Neutral Citation Number: [2017] EWHC 2619 (QB)

Case No: HQ16X03656

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/10/2017

Before :

MR JUSTICE NICOL

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Between :

Dr Salman Butt	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

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- -

Lorna Skinner (instructed by **Bindmans, LLP solicitors**) for the **Claimant**
Aidan Eardley (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 17th October 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE NICOL

Mr Justice Nicol :

1. The Claimant is the Chief Editor of Islam 21C, a publicly accessible website which describes itself as 'articulating Islam in the 21st Century'. It hosts articles written by the Claimant and others. He describes himself as holding conservative religious views, but not extremist views. He also says that he has spoken at a number of universities at the invitation of student Islamic societies.

2. In September 2015 the government published a press release ('the press release') with the title 'PM's Extremism Taskforce: tackling extremism in universities and colleges top of the agenda.' It referred to work by a government body called the Extremism Analysis Unit ('EAU') and government plans for a 'new duty to stop extremists radicalising students on campuses'.

3. The press release continued (the parties have helpfully added paragraph numbers which, while not in the original, make reference easier and which I also include):

> '[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, tackle gender segregation at events and support students at risk of radicalisation 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 educational 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. The guidance also sets out that institutions must have appropriate IT policies, staff training and student welfare programmes in place to recognise and respond to signs of radicalisation. This is all part of the government's one nation strategy to confront and ultimately defeat the threat of extremism and terrorism, top of the agenda today at the first Extremism Taskforce meeting of this Parliament chaired by the Prime Minister.
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> [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….'
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> [Paragraph 4 was a quotation from the Prime Minster, David Cameron about the importance of public institutions challenging extremism. Paragraph 5 had a quotation from the Universities Minister, Jo Johnson, who had written to the National Union of Students on the same subject].
>
> '[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.'

4. The press release then included a section headed 'Notes to editors' which in part said the following:

> '[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.
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> [8] Queen Mary College, 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.
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> [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.'

5. Paragraph 10 gave examples of people who had committed terrorist related offences while at a UK university. Paragraph 11 gave examples of people who have attended a UK university, had been convicted of their role in terrorism and who were likely to have been at least partially radicalised during their studies. Paragraph 12 named some radicalised foreign fighters who had studied in the UK.

6. The Claimant began proceedings in the Administrative Court challenging the lawfulness of the government's revised Prevent Duty Guidance (as referred to in the press release) as well as asserting private law remedies for libel, breach of statutory duty under the Data Protection Act 1998 and a claim under the Human Rights Act 1998. By a consent order dated 25th August 2016, the private law claims were transferred to the Queen's Bench Division to continue as a claim under CPR Part 7. As it happens, the remainder of the public law claim was dismissed by Ouseley J. on 26th July 2017 (see *R (Butt) v Secretary of State for the Home Department* [2017] EWHC 1930 (Admin), [2017] 4 WLR 154).

7. For the purposes of the libel claim, the Claimant's Particulars of Claim set out the terms of the press release and pleads that in their natural and ordinary meaning the words complained of meant and were understood to mean that,

> 'the Claimant is an extremist hate speaker who legitimises terrorism, is likely to radicalise students and from whose poisonous and pernicious influence students should be protected.'

8. In her defence the Defendant says that in their natural and ordinary meaning the words complained of meant and were understood to mean that

> 'the Claimant is someone who has expressed views contrary to British values.'

She does not admit that the words did, or were likely to, cause the Claimant serious harm and, accordingly, she does not admit that they were defamatory of him.

9. While this is the Defendant's primary position, her second line of defence relies on the defence of 'honest opinion'. Formerly known at common law as the defence of Fair Comment, it has now been replaced by the statutory defence in the Defamation Act 2013 s.3. The Defendant relies on the meaning just set out, but also seeks to defend as honest opinion, if 'the words bore the meaning contended for by the Claimant (or some variant thereof)'. The defence does not plead truth nor publication on a matter of public interest.

10. On 14th July 2017 Senior Master Fontaine ordered that there should be a trial of the following preliminary issues:

    i) The natural and ordinary meaning of the words complained of;

    ii) Whether the statement 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.

11. It was this trial which I heard on 17th October 2017.

The legal principles to be applied

12. There was little dispute of substance between the parties as to the legal principles which I should apply.

Meaning

13. The principles are captured by the well-known passage in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 at [14] where Sir Anthony Clarke M.R. said,

> '(1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naive 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 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 read the publication in question. (7) In determining the range of permissible defamatory meanings, the court should rule out any meaning which "can only emerge as the product 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. I add the following:

    i) My task is *not* to identify a range of permissible meanings (see *Jeynes* principle (7)), but to determine what meaning or meanings the press release in

fact had. However, while the end result of the exercise is more refined, the approach is still the same – see *Waterson v Lloyd* [2013] EWCA Civ 136; [2013] EMLR 17 at [17].

ii) In ordinary discourse, it is common to speak of the same words meaning different things to different people. The common law set its face against that. It gave juries (and now, most usually, judges) the task of determining *the* meaning which the words complained of bore. This, 'the single meaning rule' is now well established. The Defendant has pleaded that this rule has not been carried over into the statutory honest opinion defence. However, Mr Eardley on the Defendant's behalf did not ask me to rule on that contention at the present hearing. He was content for me to proceed on the basis that the 'single meaning rule' did continue to apply even in the new statutory context.

iii) No evidence is admissible on the issue of meaning, other than the publication itself.

iv) Both parties said that I could, and should take account of the context in which the words complained of appeared. However, since evidence is limited to the publication in question, the relevant context has to be only so much (if anything) as can be inferred about the context from the publication itself plus (so far as relevant) 'matters of universal notoriety … that is to say matters which any intelligent viewer or reader may be expected to know' – *Fox v Boulter* [2013] EWHC 1435 [16].

v) In determining the meaning of the words complained of, I am not confined to the alternatives put forward by the parties.

Fact or opinion

15. As I have said, the statutory defence is now contained in Defamation Act 2013 s.3. This begins as follows:

> '(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.'

16. This condition mirrors one of the conditions of the common law defence of fair comment, that the statement must be recognisable as opinion (or comment) as opposed to an imputation of fact. It has been held that in this regard the principles which the common law developed remain applicable – see *Barron v Collins* [2015] EWHC 1125 [13]-[15].

17. At [13] Warby J. cited what he had previously said in *Yeo v Times Newspapers Ltd.* [2014] EWHC 2853 (QB), [2015] 1 WLR 971 [88], namely,

> 'The statement must be recognisable as comment, as distinct from an imputation of fact: *Gatley on Libel and Slander* para 12.7. Comment is "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism,

> remark, observation etc": *Branson v Bower* [2001] EMLR 800, 12. The ultimate determinant is how the words would strike the ordinary reader: *Grech v Odhams Press Ltd* [1958] 2 QB 275, 313. The subject matter and context of the words may be an important indicator of whether they are fact or comment *Singh's* case, paras 26 and 31.'

18. *Singh*'s case was a reference to *British Chiropractic Association v Singh* [2010] EWCA Civ 350, [2011] 1 WLR 133. The defendant in that case had written an article in a newspaper that said the members of the British Chiropractic Association claimed that they could help children with various ailments even though 'there was not a jot of evidence' to this effect. Eady J. had held that this was an assertion of fact since it was either verifiable (that there was no evidence in support) or not. The Court of Appeal reversed his decision. The words complained of were to be understood as meaning that there was no worthwhile or reliable evidence in support of the beneficial effects and that was a value judgment to which the defence of fair comment could apply – see [26].

19. If the subject matter of the words complained of is a corpus of published work emanating from the Claimant, that is a factor which may tend to weigh in favour of the words being regarded as comment – see *Keays v Guardian Newspapers Ltd* [2003] EWHC 1565 (QB) at [48].

20. In deciding whether the words complained of are comment, it is permissible to look only at the publication itself – *Telnikokoff v Matusevitch* [1992] 2 AC 343 at 352, although the context of the words complained of within the publication is to be taken into account.

Reference to basis for opinion

21. I have already quoted Defamation Act 2013 s.3(1) and (2). Section 3(3) says,

> 'the second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.'

22. At common law, the defence of fair comment had also been subject to a broadly comparable requirement. In *Tse Wai Chun v Cheung* [2001] EMLR 777 the Hong Kong Final Court of Appeal had said, in the judgment of Lord Nicholls at [19], that,

> 'the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.'

23. However, this approach was rejected by the Supreme Court in *Joseph v Spiller* [2011] 1 AC 852. In the leading judgment of Lord Phillips, it was said that the purpose of the requirement was *not* to put the reader or hearer in a position to judge whether the comment was well founded, but to alert the reader to the subject matter of the comment. Lord Phillips said,

> '[101] There are a number of reasons why the subject matter of the comment must be identified by the comment, at least in general terms. The underlying justification for the creation of the fair comment exception was the desirability

> that a person should be entitled to express his view freely about a matter of public interest. That remains a justification for the defence, albeit that the concept of public interest has been greatly widened. If the subject matter of the comment is not apparent from the comment this justification for the defence will be lacking. The defamatory comment will be wholly unfocussed.
>
> [102] It is a requirement of the defence that it should be based on facts that are true. This requirement is better enforced if the comment has to identify, at least in general terms, the matters on which it is based. The same is true of the requirement that the defendant's comment should be honestly founded on facts that are true.
>
> [103] More fundamentally, even if it is not practicable to require that those reading the criticism should be able to evaluate the criticism, it may be thought desirable that the commentator should be required to identify at least the general nature of the facts that have led him to make the criticism. If he states that a barrister is "a disgrace to his profession" he should make it clear whether this is because he does not deal honestly with the court, or does not read his papers thoroughly, or refuses to accept legally aided work, or is constantly late for court, or wears dirty collars and bands.'

24. Lord Phillips considered that the approach of Lord Nicholls was not consistent with *Kemsley v Foot* [1952] AC 345 in which Viscount Kemsley had sued Michael Foot over an article the latter had written in the *Evening Standard*. The article had been scathing about the quality of journalism in papers owned by Lord Beaverbrook, but it had been published under the headline 'Lower than Kemsley'. 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. As Lord Phillips said in *Joseph v Spiller* at [94] it was sufficient

> 'where the comment identified the subject matter of the comment generically as a class of material that was in the public domain. There was no need for the commentator to spell out the specific parts of that material that had given rise to the comment.'

25. The parties were agreed that the *Joseph v Spiller* approach has been carried over to the requirement in s.3(3) of the 2013 Act, as the Explanatory Notes [22] make clear.

Potential interdependence of the issues

26. The Court of Appeal in *Singh* at [32] and Warby J. in *Barron v Collins* at [20]-[21] indicated that there may be a degree of interdependence in the issues of meaning and whether the words complained of are fact or comment. I have borne this in mind.

Meaning: the parties' submissions

27. Mr Eardley argued that the only reference to the Claimant was in paragraph 8 in which it was said that he was one of 6 speakers who were on record as expressing views contrary to British values. As is common with press releases, the document begins with bold, eye-catching terms. Thus, paragraph 3 referred to 'hate speakers' and 'extremists', but these wide terms are given greater precision (at least so far as the

Claimant is concerned) in paragraph 8 and, for him (and, presumably, the other 5 who are named) the wider expressions come down to espousing views contrary to British values.

28. 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 the Claimant. By this stage, Mr Eardley argues, 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 the Claimant, who was not being described as an apologist for, or advocate of, terrorism. Similarly, the reasonable reader would not understand the press release as saying that the Claimant was likely to radicalise students in the sense of encouraging them to support terrorism. 'Radicalisation' was used in the press release to refer to those who had gone on to commit terrorism related offences while at a UK university (paragraph 10) or who had been radicalised during their studies (paragraph 11) or who had studied in the UK and then gone to fight in support of terrorist causes abroad (paragraph 12). The reader would understand the reference to radicalisation as being the overall target of the policy rather than a description of the Claimant's activities. The Defendant argues that the Claimant has fallen into the error of taking words such as 'hate speaker' and 'extremist' in isolation, rather than reading the press release as a whole.

29. It was relevant that the Claimant was not the principal subject of the press release. His name did not feature in the headline or the main body of the press release, but only in the 'Notes to editors' section. It was also relevant that the press release was not saying that the speakers named in the 'notes to editors' should be prosecuted, reported to the police, or banned from speaking on campuses, rather that the institutions should have a proper risk assessment for such speakers and their views should not go unchallenged.

30. Miss Skinner for the Claimant submits that the Defendant's approach does not look at the words complained of as a whole and adopts an overly-elaborate analysis. The Claimant is plainly identified as an example of the 'hate speakers' against whom the new policy is aimed. The purpose of the press release is to explain the new duties which will be placed on Higher Education institutions and the importance of complying with them. It is artificial to separate the dangerous ideas from those who are espousing them. The press release firmly points the finger at the Claimant as one of the dangerous exponents of such ideas. It is unrealistic to expect readers of the press release to have a precise idea about the reach of the criminal law.

Meaning: conclusion

31. In my view Miss Skinner's submissions are to be preferred. 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.

Fact or opinion: the parties' submissions

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.

Whether the press release indicated the basis of the opinion: the parties' submissions and conclusion

37. The Defendant argues that the press release explained that the comment was founded on the matters for which the Claimant was already 'on record' which, as I have held, would be understood to mean in the public domain. Mr Eardley argues that this is sufficient to indicate in 'general terms' the basis of the opinion.

38. Miss Skinner submits that this leaves the subject matter of the comment wholly at large. She argues that it is akin to the example given by Lord Phillips in *Joseph v Spiller* at [103]. She submits that just as one would not know why the barrister in the example was a disgrace to the profession, so, too, the reader of the press release does not know on what basis the Claimant was being castigated as he was in the press release. It is not explained what the views expressed by the Claimant are being criticised or which British values they were in conflict with.

39. However, in my view there is not the analogy which Miss Skinner seeks to draw. From the context of the press release, it is clear that the reference is to the Claimant's publicly expressed views. 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. It is sufficient if he indicates the subject matter on which he is commenting. In my judgment the press release did that. It was not necessary, as Miss Skinner argued, for the press release to say one or more of what the views of the Claimant were which were being criticised, which British values were transgressed, where the record was or what that record was, before the defence of honest opinion would be available.

Conclusion

40. I return to the three matters which Senior Master Fontaine directed that this trial of preliminary issues should address.

The natural and ordinary meaning of the words complained of

41. The words complained of meant and were understood to mean that the Claimant is an extremist hate speaker who legitimises terrorism and from whose pernicious and poisonous influence students should be protected.

Whether the statement complained of was a statement of opinion

42. The statement complained of was a statement of opinion.

If opinion, whether the statement complained of indicated, in general or specific terms, the basis of the opinion

43. Yes, the statement complained of indicated in general terms the basis of the opinion, namely the views of the Claimant which were in the public domain.