Hilary Term
[2018] UKSC 3
On appeal from: [2014] EWCA Civ 708

JUDGMENT

R (on the application of Bancoult No 3) (Appellant) *v* Secretary of State for Foreign and Commonwealth Affairs (Respondent)

before

Lord Neuberger
Lady Hale
Lord Mance
Lord Kerr
Lord Clarke
Lord Sumption
Lord Reed

JUDGMENT GIVEN ON

8 February 2018

Heard on 28 and 29 June 2017

Appellant
Nigel Pleming QC
Richard Wald
Stephen Kosmin
Professor Robert McCorquodale
(Instructed by Clifford Chance LLP)

Respondent
Steven Kovats QC
Professor Malcolm Shaw QC
Penelope Nevill

(Instructed by The Government Legal Department)

LORD MANCE: (with whom Lord Neuberger, Lord Clarke and Lord Reed agree)

Introduction

1. The appellant is the chair of the Chagos Refugees Group. The Group represents Chagossians whose removal from the British Indian Overseas Territory (the Chagos Islands - "BIOT") and resettlement elsewhere was procured by the United Kingdom government in the years 1971 to 1973. The circumstances have generated much national and now also international litigation. The sad history has been told on a number of occasions. It suffices to mention *Chagos Islanders v The Attorney General* [2003] EWHC 2222 (QB), *R (Bancoult) Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] AC 453 and most recently in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2016] UKSC 35; [2017] AC 300. Following the last two decisions, it remains prohibited, under the BIOT Constitution and Immigration Orders 2004, for Chagossians to return to BIOT. Since the last judgment, the United Kingdom government has on 16 November 2016 announced its decision to maintain the ban on resettlement, after a study carried out by KPMG published on 31 January 2015. That decision is itself the subject of further judicial review proceedings.

2. The present appeal concerns the establishing for BIOT of "a marine reserve to be known as the Marine Protected Area" by Proclamation No 1 of 2010. The Proclamation was issued by Mr Colin Roberts, Commissioner for BIOT, "acting in pursuance of instructions given by Her Majesty through a Secretary of State". The Marine Protected Area ("MPA") was established in a 200 mile Environment (Protection and Preservation) Zone ("EPPZ") which had existed since Proclamation No 1 of 2003 dated 17 September 2003. Proclamation No 1 of 2010 said (para 2) that, within the MPA:

> "Her Majesty will exercise sovereign rights and jurisdiction enjoyed under international law, including the United Nations Convention on the Law of the Sea, with regard to the protection and preservation of the environment of the [MPA]. The detailed legislation and regulations governing the said [MPA] and the implications for fishing and other activities in the [MPA] and the Territory will be addressed in future legislation of the Territory."

The creation of the MPA was accompanied by a statement issued by the respondent, stating that it "will include a 'no-take' marine reserve where commercial fishing will be banned".

3. No fresh legislation or regulations relating to fishing were in the event issued or necessary. Fishing was already controlled. From 1984 it was controlled within the three mile territorial waters and the contiguous zone which extended a further nine miles (to 12 miles from shore) under Proclamation No 8 of 1984 and the Fishery Limits Ordinance 1984. Control was subject to a power (exercised on 21 February 1985) to designate Mauritius for the purpose of enabling fishing traditionally carried on within those limits. Proclamation No 1 of 1991 and the Fisheries (Conservation and Management) Ordinance 1991 ("the 1991 Ordinance") established a Fisheries Conservation and Management Zone extending 200 miles from shore, within which a fee-carrying licence was required for any fishing. The Mauritian government was, however, informed that a limited number of licences would continue to be offered free of charge in view of the traditional fishing interests of Mauritius in the waters surrounding BIOT. Proclamation No 1 of 2003 establishing the EPPZ had no impact on fishing. The 1991 Ordinance was superseded by similarly entitled Ordinances in 1998 and then 2007, under which the licensing system was continued. The majority of fishing from Mauritius was inshore fishing carried out by the Talbot Fishing Company, owned by the Talbot brothers, one of whom was Chagossian. Their vessels were flagged to Mauritius until 2006 or 2007, when for economic reasons they were reflagged to Madagascar and the Comoros. A number of regular crew members on these boats were Chagossians. After the establishing of the MPA, and the accompanying announcement, the achievement of a no-take reserve or zone was in practice accomplished by allowing existing licences to expire and by not issuing any fresh licences to the Talbot vessels or other vessels from outside BIOT for inshore or other fishing in the MPA.

4. The present challenge has two limbs. One is that the decision to create the MPA had an improper ulterior motive, namely to make resettlement by the Chagossians impracticable. The other is that the consultation preceding the decision was flawed by a failure to disclose the arguable existence on the part of Mauritius of inshore fishing rights (ie within the 12 mile limit from shore). Both challenges are associated with the enforcement of a no-take zone by the refusal since 2009 of fishing licences, since the impracticality of resettlement is said to derive from the loss by Chagossians of occupational skills and possibilities, now and at any future time when resettlement might be contemplated.

5. At the core of the appellant's case on improper purpose is a document published by The Guardian on 2 December 2010 and by The Telegraph on 4 February 2011, purporting to be a communication or "cable" sent on 15 May 2009 by the United States Embassy in London to departments of the US Federal Government in Washington, to elements in its military command structure and to its

Embassy in Port Louis, Mauritius. The cable is recorded as having been passed to The Telegraph (and was presumably also passed to The Guardian) by Wikileaks. Its text purports to be a record, by a United States political counsellor, evidently a Mr Richard Mills, of conversation at a meeting on 12 May at the Foreign Office, London with Mr Roberts, Ms Joanne Yeadon, the Administrator for BIOT, and Mr Ashley Smith, the Ministry of Defence's Assistant Head of International Policy and Planning. It also purports to refer to some previous meetings and a subsequent conversation involving Ms Yeadon. It starts with a one-paragraph summary and ends with two paragraphs of comment, and contains 12 paragraphs of purported record in between. Reliance is placed on passages in it, which it is submitted show, or could be used to suggest, that Mr Roberts, Commissioner for BIOT, had and disclosed an improper motive in relation to the creation of the MPA. It is common ground that there was in fact a meeting between US officials and Mr Roberts and Ms Yeadon at the Foreign Office on 12 May 2009.

6. The present proceedings took an unfortunate turn in this respect before the Administrative Court (Richards LJ and Mitting J). Burnton LJ had on 25 July 2012 given permission for Mr Roberts and Ms Yeadon to be cross-examined on the purported cable, acknowledging that it must have been obtained unlawfully and in probability by committing an offence under US law, but saying:

> "I do not see how the present claim can be fairly or justly determined without resolving the allegation made by the [appellant], based on the Wikileaks documents, as to what transpired at the meeting of 12 May 2009, and more widely whether at least one of the motives for the creation of the MPA was the desire to prevent resettlement."

Before the Administrative Court, objections were made to the use of the cable in cross-examination of Mr Roberts.

7. One objection, which did not find favour with the Administrative Court (and which is not live before the Supreme Court), was that the Official Secrets Act and the UK government's policy of "neither confirm nor deny" ("NCND") in relation to documents of this nature meant that Mr Roberts should not be required to answer questions relating to the purported cable. In relation to this objection, the Court ruled that Mr Roberts could be questioned on an 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 invite the Court to accept it as an accurate record of the meeting, and to rely on it evidentially. Various questions were put to Mr Roberts and answered on that basis, before Mr Kovats QC for the respondent asked for and obtained further time overnight to consider the position.

8. The other objection was that use of the cable would be contrary to the principle of inviolability of the US mission's diplomatic archive in breach of articles 24 and 27(2) of the Vienna Convention on Diplomatic Relations 1961, given effect in the United Kingdom by section 2(1) of the Diplomatic Privileges Act 1964. This further objection only occurred to the respondent during the second day. It was therefore only made the subject of submissions on the third day. This led to the first ruling being effectively over-taken, by a further ruling that it would not be open to the appellant to invite the court to treat the cable as genuine or to find that it contained an accurate record of the meeting and that any further cross-examination should proceed on that basis, without any suggestion that the purported cable was genuine. Mr Pleming applied for, but was refused immediate permission to appeal that ruling. In these circumstances, he indicated that he had no further cross-examination of Mr Roberts, and on the next day conducted a cross-examination of Ms Yeadon, limited as directed by the Court's ruling.

9. By a judgment dated 11 June 2013, the Administrative Court rejected the appellant's case both in so far as it was based on improper purpose and in so far as it was based on failure to disclose the arguable existence of Mauritian fishing rights. The Court of Appeal (the Master of the Rolls, Gloster and Vos LJJ) [2014] 1 WLR 2921 reached the same overall conclusions, but after taking a different view of the admissibility of the purported cable. It held that, since the cable had already been disclosed to the world by a third party, admitting it in evidence would not have violated the US London mission's diplomatic archive. The Court of Appeal had therefore to consider whether the exclusion of the cable from use before the Administrative Court would or could have made any difference to that Court's decision on the issue of improper purpose. By a judgment given 23 May 2014, it decided against the appellant on both this issue and the issue relating to the omission of reference to arguable Mauritian fishing rights. The Supreme Court by order dated 7 July 2016 gave permission to appeal on the issue of improper purpose and directed that the application for permission to appeal on the issue relating to the omission of reference to arguable Mauritian fishing rights be listed for hearing with the appeal to follow if permission is granted. The respondent has in turn challenged the correctness of the Court of Appeal's conclusion that use of the cable would not have contravened article 24 and/or 27(2) of the Vienna Convention.

The admissibility of the cable

10. I will take this issue first. In order to give some context to articles 24 and 27(2), the whole of articles 24, 25 and 27 of the Vienna Convention on Diplomatic Relations are set out:

> "Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

Article 25

The receiving State shall accord full facilities for the performance of the functions of the mission.

…

Article 27

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

3. The diplomatic bag shall not be opened or detained.

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy person inviolability and shall not be liable to any form of arrest or detention.

> 6. The sending State or the mission may designate diplomatic couriers ad hoc. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.
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> 7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft."

11. The submissions on inviolability under these provisions range widely. They cover the nature of the archive, its location, the circumstances in which material originating from the archive may continue inviolable and the reach of the concept of inviolability itself. As to the nature of the archive, Professor Denza concludes in *Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations* (4th ed) (2016), at p 161, that, instead of trying to list all modern methods of information storage, "it is probably better simply to rely on the clear intention of article 24 to cover all physical items storing information". Writing jointly in *Satow's Diplomatic Practice* (7th ed, edited by Sir Ivor Roberts) (2017), at p 238, para 13.31, Professor Denza and Joanne Foakes, former Legal Counsellor to the Foreign and Commonwealth Office, say, after noting that the term "archives" is not defined in the 1961 Vienna Convention:

> "but it is normally understood to cover any form of storage of information or records in words or pictures and to include modern forms of storage such as tapes, sound recordings and films, or computer disks."

That can be readily accepted, as can be the proposition that copies taken of documents which are part of the archive must necessarily also be inviolable.

12. As to location, Mr Kovats on behalf of the respondent points to the words "at any time and wherever they may be" in article 24, and to commentaries by Professor Eileen Denza in her work, cited above, pp 158-159, and by Professor Rosalyn Higgins (as she then was) in *Problems and Process: International Law and how we use it* (OUP) (1995), pp 88-89. Professor Denza observes that the words quoted

mean "that archives not on the premises of the mission and not in the custody of a member of the mission are entitled to inviolability", and that:

> "If archives fall into the hands of the receiving State after being lost or stolen they must therefore be returned forthwith and may not be used in legal proceedings or for any other purpose of the receiving State."

Professor Higgins wrote:

> "Article 24 stipulates that the archives and documents shall be inviolable at any time and 'wherever they may be'. It is clear that this last phrase is meant to cover circumstances where a building other than embassy premises is used for storage of the archives; and also the circumstances in which an archived document has been, for example, taken there by a member of the Secretariat staff for overnight work - or even inadvertently left by him on the train or in a restaurant. What would happen if the Secretariat member, or a diplomat, took an overseas trip, and mislaid the document while abroad? The English High Court [in the *Tin Council* case: International Law Reports Vol 77 (1988) pp 107-145 at pp 122-123] was disturbed by the idea that 'wherever located' could, on the face of it, mean even in Australia or Japan. It is true that an English court is not likely to be in a position to enforce the inviolability of a document from the authorities of another country where that particular document happens to be located. But it is entirely another thing to say that, because a document happens to be outside the jurisdiction, an English court is thereby entitled to treat it, in matters that do fall within its own competence, as non-archival and thus without benefit of such inviolability as it is in a position to bestow."

Again, so long as the document can be said to constitute part of the archive, a point to which I shall return, these statements appear not only authoritative in their sources, but convincing. As will appear, they also receive support from *Shearson Lehman Bros Inc v Maclaine, Watson and Co Ltd; International Tin Council (Intervener) (No 2)* [1988] 1 WLR 16. That is the House of Lords judgment in the *Tin Council* case, to the first instance decision in which Professor Higgins referred. The House in that case on any view accepted that there were some circumstances in which a document which was part of an archive, but for some reason no longer physically within the archive, remains inviolable.

13. This brings me to the circumstances in which material originating from the archive may continue inviolable and the reach of the concept of inviolability itself. The appellant, whose case on this aspect was presented by Professor Robert McCorquodale, submits that the word "inviolable", read in the context of the Convention, does not embrace inadmissibility. In his submission, the concept is directed at some degree of interference, of a more or less forceful nature, and this limited sense is the only sense which applies in all the places where the concept is deployed. The submission corresponds with the approach taken by the Court of Appeal, which picked up the characteristically trenchant view of Dr F A Mann, that

> "Inviolability, let it be stated once more, simply means freedom from official interferences. Official correspondence of the mission over the removal of which the receiving state has had no control can … be freely used in judicial proceedings."

See "'*Inviolability*' *and Other Problems of the Vienna Convention on Diplomatic Relations* in *Further Studies in International Law*, (1990) pp 326-327 and also [1988] 104 LQR, p 178. But Professor McCorquodale's submission does not allow for the fact that a concept may embrace different shades of meaning according to the particular context in which it is deployed.

14. The meaning of inviolability in the context of use of archive material in evidence was in fact the very subject of the House of Lords judgment in the *Tin Council* case. The issue arose there under article 7(1) of the International Tin Council (Immunities and Privileges) Order 1972, whereby it was provided:

> "The council shall have the like inviolability of official archives as in accordance with the 1961 Convention Articles is accorded in respect of the official archives of a diplomatic mission."

The Tin Council intervened in civil proceedings between private parties, relying on article 7(1) as rendering inadmissible various documents that the parties were proposing to adduce in evidence.

15. The House was in these circumstances asked to address the operation of article 7(1) on various "Agreed Assumptions of Fact" set out in a document so entitled. One such assumption was that a Tin Council document was supplied to a third party by an officer or other staff member of the Tin Council without any authority. Mr Kentridge QC submitted that article 24 of the Vienna Convention and article 7(1) of the 1972 Order only afforded protection against executive or judicial

action by the host state, so that, "even if a document was stolen, or otherwise obtained by improper means, from a diplomatic mission, inviolability could not be relied on to prevent the thief or other violator from putting it in evidence". Lord Bridge, giving the sole fully reasoned judgment in the House, rejected this submission, saying (p 27F) that:

> "The underlying purpose of the inviolability conferred is to protect the privacy of diplomatic communications. If that privacy is violated by a citizen, it would be wholly inimical to the underlying purpose that the judicial authorities of the host state should countenance the violation by permitting the violator, or anyone who receives the document from the violator, to make use of the document in judicial proceedings."

16. The House went on to limit this to circumstances in which the third party receiving the document was aware of the absence of any authority to pass it to him (p 29B-C). To a limited extent therefore, the Tin Council succeeded in establishing that its documents would have inviolability, precluding their use in civil proceedings. This was part of the ratio of the House of Lords' decision, as appears at p 31D-E, even though Lord Bridge went on to add that "In the event the rejection of that [Mr Kentridge's] argument turns out to be of minimal significance in the context of the overall dispute".

17. The Canadian case of *Rex v Rose* An Dig 1946, Case No 76, p 161 was cited to the House in the *Tin Council* case, but not referred to by Lord Bridge in his judgment. Rose was convicted of furnishing secret material to the Soviet Embassy in reliance on documents stolen from the Embassy archive by a defector. Rose's claim that the stolen documents used against him were immune from use was rejected, on the grounds that such a claim

> "could not be admitted where the recognition of such immunity was inconsistent with the fundamental right of self-preservation belonging to a State or where the executive had impliedly refused to recognise such immunity."

The absence of inviolability in cases where state security is involved has a pedigree going back to the extraordinary Cellamare conspiracy in 1718 by Antonio dei Giudice, Prince of Cellamare and Ambassador of Spain to France, to kidnap and depose Philippe d'Orléans, Regent of France, and replace him as Regent by Philip V of Spain: see *Martens, Causes célèbres du droit des gens*, I, p 149. *Rex v Rose* is nonetheless controversial, and, more importantly for present purposes, neither of the grounds on which it rests applies to this case.

18. In his LQR article, cited above, Dr Mann was taking direct issue with the House of Lords' rejection in the *Tin Council* case of Mr Kentridge's submission. The Court of Appeal was in my opinion bound to reject Dr Mann's analysis, and I see no reason for adopting it. I also consider that the Court of Appeal was incorrect to identify Dr Mann's analysis as representing the weight of opinion (para 64). Professor Denza says, at p 189, that:

> "As regards use of the correspondence as evidence, article 27.2 may be regarded as duplicating the protection under article 24 of the Convention which gives inviolability to the archives and documents of the mission 'wherever they may be'."

Professor Jean Salmon of The Free University, Brussels, describes F A Mann's view as regards article 27(2), in *Further Studies in international law* (OUP) (1990), p 226, as "une vue trop restrictive de l'inviolabilité": *Manuel de Droit Diplomatique* (1994), p 244. The quotation from Professor Higgins, set out in para 12 above does not fit well with Dr Mann's approach. S E Nahlik, *Development of Diplomatic Law, Selected Problems*, 222(III) Recueil des Cours (1990), 291-292 and B S Murty, *The International Law of Diplomacy: The Diplomatic Instrument and World Order* (1989) at p 382 comment critically on *Rex v Rose*, while *J Wouters, S Duquet & K Meuwissen, The Vienna Conventions on Diplomatic and Consular Relations* (OUP, 2013) at para 28.4.5.1 state, citing Professor Salmon, that:

> "The inviolability of diplomatic/consular archives and documents entails that they cannot be opened, searched, or requisitioned without consent, and cannot be used as evidence."

19. In *Fayed v Al-Tajir* [1988] QB 712 the de facto head, later Ambassador, of the Embassy of the United Arab Emirates in London was sued by Mr Fayed in respect of an Embassy communication addressed to an Embassy counsellor. For unclear reasons diplomatic immunity was waived, but the question remained whether the document could be used in court. The Court of Appeal held that the document enjoyed immunity from use, and the dispute was non-justiciable. Kerr LJ noted at p 736C-E that the judge in *Rex v Rose* had concluded that diplomatic documents generally enjoyed "inviolability", so anticipating the use of that term in the Vienna Convention, and that he had expressed the concept of "inviolability" at p 646 in wide terms:

> "International law creates a presumption of law that documents coming from an embassy have a diplomatic character and that

> every court of justice must refuse to acknowledge jurisdiction or competence with regard to them."

Kerr LJ also noted that this conclusion was supported by *Denza* on *Diplomatic Law* (1976), p 110. At p 736F-G, he distinguished the actual decision in *Rex v Rose* as having been reached on the basis that a citizen could not invoke immunity in litigation with his own government and on the basis of the principle said to derive from the Cellamare conspiracy, neither of which bases had any relevance in *Fayed v Al-Tajir*.

20. In principle, therefore, inviolability of documents which are part of the mission archive under articles 24 and 27(2) extends to make it impermissible to use such documents or copies in a domestic court of the host country, at any event absent extraordinary circumstances such as those of the Cellamare conspiracy or *Rex v Rose* and absent express waiver of the inviolability by the mission state. But the application of this principle to any particular document is subject to two qualifications. First, the document must constitute or remain part of the mission archive, and, second, its contents must not have become so widely disseminated in the public domain as to destroy any confidentiality or inviolability that could sensibly attach to it. These two qualifications may sometimes, but certainly not always, coincide. Taking the first, in the present case, there is no indication from where the Wikileaks document emanates, but there is no suggestion that it is likely to have emanated from the United States Embassy in London. It was sent both to the State Department in Washington and elsewhere. There is no indication that the United States Embassy in London attached any reservation to or placed any limitation on the use or distribution of the cable by the State Department or any other authority to whom the cable went. The cable was simply classified as Confidential. In these circumstances, once the document reached the State Department or any other addressee, it was, so far as appears and in the form in which it was there held, a document in the custody of the Federal Government of the United States or that other authority, and not part of the London Embassy archive. Bearing in mind the probability that the Wikileaks cable was extracted from the State Department or some other unknown foreign location to which it had been remitted for information and use there, it is not therefore established, even as a matter of probability that the cable remained part of the archive of the London mission, when it was so extracted. On that simple basis, the Wikileaks cable was available for use and admissible as evidence of its contents in the present proceedings. I therefore arrive as the same conclusion on this point as the Court of Appeal, albeit for different reasons.

21. Taking, second, the possibility of loss of inviolability due to a document from the mission archive coming into the public domain, I have come to the conclusion that this must in principle be possible, even in circumstances where the document can be shown to have been wrongly extracted from the mission archive. Whether it has occurred in any particular case will however depend on the context as well as

the extent and circumstances of the dissemination. That seems to me to follow by analogy with the reasoning concerning the protection afforded by the law to confidential material (as opposed to that afforded on grounds of privacy and/or human rights) in cases such as *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 and *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081, see also *Passmore on Privilege*, paras 7-039 and 7-042. In the present case, 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. In my opinion, the cable has as a result lost its inviolability, for all purposes including its use in cross-examination or evidence in the present proceedings. On that ground, I would therefore reach the same conclusion as the Court of Appeal expressed in para 64 of its judgment.

The allegation of improper purpose

22. On the above basis, the question arising is whether the Court of Appeal was right to conclude that the Administrative Court's ruling that the cable was not available for use or admissible had no material effect on the proceedings and was not a ground for allowing the appeal. The Court of Appeal, after reviewing all the material available, including the cable, the evidence given and the Administrative Court's findings, concluded (para 93) that

> "even if the cable had been admitted in evidence, the court would have decided that the MPA was not actuated by the improper motive of intending to create an effective long-term way to prevent Chagossians and their descendants from resettling in the BIOT."

A little earlier in its judgment, in para 89, the Court said that it did "not accept that there is a realistic possibility that the [Administrative Court's] assessment of the evidence of Mr Roberts and Ms Yeadon would have been affected if the cable had been formally admitted as an authentic document"; that in reaching this conclusion, it had "borne in mind the need to exercise caution in denying relief on the ground that the legally correct approach would have made no difference to the outcome"; but that it was "satisfied that the admission of the cable in evidence would have made no difference".

23. Before the Supreme Court, criticism was directed at the Court of Appeal for formulating its conclusions in terms of what "would", rather than "could" have made a difference. Reference was made to well-known authorities on the test applicable in cases of breach of natural justice (or unfairness) by public authorities, including *Malloch v Aberdeen Corpn* [1971] 1 WLR 1578 and *R (Cotton) v Chief Constable*

of the Thames Valley Police [1990] IRLR 344, paras 59-60, per Bingham LJ. Reference was also made to the discussion, without decision, on the test applicable on an application to the Supreme Court to set aside a prior judgment of its own in *Bancoult (No 4)*, cited in para 1 of this judgment. The precise test must depend on the context, including, in particular, how well-placed the court is to judge the effect of any unfairness. In the present case, the complaint is of lack of opportunity for full cross-examination and for the trial court to weigh the evidence it heard in the light of the cable, treating the cable as admissible. In these circumstances, I am prepared for present purposes to accept that the appropriate question is whether the admission of the cable for use in these ways could have made a difference. However, I also consider that this is in substance how the Court of Appeal approached the issue. The conclusion it reached (see para 22 above) was that there was no

> "realistic possibility that the [Administrative Court's] assessment of the evidence of Mr Roberts and Ms Yeadon would have been affected if the cable had been formally admitted in evidence as an authentic document."

Its statement at the end of para 89 that "the admission of the cable in evidence would have made no difference" must be read, in context, as a shorthand resumé of this conclusion. A conclusion that there was no realistic possibility that the assessment would have been affected amounts, in substance, to a conclusion that the admission of the cable could not realistically have made a difference. Nonetheless, it is incumbent upon the Supreme Court to consider for itself whether the Court of Appeal erred in reaching that conclusion.

24. The Administrative Court undertook in paras 53 to 77 of its judgment a full and careful review of the genesis and development of and decision to announce the MPA and a no-take zone, which the Court of Appeal accurately summarised as follows:

> "75. … The catalyst for making the MPA was a proposal made in July 2007 by an American environmental group, Pew Environmental Group, to Professor Sheppard, the environmental adviser for the BIOT. On 5 May 2009, Mr Roberts submitted a briefing note to the Secretary of State which explained the benefits of the proposal. These included that, because of the absence of a settled population and the strict environmental regime already in force, the BIOT was one of the few places in which a large scale approach to conservation was possible; and it offered great scope for scientific and climate change research. The Secretary of State's reaction was enthusiastic. His private secretary emailed Mr

Roberts to say that the Secretary of State was 'fired up' after the meeting and 'enthusiastic to press ahead' with the proposal.

76. This was followed by a meeting to discuss the proposal with US Embassy officials on 12 May 2009. This is the crucial meeting the gist of which was purportedly summarised in the copy cable dated 15 May 2009. Both Mr Roberts and Ms Yeadon attended the meeting and were cross-examined about it. Mr Roberts denied making any reference to 'Man Fridays'. He said that he recognised that the declaration of an MPA, if 'entrenched', would create a serious obstacle to resettlement. Ms Yeadon also denied that Mr Roberts had used the words 'Man Fridays' or that he had said that establishing a marine park would put paid to resettlement claims. The Divisional Court said (para 61) that it found Ms Yeadon to be 'an impressive and truthful witness'. Having referred to an important note of a meeting held on 25 March 2009, the court said at para 63: 'as Ms Yeadon understood, at official level, HM Government regarded the resettlement issue as settled by the 2004 Order, subject only to the pending decision of the Strasbourg Court' (this is a reference to the claimant's application which was eventually dismissed by the ECtHR on 20 December 2012: see para 7 above).

77. By a note dated 29 October 2009, Ms Yeadon proposed to Mr Roberts and the Secretary of State that consultation on the proposal to declare an MPA be launched on 10 November. Under the heading 'Risks', she noted that the risk of an aggressive reaction from the Chagossians and their supporters was high and said: 'they may claim that we are establishing a Marine Protected Area in order to ensure that they can never return to BIOT. This is not the case ...' The court said (para 65) that it was 'satisfied that in this passage Ms Yeadon again stated what she genuinely believed: that the proposal to establish an MPA was not to ensure that the Chagossians could never return.'

78. In a note dated 30 March 2010, Ms Yeadon proposed that the Secretary of State should publish the report on consultation and declare his belief that an MPA should be established, but only after further work had been done. There followed a flurry of emails between officials. The Secretary of State did not accept Ms Yeadon's advice. On 1 April, he announced the creation of an MPA in the BIOT which included

a ‘no take’ Marine Reserve where commercial fishing would be banned. Mr Roberts duly made the proclamation on 1 April.

79. The Divisional Court expressed its conclusion on the improper motive point in these terms:

> ‘74. This material makes it clear that it was the personal decision of the Foreign Secretary to declare an MPA on 1 April 2010, against the advice of his officials. There is no evidence that, in doing so, he was motivated to any extent by ‘an intention to create an effective long-term way to prevent Chagossians and their descendants from resettling in the BIOT’. His Private Secretary could hardly have written on 7 May 2009, the day after the presentation of the proposal by Professor Sheppard to him, that he was ‘really fired up about this’ if the proposal was presented as a cynical ploy to frustrate Chagossian ambitions. It is obvious that he was responding to a proposal presented by a man, Professor Sheppard, who was keen to see it adopted and put into effect for scientific and conservation purposes only. Later, on 31 March 2010, when the Foreign Secretary made the decision to go ahead immediately, the decision had nothing to do with Chagossian ambitions. The decision to override official advice can best be understood in the political context: Parliament was about to be dissolved. The Foreign Secretary no doubt believed that the decision would redound to the credit of the Government and, perhaps, to his own credit. It would do so the more if a decision with immediate effect was taken. Officials thought that this would create difficulties but it was the Foreign Secretary’s prerogative to override their reservations and make the decision which he did. There is simply no ground to suspect, let alone to believe or to find proved, that the Foreign Secretary was motivated by the improper purpose for which the claimant contends.
>
> 75. It is significant that the Foreign Secretary’s announcement contained the caveat which always accompanied public and private statements by officials: that the decision was subject to the pending judgment of the Strasbourg Court. Unless there was some deep plot to frustrate an adverse judgment, of which there is no

evidence at all, this fact alone demonstrates that no sensible official in the FCO could have believed that the establishment of an MPA would fulfil the improper purpose alleged. Nor could it have done. The proclamation made by Mr Roberts on 1 April 2010 stated that:

> 'The detailed legislation and regulations governing the said Marine Protected Area and the implications for fishing and other activities in the Marine Protected Area and the territory will be addressed in future legislation of the territory.'

The only step taken since then has been to allow fishing licences current at 1 April 2010 to expire and to issue no more. What prevents the return of Chagossians to the islands is the 2004 Order, not the MPA. If, at some future date, HM Government decided or was constrained by a judgment of a court to permit resettlement or the resumption of fishing by Chagossians, nothing in the measures so far taken would prevent it or even make it more difficult to achieve.

76. For the claimant's case on improper purpose to be right a truly remarkable set of circumstances would have to have existed. Somewhere deep in government a long-term decision would have to have been taken to frustrate Chagossian ambitions by promoting the MPA. Both the administrator of the territory in which it was to be declared, Ms Yeadon, and the person who made the decision, the Foreign Secretary, would have to have been kept in ignorance of the true purpose. Someone - Mr Roberts? - would have been the only relevant official to have known the truth. He, and whoever else was privy to the secret, must then have decided to promote a measure which could not achieve their purpose, for the reasons explained above, while explaining to all concerned that the MPA would have to be reconsidered in the light of an adverse judgment of the Strasbourg Court. Those circumstances would provide an unconvincing plot for a novel. They cannot found a finding for the claimant on this issue.'

80. In order to test Mr Pleming's submission that the effect of the Divisional Court's ruling was to deprive him of the opportunity of properly testing the evidence of the witnesses, it is necessary to see what cross-examination he was able to undertake. During day 1 and day 2 of the hearing, Mr Pleming cross-examined Mr Roberts extensively about the meeting of 12 May 2009 by reference to various documents, including the cable. Although Mr Roberts was not prepared to answer questions as to whether the contents of the cable were accurate (because of the NCND policy), nevertheless he answered questions as to what he might or might not have said at the meeting: see day 1 pp 155 to 169 and day 2 at pp 9 to 41. Mr Pleming confirmed to the court that his general purpose in cross-examining on the cable, paragraph by paragraph, was to establish its general accuracy by reference to relatively uncontroversial passages in it.

81. Despite his repeated reliance on the NCND policy, Mr Roberts gave extensive evidence of what was discussed at the meeting on 12 May. For example, in relation to one passage from the cable, he said: 'I can confirm that the general content and sense of the issues that you have just read out is consistent with the discussion we were having with the United States at the time'. In relation to another passage, he said: 'I don't recall what language I would have used at the time but it would have been consistent with the general position that we were trying to set out to the United States'.

82. At p 36 on day 2, Mr Roberts accepted that he did say to the US officials that the establishment of an MPA would in effect put paid to the resettlement claims. He said that this was 'a recognition of a reality' that, if the MPA was 'entrenched' (ie a law which would be impossible or difficult to repeal), this would be a 'serious obstacle to resettlement'. He denied that he had said anything about 'footprints' or 'Man Fridays': 'that was not the nature of the conversation'. Mr Pleming sought to persuade the court to give a ruling as to whether Mr Roberts should be required to answer questions about the accuracy of the contents of the cable. Mitting J asked whether it was necessary to have this debate, since Mr Roberts had accepted that a consequence of establishing an MPA would be that the hopes of the Chagossians to return would be thwarted. Richards LJ was not sure how much more Mr Roberts could say. He had

> indicated why he declined to answer the 'ultimate' question; but he had answered all the 'intermediate' questions.
>
> 83. The court did not make any final ruling at this stage and Mr Pleming continued with his cross-examination of Mr Roberts by reference to the cable: see day 2 pp 78 to 80. He put it to Mr Roberts that his purpose was to use the MPA to prevent or kill off the claims for resettlement; and that this policy 'shines out of the record of that meeting and is not a policy you would want to put in written form so that it could ever be seen by the Chagossians or in any litigation'. Mr Roberts replied: 'No, I reject that suggestion entirely. I do not believe it is possible to keep a policy of that significance quiet.'"

25. It is worth underlining some points about the history which arise from this account. First, the whole idea of an MPA and a no-take zone was generated by independent environmental activity. An American environmental group, Pew, made the initial proposal to Professor Charles Sheppard, BIOT's independent environmental adviser, in July 2007. This led on 22 April 2008 to discussions between Pew and Ms Yeadon about the creation of an MPA, in which there would be a no-take zone. On the same day, the Chagos Conservation Network, whose founders included Pew and Professor Sheppard, held its inaugural meeting at the Linnean Society, and expressed the view that there should be a no-take zone within BIOT waters. On February 2009, The Independent reported in an article that the Chagos Conservation Trust, the RSPB, the Zoological Society of London and Pew were launching a plan for an MPA, which would be compatible with defence interests and would offer a possibility that some Chagossians might return as environmental wardens; a marine biologist from York University was reported as describing the attitude of the British government towards the Chagos Islands up to that time as "one of benign neglect"; and the British government itself was reported as saying it would "work with the international environmental and scientific community to develop further the preservation of the unique environment". (The Mauritian government's response to this article was that the Chagos Islands were under its sovereignty, so that its consent would be required.)

26. Second, it is clear that, from the outset, the relevant decision-maker was to be the Secretary of State for Foreign and Commonwealth Affairs, Mr David Miliband, in person, not the civil servants who were directly or indirectly reporting to or advising him. Mr Miliband was first briefed on the idea of an MPA by a six and a half page note from Mr Roberts dated 5 May 2009. This was in terms to which no objection is or could be taken, and was followed up by a meeting with Mr Roberts and Professor Sheppard. The note identified and examined the "numerous benefits" and "wide range of potential beneficiaries" of an MPA. The benefits fell under the heads of conservation, climate change, scientific [research], development,

reputational/political and security (the last being explained by Mr Roberts in a witness statement dated 1 May 2012 as relating to control of illegal, unregulated and unreported fishing). The note went on to examine risks. In that connection, it identified Mauritian sovereignty claims and "a side deal done at the time of excision which gave Mauritius the right to apply for fishing licences free of charge", the Chagossian movements and the US military. The US military were not thought likely to oppose, and the note expressed confidence that reassurances could be given that they would not experience any rise in the security risk, impediment to freedom of manoeuvres or significant increase in environmental regulation.

27. In relation to the Chagossian movements, the note said:

> "Their plans for resettlement are based on the establishment of an economy based on fishing and tourism. In the specific context of BIOT this would be incompatible with a marine reserve. They are therefore hostile to the proposal, unless the right of return comes with it. They have expressed unrealistic hopes that the reserve would create permanent resident employment based on the outer islands for Chagossians.
>
> Assuming we win in Strasbourg [*as in the event occurred*], we should be aiming to calm down the resettlement debate. Creating a reserve will not achieve this, but it could create a context for a raft of measures designed to weaken the movement. This could include:
>
> - presenting new evidence about the precariousness of any settlement (climate change, rising sea levels, known coastal defences costs on Diego Garcia)
>
> - activating the environmental lobby
>
> - contributing to the establishment of community institutions in the UK and possibly elsewhere
>
> - committing to an annual visit for representatives of the communities to the outer islands on All Saints' Day

- inclusion of a Chagossian representative in the reserve government.

- [an irrelevant redaction]"

28. It is not suggested that this note was other than an objective assessment of the proposal, or that it contains or suggests any improper motivation. As the Administrative Court stated (para 77), the only "collateral" factor relating to Chagossian ambitions which it shows is that the proposal might, in various ways, permit the Government to "calm down the resettlement debate" and attract support for the Government's position from the environmental lobby. The Administrative Court went on:

> "This could not have the effect of creating an effective long-term way to prevent resettlement and Mr Pleming rightly conceded that it would not taint a decision genuinely to further environmental and scientific purposes."

That remains the position before the Supreme Court.

29. The note was followed up by a meeting between the Secretary of State, Mr Roberts and Professor Sheppard, which was on the evidence principally devoted to a slide show by Professor Sheppard showing the environmental benefits of an MPA. As a result of the note and meeting, Mr Miliband was "fired up" by the proposal and "enthusiastic to press ahead".

30. Thirdly, the meeting a week later between Mr Roberts, Ms Yeadon and representatives of the United States Embassy was aimed at briefing a United States counsellor (Mr Richard Mills) interested in knowing more about the Chagos Islands position, no doubt as it related to the United States concerns identified in the note dated 5 May 2009. In his initial summary in para 1 of the cable, its author recorded Mr Roberts as saying that

> "the BIOT's former inhabitants would find it difficult, if not impossible to pursue their claim for resettlement on the islands if the entire Chagos Archipelago were a marine reserve."

The ensuing paragraphs included the following:

> "7. … Roberts stated that according to the HGM's [sic] current thinking on a reserve, there would be no 'human footprints' or 'Man Fridays' on the BIOT's uninhabited islands. He asserted that establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former residents …"

The final paragraph of comment included this:

> "15. Establishing a marine reserve might indeed, as FCO's Roberts stated, be the most effective long-term way to prevent any of the Chagos Islands' former inhabitants or their descendants from resettling in the BIOT."

31. Accepting the Wikileaks memorandum as a genuine record of the meeting, it must be seen in that context. What would have concerned the United States were the consequences of an MPA, not the motivation. Further, the opening and the final two paragraphs are evidently comment or attempted summary by Mr Mills, while it is the intermediate paragraphs that purport to record the actual course of the discussion. In the case of The Guardian report of the cable, the intermediate paragraphs have interposed what are evidently journalistic captions. I note at this point Lord Kerr's suggestion (paras 84 and 86) that US military needs provided no reason for Mr Roberts and Ms Yeadon to assure the Americans, or ask them to confirm their requirement, that no resettlement would occur elsewhere in the BIOT. The "obvious question" which Lord Kerr considers to arise in this regard was not raised before the Supreme Court. But the answer is clear. The original exchange of notes between the United States and United Kingdom in 1966 provided that *all* of the BIOT be "set aside for defence purposes" and that any significant change of the BIOT's status that could impact the BIOT's strategic use would require US consent. Hence also, Mr Roberts' statement in this connection in his note dated 5 May 2009 that

> "We expect we will have our work cut out to reassure the US military that creation of a reserve will not result in trouble for them. Trouble could be any rise in the security risk, any impediment to the freedom of manoeuvre, or any significant raising of the bar in terms of environmental regulation."

Lord Kerr himself says in para 88 that the theme that "… the MPA would prevent any resettlement of the islands ... certainly preoccupied the Americans" in May 2009.

32. In November 2009 a consultation was launched in respect of the proposal. The motivation for the proposal was explained as being environmental and scientific, and various options were presented for public consideration. The consultation process ended in early March. The proposal then returned to the political arena, where the same picture of independent decision-making by the Secretary of State emerges as nearly a year before. This concluded with Mr Miliband instructing Mr Roberts as Commissioner for BIOT to issue Proclamation No 1 of 2010 (para 2 above), and with an FCO statement dated 1 April 2010 to the effect that "This will include a 'no-take' marine reserve where commercial fishing will be banned".

33. More specifically, the events leading to this decision were as follows. A submission dated 30 March 2010 from Ms Yeadon had discussed how best to progress the proposal. In it, Ms Yeadon pointed to likely opposition and possible international moves by the Mauritian government and advised that, rather than any immediate decision, more time should be taken to work through the various issues and a positive, but not definitive, announcement should be made. However, at 18.06 on the same day, Mr Miliband's office informed Ms Yeadon that Mr Miliband's "inclination [was] to be bolder" and actually to decide to go ahead.

34. At 8.30 next morning, Mr John Murton, at that time, it appears, the British High Commissioner in Mauritius, commented that he had no idea whether Mr Miliband would follow the recommendations of the day before, but that, if he went for the MPA immediately, they would face problems. Shortly before 11.47 next day, Mr Miliband's office informed Ms Yeadon by telephone that Mr Miliband was minded to ask Mr Roberts to declare an MPA and a full no-take zone, that no final decision has yet been taken, and that he would like to find some way of mitigating the Mauritian reaction. An internal email reaction by Mr Roberts at 12.07 proposed to give Mr Miliband "a clearer steer". This led to an immediate rejection by another civil servant, Mr Andrew Allen, who at 12.31 stated his view that "this approach risks deciding (and being seen to decide) policy on the hoof for political time-tabling reasons rather than on the basis of expert advice and public consultation" and was a very different approach to the one recommended the day before, which Mr Miliband was still considering. The reference to political time-tabling is a clear reference to the general election due not later than five years after 5 May 2005, and in fact announced on 6 April 2010 for 6 May 2010. Mr Allen's view was endorsed by Mr John Murton at 12.45, with the additional comment that - while "Obviously the Foreign Secretary is free to make whatever decision he chooses" - "to declare the MPA today could have very significant negative consequences for the bilateral relationship" with Mauritius, where an announcement of general elections was also expected, that same day, where ministers were uncontactable as a result and where the prime minister "would greatly resent our timing". Mr Murton thought that "there might be a market for a proposal to work with Mauritius as a privileged partner on management issues etc prior to a final decision on an MPA". These exchanges led

to the preparation of a further note from Ms Yeadon addressed to Mr Roberts, and, when finalised, evidently also forwarded to the Secretary of State. The note reported the views expressed and repeated the previous day's recommendation against any rapid decision.

35. Mr Miliband did not accept the advice tendered on 30 and 31 March 2010. He said he had carefully considered it and given serious thought to the different possible options. But his decision was to instruct Mr Roberts to declare the full MPA on 1 April 2010.

36. In these circumstances, the present issue can be approached, as the courts below have done, at two different levels. The first involves considering whether there is any real likelihood or risk that the Administrative Court's assessment of Mr Roberts' and/or Ms Yeadon's motivation would have been different if the Administrative Court had permitted further cross-examination on the Wikileaks memorandum and had accepted that memorandum as evidence of what its contents purport to record. The second is whether there is any real likelihood or risk that any improper motivation on the part of Mr Roberts and/or Ms Yeadon affected the ultimate decision-maker (Mr Miliband) or his decision.

37. As to the first level, the Administrative Court heard both Mr Roberts and Ms Yeadon being cross-examined on the most important passages of the cable, particularly the summary in the first and last paragraphs and the purported recital of actual discussion in para 7. Mr Roberts accepted that he said words to the effect that it was governmental policy that there should be no human footprint on the Chagos Islands (other of course than Diego Garcia), embracing within that term absence of scientific or wardens' offices, temporary workers as well as resettlement. He accepted that he had said that establishing an MPA would in effect put paid to resettlement claims, but explained that this was recognition of a reality that the Chagossians themselves had originally raised and that it only related to an MPA "entrenched" by law. He said that entrenchment was in the event never pursued, and that the proposal for an MPA was at the time always subject to the outcome of the proceedings in Strasbourg. Ms Yeadon on the other hand denied that Mr Roberts had said that establishing an MPA would in effect put paid to resettlement claims. Resettlement was, in her view, already precluded by the 2004 Order (subject only to the pending decision of the Strasbourg Court), a point on which the Administrative Court accepted her evidence, finding it to be supported in a note of a meeting of 25 March 2009 between Mr Roberts, Ms Yeadon and a Chagossian delegation including the appellant and their solicitor, Mr Gifford. Both Mr Roberts and Ms Yeadon were adamant that Mr Roberts had not used, and would never have used, the highly emotive words Man (or Men) Fridays.

38. The first tier question in these circumstances is whether further cross-examination might have led to more material favourable to the appellant's case of improper motivation on the part of Mr Roberts and/or Ms Yeadon and whether admission of the cable in evidence to counterbalance the evidence of Mr Roberts and Ms Yeadon might have led the Administrative Court to accept that either or both was, when advancing the proposal for an MPA, improperly motivated by the desire to prevent resettlement.

39. As to this question, the "extensive" evidence given by Mr Roberts about the meeting on 12 May and Ms Yeadon's own evidence give a picture which is generally and substantially consistent with that presented by the cable. In my opinion, Lord Kerr's references to an account or statements "inconsistent with", or "directly contrary to" or "flatly contradict[ing]" or "in obvious conflict" (paras 91, 92, 94 and 107) are not borne out by comparison of the evidence and the cable. That too was how the Court of Appeal evidently saw the position: see its paras 80 to 82 quoted in para 24 above; and see also para 37 above.

40. When it came to considering whether the Foreign Office representatives had some ulterior motive in their proposal for an MPA, the Administrative Court was also impressed by the evidence of Mr Roberts and Ms Yeadon. It is true that it did not directly address the contradiction between their evidence on the question whether Mr Roberts had said that an MPA would put paid to resettlement. But it accepted that a wish to preclude resettlement was not part of Ms Yeadon's motivation, because she regarded resettlement as off the table anyway as a result of the 2004 Order, and it must also have accepted Mr Roberts' evidence that what he was explaining to the United States counsellor was the practical consequences of an MPA, which is what would have been of interest to Mr Mills, rather than its motivation. It is difficult to see what further cross-examination by reference to Mr Mills' memorandum could have achieved. It is also difficult to think that admission of the memorandum, without more, would have outweighed the impression which the Court obtained from the oral evidence it heard. The memorandum is at the very lowest ambiguous as to whether the references to resettlement were uttered in circumstances indicating that they had a role in motivating the proposal for an MPA. On the face of it, it seems very unlikely that a British civil servant would have disclosed an improper motivation of this nature, rather than have been outlining the practical consequences of an MPA which is what would have concerned the Americans.

41. It is equally difficult to think that the Administrative Court could have concluded, by reference either to further cross-examination or to the cable itself, that Mr Roberts in fact used the phrase "Man Fridays", which he and Ms Yeadon adamantly denied that he would ever have used. The phrase had already had considerable currency, including in court judgments, and was well-known known in British circles as infamous. Lord Kerr in para 97 notes the Court of Appeal's

reference in para 82 of its judgment to the fact that Mr Pleming QC was not permitted to put to Mr Roberts the "ultimate question". This the Court of Appeal identified as being whether the cable was accurate, before continuing "but Mr Roberts had answered all the 'intermediate' questions". Lord Kerr treats the ultimate question as being "whether [Mr Roberts] had an explanation for the fact that he was recorded as having made certain statements which he denied having uttered". However, as to this, Mr Roberts was not party to the cable, and had, by his answers to the "intermediate" questions, given the only explanation that he could be expected to give about any differences, namely that the cable was wrong. Even more importantly in this connection, it is difficult to see that the Administrative Court could have been assisted in its task on the central issue, even if it had concluded that the phrase "Man Fridays" was used.

42. In these circumstances, I do not consider that it has been shown that the Court of Appeal erred in concluding that neither further cross-examination on the cable nor the cable itself, if admitted as evidence, would have led to any different outcome before the Administrative Court. Assuming that the test should be whether this could realistically have led to any different outcome, the answer would still, in my opinion, be negative.

43. Let me assume however that this is wrong, and that Mr Roberts and/or Ms Yeadon did have and voice to the United States Embassy officials an illegitimate motive for the proposal for an MPA. The second level question then arises whether there is or can be any conceivable basis for thinking that this affected the ultimate decision-maker, Mr Miliband, or his decision. In my opinion, the answer to this is even more clearly in the negative. The Administrative Court's conclusion in para 74, summarised in para 91 of the Court of Appeal's judgment was that it was clear that

> "it was the personal decision of the Foreign Secretary to declare an MPA on 1 April 2010, against the advice of his officials."

and that this

> "can best be understood in the political context: Parliament was about to be dissolved. The Foreign Secretary no doubt believed that the decision would redound to the credit of the Government and, perhaps, to his own credit. It would do so the more if a decision with immediate effect was taken."

44. The documentation and exchanges available all show that the proposal was put up by civil servants to the Secretary of State. Bearing in mind its nature and context, this was bound to occur. It was put up in appropriate terms without any suggestion of any improper motive, both initially in May 2009 and ultimately in March 2010. The documentation and exchanges also show that he made his decision of 31 March 2010 on that basis, against his civil servants' recommendation to give the proposal further thought and attention. Any suggestion that further cross-examination of Mr Roberts and/or Ms Yeadon or the admission of the cable as evidence of its contents might have led the Administrative Court to conclude that Mr Miliband was motivated in his enthusiasm, not by his assessment of the merits of the proposal as such, but by extraneous considerations relating to a desire to make return difficult for the Chagossians, finds no basis in the documentation or exchanges and has to my mind no plausibility at all. There is no basis whatever for impugning Mr Miliband's motivation. There is in particular no basis for suggesting that he may have connived at or joined with Mr Roberts and/or Ms Yeadon in a collusive exercise of documenting an objective-decision making process, while at the same time pursuing and concealing an illicit agenda.

45. The final matter for consideration on this basis is whether any relevance could attach to improper motivation on the part of one or more civil servants, when there is no indication whatever that it shaped or in any way influenced ministerial thinking. The answer must in my opinion be negative. If the Secretary of State as the ultimate decision-maker, the actual decision-making process and the decision were unaffected by an improper motive held by a civil servant, on a proposal bound because of its significance to be put up to the Secretary of State, the decision can and should stand by itself. That would on all the evidence be the present position, even if one assumes that the cable discloses, or would if deployed have led to a conclusion, that there was, some improper motivation on the part of Mr Roberts and/or Ms Yeadon in (or after) May 2009.

46. Mr Pleming QC submits that an opposite conclusion flows from a form of reconfiguration of the principle in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, and that the Secretary of State can be "fixed with the knowledge, motives and considerations of … civil servants when relying on them unless he proves otherwise". The problem with that submission is that, even if one or more civil servants had improper motives or considerations in mind, Mr Miliband did not rely on any decision or conduct of those civil servants to which such motives and considerations had any relevance. The relevant civil servants were, as stated, bound to put the matter before the Secretary of State. They did so in proper terms, ultimately counselling against any immediate decision to declare an MPA and no-take zone. The Secretary of State rejected their recommendation, and made his own decision.

47. *Carltona* does not have any bearing on this situation. It stands for the proposition that ministerial powers are commonly delegable and that, where this is the case and delegation occurs, the decision of an authorised official falls to be treated as the decision of the minister. Here, therefore, it may readily be accepted that, if a Minister were simply to rely on a civil servant, in effect to take a decision in the Minister's name, then it would be the knowledge, motives and considerations held by and influencing the civil servant that would be relevant. A ministerial decision may also be vulnerable to challenge if taken in ignorance of or on the basis of some mistake as to some material factor. Similarly, if a ministerial decision is arrived at by a collective decision-making process involving a minister and his departmental civil servants, it may well be impossible to separate the ultimate ministerial decision from the knowledge and motives of civil servants involved in its preparation: see eg *Bushell v Secretary of State for the Environment* [1981] AC 75, 95-96, per Lord Diplock. But these are situations very far from the present case. In the present case, far from the relevant decision being taken by an official on behalf of the minister or being a collective decision, it is clear that the minister, Mr Miliband, took his own decision on the relevant matters. His civil servants put the matter up to him in terms to which no objection is taken as such, he formed his own strong views on the basis of the material put before him and he made the relevant decision. In these circumstances it is his state of mind that is critical, not that of his civil servants.

48. I note here Lord Kerr's suggestion that the Secretary of State's decision could be regarded as having been reached without regard to material factors or considerations if taken "in ignorance of a concealed reason for the recommendation on which he acted" (para 117) and/or without awareness of "the view of the civil servants that the MPA would" eliminate the chances of resettlement of the Chagos Islands, contrary to the advice on which he in fact acted (para 118). Neither of these points was part of the applicant's case before the Supreme Court, which focused on the existence of an allegedly improper motive on the part of Mr Roberts and/or Ms Yeadon. Reliance on their suggested views as material information which should have been made available to the Secretary of State is a quite different matter. If this were sufficient to undermine a ministerial decision, then logically any irrelevant misconception possessed by any civil servant at any level in the civil service hierarchy in relation to any proposal ultimately reaching Cabinet level could undermine a Cabinet decision. There is in any event no basis for regarding any such views as material, since the appeal has been conducted on the basis that the creation of the MPA "could not have the effect of creating an effective long-term way to prevent resettlement": see para 28 above. The only suggested reason why an MPA or no-take zone might preclude resettlement was that it would deprive Chagossians of an important source of food and livelihood. But this is not an objection deriving from the establishment of an MPA, but from a policy, reversible at any time, of refusing fishing licences.

49. For these reasons, I would hold that no basis exists on which the Supreme Court would be justified in reaching a different conclusion to that reached in the Court of Appeal, upholding the Administrative Court, though for different reasons, on the point.

Fishing rights

50. The position in respect of this adjourned application for permission to appeal is unusual. I say at the outset that I consider that permission to appeal should be given. But permission to raise the issue of Mauritian fishing rights at all was only given by the Administrative Court on the limited basis that the appellant

> "does not contend in these proceedings that the traditional or historical fishing rights relied on are legally enforceable, so that the question whether there are enforceable rights under international law would not arise for decision."

The appellant's case, as explained by Mr Pleming before the Administrative Court, was

> "simply that there is credible evidence that HMG gave an undertaking to the Government of Mauritius which has subsequently been evidenced by preferential treatment for Mauritius registered vessels, and that this was an important part of the background yet was not put before consultees, who were in consequence misled."

The Administrative Court held the appellant to that position, and Mr Pleming has not sought to resile from it before the Court of Appeal or Supreme Court. Further, he made clear that before the Supreme Court the only fishing rights relied on are Mauritian fishing rights. That means (and it is unnecessary to attempt any precise definition) fishing rights enjoyed by Mauritian registered and, quite probably, owned vessels, on which in practice Chagossians are often also found as crew.

51. Yet, since the Court of Appeal's judgment in May 2014, an arbitration between the Republic of Mauritius and the United Kingdom under Annex VII of the United Nations Convention on the Law of the Sea ("UNCLOS") has concluded in an award dated 18 March 2015, finding, inter alia:

> "that the United Kingdom's undertaking to ensure that fishing rights in the Chagos Archipelago would remain available to Mauritius as far as practicable is legally binding insofar as it relates to the territorial sea."

During the course of the hearing before the Supreme Court, the Government put before the Court a statement that:

> "HM Government is committed to implementing the Dispositif made in 2015 following Arbitration between the UK and Mauritius over the Marine Protected Zone (MPA) around the British Indian Overseas Territory (BIOT). In line with the Dispositif, the UK will continue to work with Mauritius to agree the best way to meet our obligation to ensure fishing rights in the territorial sea remain available to Mauritius, so far as practicable. The Arbitral Award did not require the termination of the MPA but the UK will continue to approach discussions with an open mind about the best way to ensure proper conservation management of this unique marine environment."

52. It therefore appears that, at the international level, the fishing rights, the arguable existence of which the appellant claims should have been recognised in the consultation paper, have not only been held to exist, but are rights, to which so far as they have been held to exist, the United Kingdom is committed to giving effect. In these circumstances, it is possible to wonder what further purpose these proceedings might have, since it is on these rights that the appellant's objections to the MPA and/or no-take zone centre. Ostensibly, the appellant's case is that, if there was improper motivation and/or a failure properly to consult about arguable fishing rights, the MPA and no-take zone should be declared to have been invalidly declared. But Mr Pleming indicated at the outset of the hearing before the Supreme Court that, at any rate in relation to the latter failure if accepted, it would be possible for a court to limit any invalidity to the extent of the arguable fishing rights. A later draft declaration which Mr Pleming submitted showed that, if it were feasible to contemplate a declaration of limited invalidity, the identification of what was involved in Mauritian fishing rights could still be controversial. That is however, as already indicated, another matter.

53. I would accept that, if there was a failure properly to consult about arguable fishing rights, that could lead to a declaration of limited validity. In parenthesis, I add that the case based on improper motivation can also be related to fishing rights, since the reason why it is suggested that an MPA or no-take zone might preclude resettlement is that it would deprive Chagossians of an important source of food and

livelihood. I would therefore also have been attracted by (but do not, in the light of my conclusion in para 49 above, need to consider further) the suggestion that improper motivation might also have led to a limited declaration. Further, in either case, I would be minded to accept the Secretary of State's case that any declaration could be related and limited to the no-take zone, rather than the MPA. Mr Pleming objected that this was a new point, only raised by the Secretary of State after the hearing. But it is a pure point of law and the Administrative Court itself pointed out in para 75 of its judgment that the restrictions on fishing did not derive from the MPA itself. On the contrary, the MPA stated that the implications for fishing would be addressed in future legislation, and the only actual step taken regarding fishing was to allow existing fishing licences to expire and to withhold further fishing licences. The appellant's real complaint can therefore be identified as being to the current policy, in so far as it has been to refuse fishing licences giving effect to the Mauritian fishing rights now recognised by the UNCLOS tribunal's award. That is essentially a limited complaint, which could, it seems to me, appropriately be addressed by a limited declaration as to the invalidity of such a policy of refusal.

54. I must however revert to the case as it stands, however artificially, before the Supreme Court, on the basis that the appellant's only complaint is that there was, at the time of the consultation, credible evidence that the United Kingdom had given an undertaking to the Government of Mauritius to permit Mauritian fishing in the territorial waters of the Chagos Islands (free of charge), that these arguable rights should have been mentioned, that the consultation process was defective accordingly and that the MPA, or (for reasons I have indicated) at least the no-take zone, was invalid, at least to the extent that it excluded Mauritian fishing.

55. The UNCLOS tribunal in its award found that the United Kingdom was in breach of its obligations under UNCLOS article 2(3) ("sovereignty over the territorial sea is exercised subject to the Convention and to other rules of international law") and article 56(2), which reads, less ambiguously:

> "In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention."

The breaches so found concerned the relationship between the United Kingdom and Mauritius. It was the tribunal's view that, after a second meeting between United Kingdom and Mauritian representatives on 21 July 2009, there remained outstanding a number of unanswered issues, as well as information that the United Kingdom promised to provide to Mauritius, but that, despite this, the United Kingdom had in March 2010 elected to press ahead with the final approval and

proclamation of the MPA without providing any convincing explanation for the urgency with which it did this on 31 March and 1 April 2010.

56. The issues of both law and fact before the tribunal were, therefore, very different from that now before the Supreme Court, which is narrowly focused on the adequacy of the public consultation. It is unnecessary to go back in detail over all the issues which were considered in the courts below. I can summarise the position as it emerges, in my opinion, from the evidence and documents as follows. First, the actual extent of inshore fishing by Mauritian vessels in territorial waters, after the Chagossians left and until the no-take zone affected licensing, was always limited, but it was significant for those involved, including the owners and Chagossian crew members. The principal vessels involved were those of the Talbot brothers.

57. Secondly, there was credible evidence in the United Kingdom Government's possession (though not all of it necessarily available to Mr Roberts or Ms Yeadon) as to the existence of Mauritian fishing rights dating back to undertakings given in 1965. However, thirdly, extensive legal advice (for which privilege has not been waived) was taken on this subject during the period January to November 2009, and, on the basis of that advice, both Mr Roberts and Ms Yeadon understood that Mauritius "did not have legal rights to fish in BIOT territorial waters, which prevented the United Kingdom Government from establishing an MPA, including a complete no-take zone". Fourthly, for that reason, "after considering the position and receiving legal advice" Mr Roberts and Ms Yeadon "did not believe that Mauritius or the Chagossians had, or might have had, any such rights", and Ms Yeadon in particular saw the 1965 undertaking as being "of a political, not legal, nature"; and, as a result, no reference was made in the consultation document to any such rights.

58. Fifthly, despite the appellant's reliance on a paper prepared by Professor Brownlie for and read at a United Kingdom-Mauritius meeting in January 2009, containing at most only a fleeting suggestion of such rights, Mauritius never really advanced such rights with any clarity at any time throughout 2009 to March 2010, referring instead constantly to its sovereignty claim and refusing on that basis to engage with any consultation. In particular, it made no suggestion of any such rights in the second United Kingdom-Mauritius meeting in July 2009 or in a submission to the House of Lords in February 2010. The Administrative Court correctly so concluded (para 158).

59. Sixthly, Mauritius had the opportunity of responding to the consultation and making the point that it had fishing rights, but did not avail itself of this. Chagossians and others also had the opportunity of responding, and some did:

i) Mr Gifford and Chagossians resident in Crawley made representations against any no-take ban in the territorial waters, on a basis summarised as follows:

> "Very limited fishing anyway, so limited environmental benefit from a ban.
>
> Could have significant consequences for the Chagossians. What effect on the Chagossian community?
>
> Should not be possible to use MPA as a way of entrenching no right of abode.
>
> Inconsistent, as far as concerns fishing, with the law of the sea (UNCLOS)."

ii) The Diego Garcian Society also representing Chagossians wrote in favour of:

> "4th option, a no-take marine reserve for the whole of the territorial waters and EPPZ/FCMZ with exceptions for certain types of pelagic fishery (eg tuna) and artisanal fishing by Diego Garcians and other Chagossian fishing projects only."

iii) The members of the Chagos Refugees Group, led by the appellant and joined by Mr Gifford as their lawyer submitted that the consultation process was "premature (and flawed)" as "putting the cart before the horse", inter alia, because it needed to be with the consent of the Chagossians, rather than pushed ahead unilaterally, because the sovereignty of Mauritius was also involved and because:

> "[There] Are fishing rights which they need in their sea."

and

> "Need human rights first - wrong to come before ECHR judgment."

60. The Divisional Court observed (para 160):

> "The potential impact of an MPA on commercial fishing was squarely raised and must have been obvious to all concerned. The responses from fishing interests show that the impact was clearly understood. If anyone wished to raise an argument that a ban on fishing would be incompatible with Mauritian fishing rights, they were free to do so. … Against that background, the omission of express reference to the point in the consultation document itself is in our view a matter of no significance. It did not affect the fairness of the consultation or the validity of the MPA decision taken following that consultation."

The Court of Appeal rejected the appeal on this ground, largely for the same reasons given by the Divisional Court (para 108), and specifically agreed with the last two sentences quoted above (para 111).

61. The case open to the appellant is that there was credible evidence of Mauritian fishing rights, deriving from an undertaking given by the United Kingdom Government to the Government of Mauritius and subsequently evidenced by preferential treatment given to Mauritius registered or owned vessels. Approaching this case in the light of the matters which I have mentioned, I have no hesitation in agreeing with the assessment of both courts below that the absence of any mention of such evidence or of the arguable fishing rights to which it related does not undermine the consultation, make it unfair or justify setting it or any decision consequent upon it aside. It was obvious, as the Court of Appeal also said (para 112), that at least one of the options would affect inshore fishing, and threaten the livelihood of vessels which had previously been licensed to fish in territorial waters.

62. It was open to Mauritius or anyone affected to raise this objection in response to the consultation. Mauritius notably did not respond at all. Others made various points about the option of a no-take ban in territorial waters and/or the loss of alleged fishing rights. It would be wholly inappropriate to treat the consultation process as invalid, when the party to whom the alleged rights belonged (the Republic of Mauritius) had full opportunity of asserting them in response to the consultation, and when others indirectly involved actually took advantage of the opportunity of raising them. Finally, 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 such fishing rights.

Conclusion

63. For these reasons, I would grant permission to appeal on the issue of fishing rights, but dismiss the appeal both on the issue of improper motivation and on the issue arising from the failure to mention the possible Mauritian inshore fishing rights in the consultation document before the decision to declare an MPA and a no-take zone. I repeat that the latter issue has been before the Supreme Court solely on the basis that there was convincing evidence that such Mauritian fishing rights existed. The significance of the finding in the UNCLOS tribunal's arbitration award dated 18 March 2015 that such fishing rights do actually exist is not before us. In particular, whether that finding is capable of having any and if so what effect in domestic law, as regards either the MPA or the no-take zone is not before us.

LORD SUMPTION: (with whom Lord Neuberger, Lord Clarke and Lord Reed agree)

64. I agree with the disposal proposed by Lord Mance and with his reasons. I add a judgment of my own to address the status and use in evidence of information about the contents of diplomatic correspondence which has come into the hands of third parties. This question is the subject of the Secretary of State's cross-appeal, and raises points of some general importance. The leaking of governmental documents and their widespread distribution through the internet is a phenomenon of our time. The status of leaked documents in the public domain is an issue which is likely to recur.

65. The basis in modern international law for the protection of the documents of a diplomatic mission is article 24 of the Vienna Convention on Diplomatic Relations (1961), which provides that "the archives and documents of the diplomatic mission shall be inviolable at any time and wherever they may be." Article 27.2, which provides for the inviolability of "the official correspondence of the mission", was added (as part of an article about freedom of communication) in order to deal with the problem of the interception *en route* of communications not made by diplomatic courier or diplomatic bag, which would not necessarily be part of the mission's archives or documents at the time of interception: see *ILC Yearbook 1958*, i, 143, paras 34-35, and Denza, *Diplomatic Law*, 4th ed (2016), 189-190. These provisions have the force of law by statute in the United Kingdom, under the Diplomatic Privileges Act 1964.

66. Any issue of this kind is likely to give rise to two fundamental questions. The first is how a document is to be identified as part of "archives and documents" of a diplomatic mission. The second is what it means to describe such a document as "inviolate".

67. Traditionally, the protection accorded to a mission's documents was viewed as a particular aspect of the inviolability of its premises and the diplomatic bag, and of the immunities of diplomatic couriers. This was why, upon a cessation of diplomatic relations, when the premises of the mission would become entitled to a lesser degree of protection, the practice was to destroy the mission's archives or entrust them to a protecting power as the diplomats left. As a general rule, the movable property of a mission was protected only so far as it was located on its premises, and indeed this is still the position today: see article 22.3 of the Convention. Before the Vienna Convention came into force in 1964, the status of a mission's archives located outside diplomatic premises was therefore uncertain. To resolve that uncertainty, the words "at any time and wherever they may be" were added to article 24 at the United Nations Conference on Diplomatic Intercourse and Immunities which approved the final text of the Convention. The archives and documents of a mission were now to be protected as such and not only by virtue of their presence in a protected location or in protected hands. As the French delegate explained when introducing the amendment, "the object was to establish clearly the absolute inviolability of the mission's archives and documents as such, and not merely as part of the furniture of the mission": *Official Records*, i, (1962), 148 (para 2).

68. A diplomatic mission is not a separate legal entity. Its archives and documents belong to the sending state. But the protection of article 24 is limited to the archives and documents of the mission. It does not extend to those of any other organ of the sending state. The latter may be protected by other rules of law: for example by the criminal law, the law of confidence or the law of copyright. But they are not protected by the Vienna Convention. Against that background, what is it that identifies a document as belonging to the archives or documents of the mission, as opposed to some other organ of the sending state? (I will return below to the particular problems raised by their unauthorised possession by third parties). The test is not their location, for they are protected "wherever they may be". It must necessarily be whether they are under the control of the mission's personnel, as opposed to other agents of the sending state. The draftsmen of article 24 were thinking in terms of physical documents. But retrievable electronic files are also documents and may be part of an archive. The same protection therefore applies to them, provided that access to them is under the control of the mission's personnel, whether directly or by virtue of the terms on which the mission transmitted the document to another governmental entity. This appeal is not the occasion for determining the exact circumstances in which a mission will be treated as having control over a document by virtue of the terms on which it transmits it, because there is no suggestion that the US diplomatic cable was released on terms. The relevant point for present purposes is that because the designation of a document as that of the mission depends on control, its origin and content is in itself irrelevant. Thus the archives and documents of a mission may include original or copy documents which emanate from some other organ of the sending state or from a third party, in which case so far as they are under the control of the mission's personnel they will enjoy

the same protection as the mission's internally generated documents. Correspondingly, copy documents or originals emanating from the mission may be found in the archives of another organ of the state (say, its foreign ministry) where they will not enjoy the protection of article 24.

69. "Inviolability" is a term variously used in the Convention about diplomatic premises (articles 22, 30), documents (articles 24, 30), official correspondence (article 27), diplomatic personnel (articles 27, 29, 31, 38, 40) and personal property (article 30). But it is a protean word, whose meaning is necessarily sensitive to its context and purpose. It used to be thought that all diplomatic privileges and immunities reflected the extra-territorial character of a foreign sovereign and, by extension, of its diplomatic representatives. But in the modern law, its justification is pragmatic and wholly functional. In the words of the fourth recital to the Convention, it is intended "to ensure the efficient performance of the functions of diplomatic missions as representing States." It has been recognised ever since Vattel (*Droit des Gens*, Bk IV, 123), the first writer to deal with the question, that the basis of the rule of international law is that the confidentiality of diplomatic papers and correspondence is necessary to an ambassador's ability to perform his functions of communicating with the sovereign who sent him and reporting on conditions in the country to which he is posted. The purpose of article 24 in protecting a mission's archives *qua* archives, and not as mere items of property, is to protect the confidentiality of the mission's work, without which it is conceived that it cannot effectively represent the sending state. In particular, it is "to protect the privacy of diplomatic communications": *Shearson Lehman Bros Inc v Maclaine Watson & Co (International Tin Council intervener) (No 2)* [1988] 1 WLR 16, 27G (Lord Bridge). The confidentiality of such documents does not depend on their particular contents or subject-matter, which is not a matter which a domestic court could properly examine, but on their status as part of the archives and documents of a diplomatic mission protected by article 24 of the Convention.

70. Dr F A Mann, a notable opponent of the larger claims of international law in the domestic legal world, was of the opinion that the inviolability of a mission's archives and documents served only to protect them from interference by the receiving state, for example by seizing them or allowing them to be the subject of compulsory legal process: "'Inviolability' and other Problems of the Vienna Convention on Diplomatic Relations", *Further Studies in International Law* (1990), 326-338. A rather similar view was put forward at the United Nations Conference preceding the adoption of the Convention, as a reason for rejecting the addition of the words "wherever they may be", but it is clear that this objection did not find favour with the majority: see *Official Records*, i (1962), 149, 150 (paras 9, 22). The Court of Appeal, however, appear (paras 39-42, 58-61) to have adopted it in the present case. I agree with Lord Mance that so narrow an approach is not supported by the generality of commentators. It is also, in my view, inconsistent with the concept of inviolability. Whatever may be involved in that concept, it is clear that

article 24 is not only concerned with the duties of the receiving state but describes the status of a mission's archives and documents *erga omnes*. It is the obligation of the receiving state to give effect to that status. That obligation, extends beyond simply refraining from violating it itself. As the International Law Commission observed in its report of 1957 to the United Nations General Assembly, "the receiving State is obliged to respect the inviolability itself and to prevent its infringement by other parties": *ILC Yearbook 1957*, ii, 137. It was on this basis that the International Court of Justice held in *US Diplomatic and Consular Staff in Tehran* (1980) ICJ Rep, 3, at paras 61-63, 66-67, 69, 77 that the failure of the government of Iran to intervene to prevent or terminate the occupation of the US embassy in Tehran by militants was a violation not only of articles 22 (premises) and 29 (diplomatic agents), which impose express obligations on the receiving state to protect against action by third parties, but also of article 24 (archives and documents), which contains no express provision of that kind.

71. I make this point in order to correct what I regard as an error of the Court of Appeal. But it is not decisive of the present appeal, which is concerned with the legitimacy of a court receiving into evidence a document emanating from the archives and documents of a diplomatic mission. If this is a violation of article 24, the violation does not consist only in the receiving state failing to protect the archives and documents against third party action. The court is itself an organ of the receiving state, and the violation consists also in its receipt and use of the material. No one doubts that if the document has been communicated to a third party with the actual or ostensible authority of the responsible personnel of the mission, any immunity in respect of it is lost. In the form communicated, it is no longer the mission's document: *Shearson Lehman Bros Inc v Maclaine Watson & Co (International Tin Council intervener) (No 2)* [1988] 1 WLR 16, 27-28. But what if the document, or more plausibly a copy of the document or information about it, has come into the hands of a third party without authority? Subject to an important reservation (see below) I think that in that case there is a violation if the courts of the receiving state receive it in evidence. This is not, as is sometimes suggested, because of the words "wherever they may be". They have a different purpose, as I have explained. It is because of what is involved in the notion of inviolability, and in the receiving state's obligation to give effect to it. The real objection is to the receiving state employing them for a purpose inconsistent with their confidential status.

72. Article 25 of the Convention, which is not one of the articles scheduled to the Diplomatic Privileges Act but informs the interpretation of those that are, requires the receiving state to "accord full facilities for the performance of the functions of the mission". As Professor Denza observes (*Diplomatic Law*, 4th ed (2016), 170), article 25 is not an additional source of rights but an ancillary provision intended to make effective those facilities which are assured by other provisions of the Convention. Thus it has been held that as a matter of public international law it

prevents the courts of the receiving state from acting "in such manner as to obstruct the mission in carrying out its functions", for example by permitting the judicial enforcement of judgments against embassy property: *Alcom Ltd v Republic of Colombia* [1984] AC 580, 599. A similar view was expressed by the German Constitutional Court in the *Philippine Embassy Bank Account Case* (1977) 46 BVerfGE 342, 395, 397-398 and by the United States District Court for the District of Columbia in *Liberian Eastern Timber Corp v Government of the Republic of Liberia* (1987) 89 ILR 360, 363.

73. In my opinion, similar considerations apply to the reception in evidence by the courts of the receiving state of confidential documents obtained directly or indirectly through a violation of a mission's archives and documents. Article 24 gives effect to the confidential status of these documents, which is necessary to the functioning of the mission. Their inviolability necessarily imports that the state will take reasonable steps to prevent the violation of that status and will not itself be party to its violation. In *Rose v The King* [1947] 3 DLR 618, a decision of the Appellate Division of the Supreme Court of Quebec, the appellant had been convicted on charges of conspiracy with (among others) members of the embassy of the Soviet Union in Ottawa to violate the provisions of the Official Secrets Act. The evidence against him had included documents abstracted by a defector without authority from the files of the Russian military attaché and delivered to the Canadian government. The appeal was dismissed on the controversial ground that diplomatic immunity was subject to an exception for cases where embassy personnel had conspired against the security of the receiving state. But, subject to this supposed exception, Bissonnette J, in a judgment with which the rest of the court concurred, considered that as a matter of customary international law no court had "jurisdiction or competence … to take cognizance" of documents emanating from a foreign embassy without the consent of the sending state. At p 646, he observed:

> "International law creates a presumption of law that documents coming from an embassy have a diplomatic character and that every court of justice must refuse to acknowledge jurisdiction or competence in regard to them."

Fayed v Al-Tajir [1988] QB 712 was a decision of the Court of Appeal in England in a defamation action. The defendant, who was described as the de facto ambassador of the United Arab Emirates in London, had made the statements complained of in internal correspondence of the embassy, copied to the foreign minister. The relevant letter was subsequently communicated to the plaintiff by its recipient, a counsellor at the embassy, without authority. The issue was held to be non-justiciable, and the letter subject to absolute privilege. But Kerr LJ (with whom Croom-Johnson LJ agreed) considered that the letter was also protected by article 24 of the Vienna Convention. In *Shearson Lehman Bros Inc v Maclaine Watson & Co (International Tin Council intervener) (No 2)* [1988] 1 WLR 16, the House of

Lords considered the deployment in evidence of copies of documents of the International Tin Council which had been obtained by third parties. By statute, the Council's official archives enjoyed the same protection as those of a diplomatic mission. The Appellate Committee held that the question depended on whether the third party had obtained them with the authority of the Council or in circumstances where he could reasonably assume authority. On the assumption that a document forming part of the Council's archives had been communicated to the third party without authority, Lord Bridge (with whom the rest of the Appellate Committee agreed) held at p 27G-H that it would be

> "wholly inimical to the underlying purpose that the judicial authorities of the host state should countenance the violation by permitting the violator, or any one who receives the document from the violator, to make use of the document in judicial proceedings."

Cases in other jurisdictions are rare, but it may be noted that the German Federal Court has applied a similar principle to evidence derived from the monitoring of telephone lines contrary to the corresponding principle of the Vienna Convention on Consular Relations (1963): BGHSt 36, 396 (4.4.1990).

74. There is, however, a reservation of some importance which follows from the nature of the protection accorded by article 24 of the Convention, as I have analysed it. It concerns documents which, although indirectly obtained without authority from the archives and documents of a mission, have entered the public domain. By that I mean that they have been disclosed not simply to a few people or in circumstances where it would take some significant effort on the part of others to discover their contents, but that they are freely available to any one who cares to know. This was not a question considered in any of the cases cited in the previous paragraph, and may not have arisen on the facts.

75. In principle, as I have explained, article 24 protects documents under the control of the mission, but not documents which never were or are no longer under its control. The extension of the protection to documents under a mission's control which (or the contents of which) have come into the hands of third parties without authority is necessary in order make article 24 effective by preserving the confidentiality of unlawfully communicated documents in accordance with the article's purpose. The English courts cannot, consistently with the privileges and immunities of a diplomatic mission, allow themselves to be made the instrument by which that confidentiality is destroyed. But once the documents have been published to the world, it has already been destroyed. There is nothing left to be preserved of the interest protected by article 24. It is arguable that where a document has been put into the public domain by the very person who has violated the archives and

documents of the mission, he should not be allowed to rely on the fact, although the difficulties of the argument have often been pointed out, for example by Lord Goff in *Attorney General v Guardian Newspapers (No 2)* 1990] 1 AC 109, 286-287. But that is a refinement which does not arise on the facts in the present appeal, and I need not consider it further.

76. The Secretary of State's cross-appeal faces, as it seems to me, two distinct and equally insuperable difficulties. The first is that, although the cable relied upon by Mr Bancoult must have emanated directly or indirectly from a US government source, the Secretary of State is unable to establish that it was obtained by Wikileaks, and through them by *The Guardian* and *The Telegraph*, from the archives of the US embassy in London as opposed to some other unprotected organ of the US government. He has not therefore established the essential factual foundation for reliance on article 24 of the Vienna Convention. Secondly, even if the cable had come from the archives of the US embassy, the document has entered the public domain. Mr Bancoult was not party to the leaking of the cable and has not put it in the public domain. He has merely made use of what is now the common knowledge of any one who cares to interest himself in these matters. In my opinion it cannot possibly be a violation of the US embassy's archives or documents for Mr Bancoult to make use in litigation of the common knowledge of mankind simply because it was once confidential to the US embassy in London. Nor could it be a violation for the English courts to take cognizance of a document which has escaped from the control of the US embassy and whose confidential status long ago came to an end.

77. It was suggested to us that even if there was no remaining confidence in the document or its contents, the mission's archives and documents would be violated by making findings about its authenticity, since those findings would inevitably increase their interest and value. For the same reason it was suggested that to do this without the consent of the sending state would amount to the exercise of compulsion. I do not accept this. If the contents of the document are no longer protected from public scrutiny because they are in the public domain, I cannot see that any greater protection can attach to inferences drawn from those same contents, whether about its authenticity or anything else.

78. In those circumstances, I would dismiss the Secretary of State's cross-appeal, albeit for reasons somewhat different from those of the Court of Appeal.

LORD KERR: (dissenting)

Improper motive

(i) Background

79. The only legitimate purpose for introducing a marine protected area (MPA) around the Chagos Islands was to protect marine life. If it could be demonstrated that this was not the reason that it was introduced, or that there was a collateral purpose for its introduction, the establishment of an MPA would be unlawful.

80. It is a centrepiece of the appellant's case that his counsel was denied the opportunity to pursue a line of cross examination that would have revealed an ulterior motive for the MPA. This claim prompts the need for a careful examination of the circumstances in which Mr Pleming's cross examination of Mr Roberts and Ms Yeadon before the Divisional Court was curtailed. It is also necessary to look closely at how this matter was considered by the Court of Appeal.

81. The appellant also argues, however, that the refusal to admit a critical item of evidence meant that the Divisional Court did not assess that evidence for its potential to undermine the case for the respondent.

82. Before considering these arguments, one must be clear about the importance of that item of evidence, a cable which, the appellant claims, was sent on 15 May 2009 by the United States Embassy in London to departments of the US Federal Government in Washington. That cable, it is claimed, contained a record of what was said at a meeting on 12 May 2009 between a United States political counsellor, Mr Richard Mills, and Mr Colin Roberts, Head of Overseas Territories Directorate, Commissioner for British Indian Ocean Territory (BIOT) and Ms Joanne Yeadon, Administrator of BIOT and Mr Ashley Smith, the Ministry of Defence's Assistant Head of International Policy and Planning. As the Court of Appeal said (at para 10 of its judgment), the cable is "the only near-contemporaneous record of the meeting". It purports to have been composed three days after the meeting took place. If it is authentic, or, perhaps more pertinently, if there is no reason to doubt its authenticity, it is, at least potentially, a significant source of evidence about the reasons for making the MPA.

83. The first paragraph of the cable stated that a senior Foreign and Commonwealth Office official (Mr Roberts) had assured his American counterparts that the establishment of the MPA would "in no way impinge" on the US government's use of the British Indian Ocean Territory (BIOT). In that context, Mr

Roberts is said to have asserted that "the BIOT's former inhabitants [the Chagos Islanders] would find it difficult, if not impossible, to pursue their claim for resettlement on the islands if the entire Chagos Archipelago were a marine reserve."

84. It is, of course, understandable that Mr Roberts would want to make it clear that the establishment of the MPA would not affect America's use of BIOT as a military base. But, whether that also required the statement that the Chagos Islanders would find it difficult to resettle if *the entire Chagos Archipelago* became a marine reserve is more imponderable. After all, many of the islands in the archipelago were not required by the US for their military activities in the area. The obvious question arises, therefore, why it was necessary to state that the MPA would have the effect of preventing resettlement in *any* of the islands. It has been pointed out that this issue was not raised in argument in the Supreme Court. That, as it seems to me, is beside the point. The unalterable fact is that no evidence has been produced which established that the entire archipelago was required for American military activities. What was at stake here was the denial of the opportunity to the Chagos Islanders to return to their ancestral homeland and whether that denial was required in order to achieve the reasonable requirements of the USA. That circumstance *should* concern this court, whether or not it was raised in argument, when we are asked to consider the impact which the introduction of the cable in evidence might have had on the outcome of the proceedings before the Divisional Court. There was no evidence that the continuation of military activities required the depopulation of all the islands. In those circumstances, the reason that the civil servants advised the minister to make a MPA was highly relevant. It is therefore not only legitimate for, it is required of, a court examining the reasons for making the MPA to address the question whether the minister has been properly appraised of all material factors. If it was wholly unnecessary to keep uninhabited the islands other than Diego Garcia, the motives of the civil servants in recommending that course were directly relevant to the question of why they had advocated the establishment of the MPA. Was it to frustrate any further campaign to allow the Chagos Islanders to return to their homeland? To dismiss and treat as irrelevant this consideration simply because it did not feature in the appellant's argument cannot be right. It has been pointed out that, in the original exchange of notes between the United States and United Kingdom in 1966 it was stipulated that all of the BIOT be "set aside for defence purposes" and that any significant change of the BIOT's status that could impact the BIOT's strategic use would require US consent. But what of that? Here we are examining the motivation for the recommendation of the establishment of an MPA. Was it for the purpose of protecting marine life? Or was it in order to ensure that the Chagossians' campaign could go no further and that the Americans' desire to have all the BIOT preserved for their use (assuming that that desire had persisted since 1966) would be fulfilled? It is no answer to the charge of improper motive as to the reasons for advocating the establishment of the MPA, that this chimed with the wishes of the USA.

85. At para 7 of the cable, Mr Roberts is recorded as saying that a way had to be found to "get through the various Chagossian lobbies". He is said to have admitted that the British government was under pressure from the Chagos Islanders to permit resettlement of the outer islands. Further, Mr Roberts is recorded as having observed that, according to the British government's current thinking, there would be "no human footprints" and no "Man Fridays" on BIOT's uninhabited islands. In the words of the cable, Mr Roberts asserted that "establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former residents". When it was suggested by the Americans present at the meeting that the advocates of Chagossian resettlement continued vigorously to press their case, Mr Roberts replied that the UK's environmental lobby was "far more powerful than the Chagossians'".

86. Comment by the author of the cable is littered with observations about the possible resettlement of the Chagos Islands. Reference is made to the possible "appeal" by the Chagossians to the European Court of Human Rights (ECtHR) and the British government's assurance that this would be firmly resisted. This is the pervasive theme of the meeting. And the cable also stated that after the meeting had ended, Ms Yeadon urged US embassy officials to affirm that the US government required the entire BIOT for defence purposes. She is recorded as having said that "making this point would be the best rejoinder to the Chagossians' assertion that partial settlement of the outer islands would have no impact on the use of Diego Garcia". This is important. There is no evidence that America did need the entire BIOT. Why, if she did, did Ms Yeadon urge the US government to make this claim, if not in order to thwart the Chagos Islanders' aspiration to return to at least part of their homeland?

87. The final two paragraphs of the cable contain significant observations in relation to the importance placed on the possibility of resettlement. These are the relevant passages from those paragraphs:

> "Regardless of the outcome of the ECtHR case, however, the Chagossians and their advocates, including the 'All Party Parliamentary Group on Chagos Islands (APPG)', will continue to press their case in the court of public opinion. Their strategy is to publicise what they characterise as the plight of the so-called Chagossian diaspora, thereby galvanising public opinion and, in their best-case scenario, causing the government to change course and allow a 'right of return.' They would point to the government's recent retreat on the issue of Gurkha veterans' right to settle in the UK as a model …

> We do not doubt the current government's resolve to prevent the resettlement of the islands' former inhabitants, although as FCO Parliamentary Under-Secretary Gillian Merron noted in an April parliamentary debate, 'FCO will continue to organise and fund visits to the territory by the Chagossians.' We are not as sanguine as the FCO's Yeadon, however, that the Conservatives would oppose a right of return. Indeed, MP Keith Simpson, the Conservatives' Shadow Minister, Foreign Affairs, stated in the same April parliamentary debate in which Merron spoke, that HMG 'should take into account what I suspect is the all-party view that the rights of the Chagossian people should be recognised, and that there should at the very least be a timetable for the return of those people at least to the outer islands, if not the inner islands.' Establishing a marine reserve might, indeed, as the FCO's Roberts stated, be the most effective long-term way to prevent any of the Chagos Islanders' former inhabitants or their descendants from resettling in the BIOT."

88. It is plain, as I have said, that a dominant theme of the meeting was that the establishment of the MPA would prevent any resettlement of the islands. It certainly preoccupied the Americans and it was a recurring refrain in the assurances that Mr Roberts and Ms Yeadon are said to have given. Viewed in isolation, the cable certainly creates a suspicion that this was a motivating factor in the decision to declare an MPA.

89. The Divisional Court concluded that the cable was not admissible in evidence. It nevertheless permitted Mr Pleming to cross examine Mr Roberts and Ms Yeadon about its contents on the basis that its authenticity was assumed but not established. The Court of Appeal considered that the cable was admissible but held that, even if it had been admitted, it would have made no difference to the conclusion of the Divisional Court that improper motive had not been established.

90. The arguments about admissibility have been fully canvassed in the judgments of Lord Mance and Lord Sumption and need not be repeated here. I agree with Lord Mance that it has not been established that the cable remained part of the archive of the London mission and, on that account, that the status of inviolability can no longer be claimed. I also agree with Lord Sumption that it cannot be a violation of the US embassy's archives to use in litigation a document which has entered the public domain.

91. One must keep in mind that the exclusion of the cable had two distinct effects. First, it restricted the cross examination of Mr Roberts and Ms Yeadon. It was not possible to challenge them on the basis that the document was genuine and was to be taken as having recorded their statements at the meeting and, in Ms Yeadon's

case, subsequently. Being able to confront a witness with statements that she or he previously made which are inconsistent with their testimony is one of the most important forensic tools in the cross-examiner's armoury. Technically, Mr Pleming was bound by the answers given by the witnesses to questions based on the cable's contents. This would not have been the case if the cable had been admitted in evidence.

92. It has been suggested that the evidence given by Mr Roberts about the meeting on 12 May and Ms Yeadon's own evidence "give a picture which is generally and substantially consistent with that presented by the cable". Much of the evidence that they gave coincides with the contents of the cable, it is true. But in crucial areas it is incontestably inconsistent. It is not in the least surprising that much of the evidence from the civil servants and the contents of the cable were found to coincide. Indeed, it was part of Mr Pleming's admitted strategy to point to that coincidence in order to establish the cable's authenticity. But to imply that there were not highly significant differences, differences which, moreover, touched on the very issue at stake in this case, is unrealistic. Mr Roberts denied using the expression, "Man Fridays". Ms Yeadon denied that Mr Roberts had said that "establishing an MPA would in effect put paid to resettlement claims". This is directly contrary to the contents of the cable. Indeed, it is directly contrary to the evidence of Mr Roberts himself, for he is recorded as having accepted that he did say to the US officials that the establishment of an MPA would in effect put paid to the resettlement claims. The opportunity to exploit these differences if the cable had been admitted in evidence, as it should have been, cannot be airily dismissed. The entire cursus of the cross examination (and consequently the conclusions that might have been reached on the critical issue) could have been radically different.

93. The second consequence of excluding the cable from evidence was that it did not rank as independent material with the potential to act as a significant counterweight to the FCO witnesses' testimony. If the Divisional Court had admitted the cable in evidence, it would have to be pitted as an item of evidence which was in many respects directly contrary to the testimony of Mr Roberts and Ms Yeadon. The court would have been required to assess the veracity and reliability of their claims against the contemporaneous evidence provided by the cable. As it was, the Divisional Court merely theorised about whether Mr Pleming's cross examination would have been more effective if the cable had been admitted in evidence. It did not consider the cable's contents for their capacity to discredit the testimony of the two FCO witnesses.

(ii) The curtailing of cross examination

94. Dealing with the impact of the exclusion of the cable from evidence, the Court of Appeal said at para 88:

> "[Our] outline of the cross-examination of both witnesses does not capture its full flavour. It was extensive and searching. In our judgment, Mr Pleming was not disadvantaged by not being able to put questions on the basis that the cable was authentic and a true record of what was said at the meeting of 12 May 2009. He tested the evidence of Mr Roberts and Ms Yeadon on the basis of the cable. It is true that he was not able to put questions like: 'have you any explanation for the fact that you are recorded as having said X when you deny having said it?' But it is unrealistic to suppose that, if Mr Pleming had been able to put such questions, this would have materially affected the thrust or course of the cross-examination or of the answers that were given. The Divisional Court was right to say that the dividing line between questions which its ruling permitted and those which it did not permit was 'fine'. In our judgment, the inhibition on Mr Pleming's questions can have had no material effect on the course or the outcome of the cross-examination. Mr Pleming was able to, and did in fact, explore the accuracy of the contents of the cable with both witnesses. In particular, he probed the purpose of the MPA and whether what was purportedly recorded in the cable as having been said had in fact been said."

95. It is true that there was extensive cross examination of Mr Roberts and Ms Yeadon based on the contents of the cable. The difference between probing witnesses' accounts and confronting them with admissible evidence which flatly contradicts their accounts should not be underestimated, however.

96. As the Court of Appeal observed (in para 80 of its judgment), Mr Roberts refused to answer questions as to whether the contents of the cable were accurate. This was in reliance on the government's policy of "neither confirm nor deny" (NCND) policy. It appears to have been accepted without demur by the Divisional Court and the Court of Appeal that NCND justified this stance. For my part, I would not be disposed to accept that this policy could be resorted to in order to avoid answering a relevant question with which the court was required to deal. Given that the Divisional Court had decided that the authenticity of the cable should be assumed, it appears to me that Mr Roberts should have been required to answer as to whether what was recorded in the cable faithfully recorded what had taken place. As it happens, of course, Mr Roberts did address the question whether some parts of the cable were accurate - see para 81 of the Court of Appeal's judgment.

97. What is clear, in my view, is that Mr Roberts could not have relied on NCND if the cable had been admitted in evidence. Nor could he have refused to deal with what the Court of Appeal described in para 82 of its judgment as "the ultimate

question": whether he had an explanation for the fact that he was recorded as having made certain statements which he denied having uttered. In deciding whether being required to answer such a question could have made a difference to the outcome of the Divisional Court case, one must consider the range of possible responses that might have been given. (In this context, Lord Mance has accepted for the purposes of the appeal that the appropriate question is whether the admission of the cable *could* have made a difference - see para 23 of his judgment. For reasons that I will give later in this judgment, I consider that this is indubitably the correct test in this instance.)

98. If one imagines that Mr Roberts' answer to the "ultimate question" was that he had no explanation, or even, when pressed, that the cable was indeed accurate and that he recanted his initial disavowal of what he was recorded as having said, it is not difficult to conclude that this *could* have made a significant difference to the court's assessment of him as a reliable witness. The Court of Appeal did not consider the range of possible responses that Mr Roberts might have given to this question. In my opinion, it should have done. And if it had done, it could not have reached the conclusion that it did.

(iii) The capacity of the cable to counter the FCO evidence

99. The Court of Appeal dealt cryptically with the second issue, namely, the status of the cable as independent material with the potential to act as a counterweight to the FCO witnesses' testimony. At para 89, the court said, "[w]e do not accept that there is a realistic possibility that the court's assessment of the evidence of Mr Roberts and Ms Yeadon would have been affected if the cable had been formally admitted in evidence as an authentic document".

100. Case law emphasises the importance of documentary evidence in assessing the credibility of oral witnesses. In *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403 Lord Pearce, having reviewed the various reasons that a witness's oral testimony might not be credible, stated, "all these problems compendiously are entailed when a judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part." In *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1, 57 Robert Goff LJ made this observation:

> "It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence … reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth."

101. That approach was approved by the Privy Council in *Grace Shipping Inc v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 Lloyd's Rep 207 and applied in a number of subsequent cases. For example, in *Goodman v Faber Prest Steel* [2013] EWCA Civ 153, the Court of Appeal held that the trial judge had erred in accepting a personal injury claimant's evidence of pain without dealing with contradictory documentary evidence and explaining why the claimant's evidence was to be preferred. Moore-Bick LJ applied the approach of Robert Goff LJ and stated that "memory often plays tricks and even a confident witness who honestly believes in the accuracy of his recollection may be mistaken. That is why in such cases the court looks to other evidence to see to what extent it supports or undermines what the witness says and for that purpose contemporary documents often provide a valuable guide to the truth". He concluded that:

> "[O]ne is left with the clear impression that [the judge] was swayed by Mr Goodman's performance in the witness box into disregarding the important documentary evidence bearing on what had become the central question in the case. It may have been open to her to prefer what he had said in the witness box, but if she was minded to do so it was incumbent on her to deal with the documentary evidence and explain why Mr Goodman's oral evidence was to be preferred."

102. It is not to be suggested that the Divisional Court ignored or disregarded the "important documentary evidence" which the cable constituted. But if it had admitted the cable in evidence, as should have happened, the contrast between some of its contents and the evidence of Mr Roberts and Ms Yeadon would have been starker. The need to confront the discrepancy between the two could not have been avoided.

103. Although said in relation to commercial litigation, I consider that the observations of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), paras 15-22 have much to commend them. In particular, his statement at para 22 appears to me to be especially apt:

> "… the best approach for a judge to adopt … is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose - though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge

> the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

104. The intellectual exercise on which the Divisional Court was engaged in evaluating the evidence of Mr Roberts and Ms Yeadon, having refused to admit the cable in evidence, was quite different from that on which it would have had to embark if the evidence had been received. By refusing to admit the evidence, the court effectively had confined its role to an assessment of how well the witnesses had withstood cross examination. If the cable had been admitted, the discrepancies between the contents of the cable and their testimony would have had to be considered objectively, while keeping in mind all the adjurations as to the likelihood of contemporaneous documentary evidence being intrinsically more reliable.

105. If the Divisional Court had admitted the cable in evidence, what were the possible consequences? If it had concluded, as well it might, that it was inherently unlikely that the cable would have recorded Mr Roberts as having said there would be "no human footprints" and no "Man Fridays" on BIOT's uninhabited islands, unless he had actually used those words, what impact would that have had on his believability? These were striking expressions. Indeed, Ms Yeadon said that, if they had been used, she would have been shocked. Could they have been fabricated by the author of the cable? Why should they have been? If the cable had been admitted and was therefore a freestanding item of evidence, it is at least possible that the Divisional Court would have decided that it was unlikely that the person who composed the cable would have fabricated those phrases and attributed them directly to Mr Roberts. And, if it was concluded that this was unlikely, what effect would that have on Mr Roberts' credibility in light of his denial of having used them?

106. When the Court of Appeal came to consider what difference the admission in evidence of the cable might have made, the question for them should have been whether a different outcome was *possible*, not whether that would have happened or even whether it was likely. (I will explain presently why I consider that the possibility of a different result was the correct test.) The Court of Appeal, however, seems to have considered various possible formulations at different points of its judgment. At para 89 it twice stated that it was unrealistic to suggest that the court "would" have reached a different conclusion, had the evidence been admitted. Later in the same paragraph the court said that it had borne in mind that "a legally correct approach would have made no difference to the outcome: see, for example, *R v Chief Constable of the Thames Valley Police, Ex p Cotton* [1990] IRLR 344, per Bingham LJ at para 60." These statements suggest that the appeal court considered that, unless the admission of the cable *would* have made a difference, as opposed to whether it

could have done so, a review of the Divisional Court's decision would not be appropriate. I do not consider that this is the correct test and I turn now to that issue.

(iv) The correct test

107. In *Malloch v Aberdeen Corpn* [1971] 1 WLR 1578, the appellant had been dismissed from his employment as a teacher by a motion passed by an education committee. He claimed that he had not been given a fair hearing and that, if he had been permitted to make representations, it was possible that some members of the committee would not have voted in favour of his dismissal. (The motion required to be carried by a two-thirds majority). The House of Lords held that teachers in Scotland had in general a right to be heard before they were dismissed and, since, in view of the ambiguity of the regulations by reason of which the appellant had been dismissed, he might have had an arguable case before the committee and might have influenced sufficient members to vote against his dismissal. The committee was in breach of duty in denying him a hearing and the resolution and dismissal were accordingly unlawful. At 1582H Lord Reid dealt with an argument that affording the appellant a hearing would have made no difference. He said:

> "… it was argued that to have afforded a hearing to the appellant before dismissing him would have been a useless formality because whatever he might have said could have made no difference. If that could be clearly demonstrated it might be a good answer. But I need not decide that because there was here, I think, a substantial possibility that a sufficient number of the committee might have been persuaded not to vote for the appellant's dismissal."

108. The "substantial possibility" that the Divisional Court would have reached a different conclusion if Mr Roberts' evidence had taken a different turn as a consequence of his having to address and answer the "ultimate question" cannot be dismissed, in my opinion. Moreover, if the court had been required to confront the obvious conflict between Mr Roberts' and Ms Yeadon's evidence and that contained in the cable, again there was a distinct possibility that it would have been concluded that the frustration of the campaign by the Chagossians to resettle the outlying islands was, at least, a collateral purpose in the civil servants' recommendation to the minister that the MPA be established.

109. Lord Mance has said that the test to be applied in deciding whether a different outcome could or would have eventuated "must depend on the context, including, in particular, how well-placed the court is to judge the effect of any unfairness" - para 23. Perhaps. I would observe, however, that if the court cannot with confidence

judge the measure of unfairness to the affected individual, this should surely impel the adoption of the "could" rather than the "would" test. Unless one could be confident that unfairness would not accrue, I find it difficult to see how it could be otherwise.

110. As noted at para 106 above, the Court of Appeal suggested that the proper manner of dealing with the question was to ask whether a legally correct approach would have made no difference to the outcome. In relation to this case, that means that one should ask the question, if the Divisional Court had admitted the cable in evidence and if it had permitted cross examination on the basis that it was in evidence, would this not have affected the outcome. On one view, this partakes of the application of a "could" test, and, in effect, this is how Lord Mance considers that the Court of Appeal dealt with the issue. For the reasons given earlier, I do not agree. Even if that had been the Court of Appeal's approach, however, I could not agree with the conclusion that it reached.

111. What "might" have happened, as opposed to what "would" have happened involves consideration of a different range of imponderables. Deciding what would have happened involves the decision-maker in imposing, to some extent at least, his or her own view as to what ought to have happened. By contrast, deciding what might have happened requires the decision-maker to envisage a range of possibilities and to decide whether any one of those might have been chosen by the original decider, if the position before him or her had been as it has now been found to obtain.

112. The Court of Appeal did not review the range of possible outcomes that might have accrued if the cable had been admitted in evidence or if Mr Pleming had been permitted to press on with this cross examination to demand an explanation as to why the civil servants' evidence differed from its contents. In my opinion, that was central to a proper examination of the issue.

(v) The genesis and development of the MPA

113. It is true, as Lord Mance points out in para 25 of his judgment, that the "whole idea of an MPA and a no-take zone" came from Pew, an American environmental group. It is also true, again as stated by Lord Mance, that David Miliband, the then Secretary of State for Foreign and Commonwealth Affairs, was the relevant decision-maker as to whether the MPA should be established. The circumstance that it was the minister, and not the civil servants who were advising him, who would ultimately decide whether the MPA would be made does not, of itself, dispose of the question whether there was a collateral motive in the advocacy of the scheme by Mr Roberts and Ms Yeadon.

114. In his note of 5 May 2009 to Mr Miliband, Mr Roberts referred to the Chagos Islanders' plans for resettlement. He was bound to do so because this was an obvious aspect to be taken into account, in the event that an MPA was declared. The note contains a significant passage on this question (quoted by Lord Mance at para 27):

> "Assuming we win in Strasbourg, we should be aiming to calm down the resettlement debate. Creating a reserve will not achieve this, but it could create a context for a raft of measures designed to weaken the movement."

115. This statement is to be contrasted with what Mr Roberts is quoted in para 7 of the cable as having said during the meeting with American officials some seven days later. At that meeting he is recorded as having claimed that British government thinking was that there would be "no human footprints" and no "Man Fridays" on BIOT's uninhabited islands. He is also recorded as having asserted that "establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former residents". So, although he told the minister that the MPA would not "calm down the resettlement debate", he was telling the Americans that the resettlement claims would be effectively extinguished. And, of course, in further contrast to what the minister was being led to believe would be the effect of the MPA on the Chagossians' hopes of resettlement, Ms Yeadon was recorded in the cable as encouraging US embassy officials to affirm that the US government required the entire BIOT for defence purposes so as to nullify the Chagossians' assertion that partial settlement of the outer islands would have no impact on the use of Diego Garcia.

116. The circumstance that the decision to make the MPA rested with the minister does not immunise the process by which that decision was made from the possible taint of improper motive. If those who advised the minister were actuated by such a motive but tailored their advice to the minister so as to conceal it, the fact that the minister took the decision does not render the underlying collateral purpose of no consequence. The contrast between the advice given to the minister and the contents of the cable incidentally reinforces the need for an unrestrained cross examination of the witnesses, particularly because, as Lord Mance observed in para 40, the Divisional Court did not address the contradiction in the evidence of Mr Roberts and that of Ms Yeadon as to whether the former did in fact say that an MPA would put paid to resettlement.

117. Lord Mance has suggested (in paras 41-43) that even if Mr Roberts and/or Ms Yeadon had an improper motive, there is no conceivable reason to conclude that this affected the ultimate decision-maker. I am afraid that I cannot agree. True it is, as the Court of Appeal observed in para 91 of its judgment, that the decision was personal to the Foreign Secretary. True it may also be, as the Court of Appeal found,

that the Foreign Secretary believed that the declaration of an MPA would "redound to the credit of the government and, perhaps, to his own credit", although I am not at all clear as to the evidence on which the court drew to support that conclusion. But, if the minister had been aware that the civil servants were recommending the establishment of an MPA with the covert purpose of ensuring that the Chagos Islanders' ambition to return to their homeland would never be fulfilled, can it be said that his decision would be immune from challenge? Surely not.

118. It is not a question of reconfiguring the principle in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 so as to fix the Secretary of State with the knowledge, motives and considerations of civil servants. Rather it is whether a decision of the Secretary of State, taken in ignorance of a concealed reason for the recommendation on which he acted, can be regarded as lawful. In my judgment, a decision taken on a recommendation made to him without knowledge of the true reasons that it was made, cannot be upheld on the basis that it was a decision made without regard to material factors. On the premise that the advice to the Foreign Secretary was fashioned so as to withhold from him the true motivation for it, his decision is impeachable because he was deprived of the opportunity to consider all relevant circumstances and, on that account, it could not stand.

119. Again, it is suggested that this was not argued on behalf of the appellant before this court. For the reasons given earlier, I do not accept that this is a basis on which the point may be ignored, if it has validity. Lord Mance has stated, however, that the withholding of such information, if it were deemed sufficient to undermine a ministerial decision, would lead *logically* to the conclusion that "any irrelevant misconception possessed by any civil servant at any level in the civil service hierarchy in relation to any proposal ultimately reaching Cabinet level could undermine a Cabinet decision." - para 48. With much regret, I must register my profound disagreement with this statement. In the first place, if the appellant's case is made good, the purpose of Mr Roberts and Ms Yeadon was not the product of a "misconception". It was the outworking of a strategy to promote the establishment of the MPA for an ulterior motive. A minister whose imprimatur was required to endorse the advice given would surely need to be aware of the true motive for recommending the course that he had been advised to follow, in order that his decision be immune from challenge. There is no logical connection between the withholding of vital, relevant information from a decision-maker and his failure to be aware of a "misconception" on the part of those advising him.

120. The fact that the Foreign Secretary rejected the proposal that he should consult on the proposal is nothing to the point, in my opinion. He decided to proceed with the MPA on the basis of advice that it would not, of itself, eliminate the chances of resettlement of the Chagos Islands. If, contrary to that advice, it was the view of the civil servants that the MPA would achieve precisely that aim, the minister should

have been aware of it. Not being informed of it meant that he was not in a position to take all material considerations into account.

121. I consider, therefore, that the Court of Appeal should have recognised that there was a substantial possibility that, not only would the Divisional Court 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, but that there was an equally substantial possibility that it would have concluded that the Foreign Secretary's decision could be impugned because it was taken on a misapprehension of the true facts and circumstances. For these reasons, I would have allowed the appeal and ordered that the matter be remitted for hearing before a Divisional Court with the direction that it be reconsidered on the basis that the cable was admissible in evidence.

Fishing rights

122. I agree with Lord Mance on the issue of fishing rights.

LADY HALE:

123. This case is of huge importance to the Chagossians in their campaign to be permitted to re-settle in their islands and to fish in the waters surrounding them. On the substance of the appeal, I agree with Lord Kerr that we cannot be confident that the findings of the Divisional Court would have been the same had the "Wikileaks cable" been admitted into evidence and counsel been permitted to cross-examine the FCO officials upon it. The crucial legal issue in the case is therefore the admissibility of the cable, which is a matter of considerable importance both nationally and internationally.

124. I agree with both Lord Mance and Lord Sumption that "inviolable" in articles 24 and 27(2) of the Vienna Convention on Diplomatic Relations in general means, among other things, that the archives and documents (article 24) and the "official correspondence" (article 27(2)) of the mission cannot generally be admitted in evidence, at least in the courts of the receiving state, because to do so would interfere in the privacy of the communications of the mission, both internally and with its sending government. The question, therefore, is when such inviolability is lost.

125. In Lord Mance's view, the cable did not remain part of the archive of the London mission once it had been remitted to the State Department or some other location for information and use there (para 20). It is indeed very probable that the leak did not take place from the mission but from elsewhere in the United States

government. Nevertheless, as the main purpose of the inviolability rule is to allow the mission to communicate in confidence with the sending government, documents emanating from a mission must retain their confidentiality and consequent inviolability in some circumstances.

126. Lord Sumption agrees with Lord Mance but bases this on the principle of "control". Documents, he says, are inviolable if "they are under the control of the mission's personnel, as opposed to other agents of the sending state" (para 68). I can agree with this only if it is understood that "control" includes the restrictions placed by the sending mission (and for that matter the sending state communicating with the mission) on the further transmission and use of the document. It is my understanding of civil service practice in this country that the initiator of a document decides upon the appropriate level of confidentiality and marks the document accordingly. Other persons within government who receive the document are bound to respect that marking. (Cabinet Office, Government Security Classifications, April 2014, eg para 28.) It is reasonable to assume that other countries have similar practices in their intra-governmental communications.

127. It cannot be the case that a diplomatic communication loses its inviolability once it has left the mission. The concept of control must include the restrictions placed by the sending mission on the dissemination of the communication, subject to the directions of their superiors in the sending state. In both versions of the Wikileaks cable which we have - one published in the Guardian and one in the Daily Telegraph - it was classified Confidential by Political Counsellor Richard Mills for reasons 1.4b and d (whatever they may be). That indicates a rather low level of control exercised over the document, which obviously found its way into many hands before it was acquired and put into the public domain by Wikileaks.

128. Whatever may be the position in relation to other documents passing between a mission and their sending department, it seems clear in this case that whatever control there had initially been exercised over this document, it was lost even before it was put into the public domain. I therefore agree that it was no longer inviolable and should have been admitted in evidence in this case. As Lord Kerr has explained, its contents were such that they could have made a difference to the result. I would therefore have allowed this appeal.