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8 February 2018

PRESS SUMMARY

R (on the application of Bancoult No 3) (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent) [2018] UKSC 3
On appeal from [2014] EWCA Civ 708

JUSTICES: Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Sumption, Lord Reed

BACKGROUND TO THE APPEAL

The Appellant is the chair of the Chagos Refugees Group. He represents residents of the Chagos Archipelago in the British Indian Ocean Territory ('BIOT') who were removed and resettled elsewhere by the British Government between 1971 and 1973 and were prevented from returning. Following earlier proceedings, it remains prohibited under the BIOT Constitution and Immigration Orders 2004, for Chagossians to return to BIOT. In these proceedings the Appellant challenged the decision of the Respondent to establish a marine protected area ('MPA') in which there would also be no fishing in April 2010 in BIOT. This led to an end of commercial fishing carried on by Chagossians in the waters surrounding BIOT. The Appellant's challenge before the Supreme Court had two limbs: (i) the Respondent's decision was motivated by the improper ulterior motive of making future resettlement by the Chagossians impracticable, and (ii) the consultation which preceded the decision was flawed by a failure to disclose the arguable existence, on the part of Mauritius, of inshore fishing rights (i.e. within a 12-mile limit from the BIOT shore).

A sub-issue within limb (i) concerned the admissibility of a document which formed the core of the Appellant's case. The document, which was published by The Guardian on 2 December 2010 and The Telegraph on 4 February 2011, purported to be a communication 'cable' sent on 15 May 2009 by the US Embassy in London to departments of the US Federal Government in Washington DC, to elements in the US military command structure and to the US Embassy in Mauritius. The cable is recorded as having been sent to the newspapers by Wikileaks. It claims to be a record of conversations between employees (Mr Roberts and Ms Yeadon) of the Foreign and Commonwealth Office ('FCO') and US officials. In the Administrative Court, permission was initially given to cross-examine Mr Roberts on the cable. This was to be on the assumption that the cable was what it purported to be and that it would be open to the Appellant, at the end of the hearing, to submit that it was an accurate record of the meeting and that the Court should rely on it evidentially. Various questions were put to Mr Roberts on that basis. Following further submissions from the Respondent concerning the inviolability of the US mission's diplomatic archive under the Vienna Convention on Diplomatic Relations 1961 ('VCDR') and the Diplomatic Privileges Act 1964, the Administrative Court reversed its position. The Appellant was no longer able to invite the Court to treat the cable as genuine. Further cross-examination of Mr Roberts and Ms Yeadon was to proceed on that basis. The Court of Appeal considered that the cable should have been admissible but that its exclusion before the Administrative Court would not or could not have made any difference to that court's conclusions on improper purpose.

JUDGMENT

The Supreme Court unanimously holds that the cable should have been admitted into evidence before the Administrative Court. Lord Mance and Lord Sumption (with whom Lord Neuberger, Lord Kerr,

Lord Clarke, and Lord Reed agree) and Lady Hale write concurring judgments on the issue of the admissibility of the cable. A majority of the Court led by Lord Mance with whom Lord Neuberger, Lord Clarke, Lord Sumption and Lord Reed agree, dismisses the appeal on limb (i). The exclusion of the cable by the Administrative Court could have had no material effect on the outcome regarding improper motive. Lord Kerr and Lady Hale dissent on limb (i) of the appeal. The Court unanimously dismisses the appeal on limb (ii).

REASONS FOR THE JUDGMENT

Admissibility of the Cable

In his judgment Lord Mance holds that the cable had lost its inviolability, for all purposes, including its use in cross-examination or evidence in the present proceedings **[21 and 90]**. The inviolability of documents which are part of a mission archive under arts 24 and 27(2) of the VCDR makes it impermissible to use such documents (or copies) in a domestic court of the host country, absent extraordinary circumstances such as state security, or express waiver from the mission state **[17 and 20]**. This principle is subject to two qualifications: (a) the document must constitute and remain part of the mission archive, and (b) its contents must not have become so widely disseminated in the public domain so as to destroy any confidentiality or inviolability that could sensibly attach to it. Regarding (a), in the present case, once the cable reached the State Department or any other addressee, the copy in their hands became a document in the custody of the US Federal Government and not part of the London Embassy archive. As a matter of probability, the cable was extracted from the State Department or one of the foreign locations to which it had been transmitted. On that basis the cable is admissible **[20]**. Regarding (b), it is in principle possible for a document to lose inviolability where it comes into the public domain, even in circumstances where the document has been wrongly extracted from the mission. The cable has been put into the public domain by the Wikileaks publication and the newspaper articles which followed, in circumstances for which the Appellant has no responsibility. On that ground, the cable would also be admissible **[21]**.

In his judgment, Lord Sumption concludes that a document is part of the archives of a diplomatic mission when it is under the control of the mission's personnel, as opposed to other agents of the sending state, whether directly or by virtue of the terms on which the mission transmitted the document to another governmental entity. The document's origin and contents are irrelevant to that issue **[68]**. The confidentiality and inviolability of such documents depends not on their subject-matter or contents but on their status as part of the archives or documents of a diplomatic mission, protected by art 24 of VCDR **[69]**. It is the obligation of the receiving state to give effect to that status, which includes preventing its infringement by other parties. Thus, a court as an organ of the state would violate art 24 if it received and used material from the archives of a mission which came into the hands of a third party without authority **[70-71]**. This is subject to a reservation. Documents obtained from the archives of a mission without authority but which have entered the public domain and are freely available have already had their confidentiality destroyed. A court would not be an instrument of the destruction of its confidentiality by using it in that circumstance **[74-75]**. The Respondent's cross-appeal on this issue faces two distinct difficulties (a) the cable did not emanate from the US mission in London and (b) the document has entered the public domain **[76]**.

Lady Hale agrees with both Lord Mance and Lord Sumption that the inviolability of the archives, documents and official correspondence of a mission means that they cannot generally be admitted in evidence under arts 24 and 27(2) of VCDR **[124]**. However, Lady Hale introduces the qualification to the judgments given by Lord Mance and Lord Sumption that documents emanating from a mission must retain their confidentiality and consequent inviolability in some circumstances, the main purpose of the inviolability rule being to allow the mission to communicate in confidence with the sending government **[125];** and that 'control' must include restrictions placed by the sending mission on the further transmission and use of the document, such as markings of confidentiality **[126-127]**. However, in this case, whatever control was initially exercised over the document, it had found its way into many hands and was lost even before it was put into the public domain by Wikileaks. As such, it was no longer inviolable and should have been admitted in evidence: **[127-128]**.

Improper Motive

Lord Mance (with whom Lord Neuberger, Lord Clarke, Lord Sumption and Lord Reed agree) concludes that the Court of Appeal was correct to conclude that the Administrative Court's ruling that the cable was inadmissible had no material effect on the outcome of proceedings and was not a ground for allowing the appeal or for concluding that the motivation for creating the MPA was improper **[49]**. The appropriate test is whether the admission of the cable for use in cross-examination and to weigh against other evidence *could* have made a difference (however, the precise test must depend on the context, including how well-placed the court is to judge the effect of any unfairness) **[23-24]**. This is in substance how the Court of Appeal approached the issue **[24]**. The Administrative Court undertook a full and careful review of the genesis and development of, and decision to announce, the MPA and no-take zone **[24]**. Neither further cross-examination on the cable, nor the cable itself admitted as evidence, would have led to any different outcome before the Administrative Court **[42]**. The Administrative Court heard cross-examination of Mr Roberts and Ms Yeadon on important passages of the cable **[37]**. Both gave evidence that was generally and substantially consistent with the cable **[39]**. The cable is at the very lowest ambiguous as to whether references to resettlement were uttered in circumstances indicating that they had a role in motivating the proposal for an MPA. It seems very unlikely that a British civil servant would have disclosed an improper motivation of this nature, rather than outlining the practical consequences of an MPA which is what would have concerned the Americans **[40]**. Furthermore, even if Mr Roberts and/or Ms Yeadon did have and voice illegitimate motives for the proposal for an MPA, this was not apparent and there is no conceivable basis for thinking that this affected the ultimate decision to create the MPA, which was taken personally by the Respondent after presentation to him on a basis to which no objection is taken **[43-49]**.

Lord Kerr (with whom Lady Hale agrees) dissents on the issue of improper motive. They would have allowed the appeal and remitted the case on limb (i). They consider that the Court of Appeal should have recognised that there was a substantial possibility that the Administrative Court would have taken a different view of the evidence of Mr Roberts and Ms Yeadon if they had admitted the cable and the case had proceeded to its conventional conclusion **[121 and 128]**. The correct test to be applied by the Court of Appeal is what *might* have happened if the cable was admitted in evidence not what *would* have happened **[106-112]**. The exclusion of the cable restricted the cross-examination of Mr Roberts and Ms Yeadon because it was not possible to challenge their testimony where it was inconsistent, on the basis that the document was genuine **[91]**. Excluding the cable from evidence also meant that it did not rank as independent material and as a significant counterweight to the FCO witnesses' testimony **[93]**. Further, there was an equally substantial possibility that the Court of Appeal would have concluded that the Respondent's decision could be impugned because it was taken on a misapprehension of the true facts and circumstances **[121]**.

Fishing Rights

Lord Mance (with whom all of the other Justices agree) considers that permission to appeal should be given on this issue, but the appeal dismissed **[50 and 63]**. The absence of any mention of Mauritian fishing rights, whether by reference to an undertaking given by the UK Government and preferential treatment of Mauritian registered or owned vessels or evidence about such rights, does not undermine the Government's consultation so as to justify setting it aside. The creation of a no fishing MPA would obviously affect inshore fishing and threaten the livelihood of vessels which had previously been licensed to fish in territorial waters. It was open to Mauritius to raise this objection in response to the consultation, but it did not. It would be inappropriate to treat the consultation process as invalid when the party to whom the rights allegedly belonged had full opportunity to assert them. There is also no reason to believe that the ultimate decision would or could have been any different if the consultation had specifically drawn attention to the possible existence of Mauritian fishing rights **[62 and 122]**. The UN Convention on the Law of the Sea arbitral tribunal's finding that such fishing rights do actually exist and their effect in domestic law, as regards the MPA or no-take zone, was not relied on or capable of being relied on before the Supreme Court or relevant to the issues arising **[50-57, 63]**.

References in square brackets are to paragraphs in the judgment