Written comments in the Case of
Axel Springer AG v Germany
Application 48311 /10

A Submission to the European Court of Human Rights by the Media Legal Defence Initiative

31 July 2012

For the intervener:

Heather Rogers QC, Doughty Street Chambers
Jessica Simor, Matrix Chambers

Peter Noorlander, Chief Executive, MLDI
Nani Jansen, Legal Counsel, MLDI

Media Legal Defence Initiative
The Grayston Centre
28 Charles Square
London N1 6HT
United Kingdom

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 48311/10

Axel Springer v Germany

WRITTEN COMMENTS OF MEDIA LEGAL DEFENCE INITIATIVE

1. The Media Legal Defence Initiative (MLDI) is grateful for the opportunity to make submissions in this case by the permission granted on 9 July 2012 by the President of the Fifth Section acting under Rule 44(2) of the Rules of Court.

2. The application arises out of a case in Germany in which the court granted an injunction preventing a media company from publishing remarks made by an opposition politician about the former Chancellor of Germany. Although framed as a question, the remarks were taken as constituting a defamatory allegation. They were published as part of an ongoing debate on a political context. The domestic court held (amongst other matters) that, before publishing the remarks, the media company was required to carry out its own research into the facts *and* to obtain a response from the Chancellor himself. It also held that the question of the motive of the claimant in calling early Bundestag elections was a "private" issue.

3. The grant of an injunction against the media company, in circumstances where the court acknowledged the public interest in the subject-matter of the article *and* where it had been conceded that there were facts justifying the reporting of a suspicion of the nature circulated by the defendant[1] raises serious questions regarding the limitations that can be imposed on the right to freedom of expression. MLDI asked for permission to intervene because of the important issues raised by the case. MLDI's observations focus on the broad principles, rather than the facts.

4. MLDI address five points:-

(A) A requirement that the media *must* – in every case - carry out their own investigations before publishing a statement which may carry a defamatory allegation is an unnecessary and unwarranted infringement of the right to freedom of expression. There are cases in which there is an important public interest in the media reporting statements made, or questions asked, by third parties *without* first carrying out their own independent investigation. It is vital to recognise that there are cases – sometimes said to be covered by the principle of "neutral reportage" – where the media have a right (even a duty) to publish statements they have not verified.

(B) A requirement that the media must *obtain* the response of the person about whom a statement is made, or question asked, before publication is an unnecessary and unwarranted restriction on free speech. Such a requirement is open to abuse by persons seeking to stifle legitimate public debate.

(C) Any requirement that reporting be "objective" must take account of the fact that (a) it is for the media, not the court, to determine how matters should be reported; and (b) reporting on matters of public debate takes place on a continuing basis: an article including a question (but not the answer) may be followed by articles including a response.

[1] The claimant (S) had supported the construction of the Baltic Sea pipeline; S had met the Russian President (Vladimir Putin) on the occasion of a private business transaction of Company G, which was owned by the Russian state; S had decided on early elections (at a low point, where loss of his office appeared likely); and, after the elections, but before the end of his term of office, it became known that S would take up a highly-paid position in a consortium dominated by Company G. The court noted the external sequence of events in its judgment.

(D) Where the media report a question that has been asked on a matter of public interest (which may carry an inference of suspicion), the court should protect the report if there was a sufficient basis for asking the question. The fact that the court considers that there may be a good answer to the question, or that there are other factors tending against suspicion, does not mean that the question should not have been asked.

(E) Questions about the conduct and motives of leading politicians, in relation to their work or political acts, are not part of their "private" life, but are properly to be considered as relating to public conduct and, as such, a legitimate subject for discussion and debate. Any curtailment of freedom of speech on such matters requires strict justification.

A: Media reporting of third party statements/questions without verification – "reportage"

5. MLDI submits that it will rarely, if ever, be permissible to prevent the media from reporting what has been said in the context of political debate, including statements about a politician's conduct. Questions asked, or suspicions expressed, by one politician regarding the conduct of another politician – including on matters bearing on integrity or motive – necessarily form part of political debate. Accordingly, the reporting of such statements must be accorded a high degree of protection. Indeed, it is obviously an important function for the media within a democracy to report what politicians say about each other – even if (or, perhaps, especially where) that includes a question about, or raises suspicion of, wrong-doing or misconduct.

6. The relevant German law appears to prohibit the reporting of any defamatory "suspicion", even where the media are reporting what has been said by a third party, unless the media are themselves satisfied that there is sufficient evidence to found such suspicion. If so, this would impose a serious restriction (amounting, in some cases, to a prohibition) upon reporting questions asked[2] – as well as allegations made – by prominent politicians or other public figures about others. This raises very serious concerns: it cannot be right in a democracy that suspicions raised by one leading politician about another, however well or poorly grounded, are only to be reported if the media are themselves able to establish an evidential basis for the suspicions.

7. Such an approach ignores the fundamental principle that the right to freedom of expression incorporates not just the right to impart information but also the right to receive it. The public is *entitled* to know not just what is "true" but also what is being said, in particular, what is being said by political actors. There is a public interest both in the *content* of the statement and in the *fact* of what is being said. Indeed, it may be the case that the "suspicion" voiced is shown to be groundless and/or to have been disseminated maliciously or recklessly by the original maker of the statement: if so, this would reflect on the conduct of the politician who aired the suspicion. Well- or ill-founded, the media's role in imparting information to the public about what s/he said is a crucial one that Article 10 is intended to protect.

8. Further, such an approach is contrary to the well-established jurisprudence of the Court, which requires that any restriction on freedom of expression is strictly proportionate to a pressing social need; relevant and sufficient reasons for each and every restriction on press freedom must be provided. There should be no blanket rule requiring journalists to provide an evidential basis for suspicions reported (or, see below, to satisfy the national courts that their reporting is "objective"). Rather, it is for the State to establish that each and every restriction can be justified,

[2] The decision of the German court proceeds on the basis that even a genuine (or open) question may carry a degree of suspicion (and, hence, be defamatory).

which will rarely, if ever, be possible when the reporting concerns criticism of a political figure for conduct relating to their political activities. Where the restriction involves a prior restraint on the reporting of matters of political comment, very strong reasons indeed must be provided for it. As the Court reiterated in *Dupuis v France*, App. No. 1914/02:

> "40….The promotion of free political debate is a fundamental feature of a democratic society. The Court attaches the highest importance to freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech."

This is clearly set out in the Committee of Ministers Declaration of 12 February 2004, which provides that it is not compatible with Article 10 of the Convention for States to grant legal privileges to political figures or public officials in relation to the dissemination of "information and opinions about them in the media". Further, that:

> "Pluralist democracy and freedom of political debate require that the public is informed about matters of public concern, which includes the right of the media to disseminate negative information and critical opinions concerning political figures and public officials, as well as the right of the public to receive them…
> Political figures have decided to appeal to the confidence of the public and accepted to subject themselves to public political debate and are therefore subject to close public scrutiny and potentially robust and strong public criticism through the media over the way in which they have carried out their functions."

It is impossible to reconcile such statements with a blanket requirement in domestic law that the media must verify before reporting any third party statement giving rise to "suspicion".

9. The courts in England and Wales have considered the extent to which the media should have a defence of "reportage" – to protect the reporting of third party allegations which the media have not verified – in the context of developing the "Reynolds defence". That defence protects "responsible" reporting on matters of public interest.[3] While "responsible" reporting normally includes attempts to verify the defamatory allegation published, that is not always the case. As the President of the Supreme Court observed in *Flood v Times Newspapers* [2012] UKSC 11, [2012] 2 WLR 760, the media may be protected in reporting allegations made "in the course of an ongoing political debate", although they had made no attempt at verification; he said (emphasis added):

> "34 ... Giving the leading judgment *[in Al-Fagih[4]]* Simon Brown LJ at p 236 identified circumstances where both sides to a political dispute were being reported "fully, fairly and disinterestedly" and where the public was entitled to be informed of the dispute. In such circumstances there was no need for the newspaper to concern itself with whether the allegations reported were true or false. The public interest that justified publication was in knowing that the allegations had been made, it did not turn on the content or the truth of those allegations. A publication that attracts Reynolds privilege in such circumstances has been described as "reportage". ....

[3] The "*Reynolds* defence" (or "*Reynolds* privilege") was created by the House of Lords in *Reynolds v Times Newspapers Limited* [2001] 2 AC 127; it was revitalised in *Jameel v Wall Street Journal Europe* [2007] 1 AC 359 HL; and see also *Bonnick v Morris* [2003] 1 AC 300 (the Privy Council emphasised the defence must be "practical and flexible"; Lord Nicholls noted at [22] that "Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals"). The Supreme Court recently considered (and upheld) the defence in *Flood v Times Newspapers Limited* [2012] UKSC 11, [2012] 2 WLR 760.

[4] *Al Fagih v HH Saudi Research and Marketing* [2002] EMLR 13: key factors in upholding the reportage defence in that case were the ***context*** of the allegation (an ongoing political debate); the fact that the allegation was ***attributed*** to the third party; and the fact that the reporter did ***not adopt*** it.

> 35 ..... **There is a danger in putting reportage in a special box of its own. It is an example of circumstances in which the public interest justifies publication of facts that carry defamatory inferences without imposing on the journalist any obligation to attempt to verify the truth of those inferences.** Those circumstances may include the fact that the police are investigating the conduct of an individual, or that he has been arrested, or that he has been charged with an offence. ..."

10. The Supreme Court in *Flood* noted – with approval – the analysis of "reportage" by the Court of Appeal in *Roberts v Gable* [2008] QB 502 (*Roberts*). The appellate judgment includes an analysis of relevant cases from domestic law [38-40], the USA [41-47] and Strasbourg [48-52]; the court was satisfied that "reportage", the requirements for which were summarised in [61], was consistent both with common law and the Convention. In *Roberts*, a newspaper had reported (without checking their truth) allegations and counter-allegations between rival factions of the British National Party (BNP). Although seriously defamatory of the claimants, their claim for libel failed: the reporting of unverified allegations was protected as "reportage".

11. The application to the Court by the unsuccessful claimants in *Roberts* was (rightly) found to be inadmissible: *Roberts v United Kingdom* App 38681/08, (2011) 53 EHRR SE23. The Court at [21] set out a helpful summary of the domestic law principles on reportage (as derived from [61] of Roberts) as follows (emphasis added):-

> "(1) The information must be in the public interest.
> (2) ... the publisher will not **normally** be protected unless he has taken reasonable steps to verify the truth and accuracy of what is published ... This is where reportage parts company with *Reynolds*. **In a true case of reportage there is no need to take steps to ensure the accuracy of the published information.**
> (3) ... To qualify as reportage the report, **judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they were made** ...
> (4) **Since the test is to establish the effect of the article as a whole, it is for the judge to rule upon it in a way analogous to a ruling on meaning** ...
> (5) **This protection will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and neutral way** ...
> (6) To justify the attack on the claimant's reputation the publication must always meet the standards of responsible journalism as that concept has developed from *Reynolds*, the burden being on the defendants ...
> (7) The seriousness of the allegation ... is obviously relevant for the harm it does to reputation if the charges are untrue. **Ordinarily** it makes verification all the more important ...
> (8) The relevant factors properly applied will embrace the significance of the protagonists in public life and there is no need for insistence as pre-conditions for reportage on the defendant being a responsible prominent person or the claimant being a public figure [5]...
> (9) The urgency is relevant ... in the sense that fine editorial judgments taken as the presses are about to roll may command a more sympathetic review than decisions to publish with the luxury of time to reflect and public interest can wane with the passage of time ..."

The Court's decision summarises key principles which are relevant to and may assist the court in this case. MLDI refer to paragraphs [43-49], which include:

[5] Such limitations apply in the USA: in outline, following *Edwards v National Audubon Society* 556 F2d 113, (i) the charge must be made by a "responsible, prominent" person; (ii) the claimant must be a "public figure": (iii) the report of the allegation must be accurate and disinterested; and (iv) the accusations must be "newsworthy" (in the context of a current controversy on a matter of public interest); and see Sack *Libel, Slander and Related Problems* (2003) at 7.3.2.4.4.2 (p7-43), note 165 (p7-44) and 7.3.2.4.6.1 (p7-50) and the Rosenfeld article referred to in 12 below.

As statements of general principle

(1) In [43], as to a positive duty on the state to safeguard Article 8 rights, regard must be had "to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole";

(2) In [44], the important (and often repeated) statement of the importance of the Convention right to freedom of expression as one of the "essential foundations of a democratic society", together with acknowledgement of the "essential" role of the media in reporting on "information and ideas on all matters of public interest" and the right of the public to receive the same.

(3) In [45], a re-statement of the importance of the media in assisting in dissemination of statements made by others, as part of the "discussion of matters of public interest"; punishment of journalists for disseminating such statements would "seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so".[6]

As statements of principle on "reportage" and the facts of the case

(4) In [46], the Court noted that the allegations were made, and *attributed* in the publication as being made, in the course of an underlying political dispute; readers would have appreciated they were "not necessarily" evidence of the truth of the allegations.

(5) In [47], the Court noted the *political* nature of the dispute and the wider context in the United Kingdom at the time concerning the activities of the BNP and the changes in leadership. The article was published "within the broader context of a debate which was likely to have been of significant interest to the general public."

(6) In [48], the court noted that the reporter had *reported* the allegations, not *adopted* them as his own. The fact that the tone of the article was critical of the BNP, and the individual claimants, could not justify the conclusion that the article adopted the content of the allegations.

(7) In [49], the Court noted that there were no "particularly strong reasons" to punish the journalist or the publisher for disseminating the allegations.

In short, the public was entitled to receive information about the allegations. Yet, had there been a blanket requirement that the media verify third party allegations before reporting them, the defendant would have lost the libel case – and free speech, on a matter of "significant" interest to the general public, would have been restricted unnecessarily and disproportionately.

12. Although the First Amendment of the Constitution of the USA and its case law differ from the Convention and Court's jurisprudence, there are common principles and values at stake in relation to the question of "reportage" – that is, reporting third party allegations without verification to further debate on matters of public interest. The North American case law and

[6] The court cited *Jersild v Denmark* no. 15890/8, Series A 298, at [35]; *Bergens Tidende v Norway*, no. 26132/95 at [52], ECHR 2000-IV; *Thoma v. Luxembourg,* no. 38432/97 at [62], ECHR 2001-III; and *Verlagsgruppe News GmbH v Austria*, no. 76918/01, at [33], 14 December 2006. See also *Pedersen v Denmark* no 49017/99, (2006) 42 EHRR 24, where the Grand Chamber stated at [77]: "In news reporting based on interviews, a distinction also needs to be made as to whether the statement emanates from the journalist or is a quotation of others, since punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so." MLDI notes that the question reported came from a third party.

principles on "neutral reportage" are examined in a recent article by Shelly Rosenfeld.[7] As the author concludes, the case law is:-

> "helpful to understand how constitutional free speech guarantees can remain strong while guaranteeing sufficient protection to individuals who become the subject of that free speech. The neutral reportage privilege is not merely helpful in this regard, but essential. When a journalist neutrally reports a newsworthy statement made by a public figure or official against another public figure or official, that journalist should not be held liable for the defamatory statement if he or she tries to get both sides of the story. When Journalism is referred to as the "Fourth Estate", it is largely because it is a mechanism for checks and balances on the branches of government by keeping the public informed of potential government abuses, public issues of great importance, and the conduct of public officials".

13. The Rosenfeld article includes (p. 164) a useful illustration of when the media should be able to report an unverified statement without being liable for defamation: what if the President of a country tells a reporter in interview that the Vice-President was plotting to kill him/her? The very *fact* that the statement has been made is newsworthy; providing the media defendant does not assert that the *content* is true, their reporting of the statement should be protected. British politics provides another example: on 9 July 2012, the British Chancellor of the Exchequer accused Ministers in the previous Government (including his predecessor as Chancellor) of having been involved in the manipulation of LIBOR (the London Interbank Offered Rate of interest); although he produced no evidence for the allegation, media reporting of it was essential to democratic accountability: voters were entitled to know not just that the suspicion was held, but also that the accusation had been made (irrespective of whether the media could themselves investigate or verify it). Indeed, the political debate soon turned to the question of whether the accusations *should* have been made in the first place and/or whether the Chancellor needed to apologise for having made them. These are valid political and democratic debates. A domestic law requiring media investigation before any "suspicion" could be reported would have prevented any such debate.

14. The Court has repeatedly emphasised the importance of media reporting of court proceedings, including contemporaneous reporting of the subject matter of criminal trials, even having regard to the defendant's entitlement to be presumed innocent. In that context, as in reporting of the proceedings of legislative assemblies, there can be no doubt that the reporting of allegations made in respect of an individual must be permitted; the media have the task of carrying out such reporting and the public has a right to receive such information: *Axel Springer AG v Germany* App. No. 3994/08 judgment 7 February 2012 (*Axel Springer 1)*, at [80] citing numerous authorities. There is no duty to verify in such cases: the media are not acting as "bloodhound" (engaging in investigative journalism and reporting their findings) but as "watchdog" (observing and reporting on what is taking place).

15. Allegations made *outside* the course of proceedings of courts or other bodies may, similarly, warrant reporting in the public interest. A key example where protection is needed from defamation claims is where the media report on charges – and counter-charges – made by politicians in the context of an ongoing political debate (or, for that matter, by public figures or prominent players in the context of debate on matters of legitimate public interest). The part

[7] "The Paper Case: the neutral reportage privilege in defamation cases and its impact on the First Amendment" (2012) Villanova Sports & Entertainment Law Journal, vol 19, p135-168. The article is accessible online through the website www.law.villanova.edu (search for "shelly rosenfeld").

played in a democratic society by the media as "watchdog" is just as vital as their "bloodhound" role, but there is an important difference in their function: while the investigative journalist ("bloodhound") may be required to attempt to verify allegations prior to publication, the watchdog is different: s/he *observes* and *reports* on what third parties do and say. Protection of the "watchdog" role – which may include reporting allegations which the media have not investigated themselves – is necessary if the media are to fulfil their essential function and if the public are to have information they need and are entitled to have.

16. Conduct that may not amount to a criminal offence may throw doubt on the integrity of the individual concerned, in such a way as to raise questions as to their fitness for public office. In matters of significant public concern, it must be open to media to report suspicion, or ask questions, in relation to such conduct in order for that suspicion to be tested and questions answered. The conduct of the person who makes the allegation may (if there was no ground for the suspicion aired) be a matter of public interest and affect *their* fitness for office. And there are two further points to note in the context of reportage:

> (1) Public figures, in particular, individuals who hold (or who have recently held) positions of power within the State, are not in the same position as private individuals. They have access to the media and are able to respond to allegations, or to defend their conduct, by putting their side of the story to the public.
> (2) The aggrieved individual is not left without remedy: if legal action is needed, s/he may take proceedings against the *maker* of the statement[8]. They may seek vindication in the proceedings and through media reporting of their case. But where the individual takes no measures against the maker of the statement, it is particularly unacceptable for the "messenger" reporting the statement to be subject to restrictions.

MLDI submits that States should not through their domestic law enable individuals to prevent the dissemination of views expressed about politicians even in circumstances where no proceedings are brought against the individual who initially expressed those views. It is a valid and essential part of reportage for the media to inform the public that those views have been expressed. Such reports should not be subject to State control unless such control is shown to be absolutely necessary and proportionate.

B: Obtaining the response of the person suspected/the subject of the allegation

17. To require the media to "obtain" the response of the subject of the suspicion before any publication can take place is an unnecessary and unwarranted restriction on freedom of expression. Self-evidently, such a requirement enables the subject of criticism or suspicion to prevent (or, at least, delay) publication by refusing to provide a response.

18. While it may be necessary and proportionate to require the media to *try* to get such a response – or to try to report the "other side" of the story (see the quotation at paragraph 12 above) – the media should not be prevented from reporting simply because the subject of the

[8] Compare *Harper v Seaga* [2009] 1 AC 1 (PC): claimant sued the maker of the defamatory statement (the leader of the opposition party in Jamaica), not the media who had reported it. It was for the maker of the statement (not the media) to mount any substantive defence in relation to the defamatory charge made (or, if appropriate, to withdraw and apologise for it).

proposed publication refuses (or fails) to respond to media inquiries.[9] If "obtaining" a response is a pre-requisite to publication, then public debate on important matters could too easily be stifled by those who wish to cover matters up. Indeed, asking questions publicly, through the media, may be an effective way of securing a proper response from the person in question. The public interest is served by matters being brought to light and into the public domain.

C: Form and content of the reporting: "objectivity"

19. Great care must be taken before concluding that the omission of facts and matters from a report means that it lacks objectivity.[10] There is, inevitably, a degree of selectivity in determining what to report: there are editorial decisions to be made. Numerous Court authorities have noted the importance of the media having the right to control the form and content of their reports: it is not permissible for the State to restrict *how* a third party comment should be reported; it is not for the State (including through its national courts) to substitute its views for those of the press as to what techniques of reporting should be adopted in a particular case: see most recently *Axel Springer 1* (cited in 14 above) at [81]; *Jersild v Denmark* (1994) 19 EHRR 1 at [31]; *Fressoz & Roire v France* (1999) 31 EHRR 28 at [54]; *Selisto v Finland* [2005] EMLR 8 at [59].

20. Further, it is important to note that the reporting of news or matters of public debate takes place on a continuing basis. A first article may include the question asked by a third party, but not the answer; subsequent articles may take the debate further, including the response and other factors. "Reportage" should not be judged as a single "snapshot". Modern reporting, whether in broadcast or print media, is on a rolling basis; the original article – and subsequent articles – often remain available, to be read or watched again (in context and as the story develops) online and in other formats. The question of "objectivity" should not be judged by a single report (or by the inclusion of a single question within a report). If key matters have been omitted, the person who is the subject of "suspicion" may draw them to the attention of the media which reported the original question, requesting their publication.

21. And, finally, it would be wrong to conclude that to be "objective" a report *must* include the response of the subject of the article. If a media defendant has sought a response, or asked relevant questions, the fact that the claimant has refused or failed to reply – thus making it impossible to include their response – should not be result in a finding that the publication lacks "objectivity".[11]

---

[9] Sedley LJ noted in *Charman v Orion Publishing* [2008] 1 AER 750 CA at [91] that reportage could not logically be confined to reporting "reciprocal allegations. A unilateral libel, reported disinterestedly, will be equally protected." See also the ECtHR in *Selisto v Finland,* no 56767/00, [2005] EMLR 8 at [63].

[10] There are many examples of abuse of the requirement of "objectivity" to restrict free speech reported by the Committee to Protect Journalists (CPJ) and human rights defenders. The examples included on the CPJ website include the following: in Uzbekistan in 2000, it was made clear that "objective" reporting meant there was a duty to report positive news about the state http://cpj.org/reports/2001/07/uzbek.php; in Jordan in 2008, an editor who had published articles highly critical of a governor and who, as a result, was prosecuted and imprisoned, faced charges including of a "lack of objectivity" http://cpj.org/2008/10/editor-in-chief-held-in-detention.php); in Peru in 2011, the cancellation of the television show of a reporter who had strongly criticised a powerful public figure was said to have been because he lacked "objectivity" http://cpj.org/2011/06/attacks-on-the-press-rise-before-the-peruvian-elec.php; in Cuba, journalists critical of the regime were deprived of press credential; one experienced reporter, whose work was regarded (but not by the Government) as an "example of professionalism, impartiality, and balance", was deprived of the right to report from Cuba after being accused of violating the government's ethics and objectivity regulations http://cpj.org/2011/09/cuba-pulls-veteran-correspondents-credentials.php. There are other examples.

[11] As Sedley LJ observed in *Charman* (cited in note 9 above) at [90]: "Balance .. does not mean giving equal weight or credence to intrinsically unequal things – for example a telling accusation and an evasive reply. Such balance

D: Reporting a question on a matter of public interest

22. Where the media report a question asked by a third party on a matter of public interest, even where the asking of the question carries an inference of suspicion, the court should protect the report *providing* there was a proper basis for asking the question. Where a fact (or facts) giving rise to a question exist – and such facts may be proved by the defendant or may even, as in the present case, be undisputed – the asking of the question, and the reporting of the question, are justifiable and should be protected. The fact that the court considers that there is an answer to the question – and that such answer may dispel any suspicion – does not mean that it was wrong to ask, and report, the question in the first place. The position is analogous to the expression of a value judgment:[12] an opinion (or value judgment) cannot be proved right or wrong; its expression will be protected if there is *some* factual basis for it; though the expression of a value judgment without *any* factual basis to support it "may be excessive": see, for example, *Jerusalem v Austria* (2003) 37 EHRR 25 at [43].

23. If it was obvious (before publication) that there was no basis whatsoever for asking the question asked by the third party (for example, in this case, that no early elections had been called or that no lucrative job had been accepted) – or the media had conclusive proof that the maker of the statement was malicious or recklessly indifferent to the truth of the facts about which they were asking – then it is *possible* that the state might be able to show that a restriction on media reporting was necessary and proportionate. However, the position was quite the contrary here: the court acknowledged that there were external, objective, facts which warranted the reporting of a suspicion of the nature disseminated by the media.

E: The line between "private" and "public"

24. A question about the motives of a politician (particularly a political leader) for their political acts (such as calling an election) does not, truly, relate to an aspect of their "private" life. Nor do questions about whether a politician had a conflict of interest during office, or what they do immediately or shortly after leaving office. These are matters which properly fall within the "public" sphere and warrant unfettered public debate. An example of the well-established principles in Strasbourg jurisprudence comes from *Porubova v Russia* 8237/03 [2009] ECHR 1477, where the court said at [45] (emphasis added):

> "The Court considers that […. as] the head of the regional government and a member of the regional legislature respectively – **they inevitably and knowingly laid themselves open to close scrutiny of their every word and deed by both journalists and the public at large** … It emphasises that the right of the public to be informed, which is an essential right in a democratic society, can even extend to aspects of the private life of public figures, particularly where politicians are concerned (see *Editions Plon v. France*, no. 58148/00 , § 53, ECHR 2004 IV [information about the health of the President of France]). By reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest" (see *Von Hannover v. Germany*, no. 59320/00 , § 63, ECHR 2004 VI). ..."

---

may be a sufficient answer for the purposes of a responsible journalism defence, but it is not a necessary one. A more selective or evaluative account is quite capable of staying within the bounds of responsible journalism."

[12] An allegation about motive, which is inherently incapable of verification, is likely to constitute a "comment" or value judgment: *Nilsen & Johnsen v Norway* (1999) 30 EHRR 878 at [50]; *Branson v Bower* [2001] EMLR 32 at [13] (in that case, the reader was in no doubt that the statements about motive were an inference based on objective facts set out in the article).

24. The questions asked in this case should not be regarded as relating to "private life": they are related to the acts of the claimant, a public figure, "acting in a public context": see *Von Hannover v Germany (No 2)* nos. 40660/08 and 60641/08, [2012] EMLR 16, at [110]. As the Court stated in *Dichand v Austria* App. No. 29271/95 [2002] ECHR 154 at [51]: "the fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises." Further, as in *Karakó v Hungary*, App. No. 39311/05, (2011) 52 EHRR 36 at [23],[13] it would not be possible for the politician claimant to show that the publication of the remarks (alleged to affect his reputation) "constituted such a serious interference with his private life as to undermine his personal integrity." The conduct in issue, and the motive for that conduct, were fundamentally *public* (not private) in nature.

Conclusion

25. The grant of an injunction to prevent the media from reporting remarks made by one leading politician about another, in the context of a serious public debate on matters of public interest, is a highly unusual and grave step, requiring the clearest justification. MLDI submits that the order made by the court was not necessary and/or was disproportionate and, therefore, an infringement of Article 10. MLDI asks the court to consider these submissions and to include in its judgment on the present application a clear and unequivocal statement of the principles outlined in (A) to (E) above.

26. If the Court requires any further information or assistance from MLDI on the matters above or otherwise, MLDI would seek to assist the court.

Heather Rogers QC
h.rogers@doughtystreet.co.uk

Jessica Simor
jessicasimor@matrixlaw.co.uk

Peter Noorlander
peter.noorlander@mediadefence.org

Nani Jansen
nani.jansen@mediadefence.org

31 July 2012

[13] See also *Roberts v UK* (cited in 11 above) at [40].

Annex I - BACKGROUND INFORMATION ABOUT THE INTERVENER

The Media Legal Defence Initiative is a non-governmental charity which works in all regions of the world to provide legal support to journalists and media outlets who seek to protect their right to freedom of expression. It is based in London and works closely with a world-wide network of experienced media and human rights lawyers, local, national and international organisations, donors, foundations and advisors who are all concerned with defending media freedom.