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**VIA COURIER AND FACSIMILE +33 3 8841 2730**

March 13, 2009

**Re: Written comments in the case of *MGN Ltd v. United Kingdom* (Appl. no. 39401/04)**

Dear Mr. Early,

Please find enclosed the written comments on the above referenced case by the Open Society Justice Initiative, the Media Legal Defence Initiative, Index on Censorship, the English PEN, Global Witness, and Human Rights Watch. The documents referenced in the written comments will be sent via courier, along with this original brief.

We would be grateful if we could be informed of the receipt of the written comments **by fax** at the number +1 212 548 4662.

Yours sincerely,

Rupert Skilbeck
Litigation Director
Open Society Justice Initiative

†On leave September 2007–August 2008
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# Written Comments in the Case of *MGN Ltd v. United Kingdom*

*A Submission to the European Court of Human Rights on behalf of English PEN, Global Witness, Human Rights Watch, Index on Censorship, Media Legal Defence Initiative and the Open Society Justice Initiative.*

**March 2009**


**For the Intervenors:**

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IN THE EUROPEAN COURT OF HUMAN RIGHTS

**Application no. 39401/04**

**MGN Ltd v. the United Kingdom**

WRITTEN COMMENTS OF

English PEN

Global Witness

Human Rights Watch

Index on Censorship

Media Legal Defence Initiative

Open Society Justice Initiative

Pursuant to leave granted on 28 January 2009 by the President of the Chamber, acting under Rule 44(2) of the Rules of Court, the above named organisations hereby submit written comments on the effects of conditional fee agreements on NGOs and small publications.

**Introduction**

1. This case concerns the operation of the conditional fee agreement (CFA) system in the United Kingdom whereby claimants in non-criminal proceedings are able to obtain legal representation for free, on the basis that if successful, their legal representatives will be able to recover their legal costs from the losing side, together with an uplift of up to 100% of their costs.
2. While MGN is a large news organisation, this case raises important issues as to the "chilling effect" of very high costs in defamation proceedings against smaller news organisations and non-governmental organisations (NGOs) that are often involved in investigative reporting and dissemination of information and ideas on matters of public interest.
3. The position of the intervenors is that any system which causes excessive costs to be awarded against NGOs and small publishers in defamation and privacy cases operates as a serious and unjustifiable restriction on their freedom of expression. While conditional fee arrangements have an important role to play in supporting public interest litigation, any system must be designed so as to avoid an infringement of fundamental rights.
4. In these written comments the intervenors provide information about the two issues upon which the Court granted leave:

   - *Firstly*, how the practice of conditional fee agreements has impacted upon the abilities of NGOs and small publications to report on matters of public interest.

   These comments rely on incidents reported by the intervenors and others to demonstrate the effect of being threatened with a libel action in the UK brought under the CFA system.

   - *Secondly*, what are the costs of defending defamation and privacy cases in comparable countries, and do these costs include "success fees".

   The intervenors make reference to a recent academic study prepared by the University of Oxford that compares the legal fees for defamation proceedings across Europe. The report demonstrates that fees in the United Kingdom under a CFA are 140 times more costly than the average cost of the other countries.

**Relevant Legal principles**

5. A number of well-established principles are particularly relevant to this intervention:

   a. *The special position of the media under Article 10,* including watchdog NGOs that publish information of public interest. "Where... measures taken by national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures on the part of the Court is called for..."[1]

   b. *Excessive penalties and costs.* A damages award against a media organisation must bear "a reasonable relationship of proportionality" to the injury suffered by the claimant.[2]

   c. *Enhanced protection for campaign groups.* In a democratic society "even small and informal campaign groups ... must be able to carry on their activities effectively and there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to public debate by disseminating information and ideas on matters of public interest..". The chilling effect of measures adopted by the state upon public interest expression by such groups is important "bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion ... ."[3]

   d. *Local Newspapers,* authors and small book publishers. Special consideration must be given to the situation of small publishers who will not have the resources that are available to large media corporations. "[I]t is easy to fall into the trap of considering the position from the point of view of national newspapers only. Local newspapers play a huge role. In the United Kingdom according to the website of The Newspaper Society there are 1301 regional and local newspapers which serve villages, towns and cities. Apparently, again according to the website of The Newspaper Society, over 85 per cent of all British adults read a regional or local newspaper compared to 70 per cent who read a national newspaper.... For local newspapers, who do not have the financial resources of national newspapers, the spectre of being involved in costly legal proceedings is bound to have a chilling effect ... ."[4] See also the observations of Lord Hoffman in *Campbell v MGN (No.2)* that "smaller publishers may not be able to afford to take such a stand" when faced with lawyers acting for an impecunious defamation claimant on a CFA.[5]

**I. How has the practice of conditional fee agreements impacted upon the abilities of NGOs and small publications to report on matters of public interest?**

*Non Governmental Organisations*

6. NGOs that investigate and expose serious wrongdoing or comment on matters of public interest increasingly are assuming the watchdog functions that the media traditionally have discharged. Financial pressures, caused in part by competition from new technologies, have forced news organisations to shrink and, increasingly, to rely on material from NGOs and other sources.[6]

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[1] *Bergens Tidende v Norway,* 26132/95, judgment of 2 May 2000, at para 53.

[2] *Tolstoy Miloslavsky v United Kingdom,* 18139/91, judgment of 13 July 1995, at para. 49.

[3] *Steel and Morris v United Kingdom,* 68416/01, judgment of 15 February 2005, at paras 89 and 95.

[4] *Re S (a child) (identification: restriction on publication)* [2004] UKHL 47, at para. 36.

[5] [2005] UKHL 61 at para. 34.

[6] Andrew Currah, *What's Happening to Our News: an investigation into the likely impact of the digital revolution on the economics of news publishing in the UK,* Reuters Institute for the Study of Journalism, University of Oxford, at page 6. Available at: http://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/What_s_Happening_to_Our_News.pdf

7. NGOs are particularly vulnerable to defamation and related actions by public figures keen to prevent the disclosure of matters in the public interest. The exposure of serious wrongdoing – undoubtedly of high public interest – lies at the heart of their work. Some, including the intervenors, seek to expose and document serious abuses of international law, including the commission of international crimes (such as Human Rights Watch), corrupt exploitation of natural resources and international trade systems (such as Global Witness), and violations of freedom of expression (such as PEN and Index on Censorship). For example:

> "Global Witness was passed confidential information alleging that multinational oil companies were making payments directly into accounts at Riggs Bank, in Washington DC that were benefiting the dictatorial President of oil-rich Equatorial Guinea. Through subsequent investigations, it was able to access public mortgage records showing that President Obiang had bought two multi-million dollar mansions in the United States with the financing arranged by a senior manager of the same bank. The resulting press interest helped prompt a US congressional subcommittee investigation into the issue which showed how President Obiang was directly accessing and transferring cash from those accounts.
>
> "As a result of the investigations and publication of information, the oil companies involved are being investigated for possible violations of the US Foreign Corrupt Practices Act (though they have yet to be charged with any offences) and the bank in question has had its federal banking licence revoked for numerous ethics and anti-money laundering violations and was fined US$24 million for its role in the affair."[7]

8. Libel "tourism" is a particular problem for NGOs. Under the law of England and Wales they may be sued in defamation in that jurisdiction even though only a small proportion of the readership (print or internet) is in the UK.[8] This is a particular problem for small NGOs publishing on the internet. The *Bosnian Centre for Investigative Reporting's Organized Crime and Corruption Reporting Project,* for example, has adopted United Kingdom libel standards in all of its work following threats from UK lawyers.[9]

9. Many NGOs regard being sued in the United Kingdom as their greatest legal risk, even if they are based elsewhere. According to Dinah Pokempner, General Counsel at Human Rights Watch:

> "[W]e have concluded that the greatest legal risk we run is being sued in the UK … . This has put a damper on some reporting, and caused substantial delays in publication where risks must be carefully assessed. … Although Human Rights Watch is a large organization with a substantial budget, our donors give money to support research, not extraordinary legal costs."[10]

10. Legal proceedings were commenced against Human Rights Watch in the United Kingdom for the prize-winning report, *Leave None to Tell the Story*, about the genocide in Rwanda, produced by the late and highly respected American historian Dr. Alison Des Forges, recipient of a prestigious MacArthur fellowship (the "Genius Award") for individuals who show exceptional merit. Even though the report was published in 1999 it was not until 2005 that a Rwandan exile sought to make a complaint after the UK government relied on the report in considering his application for naturalisation. The complaint was in fact settled by mediation, as it became clear that Human Rights Watch was able to defend the substance of its report and the complainant was in fact under investigation for genocide by the Rwandan government. However,

> "[T]his was not before tens of thousands of dollars had been channelled into legal defense, and before several research trips trying to relocate witnesses and retrace sources had been

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[7] See letter of Peter Noorlander, 10 March 2009, at paras. 5 and 6, attached.

[8] See *Berezovsky v Forbes Inc. (No 1)* 11 May 2000, UKHL, [2000] 1 WLR 1004

[9] Note 6, *supra*, at paras. 22-26.

[10] See letter of Dinah Pokempner, Human Rights Watch, 10 March 2009, at paras. 10-11.

made around the world. We were fortunate to have a solicitor who offered his services *pro bono*, but HRW bore all other costs, as the complainant in this case was unwilling to even share the costs of mediation in London."[11]

11. In 2007, Global Witness was sued in the High Court for breach of confidence and a breach of Art.8 by the son of the President of the Republic of Congo-Brazzaville.[12] It had obtained documents that had entered the public domain through a court in Hong Kong. It published bank and corporate documents showing that Denis Christel Sassou-Nguesso, the son of the President of Congo-Brazzaville, had spent hundreds of thousands of dollars on luxury goods and other items using a credit card being paid from funds that appeared to have come from sales of oil by the government. As well as being son of the country's president, Denis Christel Sassou-Nguesso was the Director of Cotrade, the marketing arm of the state oil company and as such was the public official in charge of these oil sales.

12. After publication by Global Witness, Sassou-Nguesso and his company, Long Beach Limited, applied for a High Court injunction to force Global Witness to remove his company records and credit card statements from its website. Mr Justice Stanley Burnton dismissed the application, relying on Art.10 to find that: "Once there is good reason to doubt the propriety of the financial affairs of a public official, there is a public interest in those affairs being open to public scrutiny."[13] He agreed with Global Witness that the documents, unless explained, suggested that Mr. Sassou-Nguesso and his company were "unsavoury and corrupt" and concluded that "the profits of Cotrade's oil sales should go to the people of the Congo, not to those who rule it or their families"[14]. The documents were also referred to in the US Congress.[15] The conduct exposed appears to contradict solemn commitments the Congolese government made to the international community in an effort to benefit from significant debt relief.[16]

13. Global Witness was awarded its costs which were in excess of £50,000. But these have not been recovered. The applicant has refused or failed to pay them. Had Global Witness lost the case it would have incurred costs of around £100,000.[17]

14. Fear of being sued in the UK leads NGOs to limit what they are prepared to report, not only in the United Kingdom but more generally on the internet. For example, in 2007, *Index on Censorship,* the name of a non-governmental organisation and the magazine that it publishes, commissioned the distinguished US journalist James Dorsey to write an article about libel tourism. In the course of his research, Mr Dorsey came across information which he shared with the subject of the piece, to give him the right of reply. He immediately received correspondence from the subject's UK lawyer threatening libel action.

15. After taking legal advice, *Index* reluctantly decided to drop the piece owing to the very high risk of legal action. Even though *Index* had no doubts about the quality of journalism or that

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[11] *Ibid.*, at para.9.

[12] [2007] EWHC 1980 (QB).

[13] *Ibid,* at para.52.

[14] *Ibid,* at para.49.

[15] See comments of Hon. Diane E. Watson (California) on "Links between Oil, Poverty, and Corruption on Continent of Africa," U.S. House of Representatives, 11 July 2007, Congressional Record, 12 July 2007, at E1501. Available at http://frwebgate1.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=78793778938+0+1+0&WAISaction=retrieve

[16] World Bank, Press Release No: 2006/301/AFR, 9 March 2006, outlining commitments made by the Government of Congo as to links between the government and the state owned oil company. Available at: http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0,,contentMDK:20847652~menuPK:64166657~pagePK:64166689~piPK:64166646~theSitePK:469043,00.html

[17] Note 6, *supra*, at para.12.

publication would have been in the public interest, it could not sustain UK legal costs.[18] As stated by Jo Glanville, the editor of *Index*:

> "Even though I had total faith in the story, in the quality of the journalism, and in the knowledge that publication would be in the public interest, there was no way that Index could sustain legal costs. It would have ruined the organisation. Such is the burden of costs that there is no way that a small organisation like Index could take the risk. Even if we had won, and this is one of the most galling aspects of the affair, we might still have had legal costs that we could not sustain.
>
> "Index is a journal, and an organisation, that supports free expression and battles against censorship. The irony of this dilemma has not been lost on us. The chilling effect of costs means that we cannot always fulfil our role and that when the most able journalists in the world agree to write for us, we cannot always publish them."[19]

16. Nor is legal insurance an option for NGOs with scarce resources. As Dinah Pokempner of Human Rights Watch states:

> "Our ability to acquire libel insurance has ... been limited by the risk profile we present combined with our resources, to the effect that we can only obtain insurance on terms that would protect our endowment but force us to substantially redirect resources in any given year."[20]

17. This fear is compounded by the availability of CFAs. For the reasons explained in the second part of these written comments, the CFA system substantially increases the fees that are payable when defending an action for defamation. The purpose of the system is that the losing party pays not only their own costs and those of the winning party, but by also paying the success fee uplift contributes to the civil justice system as a whole.[21] .This substantial increase in costs means that when an NGO is threatened with a CFA and success fee backed claim, it is forced to settle rather than, as Lord Hoffman put it in *Campbell v MGN (No 2),* "take such a stand."[22]

18. In the most extreme cases this might amount to what Lord Hoffman has dubbed the 'blackmailing effect'[23] whereby a claimant is able to commence a meritless action with no financial risk while running up massive costs for the defendant. The system requires the NGO or small newspaper who loses to pay up to twice the reasonable costs of the claimant, or to concede liability. "[T]he obvious unfairness of such a system is bound to have the chilling effect on a newspaper exercising its right to freedom of expression . . . and to lead to the danger of self-imposed restraints on publication..."[24]

*Small publications*

19. Tony Jaffa of *Foot Anstey Solicitors,* who represents hundreds of regional and weekly newspapers in the UK and their websites, summarises the concerns of his clients in his statement of 2 March 2009, annexed to these written comments. He has no doubt that the availability of CFAs which provide for success fees chill his clients' expression by:

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[18] *Ibid.* at paras. 17-19.

[19] Note 6, *supra,* at para. 20.

[20] Note 9, *supra,* at para. 11.

[21] This contribution to the civil justice system as a whole is accomplished by allowing lawyers to claim costs of up to twice the amount of their actual fees when they win, thus enabling them, in theory, to support indigent claimants by taking more risky cases. In reality most CFA cases are won, indicating that lawyers are not taking risky cases, and many CFA cases are brought by people of means who could well afford to hire a lawyer.)

[22] Note 5, *supra.*

[23] *Ibid., per* Lord Hoffman at para.31.

[24] *King v Telegraph Group Ltd,* [2004] EWCA (Civ) 613, Brooke, LJ, at para.99.

a. making them reluctant to run contentious public interest stories; and

b. forcing them to settle claims when threatened with a CFA, because of concerns about costs, even though there is a worthwhile defence.[25]

20. In giving evidence to the House of Commons Select Committee on Constitutional Affairs in November 2005, Mr Jaffa described an example of the problem. A weekly newspaper, circulation 11,000 copies, published a reader's letter that criticised the Chairman and Chief Executive of the local district council. They threatened to sue the paper rather than the author of the letter. The editor was advised that he could rely on the defence of honest comment (opinion). However, when it emerged that the claimants' solicitors would be acting under CFAs with success fees, the editor realised that an adverse costs order would shut down the title. So he agreed to publish an apology and pay substantial damages and costs in order to settle the case.[26]

21. Like Foot Anstey, *Farrer & Co Solicitors* represent many local newspapers and specialist magazines in the UK. In March 2002 one of *Farrer & Co*'s media specialists wrote an article in UK *Press Gazette* describing a claim against a regional newspaper. It had published, alongside an article about the arrest of three people in connection with child prostitution offences, a photograph of the wrong house. Eleven months later, prominent solicitors acting under a CFA complained that the occupants of the house had been defamed. The newspaper made an immediate offer to settle under a statutory procedure.[27] The parties agreed the wording of an apology and damages. When costs were discussed, the claimants' solicitors claimed a 55% success fee. The uplifted hourly rate claimed by the partner dealing with the case was £542.50, exclusive of VAT. The costs claim was eventually settled on the basis of a lower basic hourly rate with an additional success fee of 35%, only on costs incurred up to the date of acceptance of the offer of amends.[28]

22. Another media specialist at *Farrer's* gave evidence to the Select Committee in 2005. He described acting for a newspaper in the North East of England which was warned that the after the event (ATE) insurance premium for the claimant police officer could amount to as much as £50,000, payable in the event that the newspaper lost the action, or even if the claim were settled before trial. This was in addition to costs which could be uplifted by up to 100%. *Farrer's* estimate of likely damages, if the matter settled before proceedings were commenced, was in the range of £5,000-10,000. The company successfully resisted the claim. But the editor concerned has since commented that the experience has led to extreme caution when dealing with any stories about police officers.[29]

23. Mr Jaffa's evidence and the cases referred to above suggest that the concern expressed as to the "chilling effect" of such high costs is well-founded. Claimants may threaten legal action, wrongly alleging inaccuracy in the reporting of the newspaper or the NGO in order to deflect attention from their own wrongdoing, or to silence, discredit or punish the organisation for daring to report the truth.

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[25] See Letter of Tony Jaffa, Foot Anstey Solicitors, 2 March 2009.

[26] See Mr Jaffa's written evidence to the House of Commons Select Committee on Constitutional Affairs in Nov 2005 (http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmselect/cmconst/754/754we61.htm)

[27] See s.2 of the Defamation Act 1996.

[28] Nicolas Alway, 'Costs and the Scourge of Conditional Fee Agreements', *Press Gazette,* 1 March 2002. Available at: http://www.pressgazette.co.uk/story.asp?storyCode=27856&sectioncode=1

[29] See Richard Shillito, Written Evidence to the Select Committee on Constitutional Affairs, November 2005. Available at: http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmselect/cmconst/754/754we62.htm

**II. What are the costs of defending defamation and privacy cases in comparable countries, and do these costs include "success fees"?**

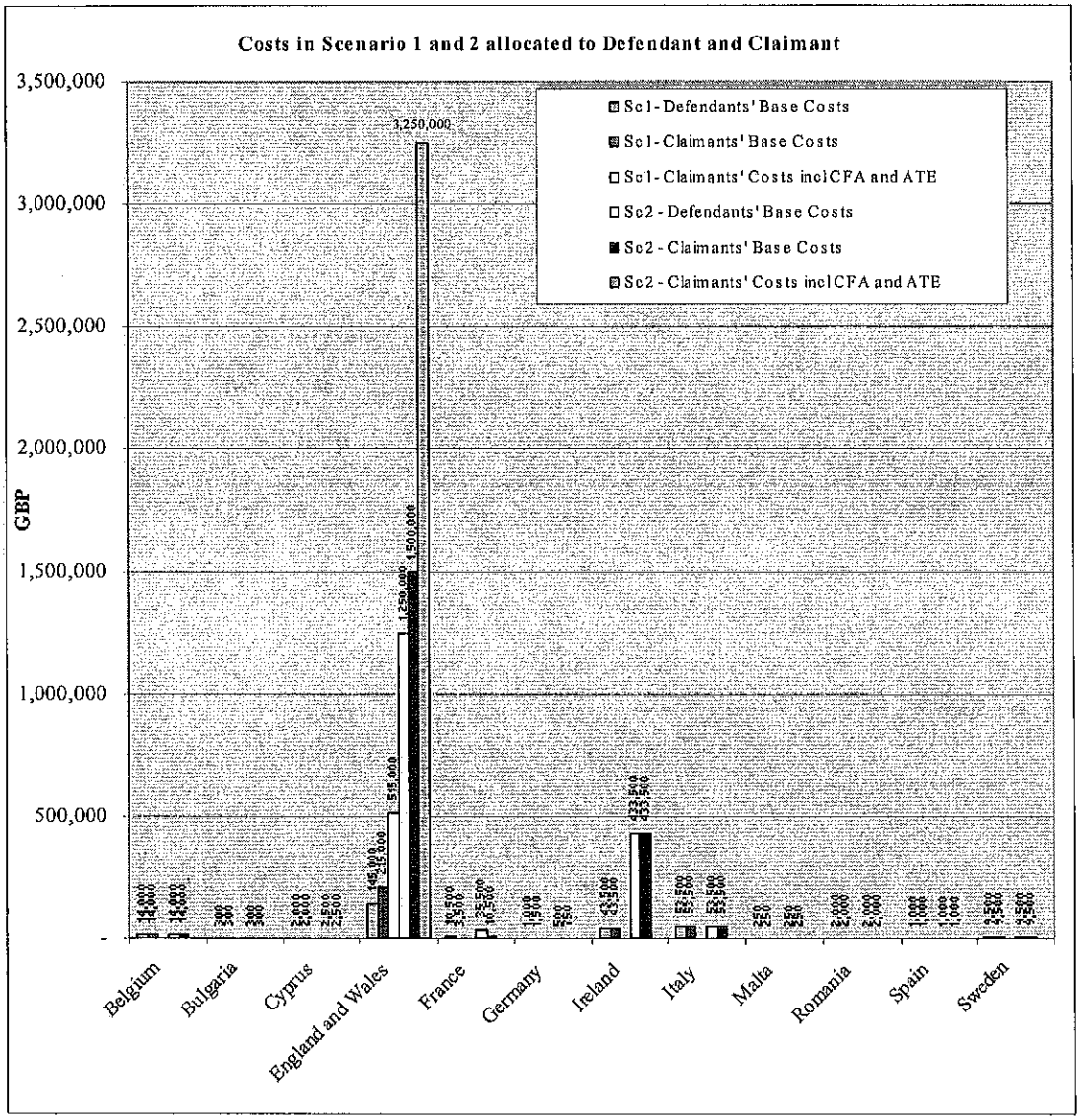
24. *A Comparative Study of Costs in Defamation Proceedings Across Europe*[30] gives a snapshot answer to this question. The following summary is not intended as a substitute for reading the report in full, but rather as a reason for doing so.

25. The comparative data used in the study comprised questionnaire answers from experienced practising lawyers in Belgium, Bulgaria, Cyprus, England and Wales, France, Germany, Ireland, Italy, Malta, Romania, Spain and Sweden. As of the date of the report, not one of these other countries had an equivalent of the CFA, let alone a CFA with the possibility of "success" fees. The questionnaire, drafted by one of the largest and most experienced London defamation firms, posited two hypothetical UK case scenarios and asked local lawyers to estimate the likely comparative costs in their jurisdictions.

    - Scenario 1: a case culminates in a five-day High Court trial, with the claimant having to pay his solicitors a 65% uplift; his barristers, a 100% uplift; and his insurance company, an ATE premium of £92,000.
    - Scenario 2: a case requires a more complex three-week High Court trial. The claimant's lawyers were all on a 100% uplift, and the claimant had paid an ATE insurance premium of £616,646.

26. In graphic form the results are as follows:

[30] 'A Comparative Study of Costs in Defamation Proceedings Across Europe', *Programme in Comparative Media Law and Policy,* The Centre for Socio-Legal Studies, Oxford University, December 2008. Available at http://pcmlp.socleg.ox.ac.uk/html/defamationreport.pdf.




27. The local lawyers' estimates for costs in the UK were as follows:

- In scenario 1, following trial, the claimant's costs were estimated to be £512,000, and the defendant's costs, to be £130,000.
- In Scenario 2, prior to the trial the claimant's costs would have been £2,774,996. The trial would lift this figure to £3,274,996. The defendant's costs following trial were estimated at around £1,250,000.

28. The local lawyers estimated costs in comparable cases as follows:

- Belgium: The defendant's and claimant's costs in both scenarios would be approximately €14,400;
- Bulgaria: The defendant's and claimant's costs in both scenarios would be approximately €300;
- Cyprus: The defendant's and claimant's costs in both scenarios would be approximately €2-2,500;

- France: The defendants' costs would range between €10-30,000, while the claimants' costs would range between €3,5-10,500;
- Germany: The defendant's and claimant's costs in the first scenario would be approximately €1-1,500, and in the second scenario €150-500
- Ireland: The defendant's and claimant's costs in the first scenario would be approximately €43,500, and in the second €433,500.
- Italy: The defendant's and claimant's costs in both scenarios would be approximately €53,500.
- Malta: The defendant's and claimant's costs in both scenarios would be approximately €250.
- Romania: The defendant's and claimant's costs in both scenarios would be approximately €2,000.
- Spain: The defendant's and claimant's costs in both scenarios would be approximately €1,000.
- Sweden: The defendant's and claimant's costs in both scenarios would be approximately €3,500.

The local lawyers explained how the litigation would proceed and the costs would be awarded in their jurisdictions. Their explanations indicate that in all of them, save perhaps Ireland, there are guidelines that limit the levels of awards, broadly, by reference to the particular pieces of work undertaken by the claimant's lawyer and/or the nature of the case.

29. Thus, the comparative research indicates that in England and Wales a claimant who has a CFA incurs substantially higher legal costs than a defendant without a CFA. In the other jurisdictions costs as between claimant and defendant tend to be equal. The study identifies a substantial difference between claimants' legal costs, where a CFA exists, and defendants' non-CFA costs. This is because a client with the benefit of a CFA or similar agreement has no incentive to exercise control over the legal work being done on his/her behalf or to resist cost increases. This erodes the client's resistance to high costs and distorts the costs control mechanism normally inherent to the market.

30. The study also estimated that even in non-CFA cases, the jurisdiction of England and Wales is up to four times more expensive than the next most costly jurisdiction, Ireland. Ireland was close to ten times more expensive than Italy, the third most expensive jurisdiction. If the figure for average costs across the jurisdictions is calculated without including the figures from England and Wales and Ireland, England and Wales is seen to be around 140 times more costly than the average. The data also shows that defamation proceedings in common law jurisdictions are far more expensive than in civil law jurisdictions.

**Conclusion**

31. As outlined in paragraph 5 above, a damages award against a publisher must bear "a reasonable relationship of proportionality" to the injury suffered by the claimant. By parity of reasoning, the costs awarded against an unsuccessful publisher must bear a reasonable relationship of proportionality to the value of the claim and the amount/complexity of the legal work involved in pursuing the claim. This is the approach adopted generally across Europe. As the Oxford University study makes clear, the CFA costs regime in the United Kingdom fails to respect this important principle.

32. The statements of small publishers and intervenor NGOs referenced in this intervention make clear that disproportionate potential costs liability in privacy and defamation actions has chilled freedom of expression Publishers of limited means (including NGOs) are concerned about the total amount of money that libel/privacy claims may cost, whether due to damages or to costs.

33. A large part of this chilling effect is invisible, and the examples in these written comments are only the tip of the iceberg. Most NGOs and publishers are reluctant to admit that they decided not

to publish something, or perhaps decided not even to investigate a story, for fear of having to defend a costly court case. Decisions to settle claims through retraction and apology often mask the publisher's assessment that he cannot risk the exorbitant costs he may need to pay even if a court should find only a minor violation and award only minor damages, as was the situation in the instant case. As the House of Lords in *Re S*[31] and Lord Hoffman in *Campbell v MGN (No 2)*[32] recognised, the chilling effect can be inferred from the very nature of the CFA costs regime and the tight budgets of NGOs and small publishers. Any publisher of limited means is inevitably inhibited in its expression when faced with a costs regime that allows already expensive specialist lawyers to enhance their fees for "success" by anything up to 100%.

34. Importantly, while the CFA scheme and success fees as they operate in the UK against NGOs and small publications demonstrably constitute a restriction on the exercise of the right to freedom of expression, they are not necessary in a democratic society to protect a legitimate interest, as evidenced by the fact that no other country in Europe permits such arrangements.

35. This case raises different considerations as to the chilling effect than did *Times Newspapers Ltd (Nos. 1 and 2) v UK*, decided by this Court on 10 March 2009. In that case, this Court declined to look at the "broader chilling effect" of the United Kingdom's internet publication rule on the basis that the UK Court of Appeal had reached a reasonable accommodation by a) requiring the publisher to add a notice to stories in an Internet archive to the effect that they were the subject of a defamation action, and b) concluding that libel proceedings brought against a newspaper after a significant lapse of time could well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10. Here, the intervenors have demonstrated that the chilling effect has in fact restricted the right to freedom of expression of NGOs and small publishers. The UK courts in this case did not fashion any doctrine that could effectively mitigate the chilling effect.

36. The weak financial position of small publishers and NGOs compared to larger media corporations makes them yet more vulnerable to threats of excessive costs. Yet the public benefits immeasurably from the ideas and information that they disseminate every day. The intervenors urge the Court to take predicament of NGOs and small publishers, as well as that of MGN Ltd, into account in determining this application.

For the intervenors:

13th March 2009

| | | |
|---|---|---|
| James Goldston | Peter Noorlander | pp Mark Stephens |
| Executive Director | Legal Director | Finers Stephens Innocent LLP |
| Open Society Justice Initiative | Media Legal Defence Initiative | 179 Great Portland St, London |

[31] Note 4, *supra.*

[32] Note 5, *supra.*