CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 28577/05
by THE WALL STREET JOURNAL EUROPE SPRL and Others
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 10 February 2009 as a Chamber composed of:

Lech Garlicki, *President*,
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
Ján Šikuta,
Mihai Poalelungi,
Nebojša Vučinić, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having regard to the above application lodged on 2 August 2005,

Having deliberated, decides as follows:

THE FACTS

The first applicant, Wall Street Journal Europe Sprl, is a corporation registered under Belgian law which publishes a daily newspaper in Europe, the "*Wall Street Journal Europe*", which reports on developments in international business, politics and diplomacy. The second applicant, Frederick Kempe, is a United States national who was the editor and associate publisher of the newspaper. He was born in 1954 and lives in Belgium. The third applicant, James Dorsey, is a German national who was born in 1951, is a journalist and lives in the Netherlands. The fourth applicant, Glenn Simpson, is a United States national who was born in

1964, is a journalist and lives in Belgium. The fifth applicant, Raju Narisetti, is a United States national who was born in 1966, is the Managing Director of the newspaper and lives in Belgium. They were represented before the Court by Mr M. Stephens, a lawyer practising in London.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

On 6 February 2002 the *Wall Street Journal Europe* ("WSJE") published on its front page an article written by the third applicant and headed "Saudi officials monitor certain bank accounts" with a smaller sub-heading stating "focus is on those with potential terrorist ties". The article reported, contrary to various other publications, that the Saudi Arabian Monetary Authority was in fact monitoring bank accounts associated with some prominent businessmen so as to prevent the funnelling of funds to terrorist organisations. It also stated that the monitoring had been requested by United States law enforcement agencies.

The article attributed the information to United States officials and Saudis. A number of companies and individuals were named, including the Jameel Group of Companies. The applicants submitted that the story had emerged through investigative journalism in Saudi Arabia, where access to information was particularly difficult for European newspapers. The third applicant was one of the very few Arabic-speaking Western reporters who had been able to obtain a visa for Saudi Arabia after the attacks in New York of 11 September 2001. The third applicant's sources had been promised anonymity given that five of them were resident in Saudi Arabia, where the government would carry out brutal reprisals were they identified. The story was approved by senior staff in Washington, who had sought confirmation of it from their sources in the United States Treasury Department.

Mr Jameel, who was head of a group of companies, and one of the corporate entities forming part of the Jameel Group, sued the WSJE for libel. The WSJE denied that the article was defamatory. Given the importance of maintaining the confidentiality of its sources and the fact that evidence in support of the publication was inaccessible in Saudi Arabia, the WSJE did not seek to rely on the defence of justification in the proceedings.

On 7 October 2003 Eady J made two rulings as to the meaning of the words complained of and as to the admissibility and relevance of certain hearsay evidence. He concluded that the words complained of were not capable of bearing a lesser defamatory meaning than that of "reasonable grounds to suspect" the claimants of having terrorist ties and of funnelling funds to terrorist organisations. Moreover, he held that the claimants could

submit evidence aiming to prove that the central allegation of the article was wrong. In an interlocutory appeal the Court of Appeal accepted on 26 November 2003 that the judge was correct in deciding that the evidence was properly adducible with regard to evaluating the plea of qualified privilege: undermining the correctness of the central allegation would make it more difficult for the jury to believe the journalists when they claimed that they were nevertheless clearly given this information. However, the Court of Appeal accepted that the article was capable of having lesser defamatory meanings or a non-defamatory meaning.

The action was tried before a jury between 1 and 19 December 2003. Counsel for each of the parties invited the judge to ask the jury what meaning the words in the article bore. The judge declined to do so. In his direction to the jury, he stated:

> "First, if you decide that it is defamatory of one or both claimants, we must all proceed on the basis that any such defamatory allegation is untrue. ... The defendants would be entitled to prove the truth of the allegation they have made ...They have chosen not to do that in this case and, therefore, the claimants are entitled to that presumption of innocence. It is not for them to prove anything ... If it does reflect in any way in a defamatory sense upon either of them, and ... the article does in some way link one or other or both of them to the funding of terrorism, then we accept, as an absolute fundamental assumption in this case, that such allegation is untrue."

On 18 December 2003 the jury decided that the article was defamatory and that, subject to the judge's decision on qualified privilege, the appropriate sums to be awarded by way of damages were 30,000 United Kingdom pounds sterling (GBP) to Mr Jameel and GBP 10,000 to his company. They found that the newspaper had proved that the author had received the information he claimed from a Saudi businessman, but had not proved that he had received confirmation from his other four sources. The jury further found that the third applicant had telephoned the office of the Jameel Group on the evening of 5 February 2002 and had spoken to a representative of the Group who asked for publication to be postponed for 24 hours so that Mr. Jameel, who was in Japan for business, could be contacted but that the third applicant had declined the request.

On 19 December 2003 Eady J. rejected the applicants' plea of qualified privilege. He gave his reasons for that ruling on 20 January 2004. He noted that "(t)here is a presumption that defamatory words are false, unless and until the relevant defendant proves them to be true. Here, because there is no plea of justification, the presumption will prevail." As to the meaning of the impugned words, the judge had regard to the ruling in the interlocutory proceedings as to the possible range of meanings, the jury's finding that the words were defamatory and the sums which the jury had specified as appropriate damages. He concluded that the words were defamatory in some sense and that at worst they suggested that there were "reasonable grounds to suspect" involvement in the funnelling of money to terrorists.

The judge found that the author could not have written the article in reliance on the claims of the Saudi businessman alone. Further, there was no urgency that required the publication to be made before Mr Jameel had been given a reasonable opportunity to comment on the matters alleged and it would have been sufficient not to name him and his company since it would be contrary to the public interest to publish the names of those being monitored.

On 3 February 2005 the Court of Appeal upheld the trial judge's decision but on a more limited ground: that the newspaper had failed to delay publication of the claimants' names to give them time to comment. The renewed application for leave to appeal concerning the presumption of falsity was rejected. While a defendant who wished to rely on the defence of qualified privilege under *Reynolds v. Times Newspapers Ltd* ([2001] 2 AC 127), might have to prove that it was reasonable for him to believe that a defamatory article was true, the applicants had implicitly accepted that if the article proved to have a defamatory meaning, they had no belief that it was true. As to the contention that the common law presumption of falsity infringed Articles 6 and 10 of the Convention, the court noted that it was too late for the applicants to raise this point as the parties had conducted the case on the premise that any defamatory meaning that the article bore was presumed to be untrue unless the publishers pleaded and proved justification. Accordingly, permission to advance this ground of appeal was also refused. With regard to the application of the presumption of falsity in the judge's direction to the jury, the court noted the following:

> "we do not consider that it was appropriate for the jury to apply the presumption of falsity when considering the issues of fact that were relevant to Reynolds privilege. When considering whether Reynolds privilege attaches to the publication of a potentially defamatory article it is necessary to decide whether the publishers acted as 'responsible journalists' in publishing the article. This question has to be addressed having regard to the position as it should have appeared to those responsible for the publication at the time of publication. Whether or not the article was true is not normally relevant to this question- see *GKR Karate v. Yorkshire Post* [2001]. What has to be considered is whether it was responsible to publish the article having regard to the risk that the defamatory imputation in the article might prove to be untrue ... It does not seem to us right that the jury should apply a presumption that the article was false".

However, counsel for the applicants had not objected to the judge's direction to the jury and had failed to raise this issue at the trial. In any event, the trial judge found the publishers' conduct wanting in respect of each of the points of guidance set out in *Reynolds v. Times Newspapers Ltd* (cited above), and concluded that it was not in the public interest to publish the names of those subjected to monitoring and that the author was at fault in not permitting the claimants to comment. Accordingly, leave to appeal on this ground was also refused.

Lastly, as to the judge's failure to obtain from the jury an indication on the meaning they attached to the article, it was noted that:

> "The only issue is whether he should have required the jury to define precisely the gravity of the defamatory meaning of the article. It seems to us that the choice was between "reasonable grounds to suspect" and "grounds for investigating". The difference between the two can be a narrow one. Had the issue of Reynolds been likely to turn on whether the words bore the more or the less serious meaning, it might have been necessary to invite the jury to choose between the two. But the judge plainly did not consider that the precise nature of the defamatory sting was capable of affecting the outcome. We share that view."

On 4 May 2005 leave to appeal to the House of Lords was granted in respect of the scope of the *Reynolds* defence of qualified privilege and the presumption of damage which allowed recovery of damages by the plaintiff corporation without proof of specific losses. Leave to appeal on the jury reasons issue was refused. On 11 October 2006 the appeal was unanimously allowed by the House of Lords on the scope of the *Reynolds* privilege and the claimant's action was dismissed (Lord Bingham, Lord Hoffmann, Lord Hope, Lord Scott and Baroness Hale). The principal issue for determination by the House of Lords was whether the newspaper had been entitled to the defence of publication in the public interest established in *Reynolds v. Times Newspapers* (cited above).

Lord Bingham of Cornhill noted that a publisher is protected by qualified privilege if he has taken such steps as a responsible journalist would take to try and ensure that what was published was accurate and fit for publication. He found that the Court of Appeal's ruling "subverts the liberalising intention of the *Reynolds* decision." The subject matter of the article was of great public interest, written by an experienced specialist reporter and approved by senior staff who themselves sought to verify its contents. The article was unsensational in tone and factual in content. The claimants' response was sought and the paper's inability to obtain a comment recorded. It was very unlikely that a comment would have been revealing. Overall, he concluded that "it might be thought that this was the sort of neutral, investigative journalism which Reynolds privilege exists to protect."

Lord Hoffmann also considered that the trial judge and the Court of Appeal had given the Reynolds defence "too narrow a scope". He observed that it was the material which was privileged and not the occasion on which it was published while the burden was upon the defendant to prove that the conditions under which the material was privileged were satisfied. The trial judge had misdirected the jury when he requested them to find whether the author's sources had indeed confirmed the reported facts bearing in mind that the reported facts had been known to be untrue. He noted that:

> "The fact that the defamatory statement is not established at the trial to have been true is not relevant to the *Reynolds* defence. It is a neutral circumstance. The elements of that defence are the public interest of the material and the conduct of the journalists at the time. In most cases the *Reynolds* defence will not get off the ground unless the

> journalist honestly and reasonably believed that the statement was true but there are cases ('reportage') in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth. In either case, the defence is not affected by the newspaper's inability to prove the truth of the statement at the trial."

Applying the criteria set out in Lord Nicholls' speech in *Reynolds*, he concluded that the article "was a serious contribution in measured tone to a subject of very considerable importance", the inclusion of the defamatory statements – the names of large and respectable Saudi businesses – was an important part of the story showing that the US Treasury's request extended to the heartland of the Saudi business world, and the applicants had behaved "fairly and responsibly in gathering and publishing the information" in compliance with the "responsible journalism" test. As to the applicants' refusal to delay publication Lord Hoffmann noted that the delay would not have made a difference to the article: in the circumstances Mr Jameel would have been asked whether he knew of any reason why anyone would want to monitor his account and the answer would most likely have been in the negative. Failure to wait was not enough to deprive the newspaper of the defence that they were reporting on a matter of public interest. Hence, there was no basis for rejecting the newspaper's Reynolds defence.

Baroness Hale of Richmond concluded that "if the public interest defence does not succeed on the known facts of this case, it is hard to see it ever succeeding".

COMPLAINTS

1. The applicants complained under Article 6 of the Convention that the refusal of the trial judge to request the jury to determine the defamatory meaning of the article had deprived them of their right to have an adequately reasoned judicial decision.

2. They further complained under Article 6 that the trial was unfair because the application of the presumption of falsity meant that they had had to show that their article was published in good faith and in the public interest when the information it contained had been deemed to be false and where all the evidence for verifying the defamatory allegations had been unobtainable.

3. Lastly, they complained under Article 10 that the operation of the common law presumption of falsity had undermined their plea of defence of qualified privilege and was incompatible with their right to freedom of expression as it had had a "chilling effect" that deterred voicing criticism because of doubt whether it could be proved in court.

THE LAW

A. Article 10 of the Convention

The applicants complained that the common law presumption of falsity had undermined their plea of defence under *Reynolds* and had had a disproportionate "chilling effect" on their exercise of their right to free speech contrary to Article 10 of the Convention. Article 10 provides, insofar as relevant:

> "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 prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ..."

Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism or, in the words of the House of Lords, "the standards of responsible journalism" (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III).

In accordance with its case-law, in order to assess the legitimacy of an impugned statement, a distinction needs to be made between statements of fact and value judgments. In assessing the legitimacy of statements of fact the Court considers that it is not, in principle, incompatible with Article 10 to place on a defendant in libel proceedings who wishes to rely on the defence of justification the onus of proving to the civil standard the truth of defamatory statements (see, *inter alia*, *Alithia Publishing Company Ltd and Constantinides v. Cyprus*, no. 17550/03, § 68, 22 May 2008; *McVicar v. the United Kingdom*, no. 46311/99, § 87, ECHR 2002-III; and *Steel and Morris v. the United Kingdom*, no. 68416/01, § 93, ECHR 2005-II).

In previous cases, when the Court has been called upon to decide whether to exempt newspapers from their ordinary obligation to verify factual statements that are defamatory of private individuals, it has taken into account various factors, particularly the nature and degree of the defamation and the extent to which the newspaper could have reasonably regarded its sources as reliable with regard to the allegations

(Bladet Tromsø *and Stensaas*, cited above, § 66). These factors, in turn, require consideration of other elements such as the authority of the source (Bladet Tromsø *and Stensaas*, cited above), whether the newspaper had conducted a reasonable amount of research before publication (*Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, § 37), whether the newspaper presented the story in a reasonably balanced manner (Bergens Tidende *and Others v. Norway*, no. 26132/95, § 57, ECHR 2000-IV) and whether the newspaper gave the persons defamed the opportunity to defend themselves (Bergens Tidende *and Others*, cited above, § 58). Hence, the nature of such an exemption from the ordinary requirement of verification of defamatory statements of fact is such that, in order to apply it in a manner consistent with the case-law of this Court, the domestic courts have to take into account the particular circumstances of the case under consideration.

Turning to the circumstances of the present case, the Court observes that the plea of qualified privilege based on *Reynolds v. The Times Newspapers Ltd* [2001] 2 AC 127 is an exceptional defence intended to ensure free communication without fear of litigation, even if that involves making defamatory statements of fact which cannot be proved to be true. It exempts newspapers from their ordinary obligation to verify factual statements that are defamatory so long as they have, taking into account all the relevant circumstances, acted in accordance with the standards of "responsible journalism" (see *Times Newspapers Ltd v. the United Kingdom* (dec.), no. 23676/03 and 3002/03, 11 October 2005).

With regard to the applicants' contention that the presumption of falsity is incompatible with Article 10 of the Convention, the Court notes that it has previously accepted this presumption as consistent with Article 10 in the context of the defence of justification (see *Alithia*, cited above, § 68 and *McVicar*, cited above, § 87). Without underestimating the presumption of falsity's potential to have a "chilling effect" on the press, its use in this context aims to protect a claimant's right to protection of his reputation as guaranteed by Article 8 of the Convention (*Pfeifer v. Austria*, no. 12556/03, §§ 35, 38, ECHR 2007-....). However, different considerations must apply where the defamatory factual statements are derived from a source that could reasonably be relied on and where, consistently with the Court's case-law, a newspaper is dispensed from its ordinary obligation to verify the statements (see, *inter alia*, Bladet Tromsø *and Stensaas*, cited above). In such a case, it would not be consistent with Article 10 to require that the newspaper establish the truth of the statements at trial.

The applicants argued that the presumption of falsity was allowed to undermine their plea of defence as it rendered it extremely difficult to show that they had acted reasonably when the information they published was deemed false as opposed to information that could not be proved to be true. The Court notes however that the inappropriate application of the

presumption of falsity by the trial judge was criticised by the Court of Appeal and was ultimately rectified by the House of Lords. In particular, the members of the House of Lords expressly noted that the inability to verify the defamatory statements of fact at the trial was not relevant for the purposes of the particular defence. Hence, despite the applicants' difficulties in proving the impugned statements, they could nevertheless justify their publication because they had acted in good faith and in accordance with the standards of responsible journalism. On this basis, their appeal to the House of Lords was successful and the action against the applicants was dismissed.

In these circumstances, the Court considers that the applicants cannot claim to be victims of a violation of their rights under Article 10 of the Convention in this respect. This complaint must, therefore, be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

B. Article 6 of the Convention

The applicants complained that the proceedings had been unfair on account of the lack of determination of the defamatory meaning of the publication by the jury and the operation of the presumption of falsity. Article 6 provides, in so far as relevant, that:

> "In the determination of ...his civil rights and obligations...everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

The Court considers that, given that the applicants' appeal to the House of Lords was allowed and having regard to the Court's conclusion on the Article 10 complaint, the applicants cannot be considered victims of a violation of their rights under Article 6 for the purposes of Article 34 of the Convention. Hence, this complaint must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

C. Article 13 of the Convention

The applicants complained of a lack of an effective remedy within the meaning of Article 13 of the Convention in respect of their other complaints. This provision reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court considers that, in light of its findings concerning the applicants' complaints under Articles 6 and 10 of the Convention, that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Fatoş Aracı
Deputy Registrar

Lech Garlicki
President