. The Claimant is a State-funded psychiatric hospital which is directed by a government ministry. The Complaint describes the Claimant as a “healthcare facility...part of the structure of National Healthcare System of the Republic of Lithuania” (page 2). It is the largest such hospital in the country. The Intervenor submits that the extension of Article.2.24 to legal persons such as the Claimant

²⁷ See the quotation referred to in note 24.

hospital – a State-run institution within the health care system – is inconsistent with established principles and emerging jurisprudence.

39. The UN Special Rapporteur on Freedom of Expression has commented that Governments and public authorities should not be permitted to sue in defamation. In his January 2000 Annual Report, he stated that “international jurisprudence ... supports the view that Governments and public authorities ought not to be able to bring actions in defamation and insult. The Human Rights Committee has, for example, called for the abolition of the offence of ‘defamation of the state’. While the European Court of Human Rights has not entirely ruled out defamation suits by governments, it appears to have limited such suits to situations which threaten public order, implying that Governments cannot sue in defamation simply to protect their honour. A number of national courts (e.g. in India, South Africa, the United Kingdom, the United States, Zimbabwe) have also refused to allow elected or other public authorities to sue for defamation.”²⁸ The Special Rapporteur went on to recommend:

Government bodies and public authorities should not be able to bring defamation suits; the only purpose of defamation, libel, slander and insult laws must be to protect reputations and not to prevent criticism of Government ...²⁹

40. The Parliamentary Assembly of the Organisation for Security and Cooperation in Europe has similarly recommended:

[L]aws which provide criminal penalties for the defamation of public figures, or which penalise the defamation of the State, State organs, or public officials as such, are used to target journalists investigating corruption ... [The Assembly] reiterates

²⁸ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 18 January 2000, UN Doc. E/CN.4/2000/63, para. 50.

²⁹ *Ibid.*, para. 52.

the call from the Warsaw Declaration for participating States that have not already done so to repeal laws which provide criminal penalties for the defamation of public figures, or which penalise the defamation of the State, State organs or public officials as such; Government bodies and public authorities should not be able to bring defamation suits; the only purpose of defamation, libel, slander and insult laws must be to protect reputations and not to prevent criticism of Government ...³⁰

41. This principle is now also firmly established in the law of some Council of Europe Member States. In the United Kingdom, the House of Lords decided in the seminal case of *Derbyshire County Council v. Times Newspapers Ltd and others* that a local council was barred from taking defamation proceedings against a newspaper because of the likely effect on free speech of granting a right of action. The House of Lords found that there was no ‘pressing social need’ for an elected body to have the right to sue for defamation; on the contrary, allowing such bodies to sue would have a serious ‘chilling effect’ upon criticism of public bodies. Government bodies were fully able to defend their reputations before the court of public opinion rather than a court of law. The House of Lords added that elected leaders could still sue in their private capacity as well, provided that – following Article 10 principles – they should tolerate a higher degree of criticism than ordinary individuals.³¹

42. The Intervenor submits that the Hospital – a State-funded entity run by a government ministry – qualifies as a public body in the sense in which that term is understood in the statements and cases noted above. There is no ‘pressing social need’ that justifies granting such a body the right to sue in defamation; and the chilling effect that results from its being allowed is a significant deterrent for NGOs such as the Respondents who wish to report critically on the conditions prevalent in Claimant’s hospital.

³⁰ Bucharest Declaration of the Parliamentary Assembly of the OSCE, 10 July 2000.

³¹ [1993] 1 All ER 1011, p. 1017.

Alternatively, the Intervenor submits that, as a public body, and in line with established case law of the European Court of Human Rights,³² the Claimant should be required to tolerate a very significant degree of criticism and scrutiny of its activities.

Proving the 'truth' of allegations of human rights abuses

43. The Claimant hospital repeatedly alleges in its Complaint that the Respondents' report, by making general statements, has specifically violated the hospital's rights.

At paragraph 2 the Claimant states:

Claimant is a psychiatric hospital, and the respondent does not specify that this information is not attributed to the facility of the claimant since the authors refer to 'psychiatric hospitals' in the plural.

At paragraph 3 the Claimant continues:

The respondent makes the accusation referring to all psychiatric hospitals and facilities, thus including the claimant.

44. The Claimant then suggests that the Respondent must be required to prove that every allegation of abuse or other maltreatment made in the Report relates specifically to the Hospital.

45. The Intervenor submits that this suggestion is highly problematic, at two levels. First, requiring an NGO producing a report for campaigning purposes to identify each time when they use the plural, 'hospitals,' whether they are referring to all hospitals named at any point in the report, or the majority of hospitals, would damage the NGO's

³² See, amongst others, *Lingens v. Austria*, note **Error! Bookmark not defined.**; and

ability freely to report on matters of public interest. It is clear to an intelligent reader that the report describes the general condition prevalent in the mental health system – and we again reiterate that its findings have been echoed by an official government report.

46. Second, the Intervenor submits that an allegation of a human rights abuse should, at least for the purpose of assessing the legitimacy of a restriction on freedom of expression, be understood as a statement of opinion. In the present case, the Respondents carried out factual research, and in their Report they use the findings of that research to come to conclusions concerning the state of institutionalised mental health care in Lithuania generally. As noted, the European Court of Human Rights has long held that there is a significant difference between statements of opinion, such as those made by the Respondent, and statements of fact. In the context of a defamation proceeding, a statement of fact can be proven; a statement of opinion cannot. The Court has held, therefore, that a requirement to prove the truth of opinions or value judgements on issues of concern or public interest is a disproportionate interference with freedom of expression.³³ The sole requirement on a defendant is that value judgments must have some basis in fact, that is, not to be imaginary.³⁴ The Intervenor therefore submits that the Respondents cannot be required to prove the truth of the value judgements expressed by them and that the factual basis underlying that value-judgement was validated by the very similar findings of the ministry report.

³³ See, for example, *Lingens v. Austria*, note **Error! Bookmark not defined.**; *Thorgeir Thorgeirson v. Iceland*, note 22.

³⁴ See for example, *Dichand and others v. Austria*, note **Error! Bookmark not defined.**, para. 43.

Damages

47. Should the Court find, in spite of the arguments advanced in the preceding paragraphs, find that the Respondents' report is defamatory of the Claimant, the Intervenor submits that the remedy awarded by the Court should be strictly proportionate in the circumstances of the present case and that this means that only actual damages, established in evidence by the Claimant, should be awarded.
48. International jurisprudence makes it clear that any award of damages must be proportionate to the actual harm caused.³⁵ A damage award should also take into account alternative remedies so that, before making any monetary award, the Court should be satisfied that it would be "necessary in a democratic society" in the sense of Article 10(2) of ECHR to compensate the hospital for any harm to its reputation. If the damage to the Claimant's reputation can be adequately redressed through publication of a correction, clarification or apology, the Court should not make an award of damages and/or grant an injunction. These principles have been accepted by the Lithuanian Constitutional Court,³⁶ in various European jurisdictions³⁷ and by the European Court of Human Rights.

³⁵ See *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application No. 18139/91.

³⁶ Ruling of the Constitutional Court (Konstitucinis Teimas), 26 January 2004 (see, in particular, pages 22-23 of 30 of transcript).

³⁷ See, for example, *Rantzen v Mirror Group Newspapers* (1994) QB 670 and *John v. MGN Ltd.*, (1997) QB 586, both UK cases.

49. The Claimant asserts considerable financial damage but provides no supporting evidence. In *Steel and Morris v. the United Kingdom*, the European Court of Human Rights held that in such a situation, any financial award would be of doubtful legitimacy:³⁸

The Court notes on the one hand that the sums eventually awarded ... were very substantial when compared to the modest incomes and resources of the two applicants. While accepting, on the other hand, that the statements in the leaflet which were found to be untrue contained serious allegations, the Court observes that not only were the plaintiffs large and powerful corporate entities but that, in accordance with the principles of English law, they were not required to, and did not, establish that they had in fact suffered any financial loss as a result of the publication of the “several thousand” copies of the leaflets found to have been distributed by the trial judge (see paragraph 45 above and compare, for example, *Hertel v. Switzerland*, cited above, § 49).

...

In these circumstances, the Court finds that the award of damages in the present case was disproportionate to the legitimate aim served.

50. The Intervenor further submits that no damages should be awarded for any upgrading of the Claimant’s facilities or for changes to the treatments which were criticised in the Report. If the Respondents’ allegations were wrong, the Claimant would not need to upgrade its facilities. If, on the other hand, the Respondents’ allegations had merit, this might well require the Claimant needed to upgrade its facilities.

51. There is a single reference to the Claimant in the Report. It is clear that the Respondents did not intend to identify the Claimant in particular in relation to any of the specific findings; indeed, the allegations were couched in general terms so as to avoid any liability for defamation. The Report as a whole concerned an issue of public importance and had been well researched. The Intervenor submits that

³⁸ Note 24, paras. 95-6.

publication of a clarification, correction or reply would suffice to repair any damage done to the Claimant's reputation and that any further award of monetary damages would be a disproportionate interference with Respondents' right to freedom of expression.