[2018] EWHC 1461 (QB)

No. HQ16X04249 and HQ16X04250

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

MASTER VICTORIA McCLOUD

IN THE MATTER OF THE BILL OF RIGHTS 1689
IN THE MATTER OF THE HUMAN RIGHTS ACT 1998

B E T W E E N :

(1) Mr Martin Warsama (Claimant in HQ16X04249)

(2) Ms Claire Gannon (Claimant in HQ16X04250)

Claimants

- and -

(1) The Foreign and Commonwealth Office

(2) The Wass Inquiry

(3) Ms Sasha Wass QC

Defendants

- and -

The Rt. Hon. The Speaker of the House of Commons

Represented non-party

Mr. Nicholas Bowen QC and Ms Louise Price of counsel (instructed by Messrs Meaby and Co, solicitors), appeared for the Claimants.

Mr. Neil Sheldon of counsel (instructed by the Government Legal Department) appeared on behalf of the 1st Defendant

Mr. Jeremy Johnson QC (instructed by the Government Legal Department) appeared on behalf of the 3rd Defendant

Ms Saira Salimi (Counsel for the Rt. Hon the Speaker of the House of Commons) appeared by way of written submissions for the Speaker.

Hearing: 23 March 2018

Draft Judgment: 30 May 2018

Handed down: 15 June 2018

Keywords: ***Bill of Rights 1689 – Constitution – Parliament – Parliamentary Privilege – Separation of Powers – Immunity - Jurisdiction of Court - Human Rights – Public Authority – Child Abuse – Inquiry Report – Motion for an Unopposed Return – ECHR Art 8 – ECHR Art 6 - Damages – St Helena and Ascension Island – Crown in Parliament – Non-Statutory Inquiry – Executive – Judicial Review – Delay – Professional Reputation – Salmon process - Maxwellisation***

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Cases referred to in submissions and/or judgment:

Sir John Eliot's case, (1629) 3 St. Tr. 294, 3 Digest 326, 134
Stockdale v Hansard, (1837) 112 ER (1839) Ad. & E. 1
Pepper v Hart [1993] AC 593
Prebble v Television New Zealand [1995] 1 AC 321
AG v Trustees of the British Museum (Commission for Looted Art in Europe intervening) [2005] 397
Toussaint v A-G of St Vincent and the Grenadines [2007] UKPC 48
Office of Government Commerce v Information Commissioner (AG Intervening) [2008] EWHC 774 (Admin.)
R v Chaytor [2010] UKSC 52, [2011] AC 684
Kimathi & Ors v FCO [2017] EWHC 3379 (QB)
R (on the application of H-S) v SSHD [2017] WL 03174585
R (Javed) v Home Secretary [2001] EWCA Civ 789
Al-Fayed v UK [1994] ECHR 27
Hurley v Secretary of State for Work and Pensions [2015] EWHC 3382
A v UK 35 EHRR 51 (2003)
Zollmann v UK App. No. 62902/00.
Chauvy & Ors v France, (ECHR Appn. No. 64915/01)
Gunnarson v Iceland (ECHR Appn. No. 4591/04)
Strizhak v Ukraine (ECHR Appn. No. 72269/01)
Opinzar v Turkey (ECHR Appn. No. 20999/04)
Axel Springer AG v Germany (ECHR Appn. No.39954/08)
Sunday Times v UK (1979) 2 EHRR 245
R (Justice for Health Ltd) v Secretary of State for Health [2016] Med LR 599
HA v University of Wolverhampton v Office of the Independent Adjudicator (General Pharmaceutical Council intervening) [2018] EWHC 144 (Admin)
Cordova v Italy (No. 1) Appn. No. 40877/98
R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368
R (Weaver) v London and Quadrant Housing Trust [2010] 1 WLR 363
YL v Birmingham City Council [2007] UKHL 27
Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37
Somerville v Scottish Ministers (HM A-G for Scotland intervening) [2007] UKHL 44
R (on the application of L) (FC) v Commissioner of Police of the Metropolis [2007] EWCA Civ 168
H and L v A Local Authority [2011] EWCA Civ 403

R (T) v Chief Constable of Greater Manchester [2014] UKSC 35
Hoffmann-La Roche and Co. AG and others v Secretary of State for Trade and Industry [1974] AC 295
R (Mousa) v Secretary of State for Defence [2013] EWHC 2941
R (Anufrijeva) v London Borough of Southwark [2004] QB 1124

Statutes referred to:
The Bill of Rights 1689
The Parliamentary Papers Act 1840
The Human Rights Act 1998
The Inquiries Act 2005

Other material referred to:
"*Guide to Laying Papers*", House of Commons Journal Office, August 2017
Erskine May *Parliamentary Procedure* 24th ed.

"Report of the Spoliation Advisory Panel in respect of a 12th Century manuscript now in the possession of the British Library", Return to an address of the Honourable House of Commons dated 23 March 2005, HC 406.

Motion for an Unopposed Return, Mr Hammond, Sec of State, House of Commons, 10 December 2015

The Wass Report "*Return to an Address of the Honourable the House of Commons dated 10 December 2015*" HC 662 ('*The Wass Inquiry Report into Allegations Surrounding Child Safeguarding Issues on St Helena and Ascension Island (Redacted Version)*')

The Bingham Report ("Inquiry into the Supervision of The Bank of Credit and Commerce International") , HC 250 1992-93

The Saville Report ('*The Bloody Sunday Inquiry*'), HC 29 2010-11

The Jones Report on the experience of the Hillsborough families ('*The Patronising Disposition of Unaccountable Power*'), HC 511 2017-19

Report of the Joint Committee on Parliamentary Privileges (HL paper 43, HC214 Vol 3 1998-9)

"Inquiries Guidance", Cabinet Office (undated).

Department for Constitutional Affairs "*Effective Inquiries*" CP 12/04, 6 May 2004

Joint Committee on Human Rights reports 2003-4 and 2006-7

Accessible language summary (not part of judgment).

This summary has a Flesch score of above 50 and was written to ensure accessibility of the judgment to readers with average reading ability.

An Act of Parliament called the Bill of Rights means that people cannot sue if a member of Parliament speaks freely or debates in Parliament. It also protects proceedings in Parliament from people who want to start court proceedings.

This is a court decision about the claims of social workers who are suing the Government and a lawyer about a Report which criticised them. The Government paid the lawyer for her work and she was in charge of the inquiry which wrote the Report. The report was about child abuse on St. Helena which people said had happened there.

The Government and the lawyer said that the social workers cannot sue them because Parliament published the Report using proceedings in Parliament and the Bill of Rights prevents them suing.

The judge's decision is that the Report is free speech in proceedings in Parliament and the social workers cannot sue about what the Report says. The most senior court decided in the past that the business of Parliament includes free speech or debate, and the Human Rights Court in Europe has decided that it is legal to protect free speech in debates in Parliament. The judge said that the social workers can sue about the way the Government and the lawyer produced the Report.

The decision also says that the lawyer had to obey the Human Rights Act 1998 and protect the Human Rights of the social workers when she was in charge of the inquiry about the child abuse.

The judge allowed the Government, the Lawyer and the social workers to appeal to the appeal court.

JUDGMENT

Introduction

1. The parliamentarian Sir John Eliot met his end by way of microbe, rather than by the judicial axe. The cause of his demise, from consumption, in 1632 at the Tower of London was nonetheless oppression by the Crown.

2. His offence was that he spoke freely in Parliament. Sir John had found himself a member of Parliament at an unfortunate moment, of the sort which is sometimes the lot of people opposing forces larger than themselves. As in his case, it sometimes does not turn out well[1].

3. He had presented resolutions against illegal taxation, and other matters, which he read to the House. When interrogated, he asserted a right to rely on privilege against questioning what was said in Parliament. He was fined by the Lord Chief Justice for conspiracy to resist an order of the King and for refusing to accept the jurisdiction of the Court of King's Bench, the predecessor of the court in which this judgment is given. (Sir John Eliot's case, (1629) 3 St. Tr. 294, 3 Digest 326, 134.)

4. His case had constitutional implications. It gave impetus to the passage, in 1689, of what is today known as the Bill of Rights. The Bill of Rights 1689, Article IX (1 Will. and Mary sess. 2 c.2), is regarded as the source of – or perhaps on another analysis the confirmation of the inherent existence of[2] - parliamentary privilege, namely (in approximate terms for the moment) the freedom to speak freely in the course of parliamentary business without fear of legal action.

5. The facts of the two cases now before me arise in a more modern context, namely the inquiry and report into alleged child abuse on the island of St Helena, which

[1] even for Masters, it seems. I refer of course to Sir Dudley Digges who was a Master in Chancery and later Master of the Rolls, imprisoned with Sir John Eliot after taking a stand on a different matter.

[2] There had been a resolution of Parliament in 1666-7 which arguably had much the same effect as the later enactment of the 1689 Act and which in its language is suggestive of a principle that parliamentary privilege is an ancient and necessary Right and Privilege of Parliament.

took the form of an inquiry by Ms Wass QC (D3) at the behest of the Foreign and Commonwealth Office (D1) in 2014, with the resulting report by her ('the Wass Report') being laid before Parliament using a "Motion for an Unopposed Return", on 10th December 2015. This judgment relates to the legal status of that procedure and the legal status of Ms Wass QC.

6. The Claimants are social workers who carried out work on the island and who were criticised in the Wass Report. They sue the FCO, 'the Wass Inquiry' and Ms Wass QC for damages for breach of their Article 8 rights due to what they allege have been serious impacts on their private and professional lives. The Wass Inquiry was not a statutory inquiry under the Inquiries Act 2005 or the Inquiry Rules 2006. The terms of reference included the response of the St Helena authorities to child protection concerns, however the terms also provided for *'a review and assessment of other matters not envisaged at the initial stages of the Inquiry but which, during the course of the Inquiry, it appears prudent to include in its scope'*.

7. An indication of the seriousness of the conclusions in the Report can be gained from the following quotation:

> *"The Inquiry was established in response to a series of newspaper articles, leaked documents and extraordinary allegations made by "whistleblowers". As the Inquiry progressed, it became increasingly clear that two of these individuals were largely responsible for the more salacious allegations and the resulting furore. This report necessarily looks at their role in considerable detail.*
> *St Helena and its people have been grossly and unfairly tarnished by the allegations which the Inquiry was asked to investigate. I hope this report clears away the wilder, unsupported accusations."*

8. As far as the Claimants are concerned the process adopted by the Wass inquiry was procedurally and substantively unfair. In using that moderate language to characterise their positions here I do not intend to belittle the strength of feeling which the Claimants have, the seriousness of the unfairness which they feel, and the impacts on them which they allege. As per Ms Gannon's Particulars of Claim at para. 13 it is alleged that the Report was 'littered with inaccuracies, and untruths'.

9. Mr Bowen QC indicated that it would not be an understatement to say that his clients' position was that the Inquiry was a disgracefully run tribunal and that Ms Wass QC was a senior criminal silk who was not independent. The inquiry was there to 'achieve an end'. Such hot dispute was made clear by the adversarial sparks which flew between counsel on the subject. From D1's perspective (and I am sure D3 agreed) the allegations were 'absurd and unpleaded'.

10. There was a query in D1's skeleton as to whether the Claimants were intending to challenge the accuracy of the Report or only the procedure which was followed but in my judgment the claims, imperfectly, do seek to challenge the accuracy of the Report and it is logically impossible to separate the most obvious alleged harm said to have been done to the Claimants by the the content of the Report.

Statutory Material

11. Article IX of the Bill of Rights 1689 states:

> *"That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."*

Ss 1-3 of the Parliamentary Papers Act 1840[3] provides that proceedings in court against a person for publication of a 'report, paper, votes or proceedings … by or under the authority of either House of Parliament' may be stayed if a certificate is produced by the Defendant to the effect that the publication was ordered by either House. The Act provides protection where another person publishes a complete copy of a parliamentary document.

s. 6(1) of the Human Rights Act 1998 provides that: *"It is unlawful for a public authority to act in a way which is incompatible with a Convention right."*

s. 6(3) of the Human Rights Act 1998 states:

> *"(3) In this section "public authority" includes—*
>
> *(a) a court or tribunal, and*
>
> *(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."*

[3] Entitled *"An Act to give summary protection to Persons employed in the Publication of Parliamentary Papers"*

The Parties' Positions

12. The 1st Defendant and the Speaker contend that the use of the Unopposed Return procedure (with subsequent order for printing) confers parliamentary privilege upon the Report, and that claims against D1 and D3 which question or impeach the Report are barred under the Bill of Rights (or the common law principles arguably reflected in it).

13. There does not appear to have been a judgment which deals with the issue. It is my duty therefore to provide this - no doubt unworthy - decision so that greater appellate minds may identify and consider where, and how far, it falls short.

14. The issue raised for Ms Wass QC is that she says no claim lies against her under the Human Rights Act 1998 because she is not a 'public authority' for the purposes of that Act. That is not her sole argument but is the main point considered in relation to her case.

Issues for determination

15. D1's case was presented by Mr Neil Sheldon, and was supported by the Speaker whose counsel Ms Salimi presented written submissions pursuant to leave granted of my own motion. No separate submissions were made for the House of Lords. D3 was represented by Mr Johnson QC and the Claimants were represented by Mr Bowen QC and Ms Price. (D2 was not represented and it was in issue whether, not being a legal person, D2 could be sued at all.)

16. Two main issues arise for decision[4]:

[4] The hearing, albeit triggered by applications for summary judgment and striking out, proceeded on the footing that I was to make a decision on the two points of law referred to in (1) and (2) which do not require controversies of fact to be resolved beforehand. The parties were directed in the weeks prior to hearing to raise any factual issues which required prior determination and none were raised. There had been some confusion prior to the hearing, on the Claimants' side, which comes across in their skeleton argument, as to the status of the hearing, which stemmed (it became clear in course of argument) from the Claimants' counsel being unaware of the exact terms of the directions order. In the event matters proceeded on the pleaded facts relating to the issues under consideration.

(1) '**the Privilege Issue'** concerns whether on the pleaded facts of this case, and in particular the use by the Secretary of State of a parliamentary procedure known as the 'Motion for an Unopposed Return', the Claimants' claims are defeated by the defence of parliamentary privilege. The Unopposed Return is the procedure adopted by ministers when they wish to ensure that material is presented to Parliament (and thereafter published) under the cloak of privilege.

(2) '**the Convention Status Issue**' concerns whether Ms Wass QC, who is D3, can face any liability under the Human Rights Act and the European Convention on Human Rights and Fundamental Freedoms (pursuant to the Human Rights Act 1998), it being in issue whether she falls within the scope of that Act.

17. A third and rather more composite set of issues which follow after the above is whether (assuming either or both of the above potentially complete defences do *not* succeed in law), the claims stand a reasonable prospect of success and/or whether there is some other good reason for a trial, and/or whether the action survives an application by the Defendants to strike out as disclosing no good reason for bringing the claims.

The facts

18. The Report was published on 10 December 2015. The manner in which that occurred was that a motion was moved in the Commons, by the Crown, in the following terms which I take from the Speaker's submissions:

> *"That an humble Address be presented to Her Majesty, that she will be graciously pleased to give directions that there be laid before this House a Return of parts of a Paper, entitled The Wass Enquiry Report into Allegations Surrounding Child Safeguarding Issues on St Helena and Ascension Island, dated 10 December 2015."*

19. The motion was passed and the Report was (as it confirms on its face) directed by the House of Commons to be printed. It was published and given a reference number HC662. There is no dispute of fact as to the above sequence of events and such were the facts relied on by D1 on the plea of parliamentary privilege.

20. As to the "Unopposed Return", *Erskine May* Parliamentary Practice 24th Ed. was referred to by D1 and the Speaker as indicating that each House of Parliament has

the power to call for the papers by means of a Motion for a Return. The procedure for a Motion for an Unopposed Return is said (at p.133) to be used for:

> *"particular documents which the Minister responsible for the government department concerned wishes to make public (hence they are 'unopposed') but in respect of which the protection of statute afforded by an order of the House for printing or other publication is sought."*

21. The evidence of the Clerk to the House of Commons which was set out in a report of the Joint Committee on Parliamentary Privileges (1998-99) observes that the procedure takes place on sitting days, like ordinary motions of the House, but that it cannot be opposed by members:

> *"The procedure of an "unopposed return" was introduced originally to avoid the inconvenience of the House having formally to consider motions by ministers for returns of largely uncontroversial information ... it is now used almost exclusively in order to ensure that a report of a ministerial inquiry will not be subject to actions for defamation. ... it involves three stages: a motion for the return in the name of the minister must be tabled (like any other motion) on a sitting day, moved (like any other motion) on a sitting day, and the return made (by publication of the report) on a sitting day. Although members cannot oppose the motion, the procedure ensures that Members receive clear notice of presentation".*

22. It is undisputed that Ms Wass QC is a barrister in practice and is a QC, and that she chaired the inquiry at the instruction of the FCO, and produced the Report. She was instructed and paid by the FCO. It is in dispute as to whether, however, Ms Wass QC in the course of holding the inquiry and producing the Report fell within the scope of the Human Rights Act s.6 definition of a 'public authority' so as to impose duties upon her under that Act.

Structure of this judgment

23. This judgment is divided into three parts.
    - In Part (I) I determine the Privilege Issue;
    - In Part (II) I determine the Convention Status Issue; and
    - In Part (III) I determine the connected summary judgment and strike out applications by the Defendants given my conclusions in Parts (I) and (II) on remaining points as far as necessary for this judgment.

(I) The Privilege Issue

The FCO and Speaker's arguments

24. The applications in relation to the Privilege Issue were those of the FCO but Speaker's counsel's argument was consistent with and agreed with by the FCO, and therefore I shall set out their points in this section together. The Speaker took no position on the substantive issues in dispute and limited submissions to the point of law as to parliamentary privilege.

25. The Speaker gave examples of previous reports published using the 'Unopposed Return' (see above). These include the Bingham Report into the collapse of BCCI, HC 250 1992-93, the Report of the Saville inquiry into 'Bloody Sunday', HC 29 2010-11, and the Jones Report on the experience of the Hillsborough families, HC 511 2017-19. These were said to be examples (consistent with the passage from *Erskine May* quoted above) of the use of the procedure where there was a public interest in the publication but where the subject matter was sensitive and required the protection of privilege.

26. In such cases, including the Wass Report, the Minister did not decide to publish (as the Claimants appeared to allege), rather it was Parliament which, through the address to the Sovereign embodied in the Motion, called for the Minister to place the document before the House, and then ordered it to be published. In this case whilst it was the case that the Minister himself actually instigated the Unopposed Motion process which led to the publication, nonetheless it was Parliament which ordered it. It was true to say that it was a procedural 'device' but nonetheless it was a device which ensured publication under privilege, that was the point of it. By the 'calling for' process, the report became privileged and it did not matter where the idea of commencing the inquiry or report originated.

Meaning of 'impeach or question' in Art IX Bill of Rights 1689

27. I was referred to Kimathi & Ors v FCO [2017] EWHC 3379 (QB) and to R (on the application of H-S) v SSHD (Admin.) [2017] WL 03174585 on the interpretation of the words "impeach or question" in Art. IX of the Bill of Rights. It was said that these establish that the breadth of the phrase is wide and that this case clearly falls within the concept of impeachment or questioning.

28. Those two cases summarise various other authorities cited to me but insofar as relied on by the Speaker specifically they were put forward as illustrative that the expression 'impeach or question' includes, for example, a situation where a court is required to make findings about the truth or falsity of statements made to either House of Parliament.

29. Eg, per Stewart J in *Kimati* at para. 20:

> *"… unless an extraneous fact is positively agreed (in which case any evidence as to what was said in Parliament is irrelevant), it is inadmissible to use Parliamentary material as evidence since the Court would then have to rule upon the truthfulness/accuracy of that material."*

30. That was said by Stewart J to be distinguished from the situation in the well-known case of Pepper v Hart [1993] AC 593 where Hansard was admissible in certain circumstances as an aid to construction of statutory material or "*eg in Toussaint*[5] *ie 'to explain executive action and enable its judicial review'*"

31. In *H-S*, much the same line of authorities were discussed as in *Kimathi* leading Lang J to conclude that the scope of the admissibility of proceedings in Parliament extends (consistent with *Pepper v Hart*) to matters of statutory construction and as a record of what was said and done, but not as far as construing the words used by individual members of Parliament and their proposed amendments to legislation as an aid to divining the supposed intentions of Parliament in enacting a particular piece of legislation. (See, eg para. 72 of judgment in *H-S*). Such would 'cross the boundary' and violate the 'separation of powers' and parliamentary privilege (cf para. 74 of judgment).

32. D1 cited Hurley v Secretary of State for Work and Pensions [2015] EWHC 3382 (Admin):

> *"Consideration of Parliamentary debates to identify the aims pursued by the legislation and information relevant to the issue which the court has to determine is proper … Nor so far as any material report by a Parliamentary Committee is concerned is there any objection to considering it simply in relation to any relevant information contained in it. What is not permissible is to seek to analyse or criticise anything contained in it since that would be to breach the provisions of the Bill of Rights."*

[5] Toussaint v A-G of St Vincent and the Grenadines [2007] UKPC 48

Meaning of "proceedings in Parliament" in Art IX

33. The Speaker's position was that the presentation of a Return to a Motion for an Unopposed Return was within the scope of 'proceedings in Parliament'. The Speaker adopted the formulation in *Erskine May* namely:

> *"… the primary meaning of proceedings … is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which a House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual member takes part in a proceeding usually by speech, but also by various recognised forms of formal action, such as voting, giving notice of motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking"*

(The Defendants and Speaker relied also on R v Chaytor [2010] UKSC 52, [2011] AC 684 as having referred with approval to the above quotation).

34. A motion for an Unopposed Return was thus said to be a 'time-saving substitute for speaking' since the Minister might otherwise read the entire report aloud[6]. The motion was an alternative means to the same end as reading aloud. Once the motion was moved and passed it then became a resolution of the House that an Address be presented to Her Majesty in the expectation that she would direct that it be complied with.

35. Compliance with that direction was said itself to be a 'proceeding' in the form of the provision of the Report as a substitute for speaking (thereafter ordered by the House to be published). The Minister was protected by Art. IX against impeachment or questioning of that proceeding. It was not permissible to sue in respect either of the truthfulness of the Report or in respect of harm said to be caused by its presentation and publication at the direction of the House. D1 observed that as far as it was concerned the Motion was self-evidently a proceeding in Parliament.

[6] In Sir John Eliot's case the Speaker was held down in his chair for the duration of Sir John's speech. To read aloud a typical inquiry report today would of course take hours, and presumably also a similarly long sedentary spell for the Speaker or Deputy in the Chair.

36. AG v Trustees of the British Museum (Commission for Looted Art in Europe intervening) [2005] 397 to which the Speaker referred, mentioned a report of the Spoliation Panel[7] which had been presented under the Unopposed Return procedure but this was not, argued the Speaker, in the context of whether it was covered by privilege. It was the Speaker's position that the reference to the Report of the Spoliation Panel 23 March 2005 (HC 406) in that decision was an example of the 'historic fact' exception to Art. IX (see below). The passage in *AG v Trustees of the British Museum* which refers to the Report is at para. 46 of the judgment of Sir Andrew Morritt V-C:

> *"… In the report dated 23 March 2005 (HC 406) at para. 77, the panel … recommended that legislation should be introduced to amend the British Museum Act 1963 … so as to permit restitution of cultural objects of which possession was lost during the Nazi era … The panel also recognised the possibility that legislation might relate to a specific object or objects. I have, in effect, reached the same conclusion. In my judgment only legislation or a bona fide compromise of a claim of the heirs of Dr Feldman to be entitled to the four drawings could entitle the Trustees to transfer any of them to those heirs."*

37. For the 'Historic Fact' exception the Speaker referred to Office of Government Commerce v Information Commissioner (AG Intervening) [2008] EWHC 774 (Admin.) per Stanley Burnton J at 49:

> *"There is no reason why the courts should not receive evidence of the proceedings of Parliament when they are simply relevant historical facts or events: no 'questioning' arises in such a case"*

38. The role of Art. IX of the Bill of Rights had, I was told by the Speaker, been considered outside court in a range of parliamentary documents and the view had been expressed that a document presented to the House as an unopposed return is a proceeding in Parliament and privileged. I was referred to *R v Chaytor* at paragraph 16 to the effect that the Court must pay careful regard to the views of the Speaker and other individuals in a position to speak on the matter with authority.

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[7] Report of the Spoliation Advisory Panel in respect of a 12th Century manuscript now in the possession of the British Library, (Return to an address of the Honourable House of Commons dated 23 March 2005).

39. The Speaker and D1 accepted that the effectiveness of the Motion for an Unopposed Return procedure in ensuring the protection provided by Art IX of the Bill of Rights did not appear ever to have been considered by the courts but I was encouraged to attach weight to the views of the Speaker, in accordance with Lord Phillips' observations in *R v Chaytor*, and also to the view expressed by the Joint Committee on Parliamentary Privileges 1998-1999 at paragraph 129 which included a recommendation (not so far enacted) that the scope of privilege be spelled out in legislation which would include expressly the production of papers by a House of Parliament and the presentation of a document to a House of Parliament.

40. I was referred to parliamentary documents which refer to the status of Unopposed Returns. In the Report of the Joint Committee on Parliamentary Privileges (HL paper 43, HC214 Vol 3 1998-9) a memorandum from the Clerk of the House of Commons to the Committee it is said (and I take the text here from the Speaker's skeleton because I do not have a specific page or paragraph reference in the Report):

> *"Governments may also lay papers by an older procedure: by moving a motion for the 'unopposed return' of the document they wish to lay before the House and be printed on its authority. The large number of papers now required to be laid by statute, combined with the more frequent use of 'Command papers' might have been expected to make this procedure obsolete. It has survived very largely because of uncertainty over the extent to which Command Papers have absolute privilege. The procedure of an 'unopposed return' was introduced originally to avoid the inconvenience of the House having formally to consider motions by ministers for returns of largely uncontroversial information from their own Departments. It is now used almost exclusively in order to ensure that a report of a ministerial inquiry will not be subject to actions for defamation."*

41. The "Guide to Laying Papers" issued by the House of Commons Journal Office (August 2017) to which I was also referred gives this guidance at para 44:

> "***Papers laid by Return to an Address (Unopposed Returns)***
> *In some cases the government may wish to lay a particularly sensitive report for which there is no statutory requirement or authority to lay, but*

for which the protection of parliamentary privilege is needed (the Report of the Hallett Review is a recent example). You should contact the Journal Office as soon as possible if you are preparing a paper which falls into this category. The Journal Office can offer further written and oral advice. You should note that the advance agreement of the Clerk of the Journals is required and that a motion has to be tabled at least one sitting day in advance and moved and agreed to on the Floor of the House to allow the laying of a Return to an Address."

Legal basis of the Unopposed Return procedure

42. In the course of hearing I asked for clarification as to the legal basis for the Unopposed Return procedure relied on by the FCO in this case. Perhaps surprisingly the parties were not in a position to give an answer in court. Accordingly supplemental submissions were made after the hearing, in writing.

43. The supplemental submissions from the Speaker put forward in those submissions the position that the power:

> *"arises in a similar way to the inherent jurisdiction of the High Court. That is to say, it is simply a power inherent in the nature of Parliament which, with other powers, is necessary to enable its core functions of scrutiny and debate. There is no statutory source for the House of Commons' power to call for persons, papers and records, but like the inherent jurisdiction of the High Court it is more than a mere convention."*

44. It was argued that this court has not previously inquired into the origins of the power, or examined its scope, as (quoting from the Speaker's skeleton argument):

> *"to do so would itself risk impeaching or questioning Parliamentary proceedings and therefore infringing Article IX of the Bill of Rights 1689 (and the broader principle of separation of powers between the judiciary, the executive and the legislature …"*

45. Prebble v Television New Zealand [1995] 1 AC 321 was cited in this context as indicative that the separation of powers was a fundamental reason for the existence of parliamentary privilege.

46. D1 referred to *A v UK* 36 (2003) EHRR 51, affirmed in Zollmann v UK App. No. 62902/00, 27 November 2003, in which the ECtHR ruled that the absolute

privilege afforded in respect of proceedings in the UK Parliament did not violate Convention Rights under Art. 6 ECHR, and was within the State's margin of appreciation in limiting an individual's right of access to a court. The gravity of the allegations or their truthfulness or falsity was irrelevant and any exception would seriously undermine the legitimate aims pursued by privilege.

47. In addition to barring proceedings in respect of the content of the Report, D1 argued that privilege also barred claims relating to the steps taken in preparation of the document and it was said that without such protection it might be possible to challenge earlier drafts, or evidence taken from witnesses in the preparation of the Report, which were steps taken by D3 and the Inquiry.

48. Furthermore, if one proceeded on the basis that a challenge to any aspect of the substance of the Report is barred then what would remain would be a challenge only to the procedure by which it was produced and that, it was argued, would be a meaningless claim under Art. 8. This was said to arise because the nature of a claim under Art. 8 required an analysis in accordance with R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368 (in the context of removal of a person from the UK but which was argued to be of general application) a part of which required the Court to answer the question "*will such interference have consequences of such gravity as potentially to engage the operation of article 8*?", and a mere claim in respect of procedure at the Inquiry could not be said to reach the required standard of gravity of violation of rights if it were made out.

49. Thus either (i) a claim challenging procedure at the Inquiry would be a collateral means to challenge the correctness of the contents of the Report and therefore barred by Privilege or (ii) it would be an 'academic' claim not reaching the level of gravity of violation required for an Article 8 claim.

Status of the copy of the Wass report published on the FCO website

50. The Speaker accepted that Article IX per se does not protect the copy of the Report published on the FCO website but the Parliamentary Papers Act 1840 (enacted in the wake of Stockdale v Hansard, (1837) 112 ER (1839) Ad. & E. 1) was said to apply similarly to protect that publication from suit at the hands of the Claimants. In that case a report by the Inspector of Prisons was laid before Parliament and ordered to be printed. Stockdale sued the printers and not the persons who produced the report. The printers were held not to be protected by privilege, and it was held that Parliament could not extend its own privileges in the manner which had been asserted by the Attorney General (the House had in

effect simply asserted by resolution that the report was protected[8]). The decision led to the enactment of the 1840 Act to 'fill the gap'.

51. Part of the argument put forth before me was that it was notable that Stockdale did not attempt to sue the Inspector of Prisons, who produced the report, and it was suggested that that was an indication that Stockdale himself had taken the laying of the report to be privileged, and that the author of it was likewise protected by such privilege, and hence not sued.

52. D3's counsel adopted D1's arguments as to privilege being a complete bar to the claims in respect of any aspect of the inquiry and report (it being a collateral attack on the Report if the processes of the Inquiry were sued upon).

The Claimants' arguments

The status and character of the claims

53. Three categories of event were relied on as founding the Claimants' claims under Art. 8. Those were (i) substantively and procedurally unfair process by the inquiry chaired by Ms Wass QC, (ii) the resulting tainted content of the Wass Report and (iii) the decision to publish, and the publication of the Report by way of the Unopposed Return procedure in Parliament.

54. Mr Bowen QC argued that Art. 8 is engaged and protects professional reputation: Chauvy & Ors v France, (ECHR Appn. No. 64915/01 at 48), Gunnarson v Iceland (ECHR Appn. No. 4591/04 at pp4-5), Strizhak v Ukraine (ECHR Appn. No. 72269/01 at 34). Opinzar v Turkey (ECHR Appn. No. 20999/04 at p2 of the decision of the Court), Axel Springer AG v Germany (ECHR Appn. No.39954/08 Grand Chamber judgment at 83-84).

55. Interference with Art. 8 rights had to be 'in accordance with the law' and the question whether a decision taken by a non-statutory inquiry was 'in accordance

[8] I observe that the case is perhaps as good a demonstration as any of the falsity of the idea that the courts must simply 'do the will of Parliament' or 'the will of the elected representatives' under the constitution. The courts apply the law as enacted by Parliament, by means of due passage through all of its estates, and that enactment is then taken to express its collective will.

with the law' was relevant in the context of any effort to justify a violation of Art. 8(2). It was argued that for such a non-statutory inquiry to be in accordance with the law required that it had some basis in domestic law, and that the law was sufficiently precise to enable the citizen to regulate his or her conduct. I was referred to Sunday Times v UK (1979) 2 EHRR 245 at 49, and HA v University of Wolverhampton v Office of the Independent Adjudicator (General Pharmaceutical Council intervening) per Knowles J, [2018] EWHC 144 (Admin).

56. Applying that test, the non-statutory inquiry in this case was not in accordance with the law for Art. 8(2) purposes. The terms of reference did not include sufficient or sufficiently express reference to the professional conduct of the Claimants being under scrutiny, and because the terms of reference and the warning letters sent to the Claimants (dated 10/4/15 and 3/9/15) were not clear enough to enable the Claimants to regulate their conduct or to foresee the consequences of their actions when responding to the way in which they were treated by the Inquiry.

57. R (on the application of L) (FC) v Commissioner of Police of the Metropolis [2007] EWCA Civ 168 was referred to which illustrated the argument that Art. 8 rights may be violated, and proportionality of approach is required where a person's career may be ruined by disclosures to third parties of adverse information (in that context, information arising from Enhanced Criminal Record Checks), notably if the process does not afford sufficient weight to the impact on the person to whom the information relates. Likewise in H and L v A Local Authority [2011] EWCA Civ 403 the Court of Appeal made observations as to the importance of giving an affected person a sufficient opportunity to make representations. (Hoffmann-La Roche and Co. AG and others v Secretary of State for Trade and Industry [1974] AC 295 was also referred to).

58. I was referred to "*Inquiries Guidance*", Cabinet Office (undated) at 47-48 which illustrates that even in non-statutory inquiries a 'Salmon' and/or 'Maxwell' process should be followed namely:
(i) (The Salmon Process) that "*where an individual is to be questioned about allegations or criticisms by the inquiry they should be given notification in writing and not less than seven days before giving evidence, of the allegations to be made and evidence in support of the allegations*"; and
(ii) (Maxwellisation): "*the individual who may be the subject of criticisms appearing in the final report sees the text of what is proposed to be published."*

Approach to construction of Art. IX of the Bill of Rights

59. Due to the antiquity of the Bill of Rights it was argued that it 'cannot always be literally construed'. I was referred to Lord Mance's speech in Toussaint v AG Saint Vincent and the Grenadines [2007] 1 WLR 2825 at 10:

> *"... the general and somewhat obscure wording of Article 9 cannot on any view be read absolutely literally. The prohibition on questioning 'out of Parliament' would otherwise have 'absurd consequences', eg in preventing the public and media from discussing and criticising proceedings in Parliament, as pointed out by the Joint Committee on Parliamentary Privilege, para. 91 (UK Session 1998-1999) HL Paper 43-1. HC 214-1)"*

60. Articles 6 and 8 were to be applied. A wide construction of Article IX would be inconsistent with those Convention rights, including the right of access to a court in the determination of whether a citizen's Convention rights had been violated. In considering, in particular, the question of the Art. 6 right of access to a court I was taken to Al-Fayed v UK [1994] ECHR 27 at 65.

61. Art. 6 did not provide an absolute right but limitations on it must not be so restrictive as to impair the '*very essence of the right*'. (Cordova v Italy (No. 1) Appn. No. 40877/98 at 54 and 59.)

62. Applying *Cordova*, it was argued that to hold that acts decided upon and performed outside Parliament, and not on its behalf, where the sole connection with Parliament was a decision to make use of a particular procedural device so as to obtain privilege, would not be a construction compatible with Art. 6 of the Convention. Accordingly I should read Art IX so as not to lead to that result.

63. Much the same considerations applied to the 1840 Act. So as to be read compatibly with the Convention I should read into that Act a requirement that it applied only to material ordered to be published by order of either House and which related to proceedings in either House, rather than so as to apply simply to any document ordered by either House to be printed irrespective of whether the material related to proceedings in Parliament. Such an approach was said to be consistent with observations of the Joint Committee on Parliamentary Privileges Ch. 8 at 340 (which I shall quote later in this judgment in my conclusions).

Privilege is to be applied narrowly to the proper business of Parliament and not extended more widely

64. Following *R v Chaytor*, privilege was to be applied narrowly to the proper business of the House and there could be no justification in this instance for widening it to the acts of the Executive which were sought to be covered in this case. Accordingly neither the Report's author nor its publisher should be protected by privilege or by the 1840 Act (which, it was submitted, did not extend further than the bounds of privilege itself).

65. Mr Bowen QC took me to *R v Chaytor* where the Court quoted *Erskine May* in the terms which I have already set out earlier in this judgment. It was said that in *R v Chaytor* the approach to privilege was a narrow one when the Court embarked on the task of identifying what was and what was not a 'proceeding in Parliament'. In that case the Supreme Court and lower courts rejected the argument that expenses claims submitted by members of Parliament formed part of 'proceedings in Parliament'. I was referred to the speech of Lord Phillips at 47-48. In reliance on Lord Phillips' speech I was exhorted to approach the question with two considerations in mind namely:

(i) the sufficiency of any 'connection' between the use of the Unopposed Return for the Wass Report and the 'core business' of Parliament; and

(ii) whether immunity from suit was required to protect the core, or essential business of Parliament.

66. Applying that approach the Unopposed Return as used in this case, and the process of the inquiry and content of the Report, were not sufficiently connected with the core business of Parliament. The inquiry had been chaired by a non-MP at the instruction of and payment by the Executive as distinct from Parliament. She reported to the Executive, and her inquiry was not a statutory one.

67. In particular the decision to use the Unopposed Return was a decision by the Executive and there was a long-recognised difference between the (impermissible) questioning of parliamentary proceedings in court and the (permissible) use of parliamentary proceedings as evidence of things which took place outside Parliament. In this case the decision to cause publication by means

of the Unopposed Return procedure was made outside Parliament by D1 as part of the constitutionally separate Executive (that is, separate from Parliament). Protection was not required so as to protect the core or essential business of Parliament and the Report did not form part of debates in Parliament, nor in Committees and nor was it the work or business of the Legislature.

68. I was referred to the Joint Committee Report on Parliamentary Privileges at 51 where it was noted that it if Article IX hampered a proper challenge to acts by the Executive, it:

> *"would be an ironic consequence of article 9. Intended to protect the integrity of the Legislature from the Executive and the courts, article 9 would become a source of protection of the Executive from the courts."* (The same passage was quoted at greater length in *Toussaint* at 17).

69. In this instance, turning to the Unopposed Return procedure itself, the procedure was said to be analogous to the laying of a Statutory Instrument by way of parliamentary procedure. There was no doubt that the legality of Statutory Instruments could be challenged in court including on the basis of irrationality. In *Toussaint* at para 18 (Privy Council) quotation was made from the domestic case of R (Javed) v Home Secretary [2001] EWCA Civ 789 to the effect that Art IX of the Bill of Rights and the common law underlying it allow a right and duty for the Court to review the legality of subordinate legislation even though tabled and approved by both Houses of Parliament.

70. Mere announcement of an executive decision in Parliament did not supply a 'Harry Potter invisibility cloak' of privilege. Per Green J in R (Justice for Health Ltd) v Secretary of State for Health [2016] Med LR 599 at 151-165. Following the decision of Green J, equivalently the Wass Report did not obtain such a cloak simply by being presented in Parliament and a direction being obtained for publication.

71. As to the Speaker's argument that *Stockdale v Hansard*, and the apparent choice by Stockdale not to attempt to sue the Inspector of Prisons, being indicative that it had been accepted by Stockdale that the report itself and its author were protected by parliamentary privilege, Mr Bowen QC referred the Court to De Smith and Brazier, Constitutional and Administrative law 8th ed at p317 to the effect that the ratio of *Stockdale v Hansard* on this point was:

> *"parliamentary papers were protected not by parliamentary privilege but only by qualified privilege in the law of defamation (ie that untrue and libellous statements made in such documents were actionable if shown to have been actuated by malice)"*

72. In any event the report in that case had been laid before Parliament by virtue of a statutory requirement pursuant to 'An Act for effecting greater Uniformity of Practice in the Government of the several Prisons in England and Wales: and for appointing Inspectors of Prisons in Great Britain' 1835, s.7. By contrast the laying of the Wass Report was not a decision of Parliament but it was said to be purely a document produced by the Executive or at its direction.

73. The purpose of privilege constitutionally was to protect Parliament from overbearing action by the Crown or the Courts, and the use of the 'device' of the Unopposed Return in the case of the Wass Report was a '*faux connection designed to protect the executive*' by means of a protection which was not there for its protection but for the protection of proceedings in Parliament. The use of the Return procedure, being one used by the Executive, was not therefore a 'proceeding in Parliament'. The objective of the Executive in using the Return procedure was to seek to obtain blanket protection from the consequences of breaches of the Claimants' fundamental rights, by illegitimate extension of the concept of privilege so as to protect Executive rather than parliamentary acts.

74. The Return did not lead to an expression of the 'will of Parliament' and was not properly characterised as part of the proper business of that body. Instead it was the Executive which commenced the motion and it did so because the Executive wanted to publish it. If the Minister, instead of using this procedure, had chosen to stand up in the House and read the Report aloud, then it would not, on the state of the law, automatically have been covered by privilege because it would have been a 'ministerial statement': I was referred again to R (Justice for Health Ltd) v Secretary of State for Health [2016] Med LR 599.

75. Here, the extent of any connection between the business of Parliament and the Wass Report was the fact that in order to publish the document, the Executive had used the 'device' of the Unopposed Return. Per the words of the Clerk to the House of Commons in evidence to the Joint Committee on Parliamentary Privileges (1998-1999) Vol. 3, the procedure:

"... is now used almost exclusively in order to ensure that a report of a ministerial inquiry will not be subject to actions for defamation. Use of the procedure is infrequent. ... Although other Members cannot oppose the motion, the procedure ensures that Members receive clear notice of presentation."

Consideration and Decision (I): The Privilege Issue

The constitutional role of the Court in the context of parliamentary privilege and the Bill of Rights

76. It is the duty of this court to determine whether a plea that a claim is barred on grounds of parliamentary privilege in reliance upon Art IX of the Bill of Rights, is a good plea.

77. Such is nowadays the clear position though it was not always so. Much of the judicial consideration, some of it run through with charming sarcasm directed at the then Attorney General in *Stockdale v Hansard,* is devoted to debunking the myth that the Court cannot trespass into consideration of the scope and application of the right to claim privilege. That is to say the Court is not, as had from time to time been said before *Stockdale v Hansard*, 'blind' as to the law of Parliament. Nor, as that authority demonstrates, is this court obliged to consider that something asserted by Parliament, even if asserted by a resolution of the House itself, is to be taken to be 'in accordance with the law', without further scrutiny by a court discharging its duty.

78. Thus it is that if a member of Parliament pleads Art IX of the Bill of Rights in bar to a claim, I must consider the point according to law. Assertion of privilege does not conclude the matter.

79. One sees this powerfully confirmed in the speech of Lord Denman CJ in *Stockdale v Hansard* at 1154 which I respectfully adopt:

"... I understand the committee of a late House of Commons to have asserted the privileges of both Houses of Parliament: and we are informed that a large majority of that House adopted the assertion. It is not without the

utmost respect and deference that I proceed to examine what has been promulgated by such high authority : most willingly would I decline to enter upon an enquiry which may lead to my differing from that great and powerful assembly. But, when one of my fellow subjects presents himself before me in this Court, demanding justice for an injury, it is not at my option to grant or withhold redress; I am bound to afford it if the law declares him entitled to it. I must then ascertain how the law stands: and, whatever defence may be made for the wrongdoer, I must examine its validity. The learned counsel for the defendant contends for his legal right to be protected against all consequence of acting under an order of the House of Commons, in conformity with what the House asserts to be its privilege: nor can I avoid then the question whether the defendant possesses that legal right or not."[9]

80. In the matter of whether Art IX applies, then, Parliament is subject to the rule of law and is neither 'supreme' nor 'a court' Per Coleridge J in *Stockdale v Hansard* at 1196:

> *"But it is said that this and all other Courts of Law are inferior in dignity to the House of Commons, and that therefore it is impossible for us to review its decisions. This argument appears to me founded on a misunderstanding of several particulars … Vastly inferior as this Court is to the House of Commons, considered as a body in the State,… yet, as a Court of Law, we know no superior but those courts which may revise our judgments for error; and in this respect there is no common term of comparison between this Court and the House. In truth, the House is not a Court of Law at all…"*

"The Fences of the Law"

81. The 'fences of the law', which in any given case are applied by the Court, limit the extent of privilege in the interests of every citizen. Per Coleridge J in *Stockdale v Hansard* at 1203:

> *"The privileges of the House are my own privileges, the privileges of every citizen in the land. I tender them as dearly as any member possibly can :*

[9] See also Per Littledale J at 1174 "*We must therefore be enabled to determine whether it be part of their privileges or not" and "I cannot bring my mind to any other conclusion …. That that this Court is not necessarily bound, by the mere assertion of the resolution of the privilege … to give judgment for the defendants without further inquiry."*

and, so far from considering the judgment we pronounce as invading them, think that by setting them on the foundation of reason, and limiting them by the fences of the law, we do all that in us lies to secure them from invasion, and root them in the affections of the people".

82. Although the extent of parliamentary privilege is a matter for the Court, the Court must apply the principle stated in *R v Chaytor* by Lord Phillips at 16:

> *"… the court will pay careful regard to any views expressed in Parliament by either House or by bodies or individuals in a position to speak on the matter with authority"*

83. In this case the clear position of the Speaker, the learned editors of *Erskine May*, the Journal Office and the Report of the Joint Committee on Parliamentary Privileges (HL paper 43, HC214 Vol 3 1998-9) is that the Unopposed Return confers privilege by ensuring that the document produced forms part of proceedings in Parliament. The rationale for its use is as a 'time saving device' to enable written material to be presented in the House without the necessity to speak it aloud, and the Return is thus equivalent to speech on the floor of the House. Whether as 'freedom of speech' or simply as 'proceedings' the Report laid before the House is said to be as much protected by privilege as if its entire content had been spoken aloud.

84. That is not to say that the views of the Speaker or even of the House itself are conclusive, nor is the fact that the procedure has been used for some years in reliance on the assumption that it confers privilege, based on the opinions of learned commentators or committees. Per Denman CJ at 1171 in *Stockdale v Hansard*:

> *"The practice of a ruling power in the State is but feeble proof of its legality".*

85. D1's post-hearing submissions observed that '*it would be hard to overstate the potential for its damaging effect: both on Parliamentary procedures and practices established over several centuries, and in encouraging substantial and extensive litigation*', if I were to accede to the Claimants' arguments on the Privilege Issue. Red flags serve to encourage bulls and to discourage crowds. They do not translate persuasively into argument before judges who are neither ungulate nor

legion. Nonetheless I do not need to reach far to find confirmation in the pre-Human Rights Act era of the idea that the power to call for papers has in the past been regarded, by the courts themselves and not merely the State in its own interest, as being a type of proceeding which is protected by privilege. Per Littledale J in *Stockdale v Hansard* at 1176:

> *"There is no doubt about the right as exercised by the two Houses of Parliament with regard to … require the production of papers and records, and the right of printing documents for the use of members … and as to any other thing which may appear necessary to carry on and conduct the great and important functions of their charge."*

86. In the modern era, as a public authority, the Court is enjoined by the Human Rights Act 1998 to interpret the Bill of Rights and the Human Rights Act 1998 as far as possible compatibly with the parties' Convention Rights. That adds a new section to Coleridge J's '*fences of the law'.*

87. If it is the case that a Report presented via an Unopposed Return is, <u>on a Convention-compliant reading of Article IX of the Bill of Rights</u>, a part of '*proceedings in Parliament*' or otherwise falls within the protection afforded to "*freedom of speech and debate ... in Parliament*" under that Act, two consequences follow:

(i) Firstly no claim may then be entertained in this Court which '*impeaches or questions'* those proceedings or that free speech or debate (Bill of Rights Art IX); and

(ii) Secondly in the case of persons "*exercising functions in connection with*" proceedings in Parliament, such are then deemed not to be 'public authorities' and there is no legal restriction upon such persons acting incompatibly with Convention Rights. (s.6(3) of the Human Rights Act, 1998). Then, domestic law provides no remedy for a violation of Convention Rights.

88. The key question therefore is whether a Convention-compliant construction of Article IX of the Convention and s.6(3) of the 1998 Act leads to the conclusion that the Unopposed Return procedure amounts to '*freedom of speech or debate and proceedings in Parliament*'.

89. No argument was put forward that a Convention-compliant reading of Art. IX of the Bill of Rights 1689 and s.6(3) of the Human Rights Act 1998 requires different approaches or outcomes in respect of the two statutes separately when considering the expression "proceedings in Parliament", and indeed it seems to me that the underlying aim of s.6(3) of the 1998 Act is to preserve the notion that parliamentary proceedings are privileged, that is to say the HRA 1998 does not erode the statutory effect of Art IX of the Bill of Rights in respect of proceedings in Parliament. Accordingly I approach this case on the footing that it is not necessary to explore potential different constructions of the two statutes.

90. The expression '*exercising a function in connection with'*, in s.6(3) of the 1998 Act would in my judgment clearly encompass the function of laying the motion and taking the other steps involved in that parliamentary process for the Unopposed Return by the Minister. I am satisfied that it is plain that *if* a Convention-compliant reading of the expression 'proceedings in Parliament' in the Bill of Rights is such as to treat the Unopposed Return as such proceedings, then the Minister would be a person exercising functions in connection with those proceedings at the time(s) he or she took the requisite parliamentary procedural steps and would then be deemed not to be a public authority, thus excluding the application of the Convention by the domestic court in respect of those actions.

If the Unopposed Return procedure were to provide immunity what impact would that have on the Claimants' Convention Rights?

91. Following *Toussaint* at 19 and at 34, and *R (Justice for Health)* in the judgment of Green J (and other cases such as Hurley v Secretary of State for Work and Pensions [2015] EWHC 3382 cited by D1) a distinction is drawn between:

- challenging the veracity or merits of a statement in Parliament, on the one hand; and
- making use of what is said and the objective meaning of what is said, as a means to elucidate and explain what occurs or has occurred outside Parliament.

92. The result is that if the Unopposed Return is a 'proceeding in Parliament' or is protected as part of 'freedom of speech or debate ... in Parliament' the Claimants are in the position of being unable to challenge the very aspect which allegedly caused them the most substantial damage in this instance, namely the content of the Report which was published.

93. In turning to consider the applicable case law arising from the ECHR, it must therefore be a part of my consideration that the *consequence* of privilege attaching to the content of the Report would be, in substance, to prevent the Claimants from seeking redress for the serious alleged violations of their Convention Rights arising from the content of the Report.

Decision on the issue of whether the Unopposed Return amounts to "proceedings in Parliament" on a Convention-compliant reading of Art IX of the Bill of Rights

94. The highest and most relevant authority in the domestic jurisdiction is that of *R v Chaytor*. Per Lord Phillips at 47-48:

> *"... the principal matter to which Article 9 is directed is freedom of speech and debate in the Houses of Parliament and in Parliamentary committees. This is where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within Parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament."*

95. As to applicable Convention principles, at 59 in *Cordova v Italy*, it was said:

> *"... immunity on the members of [...] Parliament may affect the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States, by adopting a particular system of Parliamentary immunity, were thereby absolved of their responsibility under the Convention in relation to Parliamentary activity. <u>It should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective.</u> This is particularly so of the right of access to a court, in view of the prominent place held in a democratic society by the right to a fair trial";* and
>
> *"<u>It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 (1)</u> – namely that civil claims must be capable of being submitted to a judge for adjudication – <u>if a State</u>*

could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities on categories of persons" ; and at 64

"... the lack of any clear connection with Parliamentary activity requires [the court] to adopt a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed. This is particularly so where the restrictions on the right of access stem from the resolution of a political body".

96. Applying *Cordova*, Convention rights, and in particular the right of access to a court under Art. 6 for the determination of those rights:

- Convention rights should be practical and effective. They may not be illusory or theoretical;
- Conferring immunity from suit may affect the protection of fundamental rights;
- It would be incompatible with the purpose and object of the Convention if a particular system of parliamentary immunity, led to a state being absolved of its responsibility under the Convention in relation to parliamentary activity;
- It would not be consistent with the rule of law if a state could, without restraint or control remove from the jurisdiction of the courts a whole range of civil claims or confer immunities on categories of persons.

97. Further, a limitation upon the exercise of Article 6 rights will not be compatible with Article 6 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved, as stated in the *Al-Fayed* case relied on by the Claimants, at 65:

"the final observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired."; and

"... a limitation will not be compatible with Article 6 para. 1 (art 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. These principles reflect the process, inherent in the Court's task under the Convention, of striking a fair balance between the

demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"

98. There is a court-based process of striking a balance between the demands of the interest of the community and the requirements of the protection of the individual's fundamental rights. The ECHR has had to consider the question of privilege in the UK Parliament and has previously ruled upon where that balance lies. See A v UK 35 EHRR 51 (2003), affirmed in Zollmann v UK App. No. 62902/00. In those cases the ECtHR decided that privilege under the Bill of Rights does not exceed the UK's margin of appreciation in relation to the imposition of limits upon a citizen's rights under Art. 6. In a strong judgment the Court ruled that the nature of the allegations and consequences in issue did not outweigh the legitimate aims of privilege.

99. In *Zollmann* at p377-378 the Court stated:

> *"In A v UK, the Court was satisfied that the immunity given to statements made by Members of Parliament within the House of Commons pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary.*
>
> *As regards the proportionality of the immunity enjoyed by MPs, the Court found that, notwithstanding the absolute nature of the immunity, it was compatible with the Convention. It had regard to the special importance of safeguarding the freedom of expression of the elected representatives of the people, stating that, in a democracy, Parliament or such comparable bodies are the essential fora for political debate and that very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein. .... It concluded that a rule of parliamentary immunity which was consistent with and reflected generally recognised rules within Contracting States, the Council of Europe and the European Union could not in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6.1.*
>
> *...*
>
> *The Court notes the applicants' submissions concerning the seriousness of the allegations made about them, although the statements, unlike those made about the applicants in A v UK, were at least arguably relevant to the subject matter of the debate in Parliament. It also notes the applicants'*

claims that the statements had financially damaging repercussions on their business... However, these factors cannot in any way alter the Court's conclusion as to the proportionality of the parliamentary immunity in issue, since the creation of exceptions to the immunity, the application of which depend on the particular facts of any individual case, would seriously undermine the legitimate aims pursued. The court concludes that the complaints under Article 6.1 of the Convention are manifestly ill-founded and must be rejected pursuant to Article 35 ss3 and 4."

(The Court then went on to conclude that the same issues of proportionality and legitimate aim applied to claims brought by the complainants under Article 8).

100. There are a number of features of the Unopposed Return procedure which inform my effort to bring the applicable law, and the facts of this case, together into some approximation of a successful marriage:

(i) First, the Unopposed Return is a procedure which involves a formal parliamentary motion, which has to be presented in the House and returned on days when the House is sitting. It is a matter which is not extraneous in a physical or temporal sense from the sittings of the House. It takes place in the Chamber, which is where debates and free speech in Parliament take place. It is not an act of a purely administrative or private character akin to the lodging of expenses claim at an office elsewhere in the building.

(ii) Second, no opposition to the Motion takes place[10]. It can fairly be said to be 'a formality', and indeed was acknowledged by D1 to be a 'device' used by which privilege is obtained for documents ordered to be printed.

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[10] Clarification of D1's position on the potential for opposition to an Unopposed Motion was sought by myself during consideration of this judgment and was stated by email to me on behalf of D1 (and adopted by D3) as follows:

"*The Court has also asked if the First Defendant agrees that it is not permitted to oppose a motion for unopposed return. This is not strictly a legal question, but rather a procedural one. It would be improper for us to predict how Parliament (including the Speaker) would proceed in this situation. However, the First Defendant understands the following to be the case:-*

i. There is no formal prohibition on opposing a motion for unopposed return (for example in Standing Orders);

(iii) Third, the process cannot meaningfully be described as 'legislative'. It leads to the granting of the Motion and an order for printing of the document which is in my judgment scarcely if at all 'legislative' in character.

(iv) Fourth, the procedure for practical purposes is an act of the Executive even if hedged about with the trappings of parliamentary procedure. The Executive comes to Parliament using the Return procedure with material which it wishes to make public whilst (on its case) gaining immunity from suit, by a process in which no debate takes place. Effectively it is a means by which the Executive prints material which would otherwise lead to a risk of legal liability, including for violation of Convention Rights.

(v) Fifth, in the view of the Speaker and by convention the Unopposed Return is regarded as a 'time saving substitute for speaking', and in that sense it is a species of 'free speech'. Indeed perhaps that is all that it is, in view of the absence of linkage with parliamentary debate or passage of legislation.

(vi) Sixth, in a case such as the present, where the alleged loss and damage has been caused by the publication of the content of the Report after what is said to have been a flawed process in the Inquiry, the potential 'victim' status of the Claimants for Convention purposes flows, most substantively, from the publication. Therefore, if it is the case that the Unopposed Return is a proceeding in Parliament, the effect is to ensure that the Claimants' Article 6 rights are substantially ousted in respect of their real complaints and they cannot (successfully) bring a claim to court alleging violation of their Convention Rights or other civil rights by reason of the content of the Report. The immunity, if it arises, is 'absolute'.

"Crown" or "Executive" versus "Parliament"?

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ii. However, such opposition is unlikely to be permitted in practice. The procedure derives from Parliament's undoubted power to call for papers and information, including that held by government departments, by means of a motion for a return. An 'unopposed return' is simply a motion for a return which, because it is moved by the person who holds the information, cannot sensibly be opposed. In other words, Parliament is unlikely to wish to defeat its own ability to receive papers. "

101. As to point (iv), I note that it was suggested by D1 in argument that the Constitution does not recognise the separation of the Crown from Parliament in a manner analogous to that reflected in the Constitution of the United States, and hence that the arguments put forth by Mr Bowen QC distinguishing between the 'Crown' (or in this context the 'Executive') and 'Parliament' were misguided.

102. However it seems to me that whereas the Crown-in-Parliament in its legislative role is indeed inseparable from the other estates of Parliament, there is merit, reflected well in the authorities, for the continuing acknowledgement of a distinction and a separation between Parliament, and the Executive when acting in its non-legislative capacity. Whilst the Unopposed Return has the formal trappings of a proceeding in Parliament, in substance it is simply a mechanism by which a Ministerial decision to publish is put into effect in a manner clothing it with the immunity which is afforded by the Bill of Rights and the Common Law to members of Parliament and to the Crown-in-Parliament.

103. The constitutional origin and purpose of privilege was to protect parliamentary free speech and debate from the Crown interference and oppression evident in Sir John Eliot's case, rather than to secure something close to an unfettered right of privileged publication by the Executive. It is relevant for me to take that into account.

Applying the authorities

104. In *R v Chaytor*, the Court was considering the actions of MPs outside the Chamber and outside the context of debate or committee work. In my judgment the test put forward there, which asks the question whether a given act or acts is part of the 'core' or 'essential' business of Parliament and whether immunity was necessary to protect that business, must be read alongside the statement that the test applied:

> "*In considering whether actions outside the Houses and committees fall within Parliamentary proceedings because of their connection to them" (Per Lord Phillips).*

105. It was stated in *R v Chaytor* that "*the principal matter to which Article 9 is directed is freedom of speech and debate in the Houses of Parliament and in Parliamentary committees. This is where the core or essential business of Parliament takes place".*

106. The Unopposed Return procedure takes place inside the House (ie, where the 'core or essential business of Parliament' takes place, per *R v Chaytor*), and it takes place during sittings of the House (ie, the time when the core business of the House is carried on). It is spatiotemporally coincident with the normal business of the House, where a judge must tread with care lest she leaves damaging legal hoof-marks on the upholstered face of the Separation of Powers. I therefore have well in mind the respect due to the House, from this Court, concerning the exercise of is functions when '*considered as a body in the State,*' (Per Coleridge J in *Stockdale v Hansard* at 1196).

107. Given the material before me which shows that it is an established convention that the Unopposed Return is a form of '*substitute for speaking*' and given the consideration which the high authority of *R v Chaytor* requires me to afford to the views of the Speaker, it is in my judgment not open to me on domestic authority to conclude that the Unopposed Return is outside the core business of Parliament. It is a species of "freedom of speech". It is exercised by a Parliamentary procedure and is thus also a "proceeding in Parliament" giving effect to that free speech, even though not part of "debate" or part of any form of legislative activity. It is noteworthy that both the Bill of Rights and the decision in *R v Chaytor* do not speak in terms of "freedom of speech <u>in</u> debate" but of "freedom of speech <u>and</u> debate".

108. Turning to the ECHR authorities, *A v UK* and the *Zollmann* case both (consistently with the legal approach in *Cordova*) conclude in clear terms that the parliamentary privilege is a proportionate means to achieve a legitimate aim, and that even serious consequences for people affected by the exercise of the right of free speech in Parliament do not outweigh the importance of privilege to the rule of law and separation of powers in a democracy.

109. The strength of the conclusions in the ECHR jurisprudence, in terms of the very great weight attached to freedom of speech in Parliament, further persuades me that it is not appropriate for this court to make what would be new law and a departure from the stance taken by the current authorities, albeit on different facts.

110. I am therefore driven to conclude that a Convention-compliant reading of the expression 'proceedings in Parliament' does extend as far as including the

Unopposed Return procedure, which is a parliamentary procedural device giving effect to free speech (in this instance by the Executive) in written form. Accordingly the Bill of Rights Article IX bars the Claimants' claims to the extent that they seek to challenge the accuracy or content of the Report.

Does privilege extend to the Inquiry procedure and steps out of Parliament prior to the Unopposed Return?

111. There can be no objection on grounds of privilege to the use in court of statements made by Ministers, for the purpose of showing what was said, rather than for a challenge to veracity or the establishment of legal liability for those words. It would be, as observed by the Joint Committee on Parliamentary Privileges, 'bizarre' to place the courts in the position of being unable to consider challenges to decisions made by the Executive because those decisions and reasons for them were announced in Parliament. Such would be to supply the 'Harry Potter' cloak to which Green J referred when adopting counsel's expression in the *Justice for Health* case at 164.

112. Hence the content of the Report in my judgment is still admissible 'for what it says', to adopt Lord Mance's words in the *Justice for Health* case, as part of a suit which alleges infringement of Convention Rights in respect of the decision made outside Parliament to make use of a private rather than statutory means of inquiry, and the procedure used in that inquiry outside Parliament on behalf of the first Defendant.

113. I do not consider that claims in relation to the decision to undertake the Inquiry, or the procedure and approach to the Inquiry and its inner workings, can therefore fall within the scope of privilege, indeed they seem to me to be exactly the sorts of actions of the Executive (or on its behalf) 'outside Parliament' which are permitted to be substantively considered by the courts in the light of statements made in Parliament provided that no claim may be pursued which seeks to impeach or question the content of the Report, as a collateral challenge. (I refer again to the *Justice for Health* case and *Hurley*, supra.). I do not accept the widest interpretation of the scope of Privilege contended for by D1. In my judgment privilege covers the decision to use the Unopposed Return procedure, the Parliamentary process culminating in the Unopposed Return, and the report then published consequent upon that, but not the Ministerial decision to hold a

non-statutory inquiry or the steps taken during the Inquiry or in the drafting of the report.

114. I do not, however, agree with the Claimants that the decision in *Justice for Health* says as much as the Claimants suggested in terms of how the court may approach the content of the report itself. The facts of that case place it in my judgment within the conventional scope of the use of a ministerial statement in Parliament, when considering decisions made outside Parliament. Such was clear from what Green J said at 161 in his judgment namely:

> *"... no issue of Parliamentary privilege arises. The case is analogous to that arising in Toussaint. The principles set out in that judgment can be taken to reflect the common law ... In this present case the subject of the judicial review is a decision taken by the Minister outside of Parliament. Had I found for the Claimant the relief would have been in relation to that decision. The decision is not the progeny of a proceeding in Parliament. This is not a case for instance where the opinion of a Committee in Parliament is being impugned."*

115. I must dismiss the claims against D1 save to the extent that they relate to remedies arising for alleged violations of Convention rights by D1 in his decision outside Parliament to hold the inquiry in the form it was held, and the manner of the undertaking of the inquiry outside Parliament which led to the Report. However no challenge to the correctness or otherwise of the content of the Report can be entertained by the domestic court.

Do the instant proceedings seek to 'impeach or question' the proceedings?

116. It is implicit in what I have said above that my conclusion is that insofar as the Claimants allege and seek to establish that the content of the Report is incorrect and actionably causes them loss and damage then they are necessarily seeking to impeach or question the proceedings in the form of the words uttered in writing by way of the Return to the Motion.

The 1840 Act

117. Having reached the above conclusion, subject to the observations which I have given, it seems to me self-evident that the order of the House that the Report

be published once it was presented pursuant to the Unopposed Return is caught by the protections of The Parliamentary Papers Act 1840 which were put into place very much for the reason that, but for that Act, liability could attach to a third party who publishes the Report out of Parliament: that was the position in *Stockdale v Hansard* which prompted the putting into place of just those protections in statutory form. Therefore no liability can attach to D1 arising from later publication (for example via the FCO website).

Consideration of Permission to appeal

118. The above are conclusions which are not reached without hesitation given the various features of the Unopposed Return process which I highlighted above.

119. I have had well in mind the back-bone stiffening example of *Stockdale v Hansard* and the duty of the Court to follow the law, wherever it leads.

120. In this instance following the law leads to a position which is not at odds with the position of the Speaker and the Crown via the FCO, yet it is an uneasy state of affairs given the exhortations in the ECHR authorities that blanket immunity tends to violate Art. 6 rights, and that a legitimate aim must be pursued by a proportionate means.

121. In none of the reported authorities has the procedure of the Unopposed Return been in issue. Furthermore in the ECHR authorities the approach taken by the Court has apparently been on the basis that the ECtHR was given to understand that privilege is a right which arises in a <u>limited way</u>, protecting free speech *in the context of debate* by MPs in Parliament on the floor of the House.

122. Thus in *Zollmann* at 367 we see that the Court describes privilege in the UK parliament in the following terms:

> *"Words spoken by MPs <u>in the course of debates in the House of Commons</u> are protected by absolute privilege"*

and at 378:

"More importantly in that context it may be observed that the immunity afforded to MPs in the United Kingdom appears to be narrower than that afforded to members of the national legislatures in certain other Contracting States, to representatives to the Parliamentary Assembly of the Council of Europe or to members of the European Parliament. In particular, the immunity attaches only to statements made in the course of parliamentary debates on the floor of the House of Commons or House of Lords ... this indicates that the immunity is kept within well-defined limits, such as to achieve the purposes for which it is required without lapsing into unnecessarily blanket protection (see Cordova v Italy [...])"

And in *A v UK* at p21:

"... In particular the immunity attaches only to statements made in the course of parliamentary debates ..."

123. The evidence quoted earlier in this judgment which was given by the Clerk to the House of Commons and is set out the report of the Joint Committee on Parliamentary Privileges (1998-99) was to the effect that opposition to the Unopposed Motion is not permitted. The position of D1 (which D3 adopted) on the possibility of opposing such a motion was that "*it cannot sensibly be opposed*" (I have quoted the position of D1 more fully earlier in this judgment).

124. It seems to me that the Unopposed Return is not a matter of 'debate'. It is for any practical purpose 'written speech' uttered without debate, with the simple objective of publication of material which otherwise might lead to citizens seeking to uphold their rights by means of the courts. There was considerable controversy between the parties both during and after the hearing in the post-hearing written submissions as to the Claimants' position that the Unopposed return was 'faux' or 'a device' or as to whether that was in any event relevant: it was accepted by D1 to be a device but no less effective for it.

125. What D1 referred to as pejoratives such as 'faux' aside, the relevance of the status of the Unopposed Return as a 'device' absent debate or legislative function appears to me, in law, to be one which relates to the proportionality of the use of that device, or its availability at all, where there are or may be severe impacts upon citizens' Convention Rights. The ECtHR has been willing previously to enter into consideration of the Convention-compliance of UK parliamentary

privilege in the reported case law and has considered matters of proportionality in its decisions. A factor I bear in mind when considering permission to appeal is that the ECtHR case law appears to have proceeded on the perhaps shaky foundation that privilege is confined to matters of debate in the House.

126. Furthermore the decision to make use of the Unopposed Return procedure appears to be discretionary, in the hands of the Minister but (because the Unopposed Return is a 'proceeding in Parliament') the domestic court is barred by s.6(3) of the HRA 1998 from considering whether the use of the Unopposed Return by the Executive on any given occasion is 'in accordance with (accessible) law' for the purposes of the Convention, since the HRA 1998 *deems* the Minister and the House not to be acting as a Public Authority when exercising a function 'in connection with' proceedings in Parliament.

127. The 'unease' to which I refer is the more so where what is published is the product of an inquiry which was not governed by the protections provided to participants by the framework in the Inquiries Act 2005.

128. Lastly, I refer to the report of the Joint Committee on Parliamentary Privileges Ch. 8 at 340 relied on by the Claimants:

> *"One of the themes of our report is the importance of confining the absolute legal immunity afforded by Parliamentary privilege to those areas which need this immunity if Parliament is to be effective. This principle should apply as much to the immunity afforded by the 1840 Act as to the immunity given to proceedings by Article 9 of the Bill of Rights. The extent to which the House of Commons currently grants this privilege, as a matter of course, to papers laid before it under statute contradicts this principle."*

129. Of my own motion I shall grant leave to the Claimants to appeal my decision on the privilege issue on the basis that there is a real prospect of success on an appeal and that the public interest supports the grant of leave also on the basis of a compelling reason for an appeal namely the constitutional significance of the matters decided and the observations which I have made above as to the lack of high authority specifically on the point in relation to this type of parliamentary procedure. Appeal should be to the Court of Appeal directly pursuant to CPR 52.23 in view of the high standing of many of the authorities

which I have considered and the general constitutional significance of the questions arising in this case.

130. For the same reasons I give the First Defendant permission to cross-appeal in the same manner against my decision that the Claimant's claims, to the extent to which they do not relate to the correctness or other merits of the content of the report, are not barred.

(II) The Convention Status Issue

D3's Arguments

131. D3's case was that Ms Wass QC is not a 'public authority' within the meaning of s.6 of the Human Rights Act 1998 and hence owed no duties under the Convention towards the Claimants, (ii) she did not in any event interfere with the Claimants' Convention rights and (iii) she caused no loss because she did not publish the Report, (iv) the claim is brought out of time having regard to the limitation period under the 1998 Act, (v) even if all of the above are incorrect then Judicial Review is the correct form of claim. D3 adopted D1's arguments as to privilege as barring any claim, but even if the report or process was not privileged, for the reasons (i)-(v) set out above she could not be sued successfully in any event.

132. For the purposes of this judgment the substantive decision for me is on point (i) pursuant to the directions order governing this hearing, namely whether Ms Wass QC was a public authority for the purposes of potential liability under the Human Rights Act 1998. The other points are referred to in Part III of this judgment.

133. It was argued that D3 was instructed in the course of her ordinary private practice as a barrister, by D1, to carry out the work which led to the Wass Report, by chairing the inquiry panel which produced it. The witnesses attended the inquiry voluntarily and it was a non-statutory inquiry. Ms Wass QC did not publish the Report and nor did any other member of the Inquiry panel, rather it was provided to D1, which took the steps leading to its publication. She was

chairing the inquiry as a private individual and did not discharge any public functions. She had no statutory or special powers conferred on her, she was informing and advising her clients as a barrister. By contrast since the purpose of the Human Rights Act was, notoriously to 'bring rights home', a company such as Group 4 charged with running a prison was carrying out a function of government and that included officers of that company.

134. I was referred to R (Weaver) v London and Quadrant Housing Trust [2010] 1 WLR 363 at 35 for the judgment of Elias LJ to the effect that a public body is one whose nature is, in a broad sense, governmental. Not all authorities exercising such functions are necessarily public bodies. A 'factor based' approach was set out, adopting Lord Mance's words in YL v Birmingham City Council [2007] UKHL 27, which:

> *" … requires the court to have regard to all the features or factors which may cast light on whether the particular function under consideration is a public function or not, and weigh them in the round. There is, as Lord Nicholls put it in the Aston Cantlow case[11] at para. 12, 'no single test of universal application'. Lord Bingham in YL's case [2008] AC 95 observed, at para. 5, that 'A number of factors may be relevant, but none is likely to be determinative on its own and the weight of different factors will vary from case to case.' …*
> *… a broad or generous application of s.6(3)(b) should be adopted: per Lord Nicholls in the Aston Cantlow case, at para. 11, cited by Lord Bingham in YL's case at para. 4, and by Lord Mance, at para. 91*
> *… as to public funding … it is misleading to say that a body is publicly subsidised merely because it enters into a commercial contract with a public body*
> *… the second matter, the exercise of statutory powers, or the conferment of special powers, may be a factor supporting the conclusion that the body is exercising public functions, but it depends why they have been conferred*
> *… The third factor … where a body is to some extent taking the place of central government or local authorities, chimes with Lord Nicholls's observation that generally a public function will be governmental in nature.*

[11] Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37

This was a theme running through the Aston Cantlow speeches, as Lord Neuberger pointed out in YL's case at para. 159
… The fourth factor is whether the body is providing a public service. This should not be confused with performing functions which are in the public interest or for the public benefit … usually the public service will be of a governmental nature."

Applying those factors, D3 argued that:

(i) She was appointed by a public authority and was providing a public service;
(ii) She was paid out of public funds;
(iii) However those factors do not suffice, and would apply to any barrister and all consultants acting on behalf of Government.
(iv) Ms Wass was not 'subsidised', rather she was paid commercially for providing a service;
(v) She had no statutory or special powers, this was not a Statutory Inquiry, indeed in principle any individual could have carried out the inquiry whether or not contracted by government to do it;
(vi) She was not taking the place of central government but simply provided it with the Report and it was for the government to decide what to do with it.

135. Ms Wass QC accordingly had not been acting as a public authority and the claims against her fell to be struck out.

Claimants' arguments

136. (See also the summary of the Article 8 points given under the heading of the Privilege Issue).

137. In the context of this inquiry, commenced (but not under the 2005 Act) by a government department, it was argued that the point made by D3 that Ms Wass QC lacked statutory powers was to be seen in the light of the fact that, had such powers been required (such as to summon witnesses) then they could easily have been made available by way of a certificate under that section.

138. In considering whether D3 was a 'public authority' the Court should not focus on the formalities but on the substantive nature of the task performed by

Ms Wass QC and whether her function affected the legal rights of the Claimants. Ms Wass was appointed to the task by a government minister, and her Report was then adopted by the 'arcane' Unopposed Return process so as to seek to insulate it from legal redress.

139. The status of the inquiry as 'statutory' or 'non statutory' under the 2005 Act was, in the circumstances, immaterial. Her function was '*rooted in governmental responsibility for the public interest*' rather than being in the nature of a private, third party inquiry. Mr Bowen referred to observations in Joint Committee on Human Rights reports 2003-4 and 2006-7 supportive of a broad interpretation of the notion of a public authority. Quoting from an extract from the relevant reports within Clerk and Lindsell at 3-088 he referred to this:

> *"The Joint Committee's view in 2003-4 was that 'a function is a public one when government has taken responsibility for it' in the public interest. In this context, it was argued that 'institutional links with a public body are not necessary to identifying a public function'; the question ought instead to be whether the activity has 'its origins in governmental responsibilities, in such a way as to compel individuals to rely on that body for realisation of their Convention human rights'*

140. All that would have been needed to have caused the Wass Inquiry to be a statutory inquiry within the Inquiries Act 2005, bringing with it the formal requirements for such inquiries, was a notice given by the Minister pursuant to his/her powers under s.15(1)(b) of that Act which states:

> *"15 (1) Where-*
> *(a) an inquiry ("the original inquiry") is being held, or is due to be held, by one or more persons appointed otherwise than under this Act,*
> *(b) a Minister gives a notice under this section to those persons, and*
> *(c) the person who caused the original inquiry to be held consents,*
> *the original inquiry becomes an inquiry under this Act as from the date of the notice or such later date as may be specified in the notice (the "date of conversion")."*

141. As to why Ms Wass was conducting the inquiry, Mr Bowen QC relied on as one factor that she was acting on FCO instructions, fulfilling an important role and duty on behalf of the Executive namely inquiring into allegations of child abuse in a British Overseas Territory. The scope of her work was defined by government,

wholly funded by the public purse, and an indemnity had been obtained from the State with the approval of Parliament for the benefit of D3 and the other panel members[12].

Consideration and Decision (II): The Convention Status Issue

142. The issue of the status of Ms Wass QC is a difficult one on these facts. It would be wrong to clothe any barrister acting in private practice on instructions from the State and paid by the State, with the status of 'public authority' simply as a matter of course: it would be a misapplication of the approach exhibited in, for example, *YL* to do so and indeed would cause difficulties in the day to day instruction of lawyers to act for government bodies as their clients.

143. However each case has to be looked at on its facts. Ms Wass QC and the panel were indemnified by an indemnity agreed by Parliament, Treasury and FCO, which is indicative in my judgment of an acceptance of responsibility by the State and of the fact that this Inquiry was for the purpose of discharging State duties.

144. The wording of the announcement of the indemnity makes this plain. By a written statement to the House by the Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs dated 25 June 2015 it was stated (my emphasis):

> *"I have today laid a departmental Minute proposing to provide an indemnity that is necessary in respect of a Foreign Office established independent inquiry into alleged child abuse and associated cover-up on the British Overseas Territory of St Helena. <u>The Government takes any such allegations extremely seriously, and the Inquiry reflects its commitment to a full and independent investigation into any wrongdoing</u>. Last year (2014) the Foreign Secretary announced the establishment of the Inquiry … to be*

[12] I was also taken to *Beer* on Public Inquiries, where the observation is made by the author that Government has accepted a duty to investigate matters of public concern especially in areas where it has direct or indirect responsibility (Beer, p37, referring at note 16 to Ministers having responsibility for investigation both because they have ultimate responsibility but also because they are responsible for deciding what is needed in the public interest as a result of accountability to the electorate, quoting from Department for Constitutional Affairs "*Effective Inquiries*" CP 12/04, 6 May 2004)

led by Sasha Wass QC. This indemnity will cover the entire duration of the Inquiry's work, from November 2014 until when the Inquiry submit their report in the autumn of 2015. The indemnity will cover Sasha Wass QC, the Inquiry Panel, the Inquiry Solicitor and one staff member against any liability for any act done or omission made honestly and in good faith in the execution of his or her duty as such, or in the purported execution of his or her duty as such. … The Treasury has approved the procedure in principle. If, during the period of fourteen parliamentary sitting days beginning on the date on which this Minute was laid before Parliament, a member signifies an objection by giving notice of a Parliamentary Question or by otherwise raising the matter in Parliament, final approval … will be withheld pending an examination of the objection."

145. A letter confirming the indemnity was then produced dated 14 August 2015, from which I infer either that no objection was raised by an MP or that any objection was examined and dealt with. This was therefore an Inquiry which was for the purpose of discharging duties accepted by the State, and those conducting the Inquiry were agreed to be indemnified by the State with the approval of the FCO, Treasury and (by non-objection) Parliament itself. Whilst Parliament did not call for the inquiry it did agree to indemnifying those conducting it.

146. An indemnity granted by a client to a professional barrister does not correspond to the usual position when a lawyer is instructed by the State: rather it is usually the other way round in the sense that the use of an insured professional with professional indemnity insurance of her own gives the client a degree of indemnity from the professional, if loss is incurred through the negligence of the professional. I note also that the terms of reference in the bundle state that they were "*determined by Ms Sasha Wass QC and agreed by the Secretary of State for Foreign and Commonwealth Affairs*", which whilst not by itself determinative of a great deal, is indicative that this was not akin to a normal instruction of a barrister by a client. Ms Wass played, to that extent it seems, a key decision-making role mutually with the FCO in determining the terms of the Inquiry itself.

147. The Terms of Reference of the Inquiry also cite the UK's obligations under the UN Charter towards British Overseas Territories "*to promote to the utmost…the well-being of the inhabitants of these territories*". Also referred to in the Terms are the UN Convention on the Rights of the Child.

148. The subject matter of this inquiry was thus of concern to the FCO and the public and was aimed at discharging the State's duties towards children and the people of St Helena. To outward appearance to the public on St Helena the inquiry would have appeared – if not 'a statutory inquiry' under the 2005 Act - then at least 'official' on behalf of government (which must act in accordance with the guarantees inherent in the Human Rights Act 1998 when carrying out public functions), backed by a State funded indemnity and paid for by the State. It would be implausible to imagine that people taking part would have seen this as a private act by a barrister, for example, or a matter which was for the information of the FCO via its own counsel, and not for the wider public benefit by way of discharging a public duty.

149. The intended public nature of the Inquiry Report is implicit in the Terms of Reference which confirm that '*The Panel will produce a public report of its findings*' (again, different from the usual written work output of a barrister which is made public only if the client so wishes, typically after seeing it). There is no reference in the Terms of Reference to the Report being only made public '*if the FCO so decides, and Parliament orders it to be published*', which may suggest that the Report was intended to be published from the outset and that use of the Unopposed Return was a formality, such that the Terms of the Inquiry could state with confidence that it would be published.

150. In my judgment Ms Wass QC was acting at the time of the inquiry as a person some of whose functions (ie, the conduct of the inquiry for its duration, and production of the Report) were of a public nature (per s.6(3) HRA 1998) and her functions were not sufficiently analogous to a conventional instruction to counsel to lead me to the conclusion that this was simply a non-governmental function on a commercial or private basis as between her and her client.

151. The duty of the Court in construing a statutory provision such as s.6(3) HRA 1998 is to give practical effect to Convention rights which are not illusory, which have, in other words, substance. The 'caravan' of government arrived in St Helena to conduct a publicly funded inquiry into matters of public interest which concerned matters within the obligations of the FCO and the State in terms of crime and child protection, and the people of that island took part to cooperate with a leading lawyer and a panel acting with State indemnity.

152. It is in my judgment right to conclude that the practical and effective protection of the Convention rights of the participants and others requires that the inquiry be seen as essentially governmental and public, and that the person conducting the inquiry was when so doing acting by way of a public function within the meaning of s.6(3) of the 1998 Act. Government had taken responsibility for the inquiry in the public interest, and Ms Wass QC was the key official (as I consider her to have been during the inquiry not only to likely outward appearance but also substantively) conducting the work of Government and discharging its duties 'on the ground'.

153. Accordingly, and accepting the submission that an overly narrow approach to the concept of 'public authority' would tend to undermine the practical effectiveness of guarantees of Convention rights (echoed in observations by the Joint Committee on Human Rights reports to which Mr Bowen QC referred), in my judgment in this case on these facts Ms Wass QC owed duties under s.6 of the Human Rights Act 1998 to participants and others in the discharge of her public functions namely in the conduct of the inquiry and production of the Report.

154. There is I think also a further point to be made which supports the above conclusion and that is that the Government pleads privilege in respect of the contents of the Report itself. It makes it all the more necessary to ensure the practical effectiveness of convention rights and availability of appropriate remedies that the law should look to the chair of the inquiry at the 'locus in quo', for the protection of Convention rights of participants, as well as the FCO many miles away in the UK. That is in circumstances where it is, or may be, the case that the State later relies on privilege against liability for violations of Convention rights arising from the work-product of the inquiry.

155. Of my own motion I give leave to D3 to appeal my decision above, to follow the same route of appeal as previously stated on the basis that there is compelling reason for an appeal namely the relative novelty of the point and its wider significance, and that it is proportionate to ensure that any appeal is to the same court as any appeal from my decision in Part I of this judgment.

Consideration and Decision (III): The remaining parts of the applications

156. It remains for me to consider whether the Article 8 claims which I have held not to be barred by privilege are ones which cannot in any event succeed or which stand no real prospect of success. D1's position (adopting *R (Razgar) v Home Office*) was that claims relating to the procedure adopted by the Inquiry would, if not a collateral attack on the merits of the Report, be academic claims not capable of sustaining a meritorious challenge under Art. 8 or indeed perhaps not even engaging that Article.

157. I am not satisfied that that argument is made out. It is a matter for evidence whether the decision of the minister to make use of a non-statutory inquiry and the resulting procedure followed by D3, caused sufficiently grave harm to the Claimants' professional reputations to justify an Art. 8 claim separately from the content of the Report. I accept the Claimants' submissions based on authorities which were referred to in argument *(Chauvy & Ors v France*, *Gunnarson v Iceland, Strizhak v Ukraine*, *Opinzar v Turkey*, *Axel Springer AG v Germany*) that reputation engages Article 8 and may be protected by it in principle.

158. I do not know, and would not expect to know at this stage whether there is evidence that the very process itself caused harm 'along the way', for example or involved circulation of damaging material which did not form part of the Report. The relatively low threshold for a claim to survive a striking out of those aspects of the claim is in my judgment crossed. In so saying I am taking an admittedly generous view of the pleading in this case which, if claims proceed at all, would need to be pleaded in a manner which spells out the nature of those aspects clearly so as to distinguish them from aspects which require the Court to decide on the merits of the Report. I have taken the approach of generosity in construing the Claimants' intended case based on submissions as well as the Particulars in an effort to do substantive justice. I therefore decline to strike out the claims to the extent that they relate to the decision to hold the inquiry in the form in which it was held and the procedure which was adopted, but without questioning the merits of the matters stated in the Report.

159. Ms Wass QC's case was that (if it were the case that she was a public authority under the Human Rights Act 1998 as I have held her to be) then she did not in any event interfere with the Claimants' Convention rights, she caused no loss because she did not publish the Report, and the claim is brought out of time

having regard to the limitation period under the 1998 Act and lastly even if all of the above are incorrect then Judicial Review is the correct form of claim.

160. For the reasons which I gave above when considering the summary applications relating to the parts of the claims against D1 which have survived, it is not fanciful (and also does not meet the strike-out tests) to suppose that actionable loss may have arisen by virtue of infringements of Article 8 rights or other acts or omissions done by D1 through D3, or by D3 as a public authority herself.

161. On the other points, whether the Court ought to disapply the 1 year limitation period (if the claims are out of time) that is so fact-sensitive in this case that it is not appropriate on the material before me to dismiss it on a summary basis and moreover I note that Mr Bowen QC relies on Somerville v Scottish Ministers (HM A-G for Scotland intervening) [2007] UKHL 44 for the proposition that time runs only when a continuing violation of an Article right ceases. In R (T) v Chief Constable of Greater Manchester [2014] UKSC 35 to which I was referred, the ongoing retention of data adverse to the affected person was considered to be, in itself, arguably capable of being a continuing violation of Convention rights.

162. The argument was not greatly explored at hearing but I consider that it is not an argument which satisfies the tests for summary judgment or striking out, that is to say it is a matter for exploration on evidence and further argument if the claims continue.

163. As regards the procedural point that the correct procedure was one for Judicial Review and/or the Administrative Court, D3 took me to R (Mousa) v Secretary of State for Defence [2013] EWHC 2941 (as to the need for swiftness in bringing claims) and R (Anufrijeva) v London Borough of Southwark [2004] QB 1124. Most relevant are the concerns expressed in *Anufrijeva* at 80-81 per Lord Woolf MR as to the proportionality of the likely costs of pursuing claims for damages under the HRA in respect of maladministration. The Court of Appeal in that case suggested that the courts should look critically at any attempt to recover damages under the HRA for maladministration by any procedure other than judicial review in the Administrative Court and that whilst a claim for damages alone cannot be brought by judicial review, proceedings should still be brought in the Administrative court by an ordinary claim.

164. This claim is a claim for damages under the HRA and is in my judgment best brought by ordinary claim, as suggested in *Anufrijeva*. Taking into account *Anufrijeva*, on the face of it the Court of Appeal considered that the Administrative Court is the correct venue for such claims. As a matter of real practice however it is the experience of this court that when a claim is issued in the Administrative Court, and any judicial review issues have been resolved such that what remains is a claim for damages, such claims are then transferred by the court to the Central Office of the QBD and are managed and tried there. I do not consider that, insofar as the guidance of the Court of Appeal in *Anufrijeva* suggests such claims ought to begin life in the Administrative Court, it would be proportionate for me to strike out these claims simply because they were commenced in Central Office, given the reality of how such claims generally proceed. Hence it is common enough for the judiciary in the QBD outside the Administrative court to hear such claims.

165. I do however note the observations of the Court of Appeal in *Anufrijeva* as to the need to avoid very extensive citation of authority, generally, albeit I interpret the comments there as to limiting citation to three authorities and a half day hearing as being in relation to claims which lack the elements of complexity of the one now before this court. Certainly, a great deal of authority was cited before me, as the list of cases at the start of this judgment attests.

166. I have not in this judgment dealt with the question of the viability of the claim against D2 which rested on lack of legal personality. There was very limited argument on the point in the time available given the primacy of the two main issues for hearing, and if it is to be pursued it will need to be pursued on a re-listed date.

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