Neutral Citation Number: [2006] EWCA Civ 17

Case No: A2/2005/0308

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
The Honourable Mr Justice Eady
[2004] EWHC 2786 QB

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2006

Before :

SIR ANTHONY CLARKE MR
LORD JUSTICE CHADWICK
and
LORD JUSTICE LAWS

- -

Between :

GEORGE GALLOWAY MP	**Claimant/ Respondent**
- and -	
THE TELEGRAPH GROUP LTD	**Defendant/ Appellant**

- -
- -

Richard Rampton QC and **Heather Rogers** (instructed by **Davenport Lyons**) for the Claimant
James Price QC and **Matthew Nicklin** (instructed by **Dechert**) for the Defendant

Hearing dates: 11 and 12 October 2005

- -

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

Sir Anthony Clarke MR:

Introduction

1. This is the judgment of the court. George Galloway is a well known Member of Parliament. In this action he sued *The Daily Telegraph* (or strictly The Telegraph Group Ltd) for damages for libel on the ground that he was defamed in its editions of 22 and 23 April 2003. The action was tried by Eady J without a jury and on 2 December 2004 he handed down a lengthy judgment running to 218 paragraphs. He held that the articles complained of were seriously defamatory of Mr Galloway. He noted that *The Daily Telegraph* did not seek to justify the defamatory statements as true and held that none of them was protected either by privilege at common law, whether under the principle in *Reynolds v Times Newspapers Limited* [2001] 2 AC 127 or otherwise, or by the defence of fair comment. He awarded damages of £150,000.

2. The judge refused permission to appeal. Permission was subsequently refused on paper by Keene LJ but was granted by Tuckey and Latham LJJ after oral argument on 18 April 2005. In this appeal it is accepted on behalf of *The Daily Telegraph* that the articles were defamatory but it is said that they were protected by privilege and that they were no more than fair comment so that the newspaper is not liable. Alternatively it is said that the damages were excessive.

The articles

3. The first article was published on 22 April 2003, which was just over a month after the invasion of Iraq by coalition forces and at a time when British and American troops were still heavily engaged in fighting. The articles were based on documents found by a *Daily Telegraph* reporter called David Blair in badly damaged government offices in Baghdad. On 21 April, the day before publication, Andy Sparrow of the *Telegraph* telephoned Mr Galloway and asked him for his reaction to a number of points arising out of the documents which Mr Blair had found in Baghdad. There is a transcript of that conversation which was before the judge and which we have seen.

4. It is impossible to set out in this judgment the whole of the material published on 22 and 23 April which is relevant or potentially relevant to the issues between the parties. However we will set out the key parts of it in much the same way as the judge did. There are four articles complained of in the issue of 22 April. The first was on the front page under the heading "Galloway was in Saddam's pay, say secret Iraqi documents". Underneath appeared three bullet point sub-headings as follows:

    - "Labour MP 'received at least £375,000 a year'"
    - "Cash came from oil for food programme"
    - "Papers could have been forged, he says"

5. The article is attributed to Mr David Blair "in Baghdad". The whole of the article is complained of but the judge, in our view correctly, formed the view that the flavour of the article is sufficiently conveyed by the introductory paragraphs:

> "GEORGE GALLOWAY, the Labour backbencher, received money from Saddam Hussein's regime, taking a slice of oil earnings worth at least £375,000 a year, according to Iraqi intelligence documents found by *The Daily Telegraph* in Baghdad.
>
> A confidential memorandum sent to Saddam by his spy chief said that Mr Galloway asked an agent of the Mukhabarat secret service for a greater cut of Iraq's exports under the oil for food programme.
>
> He also said that Mr Galloway was profiting from food contracts and sought 'exceptional' business deals".

6. The second article complained of is also in the 22 April edition, on page three. It is headed "The go-between" and "Loyal Ba'athist 'supplied Saddam with weapons'". Again the article is attributed to Mr Blair in Baghdad. It is introduced as follows:

> "GEORGE Galloway's Jordanian intermediary has a family history of loyalty to Saddam Hussein's Ba'ath Party, according to his Iraqi intelligence profile.
>
> Fawaz Abdullah Zureikat, 53, would clearly be an ideal choice to conduct any business dealings with the Iraqi regime.
>
> His Mukhabarat secret service profile, attached to the intelligence chief's memorandum to Saddam's office on Mr Galloway, refers to him warmly as a 'sympathiser with Iraq'".

7. As the judge observed, the article continues with a brief description of Mr Zureikat's background and business activities. It also refers to him as Mr Galloway's "representative in 2000" and to his company having been mentioned (in one of the documents found) "as a front for Mr Galloway's business dealings in Iraq".

8. On page four of the same issue alongside a photograph of Mr Galloway, sitting smiling with Saddam Hussein, there appears the third article complained of, which is attributed to Anton La Guardia, Diplomatic Editor. It is headed "Oil for food" and "Billions poured through holes in sanctions". It is introduced by the following paragraphs:

> "FOR years, Saddam Hussein abused the United Nations oil-for-food programme to fund Iraq's own illegal activities and reward the regime's favoured friends.

> The embargo may have been designed to 'contain' Saddam, but several loopholes allowed him to earn billions of pounds in illegal revenues through oil sales.
>
> The papers found in Baghdad suggest that George Galloway, through his associates, was granted two kinds of deal.
>
> The first was the right to buy Iraq's oil, under the oil-for-food programme, at concessionary prices and sell it on at a profit. The second was to sell food and perhaps other civilian supplies to Iraq".

9. The fourth article complained of in the issue of 22 April 2003 consisted of a leader headed "Saddam's little helper", which was the only leader published in *The Daily Telegraph* that day. The judge identified the flavour of the article as appearing in the first three paragraphs:

> "It doesn't get much worse than this. George Galloway is Britain's most active and visible peace campaigner. The Labour MP for Glasgow Kelvin did not just oppose the recent campaign against Saddam Hussein; he lobbied equally aggressively against the first Gulf war, and - during the years in between – for an end to sanctions. Yesterday, *The Daily Telegraph's* correspondent in Baghdad, David Blair, unearthed papers detailing alleged payments from Saddam's intelligence service to Mr Galloway through a Jordanian intermediary.
>
> There is a word for taking money from enemy regimes: treason. What makes this allegation especially worrying, however, is that the documents suggest that the money has been coming out of Iraq's oil-for-food programme. In other words, the alleged payments did not come from some personal bank account of Saddam's, but out of the revenue intended to pay for food and medicines for Iraqi civilians: the very people whom Mr Galloway has been so fond of invoking.
>
> Speaking from abroad yesterday, Mr Galloway was reduced to suggesting that the whole thing was a *Daily Telegraph* forgery, but the files could hardly be more specific. One memo comments: 'His projects and future plans for the benefit of the country need financial support to become a motive for him to do more work, and because of the sensitivity of getting money directly from Iraq it is necessary to grant him oil contracts and special commercial opportunities to provide him with a financial income under commercial cover without being connected to him directly'".

10. In the 23 April issue there is more coverage of Mr Galloway's activities. Again, we take the description of it principally from the judgment. On the front page there is a large photograph of Mr Galloway alongside a poster of Saddam Hussein. Above the photograph, alongside one another, there are three "bullet point" headlines:

> - "Telegraph reveals damning new evidence on Labour MP.
>
> - Bluster, two homes and the unanswered questions.
>
> - Tory party donor is named as key partner in oil contracts."

Underneath those bullet points, but still above the photograph, there is a headline in large bold type, which reads: "Memo from Saddam: We can't afford to pay Galloway more".

11. Mr Galloway again makes four complaints about the 23 April issue. They relate to articles on the front page, to a headline across the top of pages two and three, to an article on page three and to an article or leader on page 25. The front page article is again attributed to Mr Blair in Baghdad and the judge identified these key allegations in it:

> "SADDAM HUSSEIN rejected a request from George Galloway for more money, saying that the Labour backbencher's 'exceptional' demands were not affordable, according to an official document found by *The Daily Telegraph* in Baghdad.
>
> The letter from Saddam's most senior aide was sent in response to Mr Galloway's reported demand for additional funds. This was outlined in a memorandum from the Iraqi intelligence chief disclosed in *The Daily Telegraph* yesterday.
>
> Mr Galloway denies receiving any money from the regime…
>
> Saddam was rejecting two specific requests allegedly made by Mr Galloway, as recorded in the intelligence chief's memorandum.
>
> The first was for a greater share of the profits from oil exports. The memorandum said that Mr Galloway was already receiving between 10 and 15 cents per barrel of three million barrels exported every six months: an annual sum of at least £375,000.
>
> Mr Galloway's second reported request was for 'exceptional commercial and contractual' opportunities with three ministries and the state electricity commission. These requests for more sources of income fell on deaf ears, but Saddam's decision not to allow them did not apply to Mr Galloway's existing deals.

> Before Saddam issued his rejection, Mr Galloway sent his 'work programme' for 2000 to Mr Aziz…"

12. The headline which forms the second complaint reads: "MP in Saddam's pay defends himself from £250,000 villa in the Algarve". The third complaint is of the article appearing on the right hand page under the headline described above, which is attributed to Sally Pook in Burgau and Nicola Woolcock. The judge noted, "as part of the context of this article" that there are three photographs published alongside it, which include a photograph of Mr Galloway's "converted farmhouse near Burgau in the western Algarve" and a photograph of his home in Streatham "estimated to be worth around £800,000". The article refers to those houses and to a former home "in Glasgow's fashionable West End", thought to have been sold about two years before the article. As the judge observed, there is also reference to a Range Rover and a Mercedes.

13. The fourth complaint is of a leader on page 25 under the heading "Galloway's gall". It was the only leader published that day. The judge noted that it refers to Mr Galloway's "characteristic bravado" and to his "bluster". The judge also noted that it contains a number of opinions expressed on a conditional basis, for example:

> "If Mr Galloway did receive this money, what precisely has he done wrong? First and foremost, it is a betrayal of trust. He has betrayed those who, out of genuine philanthropy, donated money to his campaigns. He has betrayed his fellow campaigners against war and sanctions. He has betrayed the voters of Glasgow. He has betrayed the Labour Party, both locally and nationally. He has betrayed Parliament. And he has betrayed his country. Whether or not he has committed a criminal offence, he has done great damage, not only to his own reputation, but also to that of Parliament. Those who have fought alongside him would be wise not to fall for his conspiracy theories, or defend him out of a misplaced sense of loyalty or solidarity. Mr Galloway is a greater menace to his political friends than to his enemies, as the Labour Party has evidently realised."

14. In addition to the articles and headlines complained of the judge also referred to a number of other articles in the same issues. He did so because, as he put it, "context is so often crucial in libel proceedings" and they dealt broadly with the same issues. The judge said in paragraph 16:

> "In particular, the Defendants attach great weight to the fact that the critical documents, as discovered by Mr Blair in the Foreign Ministry in Baghdad, were themselves published in full, in facsimile and translation, and that the circumstances in which they were found were accurately set out for readers to judge for themselves what to make of them. They are not in

> themselves the subject of complaint in these proceedings; yet anyone reading this judgment would not be in a position to understand the issues fully without seeing the text of those two Arabic language documents which appeared on page 2 of the 22nd April issue."

15. The judge set out the letters in translation. The first was addressed to the "Republic of Iraq, President's Office, Iraqi Intelligence Service", was marked "Confidential and Personal" and was dated 3/1/2000. It read:

> "To: The President's Office – Secretariat
>
> Subject: Mariam Campaign
>
> 1. We have been informed by our Jordanian friend Mr Fawaz Abdullah Zureikat (full information about him attached appendix no. 1), who is an envoy of Mr George Galloway because he participated with him in all the Mariam Campaign's activities in Jordan and Iraq, the following:
>
> (a) The mentioned campaign has achieved its goals on different levels, Arabic, international and local, but it is clear that by conducting this campaign and everything involved in it, he puts his future as a British member of parliament in a circle surrounded by many question marks and doubts.
>
> As much as he gained many supporters and friends, he made many enemies at the same time.
>
> (b) His projects and future plans for the benefit of the country need financial support to become a motive for him to do more work. And because of the sensitivity of getting money directly from Iraq, it is necessary to grant him oil contracts and special and exception[al] commercial opportunities to provide him with a financial income under commercial cover without being connected to him directly.
>
> To implement this Mr Galloway gave him an authorisation (attached) in which he pointed out that his only representative on all matters related to the Mariam Campaign and any other matters related to him is Mr Fawaz Abdullah Zureikat, and the two partners have agreed that financial and commercial matters should be done by the last [Zureikat] and his company in co-operation with Mr Galloway's wife, Dr Amina Abu Zaid, with emphasis that the name of Mr Galloway or his wife should not be mentioned later.
>
> 2. On 26/12/1999 the friend Fawaz arranged a meeting between one of our officers and Mr Galloway in which he expressed his

willingness to ensure confidentiality in his financial and commercial relations with the country and reassure his personal security.

The most important things Mr Galloway explained were:

(a) He stressed that Mr Fawaz Zureikat is his only representative in all matters concerning the Mariam Campaign and to take care of his future projects for the benefit of Iraq and the commercial contracts with Iraqi companies for the benefit of these projects.

But he did not refer to the commercial side of the authorisation he granted to Mr Fawaz for reasons concerning his personal security and political future and not to give an opportunity to enemies of Iraq to obstruct the future projects he intended to carry out.

(b) He is planning to arrange visits for Iraqi sports and arts delegations to Britain and to start broadcasting programmes for the benefit of Iraq and to locate Iraq On Line for the benefit of Iraq on the internet and mobilise British personalities to support the Iraqi position.

That needs great financial support because the financial support given by [a named Arab sheikh] is limited and volatile because it depends on his personal temper and the economic and political changes. Therefore he needs continuous financial support from Iraq.

He obtained through Mr Tariq Aziz three million barrels of oil every six months, according to the oil-for-food programme. His share would be only between 10 and 15 cents per barrel. He also obtained a limited number of food contracts with the Ministry of Trade. The percentage of its profits does not go above one per cent.

He suggested to us the following:

First, increase his share of oil. Second, grant him exceptional commercial and contractual facilities, according to the conditions and suitable qualities for the concerned Iraqi sides, with the Ministry of Trade, the Ministry of Transport and Communications, the Ministry of Industry and the Electricity Commission.

(c) Mr Galloway entered into partnership with [a named Iraqi oil trader] (available information in appendix 2) to sign for his specific oil contracts in accordance with his representative Fawaz, benefiting from the great experience of the first in oil trading and his passion for Iraq and financial contribution to

> campaigns that were organised in Britain for the benefit of the country, in addition to his recommendation by Mr Mudhafar al-Amin, the head of the Iraqi Interests Section in London.
>
> 3. We showed him we are ready to give help and support to him to finish all his future projects for the benefit of the country and we will work with our resources to achieve this. But we should not be isolated from Mr Tariq Aziz supervising the project in its different aspects.
>
> We are going to make arrangements with him to unite the positions and co-operate to make the work succeed.
>
> 4. In accordance with what we have said, we suggest the following:
>
> (a) Agreement on his suggestion explained in article 2 b.
>
> (b) Arranging with Tariq Aziz about implementing these suggestions and taking care of the projects and Mr Galloway's other activities.
>
> Please tell me what actions should be taken."

16. The second letter was addressed to "Ministry of Foreign Affairs, Minister's Office", was dated "5/Feb/2000 and was marked "Confidential and urgent". It read:

> "To: Mr Health Minister, Mr Information and Culture Minister, Mr Transport and Communications Minister, Mr the Head of Friendship, Peace and Solidarity Organisation
>
> Subject: Work programme
>
> We send you attached a translation of the work programme for the year 2000 which was submitted by Member of Parliament George Galloway and cleared by the President's office in its letter C/16/1/3562 on 31/January/2000.
>
> Please read it and adopt suitable procedures to implement its phases under discussion according to your specialisations.
>
> With high regards,
>
> Tariq Aziz"

Tariq Aziz was described in the letter as Deputy Prime Minister and Acting Foreign Minister and ended by saying that copies should be sent to "Mr Chief of Intelligence Service/with a copy of the programme to be read please" and to "Mr Deputy Prime minister's office/ with a copy of the programme" and ended "The First Political Unit/to take care please".

The judgment

Meaning

17. The judge identified the parties' respective cases on meaning in paragraphs 54 and 55 of his judgment. Mr Galloway's case was that the articles conveyed the impression that he took large sums of money from Saddam Hussein's regime for his own personal benefit, and indeed requested more. On Mr Galloway's case, closely linked with that impression was the proposition that the Mariam Appeal was used by him as a front for his own financial advantage.

18. The case for *The Daily Telegraph*, by contrast, was that the effect of the words complained of was that the Baghdad documents consisted of strong *prima facie* evidence that Mr Galloway arranged for his Mariam political campaign, and/or other political activities, to be financed by the Iraqi government. As the judge put it, that was said to be the meaning which fair-minded readers would draw from the coverage as a whole. It was also said to be a meaning which a reasonable journalist, involved in the publication process, might reasonably have thought the words to bear. In paragraph 123 the judge noted Mr Price's submission at the end of the trial that "it is not and never has been any part of the *Telegraph's* intention to suggest guilt, or to suggest that guilt could be established other than by a most detailed investigation using powers which a newspaper lacks".

19. In paragraph 58 the judge identified a major difference between the parties' cases. The paper submitted that the "sting" of the coverage was the source of the funds; that is to say, the allegation that Mr Galloway was obtaining money from Saddam's regime. As the judge put it, the paper did not attach any particular significance, for the purposes of this argument, to whether the money was going towards Mr Galloway's political campaigning or whether it was going into his pocket. The submissions on behalf of Mr Galloway, on the other hand, focused very much upon the proposition that the coverage imputed venality and personal greed.

20. The judge accepted the case for Mr Galloway and rejected that for *The Daily Telegraph*. He did so in paragraphs 59 to 70 of his judgment, which, so far as relevant for present purposes were in these terms:

> "59. There are various passages which the Claimant relies upon as showing that the overall message of the two-day coverage was that it was Mr Galloway himself who was benefiting from Iraqi funds. It is conveniently reflected in a paragraph from the leading article of 22nd April:
>
> > "There is a word for making money from enemy regimes: treason. What makes this allegation especially worrying, however, is that the documents suggest that the money has been coming out of Iraq's oil-for-food programme. In other words, the alleged payments did not come from some personal bank account of Saddam's but out of the revenue intended to pay for food and medicines for Iraqi civilians; the very

> people whom Mr Galloway has been so fond of invoking."

60. I shall consider first the issue of the newspaper for 22nd April. The headlines are very important in setting the tone of the articles and are, in any event, generally understood by readers as intended to convey, in summary form, the meaning of what follows. Particularly significant are those on page 1, to which I have earlier referred. Mr Galloway is described as being "in Saddam's pay" and as having "received at least £375,000 a year". The cash is said to have come from the "oil-for-food programme" (i.e. monies intended for food and medicines for the benefit of the Iraqi people).

61. There is room for argument as to whether the articles in context conveyed the impression (to reasonable readers) that Mr Galloway was indeed in Saddam's pay, and thus receiving personal benefits from the oil-for-food programme, or whether *The Daily Telegraph* was pitching it no higher than that there was strong evidence that he was doing so.

62. Either meaning is seriously defamatory, the impact being no doubt the more serious for the reason that the article was published shortly after the invasion of Iraq, and at a time when British forces were still engaged. The Defendants' argument that the words do not impute personal greed at all, however, seems to me to be quite unsustainable. "In Saddam's pay" means what it says. Also, one should not lose sight of the leading article "Saddam's little helper", which begins with the words "It doesn't get much worse than this". It expresses a conclusion about Mr Galloway. So too does the use of the word "treason" in the context of a full length and solitary leader. The ordinary reader would assume that the strength of the language and the prominence given to the "story" indicated the newspaper's conclusions about its significance.

63. There were particular passages in the leader on which Mr Rampton laid emphasis (in addition to those already cited):

> "Yesterday, *The Daily Telegraph's* correspondent in Baghdad, David Blair, unearthed papers detailing alleged payments from Saddam's intelligence service to Mr Galloway through a Jordanian intermediary.
>
> …

> Speaking from abroad yesterday, Mr Galloway was reduced to suggesting that the whole thing was a *Daily Telegraph* forgery, but the files could hardly be more specific. One memo comments: 'His projects and future plans for the benefit of the country need financial support to become a motive for him to do more work, and because of the sensitivity of getting money directly from Iraq it is necessary to grant him oil contracts and special commercial opportunities to provide him with a financial income under commercial cover without being connected to him directly'.
>
> It is hard to think of a graver setback to the British anti-war movement. How would you feel if you were one of the many well-meaning peace protesters which had followed Mr Galloway's lead? What would your emotions be if you had given money to his Mariam Appeal, thinking that you were paying to treat a young Iraqi girl for leukaemia and wondering now how your money had been used? For months, anti-war campaigners have been imputing the basest of motives to their adversaries. The whole campaign, they argued, was really about money and oil.
>
> What if it turned out that they, rather than their opponents, had hidden pecuniary motives? What if it was actually the supporters of the campaign who were acting on behalf of Iraqi civilians, while anti-war activists - or at least their leaders – were acting for profit?
>
> If it is a bad day for the 'not in my name' brigade it is also a bad day for British Intelligence. If Baghdad was paying one of our MPs, did our security services know about it? If so, what action did they take? If not, what does it say about their competence? Is it possible that they were using Mr Galloway as an unwitting intermediary, probing to see whether Saddam might settle without a war?
>
> Both the Labour Party and the Stop the War Coalition will, no doubt, be following the revelations nervously…
>
> Many, from all wings of the Labour Party, have nursed their doubts about the Glasgow MP,

> peering suspiciously at his natty suits and winter sun-tan. Yet they have never been able to pin their doubts on anything concrete.
>
> If the allegations in the documents are borne out, however, expulsion from Labour is the least Mr Galloway should expect… In order to comply with the European Convention on Human Rights, Tony Blair has abolished the death penalty in treason cases; but collaborating with a hostile regime remains the most serious of offences…
>
> By the same token, although they would be quick to put the boot into Mr Galloway – as much for the crime of profiting from oil as anything else – hardcore peace campaigners would not be disheartened by the evidence that he was paid by one of the vilest regimes on earth.
>
> …The next time Britain and the US deploy force, they will march as though nothing had changed, for their convictions are beyond argument. But some of those who demonstrated for peace did so open-mindedly, from decent motives, believing that the war was, on balance, the greater evil. Such people may be prepared to extrapolate from today's revelations.
>
> …Certainly it was Saddam's view that the anti-war movement was an ally of the Ba'athist regime – so much so, it seems, that he was prepared to divert money away from hungry children in order to finance it.
>
> It is just possible that, like the British Communists who tore up their membership cards following the Soviet invasions of Hungary and Czechoslovakia, some of these people may recant their support. They may even, as they see how much more the occupying forces are doing for Iraqi civilians than the old regime ever did, feel guilty. Above all, they may be reluctant to march in support of this kingdom's enemies in future".

64. These allegations (as Mr Darbyshire almost conceded in the witness box) refer at least in part to personal gains for Mr Galloway – not to funds going merely to the Mariam Appeal or to anti-sanctions campaigning associated with

it. So the charge is personal avarice at the expense of the "very people Mr Galloway has been so fond of invoking". After all, if the funds went into the Mariam Appeal (whatever their source) they would be spent, according to Mr Galloway's belief, to the advantage of the Iraqi people. Whether one agrees with Mr Galloway or not, he was according to his evidence always open about the dual purpose of the Appeal – medical treatment *and* anti-sanctions campaigning. Of course, he denies that the Mariam Appeal received such monies anyway, but the thrust of such an allegation is rather different from saying that he diverted oil-for-food money into his own pocket.

65. Does it make any difference to the overall impact that some of the passages are framed in the form of rhetorical questions (What if …?), or that sometimes the word "allegations" is used rather than "revelations"? Not in this context, because whatever the firmness or otherwise of the assertions, they all go to personal greed on Mr Galloway's part, and hypocrisy over his professed concern for the suffering of Iraqi people. Mr Rampton is correct, in my judgment, in submitting that the words convey at least the proposition that there is very strong evidence of these charges. For my part, I would go further. I construe the coverage in the 22nd April issue, taken as a whole, as conveying the clear message that, despite his protestations, and despite the lack of any inquiry into the authenticity or veracity of the documents, *The Daily Telegraph* has concluded that the evidence is overwhelming.

66. The coverage of Mr Galloway's denials is relevant to qualified privilege, to which I shall turn in due course, but also to meaning. One has always, in such cases, to focus on the bane alongside the antidote. Crucial is the dismissive treatment given to Mr Galloway's responses in his interview with Mr Sparrow on 21st April. Whether or not the content of that interview was fairly and accurately reported is a matter which is relevant to *Reynolds* privilege. It is reflected in Lord Nicholls' non-exhaustive tests. Here, however, I am concerned with the treatment of the denials as *attributed* to Mr Galloway in the articles. Mr Sparrow on page 3 describes how he asked him during his telephone conversation to "*explain away* the documents found in Baghdad" (emphasis added). Mr Sparrow, in the witness box, described the introduction of the word "away" as a "figure of speech" or "colloquialism". Indeed it is. The question is what significance it would convey to the reader. It is most commonly used in the context of those placed in the

predicament of having to explain evidence pointing to their guilt. It means, as everyone knows, that damning evidence has been produced, for which there is no plausible explanation consistent with innocence. Mr Rampton put it to Mr Sparrow that it simply meant that his client had been "caught red handed".

67. That approach was followed through in the next day's coverage. The very first words on the front page of the 23rd April issue were "*Telegraph* reveals damning new evidence on Labour MP". The word "damning" means that the "evidence" condemns him; that it is conclusive of guilt. In the context, the publication of denials does not achieve balance or neutralise the charges. What it does is to show that the newspaper has decided that the denials were dishonest or unreliable, and thus to be discounted by the readers. The next bullet point heading, alongside the first, is "Bluster, two homes and the unanswered questions". Again the denials are portrayed as "bluster". What that means is that they are just hot air and lacking substance. The evidence is strong and, what is more, there is nothing but "bluster" to put on the scales on the side of the defence. Therefore, the strong evidence prevails. It cannot be characterised as merely a *prima facie* case. Guilt has been established.

68. The same impression is confirmed by the coverage on pages 2 and 3, across the top of which appears the headline "MP in Saddam's pay defends himself from £250,000 villa in the Algarve". Underneath appears a very large colour photograph of the villa (or "cottage" as Mr Galloway described it in evidence) with its swimming pool and another one of his house in Streatham. The *Telegraph* witnesses recognised that it would have been preferable to put the words "in Saddam's pay" in inverted commas in the headline. But that shows how little significance they really attached to the distinction between direct assertions in this context and those merely reported as allegations. What matters, of course, is not what they intended but how the readers would understand the words and photographs. Yet they too would surely realise that *The Daily Telegraph* was not drawing any such fine distinction. The inference to be drawn from that headline and the photographs is inescapable. The huge colour photograph was not there to show readers the fortuitous and incidental fact of *where* Mr Galloway was expressing his denials, but rather to demonstrate the link between being "in Saddam's pay" and the material rewards of those undeclared "profits". Readers can hardly have failed to get the message. Nor (in the context of

> *Bonnick v Morris*) can the journalists. To suggest otherwise is disingenuous or, at best, wishful thinking.
>
> 69. The references to two homes and expensive cars will only have relevance to the story as confirming the receipt of significant rewards over and above Mr Galloway's Parliamentary salary. The introductory paragraph said that Mr Galloway began his defence "from the *comfort* of his holiday home in Portugal" (emphasis added). These pointed references were not merely background "lifestyle" colour, as was suggested at one stage in argument. It was not a lifestyle piece, such as one might find in (say) *Hello* magazine. It was a gravely serious exposé of wrongdoing by a member of Parliament.
>
> 70. Then there are "the questions Galloway must answer" underneath his photograph on page 2, formulated so as to undermine each one of Mr Galloway's telephone answers to Mr Sparrow on 21st April. The object of that exercise would surely be construed by the reader, not as "putting the other side", but as demolishing Mr Galloway's "blustering" answers one by one."

21. The judge published a short summary of his conclusions which, although they were not part of the judgment, seem to us accurately to summarise the conclusions set out in detail in his judgment. He held that the allegations published in *The Daily Telegraph* articles on 22 and 23 April 2003 were seriously defamatory of Mr Galloway. They conveyed, among others, the following meanings to reasonable and fair-minded readers:

    i) Mr Galloway had been in the pay of Saddam Hussein, secretly receiving sums of the order of £375,000 a year;

    ii) he diverted monies from the oil-for-food programme, thus depriving the Iraqi people, whose interests he had claimed to represent, of food and medicines;

    iii) he probably used the Mariam Appeal as a front for personal enrichment; and

    iv) what he had done was tantamount to treason.

    In short, the judge held that the sting of the libel was the use by Mr Galloway of monies diverted from the oil for food programme for personal enrichment.

22. We have set out the judge's conclusions in relation to meaning in some detail because a central part of the argument advanced by Mr Price on behalf of *The Daily Telegraph* was that the judge failed to distinguish in this part of his judgment, as in others, between published allegations of fact and comment. We return to this important question below.

Qualified privilege

23. The case for *The Daily Telegraph* was, as the judge put it in paragraph 24 of his judgment, that the public had a right to know the contents of the documents in April 2003, even if they were defamatory of Mr Galloway and irrespective of whether the factual content was true or not. In paragraph 31 the judge directed himself that he needed to ask, broadly speaking, whether *The Daily Telegraph* was under a duty to convey to the world the content of the documents that they discovered and the words they actually published about Mr Galloway. He asked himself the question whether the paper had such an obligation irrespective of the truth or falsity of the allegations. The judge rejected this part of *The Daily Telegraph*'s case and answered those questions in the negative.

24. In paragraph 152 of his judgment the judge noted that an important element in the case for *The Daily Telegraph* was its defence that the coverage amounted to *reportage*, and that it was therefore entitled to publish the material complained of notwithstanding the repetition rule.

25. The judge described the repetition rule thus in paragraph 35, albeit in the context of justification:

> "It is trite law that if a defendant asserts "X says that Y has committed murder", he can only justify by proving that Y has committed murder. It does not avail him to prove merely that X had made the claim. He may call X, and X may be believed as a witness to the killing, but that is a different point. Here, the Defendants do not seek to prove the truth of the contents of the Baghdad documents, as they would have to do if pleading justification. They repeated the content of the documents found in Baghdad because they perceived it right, or so they have pleaded, to let the public know of the *allegations* themselves – irrespective of truth or falsity."

26. There is an exception to the repetition rule which is sometimes called *reportage*. In recent times it has developed from the decision of the House of Lords in *Reynolds v Times Newspapers Limited*, which was considered in some detail by the judge. The facts are well known. The claimant, a former Taoiseach in Ireland, claimed that he had been defamed by the publication in England of words which he said meant that he had deliberately and dishonestly misled the Dail and his cabinet colleagues. This court ruled that the publication was not covered by qualified privilege. The defendants appealed to the House of Lords, asserting that the courts should recognise a generic qualified privilege encompassing the publication by a newspaper of political matters affecting the people of the United Kingdom.

27. The House of Lords rejected the submission that the common law should develop a new subject matter category of qualified privilege but held that the elasticity of the ordinary principles of qualified privilege was such as to enable the court to maintain a fair balance between the importance of freedom of expression or freedom of speech on the one hand and the importance of reputation on the other: see in particular per

Lord Nicholls at pages 200-1 (and see further below). In the course of his speech Lord Nicholls, with whom Lord Cooke and Lord Hobhouse agreed, emphasised that the defence of qualified privilege is concerned only with allegations of fact. He noted at page 201D that the common law denies protection to defamatory statements, whether of comment or fact, which are proved to be actuated by malice in the relevant sense. Freedom of speech, he said, does not embrace freedom to make defamatory statements out of personal spite or without having a positive belief in their truth. In the case of statements of opinion on matters of public interest that is (as he put it) the limit of what is necessary for the protection of reputation. In such a case, in the absence of malice, the defendant has a defence of fair comment or, as it should probably be called, honest comment: see per Lord Nicholls at page 193. We note in passing that malice is not alleged against *The Daily Telegraph* by Mr Galloway.

28. Lord Nicholls said (at page 201F) that with defamatory imputations of fact the position is different and more difficult. In rejecting the submission that the common law should develop a new subject matter category of qualified privilege, Lord Nicholls said at page 204G that the established common law approach to misstatement of fact was essentially sound. He added at pages 204H to 205E:

> "The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern.
>
> Depending on the circumstances, the matters to be taken into account include the following. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.
>
> This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or

> proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.
>
> In general, a newspaper's unwillingness to disclose the identity of its sources should not weigh against it. Further, it should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment. *Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.*" (Our emphasis: see paragraph 37 below)

In similar vein, in *Loutchansky v Times Newspapers Limited (Nos 2-5)* [2001] EWCA Civ 1805, [2002] QB 783, Lord Phillips MR, giving the judgment of the court, said in paragraph 23, to which the judge referred in paragraph 170 (quoted below):

> "So far so good. At the end of the day the court has to ask itself the single question whether in all the circumstances the "duty-interest test, or the right to know test" has been satisfied so that qualified privilege attaches."

29. The judge considered a number of cases decided since October 1998, when *Reynolds* was decided in the House of Lords. In particular he considered the decision of this court in *Al-Fagih v H H Saudi Research and Marketing (UK) Limited* [2002] EMLR 13, where the majority allowed an appeal against a trial judge's ruling that the publication in question was *not* within the protection of *Reynolds* privilege. He noted that at paragraph 6 Simon Brown LJ described "*reportage*" as "a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper" and quoted these passages from his judgment:

> "51. I am not, of course, saying that verification (or at least an attempt at verification) of a third party's allegations will not ordinarily be appropriate and perhaps even essential. In rejecting the general claim for qualified privilege for political discussion Lord Nicholls said in *Reynolds* at 203B:
>
> > 'One difficulty with this suggestion is that it would seem to leave a newspaper open to publish a serious allegation which it had been wholly unable to verify. Depending on the circumstances, that might be most unsatisfactory.'

> 52. I am saying, however, that there will be circumstances where, as here, that may not be 'most unsatisfactory' – where, in short, both sides to a political dispute are being fully, fairly and disinterestedly reported in their respective allegations and responses. In this situation it seems to me that the public is entitled to be informed of such a dispute without having to wait for the publisher, following an attempt at verification, to commit himself to one side or the other".

30. The judge correctly observed in paragraph 126 that, when applying *Reynolds*, it is always important to concentrate on the particular facts in hand. He distinguished the facts in *Al-Fagih* from those here. In particular he noted (again correctly) that in that case the newspaper had not adopted the allegation or implied that it was true and that it was one of those cases where the mere fact that the allegations were being made was of public interest and importance, even though the reader was not in a position to determine whether the allegations were true or false.

31. In paragraph 130 the judge identified a number of significant potential distinctions between the two cases. He said:

> "First, it is necessary for me to consider whether *The Daily Telegraph* did, or did not, adopt any defamatory imputation or imply that it was true. Secondly, this was not a case of politicians or other public figures making allegations and cross-allegations about one another, so as to give rise to a dispute which would itself be of inherent public interest. Thirdly, this is not a case where one or other, or both, of two persons could be shown to be disreputable by the very nature of the allegations being made (whether true or false). Fourthly, I shall need to consider whether *The Daily Telegraph* was "fully, fairly and disinterestedly" reporting the content of the Baghdad documents and Mr Galloway's response to those allegations. Fifthly, it would clearly be significant if they went beyond reporting them and made independent allegations or inferences."

We agree.

32. The judge considered a number of decisions of the European Court of Human Rights, in which that court considered the provisions of Article 10 of the European Convention on Human Rights ("the Convention"), both before and after the decision in *Reynolds*. The House of Lords had also considered the Strasbourg jurisprudence in *Reynolds*, even though the decision in *Reynolds* was in October 1999, whereas the Human Rights Act did not come into force until October 2000. Since the House of Lords concluded that the common law approach accorded with the then state of the law of human rights (see per Lord Nicholls at pages 203-4), it is not appropriate for us to consider decisions of the European Court before *Reynolds*. That is subject to this. As the judge observed in paragraph 142, it is necessary to remember that Article 10 requires that journalists be permitted a good deal of latitude in how they present their

material and that a degree of exaggeration must be accepted: see eg *Prager and Oberschlick v Austria* (1996) 21 EHRR 1 and *Bladet Tromso and Stensaas v Norway* (1997) 23 EHRR CD40.

33. The decisions since *Reynolds* which the judge considered included *Thoma v Luxembourg* (2003) 36 EHRR 21, *Radio France v France* (Application No 53984/00 decided on 30 March 2004) and *Selisto v Finland* [2005] EMLR 1, which was decided during the trial before the judge. The judge rejected Mr Price's submission that, if he were to uphold Mr Galloway's claim, such a decision would be unsustainable in the light of the Strasbourg jurisprudence.

34. The judge recognised, we think, that Mr Price's submissions gained some support from *Thoma* and, in particular, *Selisto* (which the judge described as striking) but concluded in paragraph 145 that neither case required English law to be changed so that direct allegations of fact should be treated in the same way as genuine *reportage*. He held that he should follow the analysis of *reportage* adopted by Simon Brown LJ in *Al-Fagih* and consider whether, on the facts of a particular case, the newspaper coverage could fairly be regarded as "the neutral reporting of attributed allegations rather than their adoption by the newspaper".

35. The judge's approach can be seen from paragraph 135 of his judgment, in connection with *Thoma*:

> "Thus, in assessing the relevance of these cases to the present facts, one of the first questions to be decided would be whether the Defendants here were adopting allegations contained in the Baghdad documents, or merely repeating them in circumstances which made it plain to readers that there was no adoption by *The Daily Telegraph* of the contents. A closely related issue is whether they went beyond the content of the documents and embellished them, by adding allegations of their own, or drawing inferences from them which they could not sustain."

36. Ultimately the judge concluded that each of the European cases, like those decided here, involved carrying out its own balance. He held that, in the light of *Reynolds* and *Al-Fagih*, it was the duty of the court to carry out its own balance between freedom of speech (and thus the right to publish) on the one hand and the reputation of the individual on the other. He further held that the balance is fact-sensitive and should be carried out in accordance with the approach set out in the passage from the speech of Lord Nicholls in *Reynolds* quoted above. We will return to this below but we detect no error in that approach. It was the correct approach for the judge to adopt and, having regard to the decision of the House of Lords in *Reynolds*, it is the correct approach for this court to adopt too.

37. The judge thus asked himself (in paragraph 154) whether it was in the public interest that the readers should know what *The Daily Telegraph* chose to publish in the articles complained of and whether, applying an objective test, *The Daily Telegraph* properly considered that it was under a duty to tell the public. As we understand the

concept of duty in this context, it is not a legal duty, but flows from the conclusion that the public have a right to know, or a legitimate interest in knowing, the facts alleged, even if they cannot be shown to be true. The touchstone is that of the public interest and responsible journalism. The judge correctly added that in answering the questions, he should have regard both to Lord Nicholls' ten non-exhaustive tests and to what the judge called Lord Nicholls' general exhortation, which is the passage we have put in italics in the quotation in paragraph 28 above.

38. It is convenient to note here that in *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2005] EWCA Civ 74, [2005] 2 WLR 1577 Lord Phillips MR, giving the judgment of the court on appeal from an earlier decision of Eady J, said this at paragraphs 86 and 87:

> "86. There is no doubt that the judge rejected a simple test of *responsible journalism.* He described this as imprecise and carrying the suggestion that the test was subjective (paragraph 17). He held that the primary question was whether the particular circumstances gave rise to a duty to publish. The question of whether there had been *responsible journalism* or *the exercise of due professional skill and care* were matters to be addressed when answering that primary question (paragraph 23). The judge made it plain that the duty in question was a *social or moral duty* and that the obverse of this test was whether it was in the public interest at the time for the words to be published (paragraphs 30 and 31).
>
> 87. We agree with the judge that the phrase *responsible journalism* is insufficiently precise to constitute the sole test for *Reynolds* privilege. It seems to us that it denotes the degree of care that a journalist should exercise before publishing a defamatory statement. The requirements of responsible journalism will vary according to the particular circumstances and, in particular, the gravity of the defamation. Responsible journalism must be demonstrated before *Reynolds* privilege can be established. But there is a further element that must be demonstrated. The subject matter of the publication must be of such a nature that it is in the public interest that it should be published. This is a more stringent test than that the public should be interested in receiving the information; see *A v B plc* [2002] EWCA Civ 337; [2003] QB 195 at p 208 D."

As we see it, the court was there articulating the same principle as had been stated by Lord Hobhouse in *Reynolds*, where he said (at page 239E) that there was no generic privilege because no genus was satisfactory and added:

> "nor is any genus more satisfactory than the criterion of what it is in the public interest that the public should know and what the publisher could properly consider that he was under a public duty to tell the public."

That approach is entirely consistent with the approach of the judge in the instant case.

39. In paragraphs 155 to 157 the judge summarised Mr Rampton's submissions for Mr Galloway. As we read them, the key point, to which we referred earlier, was that the Baghdad documents do not allege that Mr Galloway took money for himself, whereas the articles complained of do make that allegation unequivocally. The articles were not "fairly and disinterestedly" reporting the contents of the Baghdad documents neutrally. They went beyond assuming the contents of the documents to be true and drew their own inferences as to the personal receipt of funds diverted from Iraq's oil for food programme, which was something which was not alleged in the documents themselves.

40. As we indicated earlier, the judge accepted Mr Rampton's submissions and rejected those of Mr Price to the contrary. He set out his reasons in detail in paragraphs 159 to 173 of his judgment. He said that *The Daily Telegraph* was not neutral. It did not merely adopt the allegations but embraced them with relish and fervour and even embellished them. He considered each of Lord Nicholls' factors. As to factors 1, 2 and 3, he held that there could be no doubt about the seriousness of the allegations, that the subject matter would be of public concern and that the sources of the information could hardly be classified as inherently reliable. As to factor 4, no steps were taken to verify the information because *The Daily Telegraph* did not think that it needed to do so. As to factor 5, the status of the information, the judge said that it could hardly be suggested that the allegations that Mr Galloway had received money from Saddam Hussein, or from the oil for food programme had been "the subject of an investigation that commands respect".

41. As to factor 6, there was no urgency. Although in one sense "scoops" are "the lifeblood of the newspaper industry", the fact that this story was a scoop did not justify urgent publication. As the judge put it in paragraph 163, if the story could be stood up, it would be of interest at any time. Here, the urgency *from the public point of view* (the judge's emphasis) could not be said to be so great as to justify either not giving Mr Galloway a proper opportunity to comment on the Baghdad documents or omitting to carry out any attempt at all at verification. Somebody at least needed to take the opportunity to speak to Mr Zureikat (either Mr Galloway or *The Daily Telegraph*). Channel 4 was able to interview him at mid-day on 22nd April, so that it was not an unreasonable step to expect the newspaper to take.

42. As to factors 7 and 8, all turned on the telephone conversation between Mr Sparrow and Mr Galloway. The judge's conclusions can be seen from paragraphs 166 and 167:

> "166. … I am quite satisfied that (a) the articles published on 22nd April conveyed the impression that Mr Galloway was in receipt of hundreds of thousands of pounds from Saddam Hussein, (b) it is clear from the morning and afternoon "foreign lists" of 21st April that this was fully intended by the editorial team, and (c) that no such allegation was put to him in advance of publication by Mr Sparrow or any one else. It should have been.

> 167. It also emerges from the "foreign lists" that they had it in mind, as a real possibility, to allege that he solicited an "Iraqi bribe" and/or that he was an "Iraqi spy". Following through that theme, the leader next day accused him of "treason" to all intents and purposes and, even though it is not customary to put leaders to people in advance, the underlying factual basis for such a charge clearly should have been put to him with complete frankness. Since it was not, the gist of what Mr Galloway had said to Mr Sparrow related to a different "story" from that published."

In short, the judge concluded that *The Daily Telegraph* did not sufficiently put the allegations it intended to make to Mr Galloway.

43. As to factor 9, the tone of the coverage was dramatic and condemnatory and the judge noted that, in Lord Nicholls' terminology, *The Daily Telegraph* did not "raise queries or call for an investigation" but chose to "adopt allegations as statements of fact". The judge added that, even more significantly, it went beyond the documents and drew its own conclusions. Nothing arose under factor 10.

44. The judge summarised his conclusions in paragraphs 170 to 173 as follows:

> "170. In the last analysis, after all these factors have been individually addressed, the question to be answered is "whether in all the circumstances the 'duty-interest test or the right to know test' has been satisfied so that qualified privilege attaches": *per* Lord Phillips MR in *Loutchansky* at [23]. It is to be answered according to an objective test: *ibid*. at [40]. It is the classic test long established at common law. The decision in *Reynolds* served as a reminder of the width of those common law principles and of how adaptable they are to a great variety of circumstances. It was also more encouraging of their invocation than previous English decisions, according to Lord Cooke, who was one of the majority of three. He made this clear in the later case of *McCartan Turkington Breen* [*v Times Newspapers* [2001] 2 AC 277] cited above, at pp. 300-301.
>
> 171. The question is not simply whether the allegations in the Iraqi documents were of public interest, but whether *The Daily Telegraph* was under a social or moral duty to communicate the totality of what it chose to publish to the world at large on 22nd and 23rd April 2003 and, specifically, the words complained of in these proceedings.
>
> 172. As is obvious, those communications went well beyond reporting the content of the documents and calling for an inquiry. Did the public have a right to be

> given *The Daily Telegraph* "blizzard" of interpretation (in Mr Galloway's phrase) as well as the basic facts? To put it another way, did *The Daily Telegraph* have a *duty* to publish the material to the effect that Mr Galloway was an "MP in Saddam's pay" at all? Did they have a duty to do so without putting that allegation to him? To my mind the answer must clearly be in the negative. Unfortunately, as emerged from a consideration of the transcript, the discussion between Mr Sparrow and Mr Galloway was confined to the Mariam Campaign and whether Iraqi money had been solicited or received for that. That was denied in unequivocal terms, but nothing was said about using it as a front, or siphoning off monies from the oil-for-food programme, for personal enrichment.
>
> 173. Thus, I am afraid that making all due allowance for the encouragement towards the wider and more flexible use of common law principles, in *Reynolds*, I am quite unable to uphold the privilege defence."

Fair comment

45. In paragraphs 174 to 176 of his judgment the judge considered the type of fair comment which supports the proposition that one may comment upon reports which are themselves the subject of privilege. However, he observed in paragraph 176 that, since this limb of fair comment depends upon the outcome of the defence of privilege, given his conclusion on privilege, it did not arise.

46. The judge otherwise rejected the defence of fair comment on the basis that the defamatory statements complained of in the articles were statements of fact and not comment, so that the defence of fair, that is honest, comment could not succeed.

Damages

47. Mr Price submitted to the judge, among other things, that *The Daily Telegraph* would have been entitled to publish the content of the Baghdad documents as *reportage* in accordance with *Reynolds* and that damages should only take account of any marginal damage to Mr Galloway's reputation over and above that occasioned by the Iraqi documents themselves of which he does not complain. The judge rejected that submission for the reasons fully explained in paragraphs 194 to 218 of his judgment.

The appeal

48. It is not in dispute that the Baghdad documents were of great interest to the public and *The Daily Telegraph* was naturally very keen to publish them. If the documents had been published without comment or further allegations of fact Mr Galloway could have no complaint since, in so far as they contained statements or allegations of fact it was in the public interest for *The Daily Telegraph* to publish them, at any rate after giving Mr Galloway a fair opportunity to respond to them. Such publication would be *reportage*. The balance would come down in favour of freedom of expression, which,

subject to Article 10.2, is protected by Article 10.1 of the Convention, and the statements would be protected by privilege.

49. There was no formal challenge to the authenticity of the Baghdad documents; and in the absence of a notice under CPR 32.19 requiring proof of authenticity they must be taken to be what they purport to be. But it is right to say that *The Daily Telegraph* took the position throughout that it would have been willing to establish authenticity if it had been required to do so; and right, also, to say that Mr Galloway's stance, in evidence, was that he did not accept that the documents were genuine. It is important, of course to keep in mind that a deemed admission as to authenticity is not to be taken as any admission of the truth of the contents. It would have been for the newspaper to seek to establish that the contents were true if it had sought to run a defence of justification. It did not do so.

50. In what is sometimes called a speaking note Mr Price summarised the essence of *The Daily Telegraph's* case in this way. In non common law language, which he says (no doubt correctly) is more used in Strasbourg than here, the newspaper was entitled to report the finding of the documents and their content and to fill in what it adjudged to be background information about Mr Galloway and his history and (for example) about the oil-for-food programme and to express its own views, its own conclusions and its own interpretation of their weight and significance and of what they established. We accept the first part of that submission. Thus, we accept that the newspaper was indeed entitled to report both the finding of the Baghdad documents and their content, but only subject both to giving Mr Galloway a fair opportunity to comment on them and to carrying out such investigation as was appropriate before publication. We also accept that it was entitled to fill in what it adjudged to be background information about Mr Galloway and his history and about the oil-for-food programme and the like, provided that none of the factual background or information was defamatory of him.

51. We also accept that the paper was entitled to express its own views, its own conclusions and its own interpretation of the weight and significance of the documents and what they established if it did so by way of honest comment and without malice. As we see it, *The Daily Telegraph* was however only entitled to make allegations of fact if it could justify them or it was entitled to claim *Reynolds* privilege in respect of them. We will return to this point below.

52. A central issue between the parties in the appeal was whether the allegations complained of were in truth allegations of fact or merely comment. Mr Galloway's case throughout was (and remains) that the passages complained of contained not comment but allegations of fact which were not mere *reportage*, either because *The Daily Telegraph* adopted the allegations in the documents or because it embellished them, and that the newspaper was not entitled to claim *Reynolds* privilege in respect of them. As indicated above, the judge accepted Mr Galloway's case and the question in this appeal is whether he was entitled to do so. In order to answer that question, it is necessary, or at least helpful, to consider a number of further questions or sub-questions. The first such question seems to us to be whether *The Daily Telegraph* adopted and embellished the allegations in the documents, although it is convenient to consider at the same time whether the allegations complained of were fact or comment.

Were the statements in the Baghdad documents adopted and embellished? Were the statements complained of fact or comment?

53. We have already referred in some detail to the judge's conclusions. It seems to us that in answering the questions just posed it is important to form a view as to whether the judge's conclusions about the meaning of what was published are correct. We set them out in paragraphs 17 to 22 above. In short, was he justified in rejecting Mr Price's submission that *The Daily Telegraph* was not suggesting guilt? Was he justified in holding that the "sting" of the coverage was not simply that Mr Galloway was obtaining money from Saddam's regime but that he was doing so for the purposes, not only of political campaigning (or use in the Mariam appeal), but of lining his own pocket, so that, as Mr Rampton had put it, the coverage imputed venality and greed?

54. The relevant passages are in paragraphs 59 to 70 of his judgment, which are quoted in paragraph 20 above. As appears in paragraph 62, the judge was particularly struck by phrases in the 22 April issue, such as Mr Galloway being guilty of "treason", being "in Saddam's pay", having "received at least £375,000 a year" and being "Saddam's little helper". He also noted the words "It doesn't get much worse than this". In paragraph 63 the judge set out a detailed extract from the leader in the same issue, which he said in paragraph 64 contained allegations which referred at least in part to personal gains for Mr Galloway and not just to funds going to the Mariam Appeal or to anti-sanctions campaigning associated with it. The judge said that the charge was "personal avarice". Moreover he rejected the submission that no such allegation of fact was made because some of the passages complained of asked "what if" questions or used the word "allegation" rather than "revelation". He concluded (in paragraph 65) that the coverage on 22 April did not merely convey that there was strong evidence of personal greed on the part of Mr Galloway but conveyed the strong message that, despite his protestations and despite the lack of any inquiry into the authenticity or veracity of the documents, *The Daily Telegraph* had concluded that the evidence was overwhelming.

55. As appears in paragraph 66, the judge further drew attention to the approach of Mr Sparrow in his telephone conversation with Mr Galloway, in which he asked him to "*explain away*" (the judge's emphasis) the Baghdad documents. It is clear that the judge accepted Mr Rampton's submission that Mr Sparrow used the expression "explain away" as a way of saying that Mr Galloway had been caught red-handed.

56. The judge focused on the issue of 23 April in paragraphs 67 to 70 of his judgment quoted above. In particular he was struck by the expression "damning new evidence", which he said meant that the evidence condemned Mr Galloway. The newspaper's coverage showed that Mr Galloway's denials were dishonest or unreliable and thus to be discounted by its readers. The judge also drew attention to other parts of the same coverage. They included the bullet point which said: "Bluster, two homes and the unanswered questions". The judge then referred to pages two and three (as described above), with their photographs and references to Mr Galloway being "in Saddam's pay" and to his "£250,000 villa in the Algarve". He concluded that the inference to be drawn by *Daily Telegraph* readers was inescapable. The photographs were not there to show where Mr Galloway was expressing his denials but to demonstrate the link between his being "in Saddam's pay" and the material rewards of those undeclared "profits". Neither readers nor journalists (the judge thought) could have failed to get

the message. In short, as he put it in paragraph 69, this was not a lifestyle piece, such as one might find in (say) *Hello* magazine, but "a gravely serious exposé" of a Member of Parliament. Finally he said that the list of "the questions that Galloway must answer" underneath his photograph would not be construed by readers as "putting the other side" but as demolishing Mr Galloway's "blustering" answers one by one.

57. Mr Price submits that the statements in the coverage simply indicated that the documents stated that Mr Galloway was receiving money from Saddam's oil-for-food programme, that they did not assert that he was lining his own pocket and that they were consistent with his using the monies for his political campaigns. He further submits that much (if not all) of the matters complained of is comment.

58. The judge thought that the suggestion that the statements used in the coverage did not impute personal greed at all was quite unsustainable. We agree. We do not accept Mr Price's submission that it was relatively unimportant how any money taken was used by the claimant. It seems to us that the judge was right to hold that the headlines and articles complained of went further than simply stating that Mr Galloway was taking money from the oil-for food programme for his political and charitable purposes but meant that he was taking money for personal gain and that that allegation was seriously defamatory of Mr Galloway. Moreover, when the articles, leaders, headlines and photographs are taken together and viewed in their context through the eyes of readers of *The Daily Telegraph,* the judge was entitled to reach the conclusions he did. Indeed, he was in our opinion right to do so.

59. It appears to us that the newspaper was not merely reporting what the Baghdad documents said but that, as the judge held, it both adopted and embellished them. It was alleging that Mr Galloway took money from the Iraqi oil-for-food programme for personal gain. That was not a mere repeat of the documents, which in our view did not, or did not clearly, make such an allegation. We agree with the judge that, although there were some references to allegations, the thrust of the coverage was that *The Daily Telegraph* was saying that Mr Galloway took money to line his own pockets. In all the circumstances we answer the question whether the newspaper adopted and embellished the statements in the Baghdad documents in the affirmative.

60. The next question is whether the statements complained of were allegations of fact and not merely comment. We agree with the judge that the allegations principally complained of, namely that Mr Galloway was taking money from Iraq which was destined for the oil-for-food programme for his own personal gain, were allegations of fact. We appreciate that the line between fact and comment may not always be easy to draw but it is difficult to think of anyone more experienced than the judge to draw it. It is true that the judge does not discuss the distinction but that is for the very good reason that the point was not, as we understand it, taken at the trial. In the defence only the leading articles and the headlines were said to be the subject of a defence of fair or honest comment. The same was true in the particulars of comment given by *The Daily Telegraph*. Moreover we note that the particulars do not include the assertion that the comment included the suggestion that Mr Galloway was lining his own pocket. By way of contrast, the publication of the news articles was said in the defence to be protected by privilege. This distinction was expressly maintained in the defendant's written case on meaning, which included this:

> "If the editorials (and two of the headlines) are comment, one of the issues, perhaps the key issue, will be whether the news articles standing alone are protected by privilege – the editorials (and two of the headlines) being the subject of a defence of fair comment on privileged material."

The same distinction was maintained in a skeleton argument prepared for a hearing on 4 October 2004 and adopted in the skeleton argument prepared for the trial.

61. In these circumstances it is not surprising that the judge does not address the question whether the statements in the articles which he held to be defamatory were comment. Nevertheless it is plain from the whole tenor of his judgment that he treated them as statements of fact which could only be defended on the basis of justification or privilege.

62. We were referred to a number of authorities on fair comment. For example we were referred to the classic statements of Lord Porter in *Kemsley v Foot* [1952] AC 345 at 356-7, where he approved a passage from *Odgers on Libel and Slander* (6th edition, 1929) as follows:

> "Sometimes, however, it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful', this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he relies by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes a mere comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment. But even in this case the writer must be careful to state the inference as an inference and not to assert it as a new and independent fact; otherwise, his inference will be something more than a comment, and he may be driven to justify it as an allegation of fact."

See also *Branson v Bower* [2001] EMLR 800, per Latham LJ at paragraph 12, where he approved a passage from *Gatley on Libel and Slander,* 9th edition, at paragraph 12.6, where, citing from a judgment of Cussen J in *Clarke v Norton* [1910] VR 494 at 499, the editors said, in the context of what amounts to fair comment:

> "More accurately it has been said that the sense of comment is "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation etc."

The same editorial comment appears at paragraph 12.6 of the 10th edition of *Gatley*, which post-dates *Branson v Bower*.

63. Mr Price draws particular attention to the proposition that, where the defendant enables his readers to judge for themselves how far his opinion is well founded, what would otherwise be an allegation of fact becomes merely a comment. He submits that here it would have been clear to readers of *The Daily Telegraph* that the newspaper was expressing its opinion on the statements in the Baghdad documents and thus leaving them to decide whether that opinion was right or wrong. He further submits that the judge failed to distinguish sufficiently between what was comment and what was not.

64. We entirely accept Mr Price's submission that a newspaper (or anyone else) is entitled to comment in the strongest terms provided that what it says is in truth honest comment and not a statement of fact. There is in our opinion, however, no justification for the view that the judge failed to distinguish between a statement of fact and comment. As already indicated, it was not suggested before him that the articles contained comment and not statements of fact but, however that may be, it is clear from his judgment that he considered the articles to contain statements of fact and, in the case of the leaders, his judgment shows that he was well aware of the distinction. The problem with Mr Price's submission is that the judge held, in our view correctly, that the newspaper adopted and embellished what was contained in the Baghdad documents.

65. In our opinion, whatever the precise line between fact and comment, the allegations which the judge considered not to be protected by qualified privilege, as described above, were allegations of fact not opinion. The statements that Mr Galloway was taking money originally destined for food and using it for his own personal gain were allegations of fact, not comment. In these circumstances, it does not seem to us to be surprising that the contrary was not argued before the judge. As already explained, the newspaper's case before the judge was not that the statements in the articles were comment but that they were allegations of fact which were protected by qualified privilege on the basis of *Reynolds* privilege.

Reynolds privilege

66. The question remains whether the judge was correct to hold that such statements of fact were not protected by *Reynolds* privilege. This involved a consideration of the nature of the principle identified by the House of Lords and whether that principle has been affected in any way by subsequent decisions of the European Court of Human Rights in Strasbourg. Mr Price submits that the judge was wrong to hold that none of the statements of fact was protected by *Reynolds* privilege as identified by Lord Nicholls and, in any event, that the Strasbourg jurisprudence leads to the conclusion that *The Daily Telegraph* was entitled to publish the matter complained of under Article 10 of the Convention. In short, he submits that *The Daily Telegraph* would be

bound to succeed in Strasbourg. We will consider first the position without regard to the Strasbourg decisions since *Reynolds*.

67. Mr Price submits that adoption by a newspaper of defamatory allegations of fact which would otherwise be *reportage* may take them out of the category of material which is protected by *Reynolds* privilege but that, whether it does so or not, all depends upon the facts of the particular case. He notes that Lord Nicholls said that a newspaper *need* not adopt the allegations as statements of fact, not that it *must* not (my emphasis). We accept that whether a particular statement of fact is protected by qualified privilege of the kind referred to in *Reynolds* does depend upon all the circumstances of the case. That is we think clear both from the speech of Lord Nicholls and from the Strasbourg cases, to some of which we refer below. It is a question of balancing the various considerations.

68. Lord Nicholls made it clear in stating his conclusions which we have quoted above that the starting point is freedom of expression. Moreover, as he put it at page 205E, any lingering doubts should be resolved in favour of publication. The right to publish must however be balanced against the rights of the individual. That balance is a matter for the judge. It is not a matter for an appellate court. This court will not interfere with the judge's conclusion after weighing all the circumstances in the balance unless he has erred in principle or reached a conclusion which is plainly wrong.

69. We see the force of Mr Price's submission that the mere fact that the newspaper has adopted some of the allegations should not be decisive in deciding where the balance lies. Indeed, recent decisions of the European Court suggest that it is not. On the other hand, the court is essentially concerned with what has been described as *reportage,* which, as the passages from the judgment of Simon Brown LJ in *Al-Fagih* quoted in paragraph 29 above show, is a "convenient word to describe the neutral reporting of attributed allegations rather then their adoption by the newspaper". See also, to much the same effect, *Mark v Associated Newspapers Ltd* [2002] EWCA Civ 772, [2002] EMLR 38 and the *Jameel* case at paragraphs 19 to 22. Thus, so far as English law has progressed to date, as shown by the reasoning in *Reynolds* and *Al-Fagih*, the adoption of defamatory statements contained in reports made by others has been treated as fatal to a defence of qualified privilege.

70. The question may arise in an appropriate case whether the law should be more flexible and not adopt quite such an inflexible rule. It does seem to us that the tenor of the European Court decisions would support a more flexible approach, in which the nature and extent of any adoption of the report would be no more than a factor, albeit an important factor, in deciding how the balance should be struck on the facts of a particular case. An example of such a case may be *Thoma v Luxembourg*, where the Court noted (at paragraph 60) that the applicant "had adopted – at least in part – the content of the quotation in issue", although in *Mark* Simon Brown LJ (with whom Mummery and Dyson LJJ agreed) did not see the decision in quite that light, noting (at paragraph 33) that the Court in *Thoma* decided that journalists cannot be "systematically and formally" required to distance themselves from the content of a [defamatory] observation".

71. It is not necessary, in order to determine the issues in this appeal, to decide whether English law should adopt a flexible approach of the kind suggested above or whether

it should hold that any adoption of defamatory material is fatal to a defence of *Reynolds* privilege. Nor is it necessary to decide whether it would be open to this court so to hold in the light of the decision of the House of Lords in *Reynolds.*

72. The reason that it is not necessary to decide either of those questions is this. Mr Price correctly recognises that how any such balance is to be struck depends upon all circumstances of the particular case and here it is plain that the judge took the view that *The Daily Telegraph* had gone a long way to adopt and embellish the allegations in the Baghdad documents. Indeed it had done so with relish. He was in our opinion entitled to reach that conclusion. Moreover, it is we think clear from his judgment that, if he had accepted the submission that adoption of some of the allegations in a document which is being reported is not fatal to a case of *Reynolds* privilege, he would nevertheless have held that the balance fell on the side of Mr Galloway and not on the side of the newspaper. Such a conclusion would in our view be entirely justified on the facts found by the judge.

73. In paragraphs 39 to 43 above we have summarised both the judge's approach to the balancing exercise identified by Lord Nicholls and his reasons for reaching the conclusion that the defence of qualified privilege was not available to *The Daily Telegraph*. The judge was plainly right to conclude that the newspaper was not neutral but both embraced the allegations with relish and fervour and (as he put it) went on to embellish them. As to the particular points identified by Lord Nicholls, the judge was further right to conclude that the allegations were serious, especially the allegation that Mr Galloway took money destined as part of the oil-for-food programme for his own personal gain. As to the second point, it is not in dispute that both the nature of the information and its subject matter were of public concern.

74. As to Lord Nicholls' third, fourth and fifth points, Mr Price criticises the judge's conclusion that the sources of the information in the Baghdad documents were operatives within Saddam's regime, had axes to grind and could hardly be classified as inherently reliable. He submits that, since, quite apart from the fact that they were deemed to be authentic under the CPR, the documents were plainly authentic since they came from internal Iraqi government sources and were not intended for publication, there is no reason to think that their contents were not correct. Mr Price further submits that there was nothing that could be done to verify the information and that there could not be or have been an independent investigation of it. There is we think some force in the point that there was no reason to think that the information in the documents was not inherently reliable, but the judge was right to say that the newspaper could have made further enquiries, perhaps through Mr Zureikat, and that this was not a case in which the allegations had been the subject of an inquiry which commanded respect.

75. As to the sixth point, the judge correctly held that there was no great urgency and that the scoop would still have been available if the newspaper had made further enquires, perhaps of Mr Zureikat and, importantly, of Mr Galloway himself. As to the seventh and eighth points, Mr Price submits in particular that there was no need to go further in asking Mr Galloway questions than Mr Sparrow did. He says with force that, since Mr Galloway denied receiving any money at all from the Iraqi regime, he would be bound to have denied using it for personal gain. While this point has some forensic force, it does appear to us that, before a newspaper publishes allegations of fact which involve the taking of money from a regime such as Iraq for personal gain, in

circumstances in which it knows that it cannot justify the allegations, it should at the very least put the thrust of the allegations to the person concerned in order to give him the opportunity of saying whatever he thinks appropriate. As the judge correctly held in paragraph 166 of his judgment quoted in paragraph 41 above, *The Daily Telegraph* did not do so. Accordingly the articles did not contain, in Lord Nicholls' words, the gist of the claimant's side of the story in response to the allegations of personal gain.

76. In connection with the ninth point, the judge emphasised that the tone of the coverage was dramatic and condemnatory. He then summarised his conclusions in paragraphs 170 to 173 which we have quoted in paragraph 43 above. He considered the matter in the round, as Lord Nicholls stressed that a judge should do. In short, as stated above, he concluded that *The Daily Telegraph* did not merely report the contents of the Baghdad documents or even simply adopt their contents but embellished them and presented them as facts to which Mr Galloway's only response was bluster.

77. We see no basis upon which this court could properly interfere with the judge's conclusions. Even if the judge had concluded both that *Reynolds* privilege was potentially available to a newspaper that adopted the contents of documents being reported and that the contents of the documents themselves were likely to be reliable, we have no doubt that he would have concluded that the matters complained of were not protected by privilege because of the way in which the facts were adopted and embellished. He would have been both entitled and (in our opinion) correct to reach such a conclusion.

Strasbourg jurisprudence

78. In the light of the conclusions on the particular facts of this case set out above, it is not necessary to analyse the Strasbourg cases in any detail. However, we should refer briefly to some of the cases because Mr Price places particular reliance upon them. It is not easy to reconcile them all but the reason for that is, as it seems to us, that the approach of the European Court is an essentially pragmatic one which focuses on the particular facts of each case and tries to balance the rights conferred by Article 10 of the Convention with those conferred by Article 8. Articles 8 and 10 provide so far as relevant:

> "*Article 8 – Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic in the interests of … the economic well-being of the country … or for the protection of the rights and freedoms of others.
>
> *Article 10 – Freedom of expression*

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority …
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are described by law and are necessary in a democratic society … for the protection of the reputation and rights of others, … or for maintaining the authority and impartiality of the judiciary."

79. The general principles to be applied where a court is seeking to strike the balance between Articles 10 and 8 have been stated by the European Court on a number of occasions. A good example is *Cumpănă and Mazăre v Romania* (2005) 41 EHRR 200, which was decided on 17 December 2004, just over a fortnight after the decision of the judge in the instant case. So far as directly relevant, the Court said this at paragraphs 88-91:

> "88. The test of "necessity in a democratic society" [in Article 10] requires the Court to determine whether the interference [with Article 10 rights] complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Art 10.
>
> 89. The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Art 10 the decisions they have taken pursuant to their power of appreciation. …
>
> 90. In particular, the Court must determine whether the reasons adduced by the national authorities to justify interference were "relevant and sufficient" and whether the measure taken was "proportionate to the legitimate aims pursued". …
>
> 91. The Court must also ascertain whether the domestic authorities struck a fair balance between, on the one hand, the protection of freedom of expression as enshrined in Art 10, and on the other hand, the protection of the reputation of those against whom

> allegations have been made, a right which, as an aspect of private life, is protected by Art 8 of the Convention. That provision may require the adoption of positive measures designed to secure effective respect for private life even in the sphere of the relations of individuals between themselves."

80. For present purposes the crucial paragraph in that judgment is paragraph 91 because it stresses the importance of the national court striking a fair balance between the protection of freedom of expression enshrined in Article 10 and the protection of a person's reputation enshrined in Article 8 as an aspect of private life. It seems to us that that is exactly the balance which Lord Nicholls was articulating in *Reynolds*: see eg the passages from his speech quoted above. Moreover, it also seems to us that Lord Nicholls was himself according particular importance to freedom of expression and thus freedom of the press in just the same way as the European Court has done. We detect no difference in principle between the approach of the House of Lords in *Reynolds* and that of the European Court.

81. Like the judge, we were referred to a number of cases, including *Lingens v Austria* (1986) 8 EHRR 407, which emphasised the importance of Article 10. The application of the principles identified in the *Cumpănă* case will of course vary from case to case. This can be seen for example in *Selisto*, to which the judge referred, where it is clear from the dissenting judgment of Sir Nicholas Bratza that the principles were not in dispute but that there was room for different views as to the application of the principles to the facts. While it may be said that the application of the principles to the particular facts in *Selisto* (upon which Mr Price relies) provides some assistance to the case being advanced by *The Daily Telegraph* on the facts, the opposite can be said of the decision of the Court in *Pedersen and Baardsgaard v Denmark* (Application no 49017/99), which was delivered on 17 December 2004, which was the same day as the *Cumpănă* case and thus about a fortnight after the decision of the judge, and which is relied upon by Mr Rampton as being a not dissimilar case from this in which (as can be seen from paragraph 77) the applicants had adopted and embellished and not merely reproduced the statements of others.

82. See also, for example, *Busuioc v Moldova* (Application no 61513/00), where the decision was delivered on 21 December 2004, and where the Court stressed in paragraph 61 that it had distinguished between statements of fact and value judgments. It concluded that some of the statements complained of were statements of fact (as in paragraph 68) and some as "value judgments which had a factual basis" (as in paragraph 84). Whether a particular statement comes into one category or the other depends upon the circumstances of the particular case. The Strasbourg cases are of course relevant in determining where, in principle the line is to be drawn but, in our view, the distinction drawn by the European Court is essentially the same as has traditionally been drawn at common law between fact and comment. See also in this regard *Branson v Bower* per Latham LJ at paragraphs 11 to 13 and Sir Philip Otton at paragraph 16.

83. The Strasbourg cases are in our opinion of limited assistance if used as comparators for the facts of this case, since their facts vary considerably. They are, however, of

assistance in so far as they identify the correct approach and the correct principles to apply. As stated above, those principles have been most recently and authoritatively summarised in the *Cumpănă* case. They are essentially the same principles as identified by the House of Lords in *Reynolds*, subject perhaps to the question whether it is fatal to a defendant to have adopted the statement of others as true. Assuming that it is not fatal, the question in every case is how to balance the freedom of speech enshrined in Article 10 with the reputation of an individual enshrined in Article 8. How the balance is to be struck is essentially a matter for the national court. In England and Wales it is essentially a matter for the judge. We have already expressed our conclusion that there is no proper basis upon which we could interfere with the balance he struck.

84. For all these reasons, we dismiss the appeal on qualified privilege.

Fair comment

85. We have already stated our conclusion that the judge was justified in concluding that the various statements in the articles and headlines complained of that Mr Galloway took money from Iraq for his personal gain were allegations of fact and not comment. It follows from our further conclusion that the statements in the articles complained of are not protected by *Reynolds* (or any other kind of) privilege and from the fact that *The Daily Telegraph* did not seek to justify the statements as true that the newspaper had no defence to Mr Galloway's claim for damages and that the judge was right for the reasons he gave.

86. That is not to say that the issues of *The Daily Telegraph* for 22 and 23 April 2003 did not contain comment or that some of that comment was not honest comment but that does not affect the validity of the judge's decision, which was based on his conclusion that the key allegations were allegations of fact. In these circumstances, we do not see how this appeal can succeed under this head once it is held that the defence of qualified privilege has failed. That is in our view so even if, as Mr Price submits, the judge mischaracterised some of the statements in the leaders as statements of fact when they were in fact comment. Such a conclusion would not affect the newspaper's liability in circumstances in which the judge had (as we concluded earlier) correctly characterised the allegations in the articles as statements of fact.

87. It could at best only relate to the editorials or leaders in so far as they stated the newspaper's views based on the Baghdad documents. Mr Price submits that the judge held that the editorial expression of the paper's views based on the documents was found to be fact rather than comment just because it was conclusionary. However, we do not accept the submission that there was any mischaracterisation of opinion as fact in the leaders or that the judge's conclusion as to what was fact was based on the mere fact that the paper's views were conclusionary.

88. The judge explained his reasons in some detail in paragraphs 177 to 190 of his judgment. In paragraphs 177 to 179 he rejected submissions based upon the conditional nature of the leaders. In paragraph 180 he said that one cannot comment upon *allegations* (his emphasis) about the claimant and then avail oneself of a fair comment defence any more than one can justify by reference to the fact that the allegations have been made. As the judge put it, one has to comment on the claimant's conduct and, if it is not admitted, prove the conduct. He held, in our

opinion correctly, that the defence in relation to the 22 April leader would fail for that reason alone.

89. In paragraphs 181 to 188 the judge gave his reasons for his conclusions that the allegations were either allegations of fact or, in so far as they were comment, they were based on unproven conduct, by which he meant unproven facts. As to the first the judge was in our opinion entitled to hold, as he put it in paragraph 188, that the sting of the leaders (which were defamatory of Mr Galloway) was factual rather than comment. As to the second, he was right to hold that, in the absence of either a defence of justification or of privilege, *The Daily Telegraph* could not rely on a defence of fair or honest comment.

Damages

90. The remaining issue is whether the judge erred in principle in awarding damages of £150,000. Mr Price submits that he did. He submits (as he did to the judge) that *The Daily Telegraph* would have been entitled to publish the contents of the Baghdad documents as *reportage* in accordance with *Reynolds* and that damages should only take account of any marginal damage to Mr Galloway's reputation over and above that occasioned by the Iraqi documents themselves of which he does not complain. The judge rejected that submission and, for reasons fully explained in paragraphs 194 to 218 of his judgment, awarded the sum of £150,000.

91. We accept Mr Rampton's submission that it was the function and duty of the judge to assess damages on the basis of the damage to Mr Galloway's reputation caused by the articles complained of and held to be defamatory. It was not his role, as Mr Rampton put it, to assess what damage might have been suffered to his reputation if *The Daily Telegraph* published different articles which contained defamatory material, but in respect of which it had a good defence of qualified privilege, or indeed if the documents had been published by someone else. The judge said in paragraph 195:

> "My duty is clear. I must reach conclusions on the issues before me and, if I hold that Mr Galloway has been defamed, I must award appropriate damages in respect of the relevant allegations."

We detect no error in that approach.

92. The judge concluded his judgment thus:

> "217. It seems to me that Mr Galloway is entitled to be compensated for the manner in which the newspaper chose to put the Iraqi documents into the public domain and the spin which the Defendants chose to put upon them. As he said, *The Daily Telegraph* chose not to confine itself to reporting the documents. He complains of the effect upon his reputation and hurt feelings brought about by the "blizzard" of comment and inference with which the publication of the documents was surrounded. Moreover, the "blizzard" came out of the blue without any opportunity to refute

> their inferences. This again illustrates how unrealistic it would be for me to try to compensate Mr Galloway for the "blizzard" but not for the content of the underlying documents.
>
> 218. The allegations are plainly very serious. There has been no apology. Nor has there been any plea of justification. Yet there were undoubtedly aggravating features about the conduct of the trial to which I have referred above. The figure I must award by way of general damages for compensation must be no greater than is necessary to achieve the legitimate objectives which I have identified, and must be proportionate to those objectives and the harm done. In all the circumstances, it seems to me that the right figure is £150,000."

93. Again, we detect no error in that approach. The judge assessed damages for the libel he found proved. Given the seriousness of the key allegation Mr Galloway had taken money from Iraq for personal profit, we can see no basis upon which this court could interfere with the amount of damages awarded by the judge.

CONCLUSIONS

94. In summary the crucial features of this case are these. The judge held that parts of the issues of 22 and 23 April 2003 were seriously defamatory of Mr Galloway, especially in so far as they alleged that he had taken money from Iraq for personal gain. *The Daily Telegraph* did not at any stage seek to justify those defamatory statements as true. It defended the action only on the basis of privilege and fair comment. The judge rejected both defences. He was, in our judgment, right to do so. It follows that the appeal on liability must be dismissed. We also dismiss the appeal on damages for the reasons given above.