

2017/2018 PRICE MEDIA LAW MOOT COURT COMPETITION

PEAPS & SCOOPS

APPLICANTS

V

TURTONIA

RESPONDENT

MEMORIAL FOR APPLICANTS

4973 words

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AComHPR	African Commission of Human and Peoples' Rights
ACtHPR	African Court of Human and Peoples' Rights
App no	Application Number
App nos	Application Numbers
art	Article
arts	Articles
CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EUR	Euro
HRC	Human Rights Committee
IA	Information Act of 2006
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-governmental organization
OAS	Organization of American States
ODPA	Online Dignity Protection Act of 2015
OSCE	Organization for Security and Cooperation in Europe
para	Paragraph
paras	Paragraphs

s	Section
ss	Sections
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States
USD	United States Dollars
v	Versus

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STATEMENT OF RELEVANT FACTS

Political situation in Turtonia

Turtonia is a small democratic country with ethnically homogeneous population. It is a member of the United Nations and has ratified the International Covenant on Civil and Political Rights. Turtonian highest source of law – the Basic Law for the Federal Republic of Turtonia – sets up the modern judiciary. The judge or judges preside over all aspects of the court proceedings and the Supreme Court has discretion to both hear and dismiss an appeal.

During the last three years, Turtonia faces a significant influx of immigrants from neighboring democratic country Aquaria. A particularly vocal group of nationalists, who are completely dissatisfied with current migration policy, called themselves Turton Power and began publicly denouncing the Turtonian Minister of Immigration, Wani Kola. Their actions included several protests with a call to resignation, harassment and abuse online, and an attempt to assault her in a public place.

Moreover, since 2015, a religious extremist group True Religion, widely regarded as terrorist organization, has intensified its activity in Aquaria. Its members have attacked mainstream religious institutions and schools, including murdering a dozen people on a university campus. Its leader, an Aquarian named Prinsov Parkta, avoids arrest and regularly appears on public videos calling to action.

Scoops and Its Presence in Turtonia

Scoops is the most popular social media platform, based in Turtonia. The user's profile consists of a screen name, topics of interests, and friends. Users can upload photos, videos and up to 200 words of text, which will be seen by 20 others, who have listed a matching topic of interest. The viewer of the post can share it with his friends or dismiss it. The author can also pay for showing his posts to more other users. Scoops has created a publicly-visible 'influencer score', which indicates the number of readers, who have seen the content. The

higher an ‘influencer score’ is, the less users have to pay for showing their posts to a larger audience. When users of Scoops sign up to the service they agree to Scoops’ Terms of Service that specify that they do not allow harmful and malicious content such as spam, non-consensual sharing of intimate images, hate speech or child exploitative imagery. The Scoops report form gives four options: ‘spam’, ‘threat of violence’, ‘child pornography’, and ‘a nude image of me shared without my consent’.

Post of Peaps

The post appeared on May 2 on the ‘XYZ News12’ account, which was created by the citizen of Turtonia, Niam Peaps. It contained an image showing Wani Kola's standing naked in a hotel room facing another person, whose right arm was on her left shoulder. The second individual appeared to be Prinsov Parkta. An image was accompanied by the text, describing the content of the photo. The post has reached more than 10,000 views on Scoops within the first hour of appearing.

Events after the Publication

XYZ Media – a popular TV news network, well-respected in Turtonia and neighboring countries – released a statement declaring that it had no role in the post and no connection to the XYZ News12 Scoops account. Wani Kola’s office has also released a statement calling the post ‘a horrific lie with no basis in fact’, and reported to Scoops through Scoops’ online reporting form about the violation of her rights. The staff selected ‘a nude image of me shared without my consent’ as the reason to request removal of the post. However, they did not complete the form, requested by Scoops to certify the identity of the depicted person. On May 3 Wani Kola’s legal counsel submitted a letter to Scoops, threatening a civil action for defamation and violation of privacy. Scoops removed the post and all shares of the post 50 hours after the submission of the complaint.

The TurtonTimes, a print and online newspaper that is affiliated to the political party that opposes Kola’s party, also ran an opinion piece mentioning that the post coincided with

growing dissatisfaction with Kola, and that it was time for her to resign. The opinion piece cited the rising fear of Turtonians that Aquarian immigrants were stealing jobs and that True Religion might begin to take root in Turtonia.

On May 4 and May 5, protesters gathered outside Wani Kola's office calling for her resignation, as they have done several times before the post appeared. Most of the signs, held by protesters, were unrelated to the post. On the evening of May 5, two Aquarian immigrants were beaten to death by an aggressively minded mob of at least 10 people. Wani Kola resigned from office on May 10 without public statement.

Adoption of the Online Dignity Protection Act of 2015

The Online Dignity Protection Act of 2015 was enacted by the Turtonian government in response to a growing problem of Non Consensual Sharing of Intimate Images. This Act prohibits the distribution of an image of another person whose intimate parts are exposed, which includes photographs, films, videotapes or other reproduction. The conduct of an individual, organization or other publisher would constitute an offence in case the actor knows or consciously disregards a risk of refusal of the depicted person to disseminate private information. The Online Dignity Protection Act does not apply to images involving voluntary exposure in public or commercial settings, and disclosures made in the public interest. A violation of this Act shall be punishable by a term of imprisonment not to exceed 5 years, a fine of up to 3 million units of Turtonian currency, or both.

Adoption of the Information Act of 2006

The Information Act of 2006 was passed after the distribution of fake documents, which purported to be real, ahead of the 2005 Turtonian General Elections. The government enacted this law in order to preserve the integrity of democracy and safeguard the peace.

This Act in Section 1.a implies the prohibition of communication to any person, by any means with information that the publisher knows to be false, in case it exposes another person to public hatred, contempt or ridicule, deprives such person of the benefits of public

confidence and social acceptance, injures the reputation of any person, corporation or association in their business or occupation. Under its Section 1.b, it is also prohibited to knowingly or recklessly communicate false information with the intent to incite civil unrest, hatred, or damage the national unity. An online service provider is immune from liability for transmitting, caching or storing material in case it does not receive a financial benefit from the infringing activity, does not know the material or activity is infringing, expeditiously removes or disables access to such material, provides users with information about terminating repeat infringer`s subscriptions and accounts. A violation of Section 1.a of this act shall be punishable by a fine of up to 2 million units of Turtonian currency. A violation of Section 1.b of this act shall be punishable by a term of imprisonment not to exceed one year and a fine of up to 3 million units of Turtonian currency, or both.

Proceedings before Turtonian courts

The trial court has found that the image of Wani Kola had been created by a member of Turton Power, who had taken a nude image from a free pornography site, photoshopped Wani Kola's head on to the body, and then photoshopped in an image of Parkta from a video of him speaking to True Religion followers. This image appeared on the Turton Power website in mid-April, but was removed on May 3.

Niam Peaps was identified through a Turtonian criminal search, which asked for the subscriber information of the person who created and owned the 'XYZ News 12' Scoops account. The court has stated that by publishing the image on Scoops, Niam Peaps, who was not entitled to protection under section 3.b of the ODPa, distributed an image of Wani Kola appearing to show her intimate parts, knowing or consciously disregarding a substantial and unjustified risk that she had not consented to the disclosure. Thereafter, Turtonia charged and convicted Niam Peaps under the ODPa, sentencing him to two years' imprisonment for distributing an image of Wani Kola. The court sentenced Niam Peaps to a fine equivalent of

100,000 USD for inciting violence, or being reckless as to whether violence was incited, through false information in violation of the IA.

According to the additional findings of the trial court, after receiving the report from Minister`s staff and submitting a defamation claim by her legal counsel, Scoops knew or consciously disregarded a substantial and unjustified risk that Wani Kola had not consented to the disclosure, and failed to remove the post within a reasonable time. The court sentenced Scoops to a fine equivalent to 200,000 USD for distributing an image of Kola in violation of the ODPa, and to a fine equivalent of 100,000 USD for knowingly communicating false information in violation of the IA.

The Supreme Court of Turtonia, which has discretionary review, declined to consider Niam Peaps` and Scoops` appeals. Both of them now have applied to the Universal Freedom of Expression Court, asserting that Turtonia has failed to comply with its human rights obligations. The Court has certified their appeals on four discrete issues:

Issue 1A: Whether Turtonia`s prosecution of Peaps under the ODPa violates Article 19 of the ICCPR.

Issue 1B: Whether Turtonia`s prosecution of Scoops under the ODPa violates this same international principle.

Issue 2A: Whether Turtonia`s prosecution of Peaps under the IA violates Article 19 of the ICCPR

Issue 2B: Whether Turtonia`s prosecution of Scoops under the IA violates this same international principle.

STATEMENT OF JURISDICTION

The Universal Court of Human Rights has jurisdiction to hear cases arising under the International Covenant on Civil and Political Rights ('ICCPR').¹ Since Turtonia has ratified the ICCPR,² the citizens of Turtonia enjoy the rights guaranteed by it. The parties, Peaps and Scoops (Applicants) and Turtonia (Respondent), have submitted their differences to the Universal Freedom of Expression Court,³ special chamber of the Universal Court of Human Rights.⁴ The issues arising from the differences relate to the right of freedom of expression under Article 19 of the ICCPR.⁵ Since the Supreme Court of Turtonia declined to consider Peaps' and Scoops' appeals, the Applicants have exhausted all the domestic remedies within the Turtonian legal system.⁶ Accordingly, the Universal Freedom of Expression Court has the authority to act as the final adjudicator.

Peaps and Scoops request this Honorable Court to adjudge the dispute in accordance with the relevant rules and principles of international law.

¹ Price Media Law Moot Court Competition Rules, 2017-2018, para 5.4.a

² Competition case, para 1.1

³ Competition case, para 14.3

⁴ Price Media Law Moot Court Competition Rules, 2017-2018, paras 5.4.b-5.4.c

⁵ Competition case, para 14.3

⁶ Competition case, para 14.2

QUESTIONS PRESENTED

- I. Whether Turtonia's prosecution of Peaps under the ODPa for distribution of Kola's nude image violated Article 19 of the ICCPR?
- II. Whether Turtonia's prosecution of Scoops under the ODPa for distribution of Kola's nude image violated Article 19 of the ICCPR?
- III. Whether Turtonia's prosecution of Peaps under the IA for inciting violence through false information violated Article 19 of the ICCPR?
- IV. Whether Turtonia's prosecution of Scoops under the IA for knowingly communicating false information violated Article 19 of the ICCPR?

SUMMARY OF ARGUMENTS

I. Prosecution of Peaps under the ODPa violated Article 19 of the ICCPR. While the existence of a legitimate aim of safeguarding rights and reputation of Kola is not contested, the prosecution breached other requirements, namely ‘provided by law’ and necessity in a democratic society.

Firstly, the prosecution was not provided by law as Peaps’ conduct was covered by the public interest exception of the ODPa. The photo raised an actual issue of possible obtaining visas by terrorists due to current migration policy, which constitutes a matter of political debate. The ODPa also lacked safeguards as to the protection of Peaps’ rights.

Secondly, Turtonia failed to strike a proper balance between Peaps’ freedom of expression and Kola’s interest in preserving her reputation. Kola, as a public figure, is subject to lesser expectation of privacy, whilst her private life is liable to public interference in circumstances, related to her authority. Her image of a satirical nature was purposely used to pay attention to a disturbing issue for public discussion. Furthermore, Peaps was neither involved in the process of its creation nor distorted the content, using an original format.

Finally, two years imprisonment was a too severe sanction for publishing the photo not belonging to hate speech or incitement to violence, while the fine was an available alternative.

II. Prosecution of Scoops under the ODPa was contrary to Article 19 of the ICCPR. Indeed, the prosecution pursued a legitimate aim of protection of Kola’s rights and reputation. Nevertheless, the ODPa did not provide for prosecution of Scoops, while the prosecution itself was unnecessary in a democratic society.

Firstly, the prosecution was not provided by law as the ODPa failed to meet the standard of foreseeability. While ODPa provides for the prosecution of a publisher, Scoops, a passive internet intermediary, could not have foreseen that it might be subject to publisher

liability. Additionally, the ODPa is devoid of legal safeguards and, thus, fails to be considered as 'law'.

Secondly, the prosecution was unnecessary in a democratic society. Doubtfully unlawful content of the publication, criminal punishment of actual author in the face of Peaps and absence of significantly adverse effects of the publication on the reputation of Kola evidence the redundant character of Scoops' prosecution.

Lastly, Scoops was overburdened with excessive fine comparing to modern practice of punishment for revenge porn offence.

III. Prosecution of Peaps under the IA breached Article 19 of the ICCPR. Notwithstanding that the interference pursued a legitimate aim of public order protection, the prosecution was both not provided by law, and unnecessary in a democratic society.

Firstly, prosecution was not provided by law as the IA, prohibiting knowingly communication of false information, is vague. Determination of such wording as overly broad correlates with the practice across jurisdictions.

Secondly, a 'pressing social need' did not exist at the time of Peaps' prosecution. Peaps is a private individual with no standing or influence. His dissemination of probable false statements fell within the ambit of the freedom of expression, as it contributed to the public interest, even though it contained some degree of provocation. Moreover, Turtonia cannot place the responsibility on Peaps for the events of May 5, as there was no causality between them and the post. The background of the case cannot be considered as tense to justify the necessity of prosecution. Further, Turtonian court failed to provide 'relevant and sufficient' reasoning for the sentence.

Finally, the fine of 100,000 USD imposed on Peaps was unjustifiably excessive, and, thus, disproportionate to the legitimate aim pursued.

IV. Prosecution of Scoops under the IA violated Article 19 of the ICCPR. Although Turtonia may have pursued a legitimate aim of Kola's rights and reputation protection, the interference was neither provided by law nor necessary in a democratic society.

Firstly, prosecution was not provided by law as the IA failed to meet the standard of foreseeability. In particular, it is unclear what the term 'expeditiously' exactly means. Further, the IA overburdened Scoops with the complex legal decision, while being devoid of any safeguards against abuse by public authorities, including the right to appeal.

Secondly, there was no pressing social need to prosecute Scoops as it acted in good faith while removing Peaps' post. Since the content of the post was neither illegal beyond reasonable doubt nor manifestly illegal and, moreover, complied with the content restriction policies of Scoops, it had to clarify the position before taking the post down. Given that the IA failed to define the term 'expeditiously', Scoops was given flexibility in its application while deciding on the post's removal.

Finally, the fine of 100,000 USD was disproportionate comparing to the sentencing practices of other states and damaging for Scoops' future contribution to public debate, thus breaching Article 19 of the ICCPR.

ARGUMENTS

I. TURTONIA'S PROSECUTION OF PEAPS UNDER THE ODPA VIOLATES ARTICLE 19 OF THE ICCPR

Freedom of expression is protected under international law.⁷ Being of paramount importance in a democratic society⁸ and one of its cornerstones,⁹ it can only be limited in case the restriction is provided by law, pursues a legitimate aim, and is necessary in a democratic society.¹⁰ In the present case, Applicants do not contest the existence of a legitimate aim of protection of rights and reputation of Kola. However, the other requirements were not satisfied.

A. Peaps' prosecution was not provided by law

'*Provided by law*' criterion demands: (a) accuracy and predictability¹¹ of a particular legal act and (b) existence of adequate safeguards in the domestic law.¹² Under Applicants' view, Turtonian prosecution of Peaps breached both requirements.

⁷ Universal Declaration of Human Rights ('UDHR') (adopted 10 December 1948) UNGA Res 217A (III) art 19; European Court of Human Rights ('ECHR') (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 1932 art 10 (1); American Convention on Human Rights ('ACHR') (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 13 (1); International Covenant on Civil and Political Rights ('ICCPR') (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19 (1); African Charter on Human and Peoples' Rights ('ACHPR') (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 9

⁸ *Tae-Hoon Park v Republic of Korea* Communication no 628/199520 UN Doc CCPR/C/64/D/628/1995 (1998), para 10.3

⁹ General comment no 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 2; *Benhadj v Algeria* Communication no 1173/2003 UN Doc CCPR/C/90/D/1173/2003 (2007), para 8.10; *Marques de Morais v Angola* Communication no 1128/2002, UN Doc CCPR/C/83/D/1128/2002, para 5.4

¹⁰ Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UNHRC, 17th Sess, Agenda item 3, UN Doc A/HRC/17/27 (16 May 2011), para 24; General comment no 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 35; *The Sunday Times v The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), para 45; *Interights and Others v Mauritania* Communication no 242/01 (ACoMHPR, 4 June 2004), paras 78-79; *Claude-Reyes and Others v Chile* (IACtHR, 19 September 2006), para 75; *Velichkin v Belarus* Communication no 1022/2001 UN Doc CCPR/C/85/D/1022/2001 (2005), para 7.3; *Francisco Martorell v Chile* (IACtHR, 3 May 1996), para 55

¹¹ *Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988), para 29; *Rekvényi v Hungary* App no 25390/94 (ECtHR, 20 May 1999), para 34; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993), para 40; *Reg v Cotter* EWCA Crim 1033 (2002), paras 35-36

a. *'Public interest' exception was unforeseeable*

For the restriction to be provided by law, a legal act must be sufficiently precise¹³ as to the rule's exemptions, limitations, and penalties,¹⁴ in order to enable a person to regulate one's conduct accordingly.¹⁵ Restrictions of a criminal nature must be formulated '*in an express, accurate, and restrictive manner*',¹⁶ narrowly defining wrongful offences.¹⁷

In the present case, the ODPa does not apply to disclosures made in the public interest.¹⁸ This interest cannot be reduced to the public's thirst for information about the private life of others, or to the reader's wish for sensationalism or voyeurism.¹⁹ It involves matters of political discussion,²⁰ including dissatisfaction with the migration policy.²¹ Moreover, the dissemination of personal or intimate images can be considered as a

¹² *Huwig v France* App no 11105/84 (ECtHR, 24 April 1990), paras 14, 33; *Liu v Russia (no 2)* App no 29157/09 (ECtHR, 26 July 2011), paras 86-88

¹³ *The Sunday Times v The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), para 49; *Wingrove v The United Kingdom* App no 17419/90 (ECtHR, 25 November 1996), paras 40-44; *Vogt v Germany* App no 17851/91 (ECtHR, 26 September 1995), para 48

¹⁴ General comment no 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 25

¹⁵ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 121; *Hashman and Harrup v The United Kingdom* App no 25594/94 (ECtHR, 25 November 1999), para 31; *The Sunday Times v The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), para 49; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993), para 40

¹⁶ *Kimel v Argentina* (IACtHR, 3 May 2008), para 63

¹⁷ *Norin Catrimán et al v Chile* (IACtHR, 29 May 2014), para 156

¹⁸ Competition case, para 10.2.3.b

¹⁹ *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015), paras 100-101; *PJS v News Group Newspapers Ltd* EWCA Civ 393 (2016), para 23

²⁰ *Egeland and Hanseid v Norway* App no 34438/04 (ECtHR, 16 April 2009), para 58; *White v Sweden* App no 42435/02 (ECtHR, 19 September 2006), para 29

²¹ *Genner v Austria* App no 55495/08 (ECtHR, 6 June 2016), paras 18, 42; *Le Pen v France* App no 18788/09 (ECtHR, 20 April 2010); *Soulas and Others v France* App no 15948/03 (ECtHR, 10 July 2008), paras 37-38; Chief Justice Robert French, *The Role of the Courts in Migration Law* (2011) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj25mar11.pdf>> accessed 15 November 2017

contribution to the debate of public interest,²² when a real need for public to discover such facts against the backdrop of events in the country exists.²³ Applicants are convinced that Peaps' conduct was covered by such exception.

Firstly, the photo raised an actual issue of possible obtaining visas by terrorists due to current migration policy, discussed in Turtonia long before the post appeared.²⁴ Secondly, the content of an image related to Kola's official functions.²⁵ Finally, an image depicts a leader of True Religion Prinsov Parkta, who has been hiding for a long time.²⁶ Therefore his appearance on the photo near the Turtonian Minister is of paramount interest for international community, which views Parkta's organization as a terrorist one.

Accordingly, public interest exception contained in the ODPa applies to Peaps' case.

b. Turtonia failed to provide adequate safeguards

As was established in *Hadjianastassiou v Greece*, effective remedy under domestic law includes the possibility of supervision by, *inter alia*, courts of appeal.²⁷ Additionally, a law must indicate the scope of the discretion conferred upon public authorities.²⁸

Applicants submit that in the present case such a safeguard did not exist. In Turtonia, appeals from trial courts are made directly to the three-judged Supreme Court, which has

²² *Saaristo and Others v Finland* App no 184/06 (ECtHR, 12 October 2010), paras 66-67; *Reinboth and Others v Finland* App no 30865/08 (ECtHR, 25 January 2011), para 86; *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015), para 59; *Verlagsgruppe News GMBH and Bobi v Austria* App no 59631/09 (ECtHR, 4 December 2012), para 75

²³ *MGN Limited v The United Kingdom* App no 39401/04 (ECtHR, 18 January 2011), para 147; *Ruusunen v Finland* App no 73579/10 (ECtHR, 14 January 2014), para 49

²⁴ Competition case, para 4.1

²⁵ Competition case, para 8.1

²⁶ Competition case, para 3.2

²⁷ *Hadjianastassiou v Greece* App no 12945/87 (ECtHR, 16 December 1992), para 33

²⁸ *Herczegfalvy v Austria* App no 10533/83 (ECtHR, 24 September 1992), para 89; *Silver and Others v The United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75 (ECtHR, 24 October 1983), para 88; *Malone v The United Kingdom* App no 8691/79 (ECtHR, 2 August 1984), paras 67-68

discretion whether or not to hear an appeal.²⁹ As a direct result, the Turtonian judiciary, having unlimited scope of discretion in providing the right to appeal, denied the protection of Applicants' fundamental rights.

Thus, Peaps' prosecution under the ODPa was not provided by law.

B. The prosecution of Peaps was unnecessary in a democratic society

The necessity³⁰ of restrictions demands the existence of pressing social need and proportionality to the legitimate aim.³¹ In *Axel Springer AG v Germany*, ECtHR set out six criteria for balancing exercise between freedom of expression and right to privacy.³² Applicants argue that all these requirements, taken cumulatively, evidence the lack of necessity of the restriction.

a. The contribution to a debate of general interest

As was argued above,³³ the aim of Peaps' publication was to draw public attention to the actual political issue of migration policy,³⁴ thus constituting a matter of general interest.³⁵

b. The notoriety of the person concerned and the subject matter of the publication

Since *Lingens v Austria*, it is clear that public figures, particularly politicians, have lesser expectation of privacy and should tolerate a greater degree of criticism.³⁶ Certain facts

²⁹ Competition case, para 2.2

³⁰ *The Sunday Times v The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), paras 58-59

³¹ *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 September 2004), para 64

³² *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012), para 89

³³ see Section I.A.a of the Memorial

³⁴ Competition case, para 4.1

³⁵ *Von Hannover v Germany (no 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), para 109; *Leempoel & SA ED Ciné Revue v Belgium* App no 64772/01 (ECtHR, 9 November 2006), para 68; *Standard Verlags GmbH v Austria* App no 21277/05 (ECtHR, 4 June 2009), para 46; *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007), para 131

³⁶ *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986), para 21

of their private lives, relating to the exercise of the official functions,³⁷ may indeed be of interest to citizens.³⁸

Applicants claim that Wani Kola is a well-known political figure, who was the Minister of Immigration.³⁹ Consequently, her private life can be subject to public interference in certain special circumstances,⁴⁰ related to her authority. Furthermore, the published material, contrary to the one in *Standard Verlags GmbH v Austria* depicting the Federal President and Ms Klestil-Löffler's intimate relationships as a reason for her divorce,⁴¹ did not relate exclusively to details of the person's private life⁴² and had the sole aim of raising a sharp issue towards possible migration of terrorists to Turtonia.⁴³

c. The prior conduct of the person concerned

The appearance of information in earlier publications⁴⁴ must be taken into consideration during the assessment of this criterion. ECtHR stated there is no need to prevent the disclosure of information already known to a large number of people.⁴⁵ In the present

³⁷ *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015), para 118; *Ojala and Etukeno Oy v Finland* App no 69939/10 (ECtHR, 14 January 2014), para 52

³⁸ *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012), para 91

³⁹ Competition case, para 4.1

⁴⁰ *Alkaya v Turkey* App no 42811/06, (ECtHR, 9 October 2012), para 35; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012), para 91; *Von Hannover v Germany (no 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), para 110; *Standard Verlags GmbH v Austria* App no 21277/05 (ECtHR, 4 June 2009), para 48; *Karhuvaara and Iltalehti v Finland* App no 53678/00 (ECtHR, 16 November 2004), para 45

⁴¹ *Standard Verlags GmbH v Austria* App no 21277/05 (ECtHR, 4 June 2009), paras 40, 52

⁴² *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012), para 91; *Standard Verlags GmbH v Austria* App no 21277/05 (ECtHR, 4 June 2009), para 53; *MGN Limited v The United Kingdom* App no 39401/04 (ECtHR, 18 January 2011), para 143

⁴³ Competition case, paras 8.2-8.3

⁴⁴ *Von Hannover v Germany (no 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), para 111; *Axel Springer SE and RTL Television GMBH v Germany* App no 51405/12 (ECtHR, 21 September 2017), para 48; *Ziemiński v Poland (no 2)* App no 1799/07 (ECtHR, 5 July 2016), para 44

⁴⁵ *Reinboth and Others v Finland* App no 30865/08 (ECtHR, 25 January 2011), para 87; *Fressoz and Roire v France* App no 29183/95 (ECtHR, 21 January 1999), para 53

circumstances, the distribution of Kola's image on Turton Power website⁴⁶ is important,⁴⁷ as Peaps merely highlighted an already discussed issue.

d. Method of obtaining the information and its veracity

Additionally, punishing someone for the dissemination of information authored by another person would seriously hamper the contribution to discussion on matters of public interest.⁴⁸ In our case, Peaps found a publicly available image through a quick online search on the Turton Power website in a post of PowerPlayer.⁴⁹ Importantly, Peaps was neither involved in the process of its creation⁵⁰ nor distorted the content of an image, using it in the original format.

e. Content, form and consequences of the publication

As to the content of the post, it was designed to illustrate extreme dissatisfaction with the possibility of obtaining visas by terrorists,⁵¹ which is also recognized as a political speech.⁵²

International law also protects not only the substance of information, but also the form in which it is conveyed.⁵³ Here, an appropriate image with a satirical nature⁵⁴ was purposely used to pay attention to a disturbing issue for public discussion.⁵⁵

⁴⁶ Competition case, para 12.3.2

⁴⁷ *Sapan v Turkey* App no 36075/03 (ECtHR, 3 May 2007), para 34; *Hachette Filipacchi Associés (ICI PARIS) v France* App no 12268/03 (ECtHR, 23 July 2009), paras 52-53; *Von Hannover v Germany (no 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), para 111; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012), para 92

⁴⁸ *Print Zeitungsverlag GmbH v Austria* App no 26547/07 (ECtHR, 10 October 2013), para 39; *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994), para 35; *Kuliś v Poland* App no 15601/02 (ECtHR, 18 March 2008), para 38; *Thoma v Luxemburg* App no 38432/97 (ECtHR, 29 March 2001), para 62; *Verlagsgruppe News GmbH v Austria* App no 76918/01 (ECtHR, 14 December 2006), para 31; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 135

⁴⁹ Competition case, paras 12.1.2, 12.3.2

⁵⁰ Competition case, paras 12.3.2, 12.3.4

⁵¹ Competition case, para 4.1

⁵² *Soulas and Others v France* App no 15948/03 (ECtHR, 10 July 2008), paras 37-38; David Card, Christian Dustmann and Ian Preston, *Understanding attitudes to immigration: The migration and minority module of the first European Social Survey* (2005) <<http://davidcard.berkeley.edu/papers/euroimmig.pdf>> accessed 17 November 2017

Finally, Kola resigned more than a week after the post,⁵⁶ which was caused by a mass demonstration.⁵⁷ Therefore, direct causal link between these two events is lacking.

f. Severity of the sanction imposed

As to the severity of the sanctions, criminal penalty should be considered as last resort measure,⁵⁸ when other alternative sanctions cannot be applied.⁵⁹ What is more, custodial sentences can only be counteracted for the most serious violations,⁶⁰ such as incitement to violence or hate speech.⁶¹ In *Adonis v The Philippines*, the criminal sanction of imprisonment for defaming the congressman in relation to his purported illicit relationship was admitted unreasonable.⁶²

Applicants submit that sanction of two years imprisonment is too severe. Firstly, Peaps' expression did not belong to incitement to violence or hate speech. Secondly, similar to *Adonis*, Peaps' post, illustrating the affair with Parkta in context of migration policy, did not

⁵³ *News Verlags GmbH & Co KG v Austria* App no 31457/96 (ECtHR, 11 January 2000), para 39; *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994), para 31; *Oberschlick v Austria* App no 11662/85 (ECtHR, 23 May 1991), para 57

⁵⁴ *Ziemiński v Poland (no 2)* App no 1799/07 (ECtHR, 5 July 2016), para 44; *Smolorz v Poland* App no 17446/07 (ECtHR, 16 October 2012), para 41; *Sokolowski v Poland* App no 75955/01 (ECtHR, 29 March 2005), para 46

⁵⁵ Competition case, para 12.2

⁵⁶ Competition case, para 9.6

⁵⁷ Competition case, para 9.4

⁵⁸ Venice Commission, *Report on the Relationship Between Freedom of Expression and Freedom of Religion* (2008) <[http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)026-e.pdf](http://www.venice.coe.int/docs/2008/CDL-AD(2008)026-e.pdf)> accessed 17 November 2016

⁵⁹ *Lehideux and Isorni* App no 24662/94 (ECtHR, 23 September 1998), para 57; *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994), para 35

⁶⁰ *Cumpănă and Mazăre v Romania* App no 33348/96 (ECtHR, 17 December 2004), paras 115-119; *Sürek and Özdemir v Turkey* App nos 23927/94 and 24277/94 (ECtHR, 8 July 1999), para 63; *Fatullayev v Azerbaijan* App no 40984/07 (ECtHR, 22 April 2010), para 103; *Feridun Yazar v Turkey* App no 42713/98 (ECtHR, 23 September 2004), para 27

⁶¹ *Lohé Issa Konaté v Burkina Faso* App no 004/2013 (ACtHPR, 5 December 2014), para 165

⁶² *Adonis v The Philippines* Communication no 1815/2008 UN Doc CCPR/C/103/D/1815/2008 (2012), para 7.7

merit the use of imprisonment. Thirdly, the fine⁶³ was an available alternative penalty.⁶⁴ Additionally, Applicants draw the Court's attention to the sentencing practice of other states, including Scotland,⁶⁵ England,⁶⁶ Canada,⁶⁷ New Zealand⁶⁸ and the US states,⁶⁹ which does not exceed 6 months imprisonment.

Taking into account all the aforementioned criteria, Applicants submit that the domestic courts failed to establish a proper balance between the conflicting rights. Accordingly, Peaps' prosecution under the ODPa was inconsistent with Article 19 of the ICCPR.

II. TURTONIA'S PROSECUTION OF SCOOPS UNDER THE ODPa VIOLATED ARTICLE 19 OF THE ICCPR

Applicants submit that Article 19 of the ICCPR was violated by Scoops' prosecution since (A) Scoops was not a publisher under the ODPa and its prosecution was not provided by it and (B) the prosecution was unnecessary in a democratic society.

⁶³ Competition case, para 10.2.3.c

⁶⁴ *Adonis v The Philippines* Communication no 1815/2008 UN Doc CCPR/C/103/D/1815/2008 (2012), para 7.7

⁶⁵ 'First conviction under new 'revenge porn' law in Scotland' (*BBC*, 4 September 2017) <<http://www.bbc.com/news/uk-scotland-south-scotland-41148077>> accessed 15 November 2017

⁶⁶ 'First imprisonment for revenge porn' (*Brett Wilson*, 17 November 2014) <<http://www.brettwilson.co.uk/blog/first-imprisonment-for-revenge-porn/>> accessed 15 November 2017; Government Equalities Office, Caroline Dinenage MP and The Rt Hon Nicky Morgan, 'Hundreds of victims of revenge porn seek support from helpline' (23 August 2015) <<https://www.gov.uk/government/news/hundreds-of-victims-of-revenge-porn-seek-support-from-helpline>> accessed 15 November 2017

⁶⁷ Tamara Khandaker, 'Canada's First Revenge Porn Convict Gets 90 Days in Jail' (*Vice*, 24 March 2016) <<https://news.vice.com/article/canadas-first-revenge-porn-convict-gets-90-days-in-jail>> accessed 15 November 2017

⁶⁸ 'Naked photo sends jilted lover to jail' (*Stuff*, 13 November 2010) <<http://www.stuff.co.nz/national/crime/4341191/Naked-photo-sends-jilted-lover-to-jail>> accessed 15 November 2017

⁶⁹ Maureen O'Connor, 'The Crusading Sisterhood of Revenge-Porn Victims' (*The Cut*, 29 August 2013) <<https://www.thecut.com/2013/08/crusading-sisterhood-of-revenge-porn-victims.html>> accessed 15 November 2017

A. Scoops' prosecution was not provided by law

a. The ODPa did not cover the activities of Scoops

Restrictions on freedom of expression must be provided by law, which shall be precise enough for persons to regulate their behavior and to foresee, to a reasonable degree, its consequences.⁷⁰ The ODPa provides for the prosecution of a publisher.⁷¹ This implies that the law is targeted at publishers, who '*knowingly distribute*'⁷² non-consensually shared intimate images. Applicants claim that it was unforeseeable for Scoops that its activities fall under the ODPa, since Scoops is not a publisher of the user-generated posts.

Online service provider, which does not contribute to the content of the publication, shall never be treated as publisher of that content.⁷³ CoE,⁷⁴ EU,⁷⁵ international NGOs,⁷⁶ UN and OSCE⁷⁷ have all indicated that intermediaries should not be held responsible for third-party content unless they failed to expeditiously take it down once they became aware of its

⁷⁰ *The Sunday Times v The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), para 49

⁷¹ Competition case, para 10.2.1

⁷² *ibid*

⁷³ US Communications Decency Act 1996, s 230

⁷⁴ Declaration on freedom of communication on the Internet, adopted by the Council of Europe Committee of Ministers (28 May 2003), prin 6

⁷⁵ 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 (Directive on electronic commerce or the e-Commerce Directive) [2000] OJ L178/1, art 14

⁷⁶ A Global Civil Society Initiative, *Manila Principles on Intermediary Liability*, prin I <<https://www.manilaprinciples.org/principles>> accessed 13 October 2017

⁷⁷ UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression & ACHPR Special Rapporteur on Freedom of Expression and Access to Information, International Mechanisms for Promoting Freedom of Expression, *Joint Declaration on Freedom of Expression and the Internet* (1 June 2011) prin 2 (a) <<http://www.osce.org/fom/78309?download=true>> accessed 17 November 2017

illegality.⁷⁸ Thus, an intermediary of ‘*a mere technical, automatic and passive nature*’ shall not be subject to any liability.⁷⁹

In *L’Oreal SA v eBay*, CJEU held that if platform stores information on its server, sets the terms of the services, obtains remuneration for them and provides general information to its users, it will be covered by the immunity.⁸⁰ It also gave an example of intermediary’s active involvement in the creation of content, which was ‘*optimising the presentation of the offers for sale or promoting those offers*’.⁸¹ As case-law indicates, social networking platforms like Facebook,⁸² My Space⁸³ or Netlog,⁸⁴ which are the means for dissemination of information through user-created profiles and can remove any posts incompatible with their terms and policy,⁸⁵ enjoy ‘*safe harbor*’ protection.

In the case at hand, Scoops is the most popular social media platform, similar to the platforms mentioned above.⁸⁶ Unlike in *Delfi AS v Estonia*, where the applicant was a large, professionally managed profit-oriented news portal, which published its news articles and invited readers to comment on them,⁸⁷ Scoops does not offer any content.⁸⁸ The users themselves tag two topics of interest, so that 20 other people with similar preferences,

⁷⁸ *Tamiz v The United Kingdom* App no 3877/14 (ECtHR, 19 September 2017), para 84

⁷⁹ Joined Cases C-236/08 to 238/08 *Google France SARL and Google Inc v Louis Vuitton Malletier SA and Others* [2010] OJ C134/2, paras 114, 120; C-291/13 *Sotiris Papasavvas v O Fileleftheros Dimosia Etaireia Ltd and Others* [2014] OJ C409/14, para 41

⁸⁰ C-324/09 *L’Oréal SA and Others v eBay International AG and Others* [2010] OJ C269/3, para 115

⁸¹ *ibid* para 116

⁸² *CG v Facebook Ireland Ltd and McCloskey* [2015] NIQB 11; *Finkel v Facebook, Inc* No 102578/09 (2009); *Gaston v Facebook, Inc* No 3:12-cv-0063 (2012); *Klayman v Mark Zuckerberg and Facebook, Inc* 753 F.3d 1354 (2014); *Tetreau v Facebook, Inc* No 10-4558-CZ (2011)

⁸³ *Doe v MySpace, Inc* 528 F.3d 413, 415 (5th Cir 2008)

⁸⁴ C-360/10 *SABAM v Netlog NV* [2012] OJ C98/6, para 27

⁸⁵ *CG v Facebook Ireland Ltd and McCloskey* [2015] NIQB 11

⁸⁶ Competition case, para 5.1

⁸⁷ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 115

⁸⁸ Competition case, para 5.1

selected by an algorithm, see the post.⁸⁹ Additionally, users make their own decisions whether to dismiss or forward the post to 20 more people.⁹⁰

Thus, Scoops was reasonably expecting that that it will not be subject to strict publisher's liability.

b. Scoops was devoid of legal safeguards

Moreover, as argued above,⁹¹ the ODPa does not provide for safeguards against the discretion of Turtonian judiciary.⁹² Consequently, the ODPa does not meet the requirements of 'law'.

B. The prosecution of Scoops was unnecessary in a democratic society

Although Turtonia may have pursued the legitimate aim of respect of the rights and reputation of Kola, the prosecution was unnecessary, given the assessment of the criteria, established in *Delfi* and elaborated in *MTE and Index.hu v Hungary*.⁹³ Similarly to Scoops, web-sites in these cases hosted third-party content, unmodified by them.

a. The content and context of the publication

ECtHR has consistently stressed that intermediaries are unique platforms hosting user-generated expressive activities and facilitating freedom of expression.⁹⁴ In *Delfi* the importance of the nature of an intermediary in establishing its liability was highlighted.⁹⁵ *Delfi* exercised substantial degree of control over the comments published on the portal, by

⁸⁹ *ibid*

⁹⁰ Competition case, para 5.2

⁹¹ see Section I.A.b of the Memorial

⁹² Competition case, para 2.2

⁹³ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 144; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016), para 73

⁹⁴ *Times Newspapers Ltd v The United Kingdom (nos 1 and 2)* App nos 3002/03 and 23676/03 (ECtHR, 10 March 2009), para 27; *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012), paras 48-49; *Cengiz and Others v Turkey* App nos 48226/10 and 14027/11 (ECtHR, 1 December 2015), para 52

⁹⁵ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 144

having unique technical means to modify or delete the comments.⁹⁶ Additionally, the content was described as manifestly unlawful.⁹⁷

The role of Scoops differs and, likewise Facebook,⁹⁸ the latter qualifies as a passive intermediary, exempt from liability. Unlike Delfi, Scoops can only delete posts after being notified of them.⁹⁹ Moreover, Scoops cannot be responsible for not instantly deleting the picture which was not clearly outlawed and the lawfulness of which is subject to debate before this Court.

b. The liability of Peaps as the author of the publication

ECtHR recognized the liability of the actual authors of the comments as a sensible alternative to the intermediary's liability.¹⁰⁰ In *MTE*, it was confirmed that the punishment of an intermediary should not be envisaged without particularly strong reasons for doing so.¹⁰¹ This is confirmed by the fact that the punishment of an actor for a third-party statement would seriously hamper the contribution to discussion of matters of public interest.¹⁰²

The present case can be distinguished since the actual author of the post, Peaps, was identified and prosecuted, notably, with the help of Scoops.¹⁰³ As follows, a Turtonian criminal search warrant was served upon Scoops corporate offices in Turtonia for the disclosure of the information about the creator and owner of the XYZ News12 account.¹⁰⁴

⁹⁶ *ibid*

⁹⁷ *ibid* para 117

⁹⁸ *Meryem Ali v Facebook, Inc et al* No 2014-42805 (2014); *Finkel v Facebook, Inc* No 102578/09 (2009); *Gaston v Facebook, Inc* No 3:12-cv-0063 (2012); *Klayman v Mark Zuckerberg and Facebook, Inc* 753 F 3d 1354 (2014); *Tetreau v Facebook, Inc* No 10-4558-CZ (2011)

⁹⁹ Competition case, para 9.2

¹⁰⁰ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), paras 147-148

¹⁰¹ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016), para 79

¹⁰² *ibid*

¹⁰³ Competition case, para 12.1

¹⁰⁴ Competition case, para 7.1

Apparently, Scoops complied with the warrant, enabling Turtonian authorities to prosecute the real offender.¹⁰⁵

c. The measures applied by Scoops to prevent or remove the publication

In this regard, the conduct of Scoops must be considered, in particular, whether the mechanism for the prevention of the violations of the rights of others was in place.¹⁰⁶ ECtHR acknowledged that the notice-and-take down procedure can function ‘*as an appropriate tool for balancing the rights and interests*’ of all involved in controversy.¹⁰⁷ In this case, Scoops had a notice-and-take-down system, so that anyone could report inappropriate posts and have them removed.¹⁰⁸ The system was applied by Scoops 68 hours after the publication.

d. Consequences of the publication for Kola

In *MTE*, the mere fact that the inquiries about the plaintiff company’s business conduct were already ongoing in the society led to the conclusion that the comments under consideration were not capable of ‘*making any additional and significant impact on the attitude of the consumers concerned*’.¹⁰⁹

Similarly, Applicants argue that the publication at hand was unable to make any significant impact on Kola’s reputation. Back to late 2015, Kola has already been publically denounced by a group of nationalists, Turton Power, for being a champion of immigration.¹¹⁰ They were calling for her resignation, protesting outside her office and attempting to harass

¹⁰⁵ *ibid*

¹⁰⁶ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 154

¹⁰⁷ *ibid* para 159

¹⁰⁸ Competition case, para 9.2

¹⁰⁹ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016), para 85

¹¹⁰ Competition case, para 4.1.1

and abuse her online.¹¹¹ This is evidenced by the fact that most of the signs carried by the protesters on May 4-5 were unrelated to the post.¹¹²

e. The consequences of the domestic proceedings for Scoops

To date, there are no reported cases of social media platforms being prosecuted.¹¹³ In the US, 38 States have enacted revenge porn laws.¹¹⁴ The fine for the revenge porn varies from 1,000 USD to 25,000 USD among the States,¹¹⁵ Arizona being the only exception, criminalizing such conduct with a fine of 150,000 USD.¹¹⁶ In New South Wales the distribution of intimate images without consent will be punished by up to 100 penalty points,¹¹⁷ which amounts to 8,400 USD.¹¹⁸ In the UK,¹¹⁹ Scotland¹²⁰ and Ireland¹²¹ the fine will not exceed 6,500 USD.¹²² Even if the amount of fine is not decisive, the imposition of criminal rather than civil liability is unnecessary and disproportionate.¹²³

The fine imposed upon Scoops by Turtonia is 200,000 USD.¹²⁴ Its comparison to the abovementioned practice leads to a conclusion that the punishment was too excessive and

¹¹¹ *ibid*

¹¹² Competition case, para 9.4

¹¹³ Ryan Garcia, *Social Media Law in a Nutshell* (1st edn West Academic Publishing 2017), pp 266-267

¹¹⁴ Revenge Porn Laws by State (2017) <<http://criminal.findlaw.com/criminal-charges/revenge-porn-laws-by-state.html>> accessed 12 November 2017

¹¹⁵ *ibid*

¹¹⁶ *ibid*

¹¹⁷ Australian Crimes Amendment (Intimate Images) Bill 2017 amending Crimes Act 1900 No 40 Part 3, Division 15C 91Q

¹¹⁸ Australian Crimes (Sentencing Procedure) Act 1999 pt 2 div 4 s 17

¹¹⁹ UK Criminal Justice and Courts Act 2015 pt 1 s 33(9)

¹²⁰ Scottish Abusive Behaviour and Sexual Harm Act 2016 pt 2 s 2(7)

¹²¹ Northern Ireland Justice Act 2016 pt, s 51(9)

¹²² UK Criminal Justice Act 1982 pt 3 s 37(2)

¹²³ *Tristán Donoso v Panama* (IACtHR, 27 January 2009), para 129

¹²⁴ Competition case, para 13.1.1

disproportionate in relation to the offence. Therefore, such punishment had chilling effect on Scoops' freedom of expression and would deter Scoops' from contributing to public debate in future.

Accordingly, Scoops' rights under Article 19 of the ICCPR were breached.

III. TURTONIA'S PROSECUTION OF PEAPS UNDER THE IA VIOLATED ARTICLE 19 OF THE ICCPR

Although freedom of expression and is subject to restrictions, the prosecution of Peaps under the IA did not satisfy a cumulative three-fold test.¹²⁵ Applicants do not dispute that Peaps' prosecution pursued a legitimate aim of public order protection. Applicants dispute, however, that it (A) was provided by law, and (B) was necessary in a democratic society.

A. Peaps' prosecution was not provided by law

A norm must be formulated with sufficient precision to allow an individual to act accordingly,¹²⁶ ascertaining what is prohibited,¹²⁷ and shall also be compatible with the aims of the ICCPR.¹²⁸ In *R v Zundel*, the provision, which penalized '*spreading false news*', described as knowingly communication of false statement that harms any public interest, was found vague and overly broad.¹²⁹ This approach was also adopted in Uganda,¹³⁰ the US,¹³¹

¹²⁵ ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19

¹²⁶ *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997), para 51; *Herrera-Ulloa v Costa Rica* (IACtHR, 2 July 2004), para 112

¹²⁷ General comment no 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34; *The Sunday Times v The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), para 49

¹²⁸ *Fedotova v Russian Federation* Communication no 1932/2010 UN Doc CCPR/C/106/D/1932/2010 (2012), para 5.11; *Faurisson v France* Communication no 550/1993 UN Doc CCPR/C/58/D/550/1993 (1996), para 9.5; *Toonen v Australia* Communication no 488/1992 UN Doc CCPR/C/50/D/488/1992 (1994), para 8.3

¹²⁹ *R v Zundel* [1992] 2 SCR 731

¹³⁰ *Obbo and Another v Attorney-General* AHRLR 256 (UgSC, 11 February 2004)

¹³¹ *New York Times Co v Sullivan* 376 US 254 (1964)

and Zimbabwe.¹³² Lastly, criminalization of dissemination of false information runs contrary to international principles.¹³³

Likewise, Section 1.b of the IA, which prohibits knowingly or recklessly communication of false information with the intent to incite civil unrest, hatred, or damage the national unity, is imprecise, broad, and imposes the very criminal liability for defamation.¹³⁴ Additionally, as was stated above,¹³⁵ Turtonia lacks safeguards due to the discretionary grant of appeal by its courts.

Therefore, provided by law criterion was not satisfied.

B. Peaps' prosecution was unnecessary in a democratic society

Necessity in a democratic society requires the existence of a pressing social need, and the proportionality of the restriction to legitimate aim pursued.¹³⁶ Applicants submit that none of these requirements were met.

a. Peaps' prosecution did not correspond to a pressing social need

In compliance with the criteria articulated in *Perinçek v Switzerland*¹³⁷ and modified in *Dmitriyevskiy v Russia*, the test for establishing a pressing social need in cases involving incitements is four-fold.¹³⁸

¹³² *Chavunduka and Choto v Minister of Home Affairs and Attorney General of Zimbabwe* No SC 36/2000 (Zimbabwe Supreme Court, 22 May 2000)

¹³³ UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression & ACHPR Special Rapporteur on Freedom of Expression and Access to Information, International Mechanisms for Promoting Freedom of Expression, *Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda* (3 March 2017) prin 2(b) <<http://www.osce.org/fom/302796?download=true>> accessed 10 November 2017; *R v Zundel* [1992] 2 SCR 731; *Başkaya and Okçuoğlu v Turkey* App nos 23536/94 and 24408/94 (ECtHR, 8 July 1999), para 62; *Karataş v Turkey* App no 23168/94 (ECtHR, 8 July 1999), para 50; *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992), para 46; *Gertz v Robert Welch Inc* 418 US 323 (1974)

¹³⁴ Competition case, para 11.2

¹³⁵ see Section I.A.b of the Memorial

¹³⁶ General comment no 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 22; *Europapress Holding Doo v Croatia* App no 25333/06 (ECtHR, 22 October 2009), para 54; *Faurisson v France* Communication no 550/1993 UN Doc CCPR/C/58/D/550/1993 (1996), para 8; *Gauthier v Canada* Communication no 633/1995 UN Doc CCPR/C/65/D/633/1995 (1999), para 13.6

¹³⁷ *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015), paras 205-208

i. Peaps' status as a speaker

The crucial factor is speaker's position and influence.¹³⁹ Prosecution is justified only if the person has standing and influence, such as a former mayor in *Zana v Turkey*,¹⁴⁰ rather than a private individual.¹⁴¹ Here, Peaps is a non-influential person not engaged in any public activity beforehand,¹⁴² whose Scoops account had no friends at the time of posting.¹⁴³

ii. Nature and wording of Peaps' post

Freedom of expression requires '*breathing space*',¹⁴⁴ as well as guarantees the use of any appropriate method to disseminate ideas, allowing them to reach the greatest number of persons.¹⁴⁵ Speech that contributes to the debate of public interest, including the problems of the integration of immigrants in their host-countries,¹⁴⁶ provides '*little scope for restrictions*',¹⁴⁷ given that governmental policies are always subject to greater criticism.¹⁴⁸ Additionally, as was stated in *Salov v Ukraine*, dissemination of probable untruthful

¹³⁸ *Dmitriyevskiy v Russia* App no 42168/06 (ECtHR, 3 October 2017), para 102

¹³⁹ UNHRC, 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence' (2012), para 29 <http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf> accessed 13 October 2017

¹⁴⁰ *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997), para 50

¹⁴¹ *Karataş v Turkey* App no 23168/94 (ECtHR, 8 July 1999), para 52

¹⁴² Competition case, paras 7.1, 8.3

¹⁴³ Competition case, para 8.3

¹⁴⁴ *Philadelphia Newspapers, Inc v Hepps* 475 US 767 (1986)

¹⁴⁵ *Ricardo Canese v Paraguay* (IACtHR, 31 August 2004), para 78; *Herrera-Ulloa v Costa Rica* (IACtHR, 2 July 2004), para 109; *Olmedo-Bustos et al v Chile* (IACtHR, 5 February 2001), para 65

¹⁴⁶ *Le Pen v France* App no 18788/09 (ECtHR, 20 April 2010)

¹⁴⁷ *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015), para 197; *Ooo Izdatelskiy Tsentri Kvaritirnyy Ryad v Russia* App no 39748/05 (ECtHR, 25 April 2017), para 45; *Erbakan v Turkey* App no 59405/00 (ECtHR, 6 June 2006), para 68; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012), para 90; *Times Newspapers Ltd v The United Kingdom (nos 1 and 2)* App nos 3002/03 and 23676/03 (ECtHR, 10 March 2009), para 27

¹⁴⁸ *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992), para 46; *Sürek and Özdemir v Turkey* App no 23927 and 24277/94 (ECtHR, 8 July 1999), para 60; *Ooo Izdatelskiy Tsentri Kvaritirnyy Ryad v Russia* App no 39748/05 (ECtHR, 25 April 2017), para 45

information is not prohibited,¹⁴⁹ as in ‘*free debate*’ false factual assertions are ‘*inevitable*’.¹⁵⁰ This also applies to provocative ideas,¹⁵¹ which ‘*offend, shock or disturb*’.¹⁵² Hence, imposing strict liability for false statements has unquestionable chilling effect on expression related to public figures.¹⁵³

Applicants claim that Peaps’ post, even being provocative, referred to the Minister of Immigration, and her actively discussed policy.¹⁵⁴ At that time, Turtonia faced a significant influx of Aquarian immigrants, while Aquaria suffered from the True Religion.¹⁵⁵ Given the terrorist nature of the group, the post concerning the possibility of True Religion members getting access to Turtonia contributed to the debate on the issue of public concern. Lastly, in light of Internet’s crucial role in enhancing public’s access to information,¹⁵⁶ it is evident that Peaps chose Scoops as a platform to disseminate the story to the widest audience.¹⁵⁷

As to the wording of Peaps’ post, in the expression should not just make the audience angry,¹⁵⁸ call for violence is required.¹⁵⁹ There must be a direct and immediate connection,¹⁶⁰

¹⁴⁹ *Salov v Ukraine* App no 65518/01 (ECtHR, 6 September 2005), para 113

¹⁵⁰ *New York Times Co v Sullivan* 376 US 254 (1964)

¹⁵¹ *Willem v France* App no 10883/05 (ECtHR, 16 July 2009), para 33; *Steel and Morris v The United Kingdom* App no 68416/01 (ECtHR, 15 February 2005), para 90; *Mamère v France* App no 12697/03 (ECtHR, 7 November 2006), para 25; *Gaunt v The United Kingdom* App no 26448/12 (ECtHR, 6 September 2016), para 59; *Bédât v Switzerland* App no 56925/08 (ECtHR, 29 March 2016), para 58

¹⁵² *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015), para 221; *Fressoz and Roire v France* App no 29183/95 (ECtHR, 1999), para 45

¹⁵³ *New Times Inc v Isaacks* 146 SW 3d 144 (2004)

¹⁵⁴ Competition case, para 8.3

¹⁵⁵ Competition case, para 3

¹⁵⁶ *Times Newspapers Ltd v The United Kingdom (nos 1 and 2)* App nos 3002/03 and 23676/03 (ECtHR, 10 March 2009), para 27; *Reno v American Civil Liberties Union* 521 US 844 (1997); *Annen v Germany* App no 3690/10 (ECtHR, 26 November 2015), para 66

¹⁵⁷ Competition case, para 8.3

¹⁵⁸ *NAACP v Claiborne Hardware Co* 458 US 886 (1982); *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015), para 206

¹⁵⁹ *Alves Da Silva v Portugal* App no 41665/07 (ECtHR, 20 October 2009), para 28; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015), para 66; *S Rangarajan v P J Ram* 1989 (2) SCR 204; Iginio

evaluating the time that passed between the speech and violence.¹⁶¹ According to *Brandenburg v Ohio*, it must be obvious from the statement that ‘*immediate serious violence was expected or advocated*’.¹⁶²

Applicants argue that Peaps’ post is clear on its face: it neither calls for violence nor contains any reference to it. Its wording was aimed at illustrating the situation and the danger related to some of the possible visa recipients,¹⁶³ which similarly to *Dmitriyevskiy v Russia* does not amount to incitement to violence.¹⁶⁴

Furthermore, there is no causality between Peaps’ post and the events of May 5. It should be stressed that the Turtonia’s major newspaper TurtonTimes on May 3 reproduced the information contained in the post, articulating the danger of allowing Aquarians to Turtonia,¹⁶⁵ and right on the next day people started protesting. The main slogan of the protesters was ‘*No more Aquarians!*’, which was a subject of the TurtonTimes’ publication rather than Peaps’ post; most of other protesters’ signs were also unrelated to the post.¹⁶⁶ Applicants would like to reiterate that the post itself did not provoke any hostility, since the dissatisfaction with Aquarians and protests against Kola’s immigration policy have already

Gagliardone and others, ‘Countering Online Hate Speech’ (UNESCO, 2015), para 12; UNHRC, ‘Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence’ (2012), para 29 <http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf> accessed 13 October 2017

¹⁶⁰ General comment no 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34

¹⁶¹ UNHRC, ‘Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence’ (2012), para 29 <http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf> accessed 13 October 2017

¹⁶² *Brandenburg v Ohio* 395 US 444 (1969)

¹⁶³ Competition case, para 8.3

¹⁶⁴ *Dmitriyevskiy v Russia* App no 42168/06 (ECtHR, 3 October 2017), para 107

¹⁶⁵ Competition case, para 9.3

¹⁶⁶ Competition case, para 9.4

existed for 3 years.¹⁶⁷ While the protests of May 4-5 amounted to 100 people,¹⁶⁸ the number is not that significant. As to the unfortunate death of two Aquarian immigrants, it occurred three days after the post,¹⁶⁹ which shows the lack of imminence of lawless action. Accordingly, the causal link between the post and further casualties was broken.

iii. Context of Peaps' publication

The restriction can be justified against an extremely tense political or social background.¹⁷⁰ The examples include separatism issues¹⁷¹ or coincidence of the expression with murderous attacks on civilians.¹⁷²

Applicants submit that there was no such tension in Turtonia at the time of posting. There is no record of everyday violence, whereas the dissatisfaction with immigration policy¹⁷³ cannot be compared to the problems of separatism or murderous attacks.

iv. Approach of Turtonian courts towards the justification of interference

The reasoning for the domestic court's judgment must be '*relevant and sufficient*', including the assessment of the facts, and compliance with the principles of freedom of expression.¹⁷⁴ While prosecuting Peaps, Turtonian courts did not assess all the relevant facts,

¹⁶⁷ Competition case, para 9.4

¹⁶⁸ Competition case, para 4.1

¹⁶⁹ Competition case, para 9.5

¹⁷⁰ UNHRC, 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence' (2012), para 29 <http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf> accessed 13 October 2017; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015), para 205

¹⁷¹ *Dmitriyevskiy v Russia* App no 42168/06 (ECtHR, 3 October 2017), para 104

¹⁷² *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997), para 59

¹⁷³ Competition case, paras 4.1, 9.4

¹⁷⁴ *Dmitriyevskiy v Russia* App no 42168/06 (ECtHR, 3 October 2017), para 111; *Tsonev v Bulgaria* App no 45963/99 (ECtHR, 13 April 2006), para 52; *The Moscow Branch of the Salvation Army v Russia* App no 72881/01 (ECtHR, 5 October 2006), para 77; *Chauvy and others v France* App no 64915/01 (ECtHR, 29 June 2004), para 70

particularly whether of the information disseminated by Peaps was false. As follows from the facts of the case, no attempt was made to analyze the content of the post. Peaps' role in creating hostility towards Kola and Aquarians was not assessed.¹⁷⁵ Consequently, the reasoning for the ruling was not '*relevant and sufficient*'.

Having regard to the foregoing, Applicants submit that there was no pressing social need to prosecute Peaps.

b. Peaps' prosecution was disproportionate as the fine was unjustifiably excessive

In assessment of the proportionality, the nature and severity of the penalties imposed should be evaluated.¹⁷⁶ The interference with the full enjoyment of freedom of expression should be '*as little as possible*',¹⁷⁷ without limiting it more than strictly necessary.¹⁷⁸ In *Salov*, the punishment, which included the fine, for dissemination of false information was found disproportionate.¹⁷⁹ In *Marques de Morais v Angola*, HRC found that the fine of 6,602 USD for accusing the President of corruption was also disproportionate to protection of public order.¹⁸⁰ ECtHR reiterated that the striking factor is the very imposition of criminal conviction regardless its severity.¹⁸¹

In the present case, Peaps was sentenced to a significant fine equivalent of 100,000 USD.¹⁸² Given that the sanctions under the IA do not contain a minimum scale, the court was

¹⁷⁵ Competition case, para 12

¹⁷⁶ *Karataş v Turkey* App no 21168/94 (ECtHR, 8 July 1999), para 53; *Başkaya and Okçuoğlu v Turkey* App nos 23536/94 and 24408/94 (ECtHR, 8 July 1999), para 66

¹⁷⁷ *Ricardo Canese v Paraguay* (IACtHR, 31 August 2004), para 81

¹⁷⁸ *ibid*

¹⁷⁹ *Salov v Ukraine* App no 65518/01 (ECtHR, 6 September 2005), para 115

¹⁸⁰ *Marques de Morais v Angola* Communication no 1128/2002 UN Doc CCPR/C/83/D/1128/2002 (2005), para 2.10

¹⁸¹ *Lehideux and Isorni v France* App no 24662/94 (ECtHR, 23 September 1998), para 57; *Schorschach and News Verlagsgesellschaft mbH v Austria* App no 39394/98 (ECtHR, 13 November 2003), paras 32-33

¹⁸² Competition case, paras 11.2, 12.1

empowered to order less severe penalty, complying with international standards. Thus, Peaps' prosecution was disproportionate.

In conclusion, Turtonia violated Peaps' rights under Article 19 of the ICCPR.

IV. TURTONIA'S PROSECUTION OF SCOOPS UNDER THE IA VIOLATED ARTICLE 19 OF THE ICCPR

Although Turtonia may have pursued a legitimate aim of Kola's rights and reputation protection, prosecution of Scoops under the IA was (A) neither provided by law (B) nor necessary in a democratic society.

A. The IA did not comply with 'quality of law' standards

Applicants submit that the IA, for the same reasons as the ODP, ¹⁸³ did not cover the activities of Scoops. Further, the IA is (a) neither foreseeable (b) nor contains safeguards.

a. The IA failed to meet the standard of foreseeability

Applicants claim that lack of foreseeability in the IA forced Scoops to struggle with legal uncertainty ¹⁸⁴ since it is unclear what 'expeditiously' exactly means. ¹⁸⁵ Similar term is also found in E-Commerce Directive. While it does not specify an express time limit, ¹⁸⁶ some Member States clarified the term for specific categories of illegal content. For instance, in Spain intermediaries have to act within 72 hours for copyright infringements, ¹⁸⁷ while the UK

¹⁸³ see Section II.A.a of the Memorial

¹⁸⁴ *The Sunday Times v The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), para 49; *Rekvényi v Hungary* App no 25390/94 (ECtHR, 20 May 1999), para 34; *Gawęda v Poland* App no 26229/95 (ECtHR, 14 March 2002), para 22; *Pentikäinen v Finland* App no 11882/10 (ECtHR, 20 October 2015), para 84

¹⁸⁵ Competition case, para 11.2.3.c

¹⁸⁶ 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 (Directive on electronic commerce or the e-Commerce Directive) [2000] OJ L178/1, art 14(1)

¹⁸⁷ Spanish Royal Decree on the functioning and operating of the Intellectual Property Commission 2011, 1889/2011 (as amended up to Royal Decree No 1023/2015 of 13 November 2015), art 22(3)

Terrorism Act prescribes 2 days limit for terrorism-related illegal content.¹⁸⁸ In contrast, Turtonia left this issue open to self-regulation¹⁸⁹ that cannot be truly effective without legislative underpinning.¹⁹⁰ This vagueness is clearly oppressive to intermediaries wishing to clarify their position before taking the content down,¹⁹¹ and to Scoops in particular. For instance, in *Mumsnet* case an online childcare forum was forced to settle since it was unclear whether removal of comments within 24 hours qualifies as ‘*expeditious*’.¹⁹² Conclusively, Scoops was deprived of any legal standard enabling to regulate its conduct and avoid prosecution.

b. The IA created risky legal environment devoid of safeguards

Applicants submit that although the IA chills free expression online, Turtonia failed to neutralize this shortcoming by the presence of adequate safeguards.

Firstly, the IA forces intermediaries to choose between taking down content upon receiving a complaint and possible risk of liability.¹⁹³ Thus, it makes them ‘*judges in their own case*’,¹⁹⁴ which private entities shall never be¹⁹⁵ due to the risk of overbroad private censorship.¹⁹⁶ The chilling effect from such self-censorship existed in India until in *Shreya*

¹⁸⁸ UK Terrorism Act 2006, s 3(2)(b)

¹⁸⁹ Competition case, para 11.2.3.c

¹⁹⁰ Sjoera Nas, ‘The Future of Freedom of Expression Online: Why ISP Self-Regulation is a Bad Idea’ (The Representative on Freedom of the Media, Amsterdam Conference, June 2003) <<http://www.osce.org/fom/13871?download=true>> accessed 11 October 2017

¹⁹¹ Lilian Edwards and Charlotte Waelde, *Law and the Internet* (3rd edn, Hart Publishing 2009) 66

¹⁹² *ibid*

¹⁹³ Competition case, para 11.2.3

¹⁹⁴ Aleksandra Kuczerawy, ‘Intermediary Liability & Freedom of expression: Recent developments in the EU Notice & Action Initiative’ (2015) Interdisciplinary Centre for Law and ICT, KU Leuven <https://lirias.kuleuven.be/bitstream/123456789/484207/1/ICRI_Working+Paper_21_2015_Aleksandra+Kuczerawy.pdf> accessed 13 October 2017

¹⁹⁵ Article 19, *Germany: The Act to Improve Enforcement of the Law in Social Networks* (2017) <<https://www.article19.org/data/files/medialibrary/38723/170426-Germany-Hate-Speech-Law-Draft-Analysis.pdf>> accessed 10 October 2017

Singhal v Union of India the burden of determining the legality of content was shifted from intermediaries to courts.¹⁹⁷ This practice received widespread approval from Special Rapporteurs on Freedom of Expression,¹⁹⁸ in Manila Principles¹⁹⁹ and is practiced across jurisdictions,²⁰⁰ while the Network Enforcement Act of Germany,²⁰¹ similar to the IA, was criticized for its incompatibility with human rights.²⁰²

Secondly, the IA requires intermediaries to assess content of expression, mental state of a person publishing the content, and considerations of impact of expression on other individual's rights, public order, or national security.²⁰³ While *prima facie* assessment allows intermediaries only to determine the content, assessment of rest of the elements, as well as legal defenses, goes beyond capabilities of any intermediary.²⁰⁴

¹⁹⁶ Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UNHRC, 17 th Sess, Agenda item 3, UN Doc A/HRC/17/27 (16 May 2016), para 40; Chinmayi Arun and Sarvjeet Singh, 'Online Intermediaries in India' (2015) NOC Online Intermediaries Case Studies Series <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566952> accessed 9 October 2017

¹⁹⁷ *Shreya Singhal v Union of India* AIR 2015 SC 1523, paras 117, 119

¹⁹⁸ Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UNHRC, 17 th Sess, Agenda item 3, UN Doc A/HRC/17/27 (16 May 2016), para 75; UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression & ACHPR Special Rapporteur on Freedom of Expression and Access to Information, International Mechanisms for Promoting Freedom of Expression, *Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda* (3 March 2017) prin 1(d) <<http://www.osce.org/fom/302796?download=true>> accessed 10 November 2017

¹⁹⁹ A Global Civil Society Initiative, *Manila Principles on Intermediary Liability*, prin II (a) <<https://www.manilaprinciples.org/principles>> accessed 13 October 2017

²⁰⁰ Spanish Royal Decree on the functioning and operating of the Intellectual Property Commission 2011, 1889/2011 (as amended up to Royal Decree No 1023/2015 of 13 November 2015), art 18(1); Chilean Law No 17336 on Intellectual Property (as amended up to Law No 20435 of 4 May 2010), art 85(R)

²⁰¹ German Act to Improve Enforcement of the Law in Social Networks 2017 (Network Enforcement Act), s 3(2)

²⁰² David Kaye, Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, OL DEU 1/2017 (1 June 2017); Article 19, *Germany: The Act to Improve Enforcement of the Law in Social Networks* (2017) <<https://www.article19.org/data/files/medialibrary/38723/170426-Germany-Hate-Speech-Law-Draft-Analysis.pdf>> accessed 10 October 2017; European Commissioner for the Single Digital Market, *Act improving law enforcement on social networks* (2017) <http://ec.europa.eu/growth/tools_databases/tris/en/search/?trisaction=search.detail&year=2017&num=127> accessed 9 November 2017

²⁰³ Competition case, para 11.2

²⁰⁴ Article 19, *Germany: The Act to Improve Enforcement of the Law in Social Networks* (2017) <<https://www.article19.org/data/files/medialibrary/38723/170426-Germany-Hate-Speech-Law-Draft-Analysis.pdf>> accessed 10 October 2017

Finally, as was mentioned above, the IA is devoid of any safeguards against abuse by public authorities,²⁰⁵ including the right to appeal.²⁰⁶ Accordingly, the IA overburdened Scoops with the complex legal decision, offering limited protection for freedom of expression. Therefore, the prosecution was not provided by law.

B. The prosecution of Scoops was unnecessary in a democratic society

Had provided by law criterion been satisfied, the prosecution was still unnecessary in a democratic society since (a) it failed to correspond to a pressing social need and (b) was disproportionate due to excessive fine.

a. There was no pressing social need to prosecute Scoops since it acted in good faith while removing Peaps' post

Applicants acknowledge that Peaps' post eventually was qualified by the domestic court as 'false information'.²⁰⁷ However, these findings were not apparent to Scoops when Kola's legal counsel submitted a defamation claim since the content of the post was neither illegal beyond reasonable doubt nor manifestly illegal. Further, it complied with the content restriction policies of Scoops.

Firstly, an intermediary is behaving unlawfully only if it fails to remove the content that is illegal beyond reasonable doubt.²⁰⁸ In such cases, it must be afforded a reasonable period of time to evaluate merits of a complaint and, where appropriate, to implement removal.²⁰⁹ Conversely, holding an intermediary liable from the moment the first letter of complaint was received, without first considering its merits, amounts to disproportionate interference with

²⁰⁵ *Malone v The United Kingdom* App no 8691/79 (ECtHR, 2 August 1994), para 67; *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000), para 56; *Karácsony and Others v Hungary* App no 42461/13 (ECtHR, 17 May 2016), para 156

²⁰⁶ *Ross v Canada* Communication no 736/1997 UN Doc CCPR/C/70/D/736/1997 (2000), para 11.4; *Uzun v Germany* App no 35623/05 (ECtHR, 2 September 2010), para 72; *Gurtekin v Cyprus* App nos 60441/13, 68206/13 and 68667/13 (ECtHR, 11 March 2014), para 28

²⁰⁷ Competition case, paras 9.1, 9.2, 12.1

²⁰⁸ *Scientology/XS4ALL* 2003 LJM AI5638; *IS InterNed Services* 2008 LJM BD1446

²⁰⁹ *Tamiz v The United Kingdom* App no 3877/14 (ECtHR, 19 September 2017), para 71

freedom of expression.²¹⁰ In this case, Kola, being a champion of immigration,²¹¹ had unsteady political ground due to the growing criticism of her immigration policies.²¹² Hence, Scoops had substantial grounds to believe that the post had factual basis and Kola might have tried to silence the unfavorable, but veracious message. Accordingly, to avoid overcensorship, Scoops had to conduct further legal research to establish the lawfulness of the post, while the prosecution impaired an essence of its freedom of expression.

Secondly, content of Peaps' post was not manifestly illegal.²¹³ In particular, its unlawfulness was not obvious to a non-lawyer from the words themselves²¹⁴ since it did not contain any hate speech or incitement to violence.²¹⁵ In this regard, a distinction of the levels of liability must be made.²¹⁶ From *Pihl v Sweden* it follows that intermediaries' liability is compatible with freedom of expression only if intermediaries fail to react expeditiously to manifestly illegal content.²¹⁷ For example, had Peaps' post contained an incitement to physically assault Kola, then expedition would require immediate removal, while any delay would lead to Scoops' liability. However, this does not apply to privacy breach or defamation cases, when upon notice the content is promptly removed.²¹⁸ For instance, in *Weaver v Corcoran* the plaintiff was a well-known scientist subjected to defamation and further insults

²¹⁰ *ibid*

²¹¹ Competition case, para 4.1

²¹² Competition case, para 9.3

²¹³ Competition case, para 8.3

²¹⁴ OGH 13 September 2000, 4 Ob 166/00s

²¹⁵ Competition case, para 8.3; see also *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016), para 64; *Pihl v Sweden* App no 74742/14 (ECtHR, 7 February 2017), para 25

²¹⁶ *Pihl v Sweden* App no 74742/14 (ECtHR, 7 February 2017), para 25

²¹⁷ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016), para 64; *Pihl v Sweden* App no 74742/14 (ECtHR, 7 February 2017), para 25; *CG v Facebook Ireland Ltd & McCloskey* [2015] NIQB 11, para 64

²¹⁸ *Pihl v Sweden* App no 74742/14 (ECtHR, 7 February 2017), para 25; *Weaver v Corcoran* 2015 BCSC 165, para 286

at the workplace. The defamatory posts were removed within two days, which was recognized as promptly enough even in the context of a deeply-resourced and well-staffed commercial entity.²¹⁹ Similarly, in the present case, the post was removed within almost two days,²²⁰ which is expeditious enough for the content that requires further investigation.

Finally, if the content in question complies with the content restriction policies of intermediaries, they need to overcautiously assess the validity of take down requests.²²¹ In the present case, Scoops' Terms of Service and report form specify that only such content as spam, non-consensual sharing of intimate images, hate speech, threat of violence or child exploitative imagery is non-compliant with its content restriction policies.²²² At the same time, '*the latest gossip*', which Peaps' post was, qualifies as '*compelling content*'.²²³ Accordingly, in order not to breach contractual relations with Peaps, who was the Scoops' user, Scoops had to clarify its position before taking the post down.²²⁴ Given the fact that the IA failed to define the term '*expeditiously*',²²⁵ Scoops was given flexibility in its application while deciding on the post's removal.²²⁶

Consequently, legal grounds to hold Scoops responsible for failure to remove Peaps' post sooner than it had done were lacking.

²¹⁹ *Weaver v Corcoran* 2015 BCSC 165, para 286

²²⁰ Competition case, para 9.2

²²¹ Jan Oster, 'Liability of Internet Intermediaries for Defamatory Speech – An Inquiry into the Concepts of 'Publication' and 'Innocent Dissemination' (2013) <<http://www.archive.legalscholars.ac.uk/edinburgh/restricted/download.cfm?id=336>> accessed 15 October 2017

²²² Competition case, para 5.1

²²³ Competition case, para 5.3

²²⁴ Jan Oster, 'Liability of Internet Intermediaries for Defamatory Speech – An Inquiry into the Concepts of 'Publication' and 'Innocent Dissemination' (2013) <<http://www.archive.legalscholars.ac.uk/edinburgh/restricted/download.cfm?id=336>> accessed 15 October 2017

²²⁵ Competition case, para 11.2.3.c

²²⁶ European Commission, Commission staff working document: Online services, including e-commerce, in the Single Market. Accompanying the document: A coherent framework to boost confidence in the Digital Single Market of e-commerce and other online services (2012), s 3.4.4.3(c) <http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf> accessed 10 October 2017

b. The prosecution was disproportionate due to unjustifiably excessive fine

Applicants submit that 100,000 USD fine was disproportionate.²²⁷ For instance, China fined BlogCN only to 150 USD for failure to remove insulting posts that damaged reputation of a well-known professor.²²⁸ Further, in *CG v Facebook* the defendant was fined to 27,000 USD for failure to delete the posts that incited violence and hatred, while in *Delfi* the fine amounted to 320 EUR.²²⁹ Finally, Turkey fined Twitter to 51,000 USD for failure to comply with requests to remove ‘terrorist propaganda’.²³⁰ Contrastingly, Scoops’ case concerns content that did not infringe Kola’s reputation²³¹ and is incomparably less severe than hate speech, incitement to violence or terrorist propaganda. Unlike BlogCN, Twitter, and Facebook, Scoops ultimately removed the post after making an informed decision.²³² Accordingly, 100,000 USD fine is unjustifiably excessive comparing to sentencing practices of other States, and, causes Scoops to unduly censor free expression online.²³³ Therefore, the prosecution was disproportionate and damaging for Scoops’ future contribution to public debate, thus breaching Article 19 of the ICCPR.

²²⁷ *Herrera-Ulloa v Costa Rica* (IACtHR, 2 July 2004), para 123; *Ross v Canada* Communication no 736/1997 UN Doc CCPR/C/70/D/736/1997 (2000), para 11.6; *Kudrevičius and Others v Lithuania* App no 37553/05 (ECtHR, 10 October 2015), para 144

²²⁸ Jun Xu and Sam Cai, ‘Online Intermediary Liability for Hate Speech under Chinese Laws’ (2017) <<https://www.law.uw.edu/media/140454/china-intermediary-liability-of-isps-hate-speech.pdf>> accessed 12 October 2017

²²⁹ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 160

²³⁰ Ercan Gurses, ‘Turkey Fines Twitter for Failure to Remove ‘Terrorist Propaganda’: Official’ *Reuters* (11 December 2015) <<http://www.reuters.com/article/us-turkey-twitter-fine-idUSKBN0TU0NK20151211>> accessed 13 October 2017

²³¹ see Section II.B of the Memorial

²³² Competition case, para 9.2

²³³ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016), para 86; Jennifer M Urban and Laura Quilter, ‘Efficient process or ‘Chilling Effects’? Takedown Notices under Section 512 of the Digital Millennium Copyright Act: Summary Report’ (2005) 22(4) SCHTLJ <<http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1413&context=chtlj>> accessed 13 October 2017

PRAYER FOR RELIEF

For the foregoing reasons, Applicants respectfully request this Honorable Court to adjudge and declare as follows:

1. Turtonia's prosecution of Peaps under the ODPa for dissemination of Kola's nude images violated Article 19 of the ICCPR.
2. Turtonia's prosecution of Scoops under the ODPa for dissemination of Kola's nude images violated Article 19 of the ICCPR.
3. Turtonia's prosecution of Peaps under the IA for inciting violence through false information violated Article 19 of the ICCPR.
4. Turtonia's prosecution of Scoops under the IA for knowingly communicating false information violated Article 19 of the ICCPR.

On behalf of Peaps and Scoops

Agents for Applicants