Ad perpetuam rei memoriam III.

ELTE Law School's memorials for the Monroe E. Price Media Law Moot Court Competition

Editors:
Gergely Gosztonyi
Anna Zanathy

2020

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ELTE Law School's memorials for the Monroe E. Price Media Law Moot Court Competition

In 2008 University of Oxford established the Monroe E. Price Media Law Moot Court Competition with the aims to foster and cultivate interest in freedom of expression issues and the role of the media and information technologies in societies around the world. The competition challenges students to engage in comparative research of legal standards at the national, regional and international levels, and to develop their arguments (in written and oral forms) on cutting-edge questions in media and ICT law[1].

ELTE Law School joined the competition in 2015 at the South-East European Regional Round[2]. Since that time ELTE Law School participated every year and its results are getting better and better[3].

With the publication of the written Memorials after each competition, ELTE Law School would like to appreciate the dedicated work of its students and help the future mooters to learn from their efforts.

We hope that our students will actually reach the stars and that we will find their names and scientific achievements in similar publications in the future as well.

Budapest, 2020.

The Editors

[1] https://www.law.ox.ac.uk/centres-institutes/bonavero-institute-human-rights/monroe-e-price-media-law-moot-court-competition

[2] https://www.law.ox.ac.uk/content/south-east-europe-2019-2020

[3] https://majt.elte.hu/mootcourt

Memorial for Applicants 2018/2019

REBEKA, ERDŐSI - GERGELY, GOSZTONYI - DORINA, GYETVÁN - NÓRA, KISS - EMESE, MEZŐ - PÉTER, SZILÁDI - ATTILA, TATÁR

EÖTVÖS LORÁND UNIVERSITY FACULTY OF LAW // ELTE LAW SCHOOL

301A

THE 2018-2019 MONROE E. PRICE

INTERNATIONAL MEDIA LAW MOOT COURT COMPETITION

Unger Ras & UConnect

(*Applicants*)

v.

Republic of Magentonia

(*Respondent*)

MEMORIAL FOR APPLICANTS

Word Count for Argument Section: 4,969

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II. LIST OF ABBREVIATIONS

ACHPR	**African Charter on Human and Peoples' Rights**
ACHR	**American Convention on Human Rights**
ACommHPR	**African Commission on Human and Peoples' Rights**
CJEU	**Court of Justice of the European Union**
Clarifications	**2018/2019 Price Media Law Moot Court Competition Combined Clarification Questions and Answers for Asia Pacific, North East Europe and South East Europe Rounds**
CoE	**Council of Europe**
Compromis	**The 2018/2019 Price Media Law Moot Court Competition Case**
CS	**Community Standards**
DPC	**Democratic Party of Cyanisia**
ECHR	**European Convention on Human Rights**
ECtHR	**European Court of Human Rights**
EU	**European Union**
FoE	**Freedom of Expression**
HCM	**High Court of Magentonia**

Honourable Court	**Chamber of the Universal Court of Human Rights, Universal Freedom of Expression Court**
IACtHR	**Inter-American Court of Human Rights**
ICCPR	**International Covenant on Civil and Political Rights**
IDPCM	**Information and Data Protection Commission**
Magentonia	**Republic of Magentonia**
MPF	**Magentonian Popular Front**
No(s)	**Number(s)**
NTDS	**Notice-and-Takedown System**
Original Article	**The article, which was published in February 2001 in The Cyanisian Times about Unger Ras**
OSCE	**Organisation for Security and Co-operation in Europe**
PIDPA	**Magentonian Public Information and Data Protection Act of 2016**
UDHR	**Universal Declaration of Human Rights**
UMP	**The United Magentonian Party**
UN	**United Nations**
UN Doc	**United Nations Document**

UNGA	**United Nations General Assembly**
UNHRC	**United Nations Human Rights Committee**

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IV. STATEMENT OF RELEVANT FACTS

Cyanisia

1. Cyanisia has a population of approximately 5 million people. The population consists of two tribes, the Cyan and the Celadon tribe. Unger Ras, a former professor of the State University of Cyanisia has established the Democratic Party of Cyanisia (DPC) in 2000, which supporters are mainly from the minority tribe.[1]
2. In February 2001, a story was published in The Cyanisian Times, which reported that Ras had been accused of misappropriation of university funds and that the Director of State Police ordered Ras's immediate arrest. Due to being persecuted for his political opinions, Ras fled Cyanisia and sought asylum in the neighbouring country, Magentonia.[2]
3. In April 2001, Ras's former university issued a public statement clarifying that Ras in fact had been accused of misconduct 6 years ago, but he was fully exonerated following an investigation by the University.[3]
4. During the past 17 years, state authorities in Cyanisia have systematically persecuted the members of DPC, many leaders and supporters were subjected to violence, and some were forced into exile due to false charges against them. This systematic violence resulted in a mass exodus of DPC party members to Magentonia.[4]

[1] Compromis 1.1-1.2

[2] Compromis 1.2

[3] Compromis 1.2

[4] Compromis 1.3

Magentonia

5. Magentonia, the neighbouring country of Cyanisia has a population of 1 million people**,** and it is the destination of Cyanisian asylum seekers. There are two main political parties, UMP and MPF.[5]
6. Ras became a naturalised Magentonian citizen in 2011, ten years after he fled Cyanisia, and joined the UMP. He actively campaigned to raise awareness on the human rights abuses in Cyanisia, and also set up the Cyanisian Refugee Center in order to support the refugees. Ras was highly respected among the wider UMP voter base and was a viable candidate at the parliamentary election scheduled for June 2018.[6]
7. Magentonia's economy relies on the export of natural gas, this industry regularly employs non-citizens, including Cyanisian refugees. A market crash in February 2018, resulted in widespread fears that Magentonia would enter a period of economic recession.[7] Magentonia is a party to the International Covenant on Civil and Political Rights.[8]

United Magentonia Party

8. The country is governed by the United Magentonia Party. It had 65% of the seats in parliament until the election in 2018. In July 2018, the party won the election with securing 50% of the seats, however, Ras, the candidate of the party had lost the election.[9]

[5] Compromis 2.1

[6] Compromis 2.2

[7] Compromis 2.3

[8] Compromis 2.4

[9] Compromis 2.1, 5.6

UConnect

9. UConnect is a social media platform, with a search engine function. It has over 100 million users worldwide, over 60% of the populations of Magentonia and Cyanisia actively use it and it is the most popular platform. Users can post, comment and share stories, news and their thoughts. Each user has a 'personal page', which consist of the user's posts, and a 'live feed' of posts by other users whom the user chooses to follow. The platform's default option is that only those can see a post, who follow the user but there is an option for the post to be 'public' which is the user's choice. Posts are searchable only if they are public.[10]
10. A post can be also 'trending'. This function is based only on popularity, which depends on the number of shares and views of the said post. A user can pay to the platform for a post to be 'promoted'. For a post to be trending and/or promoted, it must be public. These posts can appear on a user's live feed, without the need to follow the author of the post.[11]
11. UConnect has a search function as well. Search results appear according to the user's preferences; therefore, they are customized for each user. The platform uses an algorithm to deliberate user preferences. These are ascertained by enabling users to specify themes that they are interested in and collecting and analyzing data on user behaviour in posting and sharing content.[12]
12. UConnect has a Notice-and-Takedown System, in order to remove unlawful content from the platform. Through its Complaints Portal any person can report a post and

[10] Compromis 3.2

[11] Compromis 3.2

[12] Compromis 3.3-3.4

request its removal if it violates UConnect Community Standards. A team of human reviewers assesses the complaints, which are usually processed within 72 hours.[13]

Article on Unger Ras

13. On 1 April 2018, Magentonian Mail published an article claiming that Ras fled Cyanisia in 2001 following a 'corruption scandal' at his university and an arrest warrant had been issued against him. The article also linked the online version of the story published in 2001 in The Cyanisian Times, which appeared to corroborate with the article's claims. Ras immediately issued a statement clarifying that the content was false and reproduced a copy of the statement by his former university.[14]
14. The Magentonian Mail carried Ras's statement only on 3 April 2018, but it did not remove the article. Then Ras requested the Magentonian Mail to remove the article. Although the newspaper removed the article on 15 April 2018, by that day, the article started to trend on UConnect, and was featured on users' live feeds and search results. The article was connected on the live feeds to the topic of 'Magentonian politics' or other similar ones. Also, public posts which have linked the article, begun to appear high on the search results' page when users searched for 'Ras', 'Unger Ras' and 'Magentonia'.[15]
15. On 25 April 2018, an anonymous user named TakeBackMag200 posted a web link to the online version of the original story with the caption "you can't erase history". The post also started to appear high in the search results.[16]

[13] Compromis 3.5

[14] Compromis 4.1

[15] Compromis 4.1-4.3

[16] Compromis 4.4

16. On 29 April 2018, Ras wrote to the head office of UConnect requesting that the defamatory post by TakeBackMag200 be removed. Ras also requested that all search results depicting the 2001 Cyanisian Times story be blocked or removed. In his letter he also referred to the UConnect Community Standards and to the Magentonian Constitution, stating that it violated his privacy under the Magentonian Constitution.[17]
17. UConnect responded to Ras on 30 April by stating that it would remove the post, but would not remove the search results, unless ordered to do so by the Information and Data Protection Commission of Magentonia.[18]
18. On 5 May 2018, Ras filed a petition before the IDPCM seeking an order to compel UConnect to remove all search results connected to the defamatory story. Ras cited the PIDPA and Article 7 of the Magentonian Constitution, which guarantees to all persons the right to privacy. The Commission rejected Ras's request.[19]

PIDPA

19. Under Magentonian Public Information and Data Protection Act of 2016 "person" includes unincorporated and incorporated bodies carrying out any business or other activity within the territory of Magentonia. Under the Act advocacy on national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and the dissemination of false propaganda are unlawful activities, however,

[17] Compromis 4.6

[18] Compromis 4.5

[19] Compromis 4.6-4.7

these actions are not specified in the law.[20] Penalties for these offences include imprisonment and a fine up to USD 200,000.[21]

Relevant posts on UConnect

20. The post on 26 May 2018 was removed, because users reported it and the review team evaluated the post as it was not clear whether the post violated any Community Standards. However, the post on 30 May 2018 was not reported by any user.[22]

Domestic proceedings against Ras and UConnect

21. On 1 July, The High Court of Magentonia dismissed Ras's appeal. It held that Ras was not entitled to any rectification, erasure or blocking of search results. On 10 July 2018, the High Court issued its verdict on the charges against UConnect under the PIDPA. The High Court found that UConnect failed to expeditiously remove the TBM post of 26 May 2018. It also found that the claim made in the TBM post of 30 May 2018 was false, taking into account that the post was the most viewed post on UConnect, therefore it recklessly disseminated false propaganda. The Court ordered UConnect to pay a fine of USD 100,000.[23]

[20] Compromis 5.5

[21] Clarifications 34.

[22] Compromis 5.1-5.2, 5.4

[23] Compromis 6.1-6.3

V. STATEMENT OF JURISDICTION

Unger Ras and UConnect (Applicants) have applied to the Universal Freedom of Expression Court, the special Chamber of the Universal Court of Human Rights hearing issues relating to the violation of rights recognised in the Article 17 and Article 19 of the ICCPR.

Both Unger Ras' and Uconnect's appeals against the High Court of Magentonia's decisions to be considered by the Supreme Court of Magentonia were declined, exhausting their domestic appeals. This Honourable Court has jurisdiction as the final arbiter over all regional courts where parties have exhausted all domestic remedies.

The Applicants request this Honourable Court to issue a judgment in accordance with relevant international law, including the UDHR, the ICCPR, conventions, jurisprudence developed by relevant courts, and principles of international law.

VI. QUESTIONS PRESENTED

The questions presented, as certified by this Honourable Court, are as follows:

1. Whether Magentonia's decision not to grant Ras any rectification, erasure or blocking of search results depicting The Cyanisian Times story of 2001 violated Article 17 of the ICCPR.
2. Whether Magentonia's decision of 2 June 2018 to direct UConnect to suspend all operations until the conclusion of the trial violated Article 19 of the ICCPR.
3. Whether Magentonia's prosecution and conviction of UConnect under Sections 3 and 5 of the PIDPA violated Article 19 of the ICCPR.

VII. SUMMARY OF ARGUMENTS

I. Magentonia's decision not to grant Ras any rectification, erasure or blocking of search results depicting The Cyanisian Times story of 2001 violated Article 17 of the ICCPR, since it was not prescribed by law, did not pursue a legitimate aim and was not necessary in a democratic society

Firstly, the restriction was not prescribed by law, as the PIDPA uses vague terms such as 'irrelevant', 'inaccurate' and 'incomplete' that render impossible to clearly foresee the conditions in which a rectification, erasure or blocking of search results could be granted. Moreover, by fixing the hearing date for only after the election, the HCM violated Ras's right to fair trial, therefore, no adequate safeguards were available to him.

Secondly, the restriction did not pursue a legitimate aim. Taking into account that the aims of reposting the Original Article were to disseminate false accusations against Ras right before the election and to mislead the public, Magentonia would have had a positive obligation to protect Ras's reputation against unlawful attacks.

Thirdly, the restriction was not necessary in a democratic society. Ras is a public figure, however, the public interest must not overstep the boundaries set by the right to reputation and privacy. Even though the contents of the Original Article were clarified by the University and Ras as well, the citizens could not receive accurate information about him as the misleading content remained accessible. Moreover, the manipulated and thus, completely false additional publications linking the online version of the Original Article did not serve to better inform the public; instead, it only resulted in that Ras became a victim of unfounded accusations. As a consequence of this successful campaign, Ras failed to secure a seat in parliament despite the fact that he was a viable candidate.

II. Magentonia's decision to direct UConnect to suspend all operations until the conclusion of the trial violated Article 19 of the ICCPR, since it was not prescribed by law, did not pursue a legitimate aim and was not necessary in a democratic society

Firstly, the suspension was not prescribed by law, because the PIDPA did not even deal with the possibility of the issuance of wholesale suspensions or its conditions, therefore only divine legal counsel could have been sufficiently certain that the operation of a social media platform could be suspended under Magentonian law. Furthermore, it did not provide legal protection against arbitrary interferences as the wholesale suspension did not solely aim at suspending the access to the offending posts.

Secondly, the suspension did not pursue a legitimate aim, because if public order interests are invoked to interfere with FoE, it must be based on real causes that present the certain threat of a serious disturbance. However, no disturbances ensued from the posts on UConnect.

Thirdly the suspension was not necessary in a democratic society since less draconian measures should have been envisaged and UConnect had a Notice-and-Takedown System in place which was an appropriate tool. Furthermore, the wholesale suspension ordered until the conclusion of the trial was not content specific and remained valid for a long period, in addition, due to the platform's uniqueness no alternatives were available to the citizens of Magentonia for receiving and seeking information.

III. Magentonia's prosecution and conviction of UConnect under Sections 3 and 5 of the PIDPA violated Article 19 of the ICCPR, since it was not prescribed by law, did not pursue a legitimate aim and was not necessary in a democratic society

Firstly, the prosecution was not prescribed by law, because Section 5 of the PIDPA uses vague terms such as 'false propaganda,' nevertheless, such general prohibition on the dissemination of information is incompatible with international standards for restrictions on FoE.

Secondly, the prosecution did not pursue a legitimate aim as mere conjecture regarding possible disturbances is not sufficient to justify an interference with FoE.

Thirdly, the prosecution was not necessary in a democratic society for the following reasons. UConnect did not go beyond that of a passive, purely technical service provider and the TBM posts on 26 and 30 May 2018 could not be considered clearly unlawful. In addition, UConnect has taken all the necessary measures to prevent the illicit posts on its platform and to remove them expeditiously, hence, the liability of the actual author could serve as a sensible alternative. Furthermore, the prosecution was disproportionate taking into account the tremendous amount of fine and the manner in which UConnect was held liable for third-party content which may create a chilling effect on the FoE on the Internet.

VIII. ARGUMENTS

I. MAGENTONIA'S DECISION NOT TO GRANT RAS ANY RECTIFICATION, ERASURE OR BLOCKING OF SEARCH RESULTS DEPICTING THE CYANISIAN TIMES STORY OF 2001 VIOLATED ARTICLE 17 OF THE ICCPR

1. The right to FoE[24] is essential to a healthy and vibrant society and is considered fundamental to an individual's moral and intellectual development. However, it is generally accepted in democratic societies that the exercising of the said right carries with it duties and responsibilities to ensure that co-existing rights are not impugned.[25] Therefore, the state's obligation is to protect the right to privacy and a part of this right, the reputation[26] of its citizens.[27]
2. Search engine,[28] as a new development of information technologies, enables the dissemination of huge amount of information like never before, worldwide in a matter

[24] ECHR (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 1932 art 10; ICCPR (adopted 16 December 1966, entered into force 23 March 1976) art 19(2); ACHPR (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 9(2); UDHR (adopted 10 December 1948) UNGA Res 217A (III) art 19; ACHR (adopted 22 November 1969, entered into force 18 July 1978) art 13

[25] ECHR (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 1932 art 10(2); ICCPR (adopted 16 December 1966, entered into force 23 March 1976) art 19(3); ACHPR (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 9(2); ACHR (adopted 22 November 1969, entered into force 18 July 1978) art 13(2); ACHPR (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 10(2); *Shchetko v Belarus* CCPR/C/87/D/1009/2001 (UNHRC, 8 August 2006) [7.3]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (10 August 2011) UN Doc A/66/290 [15]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (11 May 2016) UN Doc A/HRC/32/38 [7]

[26] *A. v Norway* App no 28070/06 (ECtHR, 9 July 2009) [64]; *White v Sweden* App no 42435/02 (ECtHR, 19 December 2016) [26]; *Pfeifer v Austria* App no 12556/03 (ECtHR, 15 February 2008) [35]; *Chauvy and others v France* App no 64915/01 (ECtHR, 29 September 2004) [70]

[27] ECHR (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 1932 art 8; ICCPR (adopted 16 December 1966, entered into force 23 March 1976) art 17(2); ACHR (adopted 22 November 1969, entered into force 18 July 1978) art 11(3); *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [82]-[84]; *Couderc and Hachette Filipacchi Associés v France* App no 40454/7 (ECtHR, 10 November 2015) [83]-[86], [88]-[90]

[28] Chan M, 'Control or Being Controlled: Erasing Personal Data in Public Domain in Hong Kong' (2016) 10 Hong Kong Journal of Legal Studies 23; Grimmelmann J, 'Speech Engines' (2013) Minnesota Law Review 868; Kulk S and Borgesius FZ, 'Freedom of Expression and Right to Be Forgotten Cases in the Netherlands after Google

of seconds,[29] which puts an extensive burden on to the states to effectively and actively fulfil their obligation to protect the right to privacy of citizens. Therefore, a heightened risk of harm may interfere with the enjoyment of these rights.[30]

3. The present case focuses on how or whether the FoE should be restricted in the name of a public figure's right to privacy.[31] The HCM's decision not to oblige UConnect to remove the search results[32] did not protect the private sphere of Ras. In accordance with international standards, Applicants suggest applying a three-part cumulative test to establish that it was not (A) prescribed by law; (B) in pursuit of a legitimate aim; and

Spain' (2015) 1 European Data Protection Law Review (EDPL) 113; Shaw SR, 'There Is No Silver Bullet: Solutions to Internet Jurisdiction' (2017) 25 International Journal of Law and Information Technology 283.

[29] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [110]

[30] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [133]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) [63]; ECtHR, 'Internet: Case-Law of the European Court of Human Rights' (Council of Europe, June 2015) <https://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf> accessed 7 November 2018, 22

[31] *Von Hannover v Germany* App nos 40660/08, 60641/08 (ECtHR, 7 February 2012) [84]

[32] Compromis 6.1

(C) necessary in a democratic society. These requirements have been endorsed by the UNHRC,[33] the ECtHR,[34] the IACtHR,[35] and the ACHPR.[36]

A. THE RESTRICTION OF RAS'S RIGHT TO PRIVACY UNDER THE PIDPA WAS NOT PRESCRIBED BY LAW

4. A norm is prescribed by law if it a) is sufficiently precise, and b) contains adequate safeguards.[37] Applicants submit that the PIDPA was not precisely formulated for the following reasons.

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[33] *Womah Mukong v Cameroon* CCPR/C/51/D/458/1991 (UNHRC, 10 August 1994) [9.7]; *Sohn v Republic of Korea* CCPR/C/54/D/518/1992 (UNHRC, 19 July 1995) [10.4]; *Malcolm Ross v Canada* CCPR/C/70/D/736/1997 (UNHRC, 18 October 2000) [11.2]; *Velichkin v Belarus* CCPR/C/85/D/1022/2001 (UNHRC, 20 October 2005) [7.3]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (16 May 2011) UN Doc A/HRC/17/27 [24]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (10 August 2011) UN Doc A/66/290 [15]; UNHRC 'General Comment 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [35]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (17 April 2013) UN Doc A/HRC/23/40 [29]

[34] *Handyside v The United Kingdom* App no 5393/72 (ECtHR, 7 December 1976) [49]; The *Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [45]; *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) [24]; *Murat Vural v Turkey* App no 9540/07 (ECtHR, 21 January 2015) [59]; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) [124]

[35] *Francisco Martorell v Chile* (IACtHR, 3 May 1996) [55]; *Herrera-Ulloa v Costa Rica* (IACtHR, 2 July 2004) [120]; IACHR, 'Report of the Special Rapporteur for Freedom of Expression' (2009) OEA/SER L/V/II Doc 51 [231]-[233]; IACHR, 'Freedom of Expression and the Internet' (2013) OEA/SER L/II CIDH/RELE/IN F11/13 [54]-[64]

[36] ACommHPR, 'Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa' (2002) ACHPR/Res 62(XXXII)02 Principle II; *Interights v Mauritania* Comm no 242/2001 (ACommHPR, 2004) [78]-[79]; *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe* Comm no 294/04 (ACommHPR, 2009) [80]

[37] *Silver and Others v The United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [85]-[90]; *Malone v the The United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [67]-[68]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [57]-[59]

a) The PIDPA was not sufficiently precise, because it did not enable Ras to reasonably foresee in which conditions may the search results be rectified or blocked

5. A norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizens to regulate their conduct.[38] Though many laws are inevitably couched in vague terms,[39] whose interpretation and application are questions of practice,[40] Section 22 (a) of the PIDPA contains terms such as 'irrelevant', 'incomplete', 'inaccurate' that are too vague and therefore, leave a wide margin of appreciation and uncertainty for those entities (so-called Gatekeepers)[41] who apply them.[42]
6. Lacking any definition or guidelines of 'irrelevant' raises the question regarding the relevance of an appearing article.[43] Consequently, in the present case the HCM had an unfettered discretion to decide that the information was relevant. Therefore, Applicants submit that the PIDPA did not provide protection against arbitrary use of that discretion.[44]

[38] *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]

[39] *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02, 36448/02 (ECtHR, 22 October 2007) [41]; *Centro Europa 7 S.r.l. and Di Stefano v Italy* App no 38433/09 (ECtHR, 07 June 2012) [141]; *Rekvényi v Hungary* App no 25390/94 (ECtHR, 20 May 1999) [34]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]

[40] *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02, 36448/02 (ECtHR, 22 October 2007) [41]

[41] Thompson M, 'Beyond Gatekeeping: The Normative Responsibility of Internet Intermediaries' (2015) 18 Vanderbilt Journal of Entertainment & Technology Law 783

[42] *Ekin Association v France* App no 39288/98 (ECtHR, 17 July 2001) [45]; *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000) [52]; *Gaweda v Poland* App no 26229/95 (ECtHR, 14 March 2002) [39]

[43] Tokyo High Court, Judgment of July 12, 2016 [2016] Tokyo High Court 2016 (Kyo) 45; *NT1 & NT2 v Google LLC* [2018] EWHC 799 (QB); *Google Inc.*, no. 399922, (Conseil d'Etat France, 19 July 2017); *P. H. v O. G.* ref. C.15.0052.F (Cour de cassation de Belgique Belgium, 29 April 2016)

[44] *Malone v The United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [79], [87]

b) There were no adequate safeguards as the HCM's hearing was fixed for after the election

7. Adequate safeguards exist where a state's discretion is fettered through laws that "sufficiently indicate the scope and manner of exercise of the discretion conferred on the relevant authorities".[45]
8. Magentonia violated Ras's right to fair trial[46] and therefore, it did not provide sufficient safeguards as the hearing was only fixed for a date after the election.[47] According to the ECtHR[48] when examining the reasonableness of the proceedings it is crucial to determinate what is at stake for the applicant in the dispute.[49] Taking into account that Ras was a candidate in the upcoming election and the trial was held afterward, it could not provide a remedy for the harm which was caused by the non-deletion or non-rectification of search results depicting the Original Article.
9. For these reasons, the restriction of Ras's right to privacy was not prescribed by law.

[45] *Malone v The United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [70], *Silver and others v The United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [88]-[90], *Huvig v France* App no 11105/84 (ECtHR, 24 April 1990) [34]

[46] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) art 14(1); UDHR (adopted 10 December 1948) UNGA Res 217A (III) art 10; ECHR (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 1932 art 13

[47] Compromis 4.8

[48] *Frydlender v France* App no 30979/96 (ECtHR, 27 June 2000) [43]; *Comingersoll S.A. v Portugal* App no 35382/97 (ECtHR, 6 April 2000) [19]

[49] *Sürmeli v Germany* App no 75529/01 (ECtHR, 8 June 2006) [128], [132]; *Scopelliti v Italy* App no 15511/89 (ECtHR, 23 November 1993) [23], [25]

B. THE RESTRICTION OF RAS'S RIGHT TO PRIVACY UNDER THE PIDPA DID NOT PURSUE A LEGITIMATE AIM

10. Right to privacy is not an absolute right, but according to the ICCPR, it may not be restricted by unlawful attacks.[50] The protection of the right to privacy is a legitimate and valid aim for restricting the FoE.[51] Ras as a candidate at the upcoming election is a public figure who was targeted by false propaganda, the aim of which was to mislead and manipulate the citizens. Due to the dissemination of false information Ras has unexpectedly failed to secure a seat in parliament.[52] Therefore, the practice of the FoE was not driven by a general interest and did not contribute to public debate, but served a personal interest to damage one's reputation.[53]
11. Under international principles,[54] every state's positive obligation is to protect a person's honour against unlawful attacks.[55] Hence, protecting the right to privacy includes the restriction of unsubstantiated allegations.[56] Therefore, the non-deletion of search results of such allegations caused an unjustified interference with Ras's right to privacy.

[50] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) art 17(1)

[51] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) art 19(3)b

[52] Compromis 5.6

[53] *Shabanov and Tren v Russia* App no 5433/02 (ECtHR, 14 December 2006) [41]; Smet S, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict' (2010) 26 American University International Law Review 227-228

[54] *Pfeifer v Austria* App no 12556/03 (ECtHR, 15 November 2007) [31]

[55] Oster J, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015), 152

[56] *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR, 17 December 2004) [78]; *Lindon, Otchakovsky-Laurens and July v France* App no 21279/02, 36448/02 (ECtHR, 22 October 2007) [57]

C. THE RESTRICTION OF RAS'S RIGHT TO PRIVACY UNDER THE PIDPA WAS NOT NECESSARY IN A DEMOCRATIC SOCIETY

12. In the present case, two fundamental rights have come into conflict with each other. On one hand Unger Ras's right to privacy protected by Article 17 of the ICCPR, and on the other hand Magentonian citizens' right to seek, receive and impart information as part of the right to FoE protected by Article 19 of the ICCPR. According to the ECtHR, no abstract hierarchy exists between such relative human rights. Instead, these rights deserve equal respect.[57] Hence, by taking into account that one right cannot automatically trump another right, balancing is necessarily the appropriate solution.[58]
13. This balancing activity falls within the national authorities' margin of appreciation, which, however, goes hand in hand with international supervision.[59] Furthermore, the margin allowed to a state will normally be restricted where a particularly important facet of an individual's identity is at stake.[60] Therefore, Applicants submit that the Honourable Court's overview is of the highest importance in case of such violation against the right to privacy of Ras.

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[57] *Von Hannover v Germany* (No 2) App nos 40660/08, 60641/08 (ECtHR, 7 February 2012) [106]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [87]; Christina Angelopoulos and Stijn Smet, 'Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability' (Journal of Media Law 2016), 276

[58] *Mosley v The United Kingdom* App no 48009/08 (ECtHR, 10 May 2011) [111]; *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015) [91]; *Bédat v Switzerland* App no 56925/08 (ECtHR, 29 March 2016) [52]

[59] *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [39]; *Janowski v Poland* App no 25716/94 (ECtHR, 21 January 1999) [30]; *Tammer v Estonia* App no 41205/98 (ECtHR, 6 February 2001) [60]; *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011) [70]; *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 September 2004) [64]

[60] *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR, 24 January 2017 [182]; *Evans v The United Kingdom* App no 6339/05 (ECtHR, 10 April 2007) [77]; *X and Y v The Netherlands* App no 21830/93 (ECtHR, 26 March 1985) [24], [27]; *Dudgeon v The United Kingdom* App no 7525/76 (ECtHR, 22 October 1981) [52]; *Christine Goodwin v The United Kingdom* App no 28957/95 (ECtHR, 11 July 2002) [90]; *Pretty v The United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) [71]

14. Where the right to FoE is being balanced against the right to privacy, the following five criteria had been laid down in the ECtHR's case-law.[61]

a) Circumstances in which the original content was published

15. The circumstances in which the Original Article was published cannot be disregarded by the Honourable Court. The state authorities in Cyanisia have systematically persecuted the members and supporters of the main opposition party, DPC. Many of whom were subjected to violence and intimidation and were forced into exile due to false charges against them. As a consequence, more than 65,000 people were forced to flee Cyanisia until 2010.[62] Such phenomenon coincides with the present case, in which Ras was falsely accused because of his political opinions.
16. The state newspaper, The Cyanisian Times published a story referring to an alleged misappropriation of university funds in 1995. Nevertheless, it did not mention that Ras had been released from the accusation following an investigation by the University.[63] In addition, it was published only in 2001, six years after the alleged misconduct, right after Ras established the opposition party.[64]

[61] *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [89]-[111]; *Haldimann and Others v Switzerland* App no 21830/09 (ECtHR, 24 February 2015) [44]-[68]; *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015) [82]; *Axel Springer SE and RTL Television GmbH v Germany* App no 51405/12 (ECtHR, 21 September 2017) [39]-[59]

[62] Compromis 1.3

[63] Compromis 1.2

[64] Compromis 1.1

b) The status of the person concerned and the subject of the report

17. The Honourable Court shall take into account how well known the concerned person is and what the subject of the report is. The protection of privacy of a public figure is different, since he shall tolerate a higher degree of criticism,[65] from the protection of an unknown individual. However, a well-known person may also rely on the legitimate expectation of the protection of his privacy.[66] Therefore, though Ras is a public figure, he does not have to tolerate being publicly accused without such statements having an accurate factual basis.[67]
18. As stated above, Ras was the founder of the opposition party, who had to flee Cyanisia as he was persecuted for his political opinions.[68] After becoming a Magentonian citizen and joining the UMP, he actively campaigned to raise awareness on the human rights abuses in Cyanisia, and he even set up a refugee centre to support the asylum seekers.[69] Nevertheless, his popularity was not confined to the refugee population, but he was highly respected among the wider UMP voter base as well and he was considered to be a viable candidate at the upcoming parliamentary election.[70]

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[65] *Lingens v Austria* App no 9815/82 (ECtHR, 08 July 1986) [42]*; Wirtschafts-Trend Zeitschriften-Gesellschaft MbH v Austria* App no 58547/00 (ECtHR, 27 October 2005) [37]; *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02, 36448/02 (ECtHR, 22 October 2007) [56]; *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015) [84]

[66] *Von Hannover v Germany* (No 2) App nos 40660/08, 60641/08 (ECtHR, 7 February 2012) [97]; *Standard Verlags GmbH v Austria* (No 2) App no 21277/05 (ECtHR, 4 September 2009) [48]

[67] *Egill Einarsson v Iceland* App no 24703/15 (ECtHR, 7 February 2018) [52]

[68] Compromis 1.2

[69] Compromis 2.2

[70] Compromis 2.2

c) Contribution to a debate of general interest

19. The most important factor in balancing Ras's right to privacy against the citizens' right to receive information is the extent to which the reporting contributes to a matter of public interest.[71] The main issue here is whether the fact that Ras was a candidate at the upcoming election is enough in itself that any news related to him would fall within the scope of public interest. This scope, however, is limited by certain circumstances.[72]
20. Applicants submit that a publication – even in the public interest – must not unnecessarily overstep the boundaries set by the right to privacy.[73] Furthermore, a distinction must be made between value judgments and statements of facts stipulating that an accurate factual basis is indispensable.[74]
21. The Original Article was published in February 2001, stating that a warrant had been issued against Ras for alleged misappropriation of university funds. Applicants do not argue that a report of an alleged criminal proceeding against a public figure could be in the scope of public interest. However, the Original Article did not mention that Ras had been released following an investigation by the University.[75] In these circumstances, the journalist deliberately shared only some parts of the information by communicating the

[71] *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015) [93]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [90]

[72] *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015) [83]; *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016) [191]; *Bladet Tromso and Stensaas v Norway* App no 21980/93 (ECtHR, 20 May 1999) [65]

[73] *News Verlags GmbH&Co. KG v Austria* App no 31457/96 (ECtHR, 11 January 2000) [55]; *Bladet Tromso and Stensaas v Norway* App no 21980/93 (ECtHR, 20 May 1999) [59]; *Jersild v Denmark* 15890/89 (ECtHR, 23 September 1994) [31]; *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR, 17 December 2004) [71]

[74] *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02, 36448/02 (ECtHR, 22 October 2007) [55]; *Cumpana and Mazare v Romania* App no 33348/96 (ECtHR, 17 December 2004) [98]

[75] Compromis 1.2

accusations without mentioning the exoneration,[76] in order to mislead the citizens about an opposition politician. As the ECtHR held, leaving out true facts is equal to false statements.[77]

22. Since the Original Article contains only half of the information about the proceeding, it is false and lacks the accurate factual basis. False statements do not contribute to a general debate; consequently, it does not fall within the scope of public interest.[78]

d) Method of obtaining the information and its veracity

23. Exercising FoE carries with it duties and responsibilities, which also apply to the media even with respect to matters of serious public concern.[79] These duties and responsibilities are liable to assume significance when there is a question of attacking the reputation of a named individual.[80] Thus, it is crucial for the journalists to act in good faith and to publish stories based on an accurate factual basis, providing reliable and precise information in accordance with the ethics of journalism.[81] Accordingly, the more serious the allegation, the more solid the factual basis has to be.[82]

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[76] *Salumaki v Finland* App no 23605/09 (ECtHR, 29 July 2014) [56]-[60]; *News Verlags GmbH & Co. KG v Austria* App no 31457/96 (ECtHR, 11 January 2000); *Worm v Austria* App no 22714/93 (ECtHR, 29 August 1997) [46]

[77] *Shabanov and Tren v Russia* App no 5433/02 (ECtHR, 14 December 2006) [39]

[78] *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007) [103]; *Fressoz and Roire v France* App no 29183/95 (ECtHR, 21 January 1999) [54]-[55]

[79] *News Verlags GmbH & Co. KG v Austria* App no 31457/96 (ECtHR, 11 January 2000) [55]; *Bladet Tromso and Steensas v Norway* App no 21980/93 (ECtHR, 20 May 1999) [59]

[80] *Tønsbergs Blad AS and Haukom v Norway* App no 510/04 (ECtHR, 1 June 2007) [89]

[81] *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015) [131]; *Fressoz and Roire v France* App no 29183/95 (ECtHR, 21 January 1999) [54]

[82] *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR, 17 December 2004) [78]; *Ólafsson v Iceland* App no 58493/13 (ECtHR, 16 March 217) [53]; *Björk Eidsdóttir v Iceland* App no 46443/09 (ECtHR, 10 July 2012) [71]

24. Some factors shall be taken into account regarding the defamatory publications,[83] for example, whether the journalist communicated remaining doubts,[84] whether the journalist has taken all steps to verify the factual basis of the allegations, which includes a reasonable amount of research before publication.[85] Nevertheless, Applicants submit that in the present case the above mentioned criteria were not fulfilled for the following reasons.

25. The Original Article referred to the statement of the Director of State Police, however, the journalists did not take the necessary steps to verify whether the allegations were true or not.[86] Moreover, the Original Article did not mention that Ras had already been exonerated, therefore, the citizens could only receive information about the accusation, but not about its falsity. Moreover, the authors could have sought information from the University, having regard to the fact that the investigation took place six years ago.[87]

26. In addition, the media has to respect the presumption of innocence[88] and correct false statements after learning their falsity. However, these requirements were disregarded in the present case, taking into account that the exoneration was not published under the same circumstances[89] in which the Original Article was.

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[83] Oster J, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015), 183

[84] *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR, 17 December 2004) [77]; *Wizerkaniuk v Poland* App no 18990/05 (ECtHR, 05 October 2011) [66]

[85] *Prager and Oberschlick v Austria* App no 15974/90 (ECtHR, 26 April 1995) [37]; *Kimel v Argentina* (IACtHR, 2 May 2008) [79]

[86] Compromis 1.2

[87] Compromis 1.2

[88] ICCPR art 14(2); ECHR art 6(2); ACHR art 8(2); ACHPR art 7(1)b; *Flux v Moldova* (No 6) App no 22824/04 (ECtHR, 29 October 2008) [31]; *Salumaki v Finland* App no 23605/09 (ECtHR, 29 July 2014) [58]

[89] *Salumaki v Finland* App no 23605/09 (ECtHR, 29 July 2014) [56]-[60]

e) Consequences of the publication

27. Ras filed a petition in order to remove the search results depicting the Original Article referring to Section 22 (a) of the PIDPA. Under the said Act, data which is incomplete or inaccurate can be removed. Applicants submit that these criteria were met because of the following reasons.
28. The search results depicting the Original Article were incomplete because the Original Article did not contain information about the exoneration of Ras.[90] Leaving out true facts is equal to false statements,[91] hence, the search results were inaccurate.
29. By not deleting or rectifying the inaccurate and incomplete content, it was possible to disseminate such information on UConnect. Its extent is an important factor,[92] taking into account that the platform can be reached throughout Magentonia and more than 60% of the population actively use it.[93] This is especially so in an electoral context, in which arguments naturally become more forceful.[94] Besides, the content reached more users as TakeBackMag200's post was promoted and the Original Article trended as well.[95]

[90] Arguments 25.

[91] *Shabanov and Tren v Russia* App no 5433/02 (ECtHR, 14 December 2006) [39]

[92] *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [94]; *Karhuvaara and Iltalehti v Finland* App no 53678/00 (ECtHR, 16 November 2004) [47]; *Gurgenidze v Georgia* App no 71678/01 (ECtHR, 17 October 2006) [55]

[93] Compromis 3.1

[94] *Féret v Belgium* App no 15615/07 (ECtHR, 10 December 2009) [76]

[95] Compromis 4.4

30. The UMP won the election, however, Ras failed to secure a seat in parliament[96] despite the fact that he was a viable candidate.[97] Accordingly, the Magentonia Watch conducted a study on the impact of social media on the election and stated that Ras's unexpected electoral failure is attributed to the successful campaign conducted via UConnect.[98]
31. Therefore, HCM's decision not to block all the search results connected to the false accusations against Ras misled the users, because if search results contain false propaganda, the election is not won by "the candidates with the best political arguments, but by those who use the most efficient technology to manipulate voters, even emotionally and irrationally".[99] Should HCM's decision is upheld by the Honourable Court, such technical manipulation will lead to a shift in paradigm that 'jeopardise democracy'[100] itself in Magentonia.
32. Accordingly, the attack on Ras's reputation attained a significant level of seriousness and was made in a manner causing prejudice to personal enjoyment of the right to privacy,[101] and the HCM did not strike a fair balance between the competing rights. Therefore, Applicants submit that particularly strong reasons[102] are present for the Honourable Court to substitute the view of the HCM.

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[96] Compromis 5.6

[97] Compromis 2.2

[98] Compromis 3.1

[99] CoE, 'Algorithms and Human Rights: Study on the human rights dimensions of automated data processing techniques and possible regulatory implications' (March 2018) Council of Europe Studies DGI(2017)12, 31

[100] CoE, 'Algorithms and Human Rights: Study on the human rights dimensions of automated data processing techniques and possible regulatory implications' (March 2018) Council of Europe Studies DGI(2017)12, 31

[101] *A. v Norway* App no 28070/06 (ECtHR, 9 July 2009) [64]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [83]

[102] *MGN Limited v the United Kingdom* App no 39401/04 (ECtHR, 18 April 2011) [150],[155]; *Palomo Sánchez and Others v Spain* App nos 28955/06, 28957/06, 28959/06 and 28964/06 (ECtHR, 12 September 2011) [57]

II. MAGENTONIA'S DECISION TO DIRECT UCONNECT TO SUSPEND ALL OPERATIONS UNTIL THE CONCLUSION OF THE TRIAL VIOLATED ARTICLE 19 OF THE ICCPR

33. As UConnect is the most popular social media platform in Magentonia,[103] it plays an important role in enhancing the public's access to news and facilitating the dissemination of information.[104] Therefore, it is one of the principal means by which individuals exercise their right to FoE and information, providing as it does essential tools for participation in discussions concerning political issues.[105]

34. The present case deals with a prior restraint, explicitly a wholesale suspension.[106] Prior restraint covers all state measures which seek to prevent rather than to punish.[107] While the ACHR,[108] the US Supreme Court[109] and the ACommHPR[110] expressly prohibit its

[103] Compromis 3.1

[104] *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [27]; *Ahmet Yildrim v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [48]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [133]; *Cengiz and Others v Turkey* App nos 48226/10, 14027/11 (ECtHR, 1 December 2015) [52]

[105] *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [54]; Shirky C, 'The Political Power of Social Media: Technology, the Public Sphere, and Political Change' (2011) 90 Foreign Affairs 28

[106] Compromis 5.5

[107] Schauer F, *Free speech: A Philosophical Enquiry* (Cambridge University Press 1982), 150; Thomas IE, 'The Doctrine of Prior Restraint' (1955) 20 *Law and Contemporary Problems* 648-671 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2658&context=lcp> accessed 7 November 2018

[108] ACHR art 13(2)

[109] *Near v Minnesota*, 283 US 697, 713 (1913); *Bantam Books, Inc v Sullivan* 372 US 58, 70 (1963); *New York Times Co v United States*, 403 US 713, 714 (1971)

[110] *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Project v Nigeria* Comm nos 105/93, 128/94, 130/94, 152/96 (ACommHPR, 1998) [57]

imposition, the ECHR does not generally prohibit it, however, the dangers inherent in these measures are such that they call for the most careful scrutiny.[111]

35. Applicants submit that UConnect's FoE[112] – guaranteed under Article 19 of the ICCPR[113] – had been interfered with by Magentonia's decision and such interference is not justified, since it (A) was not prescribed by law, (B) did not pursue a legitimate aim and (C) was not necessary in a democratic society.[114]

A. THE SUSPENSION WAS NOT PRESCRIBED BY LAW

36. The suspension was not prescribed by law as it (i) was not foreseeable and (ii) did not provide legal protection against arbitrary interferences.[115]

[111] *The Sunday Times v The United Kingdom* (No 2) App no 13166/87 (ECtHR, 26 November 1991) [51]; Ekin *Association v France* App no 39288/98 (ECtHR, 17 July 2001) [56]; *Chauvy v France* App No 64915/01 (ECtHR, 29 June 2004) [47]

[112] *Autronic AG v Switzerland* App no 12726/87 (ECtHR, 22 May 1990) [47]; *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994) [35]; *Khurshid Mustafa and Tarzibachi v Sweden* App no 23883/06 (ECtHR, 16 Marc 2009) [32]

[113] UDHR (adopted 10 December 1948) UNGA Res 217A (III) art 19

[114] Arguments 3.

[115] UNHRC 'General Comment 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [25]; *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; *Pentikäinen v Finlad* App no 11882/10 (ECtHR, 20 October 2015) [85]; *Sanoma Uiigeuers EV v Netherlands* App no 38224/03 (ECtHR, 14 September 2010) [82]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [59]; *Claude Reyes and others v Chile* (IACtHR, 16 September 2006); UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1984) UN Doc E/CN 4/1984/4 principle 16

37. Firstly, a law must be both adequately accessible and foreseeable.[116] Foreseeability not only requires that the impugned measure should have a legal basis in domestic law[117] but also refers to the quality of the law in question,[118] which must be formulated with sufficient precision[119] to enable the individuals to anticipate the consequences which a given action may entail and thus to regulate their conduct accordingly.[120] In addition, where preventive measures are applied, the requirements for the legal basis to be regarded as law are particularly high.[121] Thus, even though the ECtHR has consistently held – and Respondent may submit – that prior restraints are not necessarily

[116] *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; *Müller v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]; UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1984) UN Doc E/CN 4/1984/4 principle 17; Human Rights Committee, UNHRC 'General Comment 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [25]

[117] *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [57]; *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [47]; *Tolstoy Miloslausky v The United Kingdom* App no 18139/91 (ECtHR, 13 July 1995) [37]; *Sanoma Uiigeucrs BV v Netherlands* App no 38224/03 (ECtHR, 14 September 2010) [83]; *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [88]; *Malone v The United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [66]

[118] *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [57]; *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; *Sanoma Uiigeucrs BV v Netherland*s App no 38224/03 (ECtHR, 14 September 2010) [81]; *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008) [140]; *Kruslin v France* App no 11801/85, (ECtHR, 24 April 1990) [27]

[119] *Müller v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *Wingrove v The United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) [40]; *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02, 36448/02 (ECtHR, 22 October 2007) [41]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) [52]; UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1984) UN Doc E/CN 4/1984/4 principle 17; UNHRC, 'General Comment 16, Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (Twenty-third session, 1988), UN Doc HRI/GEN/1/Rev.1 at 21 (1994) [3]; Human Rights Committee, UNHRC 'General Comment 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [24]-[25]

[120] *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; *RTBF v Belgium* App no 50084/06 (ECtHR, 29 March 2011) [115]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [57]; *Altuğ Taner Akçam v Turkey* App no 27520/07 (ECtHR, 25 October 2011) [87]; *Wingrove v The United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) [40]; *Larissis and Others v Greece* App no 23372/94 (ECtHR, 24 February 1998) [40]; *Sanoma Uitgevers BV v The Netherlands* App no 38224/03 (ECtHR, 14 September 2010) [81]

[121] Oster J, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015), 130

incompatible with the ECHR,[122] the provision on which the prior restraint is based must be formulated with sufficient precision to clarify the type of restrictions authorised, their purpose, duration, scope and control.[123]

38. In the present case, however, Sections 3, 5, 6 and 32 of the PIDPA,[124] which regulate the conduct of UConnect and the penalties for the offences, do not even deal with the possibility of the issuance of wholesale suspension or its conditions as ordered in the present case.[125] Therefore, even if Respondent would argue that UConnect, as a professional company, should have been familiar with the legislation and case-law, and could also have sought legal advice,[126] by borrowing the words of Judge Sajó, "only divine legal counsel could have been sufficiently certain"[127] that the operation of a social media platform could be suspended under Magentonian law.

39. Secondly, the law must provide legal protection against arbitrary interferences.[128] Hence, it must indicate with sufficient clarity the scope of any discretion and it must not

[122] *Gaweda v Poland* App no 26229/95 (ECtHR, 14 March 2002) [35]; *Observer and Guardian v The United Kingdom* App no 13585/55 (ECtHR, 26 November 1991) [60]

[123] *RTBF v Belgium* App no 50084/06 (ECtHR, 29 March 2011) [114]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) [52]; *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008) [140]

[124] Compromis 5.5

[125] Compromis 5.5

[126] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [129]

[127] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) Joint Dissenting Opinion of Judges Sajó And Tsotsoria [20]

[128] UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1984) UN Doc E/CN 4/1984/4 principle 16; UNHRC 'General Comment 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [25]; *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; *Pentikäinen v Finlad* App no 11882/10 (ECtHR, 20 October 2015) [85]; *Sanoma Uitgevers BV v The Netherlands* App no 38224/03 (ECtHR, 14 September 2010) [82]; *Claude Reyes and others v Chile* (IACtHR, 16 September 2006) [89]

grant unfettered power.[129] In the present case, however, the HCM's decision[130] produced arbitrary effects as the wholesale suspension was not applied as a last resort, moreover, it did not aim solely at suspending access to the offending posts, but it consisted in the wholesale suspension of all the posts hosted by UConnect.[131]

40. Consequently, even if Magentonia entrusts to the judiciary the power to block,[132] it is at least very deficient, because it does not surround the exercise of judicial power with all the required conditions and safeguards, and therefore, does not afford basic guarantees of FoE to social media platforms.[133]
41. In the light of these considerations, it is to be concluded that the interference with UConnect's FoE resulting from the suspension of all operations did not satisfy the requirement of lawfulness under the ICCPR and did not afford UConnect the degree of protection to which the platform was entitled by the rule of law in a democratic society.

B. THE SUSPENSION DID NOT PURSUE A LEGITIMATE AIM

42. In accordance with ICCPR,[134] Magentonian Constitution permits restrictions on FoE to protect public order or the rights and reputations of others.[135] However, where public

[129] *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [59]; *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) [30]; *Moiseyev v Russia* App no 62936/00 (ECtHR, 9 October 2008) [266]; *Sanoma Uitgevers BV v The Netherlands* App no 38224/03 (ECtHR, 14 September 2010) [82]; *Margareta and Roger Andersson v Sweden* App no 12963/87 (ECtHR, 25 February 1992) [75]

[130] Compromis 5.5

[131] Compromis 5.5

[132] Compromis 5.5

[133] *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [68]

[134] ICCPR art 19(3)b

[135] Compromis 4.6

order interests are invoked to interfere with FoE, it must be based on real causes that present the certain and credible threat of a serious disturbance.[136] FoE can only be restricted if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils", in that case a state has a right to prevent the disturbances.[137] Therefore mere conjecture regarding possible disturbances is not sufficient to justify an interference with FoE.[138]

43. Similarly, where the rights and reputations of others are allegedly harmed, the existence of a clear harm or threat of harm to the rights of others must be proven.[139] Taking into account that no disturbances ensued from the posts on UConnect, the suspension did not pursue a legitimate aim.

C. THE SUSPENSION WAS NOT NECESSARY

44. An interference must be an option of last resort and is necessary in a democratic society if it a) corresponds to a pressing social need and b) is proportionate to the legitimate aim pursued.

[136] Office of the Special Rapporteur for Freedom of Expression with the Inter-American Commission on Human Rights, Inter-American Legal Framework Regarding the Right to Freedom of Expression, 2009, CIDH/RELE/INF. 2/09 [82]

[137] *Schenck v United States*, 249 U.S. 47 (1919)

[138] Office of the Special Rapporteur for Freedom of Expression with the Inter-American Commission on Human Rights, Inter-American Legal Framework Regarding the Right to Freedom of Expression, 2009, CIDH/RELE/INF. 2/09 [82]

[139] *Ricardo Canese v Paraguay* (IACtHR, 31 August 2004) [72]

a) The interference did not correspond to a pressing social need

45. In order to comply with the principle of necessity, an assessment must be made as to whether the interference with FoE goes no further than is necessary to meet the said social need. Although states are afforded a margin of appreciation to determine what constitutes a pressing social need and how to properly respond,[140] states negative obligation to refrain from interfering with FoE on the Internet narrows the breadth of the margin of appreciation,[141] and the interim and preventive nature of the suspension narrows it even further.[142]

46. In the present case, HCM issued an interim injunction ordering UConnect to suspend all of its operations. According to the ECtHR, such measure, by rendering large quantities of information inaccessible, substantially restricts the rights of Internet users and has a significant collateral effect,[143] therefore it should have been envisaged as a last resort in curbing the dissemination of harmful content,[144] and less draconian measures should have been ordered.[145] Applicants note that UConnect had an NTDS in

[140] *Handyside v The United Kingdom* App no 5393/72 (ECtHR, 7 December 1976) [48]; *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [39]; *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985) [55]

[141] *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987) [74]; *Roche v The United Kingdom* App no 32555/96 (ECtHR, 19 October 2005) [172]; *Gaskin v The United Kingdom* App no 10454/83 (ECtHR, 07 July 1989)[52]; *The Sunday Times v The United Kingdom* (No 2) App no 13166/87 (ECtHR, 26 November 1991) [59]

[142] *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [31]

[143] *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [66]; *Cengiz and Others v Turkey* App nos 48226/10, 14027/11 (ECtHR, 1 December 2015) [64]

[144] *Cengiz and Others v Turkey* App nos 48226/10, 14027/11 (ECtHR, 1 December 2015) [44]

[145] *Ürper and Others v Turkey* App nos 14526/07, 14747/07, 15022/07, 15737/07, 36127/07, 47245/07, 50371/07, 50372/07, 54637/07 (ECtHR, 20 January 2010) [43]

place which is considered by the ECtHR in many cases an appropriate tool for balancing the rights and interests of all those involved.[146]

47. Taking into account Magentonia's extremely narrow margin of appreciation, the fact that the circumstances did not justify the suspension and that less draconian measures were available, Applicants submit that the interference did not correspond to a pressing social need.

b) The interference was not proportionate to the legitimate aim pursued

48. The principle of proportionality implies that an interference must not be overbroad, and it must be the least intrusive instrument amongst those which might achieve their protective function.[147] Applicants submit that the suspension was not proportionate for the following reasons.

49. Firstly, UConnect was ordered to suspend all operations respectively for the TBM posts on 26 and 30 May. Even if exceptional circumstances justify the suspension of illegal content, it is necessary to tailor the measure to the content which is illegal, therefore, it must be content specific.[148] Thus, such indiscriminating suspension which interferes with lawful content fails *per se* the adequacy test.[149]

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[146] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [159]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [91]

[147] UNHRC, 'General Comment 27, Article 12: Freedom of Movement' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 [11]-[16]

[148] UNHRC 'General Comment 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [43]

[149] *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) Separate Opinion 29; CoE, 'Declaration on freedom of communication on the Internet' (Committee of Ministers, 28 May 2003) principle 3

50. Secondly, UConnect was suspended until the conclusion of the trial. Suspensions imposed on platforms which remain valid indefinitely or for long periods are tantamount to pure censorship and constitute *per se* unnecessary interference with FoE.[150]

51. Thirdly, UConnect is not only a social media platform, but it also serves as a search engine. Therefore, it is "a unique platform on account of its characteristics, its accessibility and above all its potential impact".[151] Due to its uniqueness during its suspension no alternatives were available to the citizens of Magentonia as UConnect was their main source[152] for receiving and seeking information,[153] however it was rendered inaccessible right before the election.

III. MAGENTONIA'S PROSECUTION AND CONVICTION OF UCONNECT UNDER SECTIONS 3 AND 5 OF THE PIDPA VIOLATED ARTICLE 19 OF THE ICCPR

A. THE PROSECUTION AND CONVICTION WAS NOT PRESCRIBED BY LAW

52. As stated above,[154] in order for a prosecution to be prescribed by law, an act must be foreseeable. While acknowledging that foreseeability does not require absolute

[150] *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) Separate Opinion, 29

[151] *Cengiz and Others v Turkey* App nos 48226/10, 14027/11 (ECtHR, 1 December 2015) [52]

[152] Compromis 3.1

[153] *Herrera-Ulloa v Costa Rica* (IACtHR, 2 July 2004) [108]

[154] Arguments 37.

certainty, according to the ECtHR's settled case-law,[155] a rule must be formulated with sufficient precision to enable the individuals to regulate their conduct accordingly.[156]

53. In the present case, Section 5 of the PIDPA[157] uses vague terms such as 'false propaganda'. Even accepting that many laws are inevitably couched in vague terms,[158] general prohibitions on the dissemination of information based on vague and ambiguous ideas are incompatible with international standards for restrictions on FoE.[159] Vaguely worded, ambiguous and therefore unforeseeable laws have a chilling effect on FoE.[160]

54. In conclusion, Applicants submit that Section 5 of the PIDPA did not meet the requirements of being prescribed by law.

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[155] *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; *Hertel v Switzerland* App no 25181/94 (ECtHR, 25 August 1998) [35]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *Müller v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]

[156] *Sanoma Uitgevers BV v The Netherlands* App no 38224/03 (ECtHR, 14 September 2010) [81]; *RTBF v Belgium* App no 50084/06 (ECtHR, 29 Marc 2011) [115]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [57]; *Altuğ Taner Akçam v Turkey* App no 27520/07 (ECtHR, 25 October 2011) [87]; *Wingrove v The United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) [40]; *Larissis and Others v Greece* App no 23372/94 (ECtHR, 24 February 1998) [40]; *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; Article 19, 'The Johannesburg Principles on National Security, Freedom of Expression and Access to Information' (1 October 1995) [1.1]; UNHRC 'General Comment 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [25]

[157] Compromis 5.5

[158] *Hertel v Switzerland* App no 25181/94 (ECtHR, 25 August 1998) [35]; *Müller v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]; *Olsson v Sweden* (No 1) App no 10465/83 (ECtHR, 24 Marc 1988) [61]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02, 36448/02 (ECtHR, 22 October 2007) [41]; *Centro Europa 7 S.r.l. and Di Stefano v Italy* App no 38433/09 (ECtHR, 07 June 2012) [141]

[159] Joint Declaration on Freedom of Expression and Countering Violent Extremism (The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 3 May 2016) [2 a]

[160] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) Joint Dissenting Opinion of Judges Sajó and Tsotsoria [20]

B. THE PROSECUTION AND CONVICTION DID NOT PURSUE A LEGITIMATE AIM

55. As stated above,[161] the prosecution did not pursue a legitimate aim.

C. THE PROSECUTION AND CONVICTION WAS NOT NECESSARY

56. An interference must be an option of last resort and is necessary in a democratic society if it a) corresponds to a pressing social need and b) is proportionate to the legitimate aim pursued.[162]

a) The interference did not correspond to a pressing social need

57. In making the assessment of the interference, the ECtHR consistently identified the following five criteria as being relevant to determine intermediary liability.[163]

i) context of the content

58. In *Delfi AS v Estonia*,[164] the news portal created articles, profited advertising revenue the more comments were posted and exercised a substantial degree of editorial control over all of its user content, because once a comment was posted, the author could not

[161] Arguments 42-43.

[162] *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [39]-[40]

[163] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) [85]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [142]-[143]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [69]; *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) [28]

[164] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [144]-[145]

modify or delete it, solely the company had the ability to do it. For these reasons, according to the ECtHR, Delfi went beyond that of a passive, purely technical service provider.[165]

59. In the present case however, UConnect did not create content, did not earn advertising revenue from TBM posts[166] and did not practice a substantial degree of editorial control,[167] therefore it did not go beyond that of a passive, purely technical service provider.[168]

60. Furthermore, the content on Delfi's portal constituted hate speech and speech that directly advocated acts of violence. Therefore, the establishment of its unlawful nature did not require any linguistic or legal analysis, hence it was considered clearly unlawful content.[169] However, the present case did not involve such utterances.

61. Firstly, the TBM post on 26 May was value judgment of no value whatsoever.[170] However, it did not incite violence and did not stoop to the level of hate speech. In addition, as the ECtHR acknowledged such style of communication – albeit belonging to a low register of style – is common on many Internet portals.[171]

[165] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [146]

[166] Clarifications 26.

[167] Clarifications 15.

[168] Case C-236/08-C-238/08 *Google France, Google Inc. v Louis Vuitton Malletier SA* [2010] ECR I-02417 [113-114]; Case C-324/09 *L'Oréal SA v eBay* [2011] ECR I-6011 [111-113]

[169] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [117]

[170] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) Concurring Opinion of Judge Kuris [2]

[171] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [77]; *Tamiz v The United Kingdom* App no 3877/14 (ECtHR, 19 September 2017) [81]

62. Secondly, concerning the TBM post on 30 May, the establishment of its falsity would have required complex analysis since its remarks were not manifestly unlawful. Therefore, it could not *a priori* be viewed as clearly unlawful.

ii) liability of the author of the content

63. According to the facts of the case, the HCM did not examine at all whether the liability of the actual author could serve as a sensible alternative and the HCM was satisfied that it was UConnect that bore a certain level of liability since it had "disseminated" false propaganda.[172]

64. Even accepting such qualification of Uconnect's conduct by the HCM, its liability is difficult to reconcile with the existing case-law according to which "punishment for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so".[173] However, as stated above,[174] the role played by the company was merely technical, automatic and passive.

[172] Compromis 6.2.2

[173] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [79]; *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) [35]; *Thoma v Luxembourg* App no 38432/97, (ECtHR, 29 June 2001) [62]; *Verlagsgruppe News GmbH v Austria* App no 76918/01, (ECtHR, 14 March 2007) [31]; *Print Zeitungsverlag GmbH v Austria* App no 26547/07 (ECtHR, 10 January 2014) [39]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) [135]

[174] Arguments 59.

iii) measures taken by UConnect

65. Applicants submit that UConnect has taken all the necessary measures to prevent the illicit posts on its platform and to remove them expeditiously.

66. Firstly, UConnect has prepared a CS which provided that malicious posts would be taken down.[175] Secondly, in order to indicate unlawful content to the service provider so that they be removed, UConnect has created an NTDS.[176] Thirdly, a team of dedicated human reviewers was set up to assess the validity of the complaints.[177]

67. In the present case, UConnect was held liable under Section 3 of the PIDPA by failing to expeditiously remove the TBM post of 26 May,[178] and under Section 5 of the PIDPA by recklessly disseminating false propaganda since the TBM post of 30 May was false.[179] Applicants submit that UConnect should be exempted from liability for the following reasons.

68. Concerning the TBM post on 26 May, after being notified about it, UConnect removed it on 30 May.[180] Applicants highlight that there is no agreed timeframe of 'expeditious removal' in international law, although some countries oblige intermediaries to remove content within 24 hours, but only in case of hate speech.[181] Moreover, according to the

[175] Compromis 3.5

[176] Compromis 3.5

[177] Compromis 3.5

[178] Compromis 6.2.1

[179] Compromis 6.2.2

[180] Compromis 5.2

[181] Act to Improve Enforcement of the Law in Social Networks of Germany (Network Enforcement Act) sec 3(2)2; Office of the High Commissioner For Human Rights, 'Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders' (26 July 2017), 5; Daily Nation, 'Social Media Sites to Delete Hate Mongers' Accounts in a Day' <https://www.nation.co.ke/business/Social-media-sites-to-delete-hate-mongers-accounts-in-a-day/996-4016026-qo0k2n/index.html> accessed 7 November 2018; Access Now, 'Honduras: New Bill Threatens to Curb Online

European Commission, what 'expeditious' means in practice depends on the specifics of the case at hand, in particular, the type of illegal content.[182] Taking into account that this case does not deal with hate speech[183] and it was not clear as to whether the post violated any CS,[184] Applicants submit that the removal was expeditious.

69. Regarding the TBM post on 30 May, no user reported it for violating any CS. Thus, even if it was the most viewed post on the platform, Applicants emphasize that intermediaries are not obliged to monitor their platform seeking illegal content.[185] Respondent might note that in *Delfi AS v Estonia* the ECtHR declared that states may impose liability on Internet news portals if they fail to take measures to remove clearly unlawful content without delay, even without notice.[186] However, the ECtHR also held that the case does not concern other fora on the Internet, for example, a social media platform where the platform provider does not offer any content.[187] In addition, as stated above,[188] the post could not *a priori* be viewed clearly unlawful.

Speech' <https://www.accessnow.org/honduras-new-bill-threatens-curb-online-speech/> accessed 7 November 2018; AP NEWS, 'Venezuela Assembly Passes New Law Clamping down on Media' <https://apnews.com/d0083a0ce86441358b702e8b53c4eb44> accessed 7 November 2018

[182] Commission, 'Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms' (Communication) COM(2017) 555 final, 14

[183] Arguments 61.

[184] Compromis 5.2

[185] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1 art 15 (1); Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECR I-11959 [35],[40]; Case C-360/10 *SABAM v Netlog* (ECR, 16 February 2012) ECR-0000 [33],[38]; Edwards L, 'The fall & rise of intermediary liability online Law and the internet' eds. Edwards L and Waelde C, *Law and the Internet* (Hart Publishing 2009) 47, 74

[186] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [159]

[187] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [116]

[188] Arguments 62.

70. Furthermore, the approach taken by the HCM suggests that by allowing unfiltered posts, UConnect should have expected that some of those might be in breach of the law. However, the ECtHR undisputedly stated that "this amounts to requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet".[189]

b) The interference was not proportionate to the legitimate aim pursued

iv) the consequences of the domestic proceedings for UConnect

71. UConnect was ordered to pay a fine of USD 100,000.[190] Applicants submit that the fine was disproportionate taking into account the practices of other countries.[191] Nevertheless, the decisive question when assessing the consequences for UConnect is not only the tremendous amount of fine but also the manner in which a social media platform can be held liable for third-party content.[192] In other words, what is at stake is not merely USD 100,000, but rather the entire way in which social media platforms like UConnect exist.
72. Because, by holding UConnect liable for not removing expeditiously content without properly assessing its legality or even for not removing content without being notified

[189] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [82]

[190] Compromis 6.3

[191] BBC, 'Turkey fines Twitter over 'terrorist propaganda' (11 December 2015) <https://www.bbc.com/news/technology-35072321> accessed 7 November 2018; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [160]; *Lancellotti v Facebook* Series C No 524 (Poder Judiciário do Estado do Rio de Janeiro Brazil, 30 November 2016)

[192] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [86]

about it will incite UConnect and other similar entities to generally monitor their platforms, to self-censor and to err on the side of caution therefore take down material that may be perfectly legitimate and lawful[193] or it will simply force them to install filtering technologies to avoid liability. Therefore, such liability may create a chilling effect[194] on the FoE on the Internet. These consequences would be extremely damaging since social media is an indispensable tool for promoting social justice and political liberty.[195]

[193] Article 19, 'Internet Intermediaries: Dilemma of Liability' (2013), 11

[194] *Fatullayev v Azerbaijan* App no 40984/07 (ECtHR, 04 October 2010) [102]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [86]; UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (16 May 2011) UN Doc A/HRC/17/27 [26], [28]

[195] Reuters, 'Myanmar to probe video that appears to show soldiers beating people' (31 May 2017) <https://www.reuters.com/article/us-myanmar-military/myanmar-to-probe-video-that-appears-to-show-soldiers-beating-people-idUSKBN18R1JZ> accessed 7 November 2018; Coconuts Bangkok, 'Thailand plans new unit to curb online dissent after 150k sign petition opposing single gateway' (21 October 2015) <https://coconuts.co/bangkok/news/thailand-plans-new-unit-curb-online-dissent-after-150k-sign-petition-opposing-single/> accessed 7 November 2018; World Wide Web Foundation, 'Citizens triumph in Nigerian digital rights battle' (9 December 2015) <https://webfoundation.org/2015/12/citizens-triumph-in-first-nigerian-digital-rights-battle/> accessed 7 November 2018; Newsweek, 'Argentinians protest against domestic violence with 'not one less' slogan (6 April 2017) <https://www.newsweek.com/argentinians-protest-against-domestic-violence-not-one-less-slogan-339609> accessed 7 November 2018; Reuters 'Staying alive: WhatsApp finds new uses in conflict zones' (3 August 2017) <https://www.reuters.com/article/us-global-crisis-health-tech/staying-alive-whatsapp-finds-new-uses-in-conflict-zones-idUSKBN1AJ0UX> accessed 7 November 2018

IX. PRAYER FOR RELIEF

In the light of arguments advanced and authorities cited, the Applicants respectfully request this Honourable Court to adjudge and declare that:

1. Republic of Magentonia's decision not to grant Ras any rectification, erasure or blocking of search results depicting The Cyanisian Times story of 2001 violated his right to Privacy according to Article 17 of the ICCPR.
2. Republic of Magentonia's decision of 2 June 2018 to direct UConnect to suspend all operations until the conclusion of the trial violated its right to Freedom of Expression according to Article 19 of the ICCPR.
3. Republic of Magentonia's prosecution and conviction of UConnect under Sections 3 and 5 of the PIDPA violated its right to Freedom of Expression according to Article 19 of the ICCPR.

On behalf of Unger Ras and UConnect,

301A

Agents for the Applicants

Memorial for Respondent 2018/2019

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301R

THE 2018-2019 MONROE E. PRICE

INTERNATIONAL MEDIA LAW MOOT COURT COMPETITION

Unger Ras & UConnect

(*Applicants*)

v.

Republic of Magentonia

(*Respondent*)

MEMORIAL FOR RESPONDENT

Word Count for Argument Section: 4,969

I. TABLE OF CONTENT

II. LIST OF ABBREVIATIONS

ACHPR	**African Charter on Human and Peoples' Rights**
ACommHPR	**African Commission on Human and Peoples' Rights**
ACHR	**American Convention on Human Rights**
CJEU	**Court of Justice of the European Union**
Clarifications	**2018/2019 Price Media Law Moot Court Competition Combined Clarification Questions and Answers for Asia Pacific, North East Europe and South East Europe Rounds**
CoE	**Council of Europe**
Compromis	**The 2018/2019 Price Media Law Moot Court Competition Case**
CS	**UConnect Community Standards**
DPC	**Democratic Party of Cyanisia**
ECHR	**European Convention on Human Rights**
ECtHR	**European Court of Human Rights**
EU	**European Union**
FoE	**Freedom of Expression**
HCM	**High Court of Magentonia**
Honourable Court	**Chamber of the Universal Court of Human Rights, Universal Freedom of Expression Court**
IACtHR	**Inter-American Court of Human Rights**

ICCPR	**International Covenant on Civil and Political Rights**
IDPCM	**Information and Data Protection Commission**
Magentonia	**Republic of Magentonia**
MPF	**Magentonian Popular Front**
No(s)	**Number(s)**
NTDS	**Notice-and-Takedown System**
Original Article	**The article, which was published in February 2001 in The Cyanisian Times about Unger Ras**
OSCE	**Organization for Security and Co-operation in Europe**
PIDPA	**Magentonian Public Information and Data Protection Act of 2016**
SCM	**Supreme Court of Magentonia**
Second Article	**The article, which was published on 1 April 2018 in Magentonian Mail about Unger Ras**
UDHR	**Universal Declaration of Human Rights**
UMP	**The United Magentonian Party**
UN	**United Nations**
UN Doc	**United Nations Document**
UNGA	**United Nations General Assembly**
UNHRC	**United Nations Human Rights Committee**

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IV. STATEMENT OF RELEVANT FACTS

Cyanisia

1. Unger Ras established the DPC, the main opposition party in a 5 million inhabitants' country, Cyanisia.[1] He is a former professor of the State University of Cyanisia. The Cyanisian Times in February 2001 reported that a warrant had been issued against Ras for alleged misappropriation of university funds and the Director of State Police had issued instructions for Ras's immediate arrest. Soon after the story broke, Ras fled Cyanisia and sought asylum in the neighboring 1 million inhabitants' country, Magentonia.[2]

Magentonia

2. In 2001 Ras became a naturalised Magentonian citizen and soon after he joined the UMP, which secured 65% of the seats in the parliamentary election in August 2013.[3] In January 2018, Ras announced that he was running for office at the next parliamentary election that it scheduled for June 2018.[4]
3. Due to the systematic violence in Cyanisia, Magentonia experienced a mass influx of Cyanisians in 2010. In February 2018, Magentonia suffered a market crash due to the plummeting of the world prices of natural gas – which employed non-citizens, including Cyanisian refugees – which resulted in widespread fear that the State would enter a period of economic recession. It was emphasised by the campaign slogan of MPF as

[1] Compromis 1.1

[2] Compromis 1.2

[3] Compromis 2.1

[4] Compromis 2.2

follows: ‘Take back Magentonia!’ which sought to frame Cyanisian refugees as a major strain on the Magentonian economy and the main cause of the economic crisis.[5]

4. Magentonia is party to the International Covenant on Civil and Political Rights and upon ratification, it submitted a declaration specifically with regards to Articles 17 and 19, in accordance with international law.[6]

The PIDPA and the Magentonian Constitution

5. The PIDPA 2016 – which is applicable to both natural and legal persons that carry out their activity within the territory of the Republic of Magentonia – explicitly prohibits the advocacy of national, racial hatred that constitutes incitement to hostility. The PIDPA also forbids the knowing and reckless engagement in dissemination of false propaganda that causes public disorder.[7] The PIDPA sets out the penalties for offences contained in the Act, which include a maximum fine of USD 200,000 for legal persons.[8]

UConnect

6. UConnect is the most popular social media platform in both Magentonia and Cyanisia with 60% of both populations actively using the site and 100 million users worldwide.[9] It has its headquarters in Magentonia, where it is a recognized legal person under Magentonian law. The users’ posts are interspersed with ‘promoted’ and ‘trending’ posts, which the platform determines according to an algorithm based on user

[5] Compromis 2.3

[6] Compromis 2.4

[7] Compromis 5.5

[8] Clarifications 34.

[9] Compromis 3.1

preferences and the popularity of posts.[10] The platform's promoted content includes posts by advertisers who pay the platform to promote their products and services and ordinary users can also pay the platform to have their posts promoted,[11] which resulted in UConnect earning USD 250 million in advertising revenue in 2017,[12] which suggests a massive economic interest from the platform. UConnect has a NTDS in place, therefore, any person can complain about a post visible in the person's country and request its removal if it a) incited violence b) amounted to defamation or c) violated any law in the country concerned. Such complaints are usually processed within 72 hours.[13]

Article on Unger Ras

7. On 1 April 2018, the Magentonian Mail published an 'exposé' on Ras including he fled Cyanisia after a corruption scandal and that an arrest warrant had been issued against him. The Magentonian Mail carried Ras's statement clarifying that the contents of the story from 2001 were false.[14] On 15 April 2018 the Magentonian Mail decided to remove the article, but by that time the article had begun to trend on UConnect.[15]
8. On 25 April an anonymous user named TakeBackMag200 posted a link to an online version of the original 2001 story.[16] Ras wrote to the head office of UConnect requesting the removal of the post by TakeBackMag200. He also requested that all search results depicting the 2001 Cyanisian Times story be blocked or removed. He stated that it

[10] Compromis 3.2.1

[11] Compromis 3.2.4

[12] Compromis 3.6

[13] Compromis 3.5

[14] Compromis 4.1

[15] Compromis 4.3

[16] Compromis 4.4

violated his privacy under the Magentonian Constitution. UConnect responded stating that it would remove the post, but would not remove the search results unless ordered to do so by the IDPCM. It explained that it is against its policies to censor search results that do not clearly violate the CS.[17]

9. On 5 May 2018, Ras filed a petition before the IDPCM. UConnect stated that it was not contesting the case and would comply with any order made by the IDPCM.[18] On 10 May 2018, the IDPCM issued its decision rejecting Ras's request for an injunction and dismissing the petition. The reasoning of the IDPCM included that the search results were relevant to the public interest as Ras was a public figure and a candidate at an upcoming election. Ras failed to establish that UConnect had an obligation under the PIDPA of the Magentonian Constitution to remove the search results.[19]

Anti-refugee posts on UConnect

10. In the emotionally heightened pre-election debate from early May 2018, the derogatory posts about Cyanisian refugees proliferated with several thousand new users subscribing to UConnect, characterising Cyanisian refugees regularly as 'bottom feeders'. One TBM post that appeared on UConnect on 26 May 2018 'trended', which was reported several times (on 26, 27, 28, 29, 30 May),[20] however, UConnect only removed it on 30 May 2018.[21] On 30 May 2018 TBM 6000 posted a similar content, which was removed by UConnect, despite the fact that no user reported the post.[22] Still, on the same day,

[17] Compromis 4.5

[18] Compromis 4.6

[19] Compromis 4.7

[20] Clarifications 27.

[21] Compromis 5.2

[22] Compromis 5.3

another post was published by TBM claiming that Cyanisian refugees would outnumber Magentonians by 2025. The post trended between 30 May and June 1, 2018, and became the most viewed post on UConnect in Magentonia.[23]

Domestic Proceedings

11. On 11 May 2018, Ras appealed to the HCM to overturn the IDPCM's decision. The HCM already fixed a hearing date for July.[24] On 1 July, the HCM dismissed Ras's appeal and held that he was not entitled to any rectification, erasure or blocking of search results under Section 22 of the PIDPA. The right to privacy under the Constitution had to be balanced with UConnect users' freedom to receive information. UConnect was not obliged to remove the search results under the PIDPA as it was entitled to retain the information in the public interest.[25]
12. The Magentonian government filed an action before the HCM, seeking an injunction against UConnect to stop the senseless proliferation of anti-refugee posts. As a result, the HCM issued an interim injunction – during the trial – ordering UConnect to suspend all operations in Magentonia until the conclusion of the trial.[26] On 10 July 2018, UConnect was charged under Section 3 of the PIDPA for failing to expeditiously remove the TBM post of 26 May 2018 and under Section 5 of PIDPA for recklessly disseminating false propaganda. For these reasons, UConnect was ordered to pay a fine of USD 100,000.[27]

[23] Compromis 5.4

[24] Compromis 4.8

[25] Compromis 6.1

[26] Compromis 5.5

[27] Compromis 6.2-6.3

13. Unger Ras and UConnect submitted applications before the Universal Court of Human Rights.[28]

[28] Compromis 7.3

V. STATEMENT OF JURISDICTION

The Republic of Magentonia (Respondent) has approached the Universal Freedom of Expression Court, the special Chamber of the Universal Court of Human Rights hearing issues relating to the alleged violation of rights recognised in the Article 17 and Article 19 of the ICCPR.

Both Unger Ras' and UConnect's appeals against the High Court of Magentonia's decisions to be considered by the Supreme Court of Magentonia were legally declined, exhausting their domestic appeals. This Honourable Court has jurisdiction as the final arbiter over all regional courts where parties have exhausted all domestic remedies.

The Respondent requests this Honourable Court to issue a judgment in accordance with relevant international law, including the UDHR, the ICCPR, conventions, jurisprudence developed by relevant courts, and principles of international law.

VI. QUESTIONS PRESENTED

The questions presented, as certified by this Honourable Court, are as follows:

1. Whether Magentonia's decision not to grant Ras any rectification, erasure or blocking of search results depicting The Cyanisian Times story of 2001 violated Article 17 of the ICCPR.
2. Whether Magentonia's decision of 2 June 2018 to direct UConnect to suspend all operations until the conclusion of the trial violated Article 19 of the ICCPR.
3. Whether Magentonia's prosecution and conviction of UConnect under Sections 3 and 5 of the PIDPA violated Article 19 of the ICCPR.

VII. SUMMARY OF ARGUMENTS

I. Magentonia's decision not to grant Ras any rectification, erasure or blocking of search results did not violate Ras's right to privacy since it was prescribed by law, pursued a legitimate aim and was necessary in a democratic society

1. Firstly, the restriction was prescribed by law, as the accessibility of PIDPA was unquestionable being in effect for over two years since 2016. Correspondingly, the accuracy of the term 'irrelevant' is precise and clear enough – without being unreasonably rigid – to enable the determination of the Original Article not falling under the scope of 'irrelevant' in light of Ras's status of being a promising candidate on the upcoming election. Furthermore, the mere fact that Ras could exhaust all domestic administrative and judicial remedies in itself is an adequate safeguard against unfettered discretion.
2. Secondly, the restriction of the right to privacy is in pursuit of a legitimate aim, since the mission to ensure the transparent functioning of Magentonian politics and to guarantee the Magentonian citizens' right to receive information about the current candidate especially reporting on crime of him on the upcoming election – which is *per se* public interest – is the lawful interest, which, therefore, justifies the restriction of Ras's private life.
3. Thirdly, the restriction of Ras's right to privacy was necessary in a democratic society. Ideas about political issues among citizens are essential, thus the publication of Ras's misconduct did not aim to damage Ras's reputation, but instead, it intended to disclose an issue, which could potentially affect the way Ras would exercise his power in case of winning at the election. Consequently, Ras is a political figure, and he voluntarily exposed himself to public scrutiny. Therefore, he should display a greater degree of tolerance with regards to public criticism and intrusions into his affairs. In fact, with

fleeing Cyanisia, he did not contest the veracity of the issued warrant but implicitly accepted the allegations as he did not refer to that issue before the HCM or the Honourable Court. Furthermore, the Original Article was based on a warrant, which was issued by the State Police itself – thus being an official document – the veracity of which the journalist rightfully did not question. Furthermore, in the present case because of the relevancy of search results the interest of the public in having that information is crucial. Considering the mentioned arguments, the warrant could not be regarded irrelevant or inaccurate; and thus, the HCM stroke a fair balance between Ras's right to privacy and the right to impart information before the election, because privacy should act as a shield but not a sword.

II. Magentonia's decision to suspend all operations of UConnect until the conclusion of the trial did not violate Article 19 of the ICCPR since it was prescribed by law, pursued a legitimate aim and was necessary in a democratic society.

4. Firstly, the suspension was prescribed by law, because the PIDPA, along with the relevant case-law and international examples, made it foreseeable that the operation of a social media platform could be suspended under Magentonian law for disseminating hate speech and false propaganda. Moreover, the suspension had a legal basis in domestic law since UConnect undoubtedly fall within the scope of PIDPA based on Section 32 of the Act. Additionally, there were adequate safeguards against unfettered discretion as the suspensive powers were concentrated in one single authority and a judicial appeal procedure was available against the suspension.
5. Secondly, the suspension pursued the legitimate aims to protect the public order and the rights and reputations of others, namely the rights of the immigrant community since numerous xenophobic posts proliferated on UConnect with the inevitable risk of arousing feelings of distrust, rejection and hatred.

6. Thirdly, the suspension was necessary in a democratic society, because it was the only feasible method to prevent the additional dissemination of anti-refugee posts taking into account that in the present case the Notice-and-Takedown System could not function as an appropriate tool and it was technically impossible to target only the unlawful content.

III. Magentonia's prosecution and conviction of UConnect under Sections 3 and 5 of the PIDPA did not violate Article 19 of the ICCPR since it was prescribed by law, pursued a legitimate aim and was necessary in a democratic society.

7. Firstly, the prosecution was prescribed by law, because it was undisputedly foreseeable that a social media platform can be held liable under the PIDPA for recklessly disseminating false propaganda after failing to remove the *prima facie* false and most viewed post on its platform.
8. Secondly, the prosecution pursued the legitimate aims to protect the public order and the rights and reputations of others, namely the rights of the immigrant community having regard to the fact that even though UConnect was not the author of the derogatory posts itself, it provided their users with an outlet for stirring up hatred.
9. Thirdly, the prosecution was necessary in a democratic society for the following reasons. UConnect went beyond that of a passive, purely technical service provider and the TBM posts on 26 and 30 May were considered clearly unlawful. However, UConnect was not prepared to remove them as soon as they were brought to its attention, therefore the company neglected its duty to avoid causing harm to third-parties. Nevertheless, the fine – which is remarkably lower in comparison to the maximum penalty given in Section 6 of the PIDPA – can by no means be considered disproportionate.

VIII. ARGUMENTS

I. MAGENTONIA'S DECISION NOT TO GRANT RAS ANY RECTIFICATION, ERASURE OR BLOCKING OF SEARCH RESULTS DID NOT VIOLATE HIS RIGHT TO PRIVACY

1. It is generally acknowledged that FoE[29] is a fundamental human right. It is a linchpin of democracy,[30] key to the protection of all human rights and one of the basic conditions for its progress and for the development of every man.[31] Though the right to privacy[32] is a fundamental right, nevertheless, it is generally recognised that these rights are not absolute, hence they can be restricted to ensure the exercise of other human rights as declared by ICCPR,[33] ECHR,[34] ACHPR,[35] ACHR,[36] and UDHR.[37]

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[29] UDHR (adopted 10 December 1948) UNGA Res 217A (III) art 19; ECHR (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 1932 art 10; ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19(2); ACHR (adopted 22 November 1969, entered into force 18 July 1978) art 13; ACHPR (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 9

[30] Mendel T, 'Restricting Freedom of Expression: Standards and Principles' <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf> accessed 7 November 2018

[31] *Engel and Others v The Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 8 June 1976) [41]-[42], [100]; *Handyside v The United Kingdom* App no 5393/72 (ECtHR, 7 December 1976) [49]; *Association Ekin v France* App no 39288/98 (ECtHR, 17 July 2001) [56]; *Perna v Italy* App no 48898/99 (ECtHR, 6 May 2003) [39]

[32] ECHR Art 8; ICCPR Art 17(2); ACHR Art 11(3); *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [82]-[84]; *Couderc and Hachette Filipacchi Associés v France* App no 40454/47 (ECtHR, 10 November 2015) [83]-[86], [88]-[90]

[33] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19(2)

[34] ECHR (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 1932 art 10

[35] ACHPR (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 9

[36] ACHR (adopted 22 November 1969, entered into force 18 July 1978) art 13

[37] UDHR (adopted 10 December 1948) UNGA Res 217A (III) art 19

2. In the present case, Magentonia ratified the ICCPR and submitted a declaration[38] which is considered a reservation regardless of the term 'declaration'.[39] A reservation must be specific and it must be compatible with the object and purpose of the ICCPR[40] which are to create legally binding human rights standards on ratifying states.[41] Magentonia's reservation[42] is valid, as it transparently refers to Articles 17 and 19 indicating its scope in precise terms, and therefore, ensures certainty as to the extent of obligations undertaken.[43] Magentonia did not take away the essence of these rights,[44] as it merely restricted the obligation undertaken by Magentonia to regulate FoE.[45] Consequently, the reservation is consistent with the object and purpose of the ICCPR.
3. States can take measures to restrict human rights when such limitation (A) is prescribed by law, (B) pursues a legitimate aim, and is (C) necessary and proportionate to the

[38] Compromis 2.4

[39] UNHRC, 'General Comment 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6 [3]

[40] Vienna Convention on Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 19(3); Villiger ME, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (BRILL first published 2009) 325

[41] UNHRC, 'General Comment 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6 [7]

[42] Compromis 2.4

[43] UNHRC, 'General Comment 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6 [19]

[44] IACtHR, 'Restrictions to the Death Penalty (Arts. 4(2) And 4(4) American Convention on Human Rights' (8 September 1983), Advisory Opinion OC 3-83, Series A No 3 [61]

[45] Compromis 2.4

pursued goal. These requirements have been endorsed by the UNHRC,[46] the ECtHR,[47] the IACtHR,[48] and the ACHPR.[49]

4. In the present case, Applicants submit that Magentonia made a proper decision to fulfil its obligation to protect the citizen's right to receive information[50] and to secure the national security.[51]

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[46] *Womah Mukong v Cameroon* CCPR/C/51/D/458/1991 (UNHRC, 10 August 1994) [9.7]; *Sohn v Republic of Korea* CCPR/C/54/D/518/1992 (UNHRC, 19 July 1995) [10.4]; *Malcolm Ross v Canada* CCPR/C/70/D/736/1997 (UNHRC, 18 October 2000) [11.2]; *Velichkin v Belarus* CCPR/C/85/D/1022/2001 (UNHRC, 20 October 2005) [7.3]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (16 May 2011) UN Doc A/HRC/17/27 [24]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (10 August 2011) UN Doc A/66/290 [15]; UNHRC, 'General Comment 34, Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34 [35]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (17 April 2013) UN Doc A/HRC/23/40 [29]

[47] *Handyside v The United Kingdom* App no 5393/72 (ECtHR, 7 December 1976) [49]; The *Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [45]; *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) [24]; *Murat Vural v Turkey* App no 9540/07 (ECtHR, 21 January 2015) [59]; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) [124]

[48] *Francisco Martorell v Chile* (IACtHR, 3 May 1996) [55]; *Herrera-Ulloa v Costa Rica* (IACtHR, 2 July 2004) [120]; IACHR, 'Report of the Special Rapporteur for Freedom of Expression' (2009) OEA/SER L/V/II Doc 51 [231]-[233]; IACHR, 'Freedom of Expression and the Internet' (2013) OEA/SER L/II CIDH/RELE/IN F11/13 [54]-[64]

[49] ACommHPR, 'Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa' (2002) ACHPR/Res 62(XXXII)02 Principle II; *Interights v Mauritania* Comm no 242/2001 (ACommHPR, 2004) [78]-[79]; *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe* Comm no 294/04 (ACommHPR, 2009) [80]

[50] *Bédat v Switzerland* App no 56925/08 (ECtHR, 29 March 2016) [51]; *Handyside v The United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [49]; *Österreichische Vereinigung zur Erhaltung, Starkung und Schaffung eines Wirtschaftlich gesunden Land- und Forst- Wirtschaftlichen Grundbesitzes v Austria* App no 39534/07 (ECtHR, 28 November 2013) [33]

[51] *Klass v Germany* App no 5029/71 (ECtHR, 6 September 1978) [41]; *Ochensberger v Austria* App no 21318/93 (ECtHR, 2 September 1994)

A. THE RESTRICTION OF RAS'S RIGHT TO PRIVACY UNDER THE PIDPA WAS PRESCRIBED BY LAW

5. A norm is prescribed by law if it a) has legal basis and is accessible; b) is sufficiently precise; c) contains adequate safeguards.[52]

a) Magentonia's decision had legal basis in Magentonian law and it is accessible

6. Law is meant to be the norms in force in a given legal system, in this instance a combination of the written law and the case-law interpreting it.[53] In the present case, Section 22 of the PIDPA as written source is satisfactory.[54]
7. The law should give the citizens an adequate indication of the legal rules applicable to the given case.[55] The PIDPA came into effect and was accessible for the citizens for more than two years since 2016.[56] Therefore, the accessibility of the law does not raise any concern in the present case.

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[52] *Silver and Others v The United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [85]-[90]; *Malone v The United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [67]-[68]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [57]-[59]

[53] *Huvig v France* App no 11105/84 (ECtHR, 24 April 1990) [27]; *De Wilde, Ooms and Versyp v Belgium* App nos 2832/66, 2835/66, 2899/66 (ECtHR, 18 June 1971) [93]; *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994) [43]; *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) [88]

[54] *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990) [28]; *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [47]; *Dudgeon v The United Kingdom* App no 7525/76 (ECtHR, 22 October 1981) [44]; *Chappell v The United Kingdom* App no 10461/83 (ECtHR, 30 March 1989) [52]

[55] *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; Greer S, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing 1997) 9-13; UNHRC, 'General Comment 34, Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34 [25]

[56] *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; *Silver and Others v The United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [87],[93]

b) The PIDPA was sufficiently precise because it enabled Ras to reasonably foresee in which conditions may the search results be rectified or blocked

8. A norm can be regarded as 'law' if it is formulated with sufficient precision to enable citizens to regulate their conduct.[57] In the present case, Section 22 (a) of the PIDPA[58] uses expressions such as 'irrelevant', 'incomplete', 'inaccurate' that are neither vague nor overbroad. Laws are expected to be precise and clear, but absolute certainty is not required. Such wording would undermine the ability of the PIDPA to keep pace with changing circumstances especially in connection with modern communication technologies.[59] In addition, very similar terms are used in other acts as well.[60]
9. The required degree of precision depends on the content, the field that the law is designed to cover and the number of those addressed.[61] Respondent submits that it would be impossible to give a clearer definition of what 'irrelevant' is. This case is a good example since an old story of 2001 appeared to be relevant in 2018 when the

[57] *Silver and Others v The United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [85]-[90]; *Malone v The United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [67]-[68]; *Weber and Saravia v Germany* App no 54934/00 (ECtHR, 29 June 2006) [93]-[95]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 05 May 2011) [51]-[52]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [57]-[59]

[58] Compromis 4.6

[59] *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *Cantoni v France* App no 17862/91 (ECtHR, 15 November 1996) [28]; *McLeod v The United Kingdom* App no 24755/94 (ECtHR, 23 September 1998) [41]; *Rekvényi v Hungary* App no 25390/94 (ECtHR, 20 May 1999) [34]; *Kazakov v Russia* App no 1758/02 (ECtHR, 18 December 2008) [22]

[60] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119, art 16-17; Privacy Amendment (Enhancing Privacy Protection) Act of Australia (2012) art 13.1 (b) (i)

[61] *Groppera Radio AG and Others v Switzerland* App no 10890/84 (ECtHR, 28 March 1990) [68]; *Larissis and Others v Greece* App no 23372/94 (ECtHR, 24 February 1998) [34]; *Steel and Others v The United Kingdom* App no 24838/94 (ECtHR, 23 September 1998) [55]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 05 May 2011) [52]

person concerned decided to run for office.[62] Even though 17 years passed, there is public interest in getting to know a candidate and his previous actions and as a consequence, the 17-year-old story appears to be relevant under such circumstances. According to international principles, Respondent submits that the need to avoid excessive rigidity and to keep pace with changing circumstances mean that laws will necessarily be couched in terms which, to a greater or lesser extent, are vague.[63]

c) The PIDPA provided adequate safeguards against arbitrary interferences

10. The law must indicate the scope of any discretion to give the individual adequate protection against arbitrary interference.[64] In the present case, Sections 22 (b) (c), 30 and 31 of the PIDPA allow Unger Ras to file a claim before the IDPCM and to appeal before the HCM and the SCM. The right to appeal is considered in itself an adequate safeguard,[65] because the judiciary is an appropriate check against the executive.[66] Taking into account that such right was granted to Ras, thereby he exhausted all the

[62] Compromis 4.1

[63] *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; *Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]; *Christie v The United Kingdom* App no 21482/93 (ECtHR, 27 June 1994)

[64] *Malone v The United Kingdom* App no 8691/79 (ECtHR, 26 April 1985) [69]; *Liu v Russia* App no 42086/05 (ECtHR, 06 December 2007) [88]; *Silver and Others v The United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [90]; *Huvig v France* App no 11105/84 (ECtHR, 24 April 1990) [34].

[65] *Klass v Germany* App no 5029/71 (ECtHR, 6 September 1978) [56]; *Malone v The United Kingdom* App no 8691/79 (ECtHR, 26 April 1985) [74]-[78]; *Uzun v Germany* App no 35623/05 (ECtHR, 02 September 2010) [72]; *Gürtekin and Others v Cyprus* App nos 60441/13, 68206/13, 68667/13 (ECtHR, 11 March 2014) [28]; *Malcolm Ross v Canada*, CCPR/C/70/D/736/1997 (UNHRC, 26 October 2000) [11.1]

[66] *Malcolm Ross v Canada*, CCPR/C/70/D/736/1997 (UNHRC, 26 October 2000) [11.1]; *Klass v Germany* App no 5029/71 (ECtHR, 6 September 1978) [56]

domestic remedies, Respondent submits that the PIDPA had adequate safeguards against unfettered discretion.

B. THE RESTRICTION OF RAS'S RIGHT TO PRIVACY UNDER THE PIDPA PURSUED A LEGITIMATE AIM

11. For a restriction of one's right to privacy to be permissible, it must serve a legitimate purpose.[67] According to Article 17 (1) of the ICCPR, the protection of one's private life is justified only against unlawful attacks on honour and reputation.[68] Furthermore, Article 7 of the Magentonian Constitution also allows the limitations necessary for the protection of the rights and freedoms of others, or in the public interest.[69]
12. To guarantee citizens the receipt of important information falls within the scope of public scrutiny.[70] Therefore, reporting on a crime committed by Ras who has entered the public arena[71] is *per se* subject to public interest.[72] Hence, the citizens' right to

[67] ECHR (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 1932 art 10(2); ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19(3); ACHPR (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 9(2), art 10(2); ACHR (adopted 22 November 1969, entered into force 18 July 1978) art 13(2); *Handyside v The United Kingdom* App no 5393/72 (ECtHR, 7 December 1976) [49]

[68] UNHRC, 'General Comment 31, The nature of the general legal obligation imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13 [8]; UNGA, *Official Records of the General Assembly*, *Forty-third Session*, *Supplement No. 40* (A/43/40), annex VI, [3]; *Toonen v Australia*, CCPR/C/50/D/488/1992 (UNHRC, 31 March 1994) [8.3]; Oster J, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015) 151

[69] Compromis 4.6

[70] UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1984) Annex, UN Doc E/CN 4/1984/4 [35]-[37]; *Couderc and Hachette Filippacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015) [89]-[90]

[71] *Ruusunen v Finland* App no 7359/10 (ECtHR, 14 January 2014) [41]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [91]

[72] *News Verlags GmbH & Co. KG v Austria* App no 31457/96 (ECtHR, 11 January 2000) [54]; *Krone Verlag GmbH & Co. KG v Austria* App no 34315/96 (ECtHR, 26 February 2002) [37]; *Verlagsgruppe News GmbH v*

receive information about a candidate's suitability before the election[73] cannot be interpreted as 'unlawful attack',[74] but as to contribute to the public debate and to support the transparent functioning of Magentonia's politics. Therefore, Respondent submits that the restriction pursued a legitimate aim.

C. THE RESTRICTION OF RAS'S RIGHT TO PRIVACY UNDER THE PIDPA WAS NECESSARY IN A DEMOCRATIC SOCIETY

13. The present case particularly requires to apply a fair balance test, because two fundamental rights have come into conflict with each other: on one hand Ras's right to privacy under Article 17 of the ICCPR, and on the other hand the Magentonian citizens' right to seek, receive and impart information as part of the right to FoE under Article 19 of the ICCPR.[75]
14. In these conflicts, the national authorities enjoy a margin of appreciation, the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved.[76] Additionally, the ECtHR stated that

Austria (No 2) App no 10520/02 (ECtHR, 14 December 2006) [40]; *Connick v Myers*, 461 U.S. 138 (1983); Oster J, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015) 44

[73] *Brosa v Germany* App no 5709/09 (ECtHR, 17 July 2014) [42]

[74] UNHRC, 'General Comment 16, Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (Twenty-third session, 1988), UN Doc HRI/GEN/1/Rev.1 at 21 (1994); UN Human Rights Office of the High Commissioner, 'Right to Privacy in the Digital Age' <https://www.ohchr.org/en/issues/digitalage/pages/digitalageindex.aspx> accessed 7 November 2018

[75] *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [84]; *Hachette Filipacchi Associés v France* App no 71111/01 (ECtHR, 14 June 2007) [43]; *MGN Limited v The United Kingdom* App no 39401/04 (ECtHR, 18 January 2011) [142]

[76] *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR, 24 January 2017) [182]; *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011) [70]; *Evans v The United Kingdom* App no 6339/05 (ECtHR, 10 April 2007) [77]; *Dickson v The United Kingdom* App no 44362/04 (ECtHR, 4 December 2007) [78]

strong reasons are required to substitute the findings of the domestic courts.[77] In other words, there will usually be a wide margin of appreciation afforded if the State is required to strike a balance between these competing rights.[78]

15. The right to privacy must not be unduly protected at the expense of undermining the right to FoE, as these competing rights are of equal value.[79] To determine whether a fair balance has been struck between these rights, the following five criteria had been laid down in the ECtHR's case-law.[80]

a) Contribution to a debate of general interest

16. Whether or not a publication concerns an issue of public interest should depend on a broader assessment of the subject matter and the content of the publication.[81] Public discourse involves free public deliberation of matters of public interest, especially, but not only the scrutiny of those who exercise power.[82] Free elections and FoE –

[77] *MGN Limited v The United Kingdom* App no 39401/04 (ECtHR, 18 January 2011) [150], [155]; *Von Hannover v Germany* (No 2) App nos 40660/08, 60641/08 (ECtHR, 7 February 2012) [107]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [88]; *Lillo-Stenberg and Sæther v Norway* App no 13258/09 (ECtHR, 16 January 2014) [44]

[78] *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987) [59]; *Klass v Germany* App no 5029/71 (ECtHR, 6 September 1978) [49]; *De Wilde, Ooms and Versyp v Belgium* App nos 2832/66, 2835/66, 2899/66 (ECtHR, 18 June 1971) [93]; *Golder v The United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) [45]; *Engel and Others v The Netherlands* App no 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 8 June 1976) [100]; *Handyside v The United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [48]

[79] *Mosley v The United Kingdom* App no 48009/98 (ECtHR, 10 May 2011) [111]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [87]

[80] *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [89]-[111]; *Haldimann and Others v Switzerland* App no 21830/09 (ECtHR, 24 February 2015) [44]-[68]; *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015) [82]; *Axel Springer SE and RTL Television GmbH v Germany* App no 51405/12 (ECtHR, 21 September 2017) [39]-[59]

[81] *Tønsbergs Blad AS and Haukom v Norway* App no 510/04 (ECtHR, 1 March 2007) [87]; *Fressoz and Roire v France* App no 29183/95 (ECtHR, 21 January 1999) [50]; *Bladet Tromsø and Stensaas v Norway* App no 21980/93 (ECtHR, 20 May 1999) [63]; *Björk Eiðsdóttir v Iceland* App no 46443/09 (ECtHR, 10 July 2012) [67]; *Medžlis Islamske Zajednice Brčko and Others v Bosnia and Herzegovina* App no 17224/11 (ECtHR, 27 June 2017) [92]

[82] *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [42]; *Feldek v Slovakia* App no 29032/95 (ECtHR, 12 July 2001) [74]; *Brasilier v France* App no 71343/01 (ECtHR, 11 April 2006) [41]; *Gutiérrez Suárez v Spain* App

particularly freedom of political debate – together form the bedrock of any democratic system. It is particularly important in the period preceding an election that information of all kinds is permitted to circulate freely.[83]

17. The free communication of information and ideas about public and political issues amongst citizens are essential,[84] even to inform the public.[85] The laws include *lèse-majesté,*[86] the protection of the honour of public authorities[87] or prohibition of the criticism of public institutions[88] are not reconcilable with the essential function of FoE, therefore such regime may not be referred to as 'democratic society'.
18. In the present case, the Original Article in question concerns a warrant issued against Ras – a candidate of the upcoming election – for misappropriation of university funds, which must be considered to present a degree of general interest.[89] This publication was a balanced one and did not intend to damage Ras's reputation, rather the purpose was

no 16023/07 (ECtHR, 1 June 2010) [26]; *Fontevecchia and D'amico v Argentina* (IACtHR, 29 November 2011) [47]

[83] *Bowman v The United Kingdom* App no 24839/94 (ECtHR, 19 February 1998) [42]; *Incal v Turkey* App no 22678/93 (ECtHR, 09 June 1998) [46]; *TV Vest AS & Rogaland Pensjonistparti v Norway* App no 21132/05 (ECtHR, 11 December 2008) [61]; *Ricardo Canese v Paraguay* (IACtHR, 31 August 2004) [88]

[84] *Von Hannover v Germany* (No 2) App nos. 40660/08, 60641/08 (ECtHR, 7 February 2012) [60]; *Leempoel & S.A. ED. Ciné Revue v Belgium* App no 64772/01 (ECtHR, 9 November 2006) [68]; *Standard Verlags GmbH v Austria* (No 2) App no 21277/05 (ECtHR, 4 June 2009) [46]

[85] UNHRC, 'General Comment 25, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)' (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7 [12]

[86] *Aduayom and Others v Togo* CCPR/C/51/D/422/1990, 423/1990, 424/1990 (UNHRC, 30 June 1994)

[87] UNHRC, 'Concluding observations on Costa Rica' (16 November 2007) CCPR/C/CRI/CO/5 [11]

[88] UNHRC, 'Concluding observations on Tunisia' (23 April 2008) CCPR/C/TUN/CO/5 [18]

[89] *News Verlags GmbH & Co. KG v Austria* App no 31457/96 (ECtHR, 11 January 2000) [56]; *Dupuis and Others v France* App no 1914/02 (ECtHR, 7 June 2007) [37]; *Campos Dâmaso v Portugal* App no 17107/05 (ECtHR, 24 April 2008) [32]; CoE, 'Recommendation Rec (2003) 13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings' (2016) [50]

to disclose an issue in which the public had an interest in being informed about, because it may affect the way Ras would exercise his power as an elected official.[90]

19. Hence, the deletion of search results depicting the Original Article would clearly interfere with the public's right to receive information in such circumstances.[91]

b) The status of the person concerned

20. A private individual unknown to the public may claim particular protection of his right to privacy, however the same is not applicable for public figures.[92] They might be defined as persons holding public offices or using public resources, more broadly speaking, all those who play a role in public life, whether in politics or in any other domain.[93] Hence, a candidate on a democratic election who inevitably, knowingly and voluntarily exposes himself to public scrutiny is undisputedly considered a public figure since his activities go beyond the private sphere and belong to the realm of public debate, where journalists should enjoy a wide freedom to criticise his actions.[94]

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[90] *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR, 17 December 2004) [78]; *Tønsbergs Blad A.S. and Haukom v Norway* App no 510/04, (ECtHR, 1 March 2007) [89]

[91] *White v Sweden* App no 42435/02 (ECtHR, 19 September 2006) [29]; *Egeland and Hanseid v Norway* App no 34438/04 (ECtHR, 16 April 2009) [58]; *Leempoel & S.A. ED. Ciné Revue v Belgium* App no 64772/01 (ECtHR, 9 November 2006) [72]

[92] *Minelli v Switzerland* App no 14991/02 (ECtHR, 14 June 2005) [55]; *Petrenco v Moldova* App no 20928/05 (ECtHR, 30 March 2010) [55]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [91]

[93] CoE, 'Parliamentary Assembly, Resolution 1165 (1998) on the Right to Privacy' (1998) [7]

[94] *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [42]; *Standard Verlags GmbH and Krawagna-Pfeifer v Austria* App no 19710/02 (ECtHR, 02 November 2006) [47]; *Vörður Ólafsson v Iceland* App no 20161/06 (ECtHR, 27 April 2010) [51]; *Erla Hlynsdóttir v Iceland* App no 43380/10 (ECtHR, 10 July 2012) [65]; *Instytut Ekonomichnykh Reform, TOV v Ukraine* App no 61561/08 (ECtHR, 17 October 2016) [44]; UNHRC, 'General Comment 34, Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34 [38]; IACHR, 'Report of the Special Rapporteur for Freedom of Expression' (30 December 2009) OEA Ser L V/II/ Doc 51 [223]

Additionally, he has to display a greater degree of tolerance with regard to public criticism and intrusions into his affairs.[95]

21. In the present case, after acquiring Magentonian citizenship, Ras joined the UMP and actively campaigned to help Cyanisian refugees to be employed and was a candidate at the upcoming election for June 2018.[96] Therefore, he was also known among the UMP voter base, not just among the refugees.[97] For these reasons, the IDPCM correctly ruled that "the complainant was a public figure"[98] as a part of the above-mentioned wider margin of appreciation,[99] which underlines the public interest as well.

c) Prior conduct of the person concerned

22. It was widely known that Ras was the founder of the main opposition party, DPC in Cyanisia.[100] As soon as the story was published that a warrant had been issued against Ras for misappropriation of university funds, he immediately fled Cyanisia. However, he did not contest the veracity of the Original Article, but only claimed that he was persecuted because of his political opinions,[101] which indicated that he implicitly

[95] *Bodrozic v Serbia and Montenegro,* CCPR/C/85/D/1180/2003 (UNHRC, 31 October 2005) [7.2]; *Marques de Morais v Angola,* CCPR/C/83/D/1128/2002 (UNHRC, 18 April 2005) [6.8]; *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [42]; *Oberschlick v Austria* App no 11662/85 (ECtHR, 23 May 1991) [59]; *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria* Comm nos 105/93, 128/94, 130/94, 152/96 (ACommHPR, 31 October 1998) [74]; *Herrera-Ulloa v Costa Rica* (IACtHR, 2 July 2004) [127]

[96] Compromis 2.2

[97] Compromis 2.2

[98] Compromis 4.7

[99] Arguments 15.

[100] Compromis 1.1

[101] Compromis 1.2

accepted that the allegations were true,[102] despite the fact that due to his exposed function as a politician he could have had access to means of communication available to reply such allegations.[103]

23. After moving to Magentonia, given that Ras – as a candidate on the national election – wanted to exercise an influence on Magentonia's immigration policy[104] as there was a mass exodus of immigrants from Cyanisia,[105] the past stances of him remained a matter of public concern.

24. The Magentonian Mail published an 'exposé' on him, following which he disclosed a public statement; [106] therefore, he actively sought the limelight, hence – considering the degree to which he was known to the public – his 'legitimate expectation' that his private life would be effectively protected was reduced.[107]

d) Method of obtaining the information and its veracity

25. A professional journalist reporting on issues of general interest must be acting in 'good faith', on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism.[108] As the Original Article was based on a

[102] Compromis 2.2

[103] *Axel Springer AG v Germany* (No 2) App no 48311/10 (ECtHR, 10 June 2014) [66]

[104] Compromis 2.2

[105] Compromis 1.3

[106] Compromis 4.1

[107] *Von Hannover v Germany* App no 59320/00 (ECtHR, 24 June 2004) [51]; *Hachette Filipacchi Associés* (*ICI PARIS*) *v France* App no12268/03 (ECtHR, 23 July 2009) [53]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [101]

[108] *Fressoz and Roire v France* App no 29183/95 (ECtHR, 21 January 1999) [54]; *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR, 17 December 2004) [78]; *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007) [103]

warrant issued by the State Police against Ras,[109] it had sufficient factual basis, because the media is entitled to rely on the contents of official reports.[110] Consequently, there was no need to check the accuracy of such statement before the publication.[111]

26. Though Ras's former University disclosed a statement about a misconduct in 1995[112] claiming that Ras was exonerated in 1995 after an investigation,[113] the Original Article that was published in 2001 did not state that the alleged misappropriation happened in 1995. Subsequently, it could happen anytime during Ras's spell at the University.

27. Furthermore, the Magentonian Mail prevaricated the original content and wrote about a 'corruption scandal',[114] therefore assuredly, because of its excessiveness, shortly after removed it.[115] Nevertheless, the Second Article linked the online version of the original one,[116] hence Ras's conduct could be known by the public.[117] The fact that it contained certain expressions which, to all intents and purposes, were designed to attract the public's attention cannot in itself raise an issue.[118] Accordingly, the latter article must not be taken into account as it could not influence the public in a wrong way.

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[109] Compromis 1.2; Clarifications 8.

[110] *Bladet Tromsø and Stensaas v Norway* App no 21980/93 (ECtHR, 20 May 1999) [72]; *Eerikäinen and Others v Finland* App no 3514/02 (ECtHR, 10 February 2009) [64]; *Pipi v Turkey* App no 4020/03 (ECtHR, 15 May 2009); *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [105]

[111] *Colombani and Others v France* App no 51279/99 (ECtHR, 25 June 2002) [65]; *Selistö v Finland* App no 56767/00 (ECtHR, 16 November 2004) [60]; *Tanasoaica v Romania* App no 3490/03 (ECtHR, 19 June 2012) [50]; *Rumyana Ivanova v Bulgaria* App no 36207/03 (ECtHR, 14 February 2008) [65]

[112] Compromis 1.2

[113] Compromis 1.2

[114] Compromis 4.1

[115] Compromis 4.2

[116] Compromis 4.1

[117] *Aleksey Ovchinnikov v Russia* App no 24061/04 (ECtHR, 16 December 2010) [49]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [107]

[118] *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR, 17 December 2004) [78]; *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007) [102]-[103], [149]; *Krone Verlag GmbH v Austria* App no

e) Consequences of the publication

28. Ras filed a petition in order to remove the search results depicting the Original Article referring to Section 22 (a) of the PIDPA. Under the said Act data, which is 'inaccurate' or 'irrelevant' can be removed. Respondent submits that these criteria were not met because of the following reasons.

29. Regarding the question, whether the search results depicting the Original Article were 'inaccurate', Respondent notes that the Original Article purely contained information about an issued warrant against Ras, nevertheless its issuance was not contested by him either in the domestic proceedings[119] or in the proceedings before the Honourable Court.[120] In other words, it was never considered inaccurate by him.

30. Concerning the irrelevance of the search results, Respondent suggests that the Honourable Court should take account of the crucial role of developments in information and communication technologies, particularly search engines, which help to express the opinion of the Magentonian citizens.[121] The removal of search results could have effects upon the legitimate interest of internet users potentially interested in

27306/07 (ECtHR, 19 June 2012) [46]-[47]; *Novaya Gazeta and Borodyanskiy v Russia* App no 14087/08 (ECtHR, 28 March 2013) [37]; *Ageyevy v Russia* App no 7075/10 (ECtHR, 18 April 2013) [227]

[119] Compromis 4.7

[120] Compromis 7.4.1; *Karhuvaara and Iltalehti v Finland* App no 53678/00 (ECtHR, 16 November 2004) [44]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [105]

[121] *Search King, Inc. v Google Technology, Inc*, No 02-1457, 2003 (WD Oklahoma, 27 May 2003) [11]; *Metropolitan International Schools Ltd v Designtechnica Corp* [2009] EWHC 1765 (QB) [25]; Karapapa S and Borghi M, 'Search Engine Liability for Autocomplete Suggestions: Personality, Privacy and the Power of the Algorithm' (2015) 23 International Journal of Law and Information Technology 268; Grimmelmannt J, 'Speech Engines' [2013] Minnesota Law Review 925

having access to specific information.[122] According to the CJEU, the relevance of search results *inter alia* depends on the interest of the public in having that information.

31. In the present case the search results depicting the Original Article because of the above reasons[123] are of public concern, therefore the interest of the users to inform themselves freely and gather all the information about the candidates on the internet is crucial,[124] since UConnect is the most popular platform in Magentonia and most of the citizens actively use it.[125]

32. The right to privacy is a shield, not a sword.[126] Therefore, in order to respect one's right to privacy, the attack on personal honour and reputation must attain a certain level of gravity and in a matter causing prejudice to personal enjoyment of such right.[127] However, Ras could not raise any clear-connected evidence proving that he did not secure a seat due to the posts and stories about him, which is underlined by the fact that UMP won the election.[128]

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[122] Case C-131/12 *Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* [2014] ECR I-317, [81]

[123] Arguments 16-19.

[124] CoE, 'Appendix to Recommendation No. R (94) 13 of the Committee of Ministers to member states on measures to promote media transparency' (22 November 1994) Guideline No. 1: Access by the public to information on the media

[125] Compromis 3.1

[126] Oster J, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015) 44

[127] *A. v Norway* App no 28070/06 (ECtHR, 12 November 2009) [64]; *Sidabras and Džiautas v Lithuania*, App nos 55480/00, 59330/00 (ECtHR, 27 July 2004) [49]; *Polanco Torres and Movilla Polanco v Spain* App no 34147/06 (ECtHR, 21 September 2010) [40], [44]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [83]; *Bédat v Switzerland* App no 56925/08 (ECtHR, 29 March 2016) [72]; *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018) [112]

[128] Compromis 5.6

33. Accordingly, Respondent submits that the HCM stroke a fair balance between Ras's right to privacy and the citizens' right to impart information before the election in Magentonia.[129]

II. MAGENTONIA'S DECISION TO SUSPEND ALL OPERATIONS OF UCONNECT UNTIL THE CONCLUSION OF THE TRIAL DID NOT VIOLATE ARTICLE 19 OF THE ICCPR

34. Respondent acknowledges that the Internet remains history's greatest tool for global access to information,[130] and user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of FoE.[131] However, clearly unlawful speech, including hate speech, can be disseminated worldwide like never before, in a matter of seconds, and remain persistently available online.[132] Hence, while important benefits can be derived from the Internet in the exercise of FoE, every democratic country must set up rules for liability for unlawful speech that must be retained and constitute an effective remedy.[133]

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[129] *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [65]; *Bédat v Switzerland* App no 56925/08 (ECtHR, 29 March 2016) [51]; *Handyside v The United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [49]; *Österreichische Vereinigung zur Erhaltung, Starkung und Schaffung eines Wirtschaftlich gesunden Land- und Forst- Wirtschaftlichen Grundbesitzes v Austria* App no 39534/07 (ECtHR, 28 November 2013) [33]

[130] UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (12 June 2018) UN Doc A/HRC/38/35 p 3; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (17 April 2013) UN Doc A/HRC/23/40 [13]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (22 May 2015) UN Doc A/HRC/29/32 [11]

[131] *Times Newspapers Ltd. v the United Kingdom* (Nos 1 and 2) App nos 3002/03 and 23676/03 (ECtHR, 10 June 2009) [27]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [48]

[132] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [110]

[133] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [110]

35. In the present case, although UConnect's FoE[134] guaranteed under Article 19 of the ICCPR had been interfered with by Magentonia's decision, such interference was justified, since it (A) was prescribed by law, (B) pursued a legitimate aim and (C) was necessary in a democratic society.[135]

A. THE SUSPENSION WAS PRESCRIBED BY LAW

36. The suspension was prescribed by law as it (i) was foreseeable,[136] (ii) met the necessary formal requirements[137] and (iii) provided legal protection against arbitrary interferences.[138]

37. Firstly, Respondent submits that foreseeability does not require absolute certainty,[139] and consequences may still be sufficiently foreseeable if the person concerned has to take appropriate legal advice.[140] In addition, persons carrying on a professional activity

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[134] *Autronic AG v Switzerland* App no 12726/87 (ECtHR, 22 May 1990) [47]; *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994) [35]; *Khurshid Mustafa and Tarzibachi v Sweden* App no 23883/06 (ECtHR, 16 Marc 2009) [32]

[135] Arguments 3.

[136] UNHRC, 'General Comment 34, Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34 [25]; *Tammer v Estonia* App no 41205/98 (ECtHR, 6 February 2001) [37]; *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 September 2004) [43]; *Goodwin v The United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) [31]

[137] *Tolstoy Miloslausky v The United Kingdom* App no 18139/91 (ECtHR, 13 July 1995) [37]; *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [48]-[49]; *Malone v The United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [66]; *Margareta and Roger Andersson v Sweden* App no 12963/87 (ECtHR, 25 February 1992) [75]

[138] UNHRC, 'General Comment 27, Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 [13]

[139] *Hertel v Switzerland* App no 25181/94 (ECtHR, 25 August 1998) [55]; *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *Müller v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]

[140] *Tolstoy Miloslausky v The United Kingdom* App no 18139/91 (ECtHR, 13 July 1995) [37]; *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02, 36448/02 (ECtHR, 22 October 2007) [41]; *Cantoni v France* App no 45/1995/551/637 (ECtHR, 15 November 1996) [35]; *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 June 2004) [43]-[45]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) [129]

are expected to take special care in assessing the legal risks that their activity entails.[141] Moreover, the ECtHR in *Delfi AS v Estonia* observed that Delfi as one of the largest news portal in Estonia, "should have been familiar with the legislation and case-law, and could also have sought legal advice."[142] Since UConnect is the most popular social media platform in Magentonia[143] and already in early May 2018, TBM began posting anti-refugee posts on UConnect,[144] the PIDPA, along with the relevant case-law[145] and international examples,[146] made it foreseeable that the operation of a social media platform could be suspended under Magentonian law for disseminating hate speech and false propaganda.

38. Secondly, the suspension has a legal basis in domestic law. In *Delfi AS v Estonia*, where even the applicable law was disputed between the parties,[147] the ECtHR reaffirmed that it is primarily for the national authorities – notably the courts – to interpret and apply domestic law[148] and the ECtHR's task is to determine whether the methods adopted by the State and the effects they entail are in conformity with the ECHR.[149] In the present

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[141] *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02, 36448/02 (ECtHR, 22 October 2007) [41]; *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 September 2004) [45]

[142] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [129]

[143] Compromis 3.1

[144] Compromis 5.1

[145] *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012); *Cengiz and Others v Turkey* App nos 48226/10 and 14027/11 (ECtHR, 1 December 2015)

[146] Latif DA, 'More African governments blocked the internet to silence dissent in 2016' (*Quartz Africa*, 31 December 2016) <https://qz.com/africa/875729/how-african-governments-blocked-the-internet-to-silence-dissent-in-2016> accessed 7 November 2018

[147] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [127]

[148] *Rekvényi v Hungary* App no 25390/94 (ECtHR, 20 May 1999) [35]; *Chorherr v Austria* App no 13308/87 (ECtHR, 25 August 1993) [25]; *Hadjianastassiou v Greece* App no 12945/87 (ECtHR, 16 December 1992) [42]; *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990) [29]; *Malone v The United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [79]

[149] *Gorzelik and Others v Poland* App no 44158/98 (ECtHR, 17 February 2004) [67]

case, however, the applicable law cannot be disputed since UConnect undoubtedly falls within the scope of PIDPA based on Section 32.[150]

39. Thirdly, there were adequate safeguards against unfettered discretion[151] for the following reasons. The suspensive powers were concentrated in one single authority, namely the HCM, which facilitated uniform application of the law.[152] UConnect exhausted all legal remedies, as a trial took place at which parties were heard;[153] therefore, a judicial appeal procedure which is an additional adequate safeguard[154] was available against the suspension.[155]

B. THE SUSPENSION PURSUED LEGITIMATE AIMS

40. The numerous xenophobic posts on UConnect referred to Cyanisian refugees with vexatious and humiliating remarks and with the inevitable risk of arousing – particularly among the emotionally biased participants of the heated political debate – feelings of distrust, rejection or even hatred.[156] Thus, while acknowledging the importance of debate on matters of public interest, the impact of racist and xenophobic discourse is

[150] Compromis 5.5

[151] *Larry James Pinkney v Canada,* CCPR/C/OP/1, at 12 (UNHRC, 1984) [34]; UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1984) UN Doc E/CN 4/1984/4 Annex (1985), nos. 15-18.; UNHRC, 'General Comment 27, Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 [13]; *Claude Reyes and others v Chile* (IACtHR, 19 September 2006) [89]

[152] *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) Separate Opinion, 28

[153] Clarifications 32.

[154] *Malcolm Ross v Canada* CCPR/C/70/D/736/1997 (UNHRC, 26 October 2000) [11.4]; *Uzun v Germany* App no 35623/05 (ECtHR, 02 December 2010) [72]; *Klass v Germany* App no 5029/71 (ECtHR, 6 September 1978) [56]; *Gürtekin v Cyprus* App nos 60441/13, 68206/13, 68667/13 (ECtHR, 11 March 2014) [28]

[155] Compromis 7.1

[156] *Féret v Belgium* App no15615/07 (ECtHR, 10 December 2009) [69]

magnified in an electoral context, in which arguments naturally become more forceful.[157] Therefore it certainly remains open to the competent State authorities to adopt – in their capacity as guarantors of public order – measures, even of a criminal-law nature, intended to react appropriately.[158] Hence, even though UConnect was not the author of the derogatory posts itself, it provided their users with an outlet for stirring up hatred[159] when the risk of harm posed by communications on the Internet is certainly higher than that posed by the press.[160] Thus, there was a compelling social need to protect the public order and the rights and reputation of others, namely the rights of the immigrant community.

C. THE SUSPENSION WAS NECESSARY

41. An interference is necessary in a democratic society if it a) corresponds to a pressing social need and b) is proportionate to the legitimate aim pursued.

a) The interference corresponded to a pressing social need

42. In order to comply with the principle of necessity, an assessment must be made as to whether the interference with FoE goes no further than is necessary to meet the said

[157] *Féret v Belgium* App no15615/07 (ECtHR, 10 December 2009) [76]

[158] *Sürek v Turkey* App no 26682/95 (ECtHR, 8 July 1999) [61]; *Incal v Turkey* App no 22678/93 (ECtHR, 9 June 1998) [54]; *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992) [46]; *Observer and Guardian v The United Kingdom* App no 13585/88 (ECtHR, 26 November 1991) [59]

[159] *Sürek v Turkey* App no 26682/95 (ECtHR, 8 July 1999) [63]

[160] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [133]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) [63]; *Węgrzynowski and Smolczewski v Poland* App no 33846/07 (ECtHR, 16 July 2013) [98]

social need. Even though the less draconian measures should be envisaged,[161] Respondent submits that the suspension was the only feasible method to prevent the additional dissemination of anti-refugee posts for the following reasons.

43. Albeit UConnect had an NTDS in place, after being notified on numerous occasions,[162] the company failed to expeditiously remove the TBM post appeared on UConnect on 26 May, which contained odious hate speech.[163] Secondly, UConnect removed the said post but decided not to terminate or suspend TBM's account.[164] As a consequence of these failures, several thousand users who only subscribed between 10-31 May could begin to share TBM's posts;[165] hence, anti-refugee content has proliferated on the platform.[166]

44. For these reasons, Respondent submits that in the present case the NTDS could not function as an appropriate tool. Such finding coincides with *Delfi AS v Estonia* in which the ECtHR clearly endorsed stricter measures as appropriate for hate speech.[167]

b) The interference was proportionate to the legitimate aim pursued

45. The principle of proportionality implies that an interference must not be overbroad, and it must be the least intrusive instrument amongst those which might achieve their

[161] *Ürper v Turkey* App nos 14526/07, 14747/07, 15022/07, 16737/07, 36137/07, 47245/07, 50371/07, 50372/07, 54637/07 (ECtHR, 20 January 2010) [43]

[162] Clarifications 27.

[163] Arguments 58.

[164] Compromis 5.2

[165] Compromis 5.4

[166] Compromis 5.5

[167] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [159]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [91]

protective function.[168] Respondent submits that the suspension was proportionate for the following reasons.

46. Firstly, several thousand new users subscribed to UConnect and began to share content posted by TBM.[169] Thus, taking into account the proliferation of anti-refugee posts[170] and the fact that UConnect could not block posts on a specific topic,[171] Respondent submits that unlike to *Ahmet Yıldırım v Turkey,*[172] in the present case it was technically impossible to target only the unlawful content.

47. Secondly, the HCM's decision ordered UConnect to suspend its operations in Magentonia until the conclusion of the trial, thus for less than six weeks. Hence, a limit on the duration of the suspension was prescribed. On the contrary, in *Ahmet Yildirim v Turkey*, the blocking order remained in place for an indeterminate period,[173] furthermore, in *Cengiz and Others v Turkey* the blocking order remained in place for a lengthy period which took some years.[174]

48. In conclusion, since insulting or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech,[175] the protection of

[168] UNHRC, 'General Comment 34, Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34 [34]; UNHRC, 'General Comment 27, Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 [14]; *Ricardo Canese v Paraguay* (IACtHR, 31 August 2004) [96]; *Herrera Ulloa v Costa Rica* (IACtHR, 2 July 2004) [121]-[123]; IACtHR, 'Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)' (13 November 1985) Advisory Opinion OC-5/85, Series A No 5 [46]; *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [59]; *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985) [59]

[169] Compromis 5.4

[170] Compromis 5.5

[171] Clarifications 21.

[172] *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [68]

[173] *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [51]

[174] *Cengiz and Others v Turkey* App nos 48226/10 and 14027/11 (ECtHR, 1 December 2015) [7],[57]

[175] *Féret v Belgium* App no15615/07 (ECtHR, 10 December 2009) [76]

public order in suspending the platform clearly outweighed UConnect's and its users' FoE.

III. MAGENTONIA'S PROSECUTION AND CONVICTION OF UCONNECT UNDER SECTIONS 3 AND 5 OF THE PIDPA DID NOT VIOLATE ARTICLE 19 OF THE ICCPR

49. The prosecution and conviction of UConnect under the PIDPA interfered with UConnect's FoE, however, it was a justified interference, as it passed the three-part cumulative test.[176]

A. THE PROSECUTION AND CONVICTION WAS PRESCRIBED BY LAW

50. As stated above,[177] in order for a prosecution to be prescribed by law, an act must be foreseeable. While acknowledging that law must be formulated with sufficient precision, foreseeability does not require absolute certainty.[178] Hence, even though Applicants may submit that PIDPA[179] establishes vague terms such as 'false propaganda', it does not mean that it would fail the foreseeability requirement *per se*. On the contrary, law must be able to keep pace with changing circumstances,[180]

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[176] Arguments 3.

[177] Arguments 35.

[178] *Hertel v Switzerland* App no 25181/94 (ECtHR, 25 August 1998) [35]; *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *Müller v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]

[179] Compromis 5.5

[180] *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02, 36448/02 (ECtHR, 22 October 2007) [41]; *Feldek v Slovakia* App no 29032/95 (ECtHR, 12 July 2001) [56]; *Centro Europa 7 S.R.L. and Di Stefano v Italy* App no 38433/09 (ECtHR, 7 June 2012) [141]

therefore many laws are inevitably couched in terms whose interpretation and application are questions of practice.[181] In addition, very similar terms are used in other acts all around the world.[182]

51. Moreover, taking into account that by carrying on a professional activity, it can be expected to take special care in assessing the risks such activity entails,[183] it was undisputedly foreseeable that UConnect could be held liable under Magentonian law for recklessly disseminating false propaganda after failing to remove the *prima facie* false and most viewed post on its platform.[184]

B. THE PROSECUTION AND CONVICTION PURSUED LEGITIMATE AIMS

52. As stated above,[185] the prosecution and conviction pursued the legitimate aims of the protection of public order and the rights and reputation of others, namely the rights of the immigrant community.

[181] *The Sunday Times v The United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]; *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02, 36448/02 (ECtHR, 22 October 2007) [41]

[182] Anti-Unfair Competition Law of the People's Republic of China (1993), art 9; The Computer and Cybercrimes Bill of Kenya (2017), art 12; Act Penalizing The Malicious Distribution Of False News And Other Related Violations of the Philippines (2017), sec 3

[183] *Cantoni v France* App no 17862/91 (ECtHR, 11 November 1996) [35]; *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02, 36448/02 (ECtHR, 22 October 2007) [41]; *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 June 2004) [43]-[45]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [122]

[184] Compromis 6.2.2

[185] Arguments 40.

C. THE PROSECUTION AND CONVICTION WAS NECESSARY

53. An interference is necessary in a democratic society if it a) corresponds to a pressing social need and b) is proportionate to the legitimate aim pursued.

a) The interference corresponded to a pressing social need

54. In making the assessment of the interference, the ECtHR identified the following five criteria as being relevant to determine intermediary liability.[186]

i) context of the content

55. UConnect is a professionally managed social media platform run on a commercial basis and has an economic interest in the posting of third-party content. It exercises a substantial degree of editorial control over all of the posts published on its portal because it has the technical means to remove content[187] at its discretion without notice and to terminate user's accounts.[188] Furthermore, according to the CJEU eBay plays an active role when it provides assistance which entails promoting offers for sale.[189] Therefore, by allowing 'promoted' content UConnect plays such a role as well.[190]

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[186] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) [85]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [142]-[143]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [69]; *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) [28]

[187] *Kaschke v Gray & Another* [2010] EWHC 690 (QB) [86]

[188] Compromis 5.3

[189] Case C-324/09 *L'Oréal SA v eBay* [2011] ECR I-6011 [123]

[190] Compromis 3.2.4

56. For these reasons, similarly to *Delfi AS v Estonia*, the fact that UConnect was not the author of the content does not mean that the company had no control over it, hence, it went beyond that of a passive, purely technical service provider.[191]

57. Furthermore, likewise in *Delfi AS v Estonia*, the establishment of the unlawful nature of the TBM posts did not require any linguistic or legal analysis since the remarks were on their face manifestly unlawful.[192] In other words, they are considered clearly unlawful posts for the following reasons.

58. Firstly, the TBM post on 26 May referred to Cyanisian refugees with vexatious and humiliating remarks and linking them with terrorist attacks.[193] According to the ECtHR, such speech is incompatible with the values proclaimed and guaranteed by the ECHR, notably tolerance, social peace, and non-discrimination.[194]

59. Secondly, the TBM post on 30 May claimed that Cyanisian refugees would outnumber Magentonians in the next few years.[195] Considering its outlandishness,[196] the establishment of its falsity and therefore its unlawfulness did not require any linguistic or legal analysis hence, it could *a priori* be viewed by UConnect as false propaganda.

60. Thus, the FoE of the author of the TBM posts is not at issue in the present case.[197]

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[191] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [144]-[146]

[192] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [117]

[193] Compromis 5.1

[194] *Norwood v The United Kingdom* App no 23131/03 (ECtHR, 16 November 2004)

[195] Compromis 5.4

[196] Compromis 1.2, 2.1

[197] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [140]

ii) liability of the author of the content

61. Respondent submits that the liability of the actual author could not serve as a sensible alternative to the liability of UConnect because after being notified that clearly unlawful content was displayed on its platform,[198] UConnect was considered a publisher,[199] nevertheless the company was not prepared to remove it as soon as it was brought to its attention, therefore it bore liability for the posts since it had failed to prevent the hatred.
62. Such liability is compatible with the existing case-law according to which shifting the risk of the defamed person obtaining redress to the media company, which was usually in a better financial situation than the defamer was not as such a disproportionate interference with the company's right to FoE.[200]

iii) measures taken by UConnect

63. Even though UConnect took certain general measures to remove illicit content,[201] nevertheless in the present case the company almost wholly neglected its duty to avoid causing harm to third-parties.
64. Concerning the TBM post on 26 May which is regarded as hate speech,[202] UConnect removed it only on 30 May despite the fact that users reported it on numerous

[198] Compromis 5.2

[199] *Byrne v Deane* [1937] 1 KB 818, at 830; *Godfrey v Demon Internet Ltd* [1999] EWHC QB 240 [50]; *Davison v Habeeb and Others* [2011] EWHC 3031 (QB) [47]; *Tamiz v Google* [2013] EWCA Civ 68 [27]; *Sadiq v Baycorp (NZ) Ltd* [2008] CIV 2007-404-6421 [48]

[200] *Krone Verlag GmbH & Co. KG v Austria* (No 4) App no 72331/01 (ECtHR, 26 March 2007) [32]

[201] Compromis 3.5

[202] Arguments 58.

occasions.[203] Respondent submits that the removal four days after the notice was submitted cannot be considered expeditious for the following reasons.

65. Firstly, in case of hate speech, the European Commission[204] and several countries[205] require removal within 24 hours. Secondly, in *Pihl v Sweden,*[206] where the infringing material was taken down the day after the request had been submitted, the ECtHR stated that "had the comment been more severe nature, the association could have been found responsible for not removing it sooner."[207] Additionally, such removal even breached UConnect CS which stipulates that complaints are processed within 72 hours.[208]

66. Regarding the clearly unlawful TBM post on 30 May,[209] even though UConnect was not notified about it, the CJEU highlighted that notice is not the only way of obtaining knowledge about unlawfulness, because it also mentioned the possibility of investigations undertaken on the intermediary's own initiative.[210] Such partial monitoring activity was performed by UConnect as well because on a separate occasion

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[203] Clarifications 26.

[204] European Commission, 'Code of conduct on countering illegal hate speech online' (May 2016) <https://ec.europa.eu/information_society/newsroom/image/document/2016-50/factsheet-code-conduct-8_40573.pdf> accessed 7 November 2018; European Commission, 'Countering illegal hate speech online – Commission initiative shows continued improvement, further platforms join' (19 January 2018) <http://europa.eu/rapid/press-release_IP-18-261_en.htm> accessed 7 November 2018

[205] Act to Improve Enforcement of the Law in Social Networks of Germany (2017) sec 3 (2) 2; Office of the High Commissioner For Human Rights, 'Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders' (26 July 2017); Mumo M, 'Social media sites to delete hate mongers' accounts in a day' (Daily Nation, 15 July 2017) <https://www.nation.co.ke/business/Social-media-sites-to-delete-hate-mongers-accounts-in-a-day/996-4016026-qo0k2n/index.html> accessed 7 November 2018; Javier P, 'Honduras: new bill threatens to curb online speech' (Access Now, 12 February 2018) <https://www.accessnow.org/honduras-new-bill-threatens-curb-online-speech/>accessed 7 November 2018; AP News, 'Venezuela assembly passes new law clamping down on media' (8 November 2017) <https://apnews.com/d0083a0ce86441358b702e8b53c4eb44> accessed 7 November 2018

[206] *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) [37]

[207] *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) [38]

[208] Compromis 3.5

[209] Arguments 59.

[210] Case C-324/09 L'Oréal SA v eBay [2011] ECR I-6011 [122]

it removed the TBM6000 post at its discretion.[211] Obtaining knowledge about the TBM post on 30 May would not have required general monitoring activity taking into account that it became the most viewed post on the platform.[212]

67. Additionally, taking into account the several thousand new users who began to share content posted by TBM, [213] there was a higher-than-average risk that posts could go beyond the boundaries of lawfulness[214] thus UConnect as a 'diligent economic operator'[215] should have exercised special caution.

68. Furthermore, although UConnect had an NTDS in place, which is considered by the ECtHR in many cases as an appropriate tool for balancing the rights and interests of all those involved,[216] the ECtHR also held that the rights and interests of others and of society as a whole may entitle states to impose liability on intermediaries if they fail to take measures to remove clearly unlawful content without delay, even without notice from third parties.[217]

[211] Compromis 5.3

[212] Compromis 5.4

[213] Compromis 5.4

[214] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [86]

[215] Case C-324/09 L'Oréal SA v eBay [2011] ECR I-6011 [122]

[216] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [159]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [91]

[217] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [159]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [91]; Angelopoulos C and Smet S, 'Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability' 8 Journal of Media Law 285

b) The interference was proportionate to the legitimate aim pursued

iv) the consequences of the domestic proceedings for UConnect

69. The ECtHR always considers the size of the intermediary when imposing liability.[218] In *Delfi AS v Estonia*, the news portal was held liable *inter alia* because it was a professionally managed company run on a commercial basis.[219] However, in *Pihl v Sweden*, the small and non-profit character of the association that run the blog at issue was a crucial aspect in excluding its liability.[220]

70. Hence, by holding the professionally managed UConnect liable for almost wholly neglecting its duty to avoid causing harm and ordering a fine of USD 100,000[221] –, which is remarkably lower in comparison to the maximum penalty given in Section 6 of the PIDPA[222] and only worth 0.04% of UConnect's advertising revenue[223] – can by no means be considered disproportionate.

71. Although Applicants may submit that the fine could cause a 'chilling effect', having regard to UConnect's USD 250 million advertising revenue in 2017,[224] it does not appear that the company has to change its business model.[225] Nevertheless, the result of

[218] Dirk Voorhoof, 'Pihl v Sweden: non-profit blog operator is not liable for defamatory users' comments in case of prompt removal upon notice' (Strasbourg Observers, 20 March 2017) <https://strasbourgobservers.com/2017/03/20/pihl-v-sweden-non-profit-blog-operator-is-not-liable-for-defamatory-users-comments-in-case-of-prompt-removal-upon-notice/> accessed 7 November 2018

[219] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [162]

[220] *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) [31]

[221] Compromis 6.3

[222] Clarifications 34.

[223] Compromis 3.6

[224] Compromis 3.6

[225] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [161]

the domestic proceedings would incite UConnect to act as a 'diligent economic operator'[226] and to fulfil its duties and responsibilities.[227]

[226] Case C-324/09 *L'Oréal SA v eBay* [2011] ECR I-6011 [122]

[227] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [115]

IX. PRAYER FOR RELIEF

In the light of arguments advanced and authorities cited, the Republic of Magentonia respectfully requests this Honourable Court to adjudge and declare the following:

1. Republic of Magentonia's decision not to grant Ras any rectification, erasure or blocking of search results depicting The Cyanisian Times story of 2001 did not violate his right to Privacy according to Article 17 of the ICCPR.
2. Republic of Magentonia's decision of 2 June 2018 to direct UConnect to suspend all operations until the conclusion of the trial did not violate its right to Freedom of Expression according to Article 19 of the ICCPR.
3. Republic of Magentonia's prosecution and conviction of UConnect under Sections 3 and 5 of the PIDPA did not violate its right to Freedom of Expression according to Article 19 of the ICCPR.

On behalf of Republic of Magentonia,

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Agents for the Respondent