Yet while "physical liberty" lies at the heart of Strasbourg's interpretation of Article 5, it is not exhaustive. Deprivation of liberty under Article 5 must be distinguished from mere restriction upon freedom of movement under Article 2 of Protocol 4 of the Convention, albeit that, as the Court of Appeal pointed out, the distinction between the two is one of degree and not kind (at [6]). "[T]he starting point [for determining deprivation of liberty] must be [the individual's] concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question" (*Guzzardi*, at [92]). As the Court of Appeal accepted, rejecting the appeal on the Article 5 point, Sullivan J. was correct to repudiate an approach to deprivation of liberty wholly concerned with physical freedom.

The second question which arose in *JJ* was the appropriate remedy. The Home Secretary argued that the jurisdiction of the court in section 3(12)(a) PTA to quash a non-derogating control order as "flawed", applies only where the flaw lies in the Secretary of State's decision that there exist grounds for the imposition of the order and not where the flaw is the invalidity of some (or all) of the obligations contained within that order. The Court of Appeal accepted this argument in part, questioning whether it was correct for Sullivan J. to treat the conclusion that the orders were in breach of Article 5 as a finding that the orders were "flawed" under section 3(12) (at [26]). However, this did not affect the jurisdiction of the judge to quash the orders as being invalid for breach of Article 5. This conclusion must surely be correct: where a statutory regime provides for the making of orders in breach of Article 5 only by the court, it cannot be that the court lacks jurisdiction to quash orders in breach of Article 5 purportedly made by the Secretary of State.

The decision of the Court of Appeal in *JJ* is a further blow to the government's anti-terrorism strategy, with Article 5 placing greater limits than envisaged on the scope of control orders. The choice now before the government would seem to be between accepting more limited (Article 5 compliant) control over terrorist suspects, and attempting to frame a derogation from Article 5 which will be accepted by the judiciary as a proportionate response to the terrorist threat.

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LIBEL AND THE PUBLIC INTEREST

THE defence of *Reynolds* privilege (established as a form of qualified privilege by the House of Lords in *Reynolds* v. *Times Newspapers*

https://doi.org/10.1017/S0008197307000220 Published online by Cambridge University Press

[2001] 2 A.C. 127) initially raised hopes that it would be a milestone for media freedom, limiting the chilling effect of potential libel actions when reporting on matters in the public interest. However, in the lower courts *Reynolds* privilege has often received a more limited application than some had initially anticipated. In *Jameel* v. *Wall Street Journal Europe SPRL* [2006] UKHL 44, [2006] 3 W.L.R. 642 the House of Lords sought to halt this trend and unanimously emphasised the liberalising goal of *Reynolds*.

Jameel brought a libel action against the *Wall Street Journal* after that newspaper published an article in February 2002 naming him as one of several businessmen and companies whose bank accounts were being monitored by the central bank of Saudi Arabia. The accounts were allegedly monitored at the request of US agencies to prevent the channelling of funds to terrorist organisations. The defendant relied on the *Reynolds* defence, but both Eady J. and the Court of Appeal rejected this defence. On appeal, the House of Lords set aside the decision of the Court of Appeal and upheld the *Reynolds* defence. While their Lordships also decided by a majority of three to two that the presumption of damage in libel actions applies where the claimant is a trading company, this note will focus on the impact of the decision on *Reynolds* privilege.

Lord Hoffmann set out three questions for establishing *Reynolds* privilege: the story must be in the public interest; the inclusion of the defamatory statement must be justifiable; and the defendant must have acted as a fair and responsible journalist in gathering and publishing the information. While these questions are to be determined by the court, weight is to be given to the professional judgement of the editors, so that the actions of the defendant are not judged with the benefit of hindsight. On the first question, their Lordships held it is the general thrust of the story rather than each individual statement that must be in the public interest. In this case, the subject of the investigation of terrorism in the aftermath of the attacks on 11 September 2001 was clearly in the public interest. The inclusion of the claimants' names in the article was also justified to show that the accounts of prominent businessmen, rather than those on the margins of Saudi society, were being monitored.

On the requirements of responsible journalism, Lord Nicholls in *Reynolds* had set out ten factors to be taken into account. In *Jameel*, the Court of Appeal upheld the rejection of the *Reynolds* defence as the defendant had not fulfilled at least one of the ten factors, that the claimants had not been given sufficient opportunity to comment on the allegations. On the evening before publication, the defendant contacted Jameel, who was unavailable for comment until the following day. The defendant refused the claimants' request that

https://doi.org/10.1017/S0008197307000220 Published online by Cambridge University Press

publication be delayed for a day to permit a comment. The House of Lords held that the failure to delay publication was insufficient to deny the *Reynolds* defence. Lord Hoffmann stated that the ten factors set out by Lord Nicholls in *Reynolds* were not to be treated as "ten hurdles at any of which the defence may fail", but the "standard of conduct required of the newspaper must be applied in a practical and flexible manner" (at [56]). Lord Bingham stated that rejecting the defence on such a narrow ground "subverts the liberalising intention of the *Reynolds* decision" (at [35]). This more flexible approach does not, however, give the media *carte blanche* to publish defamatory statements. The defence still requires high standards of journalism to be met. Their Lordships noted that the *Wall Street Journal* article was not sensational in its tone, but was a neutral piece of investigative journalism written by an experienced specialist. The effect of the decision is to ensure that the requirements of responsible journalism are not applied in an overly rigid way, so that the failure to meet one or more of the ten factors is not always fatal to the defence.

The decision is also important for its discussion of the nature of *Reynolds* privilege and its relation to other forms of privilege. The defence of qualified privilege traditionally applies where the publisher has a legal, moral or social duty to publish the statement and the audience has a reciprocal interest to receive it (*Adam* v. *Ward* [1917] A.C. 309). For example, a person writing a job reference would have such a duty to tell the prospective employer if the job applicant were suspected of having a drink problem. Under this approach, a reciprocal duty and interest for a statement to be made to the public at large arises only in exceptional circumstances, for example, where as a matter of urgency it is necessary to inform the public about a suspected terrorist (*Blackshaw* v. *Lord* [1984] 1 Q.B. 1). At first instance in *Jameel*, Eady J. stated that *Reynolds* was not a departure from this traditional approach and consequently set a very high threshold for *Reynolds* privilege.

By contrast, the House of Lords did not confine the *Reynolds* defence to such strict limits and several of their Lordships commented on the limits of the duty and interest test in this context. Lord Scott stated that it makes little sense to insist on a specific reciprocal duty and interest in the cases of statements to the world at large. Instead, he treated the duty to publish more flexibly as a professional duty to publish information that is in the public interest. Lord Hoffmann and Baroness Hale went further in stating that *Reynolds* privilege is a different jurisprudential creature from traditional qualified privilege, following the Court of Appeal in *Loutchansky* v. *Times Newspapers* [2001] EWCA Civ 1805, [2002] Q.B. 783, and that *Reynolds* is better described as a public interest defence rather than privilege. Lord

https://doi.org/10.1017/S0008197307000220 Published online by Cambridge University Press

Hoffmann highlighted the differences between *Reynolds* and traditional privilege, as with *Reynolds* the material rather than the occasion is privileged and there is no question of the privilege being defeated by malice once the conditions of responsible journalism are satisfied. Despite the different views on the relationship between *Reynolds* and traditional qualified privilege, their Lordships rejected the lower courts' narrow application of the duty and interest test. This marks an important development in allowing *Reynolds* privilege to be relied upon in a broader range of contexts where statements are made to the public at large.

The decision of the House of Lords does not give absolute protection to the media, but emphasises the weight to be given to media freedom when balancing the public's need to be informed, on the one hand, with rights to reputation, on the other. The danger with the stricter approach of the lower courts is that as the defence becomes harder to establish, the reputation rights of the claimant will tend to outweigh other considerations. Too high a threshold for the defence increases the chance that newspapers will suppress important stories the publication of which is in the public interest. While uncertainties as to whether the defence can be established in each case still exist, it is to be hoped that the decision in *Jameel* will limit the scope for threatened libel actions to deter the publication of responsible and fair journalism on matters in the public interest.

JACOB ROWBOTTOM

TO THE FULLEST EXTENT OF THE LAW? *JONES V. WHALLEY* AND THE RIGHT TO PRIVATE PROSECUTION

ON one view, the right of an individual to bring a private prosecution is something of an anachronism in modern Britain. The notion that a private person might invoke the state's punitive machinery, including the possibility that the state may, notwithstanding that the DPP may not have seen fit to take over the prosecution, ultimately incarcerate the accused, seems out of place in a system that possesses a fully functioning, adequately equipped, non-corrupt police force, and an independent prosecuting body. Alternatively, others view the right as a constitutional fundamental, and an essential part of the deterrent weaponry used to protect those who serve amongst the public, such as transport workers and postal employees.

In *Jones* v. *Whalley* [2006] UKHL 41, [2006] 3 W.L.R. 179 the House of Lords was required to rule on the relationship between this ancient right of "anomalous historical survival" (at [15]) and

https://doi.org/10.1017/S0008197307000220 Published online by Cambridge University Press