



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF PAL v. THE UNITED KINGDOM

(Application no. 44261/19)

JUDGMENT

*This version was rectified on 15 March 2022
under Rule 81 of the Rules of Court.*

Art 10 • Freedom of expression • Journalist's arrest and prosecution for the harassment of another journalist, arising from the publication of an article and tweets • Domestic courts' failure to carry out balancing exercise on Art 8 and 10 rights • Absence of relevant and sufficient reasons

STRASBOURG

30 November 2021

FINAL

28/02/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Pal v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Yonko Grozev, *President*,

Tim Eicke,

Faris Vehabović,

Iulia Antoanella Motoc,

Armen Harutyunyan,

Gabriele Kucsko-Stadlmayer,

Ana Maria Guerra Martins, *judges*,

and Andrea Tamietti, *Section Registrar*,

Having regard to:

the application (no. 44261/19) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Ms Rita Pal (“the applicant”), on 16 August 2019;

the decision to give notice to the United Kingdom Government (“the Government”) of the Article 10 complaint concerning the applicant’s arrest and prosecution and to declare inadmissible the remainder of the application;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by Media Defence, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 9 November 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The present application concerns the decision to arrest and charge a journalist with the offence of harassment. It raises issues under Article 10 of the Convention.

THE FACTS

2. The applicant was born in 1971 and lives in Birmingham. She was represented by Mr Aaron Rathmell of Serjeants’ Inn Chambers, a barrister practising in London.

3. The Government were represented by their Agent, Mr M. Boulton of the Foreign, Commonwealth and Development Office.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND

5. The applicant is a former psychiatrist who, since ceasing to practice medicine, has become a journalist concentrating on whistleblowing issues within organisations such as the National Health Service.

6. In or about June 2011 the applicant became involved in a dispute with AB, a barrister and journalist who worked for “Private Eye” and who was linked to Patients’ First, a network of health professionals and their supporters working to protect whistle-blowers. The dispute led to a series of email allegations and counter-allegations between the two.

7. After a complaint by AB about the applicant’s conduct to the Commissioner of Police for the Metropolis (“the Metropolitan Police”), on 24 July 2011 a Prevention of Harassment Letter (“PHL”) was served on the applicant. A PHL informs the recipient that an allegation has been made against them and warns them of the possible consequences of continuing to act in the way the letter describes. In the present case the PHL informed the applicant that an allegation of harassment had been made against her and that AB had asked her to stop sending him emails as he was feeling harassed by their content. She was notified that if she committed “any act or acts either directly or indirectly that amount to harassment” she might be liable to arrest and prosecution.

II. THE EVENTS LEADING UP TO THE APPLICANT’S ARREST

8. On 1 July 2014 the applicant wrote and published an article on her website, the World Medical Times, entitled “[AB] of Patients First”. The article detailed some of AB’s alleged professional contacts. It also contained links to, *inter alia*, a judgment of the Bar Council concerning AB and a newspaper article concerning his representation at an Employment Tribunal, for which, according to the applicant, he was heavily criticised. The article ended with an invitation to readers to send the applicant any information they had about AB or Patients’ First.

9. In response to the article, AB emailed the applicant on 30 July 2014. The applicant subsequently complained to the West Midlands Police, who emailed AB on 1 August 2014 to say that if he wished to make any complaint about the article, he should do so via the World Medical Times and not to the applicant directly.

10. On 23 November 2014, the applicant posted a series of Tweets which suggested that the police had issued a harassment warning against “Private Eye’s journalist” and “Peter’s friend”.¹ Although AB was not named, it does not appear to be in dispute that the Tweets referred to him.

¹ Rectified on 15 March 2022: the text was “On 23 November 2014, the applicant posted a series of Tweets which suggested (incorrectly) that the police had issued a harassment warning against “Private Eye’s journalist” and “Peter’s friend”.”

11. On 9 December 2014 AB provided a detailed statement to the police in which he emphasised the acute anxiety that had been caused by the applicant's behaviour over a number of years. He described the information she had published about him as "largely false", and "twisted, spiteful and bizarre". He further claimed that the applicant's behaviour had affected his career and his employment prospects.

III. THE APPLICANT'S ARREST AND PROSECUTION

12. On 18 December 2014 the Metropolitan Police arrested the applicant in Birmingham on suspicion of harassment contrary to section 2 of the Protection from Harassment Act 1997 ("the 1997 Act" – see paragraphs 31 and 32 below). The applicant was handcuffed. She was driven approximately 185 kilometres to London, as attempts to secure custody facilities in the West Midlands had been unsuccessful, and interviewed under caution with her solicitor present. The applicant declined to answer questions, save to provide a prepared statement.

13. The applicant was detained for approximately seven hours before being bailed, subject to conditions, to re-attend the police station on 22 January 2015. The conditions imposed included that she not contact AB directly or indirectly by any means whatsoever, and that she not post any messages on any form of media relating to AB either inferred or by direct reference.

14. On 22 January 2015 the applicant was charged with an offence of harassment contrary to section 2 of the 1997 Act (see paragraph 32 below).

15. The pre-charge decision contained a significant error. It stated that the alleged course of conduct appeared to have been "sustained and frequent with, as is stated, up to twenty emails per day on occasion". The Government have accepted that this was not correct, as the charge concerned only the article and Tweets described in paragraphs 8 and 10 above. Under the heading "ECHR", the pre-charge decision stated "No issues: the facts of the case suggest that a criminal prosecution is necessary and proportionate".¹

16. On 3 March 2015 the applicant appeared at a Magistrates' Court and entered a plea of not guilty. The Magistrates renewed the applicant's bail on the same conditions as those described in paragraph 13 above.

¹ Rectified on 15 March 2022: the text was "The pre-charge decision contained two significant errors. First of all, it indicated that both the applicant and AB had previously been issued with First Instance Harassment Warnings. The applicant had been issued with a PHL (see paragraph 7 above); AB had not. Secondly, it stated that the alleged course of conduct appeared to have been "sustained and frequent with, as is stated, up to twenty emails per day on occasion". The Government have accepted that this was not correct, as the charge concerned only the article and Tweets described in paragraphs 8 and 10 above. Under the heading "ECHR", the pre-charge decision stated "No issues: the facts of the case suggest that a criminal prosecution is necessary and proportionate"."

17. In August 2015 the Crown Prosecution Service (“CPS”) served a notice of discontinuance on the basis that there was insufficient evidence to establish a realistic prospect of a conviction under the 1997 Act. According to the CPS file review, the article published by the applicant was “an informative piece” which was “derived simply from other information within the public domain” and was “presented by a journalist with a view to present facts than [sic] that must be permitted with freedom of speech rights under art 10”. The CPS further considered that the Tweets, which did not mention AB by name, could not amount to harassment. It therefore concluded that there had been “no harassment”. Having regard to Article 10 case-law, the CPS was not satisfied that the documents involved contained material that would justify restricting the applicant’s Article 10 rights. In their view the material “was not unreasonable nor oppressive nor is it material that is so grossly offensive that it would require restriction”.

18. On 8 August 2015 the prosecution was therefore determined in the applicant’s favour, and an award of costs, including an amount in respect of her legal costs, was made in her favour from central funds.

IV. THE APPLICANT’S CLAIM AGAINST THE METROPOLITAN POLICE

A. Proceedings before the County Court Judge

19. On 25 February 2016 the applicant issued proceedings against the Metropolitan Police seeking damages and declaratory relief. Her claim, as subsequently amended, included the following causes of action: assault, unlawful arrest, false imprisonment, malicious prosecution and a breach of Article 10 of the Convention.

20. At the hearing oral evidence was heard from the applicant and five police officers, including the arresting officer and the officer responsible for deciding to charge the applicant. It was put to the arresting officer that she had given no thought to the applicant’s freedom of expression. In response, she said:

“That’s not true. I agree it is not in notes, but you have asked me. If [AB] found what was written unfairly affected his privacy, that part of freedom of speech is not acceptable. When it starts affecting somebody else’s life.”

21. On 24 January 2018 the County Court judge dismissed the claim and ordered that there be judgment for the defendant on all the causes of action. The judge held that the arrest had been lawful. He accepted that the arresting officer had an honest suspicion that the applicant had committed the offence of harassment, and found there to be “ample evidence” to support the objective reasonableness of that suspicion, namely the content of the article and the Tweets, and the witness statement made by AB detailing his distress at the applicant’s conduct. The judge further found that

there had been objectively reasonable grounds for concluding that the arrest was necessary to allow for the prompt and effective investigation of the conduct in question. The arresting officer had considered, but rejected, alternatives (including voluntary attendance at a police station for interview) as inappropriate as she wanted to get to the bottom of AB's complaint expeditiously. The judge also found that the use of handcuffs when arresting the applicant, and in transporting her to London, had been justified, and that there had been reasonable and probable cause to charge the applicant under section 2 of the 1997 Act.

22. With regard to the applicant's complaint under Article 10 of the Convention, the judge noted that the arrest was lawful, and the prosecution was with reasonable and probable cause and not malicious. Therefore, in his judgment the arrest and charge of the applicant, which did not interrupt, curtail and prevent the exercise of the fundamental right to freedom of expression, simply did not engage Article 10. The judge also found that the bail conditions did not engage Article 10 in this case, although he considered the point to be "probably moot" as the applicant had accepted in evidence that she would not have published anything further about AB in any case. Even if Article 10 was engaged, the judge considered the interference to be justified under paragraph 2 of this provision, as it had a clear purpose, namely the prevention of crime, which was achieved by preventing any possible recurrence of the alleged offence. It was therefore proportionate and pursued a legitimate aim.

B. Appeal proceedings

23. The High Court granted the applicant permission to appeal on 28 August 2018. The judge considered that Article 10 of the Convention governed the entirety of the decision and it should have been at the forefront of the consideration of the issues that arose. An analysis of harassment and whether there was an objectively reasonable basis to suspect the commission of an offence in a case involving speech required a very careful consideration of what, objectively judged, amounted to harassment in the communications complained about. In the judge's view, it was arguable that the acts relied upon by the applicant did not, as a matter of law, provide an objectively reasonable basis of the suspicion that an offence had been committed. There was not persistence in the conduct that led to the 2011 warning (see paragraph 7 above); the recent events were three years later; the article (see paragraph 8 above) was in a different form and was not targeted at AB; objectively judged, it had not been written in offensive terms; and the Tweets (see paragraph 10 above) were also not targeted at AB.

24. In granting permission to appeal, the judge ordered that the appeal be heard before a High Court judge of the Media & Communications List. This does not appear to have happened.

25. On 9 November 2018 the High Court dismissed the applicant's appeal. In the judge's view, the County Court judge had been entitled, on the evidence, to find that the arresting officer had an honest suspicion, which was objectively justified, that the applicant had committed an offence of harassment. Further, there was evidence to support the County Court judge's conclusion that the arrest was necessary.

26. The High Court further agreed that there had been no breach of Article 10 of the Convention. The applicant enjoyed a qualified right to freedom of expression, both as a journalist and as an ordinary citizen, since the right could be restricted or subject to penalty for the prevention of disorder or crime. Her arrest had been found to have been lawful and where that was the case it was difficult to conceive of circumstances that could give rise to a breach of Article 10. Accordingly, having found that the arrest was lawful, the judge was correct to find no arguable claim that the applicant's Article 10 rights had been breached by her lawful arrest. The judge also found as a fact that the arrest and charge of the applicant did not curtail or prevent her exercise of her Convention right.

27. Before the High Court the applicant had also contended that her Article 10 rights should have been considered before the decision to arrest her was made. While the High Court judge accepted that her Article 10 rights were relevant at that stage, the County Court judge had considered Article 10 as part of the objective justification. During cross examination the arresting officer had confirmed that she had considered the applicant's Article 10 rights when forming her honest and reasonable suspicion that the arrest was necessary (see paragraph 20 above), and this was accepted by the judge.

28. Accordingly, the High Court judge did not consider that the County Court judge had been wrong to conclude that Article 10 was not engaged, in the sense that it had not been breached by the applicant's arrest.

29. Finally, the High Court judge considered the conditions of bail (see paragraphs 13 and 16 above). In his judgment, once the County Court judge had found that the arrest was lawful, the imposition of the bail conditions was proportionate. Therefore, if the conditions of bail had interfered with the applicant's Article 10 rights, it had been a proportionate and temporary interference, and could not succeed as a separate ground of appeal.

30. On 27 November 2018 the applicant applied to the Court of Appeal for permission to appeal. On 15 February 2019 permission was refused. The applicant claims she received the decision on 19 February 2019. The Government did not challenge this. The applicant subsequently applied to the Supreme Court for permission to appeal, but on 13 March 2019 the

Registrar notified her that the Supreme Court did not have jurisdiction to hear the appeal.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE PROTECTION FROM HARASSMENT ACT 1997

31. The 1997 Act makes “harassment” a crime and a tort. The criminal offence is summary only; the maximum sentence is of six months’ imprisonment and a fine.

32. Section 2(1) of the 1997 Act creates the offence of harassment. It provides that a person who pursues a course of conduct which amounts to harassment of another and which he or she knows amounts to harassment is guilty of an offence. “Harassment” is not defined in the 1997 Act but pursuant to section 7(2) references to harassing a person include alarming the person or causing the person distress.

II. JUDGMENTS CONCERNING THE 1997 ACT

33. In *Majrowski v. Guy’s and St Thomas’s NHS Trust* [2006] UKHL 32; [2007] 1 AC 224, the House of Lords held that behaviour must reach a certain level of seriousness before it amounts to harassment. In this regard, courts were well able to recognise the boundary between conduct which was unattractive, even unreasonable, and conduct which was oppressive and unacceptable.

34. In *Hayes v. Willoughby* [2013] UKSC 17; [2013] 1 WLR 935 Lord Sumption defined “harassment” as a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which was calculated to and did cause that person alarm, fear or distress.

35. The “course of conduct” must be judged from an objective standpoint. In *Trimingham v. Associated Newspapers Ltd* [2012] EWHC 1296 (QB) Mr Justice Tugendhat stated that it “would be a serious interference with freedom of expression if those wishing to express their own views could be silenced by, or threatened with, claims for harassment based on subjective claims by individuals that they feel offended or insulted”.

III. THE POWER TO ARREST AND CHARGE SUSPECTS

36. Pursuant to section 24 of the Police and Criminal Evidence Act 1984 (“PACE”), if a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it. However, the constable must also have reasonable grounds for believing that it is

necessary to arrest the person in question for one of a number of relevant reasons, which include allowing the prompt and effective investigation of the offence or of the conduct of the person in question.

37. Section 47(1E) of PACE provides that where a person is bailed after arrest, he or she may apply to the Magistrates' Court to vary the conditions of bail.¹

IV. THE APPLICATION OF THE CONVENTION TO PROSECUTORIAL DECISIONS

38. In *SXH v. The Crown Prosecution Service* [2017] UKSC 30; [2017] 1 WLR 1401 the Supreme Court held that if the criminalisation of certain conduct did not amount to an interference with Article 8 of the Convention, then a decision to prosecute could not do so. By commencing a prosecution the CPS placed the matter before a court, where the individual's rights under Article 6 of the Convention would be guaranteed. According to the Supreme Court, it was "difficult to envisage circumstances in which the initiation of a prosecution against a person reasonably suspected of committing a criminal offence could itself be a breach of that person's human rights". The court did, however, recognise that the situation would be different if the State had "deliberately trumped up charges against someone as a form of harassment".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

39. The applicant complained that her prosecution, the manner in which her arrest was carried out and the conditions of bail imposed on her breached her rights under Article 10 of the Convention, which reads as follows:

"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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

¹ Rectified on 15 March 2022: the text was "Section 45(1E) of PACE provides that where a person is bailed after arrest, he or she may apply to the Magistrates' Court to vary the conditions of bail."

rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

A. Admissibility

1. The imposition of bail conditions

40. In her application form the applicant stated that the imposition of bail conditions – in particular the condition that she not post any messages on any form of media relating to AB either inferred or by direct reference (see paragraph 13 above) – was overly restrictive and breached her rights under Article 10 of the Convention. She did not maintain this complaint in her subsequent submissions to the Court and in any event the Court considers that it should be declared inadmissible for failure to exhaust domestic remedies as required by Article 35 § 1 of the Convention. The applicant could have – but failed to – apply to the Magistrates’ Court to vary the conditions of bail (see paragraph 37 above).

2. The applicant’s arrest and prosecution

41. The Government argued that neither the arrest nor the charge of the applicant interfered with her rights under Article 10 of the Convention since Article 10 was not engaged where an arrest was lawful and the offence for which an individual was arrested did not in itself interfere with Article 10 of the Convention.

42. The applicant, on the other hand, submitted that her arrest and prosecution on suspicion of an offence under the Protection from Harassment Act 1997 was a plain interference with her rights under Article 10 of the Convention. Furthermore, it had a chilling effect on her and on her journalistic activities which was significant and continuing.

43. The Court has found that, notwithstanding the absence of a final conviction, the prosecution of journalists or other individuals because of material that they published amounted to an interference with the exercise of their right to freedom of expression (see, for example, *Yaşar Kaplan v. Turkey*, no. 56566/00, § 35, 24 January 2006, and *Veysel Turhan v. Turkey*, no. 53648/00, § 19, 20 September 2005). In those cases the repercussions for the applicants were considerably greater than in the present case. Both applicants were initially convicted and sentenced to periods of imprisonment of more than a year before their convictions were quashed pursuant to a new law. The proceedings against them were thereafter suspended for three years. In addition, Mr Kaplan had spent over a month in pre-trial detention.

44. Nonetheless, following the complaint by AB about the applicant’s article and Tweets she was arrested by two police officers, handcuffed and driven to London where she was interviewed under caution (see paragraph 12 above) and detained for approximately seven hours before

being granted bail (see paragraph 13 above). She was subsequently charged with harassment (see paragraph 14 above). Although the criminal proceedings were ultimately discontinued, this only happened more than eight months after her arrest (see paragraphs 17 and 18 above), during which time she had appeared in the Magistrates' Court and pleaded "not guilty" (see paragraph 16 above). Consequently, the Court finds that Article 10 is applicable and cannot accept the Government's argument that there has been no interference with the applicant's rights under Article 10 of the Convention.

45. Furthermore, the Court is of the opinion that the complaint concerning the applicant's arrest and prosecution raises sufficiently complex issues of fact and law, so that it cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is further satisfied that it is not inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

46. The applicant accepts that the interference was prescribed by law and pursued a legitimate aim. However, it is her contention that her arrest and prosecution was wholly unnecessary and disproportionate, and that neither the police nor the domestic courts gave proper consideration to her Article 10 rights.

47. In this regard, the applicant referred to the police investigation log. Nowhere in that log did the police refer to her right to freedom of expression, nor did they provide any objective basis for the urgency or necessity of her arrest, or indicate that alternative measures had been considered. In particular, the police could have issued her with a further Prevention of Harassment Letter ("PHL") or, if criminal proceedings were deemed necessary, she could have been invited to provide written evidence or to attend for a voluntary interview.

48. Finally, the applicant submitted that her work was in the public interest. Like the applicant, AB wrote about whistleblowing in the medical sector. The applicant was concerned that he did not declare associations and conflicts of interest relevant to his work, which her readers had an interest in knowing about. The article in question was factual in content and contained no language which could be described as gratuitously abusive or insulting. Moreover, no objective evidence was provided to the police that the applicant's publication had had any impact on AB's health or income.

(b) The Government

49. The Government contended that the applicant's arrest and charge were in accordance with the law and in pursuit of a legitimate aim, namely the prevention of disorder and crime and/or the protection of the rights of others. The Government further contended that the applicant's arrest and/or charge was not a disproportionate interference with her rights under Article 10. The protection afforded to journalists was subject to the proviso that they acted in good faith in accordance with the tenets of responsible journalism. Journalists could not, however, claim exclusive immunity from criminal liability for the sole reason that the offence was committed during the performance of their journalistic function. In the present case, the applicant had not demonstrated how the article and Tweets could have contributed to any public debate on legitimate subjects such as whistleblowing. Rather, the publications related to her dispute with AB and had limited, if any, public interest. Furthermore, the applicant's work was not disadvantaged in any significant way since at no material time was she prevented from reporting on matters other than AB.

2. Submissions by the third-party intervenor

50. Media Defence stated that the imposition of criminal sanctions on speech had serious implications for the media's ability to carry out its role as a public watchdog. In this regard, it pointed out that the Court had frequently found criminal sanctions to be disproportionate when civil remedies were available (see, for example, *Raichinov v. Bulgaria*, no. 47579/99, § 50, 20 April 2006, and *Lehideux and Isorni v. France*, 23 September 1998, § 51 *in fine* and § 57, *Reports of Judgments and Decisions* 1998-VII). The third-party intervenor relied on the principles laid down in *Bladet Tromsø and Stensaas v. Norway* ([GC], no. 21980/93, § 64, ECHR 1999-III) and argued that the Court had repeatedly held that the imposition of criminal sanctions on a person exercising his or her right to freedom of expression would only be compatible with Article 10 of the Convention in "exceptional circumstances", such as where other fundamental rights had been seriously impaired. Moreover, according to the third-party intervenor the improper use of criminal law enforcement powers could profoundly affect the exercise of Article 10 rights even in the absence of subsequent prosecution or conviction (in this respect, the third intervenor referred to *Yaşar Kaplan*, cited above, § 35, 24 January 2006). Criminal charges and prosecutions could therefore amount to a violation of Article 10 even if the prosecution was abandoned or discontinued (see *Murat Vural v. Turkey*, no. 9540/07, § 52, 21 October 2014, and *Semir Güzel v. Turkey*, no. 29483/09, § 27, 13 September 2016).

3. *The Court's assessment*

(a) **Whether the interference was lawful and pursued a legitimate aim**

51. It does not appear to be in dispute that the interference with the applicant's Article 10 rights was "prescribed by law", notably by the Protection from Harassment Act 1997 and by section 24 of the PACE (see paragraphs 31-32 and 36 above), and that it pursued a legitimate aim in the form of either the prevention of disorder and crime or the protection of the rights and reputation of AB.

52. It remains to be determined whether it was "necessary in a democratic society" in order to achieve that aim.

(b) **Proportionality of the interference**

(i) *General principles*

53. The general principles concerning the necessity of an interference with freedom of expression can be found in *Pentikäinen v. Finland* ([GC], no. 11882/10, §§ 87-91, ECHR 2015); and the general principles applicable to cases in which the right to freedom of expression under Article 10 of the Convention has to be balanced against the right to respect for private life under Article 8 of the Convention were set out by the Grand Chamber in *Axel Springer AG v. Germany* ([GC], no. 39954/08, §§ 78-95, ECHR 2012) and *Von Hannover v. Germany (No. 2)* ([GC], nos. 40660/08 and 60641/08, §§ 95-113, ECHR 2012).

54. In particular, according to the Court's established case-law, the test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient. The margin of appreciation left to the national authorities in assessing whether such a "need" exists and what measures should be adopted to deal with it is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10. Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts. The Court has already had occasion to lay down the relevant principles which must guide its assessment in this area. It has thus identified a number of criteria in the context of balancing the competing rights under Articles 8 and 10 of the Convention. The relevant criteria thus defined include: contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned and the content, form and consequences of the publication. Where it examines an application

lodged under Article 10, the Court will also examine the way in which the information was obtained and its veracity, and the gravity of the penalty imposed on the journalists or publishers (see *Couderc et Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 92-93, ECHR 2015 (extracts), with further references).

55. Furthermore, the Court reiterates that a distinction needs to be made between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see *Mika v. Greece*, no. 10347/10, § 31, 19 December 2013). However, where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient “factual basis” for the impugned statement: if there is not, that value judgment may prove excessive. In order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks, bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact (see *Morice v. France* [GC], no. 29369/10, § 126, ECHR 2015, with further references).

(ii) *Application of the general principles to the facts of the case at hand*

56. The applicant, who was a registered journalist, was arrested after AB made a complaint to the police on 9 December 2014 about an article that she published on the “World Medical Times” website and about her subsequent Tweets (see paragraph 11 above). It was not AB’s first complaint about her behaviour: a previous complaint to the police, on the basis of an allegation of harassment arising out of emails sent to AB by the applicant, in June/July 2011 had resulted in a PHL being served on the applicant (see paragraphs 6 and 7 above). However, at no point was there any suggestion that the applicant’s publications amounted to hate speech or the promotion of violence (see, by way of comparison, *Sürek v. Turkey (no. 4)* [GC], no. 24762/94, § 60, 8 July 1999). Rather, according to AB, the information being published about him by the applicant was “largely false”, caused him acute anxiety and had harmed his career (see paragraph 11 above).

57. The right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life, although in order for Article 8 to come into play, an attack on a person’s reputation must attain a certain level of seriousness and cause prejudice to personal enjoyment of the right to respect for private life (see *Axel Springer AG*, cited above, § 83). The Court has therefore acknowledged that freedom of expression carries with it “duties and responsibilities”, which are liable to assume significance when there is a

question of attacking the reputation of a named individual and infringing the “rights of others” (ibid., § 82). When examining the necessity of an interference in a democratic society in the interests of the “protection of the reputation or rights of others”, the Court may be required to verify whether the domestic authorities struck a fair balance when protecting, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8 (ibid., 84).

58. In the present case the arresting officer stated during cross examination that she had considered the applicant’s Article 10 rights when forming her honest and reasonable suspicion that the arrest was necessary, but discounted them because AB found that what was written about him affected his privacy (see paragraphs 20 and 27 above). There is, however, no record of any such consideration. The arresting officer herself, in fact, indicated that it was not in her notes (see paragraph 20 above) and it appears not to have been recorded in the police investigation log (see paragraph 47 above). Nonetheless, the High Court judge accepted the evidence of the arresting officer (see paragraph 27 above).

59. Even if the arresting officer’s evidence were taken at its highest, however, her conclusion appears to have been based on the subjective viewpoint of AB himself, without any acknowledgment of the fact that the right to freedom of expression extends to information or ideas that offend, shock or disturb (ibid., § 78). Moreover, there is no evidence that the criteria identified by the Court as being relevant to the balancing of the right to freedom of expression and the right to respect for private life (see paragraph 54 above) were taken into account prior to the applicant’s arrest. In particular, no consideration appears to have been given to the subject matter of the applicant’s article and Tweets, and whether they could be said to have contributed to a debate of general interest; the prior conduct of AB; whether the nature of the activities of AB, a fellow journalist, which were the subject of the article and Tweets, were private or public in nature, with the consequence that he could be subject to wider limits of acceptable criticism than ordinary citizens; whether the information in the article or Tweets was true; or whether the attack on AB’s reputation attained a sufficient level of seriousness and caused prejudice to his personal enjoyment of the right to respect for his private life.

60. The aforementioned criteria were also not examined in any detail in the pre-charge decision, which simply noted that that no issues arose under the Convention as the facts of the case suggested that a criminal prosecution was necessary and proportionate. This decision appears to have been based on incorrect information concerning the nature and intensity of the applicant’s conduct (see paragraph 15 above).

61. However, these criteria were central to the subsequent decision of the CPS to discontinue the prosecution. Having taken all the relevant factors into account, including the important distinction between statements of fact

and value judgments (see the case-law quoted in paragraph 55 above), the CPS was not satisfied that the material published by the applicant justified restricting her Article 10 rights (see paragraph 17 above). Nevertheless, when the applicant brought her claim against the Metropolitan Police, neither the County Court nor the High Court took the aforementioned criteria into account. The County Court judge conducted no meaningful balancing exercise as he did not consider that there had been any interference with the applicant's Article 10 rights (see paragraph 22 above). The High Court judge granting permission to appeal, by contrast, acknowledged that Article 10 should have been at the forefront of the consideration of the issues that arose (see paragraph 23 above). Although he ordered that the appeal be heard before a High Court judge of the Media & Communications List (other than himself), this does not appear to have happened (see paragraph 24 above). While the judge who heard the appeal appears to have accepted that Article 10 was engaged, he found that there was no violation of the applicant's right to freedom of expression, principally because the applicant's arrest had been lawful and because the arresting officer confirmed that she had considered the applicant's Article 10 rights when forming her honest and reasonable suspicion that the arrest was necessary (see paragraphs 26-28 above). However, as already noted this conclusion appears to have been based solely on the subjective viewpoint of AB himself, and did not entail any assessment of the relevant criteria identified by this Court as relevant to the balancing of the right to freedom of expression under Article 10 of the Convention against the right to respect for private life under Article 8 of the Convention (see paragraph 59 above).

62. In light of the foregoing, it has not been established that the arresting officer, the officer responsible for deciding to charge the applicant, or the domestic courts balanced her right to freedom of expression and either AB's right to respect for his private life and reputation or the need to prevent disorder or crime in accordance with the relevant criteria mentioned in paragraphs 54 and 55 above.

63. The parties have not addressed the relevant criteria in detail in their submissions. Therefore, in the absence of any findings by the domestic courts, the Court cannot but conclude that the reasons given by the national authorities to justify the interference with the applicant's Article 10 rights were neither relevant nor sufficient (see the case-law quoted in paragraph 54 above). Accordingly, it finds that there has been a breach of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

65. The applicant claimed 35,338 euros (EUR) in respect of pecuniary damages, reflecting the costs she was liable to pay the police defendant in the domestic proceedings (EUR 28,960), the cost of a transcript required for the domestic proceedings (EUR 1,920), and her costs as a litigant in person in the domestic proceedings (EUR 3,850 for her time and EUR 608 for her travel expenses). She also claimed EUR 10,000 in respect of non-pecuniary damage.

66. The Government informed the Court that on 15 July 2019 solicitors instructed by the police had informed the applicant that no steps would be taken in relation to enforcement or recovery of the costs orders at that time. Consequently, this expense was not actually incurred. The Government further submitted that the time spent of her case as a litigant in person was not an expense that could be recovered under Article 41 of the Convention, again as it did not represent costs actually incurred. Insofar as the applicant was claiming for actual expenses which were incurred, such as her travel, her claims were not supported by invoices or receipts.

67. The Government did not object in principle to the recovery of the cost of a transcript, but noted that the applicant had indicated to her lawyer her intention to withhold 441.70 pounds sterling (GBP) from the total cost of GBP 1643.74 (equivalent to approximately EUR 1,920), and there was no evidence that this sum was ever paid.

68. Finally, the Government contended that the amount claimed for non-pecuniary loss was excessive.

69. The Court makes no award for pecuniary damage. Neither the costs the applicant was liable to pay the police defendant in the domestic proceedings nor her costs as a litigant in person are costs which were actually incurred, and the claim for travel expenses was not supported by appropriate documentary evidence. The claim for the cost of the transcript will be considered under the heading “costs and expenses”.

70. As to non-pecuniary damage, the Court considers that the applicant must have experienced a certain degree of frustration and inconvenience as a result of her arrest and prosecution. It notes, however, that after the prosecution was discontinued she was awarded costs, including an amount in respect of her legal costs (see paragraph 18 above). Ruling on an equitable basis as required by Article 41 of the Convention, it therefore

awards the applicant the sum of EUR 2,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

71. The Court awards the applicant EUR 1,400 under this heading, representing the cost of the transcript required for the domestic proceedings.¹

72. The applicant makes no further claim for the costs and expenses incurred before the Court.

C. Default interest

73. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the applicant's arrest and prosecution admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement:
 - (i) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage; and
 - (ii) EUR 1,400 (one thousand four hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

¹ Rectified on 15 March 2022: the text was "The Court awards the applicant EUR 1,400 under this heading, representing the cost of the transcript required for the domestic proceedings."

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 30 November 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Registrar

Yonko Grozev
President