THE 2018-2019 PRICE MEDIA LAW MOOT COURT COMPETITION

RAS & UCONNECT
(APPLICANTS)

V

STATE OF MAGENTONIA
(RESPONDENT)

MEMORIAL FOR RESPONDENT

Word Count: 4996
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LIST OF ABBREVIATIONS

ACHR American Convention of Human Rights
CJEU Court of Justice of the European Union
CT Cyanisian Times
ECHR European Convention on Human Rights
ECtHR European Court of Human Rights
EU European Union
GDPR General Data Protection Regulation
HRC Human Rights Committee
ICCPR International Covenant on Civil and Political Rights
IDPC Information and Data Protection Commission of Magentonia
MPF Magentonia Popular Front
OECD Organisation for Economic Co-operation and Development
PIDPA Public Information and Data Protection Act 2016
TBM Take Back Magentonia
UDHR Universal Declaration of Human Rights
UK United Kingdom
UMP United Magentonia Party
UN United Nations
UNESCO United Nations Educational, Scientific and Cultural Organisation
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STATEMENT OF RELEVANT FACTS

Cyanisia and Magentonia

1. Cyanisia and Magentonia are two neighbouring democratic countries. However, Cyanisia’s political landscape is particularly volatile and toxic. The systematic persecution and violence of political dissidents led to a mass exodus of members from the Celadon tribe to Magentonia, who eventually were stripped off their citizenships by law.


Unger Ras

3. Unger Ras was a former professor at the State University of Cyanisia and founder of the main opposition party in Cyanisia. In February 2001, *The Cyanisian Times* published an article reporting that an arrest warrant had been issued against Ras for alleged misappropriation of university funds. His university issued a public statement clarifying that he had been accused and investigated of misconduct in 1995, but eventually cleared.

4. Ras fled to Magentonia and obtained citizenship in 2011. He joined the United Magentonia Party (UMP), the political party of the incumbent government. He is a strong champion for the rights of refugees, especially Cyanisian refugees living in Magentonia.
UConnect

5. UConnect is the most popular social media platform among Cyanisians and Magentonians with over 100 million active users worldwide. UConnect offers two main functions. First, it enables users to post, comment and share personal stories and news. Second, the platform provides a search functionality.

6. Content is displayed based on users’ preference and behavior. There is a feature allowing users to boost their post to appear in the ‘trending’ and ‘promoted’ feed. The Complaints Portal enables users to lodge complaints against posts in violation of its Community Standards. Human reviewers would process such complaints within 72 hours.

Magentonian Mail Article

7. An article was published on 1st April 2018 by The Magentonian Mail, a private owned news website, claiming that Ras fled Cyanisia due to a corruption scandal in his former university, as collaborated by the 2001 CT Story. Ras immediately issued a statement to clarify that the story was false and reproduced his former university’s statement. The Magentonian Mail also carried his statement.

8. Upon Ras’ request, the article was removed by Magetonian Mail in 15th April 2018. But by then, the article had already been ‘trending’ on UConnect, highly viewed and shared among Magentonian users with a penchant for Magendonian politics. Public posts linked to the article also appeared high on the search results when terms related to ‘Ras’ and ‘Magentonia’ are entered.

9. On 25th April 2018, TakeBackMag200, an anonymous user, posted a web link of the 2001 story with the caption ‘you can’t erase history’. It was later promoted and trended. On 29th April
2018, Ras wrote a letter requesting for the removal of the post and for the 2001 CT Story to be blocked or removed. UConnect agreed to remove the post, but refused to remove the search results unless ordered by the IDPC of Magentonia.

10. On 5th May 2018, Ras filed a petition to the IDPC to compel UConnect to remove all search results that depicts the 2001 CT Story pursuant to Section 22 of the PIDPA and Article 7 of the Magentonian Constitution. On 10th May 2018, the IDPC rejected Ras’ request on the basis of ‘public interest’ considering that he was a public figure and a candidate for the upcoming election. Ras appealed to the Magentonian High Court against such decision.

**Anti-Refugee Posts**

11. In early May 2018, TBM began actively posting content on UConnect against Ras and Cyanisians. An article published on 26 May 2018 described Cyanisians in derogatory terms and trended on UConnect for 4 days before its removal on 30th May 2018.

12. On 30th May 2016, TBM posted another article which cited a study by the University of Magentonia claiming that Cynasian refugees would outnumber native Magentonians by 2025. The post trended for 3 days until 1st June 2018. No user reported against it.

13. On 2nd June 2018, the Magentonian prosecution charged UConnect under Section 3 and 5 of the PIDPA relating to these two posts. An interim injunction was issued ordering UConnect to suspend all its operations in Magentonia pending trial.

14. On 4th June 2018, the UMP won the parliamentary election, albeit with a reduced majority. Ras failed to win a seat. The *Magentonian Watch*, an independent organization, attributed their failure to the effective campaign ran by TBM on UConnect.
Magentonian Judiciary Decision

15. On 1st July 2018, the Magentonian High Court dismissed Ras’ appeal.

16. On 10th July 2018, the High Court found UConnect guilty under Section 3 of the PIDPA for failing to swiftly remove the 26th May post, and under section 5 of PIDPA for recklessly disseminating false propaganda. A fine of USD 100,000 was imposed.
STATEMENT OF JURISDICTION

Unger Ras, UConnect and the state of Magentonia, which is a party to the International Covenant on Civil and Political Rights (ICCPR), have submitted their differences to the Universal Court of Human Rights (‘this Court’), and hereby submit to this Court their dispute concerning Articles 17 and 19 of the ICCPR.

On the basis of the foregoing, this Court is requested to adjudge the dispute in accordance with the rules and principles of international law, including any applicable declarations and treaties.
QUESTIONS PRESENTED

I. 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?

II. Whether Magentonia’s suspension of UConnect’s operations violates Article 19 of the ICCPR?

III. Whether Magentonia’s prosecution and conviction of UConnect under the PIDPA violates Article 19 of the ICCPR?
SUMMARY OF ARGUMENTS

I. Magentonia’s decision not to grant Unger Ras any rectification, erasure or blocking of search results depicting the 2001 CT Story did not violate Article 17 of the ICCPR. First, Ras’ application is inadmissible under Article 17 as the right to privacy does not incorporate the right to be forgotten; and alternatively, Magentonia has sufficiently discharged its positive obligation under Article 17 to protect Ras’ right to be forgotten. In any event, Magentonia’s interference with Ras’ right to privacy was lawful and non-arbitrary. First, the decision by the Magentonian High Court was provided by law since it was foreseeable that Ras cannot avail to the right to erasure under the PIDPA in light of the 2001 CT Story being a matter of public interest. Second, the decision pursued a legitimate aim i.e. to protect the right of freedom of expression of Magentonian citizens to impart and receive information and ideas. Third, the decision was reasonable in the circumstances because (i) the 2001 CT Story was a matter of public interest, (ii) Ras actively stayed in the public limelight, (iii) UConnect is not a ‘data controller’ in respect of its search functionality; and (iv) the deletion of all search results is not proportionate.

II. Magentonia’s decision to suspend UConnect’s operations under the PIDPA did not violate Article 19 of the ICCPR. First, the suspension was provided by law as the PIDPA is accessible to the general public of Magentonia and formulated with sufficient precision. Second, the suspension pursued a legitimate aim, which was to prevent the victimization of the Cyanisian refugees due to the proliferation anti-refugees posts in UConnect. Third, the suspension was necessary in a democratic society as (i) there was a rising resentment against the Cyanisian refugees, (ii) the content on UConnect can be
disseminated rapidly and widely, and also persistently remain online, (iii) the suspension was enforced under a court order with a limited geographical and temporal scope; and (iv) the suspension was the only viable way of curbing the threat of public disorder.

III. Magentonia’s prosecution and conviction of UConnect under the PIDPA did not violate Article 19 of the ICCPR. First, it was provided by law under Sections 3 and 5 of the PIDPA. Second, it pursued a legitimate aim, which was to prevent the victimization of the Cyanisian refugees due to the proliferation anti-refugees posts in UConnect. Third, it was necessary in a democratic society as (i) the publications were able to incite hostility and discrimination, (ii) UConnect was an active intermediary, (iii) UConnect did not expeditiously remove the 26 May 2018 post which amounted to hate speech, nor took any action to remove or verify the 30 May 2018 post which amounted to false propaganda; and (iv) the fine imposed on UConnect was proportiona
ARGUMENTS

I. MAGENTONIA’S DECISION NOT TO GRANT RAS ANY RECTIFICATION, ERASURE OR BLOCKING OF SEARCH RESULTS DEPICTING THE 2001 CT STORY DID NOT VIOLATE ARTICLE 17 OF THE ICCPR

1. Magentonia’s objection against Ras’ application on therectification, erasure or blocking of search results depicting the 2001 CT Story is two-fold:1 (A) first, such application is inadmissible under Article 17 of the ICCPR; and alternatively, even if admissible, (B) Magentonia’s interference with Ras’ right to privacy was lawful and non-arbitrary.

A. Ras’ application is inadmissible under Article 17 of the ICCPR

2. UConnect’s search results depicting the 2001 CT Story does not interfere with Ras’ right to privacy enshrined under Article 17 of the ICCPR2 because (i) the right to be forgotten is not a protected right; and alternatively, (ii) Magentonia has discharged its positive obligation to ensure its protection.

(i) The right to privacy does not incorporate the right to be forgotten

3. Privacy is a broad term not susceptible to exhaustive definition.3 Such right is commonly

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referred as the right to live privately away from unwanted attention\(^4\) or the “right to be left alone”.\(^5\) Private life encompasses the physical and psychological integrity of a person,\(^6\) and also activities of a professional or business nature.\(^7\)

4. The issue that arises is whether the right to privacy incorporates the right to be forgotten.

5. This emerging right first entered into international consciousness flowing from the Court of Justice of the European Union’s (CJEU) 2014 decision of *Google Spain v Costeja* affirming that individuals have the right to ask search engine to de-list links to third-party web pages containing their personal data “which are inaccurate, inadequate, irrelevant or excessive in relation to the purpose of processing”.\(^8\)

6. However, the decision arose in the peculiar context of EU jurisprudence. *First*, the CJEU was strictly applying the European Parliament’s Directive 95/46\(^9\) – the repealed predecessor of the

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\(^4\) Satakunnan (n 3) [130]; Smirnova v Russia Application App nos. 46133/99 and 48183/99 (ECtHR, 24 July 2003) [95].


\(^6\) Satakunnan (n 3) [130]; X and Y v the Netherlands App no. 8978/80 (ECtHR, 26 March 1985) [22].

\(^7\) Satakunnan (n 3) [130]; Niemietz v Germany App no. 13710/88 (ECtHR, 16 December 1992) [29].

\(^8\) Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González ECLI:EU:C:2014:317 [92]-[94].

\(^9\) Directive 95/46/EC of The European Parliament and of The Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31, art 12 & art 14; Google Spain (n 8) [3].
EU General Data Protection Regulation (GDPR).\textsuperscript{10} \textit{Second}, Article 8 of the Charter of Fundamental Rights of the European Union explicitly provides the ‘right to the protection of personal data’ \textit{in addition} to the right to privacy under Article 7.\textsuperscript{11} Hence, the EU recognizes personal data protection as a separate and distinct fundamental right.\textsuperscript{12}

7. EU data protection laws are starkly distinct from the American conception of privacy.\textsuperscript{13} The US Courts have consistently rejected the notion of the right to be forgotten.\textsuperscript{14} California is the only US state that has enacted legislation recognising such right – even then, such ‘Eraser Law’ is limited to only protecting minors, especially victims of pornography.\textsuperscript{15}


\textsuperscript{11} Google Spain (n 8) [1], [69], [74], [81], [97] & [99]; Charter of Fundamental Rights of the European Union [2000] OJ C364/01, art 7 & art 8.


\textsuperscript{14} Smith v Daily Mail Publishing Co. 443 US 97 (1979); Oklahoma Pub. Co. v Distr. Court 430 US 308 (1977); Landmark Communications, Inc. v Virginia 435 US 829 (1978); Bartnicki v Vopper 532 US 514 (2001); Gates v Discovery Communications Inc 34 Cal.4th 679, 21 Cal.Rptr.3d 663.

8. Furthermore, the ‘right to be forgotten’ has been rejected in numerous jurisdictions, including Canada,\textsuperscript{16} Brazil,\textsuperscript{17} Chile,\textsuperscript{18} Columbia,\textsuperscript{19} South Korea\textsuperscript{20} and Japan.\textsuperscript{21}

9. As recent as March 2017, the Special Rapporteur for Freedom of Expression for the Inter-American Commission of Human Rights concluded that ‘international human rights law does not protect or recognise the so-called ‘right to be forgotten’ in the terms outlined by the CJEU in the Costeja case’.\textsuperscript{22} In light of years of conflict, authoritarian regimes and gross human rights violations, “people want to remember and not forget”.\textsuperscript{23}

10. Indeed, until today, no regional human rights court – the Inter-American Court of Human Rights, the African Court of Human and People’s Rights, nor even the European Court of Human Rights (ECtHR) – has recognized the right to be forgotten.\textsuperscript{24}


\textsuperscript{17} No. 1.593.873 \textit{SMS v Google} (2016/0079618-1).

\textsuperscript{18} Supreme Court in ruling No. 76.421-2016 of November 22 2016; Supreme Court No. 11.746-2017 of 9 August 2017 [7].

\textsuperscript{19} T-4296509 Acción de tutela instaurada por Gloria contra la Casa Editorial El Tiempo [9.5].

\textsuperscript{20} Supreme Court in \textit{Decision 2014Da235080,} August 17, 2016.

\textsuperscript{21} Supreme Court ruled in a case decided on 31 January 2017 (cited in the Written Observations of Article 19 and others, \textit{Google Inc v Commission nationale de l’informatique et des libertés (CNIL),} Case C-507/17, 29 November 2017 [28].

\textsuperscript{22} Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, \textit{Standards for a Free, Open and Inclusive Internet} (15 March 2017) [132].

\textsuperscript{23} Special Rapporteur for Freedom of Expression (n 22) [34].

\textsuperscript{24} Written Observations of Article 19 (n 21) 29 November 2017, [29].
11. Hence, due to the paucity of consistent state practice, the right to be forgotten is not a protected right falling within the ambit of Article 17 of the ICCPR.

(ii) Alternatively, Magentonia had discharged its positive obligation to protect Ras’ right to be forgotten

12. Article 17 construed in tandem of Article 2(1) of the ICCPR imposes upon Magentonia both negative and positive obligations. Positive obligation necessitate the adoption of an adjudicatory and enforcement framework to secure respect for privacy even in the sphere of the relations of individuals between themselves from unlawful private actions.

13. In discharging positive obligations, States enjoy a wider ‘margin of appreciation’ where there is no international consensus as to the relative importance of the interest at stake, and where they are required to strike a balance between competing private and public interests.

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26 ICCPR, (n 2) art 2; UN Human Rights Committee (HRC), CCPR General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13 [8]; General Comment No. 16 (n 1) [1]; U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (2013) [24] – [25].

27 General comment no. 31 (n 26) [6] & [80]; Hämäläinen v Finland [GC] App no. 37359/09 (ECtHR, 16 July 2014) [63]; Airey v Ireland App no. 6289/73 (ECtHR, 9 October 1979) [33]; Marckx v Belgium, App no. 6833/74 (ECtHR, 13 June 1979) [31]; X and Y (n 6) [23]; Söderman v Sweden, Application no. 5786/08 (ECtHR, 12 November 2013) [78]; Von Hannover No.1 (n 5) [57]; Stubbings and Others v the United Kingdom, App no. 22083/93; 22095/93 (ECtHR, 22 October 1996) [61]-[62]; Mosley v The United Kingdom App no. 48009/08 (ECtHR, 10 May 2011) [105]; Von Hannover No.2 (n 5) [98].

28 Hämäläinen v Finland (n 27) [67], 75; X and Y (n 6) [44]; Christine Goodwin v the United Kingdom, App no. 28957/95 (ECtHR, 11 July 2002) [85]; Von Hannover No.1 (n 5) [82]; A. v Norway App no. 28070/06 (ECtHR, 9 April 2009) [66]; Armonienė v Lithuania App no. 36919/02 (ECtHR, 25 November 2008) [38].

29 Hämäläinen v Finland (n 27) [67]; Fretté v France, App no. 36515/97, (ECtHR, 26 February 2002) [41]; Evans v the United Kingdom, App no. 6339/05 (ECtHR, 7 March 2006) [77]; Odièvre v France, App no. 42326/98 (ECtHR, 13 February 2003) [44]-[49]; S.H. and Others v Austria [GC] Application no. 57813/00 (ECtHR, 3 November 2011) [94]; Dickson v The United Kingdom App no. 44362/04 (ECtHR, 4 December 2007) [78]; Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich Judgement of the Court of 12 June 2003, C-112/00
14. Since there is no international consensus on the ‘right to be forgotten’ and the subject matter of the 2001 CT Story involves elements of public interest, the Magentonian authorities are best positioned to decide whether the search results should be rectified, erased or blocked from UConnect under Section 22 of the PIDPA and Article 10 of the Magentonian Constitution.

15. Since the Magentonian IDPC and High Court had assessed Ras’ request in accordance to due process, Magentonia had satisfied its positive obligation to respect Ras’ right to privacy.

B. Alternatively, Magentonia’s interference with Ras’ Right to Privacy under Article 17 of the ICCPR was lawful and non-arbitrary

16. Although Article 17 does not explicitly stipulate restrictions, the test of ‘unlawfulness’ and ‘arbitrariness’ is also subject to a three-part inquiry, namely whether the interference: (i) is provided by law; (ii) in accordance with the provisions, aims and objectives of the ICCPR; and (iii) reasonable in the particular circumstances.

(i) Magentonia’s decision was provided by law

17. An interference is ‘provided by law’ when it has a basis in domestic law, and that such law is

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CJEU; Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, Judgement of the Court of 14 October 2004, C-36/02.


31 Fact Pattern, [4.7].

32 X and Y (n 6) [24]; and Odièvre v France (n 29) [46].


accessible to the public and foreseeable as to its effects.\(^{35}\)

\[a)\] **The PIDPA was accessible**

18. A law is accessible when citizens are able to have adequate indication of the legal rules applicable to a given case.\(^ {36}\)

19. Since Ras is a naturalized Magentonian citizen since 2011,\(^ {37}\) he would have been well aware of the passing of the PIDPA in 2016.

\[b)\] **Magentonia’s decision to not grant Ras’ request was foreseeable**

20. The element of foreseeability means that the law must be formulated with sufficient precision\(^ {38}\) to enable a person to reasonably foresee the consequences which a given action may entail.\(^ {39}\)

However, those consequences need not be foreseeable with absolute certainty, as the law

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\(^{35}\) Delfi AS v Estonia [GC] App no. 64569/09 (ECtHR, 16 June 2015) [120]; VgT Vereingegen Tierfabriken v Switzerland App no. 24699/94 (ECtHR, 28 June 2001) [52]; Rotaru v Romania App no. 28341/95 (ECtHR, 2000) [52]; Gawęda v Poland App no. 26229/95 (ECtHR, 14 March 2002) [39]; Maestri v Italy App no 39748/98 (ECtHR, 17 February 2004) [30].

\(^{36}\) Sunday Times v United Kingdom App no 6538/74 (ECtHR, 26 April 1979) [49]; Groppeara Rodio AG and Others v Switzerland App no. 10890/84 (ECtHR, 23 March 1990) [68]; Silver and Others v The United Kingdom App nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75 (ECtHR, 25 March 1983) [88]; MM v United Kingdom App. No. 24029/07 (ECtHR 13 November 2012) [193].

\(^{37}\) Fact Pattern, [2.2].


\(^{39}\) The Sunday Times (n 36) [49]; Couderc and Hachette Filipacchi Associés v France App no 40454/07 (ECtHR, 10 November 2015) [31]; Malone v The United Kingdom App no 8691/79 (ECtHR, 2 August 1984); Miller v Switzerland, App no 10737/84 (ECtHR, 24 March 1988); Liberty and Others v The United Kingdom App no. 58243/00 (ECtHR, 1 July 2008) [59].
cannot be excessively rigid and must be able to evolve with changing circumstances.\footnote{Delfi (n 35) [121]; Lindon and others v France App no 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41]; Centro Europa 7 Srl v Italy App no 38433/09 (ECtHR, & June 2012) [141].}

21. \textit{First}, Section 22 of the PIDPA mirrors the GDPR regime\footnote{Fact Pattern, [4.6].} by explicitly recognising “the right to obtain from a data controller the rectification, erasure or blocking of data which is irrelevant, incomplete or inaccurate”.\footnote{PIDPA, s 30; Fact Pattern, [4.6].}

22. \textit{Second}, the ‘right to be forgotten’ under the PIDPA is subject to the universal exception of ‘public interest’\footnote{Regulation (EU) 2016/679 (n 10) art 17.} akin to the GDPR\footnote{Regulation (EU) 2016/679 (n 10) art 17.} and various EU domestic data protection legislations.\footnote{UK Data Protection Act 2018, s 15 & Schedule 2, Part 1; Federal Data Protection Act 2017 of Germany; Data Protection Act 2018 of Austria, s 7.}

23. \textit{Third}, the PIDPA also provides effective procedural remedies\footnote{ICCPR (n 2) art 2(3); Posevini v Bulgaria App no 63638/14 (ECtHR, 19 January 2017) [84]; İrfan Güzel v Turkey App no. 35285/08 (ECtHR, 7 February 2017) [94]-[99]; Roman Zakharov v Russia [GC] App no. 47143/06 (ECtHR, 4 December 2015) [233].} and does not constitute unfettered discretion that would impair the right to privacy\footnote{UN Human Rights Committee (HRC), \textit{CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9 [13]; Observer and Guardian v The United Kingdom App no. 13585/88 (ECtHR, 26 November 1991) [65]; The Sunday Times (n 36) [63]; Huvig v France App no. 11105/84 (ECtHR, 24 April 1990); Kruslin v France App no. 11801/85 (ECtHR, 24 April 1990) [33].} as it allows parties aggrieved by the decision of the IDPC to appeal to the Magentonian High Court.\footnote{Fact Pattern, [4.6].}

24. Hence, Magentonia’s refusal to grant Ras’ request was not only foreseeable, but also done in
pursuance to the rule of law.\textsuperscript{49}

\textit{(ii) Magentonia’s decision pursued a legitimate aim}

25. The permissible restrictions under the ICCPR are to protect national security, public order, public health or morals, and to respect the rights and reputation of others.\textsuperscript{50}

26. The Magentonian High Court justified the retention of the search results not only on the ‘public interest’ exception in Article 7 of the Magentonian Constitution,\textsuperscript{51} but also in light of “UConnect users’ freedom to receive information, as guaranteed by Article 10 of the Magentonian Constitution”.\textsuperscript{52} Hence, its decision pursued a legitimate aim.

\textit{(iii) Magentonia’s decision was reasonable in the circumstances}

27. According to the ICCPR’s travaux préparatoires, the term ‘reasonableness’ in Article 17 means that any interference must be proportionate to the legitimate end sought.\textsuperscript{53}

\textit{a) The 2001 CT Story was a matter of public interest}

28. The press has the task of imparting such information and ideas on political issues and areas of public interest, whilst the public has a corresponding right to receive them.\textsuperscript{54}

\textsuperscript{49} General Comment No. 16 (n 1): Article 17 (Right to Privacy), [6]-[8]; \textit{Vukota-Bojici v Switzerland} App no 61838/10 (ECtHR, 18 October 2016), [67]-[68].

\textsuperscript{50} ICCPR (n 2), art 12(3), art 18(3), art 19(3), art 21 & art 22(2).

\textsuperscript{51} Fact Pattern, [4.6]

\textsuperscript{52} Fact Pattern, [6.1].

\textsuperscript{53} CCCPR General Comment No. 16 (n 1): Article 17 (Right to Privacy), [3]-[4]; \textit{Toonen} (n 34) [6.4] & [8.3]; \textit{Van Hulst} (n34) [7.6]; \textit{G v Australia} (n 34) [4.5] & [7.4].

\textsuperscript{54} \textit{Mavlonov and Sa’di v Uzbekistan} Communication No. 1334/2004 U.N. Doc. CCPR/C/95/D/1334/2004 [8.4]; \textit{Lingens v Austria} App no. 9815/82 (ECtHR, 8 July 1986) [41]; \textit{Bladet Tromsø and Stansaa}, App no. 21980/93 (ECtHR, 20 May 1999) [62]; \textit{Jersild v Denmark [GC]} App no. 15890/89 (ECtHR, 23 September 1994) [31].
29. Public interest is commonly defined as common values held by society, society’s best interest, a moral standard for public action and other things besides. The limits of acceptable criticism against politicians are wider than that of a private individual to ensure that the public has the means of discovering and forming opinion of politicians’ attitudes. The right to impart information on public interest, if done in good faith, should be protected regardless of damage done to affected individuals.

30. ‘Public interest’ is also recognised under the Magentonian Constitution and PIDPA.

31. The 2001 CT Story was of public interest, and not merely to satisfy the curiosity of a particular leadership on Ras’s private life. At that time, Ras was a candidate running for the upcoming parliamentary election and representing the ruling political party.

32. The ECtHR in Fuchsmann opined that “there was great public interest in corruption allegations” even if based on mere suspicion dating back 16 years ago. Here, since the 2001
CT Story concerned his alleged misappropriation of university funds during his previous tenure as a professor, the public has an interest to be informed about his character.

33. Further, the influx of Cyanisian refugees into Magentonia was a widely perceived threat to Magentonia’s economy. Ras, a former Cyanisian, even promised in his electoral campaign to fast-track Magentonizan citizenship to all Cyanisian refugees. The Magentonian public is entitled to appraise of immigration policies since they deeply affect society’s well-being.

b) Ras actively stayed in the public limelight

34. It is critical to consider the conduct of the person concerned prior to publication, and whether related information had already appeared in an earlier publication.

35. In February 2001, when the 2001 CT Story was initially published by The Cyanisian Times, Ras responded that he was a victim of persecution for his political opinions.

36. On 1 April 2018, when the 2001 CT Story was republished by Magentonian Mail, he again merely clarified that it was a false allegation, and reproduced his former university’s statement.

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64 Fact Pattern [1.2]; Clarifications [8].
65 Couderc (n 39) [99]; Ojala v Finland App no 69939/10 (ECtHR, 2 June 2014) [54]-[55]; Ruusunen v Finland App no 735779/10 (ECtHR, 14 April 2014) [49]-[50].
66 Fact Pattern [2.3].
67 Fact Pattern [2.3].
68 Couderc [103]; Barthold v Germany App no 8734/79 (ECtHR, 25 March 1985) [58]; Sunday Times (n 36) [66]; Satakunnan (n 3) [171].
69 Hachette Filipacchi AssociÉs (ICI PARIS) [52]-[53]; Sapan v Turkey App no. 17252/09 (ECtHR, 20 September 2011) [34]; Fuchsmann v Germany (n 63) [49].
70 Fact Pattern, [1.2].
on his full exoneration. He only requested for the republication to be removed, but not the original article. Consequently, the trending of public posts on Ras subsided.

37. The trending picked up again on 25 April 2018 when TakeBackMag200 posted a web link to the 2001 CT Story with the caption “you can’t erase history”. It is only at this point that Ras requested for the search results depicting the 2001 CT Story to be blocked or removed on UConnect for the first time.

38. However, such request is now redundant, and even counter-productive.

39. First, the passage of time naturally makes people forget inconsequential incidents, even if it involves criminal allegations. The only reason the 2001 CT Story kept resurfacing on UConnect was due to the new publications linking to the article. Hence, so long as such republication is removed, the 2001 CT Story would no longer linger in the public’s memory.

40. Second, an individual actively seeking the limelight denudes his own right to privacy. Ras could have requested the removal of the 2001 CT Story or de-listing from UConnect’s search results earlier. Instead, he chose to publicly rebut the allegations, attracting more attention to himself. As such, Ras now suffers from the paradoxical ‘Streisand effect’ – any further action

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71 Fact Pattern, [4.1].
72 Fact Pattern, [4.2].
73 Fact Pattern, [4.3].
74 Fact Pattern, [4.4].
75 Fact Pattern [4.5].
76 Superior Court of Justice, decision No. REsp. 1.335.153. 20 October 2013.
77 Fuchsmann v Germany (n 63) [49].
to censor the 2001 CT Story will inevitably entrench itself deeper into public consciousness.\textsuperscript{78}

c) \textit{U}Connect \textit{is not a ‘data controller’ in respect of its search functionality}

41. All data controllers are intermediaries, but not all intermediaries are data controllers.\textsuperscript{79} An intermediary may be a controller only in specific functions.\textsuperscript{80} For instance, Google is not a ‘controller’ in respect of its \textit{Blogger} platform.\textsuperscript{81}

42. In \textit{Google Spain}, the CJEU found Google to be a ‘controller’ for its search engine as its function consisted of “finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference”.\textsuperscript{82}

43. However, ‘external’ search engine operators like Google and Bing must be distinguished from

\begin{footnotesize}
\begin{enumerate}
\item Google Spain [41].
\end{enumerate}
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websites having ‘internal’ search engines.\textsuperscript{83} Indexing done by the former has a more significant impact on privacy – \textit{first}, by revealing a vast array of aspects of a person’s private life to create a detailed profile; and \textit{second}, by making such information ubiquitously accessible to \textit{all} Internet users.\textsuperscript{84}

44. UConnect is primarily a social media platform with a search functionality accessible \textit{only} to its users.\textsuperscript{85} Whilst search engine operators like Google employ a host of complex algorithms assessing a web-page’s relevancy on its own objective merits (\textit{i.e.} freshness of content and good user experience),\textsuperscript{86} UConnect’s functionality is influenced by subjective factors, exclusive to UConnect activities (\textit{i.e.} user preference and behavior, and popularity of posts integrating the web-page).\textsuperscript{87}

45. Hence, UConnect’s search functionality does not qualify as a ‘controller’ under the PIDPA.

\begin{itemize}
\item \textit{d) Deletion of all search results is not proportionate}
\end{itemize}

46. The principle of proportionality dictates that the least restrictive technical means must be

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\textsuperscript{83} Working Party, art 29, Guidelines on the Implementation of the Court of Justice of the European Union Judgment on ‘Google Spain and Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González’ C-131/12 26 November 2014 [18].

\textsuperscript{84} Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD) & Mario Costeja González [80] & [87]; Article 29 Working Party, Guidelines on the Implementation of the Court of Justice of the European Union Judgment on ‘Google Spain and Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González’ C-131/12, 26 November 2014, [5]; eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited (Jointed Cases C-509/09 and C-161/10) [2012] QB 654 [45]; NT1 and NT2 v Google LLC [2018] EWHC 799 (QB) [33].

\textsuperscript{85} Fact Pattern, [3.2] and [3.3].


\textsuperscript{87} Fact Pattern, [3.4]; Clarifications, [22].
\end{flushleft}
adopted when restricting content.\textsuperscript{88}

47. The CJEU in Google Spain ruled that “the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages”.\textsuperscript{89} The remedy granted was lesser than Mr. Costeja’s request to completely “prevent indexing of the information relating to him personally” so that it would “not be known to internet users”.\textsuperscript{90}

48. Hence, the ruling only ‘blocks’ search results obtained by searches on the individual’s name, and does not go so far as requiring complete deletion of all links to the web-page from the search engine’s indexes – the web-page is still accessible if different search terms are used.\textsuperscript{91}

49. The 2001 CT Story trended on the search results page for search terms including ‘Ras’, ‘Unger Ras’ and ‘Magentonia’.\textsuperscript{92} If Ras’ request to remove or block “\textit{all search results depicting the 2001 Cyanisian Times story}”\textsuperscript{93} is granted, the link to the 2001 CT Story will no longer show


\textsuperscript{89} Google Spain [88].

\textsuperscript{90} Google Spain [20].

\textsuperscript{91} Working Party, art 29 (n 83) [21].

\textsuperscript{92} Fact Pattern [4.3], [4.4].

\textsuperscript{93} Fact Pattern [4.5].
up even when searching the topic regardless of search terms.\textsuperscript{94} Such overbroad de-listing order “\textit{almost has much the same effect as deleting the original content}”.\textsuperscript{95}

50. Further, UConnect has the ability to “\textit{block search results in any country}”.\textsuperscript{96} Ras’ request to deletion would extend extraterritorially, affecting non-Magentonian users. Such sweeping deletion is currently fiercely contested in the CJEU Court between Google and France’s CNIL (at the time of writing, the case is awaiting decision expected to be delivered in December 2018).\textsuperscript{97} Various human rights NGOs find such global expansion of the right to be forgotten as an ‘\textit{inherently disproportionate interference with freedom of expression}’.\textsuperscript{98}

51. Hence, Ras’ request is an extremely excessive and intrusive measure.

\textsuperscript{94} Clarifications, [19].


\textsuperscript{96} Clarifications, [21].


\textsuperscript{98} Written Observations of Article 19 (n 21) [31].
II. THE SUSPENSION OF UCONNECT'S OPERATIONS DID NOT VIOLATE

ARTICLE 19 OF THE ICCPR

52. The right to freedom of expression\(^99\) under Article 19(2) of the ICCPR is not absolute.\(^{100}\) An interference to such right would be lawful if it (A) is prescribed by law, (B) pursues a legitimate aim, and (C) is necessary in a democratic society.\(^{101}\) The interim injunction order granted by the Magentonian High Court on 1 July 2018\(^{102}\) suspending UConnect’s operations in Magentonia fulfilled this three-part test.


\(^{100}\) General comment No 34 (n 88); Handyside v United Kingdom App no 5493/72 (ECtHR, 7 December 1976) [49]; Tae-Hoon Park v Republic of Korea Communication No 628/1995 U.N. Doc CCPR/C/57/D/628/1995 (1998) [10.3]; Perna v Italy App no 48898/99 (ECtHR, 6 May 2003) [38]; Benhadj v Algeria Communication No 1173/2003 U.N. Doc. CCPR/C/90/D/1173/2003 (2007) [8.10]; Stoll v Switzerland Application No 69698/01 (ECtHR, 10 Dec 2007) [87]; Hachette Filipacchi Associes v France App no 71111/01 (ECtHR, 12/11/2007 [40]; Mouvement Ralien Suisse v Switzerland App no 16354/06 (ECtHR, 13 July 2012) [48]; Animal Defenders International v United Kingdom App No. 48876/08 (ECtHR, 22 April 2013) [100]; Stephen Peter Gough v United Kingdom App No 49237/11 (ECtHR, 28 October 2014) [164].


\(^{102}\) Fact Pattern, [5.5].
A. Magentonia’s suspension of UConnect was prescribed by law

(i) The PIDPA was accessible

53. UConnect is headquartered in Magentonia and a recognized legal person under Magentonian Law.\(^{103}\) Hence, it should be aware of the PIDPA being passed in 2016.

(ii) Magentonia’s suspension of UConnect was foreseeable

54. The scope of the PIDPA was sufficiently precise for UConnect to reasonably foresee\(^{104}\) that enforcement actions could ensue if unlawful content appeared on its platform.

55. First, the term ‘person’ in Section 32 encompasses “incorporated bodies carrying out any business or other activity within the territory of Magentonia”.\(^{105}\)

56. Second, Section 3 and 5 of the PIDPA relate to grave offences prevalent in today’s modern digital era – ‘hate speech’ and ‘fake news’. The terms ‘advocacy of national, racial and religious hatred’ and ‘dissemination of false propaganda’\(^{106}\) are sufficiently precise for UConnect to anticipate the correlation between any suspicious content and such offenses.\(^{107}\)

57. Third, even if such terms carry an element of uncertainty\(^{108}\) or may be liable to more than one

\(^{103}\) Fact Pattern, [3.1].

\(^{104}\) Wingrove (n 38) [40]; Editorial Board (n 38) [51]– [52]; Dmitrievskiy v Russia App no. 42168/06 (ECHR, 3 October 2017) [78]; General Comment 34 (n 88) [25].

\(^{105}\) Fact Pattern, [5.5].

\(^{106}\) Fact Pattern, [5.5].


\(^{108}\) Jobe v the United Kingdom (dec.) App no. 48278/09 (ECHR, 14 June 2011) [8].
meaning, the interpretation and application of the PIPDA are questions of practice for the Magentonian courts to determine, including the imposition of injunctions.

58. *Fourth*, professional people, who exercise a high degree of caution in their occupation, are expected to take special care in assessing the risks of their activities. UConnect is the largest social media platform in Mangetonia, with an advertising revenue of USD 250 million in 2017. With such wide reach and high adoption, any Internet intermediary in the shoes of UConnect would reasonably anticipate that its users’ activities would attract enforcement measures.

**B. Magentonia’s suspension of UConnect pursued a legitimate aim**

59. Freedom of expression can be restricted for the respect of the rights and reputation of others, or the protection of national security, public order, public health or morals.

60. Section 3 of the PIDPA is an exact mirror image of Article 20 of the ICCPR. In essence, the provision is a “hate speech” law, which is prevalent in many liberal democracies, including

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109 Leyla Şahin v Turkey [GC] App no. 44774/98 (ECtHR, 10 November 2005) [91]; Gorzelik and Others v Poland [GC] App no. 44158/98 (ECtHR, 17 February 2004) [65].

110 Delfi (n 35) [127]; Centro Europa (n 40) [140]; Gorzelik and Others v Poland [67].

111 Krone Verlag GmbH & Co. KG v Austria App no. 34315/96 (ECtHR, 26 February 2002) [23]; News Verlags GmbH & Co.KG v Austria App no. 31457/96 (ECtHR, 14 December 2006) [43].

112 Delfi (n 35) [122]; Otchakovsky-Laurens and July v France [GC] App nos. 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41]; Cantoni v France App no. 17862/91 (ECtHR, 15 November 1996) [35]; Chaussy and Others v France App no. 64915/01 (ECtHR 29 June 2004) [43]-[45].

113 Fact Pattern, [3.1].

114 Fact Pattern, [3.7].

115 ICCPR (n 2), art 19(3).
Canada, Ireland, and UK. Such laws are critical to protect the rights of minority communities, including the right to life.

61. Section 5 of the PIDPA prohibits the “dissemination of false propaganda”. The insidious impact of social media disinformation has been felt worldwide, most notoriously in the US Presidential Election and UK Brexit referendum in 2016. Legislation prohibiting online falsehoods has been passed in Germany, while similar proposals are under Parliamentary review and public consultation in various jurisdictions including the UK and Singapore.

62. Here, the flood of anti-Cyanisian posts on UConnect in mid-2016 posed a serious risk to Magentonia’s electoral process. If left unchecked, hate speech coupled with false propaganda

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116 Canadian Criminal Code, s. 319.
118 United Kingdom Public Order Act 1986, s. 17 of 29A.
119 Special Rapporteur 2013 (n 26) [25]; Delfi (n 35) [48].
121 Singapore Ministry of Communications and Information and the Ministry of Law, ‘Deliberate Online Falsehoods: Challenges and Implications’, 5 January 2018, [16]-[24].
122 German Act to Improve Enforcement of Law in Social Networks (Network Enforcement Act) 2017.
124 Singapore Ministry of Communications and Information and the Ministry of Law, ‘Deliberate Online Falsehoods: Challenges and Implications’, 5 January 2018, [84].
125 Fact Pattern, [5.1], [5.3]-[5.5].
will entrench divisions within society, sow the seeds of racial and religious extremism, and erode public trust in democratic institutions and the media.\textsuperscript{126} Hence, enforcement action under the PIDPA was warranted.\textsuperscript{127}

C. Magentonia’s suspension of UConnect was necessary in a democratic society

63. The test of ‘necessity in a democratic society’ turns on the principle of proportionality – in that the measures taken by States must be proportionate to the legitimate aim pursued.\textsuperscript{128} The relevant factors include the context and extent of the publication,\textsuperscript{129} as well as the elements of due process and necessity of the suspension order.\textsuperscript{130}

(i) Context of publication

64. Context includes sensitive social and political background, tense security situation, or atmosphere of hostility and hatred.\textsuperscript{131} Threats to public order is not limited to public

\begin{footnotesize}
\begin{enumerate}
\item[S\textsuperscript{126}] Singapore Ministry of Communications and Information and the Ministry of Law, ‘Deliberate Online Falsehoods: Challenges and Implications’, 5 January 2018, [59]-[60].
\item[S\textsuperscript{128}] General Comment No 34 (n 88) [33]; \textit{Perna v Italy} (n 100) [38]; \textit{Nikula v Finland} App no 31611/962 (EChR, 1 March 2002) [47].
\item[S\textsuperscript{129}] Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, [29] (annexed to the Annual Report of the United Nations High Commissioner of Human Rights, A/HRC/22/17/Add.4, 11 January 2013).
\item[S\textsuperscript{130}] Manila Principles (n 88), Principles II, IV and V.
\end{enumerate}
\end{footnotesize}
disturbances, but also disruption to social structure.\textsuperscript{132}

65. In 2018, the plunge in the world price of natural gas, Magentonia’s core industry, resulted in widespread fears of economic recession among the citizens, as well as rising resentment against the Cyanisian refugees demonized by MPF politicians for taking away their jobs.\textsuperscript{133} In May 2018, the virulent attack peaked, as reflected by the high volume of trending anti-Cyanisian posts on UConnect.\textsuperscript{134} Such exigencies called for greater governmental oversight.

\textbf{(ii) Extent of publication}

66. The Internet provides an unprecedented platform that augments the freedom of expression.\textsuperscript{135} Intermediaries must not allow themselves to become a vehicle for the dissemination of hate speech and the promotion of violence, especially in situations of conflict and tension.\textsuperscript{136} The harm is even more acute as its content can be disseminated rapidly and widely, and persistently remain online.\textsuperscript{137}

67. Content published on mainstream or highly visited web pages have more extensive reach compared to the ones that have minimal readership.\textsuperscript{138} Since UConnect has an enormous user

\textsuperscript{132} Perincek v Switzerland App no. 27510/08 (ECtHR, 15 October 2015) [146].

\textsuperscript{133} Fact Pattern, [2.3].

\textsuperscript{134} Fact Pattern, [5.1] - [5.4].

\textsuperscript{135} Delfi (n 35)[110], Ahmet Yildirim v Turkey App no. 3111/10 (ECtHR, 18 December 2012) [48], Times Newspaper Ltd v the United Kingdom (nos. 1 and 2) App nos. 3002/03 and 23673/03 (ECtHR, 2009) [27].

\textsuperscript{136} Sürek (n 55) [60], [62] & [63]; Erdoganu & Ince v Turkey Application nos. 25067/94 and 25068/94 (ECtHR, 8 July 1999) [54].

\textsuperscript{137} Delfi (n 35) [110].

\textsuperscript{138} Savva (n 131) [79].
base in Magentonia (60% of population), the anti-Cyanisians posts can reach the majority of citizens in a blink of an eye. The speed of dissemination was alarming: the 26 May 2018 and 30 May 2018 posts ‘trended’ on UConnect within 24 hours of publication.

68. The extensive reach afforded by social media far supersedes the traditional press justifies a different approach in regulation. The unfair advantages of paid content on UConnect may even curtail, rather than promote, a free and pluralist debate amidst the election period. Hence, suspending UConnect’s service in Magentonia was a reasonable measure.

(iii) Due process of the suspension

69. Prior restraints of the media are permissible, so long as there is a legal framework to ensure tight control over the scope of any bans and effective judicial review to prevent abuses.

70. Whilst intermediaries are generally not responsible for third party content published on its platform, content restrictions may be imposed by an independent and impartial judicial authority. Such restrictions should be limited in geographical and temporal scope.

71. On 1 June 2018, the Magentonian High Court granted an injunction to suspend UConnect’s

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139 Fact Pattern, [3.1].
140 Fact Pattern, [5.4].
141 Editorial Board (n 38) [63].
142 Animal Defenders International (n 100) [111]-[112]; Centro Europa (n 40) [134].
143 RTBF v Belgium Application no. 50084/06 (ECtHR, 29 March 2011) [105] & [115]; Ahmet Yildirim (n 135) [64]; Association Ekin v France Application no. 39288/98 (ECtHR, 17 July 2001) [58]; Editorial Board (n 38) [55].
144 Manila Principles (n 88), Principle II.a.
145 Manila Principles (n 88), Principle II.b.
operations within Magentonia until the conclusion of trial. The trial proceeded expeditiously, with the High Court delivering its verdict on 10 July 2018. The suspension of UConnect only lasted for 1 month and 10 days, and only affected Magentonians but not users worldwide. Hence, the suspension complied with due process of law.

(iv) Necessity of the suspension

72. While restrictions must adopt the least intrusive measure, the suspension of UConnect’s operations was the only viable way to curb the threat of public disorder.

73. At the peak of TBM’s campaign in May 2018, there was a sudden, suspicious surge of new users subscribing to UConnect and immediately sharing and viewing TBM’s anti-refugee rhetoric. This raises concerns of malicious bots and trolls running rampant on UConnect, reminiscent of Russian agents weaponising social media to sow discord during the 2016 US Presidential Election.

74. Without a robust authentication system, UConnect would be ill-equipped to actively filter ‘fake’ users. Removal of content and termination of user accounts are ineffective remedial

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146 Fact Pattern, [5.5].
147 Fact Pattern, [6.2].
149 General Comment No 34 (n 88) [34].
150 PIDPA, s 5; Fact Pattern, [5.5].
151 Fact Pattern, [5.4].
153 Fact Pattern, [5.3].
measures, as new bots and content can be generated instantaneously.\textsuperscript{154}

75. Hence, in order to maintain the integrity of Magentonian’s electoral process\textsuperscript{155}, restricting the public’s access to UConnect was justified.


\textsuperscript{155} General Comment No. 34 (n 88) [37]; Kim v Republic of Korea Communication No. 968/2001 U.N. Doc. CCPR/C/84/D/968/2001 (2005) [8.3]; Animal Defenders (n 100) [111]; Bowman v the United Kingdom, 19 February 1998, Reports 1998-I; [41].
III. THE PROSECUTION AND CONVICTION OF UCONNECT DID NOT VIOLATE ARTICL 19 OF THE ICCPR

Magentonia’s prosecution and conviction of UConnect under Sections 3 and 5 of the PIDPA fulfilled the three-part test of legality, necessity and proportionality.

A. Magentonia’s prosecution and conviction of UConnect was prescribed by law

76. As adumbrated above, the PIDPA was formulated with sufficient precision for UConnect to reasonably foresee that content posted by its user may attract criminal liability.

B. Magentonia’s prosecution and conviction of UConnect pursued a legitimate aim

77. As adumbrated above, the criminal action taken against UConnect pursued a legitimate aim i.e. for the protection of the rights of others and public order.

C. Magentonia’s prosecution and conviction of UConnect was necessary in a democratic society

78. The prosecution and conviction of UConnect under Sections 3 and 5 of the PIDPA was necessary and proportionate, considering the nature of the anti-Cyanisian posts, as well as UConnect’s role in their dissemination.

(i) Content of publications

79. Offensive statements with the sole intent to insult and humiliate amounts to wanton

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156 Arguments, [54]-[58].

157 Arguments, [59]-[62].
denigration, and would fall outside the protection of free speech.\textsuperscript{158} A publication should not be construed solely in reference to one or more statements in isolation, but rather in light of its overall thrust.\textsuperscript{159}

80. Furthermore, heightened protection from attacks by insult or slander ought to be afforded to vulnerable minority groups stricken with a history of oppression or inequality and facing deep-rooted prejudices, hostility and discrimination,\textsuperscript{160} especially immigrants\textsuperscript{161} and native minorities.\textsuperscript{162}

81. The \textbf{26 May 2018} post hurled a plethora of offensive insults against the Cynasian refugees, such as “bottom feeders” (a derogatory term often associated with them), “thieves” and “fraudsters”.\textsuperscript{163} The post even accused them of treason and terrorism. Although there was no explicit call for violence,\textsuperscript{164} targeting such a vulnerable section of society with a long history of oppression and discrimination would further stigmatise and alienate them in the eyes of the populace. Worse still, they would even fear reprisals by angry mobs.

82. In \textbf{30 May 2018}, TBM published a second post claiming that a study by University of Magentonia revealed that the Cyanisian refugees would outnumber the Magentonia citizens by

\begin{footnotesize}
\textsuperscript{158} Savva (n 131) [68]; Skalka v Poland App no. 43425/98 (ECtHR, 27 May 2003) [34]; Magyar (n 101) [76].

\textsuperscript{159} Lewandowska-Malec v Poland App no. 39660/07 (ECtHR, 18 September 2012) [62].

\textsuperscript{160} Savva (n 131) [76].

\textsuperscript{161} Soulas (n 131) [36]-[41]; Féret v Belgium App no. 15615/07 (ECtHR, 16 July 2009) [69]-[73] & [78].

\textsuperscript{162} Balsytė-Lideikienė v Lithuania App no. 72596/01 (ECtHR, 4 November 2008) [78].

\textsuperscript{163} Fact Pattern, [5.1].

\textsuperscript{164} Dmitriyevskiy v Russia (n 104) [99]; Ibragim Ibragimov and others v Russia App nos. 1413/08 and 28621/11 (ECtHR, 28 August 2018) [94].
\end{footnotesize}
However, this was a bald-faced lie, shorn of any factual basis. More worryingly, it was calculated to build upon the false narrative from the first post which alleged that the Cyanisian refugees “want to form their own nation, kicking us out”.

83. Such inflammatory personal attacks against the Cyanasian refugees transcended the boundaries of acceptable debate and discussion. Incitement to hostility and discrimination does not in any way contribute to a discussion of public interest, hence should not be entitled to the protection of free speech.

(ii) UConnect is an active intermediary having substantial control over TBM’s posts

84. Internet intermediaries that host third-party content come in two forms: passive or active.

85. An intermediary is passive when its activities are merely technical, automatic and passive in nature. Examples include WhatsApp (private communications) and Dropbox (private database storage).

86. However, an intermediary is deemed active when it exercises a substantial degree of control
The test of substantial control relies on two key factors: (a) economic interest; and (b) exclusive technical means to regulate the content.

87. Several notable cases illustrate the distinction between these two types:

(a) In *L’Oreal SA*\(^{173}\), eBay’s featured allowed users to make a listing of offers on its website. At the same time, eBay utilized paid advertising provided by search engines to direct potential consumers to the offers. Hence, the CJEU held that eBay played an active role by optimizing the presentation of the offers for sale and promoting these offers.

(b) In *Delfi AS*\(^{174}\), the ECtHR held an online news portal liable for comments posted by third parties mainly because it retained the power to delete comments posted on its platform and had a direct economic interest in soliciting third party comments.

(c) In *Telecinco*\(^{175}\), the Spanish Court found that Youtube was not liable as an active intermediary because the ‘suggested videos’ function purely automated based on an objective criterion (user preference), hence did not amount to an editorial function.

88. Based on the test of substantial control, UConnect is deemed as an active intermediary.

89. *First*, UConnect employs a team of human reviewers to review the content reported by its

\(^{171}\) *Delfi* (n 35) [144].

\(^{172}\) *Delfi* (n 35) [144].


\(^{174}\) *Delfi v Estonia*.

users.\textsuperscript{176} \textbf{Second}, UConnect reserves the right to remove posts that violates its Community Standards\textsuperscript{177} and to terminate user accounts.\textsuperscript{178} \textbf{Third}, UConnect allows advertisers and users to pay to increase visibility of their posts on the feeds of other users.\textsuperscript{179} \textbf{Fourth}, the algorithm deployed\textsuperscript{180} on UConnect restricts user exposure to similar offensive and inaccurate content\textsuperscript{181} and information coherent to their existing views,\textsuperscript{182} hence impairing effective access to alternative information.

90. Hence, as an active intermediary, UConnect has a higher degree of responsibility in monitoring and removing any unlawful user content.

\textit{(iii) UConnect failed to expeditiously remove TBM’s posts}

91. As a general rule, intermediaries are immune from liability of content posted by third party users.\textsuperscript{183} However, upon having actual or constructive knowledge of illegal content published

\begin{thebibliography}{10}

\bibitem{176} Fact Pattern, [3.5].
\bibitem{177} Fact Pattern, [3.5].
\bibitem{178} Fact Pattern, [5.3].
\bibitem{179} Fact Pattern, [3.2.4].
\bibitem{180} Fact Pattern, [3.2.2] & [3.4]; Clarifications, [15].
\bibitem{183} Manila Principles (n 88), Principle I(b); The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization Of American States (OAS), Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR), Special Rapporteur on Freedom of Expression and Access to Information, Article 19, Global Campaign for Free Expression, and the Centre for Law and Democracy, \textit{“Joint Declaration on Freedom of Expression and the Internet,”} June 1, 2011, [2].

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on its platform, they have a duty to expeditiously remove the illegal content.\textsuperscript{184}

92. In \textit{Delfi}, the ECtHR justified the duty being borne by intermediaries because “\textit{the ability of a potential victim to contentiously monitor the Internet is more limited than the ability of a large commercial internet news portal to prevent or rapidly remove such comments}.”\textsuperscript{185} Such a duty arises even in the absence of any notice from victims or third parties.\textsuperscript{186}

93. Although there is no universal time frame as to what amounts to ‘expeditious’,\textsuperscript{187} removal within 24 hours appears to be the emerging norm. The prime example is Germany’s \textit{Act to Improve Enforcement of Law in Social Networks} which requires social media platforms to “\textit{remove or block access to content that is manifestly unlawful within 23 hours of receiving the complaint}.”\textsuperscript{188} Although non-binding, the 24-hour limit recommended by the European Commission’s \textit{2016 Code of Conduct on Countering Illegal Hate Speech}\textsuperscript{189} has been complied with by leading tech companies, such as Facebook, Twitter and Youtube.\textsuperscript{190}

94. The nature of content is also a critical factor. Where a content is manifestly unlawful (such as hate speech and incitement to violence), then immediate removal is imperative.\textsuperscript{191} In contrast,

\textsuperscript{184} Directive on Electronic Commerce (n 170) art 14; US Digital Millennium Copyright Act 1996, s 512(c)(1)(c); Magentonian Public Information and Data Protection Act 2016 (‘PIDPA’), s 3.

\textsuperscript{185} \textit{Delfi} (n 35) [158].

\textsuperscript{186} \textit{Delfi} (n 35) [159].


\textsuperscript{188} German Network Enforcement Act (n 122), s 3(2).

\textsuperscript{189} European Commission, ‘Code of Conduct on Countering Illegal Hate Speech Online’, 19 January 2018.

\textsuperscript{190} Věra Jourová, ‘Code of Conduct on Countering Illegal Hate Speech Online: First Results on Implementation’, December 2016.

\textsuperscript{191} \textit{Delfi} (n 35) [115] & [117].
where there is doubt or ambiguity as to a publication’s lawfulness (e.g. defamation), there is less urgency in removal.¹⁹²

95. Here, UConnect took 5 days to remove the 26 May 2018 post despite receiving numerous user complaints.¹⁹³ Its review team consulted with lawyers on its lawfulness, and yet waited for another 4 days before taking action.¹⁹⁴ Such delay was unreasonable and not expeditious, amounting to a violation of Section 3 of the PIDPA.

96. At this point, UConnect ought to have been put on notice over TBM’s activities, especially having consciously decided against banning or suspending its account.

97. Undeterred, TBM followed up with a less incendiary but equally ominous-sounding post on 30 May 2018. Although unreported, UConnect as a diligent economic operator should have been aware of the factual circumstances surrounding the veracity of the post.¹⁹⁵

98. First, TBM had been regularly posting numerous offensive posts since early May 2018.¹⁹⁶ Second, the 26 May 2018 post incident should have put the Applicant on alert, to closely monitor TBM on any subsequent reappearance of controversial content.¹⁹⁷ Third, UConnect

¹⁹² *Magyar* (n 101) [80]-[82] & [91].

¹⁹³ Fact Pattern, [5.1]-[5.2].

¹⁹⁴ Fact Patter, [5.2].

¹⁹⁵ *CG v Facebook Ireland Limited* [2016] NICA 54 [72]; Johanna Tuohino, ‘Liability of Intermediary Service Providers in the EU: Review of current developments’ (Masters, University of Lapland, 2013) [18]–[19]; *L’Oreal* (n 173) [120]; T-336/07 *Telefónica v Commission* [2012] [323].

¹⁹⁶ Fact Pattern, [5.1].

¹⁹⁷ Tomáš Elbert, ‘Notice and Take Down, On Certain Aspects of Liability of Online Intermediaries’, (Masters, Charles University in Prague,2011) [36]; Reference for a preliminary ruling from High Court of Justice (England and Wales), Chancery Division, made on 12 August 2009 — *L’Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L’Oréal (UK) Limited v eBay International AG, eBay Europe SARL, eBay*
could have employed mechanism to effectively detect infringing content, such as automated word-based filters on specific terms (e.g. ‘Cyanisian’, ‘refugees’) but failed to do so. Fourth, the 30 May 2018 post ‘trended’ on the live feeds and became the most viewed post for 3 days. And yet, UConnect took no action to remove the post, or any steps of verification. Such failure amounts to a ‘reckless dissemination of false propaganda’ in violation of Section 3 of the PIDPA.

(iv) The fine imposed on UConnect was proportionate

99. The use of criminal sanctions to combat hate speech and falsehoods is not in itself disproportionate.

100. The Magentonian High Court punished UConnect for both offenses under Sections 3 and 5 of the PIDPA with a fine of USD 100,000. The entire quantum amounts to merely 0.04% of UConnect’s advertising revenue of USD 250 million in 2017 – a drop in the ocean far from being excessive and disproportionate.

(UK) Limited, Stephan Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi [2009] OJ C267/40 [9(c)].

198 Delfi (n 35) 154]-[156].

199 Fact Pattern, [5.4].

200 Fact Pattern, [6.2.2].

201 Radio France (n 107) [40]; Lindon, Otchakovsky-Laurens and July v France [GC] App nos. 21279/02 and 36448/02 (ECtHR, 22 October 2007) [59]; Długolecki v Poland App no. 23806/03 (ECtHR, 24 February 2009) [47]; Saaristo and Others v Finland App no. 184/06 (ECtHR, 12 October 2010) [69]; Pedersen and Baadsgaard v Denmark [GC] App no. 49017/99 (ECtHR, 17 December 2004) [93]; Bozhkov v Bulgaria App no. 3316/04 (ECtHR, 19 April 2011) [53].

202 Fact Pattern, [6.3].

203 Fact Pattern, [3.6].
PRAYER

For the foregoing reasons, the Respondent respectfully request this Honorable Court to adjudge and declare the following:

1. Magentonia’s decision not to grant Unger Ras any rectification, erasure or blocking of search results depicting the 2001 Cyanisian Times story did not violate Article 17 of the ICCPR.

2. Magentonia’s suspension of UConnect’s operations under the PIDPA did not violate Article 19 of the ICCPR.

3. Magentonia’s prosecution and conviction of UConnect under the PIDPA did not violate Article 19 of the ICCPR.

Respectfully submitted 7 November 2018,

701R,

Counsel for Respondent.