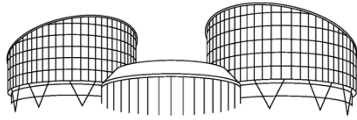

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
issued by the Registrar of the Court

ECHR 264 (2024)
12.11.2024

# Obligation on publisher of the *Daily Mail* to pay substantial "success fees" in defamation and breach of privacy cases was excessive

The case Associated Newspapers Limited v. the United Kingdom (application no. 37398/21) concerned the fact that Associated Newspapers Limited – the publisher of the *Daily Mail* and the *Mail on Sunday* – had been obliged to pay extensive costs incurred by claimants who had successfully sued it in privacy and/or defamation proceedings following articles it had published in print or online in 2017 and 2019. Since one of the claimants had entered into a conditional fee arrangement (CFA) with his legal representative, and both had taken out "after-the-event" (ATE) insurance, Associated Newspapers Limited had been liable not only for their base costs, but also for fee uplifts including the "success fee" in the CFA and for their ATE insurance premiums.

In today's **Chamber** judgment[1] in the case, the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 10 (freedom of expression)** of the European Convention on Human Rights as regards the "success fees" the newspaper company had had to pay, **and**

**no violation of Article 10** as regards the company's obligation to cover the "after-the event" (ATE) insurance premiums taken out by the successful claimants.

The first set of proceedings had been brought by A.S., a Libyan businessman, after the MailOnline had named him as a suspect in the 2017 terrorist attack at the Manchester Arena. The second had been brought by E.H., the clinical psychologist named in the *Mail on Sunday* and MailOnline in the context of the police investigation into historic child sex abuse, known as "Operation Midland".

In considering whether unsuccessful media defendants being liable for these additional costs was compatible with Article 10 of the Convention, the Court found that there was insufficient evidence to enable it to depart from its findings in its 2011 judgment *MGN Limited v. the United Kingdom*, where, in the context of the same Article, it had found the CFA regime to be disproportionate to its original aim – of ensuring the widest possible public access to legal services for civil litigation, including to people who would not otherwise be able to afford a lawyer. In that case, it had concluded that the CFA regime exceeded even the wide discretion accorded to the Government in such matters. In today's case, the Court concluded that the obligation on Associated Newspapers Limited to pay substantial costs including success fees to A.S. had also been disproportionate.

On the other hand, the Court did not find that the requirement for the newspaper company to cover A.S.'s and E.H.'s ATE insurance premiums had been disproportionate. As a Libyan refugee who had lost his employment, there was nothing to show that A.S. could have paid the applicant company's costs if his claim had been unsuccessful. Similarly, E.H., a clinical psychologist, would probably not have been in a position to pay the media company's costs. In contrast, Associated Newspapers Limited was the publisher of a leading daily newspaper which could be expected to have insurance against such litigation.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

## Principal facts

The applicant, Associated Newspapers Limited, is the publisher of the *Daily Mail* and the *Mail on Sunday* newspapers, and is based in the United Kingdom.

On 29 May 2017, the MailOnline named A.S., a Libyan businessman who had been granted asylum in the United Kingdom, as a suspect in a terrorist attack that had been carried out at the Manchester Arena one week earlier. The attack had resulted in the death of 22 people and injuries to more than 800 others. A.S. worked for a company that transferred money between Libya and the United Kingdom, and had been contacted in the days leading up to the Manchester Arena attack by the attacker, who wanted to exchange Libyan dinars into British currency. A.S. had refused the transaction but was subsequently arrested as part of the police investigation into the attacker's contacts. He was released when it became clear that he had had no involvement. Although the police had not published information about him, he was named in the MailOnline article. A.S. alleged that, as a result, he had lost his job and had suffered related distress.

A.S. entered into a conditional fee arrangement with his lawyers on 2 March 2018, and purchased ATE insurance in July 2018. On 21 December 2018, he sued Associated Newspapers Limited for breach of privacy. As his claim was successful, the media company was obliged to pay damages and costs to A.S. which included 245,775 pounds sterling (GBP) plus VAT in respect of the success fee he had agreed with his lawyer in the framework of a conditional fee arrangement. In November 2011, the company settled the total sum of GBP 822,421.

The second set of proceedings was brought by E.H. and arose from a police investigation into historic child sex abuse known as "Operation Midland". The allegations of sex abuse had been made by an individual who was ultimately found to have fabricated his claims. Articles published on 28 July 2019 in the *Mail on Sunday* and on MailOnline named E.H. as the clinical psychologist who had given credibility to those allegations.

E.H. sued the newspaper company in November 2019 for false and defamatory articles – the proceedings were settled following a settlement offer by the company. As a result, it was liable to pay E.H.'s costs of the proceedings, which amounted to GBP 825,164, of which GBP 335,160 represented an ATE premium. She had not entered into a conditional fee arrangement, but had purchased ATE insurance the day before bringing the proceedings and had increased her level of cover in August 2020. In April 2021, E.H. indicated that she was prepared to accept GBP 709,095 in full and final settlement of her costs claim, an amount which the media company subsequently settled.

## Complaints, procedure and composition of the Court

The applicant company complained that its liability to pay the success fees and/or ATE insurance premiums incurred in the cases brought by A.S. and E.H. had breached Article 10 (freedom of expression). It argued that the burdens placed on unsuccessful defendants were excessive and unfair, and the threat of such liabilities was plainly capable of discouraging the participation of the press in debates over matters of legitimate concern.

The application was lodged with the European Court of Human Rights on 22 July 2021.

Judgment was given by a Chamber of seven judges, composed as follows:

Gabriele **Kucsko-Stadlmayer** (Austria), *President*,
Tim **Eicke** (the United Kingdom),
Faris **Vehabović** (Bosnia and Herzegovina),
Armen **Harutyunyan** (Armenia),
Anja **Seibert-Fohr** (Germany),
Ana Maria **Guerra Martins** (Portugal),

Sebastian **Răduleţu** (Romania),

and also Andrea **Tamietti**, *Section Registrar.*

## Decision of the Court

Success fees

The relevant domestic law and practice concerning costs, CFAs, success fees and ATE insurance had been set out in detail in the 2011 judgment *MGN Limited v. the United Kingdom* and the 2022 decision *MGN Limited v. the United Kingdom* (dec.). The Court reiterated that the requirement to pay success fees had been based on domestic legislation, in particular the Courts and Legal Services Act 1990, the Access to Justice Act 1999, the Conditional Fees Arrangement Orders 1995 and 2000 as well as the Civil Procedure Rules and the relevant Cost Practice Directions. It accepted that the success fee agreement had sought to ensure the widest possible public access to legal services for civil litigation, including to people who would not otherwise be able to afford a lawyer.

The conditional fee arrangement scheme had been the subject of detailed and lengthy consultations initiated by the Ministry for Justice since 2003, and notably of a fundamental review published by Jackson LJ ("the Jackson Review"). Indeed, in the *MGN Limited* judgment, the Court had largely relied on four specific flaws first identified in that review: the lack of focus of the regime and the lack of any qualifying requirements for claimants to be allowed to enter into a CFA; the absence of any incentive on the part of a claimant to control the incurring of legal costs on his or her behalf, and the fact that judges assessed those costs only at the end of the case, when it was too late to control what had been spent; the "blackmail" or "chilling" effect due to the fact that the costs burden on the opposing parties was so excessive that often a party was driven to settle early despite good prospects of a successful defence; and the fact that the regime allowed solicitors and barristers to "cherry pick" cases likely to succeed and to avoid claims with smaller chances of success.

In the *MGN Limited* judgment, in the context of Article 10 of the Convention, the Court had found that the requirement that the applicant pay success fees to the claimant was disproportionate to its aims and concluded that that fee arrangement exceeded even the wide discretion accorded to the Government in such matters.

Following that judgment, legislation had been adopted to prevent losing parties from being liable for success fees and ATE insurance premiums – except in cases of defamation or privacy proceedings. Liability for success fees in such proceedings has since been abolished (unless the CFA pre-dated that abolition, as was the case here), but successful claimants may still recover the costs of ATE premiums from the losing party.

The Court noted the Government's argument that the costs regime had been developed in order to implement proper costs budgeting to ensure that the costs were proportionate and reasonable. However, in the absence of concrete examples, it was not clear how significant those developments had been in practice. For instance, the sum awarded in the A.S. case had still been "eyewatering" and the success fees disproportionate to what had been awarded in damages.

In general, the Court found that there was insufficient evidence in this case to enable it to depart from its findings in the *MGN Limited* judgment. It concluded that the obligation on the media company to pay additional costs including success fees to A.S. had been disproportionate. There had therefore been a violation of Article 10 of the Convention as regards the success fees Associated Newspapers Limited had had to pay.

ATE premiums

For the reasons set out by the Court in 2022 in the *MGN Limited decision* and in *Coventry v. the United Kingdom*, namely that, in contrast to success fees, ATE insurance afforded protection not only

to claimants but also to successful defendants by providing them with the opportunity to recover their costs – the Court considered that the proportionality had to be considered on a case-by-case basis.

As a Libyan refugee who had lost his employment, there was nothing to show that A.S. could have paid the newspaper company's costs if his claim against it had been unsuccessful. Similarly, E.H., a clinical psychologist, would probably not have been in a position to pay the company's costs. In contrast, Associated Newspapers Limited was the publisher of a leading daily newspaper and could be expected to be insured against litigation. Moreover, E.H. had not entered into a CFA, thus absolving Associated Newspapers Limited from any requirement to pay a success fee. More importantly, that had meant that there had been a strong incentive for her to control the incurring of legal costs on her behalf.

Consequently, the Court did not find that the obligation on Associated Newspapers Limited to cover A.S.'s and E.H.'s ATE premiums had been disproportionate, especially since those premiums would have served in the newspaper company's interests had it won the cases against it.

Therefore, there had been no violation of Article 10 in respect of the ATE premiums payable by Associated Newspapers Limited.

## Just satisfaction (Article 41)

The Court considered that the case raised important questions about how to calculate pecuniary damages, and further submissions from the parties were necessary before the question of just satisfaction in so far as pecuniary damages were concerned was ready for decision.

It held that the United Kingdom was to pay the applicant 15,000 euros (EUR) in respect of costs and expenses.

*The judgment is available only in English.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.