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Case No: A2/2017/3115/6

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Nicol J: [2017] EWHC 2619 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/06/2019

Before :

LORD JUSTICE UNDERHILL
VICE-PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION
LADY JUSTICE SHARP
and
SIR RUPERT JACKSON

- -

Between :

DR. SALMAN BUTT	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

LORNA SKINNER (instructed by **BINDMANS LLP**) for the **Appellant**
AIDAN EARDLEY (instructed by the Treasury Solicitor) for the **Respondent**

Hearing date: 20 October 2018

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Lady Justice Sharp:

Introduction

1. On 17 September 2015, the Home Office published on the www.gov.uk website a Press Release entitled "PM's Extremist Task Force: Tackling Extremism in Universities and Colleges Top of the Agenda" (the Press Release). Amongst the individuals named in the Press Release was Dr Salman Butt, the Chief Editor of a website called Islam21C.

2. The Press Release, which we were told was still available on the website, says as follows (paragraph numbers have been added to reflect the numbering used by the parties and the court below: paragraph 4 is not complained of):

> "PM's Extremism Taskforce: tackling extremism in universities and colleges top of the agenda.
>
> From:
>
> Prime Minister's Office, 10 Downing Street, Home Office, Department for Business, Innovation and Skills, The Rt Hon David Cameron MP and Jo Johnson MP
>
> ...
>
> **A new duty to stop extremists radicalising students on campuses is scheduled to come into force by 21 September 2015**
>
> **…**
>
> 1. For the first time, universities and colleges in the UK will be legally required to put in place specific policies to stop extremists radicalising students on campuses,…as part of the government's plans to counter extremism.
>
> 2. The updated Prevent duty guidance, scheduled to come into force at all UK higher and further education institutions by 21 September, requires establishments to ensure they have proper risk assessment processes for speakers and ensure those espousing extremist views do not go unchallenged…
>
> 3. Last year at least 70 events featuring hate speakers were held on campuses, according to the government's new Extremism Analysis Unit, established to support all government departments and the wider public sector to understand extremism so they can deal with extremists appropriately…
>
> 4. Prime Minister David Cameron said:
>
> > 'I said in July that tackling extremism will be the struggle of our generation, one which we will defeat if we work together.
> >
> > All public institutions have a role to play in rooting out and challenging extremism. It is not about oppressing free speech or stifling academic freedom, it is about making sure that radical views and ideas are not given the

oxygen they need to flourish. Schools, universities and colleges, more than anywhere else, have a duty to protect impressionable young minds and ensure that our young people are given every opportunity to reach their potential. That is what our one nation government is focused on delivering.'

5. As part of this work, the Universities Minister, Jo Johnson has written to the National Union of Students to remind them of their responsibilities in preventing radicalisation and challenging speakers. In the letter he says:

'Universities represent an important arena for challenging extremist views. It is important there can be active challenge and debate on issues relating to counter terrorism and provisions for academic freedom are part of the Prevent guidance for universities and colleges. It is my firm view that we all have a role to play in challenging extremist ideologies and protecting students on campus Ultimately, the Prevent strategy is about protecting people from radicalisation. It is therefore disappointing to see overt opposition to the Prevent programme…The legal duty that will be placed on universities and colleges highlights the importance that government places on this.'

6. The Business Secretary has also instructed the Higher Education Funding Council for England (HEFCE), as the lead regulator for higher education in England, to monitor universities' implementation and compliance with the duty. Continued failure to comply could ultimately result in a court order.

Notes to editors

7. The Extremism Analysis Unit (EAU) has been established to support all government departments and the wider public sector to understand extremism so they can deal with extremists appropriately. In 2014 there were at least 70 events involving speakers who are known to have promoted rhetoric that aimed to undermine core British values of democracy, the rule of law, individual liberty and mutual respect and tolerance of those with different faiths and beliefs, held on university campuses.

8. Queen Mary, King's College, SOAS and Kingston University held most events. Events included the hosting of 6 speakers that are on record as expressing views contrary to British values, including Haitham Al-Haddad, Dr Uthman Lateef, Alomgir Ali, Imran Ibn Mansur (aka 'Dawah Man'), Hamza Tzortis and Dr Salman Butt.

9. Institutions are already required to pay regard to their existing responsibilities in relation to gender segregation, as outlined in the guidance produced in 2014 by the Equality and Human Rights Commission. The Prevent Duty Guidance makes it a legal requirement (Section 29 of the Counter-Terrorism and Security Act 2015). The duty is about protecting people from the poisonous and pernicious influence of extremist ideas that are used to legitimise terrorism.

10. People committing terrorist-related offences while at a UK university:

- Erol Incedal, a law student at London South Bank University (LSBU), who was found guilty of possession of a bomb-making manual, in November 2014

- Afsana Kayum, sentenced in March 2015 to 18 months in jail, for possession of a record containing information useful in the commission of terrorism contrary to the Terrorism Act – Kayum was a law student at the University of East London (UEL) at the time of her arrest

11. People who have attended a UK university and been convicted of their role in terrorism and have likely been at least partially radicalised during their studies:

- Umar Farouk Abdulmutallab, convicted in 2012 of attempted murder and terrorism, after trying to bomb a passenger flight to Detroit in 2009 – during his time at UCL, he had repeatedly contacted extremists who were under MI5 surveillance;

- Roshonara Choudhry, who tried to assassinate the Labour MP Stephen Timms in May 2010 just weeks after dropping out of KCL because of its work with Israeli institutions and its research centre studying radicalisation

12. Radicalised foreign fighters who have studied in the UK:

- Aqsa Mahmood, a radiography student at Glasgow Caledonian University, who dropped out of her course and travelled to Syria in late 2013

- David Souaan, convicted, in December 2014, of preparing for terrorist acts – Souaan was a student at Birkbeck, University of London when he was arrested in May 2014 as he attempted to travel to Syria for a second time

- Rashed Amani, believed to have travelled to Syria in March 2014 – Amani had been enrolled on a Business Studies course at Coventry University

- Zubair Nur, reported to have travelled to Syria in March 2015, after it emerged that Royal Holloway, University of London had contacted his parents to inform them he had not attended lectures since January."

3. On 26 October 2016, Dr Butt issued proceedings in respect of the Press Release in the Administrative Court. Those proceedings included a private law claim for damages and related relief, together with public law claims for Judicial Review. In the public law claims Dr Butt challenged the lawfulness of the Government's revised Prevent Duty Guidance described in the Press Release, i.e. the guidance issued pursuant to section 29 of the Counter Terrorism and Security Act 2015. Dr Butt's claim for Judicial Review was subsequently dismissed by Ouseley J: see [2017] EWHC 1930 (Admin), a decision that was upheld, save in one limited respect, by the Court of Appeal (The Master of the Rolls, Sharp and Irwin LJJ): see [2019] EWCA Civ 256.

4. The private law claim (or the "Press Release claim" as it became known) included a claim for damages for libel for the publication of the Press Release, as well as claims for breach of statutory duty under section 4(4) of the Data Protection Act

1998 and under section 6(1) of the Human Rights Act 1998. These private law claims were transferred by consent to the Queen's Bench Division on 26 August 2016, to proceed as ordinary civil claims; and it is these proceedings, specifically, the claim for libel, with which this appeal is concerned.

The libel claim

5. In the Particulars of Claim for the purposes of his libel claim, Dr Butt attributed to the Press Release the following natural and ordinary meaning: *that [Dr Butt] is an extremist hate speaker who legitimises terrorism, is likely to radicalise students and from whose poisonous and pernicious influence students should be protected*. In her Defence, the Secretary of State denied that the Press Release bore that meaning, and contended that the words complained of meant and were understood to mean only that *Dr Butt is someone who has expressed views contrary to British values*.

6. The Secretary of State also relied on the defence of honest opinion pursuant to section 3 of the Defamation Act 2013 (the 2013 Act). The pleaded Particulars of honest opinion were that (i) insofar as it referred to Dr Butt, the Press Release was a statement of opinion, namely that Dr Butt was someone who has expressed views contrary to British values; (ii) the Press Release indicated the basis of the said opinion, namely the views which Dr Butt is on record as having expressed; and (iii) an honest person could have held the same opinion on the basis of one or more of a number of articles, Tweets and internet postings, which were written and published by Dr Butt prior to the publication of the Press Release (these articles etc. were specifically identified in the pleadings).

7. The Secretary of State pleaded in the alternative, that if the court found the Press Release bore the meaning contended for by Dr Butt or some variant of it, the Secretary of State would contend that in that meaning the Press Release was nonetheless a statement of opinion, the basis of which was indicated in the Press Release, and which an honest person could hold on the basis of Dr Butt's published articles (i.e. those already specified). Though not material to this appeal, the Defence further said that the single meaning rule does not apply to the defence under section 3 of the 2013 Act and it is accordingly sufficient for the Secretary of State to prove that the opinion defended by the Secretary of State is one which was capable of being conveyed by the Press Release, and the second and third conditions under section 3 of the 2013 Act were satisfied in relation to that opinion.

8. On 14 July 2017, at the first Case Management Conference, the Senior Master, Master Fontaine ordered the trial of three preliminary issues: (i) The natural and ordinary meaning of the statement complained of; (ii) Whether the statement of complained of was a statement of opinion; (iii) If opinion, whether the statement complained of indicated, in general or specific terms, the basis of the opinion.

9. Nicol J tried the preliminary issues on 17 October 2017. In a judgment handed down on 20 October 2017 (see [2017] EWHC 2619 (QB)) he found: (i) the natural and ordinary meaning of the Press Release to be that "*the claimant is an extreme hate speaker who legitimises terrorism and from whose pernicious and poisonous influence students should be protected."* (ii) the statement complained of was a

statement of opinion; and (iii) the statement complained of indicated in general terms the basis of the opinion, namely the views of Dr Butt which were in the public domain. The judge refused the Secretary of State's application for permission to appeal against his determination of the first preliminary issue and Dr Butt's application for permission to appeal against his determination of the second and third preliminary issues.

10. Bean LJ subsequently granted Dr Butt permission to appeal against the judge's determination of the second issue (that the statement complained of was opinion and not fact). Whilst he expressed real doubt about its arguability, he also adjourned to an oral hearing, with the appeal to follow, if permission was granted, the Secretary of State's application for permission to appeal against the judge's determination of the first issue (meaning). Dr Butt's further application for permission to appeal against the judge's determination of the third preliminary issue was refused.

Meaning

11. The relevant principles to be applied when determining meaning are well established. They were common ground in this appeal, as they were before Nicol J, and it is not suggested the judge misunderstood or mis-described them. The submission of the Secretary of State is that the judge applied them wrongly. Nonetheless it is helpful to refer briefly to the legal framework, and to a decision of the Supreme Court in *Stocker v Stocker* [2019] UKSC 17, handed down after we heard argument in this appeal.

12. The court must identify the notional single meaning that the statement complained of would convey to a hypothetical reasonable reader, who must be assumed to have read the whole of the statement: see *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65. This determination is a question of fact for the judge who must articulate the meaning found and give reasons: see for example, *Cruddas v Calvert* [2014] EMLR 5 at para 14.

13. As the Supreme Court has now affirmed in *Stocker v Stocker*, a convenient summary of the approach to be applied in order to arrive at the notional single meaning of the words complained of is to be found in paragraph 14 of the judgment of Sir Anthony Clarke MR in *Jeynes v News Magazine Ltd* [2008] EWCA, Civ. 130 as follows:

> "(1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any "bane and antidote" taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range

> of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation…"…(8) It follows that "it is not enough to say that by some person or another the words *might* be understood in a defamatory sense."

14. Some of these "delimiting" principles are derived from "capability" cases, that is, cases where the appellate court reviewed the determination of the range of meanings the words were capable of bearing, rather than the actual meaning of the words found by a judge, sitting alone. Thus, the seventh principle applies only where, unusually under modern procedures, the court is asked to determine what meaning the words are capable of bearing, rather than the meaning they actually bear. Further, the second principle is not an instruction to the judge: it describes a characteristic of the ordinary reasonable reader. Such readers will not always select the bad meaning, but nor will they always select the less derogatory meaning: see *Elliott v Rufus* [2015] EWCA Civ 121 at para 11, approving the observations of Tugendhat J in *Lord McAlpine v Bercow* [2013] EWHC 1342 at para 66. Nonetheless, with these modest adjustments, these principles continue to encapsulate the essence of the correct approach.

15. In this case, Dr Butt relies only on the natural and ordinary meaning of the words complained of. No evidence is therefore admissible on the issue of meaning; and while the court may have regard to the general knowledge of reasonable readers, (that is, "matters of universal notoriety" – that is to say, matters which any intelligent viewer or reader may be expected to know"; see *Fox v Boulter* [2013] EWHC 1435 at para 16) it may not take into account any material other than the statement complained of, and the context in which it appeared.

16. As for the standard of appellate review, in *Bukovsky v CPS* [2017] EWCA Civ. 1529 Simon LJ, with whom Peter Jackson and Gross LJJ agreed, did not accept that a heightened standard of review applied in 'meaning' appeals, and considered the test was simply whether the judge's determination was wrong: see paras 30 to 39. In *Stocker v Stocker* the Supreme Court considered the judge's decision on meaning had been vitiated by a legal error, and therefore decided the issue of meaning afresh. At paragraph 59, Lord Kerr JSC (with whom Lord Reed DPSC, Lady Black, Lord Briggs and Lord Kitchen JJSC agreed) said, obiter:

> "As to whether the appellate task needs to be described as one requiring caution, as Simon LJ suggested [in *Bukovsky*], I am doubtful. I would prefer to say that it calls for disciplined restraint. Certainly, the trial judge's conclusion should not be lightly set aside but if an appellate court considers that the meaning that he has given to the statement was outside the range of reasonably available alternatives, it should not be deterred from so saying by the use of epithets such as "plainly" or "quite" satisfied…if the appellate court would just prefer a different meaning within a reasonably available range, then it should not interfere."

17. In this case, the core of the argument advanced by Mr Eardley for the Secretary of State is that the only specific allegation made against Dr Butt, is that he has expressed views contrary to British values. This is because the reasonable reader when forming their view of what is being said about Dr Butt, will read the Press Release with a degree of attentiveness from beginning to end, and will understand from the context, that what is being said about him is in the only passage in which his name appears, viz. paragraph 8 of the Press Release (where it is said he is one of six speakers who were on record as expressing views contrary to British values); and in the preceding paragraph, paragraph 7, to which paragraph 8 is linked. That the reader would turn to this passage to find out what is really being said is supported by the fact that this is a press release. As reasonable readers will know from their general knowledge, a press release will typically initially announce a development in eye-catching terms, and then state with precision what is announced, further on, as here in the "Notes to Editors" section.

18. Although therefore paragraph 3 of the Press Release refers to "hate speakers" and "extremists" these wider terms are given greater precision in paragraph 8, where the wider expression comes down to espousing views contrary to British values. Furthermore, the words 'who legitimises terrorism…and from whose poisonous and pernicious influence students should be protected' appear in paragraph 9 of the Press Release, but not in relation to Dr Butt. By this stage, the Press Release has turned from the specific examples of speakers identified by the EAU and is explaining at a high level of generality the objective of the duty which is to be placed on Higher Education institutions. In this paragraph it is speaking of the ideas in relation to which those institutions must take certain measures. The reasonable reader would understand the difference between ideas, which are used to legitimise terrorism, and an individual, such as Dr Butt, who is was not being described as an apologist for, or an advocate of, terrorism.

19. Miss Skinner for Dr Butt cites what was said by Gray J in *Charman v Orion Publishing Group Ltd* [2005] EWHC 2187 (QB) at paragraph 11:

> "It appears to me to be particularly important where, as here, a judge is providing written reasons for his conclusion as to the meaning to be attributed to the words sued upon, that he should not fall into the trap of conducting an overly-elaborate analysis of the various passages relied on by the respective protagonists. The parties are entitled to a reasoned judgment but that does not mean that the court should overlook the fact that it is ultimately a question of the meaning which would be put on the words …by the ordinary reasonable reader…The exercise is essentially one of ascertaining the broad impression made on the hypothetical reader by the (words) taken as a whole."

20. Miss Skinner argues, it is readily apparent from reading the Press Release once, as the ordinary reasonable reader would do, that the meaning found by the judge is the one the words complained of bore. In context, it is clear that Dr Butt is identified as an extremist hate speaker who legitimises terrorism and from whose pernicious and poisonous influence students should be protected. The Secretary of

State's arguments to the contrary require the reader, contrary to principle, to engage in an elaborate linguistic analysis and to focus only on the passage in which Dr Butt is named, rather than upon the Press Release as a whole.

21. The judge carefully considered the arguments advanced by each side and decided he preferred those advanced for Dr Butt. In my view, his determination of meaning is unassailable, and I would refuse the Secretary of State's application for permission to appeal.

22. Contrary to the tenor of Mr Eardley's submissions, the judge obviously did consider paragraph 8 of the Press Release in its context. However the contextual argument does not assist the Secretary of State since the meaning she relies on can only be derived by reading paragraph 8 in isolation, something the ordinary reader would not do. I also consider it is artificial in this context to separate extremist ideas from those who espouse them, and in my opinion, that this is not something such a reader would do either.

23. I therefore agree with the judge's conclusions on the meaning issue, which were these:

> "31. Reading the press release as a whole an obvious link is drawn between paragraphs 3 and 7. Both speak of the EAU's analysis of 70 events at institutions of Higher Education. In my view the reasonable reader would understand the press release to be characterising the speakers at those events as 'hate speakers' and 'extremists'. The Claimant is among the speakers who are then identified in paragraph 8. The description of the Claimant's views as being 'contrary to British values' does not, in my view, detract from the point which Miss Skinner makes that, reading the press release as a whole, he was also being characterised as a hate speaker and an extremist.
>
> 32. I agree that paragraph 9 is talking about ideas, but, coming immediately after paragraph 8, the reasonable reader would draw the obvious inference that the Claimant is one of those who has promoted the ideas which are described as 'poisonous and pernicious' and in relation to which the new Guidance is directed."

24. It would of course be wrong to impose liability for the publication of a defamatory imputation that could only be arrived at by a careless reading of particular words, because that would be to found liability on the default of the reader rather than on that of the author or publisher; but there is a material difference between a careless reading on the one hand, and a careless impression given to ordinary readers by what is written on the other. To adopt the cautionary words used by Lord Devlin in *Lewis v Daily Telegraph* [1964] AC 234, [1963] 1 QB 340, at p. 235 (albeit used in the different factual context of distinguishing suspicion from guilt):

> "…it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that."

Honest opinion

25. The defence of honest opinion, or fair comment as it was known at common law, has long been regarded as an essential part of the protection afforded to freedom of expression in this jurisdiction. It was described as a "bulwark of free speech" by the Faulks Committee in 1975[1], and by Scott LJ in *Lyon v Daily Telegraph* [1943] 1 K.B. at p.753 as "one of the fundamental rights of free speech and writing…and … of vital importance to the rule of law on which we depend for our personal freedom." See further, the discussion of the development of the defence of fair comment by Lord Phillips PSC in *Spiller and anor v Joseph and ors* [2010] UKSC 53 at paragraphs 33 to 73 and by Paul Mitchell in The Making of the Modern Law of Defamation (2005), Ch 8.

26. The essence of the defence, as developed by the common law, and as now provided by statute, is the protection it affords for the honest expression of opinion of those with strong views and prejudices. The limits of the defence are therefore very wide. In *Campbell v Spottiswoode* (1863) 3 B & S 769, the case described by Lord Phillips in *Spiller* as perhaps the most important foundation stone of the modern law of fair comment, Crompton J said at p. 778:

> "Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, the proceedings in courts of justice or in Parliament, or the publication of a scheme or of a literary work."

27. In *Kemsley v Foot* both the House of Lords ([1952] AC 345), and the Court of Appeal ([1951 2 KB 34) emphasised the breadth and importance of the defence. In the Court of Appeal for example, Birkett LJ at pp. 46-7 explained the position in this way:

> "The defence of fair comment is now recognised to be one of the most valuable parts of the law of libel and slander. It is an essential part of the greater right of free speech. It is the right of every man to comment freely, fairly and honestly on any matter of public interest, and this is not a privilege which belongs to particular

[1] Report of the Committee on Defamation (Cmnd 5909) 1975.

> persons in particular circumstances. It matters not whether the comments are made to the few or to the many, whether they are made by a powerful newspaper or by an individual, whether they are written or spoken: the defence that the words are fair comment on a matter of public interest is open to all. When defendants who wish to rely upon this defence are deprived of it, the importance of the matter is manifest to all; and the character of the defence, as I have just summarized it, is not without importance in the consideration of the facts in the present appeal.
>
> It is now very well established that this defence of fair comment has a wide application. In *Merivale v. Carson* [*(1887)* 20 QBD 275 at 280][2] Lord Esher, M.R., made this plain in what is now a celebrated passage: "Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment ... mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this: would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said?"

28. And at p. 51, when considering the extent to which it was necessary to set out the facts on which the comment was based, he said:

> "I do not think it is possible to lay down any rule of universal application. If, for example, a defamatory statement is made about a private individual who is quite unknown to the general public, and who has never taken any part in public affairs, and the statement takes the form of comment only and is capable of being construed as comment and no facts of any kind are given, while it is conceivable that the comment may be made on a matter of public interest, nevertheless the defence of fair comment might not be open to a defendant in that case. It is almost certain that a naked comment of that kind in those circumstances would be decided to be a question of fact and could be justified as such if that defence were pleaded. But if the matter is before the public, as in the case of a book, a play, a film, or a newspaper, then I think different considerations apply. Comment may then be made without setting out the facts on which the comment is based if the subject-matter of the comment is plainly stated. This seems to me to accord with good sense and the true public interest."

[2] The passage was also cited in the summing up of Lord Hewart CJ in *Stopes v Sutherland* House of Lords, Printed Cases, 1924, p.375.

29. In that case, the plaintiff, Viscount Kemsley, complained that the defendant had defamed him with a headline, 'Lower than Kemsley' to an article which otherwise had no connection with the plaintiff. He said it suggested that he was a byword for poor journalism. The headline was conceded to be comment: see Lord Porter at p.354 to 355 and Lord Oaksey at p.361. The issue in the case was whether the basis of the comment was sufficiently indicated. The Court of Appeal and the House of Lords held that those three words were sufficient to indicate to readers that the subject matter of the comment was the publications owned by the plaintiff, who, by publishing his newspapers, had submitted work to the public and invited comment. See Lord Porter, at p.355. See further *Keays v Guardian Newspapers Ltd* [2003] EWHC 1565 at paragraphs 45 to 48, where Eady J considered one fact that weighed in favour of construing the observations sued on as comment, or being analogous to value judgments, was that on the face of the article, they were a response to a corpus of published work emanating from Miss Keays.

30. The defence of fair comment was abolished by section 3 of the 2013 Act, and replaced by the defence of honest opinion. The Explanatory Notes to section 3 of the 2013 Act state at paragraph 19 that the section broadly reflects the (common) law while simplifying and clarifying certain elements. There is, for example, no longer any requirement for the opinion to be on a matter of public interest.

31. The relevant parts of section 3 of the 2013 Act provide as follows:

"**Honest opinion**

(1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.

(2) The first condition is that the statement complained of was a statement of opinion.

(3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.

(4) The third condition is that an honest person could have held the opinion on the basis of—

(a) any fact which existed at the time the statement complained of was published;

…

(5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person ("the author"); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold that opinion.

…

(8) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed."

32. This appeal is concerned with the first condition (condition 1) in section 3(2) of the 2013 Act, that is, whether "the statement complained of was a statement of opinion." Paragraph 21 of the Explanatory Notes says this about the first condition:

> "21. Condition 1 … is intended to reflect the current law and embraces the requirement …that the statement must be recognisable as comment as distinct from an imputation of fact. It is implicit in condition 1 that the assessment is on the basis of how the ordinary person would understand it. As an inference of fact is a form of opinion, this would be encompassed by the defence."

33. The agreed position before the judge was that the common law principles developed in relation to that requirement remain applicable to the statutory defence. Further, though there was some difference of emphasis, there was no discernable difference between the parties as to what those principles were, or as to whether they were correctly summarised by the judge: see paragraphs 15 to 20 of the judgment below.

34. In *Clarke v Norton* [1910] VLR 494 Cussen J said at p. 499:

> "[Comment is] to be taken as meaning something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark or observation."

35. This classic dictum was cited with approval by Latham LJ in *Branson v Bower (No 1)* [2001] EMLR 32 at paragraph 12, and by Keene LJ in *Associated Newspapers Ltd v Burstein* [2007] EWCA Civ. 600: see paragraphs 12 and 22. In *Branson* it was held that the judge was entitled to conclude that a statement that the claimant's bid to run the National Lottery was motivated, not by charity, but by revenge and self-interest, was, in its context, one which a jury could reasonably regard as comment, because a reader could be in no doubt that the imputation was an inference drawn by the defendant from the facts set out in the article, even though the state of a person's mind is, for some legal purposes, unquestionably a fact.

36. In *Associated Newspapers Ltd v Burstein* the judge had ruled that it was a matter for the jury to decide whether the review of an opera composed by the claimant, made an allegation of fact against him, on the basis that it might attribute motivation behind the genesis of the opera. The Court of Appeal took the view that attribution of motive where it would be clear to the reader that the deduction was on the basis of the work being reviewed rather than personal experience of

the claimant, did not take the matter outside the protection of comment. At paragraph 22, Keene LJ, with whom Waller and Dyson LJJ agreed, said:

> "Insofar as the final sentence in the review might be said to be capable of being read as a statement of fact, it was patently intended as a summary of and a commentary on the factual description of the opera set out in the preceding part of the review…The final sentence in the review was patently drawing an inference from the facts which had been set out earlier in the review, and on the principles approved by the House of Lords in Kemsley v. Foot [1952] A.C. 345 it was unmistakeably comment."

37. As can be seen, the defence is not restricted to "such epithets as the commentator may apply to the subject matter commented upon", but can include inferences of fact drawn by the commentator. The matter is perhaps expressed too broadly in paragraph 21 of the Explanatory Notes, since this is often, but not invariably the case. Be that as it may, that comment can include inferences of fact is a general principle of very long standing: see the observations of Palles CB in *Lefroy v Burnside* (1879) 4 LR Ir 556 at p.566 and Field J in *O'Brien v Marquis of Salisbury* (1889) 54 JP, cited in successive editions of *Duncan & Neill* on *Defamation*. In *O'Brien* Field J said:

> "Comment may sometimes consist in a statement of fact, and may be held to be a comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to."

38. Though in her written argument, Miss Skinner refers to paragraph 114 of *Spiller* where Lord Phillips questioned, obiter, whether it was satisfactory that inferences of (verifiable) fact could be defended as comment, she does not suggest either there or in her oral submissions, that a statement that is verifiable cannot be defended as comment. In my view she was right not to do so. Parliament did not take the opportunity afforded by the enactment of the 2013 Act, to define opinion in a way which excludes inferences of fact or to thereby narrow the scope of the protection given to the expression of opinion by the common law. Further, as the learned editors of *Gatley* 12th edn, say at para 12.10, if the ability of an audience to recognise words as comment is key, then it is not obvious why the verifiability or otherwise of an inference should be important.

39. The ultimate determinant then is how the statement would strike the ordinary reasonable reader: see *Barron v Collins* at paragraph 13, citing *Grech v Odhams Press Ltd* [1958] 2 QB 275 – that is, whether the statement is discernably comment (to such a reader) in the sense described above. In that regard, the subject matter, the nature of the allegation and the context of the relevant words may well be important. See for example, *Branson v Bower* at paragraph 16; *Gatley on Libel and Slander*, 12th edition, para 12.11 and *British Chiropractic Association v Singh* [2011] 1 WLR 133 at paragraphs 22, 26 and 31. In *Singh* the

defendant had written an article highly critical of the BCA in which he had said that the BCA "claims that their members can help treat children with colic, sleeping and feeding problems …even though there is not a jot of evidence". The Court of Appeal (Lord Judge CJ, the Master of the Rolls and Sedley LJ) held the judge had been wrong to hold these were assertions of fact, not expressions of opinion. Instead, in the context, this was an evaluation of whether the scientific literature gave any worthwhile support to the claims, and it was thus, a value judgment or expression of opinion. At paragraph 31, Lord Judge CJ giving the judgment of the court said: "Our decision does not seek to collapse or erode the general distinction between fact and comment; it seeks to relate the distinction to the subject matter and context of the particular article and the dispute to which it relates".

40. The judge said this about the fact/opinion issue:

> **"**33. Miss Skinner argues that the words complained of were an assertion of fact and not opinion. She argues that the context was a press release and not a newspaper comment or editorial. Its purpose was to disseminate information rather than provide opinion. The reader would understand it to be factual in nature. The measures which the press release announced implied that the object of those measures and extremism were matters of fact which were capable of identification. Paragraph 7 was also couched as an assertion of fact, rather than opinion. The phrase in paragraph 8 that the Claimant is 'on record as expressing views contrary to British values' again suggests a factual statement about the Claimant's statements.
>
> 34. Mr Eardley submits that the press release was expressing an opinion on how the Claimant's views could be characterised. These were views which were 'on record' a phrase which he submitted would be understood as meaning in the public domain. As such, they were, like the publicly expressed views of Sarah Keays, a subject for comment by others. Mr Eardley argued as well that whether views conformed to British values, or were extremist was necessarily a matter of opinion and judgment. People might disagree about the characterisation, but they were inevitably value laden. The press release included the Claimant's name on the basis of the work of the EAU, but it was not the EAU which would have the task of making a definitive determination as to whether the Claimant was someone whose views triggered the new Prevent duty. That would be the task of the HEFCE, but even its role was an evaluative one. The source of the press release was the government, but that did not help the Claimant since a government publication (including a press release) could also include opinion.
>
> **Fact or opinion: conclusion**
>
> 35. In my judgment the words complained of by the Claimant were opinion. I agree with Mr Eardley's submissions. I was not persuaded by Miss Skinner's argument that the phrase 'on record'

> was ambiguous as to whether it meant publicly available, or on record with the EAU. The test is how that phrase would appear to the ordinary reader. In my view, such a reader would, as Mr Eardley argued, understand the term 'on record' to be a reference to the Claimant's publicly stated views. The press release was commenting or expressing an opinion on those views. That was the case in the immediate context in which the Claimant's name appeared in paragraph 8. The opinion (in that immediate context) was that the Claimant's views were contrary to British values. In my view that conclusion is even clearer in respect of the wider meaning of the words complained of for which the Claimant contends and which I have said the words did indeed bear. Thus, whether someone is a 'hate speaker', an extremist, or someone from whose ideas students need protection are all necessarily matters of opinion.
>
> 36. It is nothing to the point that the HEFCE may have to make a determination as to whether an institution has complied with its duties under the new guidance. First, I have to judge the words of the press release, not some hypothetical determination by the HEFCE. Next, any such determination by the HEFCE might itself involve a process of evaluation. In any case, the issue before me arises in the context of a private law action for libel. It is whether the condition in Defamation Act 2013 s.3(2) is satisfied, not whether a determination is one to which a decision maker could legitimately come as a matter of public law."

41. Dr Butt was given permission to appeal on two grounds. First, that the judge erred in principle, wrongly holding at paragraph 35, that whether someone is a hate speaker is "necessarily a matter of opinion"; further he wrongly failed to give any, or any proper consideration to the context in which the statement was published or how the statement would strike the ordinary reasonable reader. Second, that in making his determination that the statement was a statement of opinion not fact, the judge failed to strike the correct balance between Dr Butt's Article 8 right to reputation and the Secretary of State's Article 10 right to freedom of expression.

42. We are only concerned with the first ground. Miss Skinner did not pursue the second ground in the face of a preliminary objection by the Secretary of State that Dr Butt did not advance the "Convention" argument below; and had he done so, the judge would have had to resolve an underlying factual issue as to whether the publication of the Press Release engages Dr Butt's Article 8 rights, an issue which remains to be determined at the full trial.

43. Miss Skinner's essential submission, as it was to the judge, is that context is key in this case. The statement was contained in a press release issued by the Government to the media and the general public, the purpose of which was to provide information to the media and to the general public. The particular subject matter of the Press Release was law-making action being taken by the Government; and the statements about the legal requirements to put in place

specific policies to stop extremists, necessarily assume that extremists and extremism are measurable matters of fact (a message reinforced by the references to the Extremism Analysis Unit (the EAU)), and the regulator and to the fact that failures to comply could result in a court order. The statement about Dr Butt would therefore, in the context of the Press Release as a whole, strike the ordinary reasonable reader as a statement of fact about Dr Butt and this is what the judge should have found.

44. Mr Eardley submits the judge correctly summarised the relevant principles of law including the importance of the subject matter and context, and it is unthinkable that by the time he came to express his conclusions at paragraph 35, he would have forgotten them. The judge's view was not that a statement that someone is an extremist (etc.) is a statement of opinion, irrespective of context, but that it was necessarily so in the Press Release, because the statement was presented to the reader as the EAU's assessment or evaluation, reached by looking at Dr Butt's public pronouncements and then assessing how they conform to "British values." In that regard, whether a piece of writing or speech expresses views that conform to a given set of values is something that is obviously incapable of objective proof. It is a classic value judgment and would be seen as such by the reader. It is plainly a "deduction, inference, conclusion, criticism, remark or observation".

45. Like the judge, I consider Mr Eardley's submissions to be well founded.

46. The judge was plainly alive to the importance of context in considering whether a statement was opinion or not. He referred at paragraph 20 to the principle that the relevant context for the purposes of this defence is the publication containing the statement: see *Telnikoff v Mutusevitch* [1992] 2 AC 343; and *Gatley, 12th edition*, paragraphs 12.12 and 33.20. He accurately summarised the gravamen of Miss Skinner's argument in this connection at paragraph 33, and referred to the issue of context again at paragraphs 35 and 36. As Mr Eardley submits, it is not likely the judge will have overlooked the points made by Miss Skinner in arriving at his decision, and in my view, he did not do so.

47. The judge's view, to put it shortly, was that the statement about Dr. Butt in the Press Release was in its immediate and wider context, clearly an evaluative one. I agree with that conclusion and the judge's reasons for reaching it.

48. The EAU was not presented as a decision-making body, but an evaluative and informative one supporting Government departments, which had made an assessment of Dr Butt before the new relevant policy and guidance had been introduced. Like the judge, I am unpersuaded that the contextual points highlighted by Miss Skinner, neutralise or diminish the fundamentally evaluative nature of the exercise undertaken by the EAU, or how this would have struck the ordinary reader of the Press Release.

49. In this case, it was apparent from the Press Release that the 'label' applied to Dr Butt essentially involved a two-stage process of evaluation by the EAU, assessing Dr Butt's "on the record", views about matters touching on religious, social, political and moral issues and then comparing this assessment against the yardstick of "British values". The whole exercise was inevitably highly value-laden particularly where the reader was not given an exhaustive definition of the

yardstick of such values and where the partial definition was itself open textured. I should add that the identification of Dr Butt's publicly expressed views as the subject matter of the comment was relevant at this stage, as well as at the second stage (condition 2), as to which the judge said at paragraph 39:

> "Since the subject matter of the press release was the risks posed by speakers on university campuses, the reader would understand this to be a reference to the Claimant's publicly expressed views on social, religious, political or moral issues, since these are the kinds of matters which would be likely to be debated at a university or college. The allusion to the Claimant's publicly available views was brief, but then so too was the allusion to the works of Lord Kemsley in *Kemsley v Foot* and, as *Joseph v Spiller* made clear, it is not necessary for the defendant to have specified the foundation for his comment with such clarity that the reader can make his own assessment of the comment's validity."

50. There may be circumstances where the content of a government press release is purely factual. However, governments have views and opinions and often express them publicly. Whatever the expectations might be about the content of such a press release, what matters is not the position in the abstract, but what was actually said, and how what was said about Dr. Butt was presented.

51. Miss Skinner referred us to the case of *Begg v BBC* [2016] EWHC 2688 (QB). In that case, the only substantive defence to a libel claim in respect of an allegation that Dr. Begg was an extremist Islamic speaker who espoused extremist Islamic positions was one of truth; and the defence was successful. In my view, the fact that in different circumstances, a court might be required to determine such an allegation to be true or false takes Dr. Butt's case no further. In any event, as indicated above, the mere fact that a statement may in principle be capable of being objectively proved is not sufficient to take it outwith the protection afforded by the defence of honest opinion. In my judgment that would be the position here: that is, the statement about Dr. Butt would still be defensible as honest opinion, even if, contrary to my view, it was to be regarded as an inferential one of fact, rather than an evaluative judgment.

52. As it is however, for the reasons given, I would dismiss the appeal

Sir Rupert Jackson:

53. I agree.

Lord Justice Underhill:

54. I also agree.