IN THE EUROPEAN COURT OF HUMAN RIGHTS

APP. NO. 3877/14

Between: -

PAYAM TAMIZ

Applicant

- and -

UNITED KINGDOM

Respondent Government

THIRD-PARTY INTERVENTION SUBMISSIONS BY ARTICLE 19

INTRODUCTION

1. This third-party intervention is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression ("ARTICLE 19"), an independent human rights organisation that works around the world to protect and promote the rights to freedom of expression and freedom of information. It takes its name from Article 19 of the Universal Declaration on Human Rights. ARTICLE 19 monitors threats to freedom of expression in different regions of the world, as well as national and global trends, and develops long-term strategies to address them; it also advocates for the implementation of the highest standards of freedom of expression both nationally and globally.

2. ARTICLE 19 welcomes the opportunity to intervene in this case, by leave of the President of the Court granted on 10 March 2016 pursuant to Rule 44(3) of the Rules of Court. These submissions do not address the facts or merits of the applicant's case.

3. In ARTICLE 19's view, the core issues raised by the present case are the appropriateness and Convention compatibility of threshold tests for claims in defamation – particularly claims relating to statements published online – and the circumstances under which the Court will re-examine the application of such tests by national courts.

4. Accordingly, in these submissions ARTICLE 19 addresses: (i) key general considerations relating to the application of defamation law to statements published online; (ii) the importance and Convention compatibility of threshold tests in defamation proceedings; and (iii) the application of the "fourth-instance" admissibility criteria in the case-law of the Court.

DEFAMATION LAW AND STATEMENTS PUBLISHED ONLINE

5. In considering the application of defamation law to statements published online, it is crucial to recognise the extent to which recent technological advances have facilitated the dissemination of information and opinion. In particular, the explosive growth of blogs and social media platforms over the past decade has made it possible for individuals to publish their personal views to a potentially global audience almost instantaneously, with minimal or no editorial oversight.

6. These developments have the enormous benefit of enabling and promoting the lively exchange of views between individuals around the world. This occurs not only via the publication of individual posts, but also (and especially) via the publication of comments on such posts – an activity which, in ARTICLE 19's view, is best viewed not as a form of journalism but as public debate in its purest form.[1]

7. Of course, any public debate may on occasion involve the making of statements which are imprudent, offensive, and even unlawful. As a result, the ease of online publication exposes individuals who publish comments online, as well as the publishers who host these publications, to a far higher risk of being held liable than at any time in the past.

8. In determining when liability does arise, particularly in relation to claims in defamation, ARTICLE 19 submits that account should be taken of the fact that the makers of online comments are not generally professional journalists writing in their capacity as such, but laypeople expressing their views in much the same way they might do in person in everyday conversation.

9. Still more importantly, ARTICLE 19 considers that account should be taken of the fact that the vast majority of statements published online are too trivial in character, and/or the extent of their publication is too limited, for them to cause any significant or substantial damage to an individual's reputation. This is particularly so where the statement in question is made in the form of a comment on an existing post.

10. First, such comments are likely to be rapidly superseded (and hence effectively "buried") by subsequent comments on the same piece.[2] Thus, far from going "viral",[3] they are likely to reach only a relatively small audience and their effects are likely to be limited accordingly.

11. Secondly, to the extent that such comments are read by others, their impact is likely to be qualitatively different from that of statements made in (for example) a national newspaper, as they are inherently less likely to be taken at face value as authoritative or

[1] See e.g. ARTICLE 19's third-party intervention in the case of *Delfi AS v Estonia* (App. no. 64569/09) paras 6, 9.
[2] See also ARTICLE 19's third-party intervention in *Jezior v Poland* (App. no. 31955/11), para 39.
[3] This concern has been raised by a number of courts in relation to allegedly defamatory statements made in individual posts on blogs or social media platforms, which can be easily "shared" or otherwise republished: see e.g. *Cairns v Modi* [2012] EWCA Civ 1382 (CA) (albeit in the context of assessing damage rather than establishing liability); *Dabrowski v Greeuw* [2014] WADC 175.

accurate.[4] This point was made very clearly by Mr Justice Eady in *Smith v ADFN* [2008] EWHC 1797(QB) where he said at [17] that, "From the context of casual conversations, one can often tell that a remark is not to be taken literally or seriously and is rather to be construed merely as abuse. That is less common in the case of more permanent written communication, although it is by no means unknown. But in the case of a bulletin board thread it is often obvious to casual observers that people are just saying the first thing that comes into their heads and reacting in the heat of the moment. The remarks are often not intended, or to be taken, as serious."

12. This has also been recognised in several recent Australian cases, which have noted that the brief, transitory nature of statements made on blogs and social media affects their potential for harm and (hence) their capacity to be considered defamatory.[5] Similarly, at least one Canadian decision has recognised the existence of "countless websites that are of no interest to anyone but the site's own creator and webmaster."[6]

13. In ARTICLE 19's view the result is that, in the vast majority of cases involving statements (and especially comments) published online, a self-regulatory right of reply is likely to constitute an adequate and effective mechanism for dealing with content which might be considered defamatory.[7] These mechanisms are increasingly available in the form of features which enable "replies" to existing comments, thereby allowing users to respond directly, promptly, and at no cost.

14. This view has been endorsed by the UN Special Rapporteur on Freedom of Expression, who has stressed that where a right of reply is available sanctions for defamation may well be unnecessary or disproportionate.[8]

IMPORTANCE OF THRESHOLD TESTS FOR DEFAMATION

15. In ARTICLE 19's submission, it follows from the considerations outlined above that while it is important to apply a high threshold test for all defamatory statements, it is particularly important in the context of defamatory comments published on discussion forums such as comment sections of blogs or newspapers. The most appropriate formulation is to require that claimants show that "substantial" or "significant" harm to their reputation was caused by, or was likely to be caused by, the allegedly defamatory statement.[9]

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[4] See also ARTICLE 19's third-party intervention in *Jezior v Poland* (App. no. 31955/11), para 39.
[5] See e.g. *Rana v Google Australia Pty Ltd* [2013] FCA 60, para 78, citing *Prefumo v Bradley* [2011] WASC 251.
[6] *Elfarnawani v International Olympic Committee* 2011 ONSC 6784, paras 32-34.
[7] See ARTICLE 19's third-party intervention in *Jezior v Poland* (App. no. 31955/11), para 41. At least the potential relevance of a right of reply has been recognised by Belgian courts: see e.g. Civ. Bruxelles, 2 March 2000, J.T., 2002, p 113 (interlocutory judgment) (noting that "il y a lieu de pondérer les appreciations de la faute avec les conditions liées à la diffusion des propos litigieux, notamment les particularités du média choisi et les possibilités de réplique que celui-ci permettrait").
[8] *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 16 May 2011, A/HRC/17/27, para 27.
[9] See ARTICLE 19's third-party intervention in *Jezior v Poland* (App. no. 31955/11), para 39.

16. A threshold test may be applied as a general requirement for bringing a claim in defamation; in determining whether a claim may proceed in a particular jurisdiction; or in determining whether a claim should be stayed or struck out as an abuse of process. Provided that the test is reasonably interpreted and applied, ARTICLE 19 considers that in all these contexts it will assist in striking a proper balance between potential claimants' rights to protection of reputation under Article 8 and potential defendants' rights to freedom of expression under Article 10.

General threshold test

17. The utility of a general threshold test is expressly recognised in the *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* ("2016 Principles"), which are being revised and updated following an expert meeting held in December 2015 and broader consultations subsequently organised by ARTICLE 19.

18. Principle 2(d) states that "[l]aws should provide, and courts should ensure, that a statement is deemed to be defamatory only if its publication causes substantial or serious harm to the plaintiff's reputation." The Commentary to Principle 2 notes that this threshold is "particularly important in relation to digital content" and that, in all cases, courts "should ensure that the actual circulation of the statement and the actual harm are assessed on a strictly factual basis, and that damages are never awarded… for defamatory statements that are rapidly buried by a large volume of online content."

19. A threshold test of the kind endorsed by the 2016 Principles exists in England and Wales in the form of s 1(1) of the Defamation Act 2013, which provides that a statement "is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant."

20. The introduction of the "serious harm" requirement built on previous judicial decisions holding that a certain "threshold of seriousness" must be attained for a publication to be capable of being defamatory. Some of these decisions linked the threshold requirement directly to the relationship between Articles 8 and 10. For example, in the case of *Dell'Olio v Associated Newspapers Ltd* [2011] EWHC 3272 (QB), Mr Justice Tugendhat drew attention to "a number of authorities to the effect that intrusions [into Article 8 rights] must reach a certain level of seriousness to engage the operation of the Convention."[10] The compatibility of threshold tests with Article 8 is considered further at [30]-[36] below.

21. Other jurisdictions have also begun to implement general threshold tests for defamation. For example, a recent decision of the High Court of New Zealand confirmed the need for defamation claims to reach a "minimum threshold of seriousness" in order to proceed.[11]

[10] Para 15, citing *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 AC 307 para 28, *Wood v Commissioner for Police for the Metropolis* [2009] EWCA Civ 414 paras 22-23, and *M v Secretary of State for Work and Pensions* [2006] UKHL 11 para 83.
[11] *CPA Australia v NZICA* [2015] NZHC 1854, paras 104-120.

Noting the developments in England and Wales and their link to Article 10 of the Convention,[12] the High Court observed that freedom of expression was also protected by New Zealand's Bill of Rights Act and considered that "[a]pplying a threshold of seriousness" was "one way to project against unjustified infringements" of that right.[13]

22. Australia has opted for a further variant, with the uniform Defamation Acts adopted from 2006 onward across all States and Territories providing for a "triviality" defence where a defendant can establish that "the circumstances of publication were such that the plaintiff was unlikely to sustain any harm."[14]

Threshold test related to jurisdiction

23. A threshold test may also be applied – and, indeed, may be particularly important – in determining whether a claim in defamation relating to a statement published in a number of different jurisdictions should be allowed to proceed in any one of them.

24. The difficulties presented by jurisdictional issues were recognised in the 2010 Joint Declaration of Special Rapporteurs on Freedom of Expression,[15] which identified as part of the "ten key challenges to freedom of expression in the next decade" the existence of "jurisdictional rules which allow cases, particularly defamation cases, to be pursued anywhere, leading to a lowest common denominator approach."[16]

25. Threshold tests form a key part of the response to this challenge. This is reflected in the 2016 Principles, Principle 7(a) of which provides that "[l]aws should provide, and courts should ensure, that jurisdiction is only asserted in cases where there is a substantial connection to, and actual damage has been suffered in, the State." Of relevance in this regard are the extent of the plaintiff's reputation in the relevant State, and the extent to which this reputation has suffered "serious harm".

26. In England and Wales, a threshold test applies in all cases where a defendant seeks to set aside an order allowing a claimant to serve proceedings on him or her outside the jurisdiction. Critically, the order will be set aside if the court is satisfied that no "real and substantial tort" has been committed in England and Wales. In the particular context of claims in defamation, and consistent with the position endorsed by the 2016 Principles, this issue has been determined by reference to the extent of publication of the impugned statement in England and Wales, and the nature and extent of the claimant's reputation there. A claim will not be allowed to proceed where, in light of these factors, it appears

[12] Para 105.
[13] Para 115.
[14] See e.g. Defamation Act 2005 (NSW) s 33.
[15] The signatories were the UN Special Rapporteur on Freedom of Expression, the Representative on Freedom of the Media of the OSCE, the Special Rapporteur on Freedom of Expression of the OAS, and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights.
[16] *Report of the Special Rapporteur on the promotion and protection of the rights to freedom of opinion and expression – Addendum: Tenth anniversary joint declaration: Ten key challenges to freedom of expression in the next decade*, A/HRC/14/23/Add.2, point 9(d).

that the harm caused by publication of the statement in England and Wales is likely to have been so minor as not to justify the cost and time the proceedings will require.[17] In reaching that decision the Court will take into account the circumstances of publication, including the fact that online comments often disappear quickly from view and are generally understood by readers as having been made in the heat of the moment and therefore not to be taken seriously.

Threshold test related to abuse of process

27. Finally, a threshold test may be applied in determining whether a claim in defamation should be stayed or struck out as an abuse of process.

28. The utility of this type of test is reflected in Principle 6 of the 2016 Principles, which notes that "[l]aws should be adopted and constructed to prevent the chilling effect of litigation by raising substantive and procedural hurdles to potential claimants to ensure that only viable and well-founded defamation claims are brought."[18]

29. In the English case of *Jameel v v Down Jones & Co Inc* [2005] EWCA Civ 75, the requirement of a "real and substantial tort" (discussed above in relation to jurisdiction) was applied to determine whether a claim should be struck out. The Court of Appeal based its decision in part on the need to strike a "proper balance" between "the Article 10 right of freedom of expression and the protection of individual reputation."[19] This balance required courts to "bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged."[20] Thus, where the cost of pursuing the claim was likely to be "out of all proportion" to the damages likely to be obtained, a strike-out was appropriate.[21]

30. The "real and substantial tort" requirement has subsequently been applied to stay defamation proceedings in Australia as an abuse of process.[22]

Convention compatibility of threshold tests

31. In ARTICLE 19's submission, the jurisprudence of the Court confirms the appropriateness and Convention compatibility of these types of threshold test as they relate to claims in defamation. This is because the Court has consistently affirmed the existence of a

[17] See eg. *Subotic v Knezevics* [2013] EWHC 3011 (QB); *Jameel v Down Jones & Co Inc* [2005] EWCA Civ 75, paras 50-51 and the judgments there cited.
[18] See also ARTICLE 19's third-party intervention in *Jezior v Poland* (App. no. 31955/11), para 42 (noting that, where allegations of defamation in relation to online publications are not sufficiently serious, the Court "should pay close attention to the question whether the application should have been struck as an abuse of process in the domestic courts").
[19] See para 55.
[20] Ibid. See also paras 57-58 and the cases there cited.
[21] Ibid, para 69.
[22] *Bleyer v Google* [2014] NSWSC 897.

threshold requirement for establishing an interference with Article 8 rights as they relate to the protection of reputation.

32. In the case of *Polanco Torres and Movilla Polanco v Spain* (App. no. 34147/06, 21 September 2010) the Third Section confirmed that the right to protection of reputation forms part of the right to respect for private life under Article 8, and continued:[23]

> Encore faut-il que les allégations factuelles soient suffisamment graves et que leur publication ait des répercussions directes sur la vie privée de la personne concernée. Pour que l'article 8 entre en jeu, la publication pouvant ternir la réputation d'une personne doit constituer une atteinte à sa vie privée d'une gravité telle que son intégrité personnelle soit compromise.

33. Similarly, in the case of *A v Norway* (App no. 28070/06, 9 April 2009) the First Section held that in order for the reputational element of Article 8 to be invoked "the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life."[24]

34. These decisions have been cited in a long and consistent line of subsequent judgments – including judgments of the Grand Chamber – in support of the proposition that "[i]n order for Article 8 to come into play… an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life."[25]

35. The result is that, to the extent that threshold tests for defamation prevent individuals from pursuing claims where the harm to their reputation is not serious or substantial, there is simply no interference with Article 8 rights. The result is that, in these cases, threshold tests serve only to protect potential defendants' Article 10 rights from unwarranted interference.

36. It may be that, very occasionally, the application of threshold tests precludes a defamation claim in circumstances where there has been some minimal interference with the right to reputation. However, the Court has emphasised that where national authorities have engaged in a balancing exercise between Article 8 and 10 rights – for example, in applying a threshold test of the type under discussion to the facts of a

[23] Para 40.

[24] Para 64.

[25] See e.g. *Axel Springer AG v Germany* (App. No. 39954/08, 7 February 2012) (Grand Chamber) para 83, *Hlynsdottir v Iceland* (App. no. 43380/10, 10 October 2012) para 58, *Bugan v Romania* (App. no. 13824/06, 12 May 2013) para 23, *Haldimann v Switzerland* (App. no. 21830/09, 24 February 2015) para 49, *Delfi AS v Estonia* (App. No. 64569/09, 16 June 2015) (Grand Chamber) para 137, *Caragea v Romania* (App. no. 51/6, 8 December 2015) para 20, *Genner v Austria* (App. no. 55495/08, 12 January 2016) para 32, *Egyesulete and Huzrt v Hungary* (App. no. 22947/13, 2 February 2016) para 57, *Arztekammer für Wien and Dorner v Austria* (App. no. 8895/10, 16 February 2016) para 62, *Annen v Germant* (App. no. 3690/10, 26 February 2016) para 54, *Goucha v Portugal* (App. no. 7043/12, 22 March 2016) para 25, and *Bedat v Switzerland* (App. no. 56925/08, 29 March 2016) (Grand Chamber) para 72.

particular case – it will require "strong reasons to substitute its view for that of the domestic courts".[26]

37. In ARTICLE 19's view, the result is that threshold tests in defamation proceedings, if reasonably interpreted and applied by domestic courts, are entirely compatible with Article 8 – and, indeed, assist in striking a proper balance between the protection of reputation and the right to freedom of expression.

"FOURTH-INSTANCE" ADMISSIBILITY CRITERIA IN THE CASE-LAW OF THE COURT

38. This conclusion has direct implications for the admissibility of challenges to decisions of national courts applying threshold tests to the facts of particular cases.

39. Under Article 19 of the Convention, the function of the Court is to "ensure the observance of engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto."

40. Accordingly, the Court has consistently held that it will not act as a court of "fourth instance", in that it will not seek to correct alleged errors of fact or law by a national court unless and insofar as such errors have resulted in unlawful interference with Convention rights.[27] A similar position has been taken by other regional and international human rights bodies.[28]

41. Applications which fall foul of the fourth-instance doctrine are considered as "manifestly ill-founded" under Article 35(3) of the Convention.

42. One consequence of the doctrine is that, as a general rule, the Court will not second-guess the interpretation and application of domestic law by national courts where the law in question is Convention-compliant. For example, in *Sisojeva v Latvia* (App. no. 60654/00, 15 January 2007) the Grand Chamber noted that:[29]

> … it is not [the Court's] function to deal with errors of fact or law allegedly committed by a national court or to substitute its own assessment for that of the national courts or other national authorities unless and in so far as they may have infringed rights and freedoms protected by the Convention… In other words, the Court cannot question the assessment of the domestic authorities unless there is clear evidence of arbitrariness…

[26] See e.g. *Axel Springer AG v Germany* (App. No. 39954/08, 7 February 2012) (Grand Chamber) para 88; *Delfi AS v Estonia* (App. No. 64569/09, 16 June 2015) (Grand Chamber) para 139; *Haldimann v Switzerland* (App. no. 21830/09, 24 February 2015) para 55; *Goucha v Portugal* (App. no. 7043/12, 22 March 2016) para 45.
[27] See e.g. Case '*Relating to certain aspects of the laws on the use of languages in education in Belgium*' *v Belgium* (*Belgium Linguistic case*) (App. nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23 July 1968) para 10; *Schenk v Switzerland* (App. no. 10862/84, 12 July 1988) para 45; *Perlala v Greece* (App. no. 17721/04, 22 February 2007) para 25.
[28] See e.g. UN Human Rights Committee, *Pillai v Canada* (Communication no. 1763/2008, 25 March 2011) para 11.2; Inter-American Court of Human Rights, *Melba del Carmen Suarez Peralta v Ecuador* (Case no. 12.683, 26 January 2012) para 83.
[29] Para 89.

43. Similarly, in *Pelipenko v Russia* (App. no. 69037/10, 1 October 2012) the First Section reiterated that:[30]

> it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, even in those fields where the Convention "incorporates" the rules of that law, since the national authorities are, by their very nature, particularly qualified to settle issues arising in this connection…

44. Finally, the Court's own Practical Guide on Admissibility Criteria notes that it will not "question the findings and conclusions of the domestic courts" as regards (inter alia) the establishment of the facts of the case, or the interpretation and application of domestic law.[31]

45. For the reasons given at [14]-[36] above, ARTICLE 19 considers that threshold tests requiring claimants to show "serious" or "substantial" harm to their reputation in order to pursue defamation proceedings are not inherently incompatible with Article 8. As a result, if reasonably applied to the facts of individual cases, they will not result in decisions which unlawfully interfere with Article 8 rights. Rather, they will be fact-specific situations where national courts are in principle best equipped to decide how to strike the balance between competing Convention rights.

46. It follows that a challenge to a decision flowing from the application of such a threshold test – absent an allegation of arbitrariness – would likely amount to no more than an invitation for the Court to revisit the decision of the national court in question. It would therefore be inadmissible on fourth-instance grounds.

CONCLUSION

47. In today's interconnected digital world, millions of internet users post comments online on a daily basis. Some – even many – may express themselves in ways that might be regarded as defamatory. In assessing any claims that are brought against them, it is crucial to take account of the fact that the majority of comments made by private individuals, particularly in response to blogs or posts on social media, are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage to another person's reputation. It is well understood by readers of online publications that individuals posting comments online are often saying the first thing that comes into their heads and that their comments are not to be taken seriously.

48. In light of this, it is particularly important that national legislatures and courts require claimants to show "significant" or "serious" harm to their reputation in order for a claim in defamation to proceed or succeed. Such threshold tests may be applied to defamation

[30] Para 65. See also *Pla and Puncernau v Andorra* (App. no. 69498/01, 13 July 2004) para 46 (noting that "[o]n many occasions, and in very different spheres, the Court has declared that it is in the first place for the national authorities, and in particular the courts of first instance and appeal, to construe and apply the domestic law").
[31] European Court of Human Rights, *Practical Guide on Admissibility Criteria* (2014), para 384.

claims generally; to decisions regarding the appropriate jurisdiction for bringing a claim; or to applications to strike out a claim as an abuse of process. These threshold tests also apply to defamation claims brought against companies on the basis of intermediary liability who must defend defamation claims based on postings by their users (of which they would have had no prior knowledge).

49. If reasonably interpreted and applied, these tests will result in outcomes which strike an appropriate balance between the protection of reputation under Article 8 and freedom of expression under Article 10. This view is entirely consistent with the jurisprudence of the Court, which has repeatedly held that the reputational element of Article 8 will only be engaged where an attack on a person's reputation attains a minimum level of seriousness.

50. Where applicants seek to challenge a national court's decision applying a threshold test to the facts of a particular case, the Court's jurisprudence on the "fourth-instance" doctrine is likely to be of relevance. In particular, absent an allegation of arbitrariness, any application which essentially invites the Court to second-guess such a decision is likely to be inadmissible on fourth-instance grounds.

POSTSCRIPT

51. Should the Court be minded to examine the intermediary liability issues that arose as part of the context of this case, we would generally agree and support the submissions of the Medial Legal Defence Initiative and others in the instant case. In particular, we would urge the Court to pay particular attention to the requirement of actual knowledge of illegality based on proper and substantiated notice before intermediaries can be held liable for content posted on discussion forums by third parties.[32] Such a requirement is vital to upholding freedom of expression on the internet as absent such protections internet intermediaries would be unable to assume the risk of providing open discussion fora in which members of the public can freely express their views on important issues of public interest.

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ARTICLE 19

[32] The necessary elements of such a notice have been set out in some detail in Principle 3 of the Manila Principles on Intermediary Liability, a global civil society initiative, of which ARTICLE 19 is a founding member: https://www.manilaprinciples.org/