Neutral Citation Number: [2020] EWCA Civ 142

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MASTER VICTORIA McCLOUD
[2018] EWHC 1461 (QB) and [2018] EWHC 3393 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 February 2020

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON LORD JUSTICE COULSON
and
THE RT HON LADY JUSTICE ROSE DBE

- -

Between:

Case No. A2/2019/0240

(1) THE FOREIGN AND COMMONWEALTH OFFICE **(2) MS SASHA WASS QC**	**Appellants**
- and -	
(1) MR MARTIN WARSAMA **(2) MS CLAIRE GANNON**	**Respondents**
- and -	
THE SPEAKER OF THE HOUSE OF COMMONS	**Interested Party**

Case No. A2/2019/1967

(1) MR MARTIN WARSAMA **(2) MS CLAIRE GANNON**	**Appellants**
- and -	
(1) THE FOREIGN AND COMMONWEALTH OFFICE **(2) MS SASHA WASS QC**	**Respondents**
- and -	
THE SPEAKER OF THE HOUSE OF COMMONS	**Interested Party**

- -
- -

Neil Sheldon QC (instructed by the **Government Legal Department**) for the First Appellant
Alan Payne QC (instructed by the **Government Legal Department**) for the Second Appellant
Nicholas Bowen QC and David Lemer (instructed by **Meaby & Co LLP**) for the Respondents
Ms Saira Salimi (Counsel to the Rt. Hon the Speaker of the House of Commons) appeared by way of written submissions for the Speaker

Hearing dates: 27 and 28 November 2019

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Approved Judgment

The Lord Burnett of Maldon, Lord Justice Coulson and Lady Justice Rose:

Introduction

1. This is the judgment of the court to which we have all contributed.

2. The principal issue in this appeal is whether the report of an inquiry ordered to be published by the House of Commons following a Motion for an Unopposed Return is protected by Parliamentary privilege. The second issue is whether the proceedings commenced by Mr Warsama and Ms Gannon (to whom we refer as the appellants) can survive a finding that the report in which they were criticised is protected by Parliamentary privilege or should be struck out. The third issue is whether the panel which conducted the inquiry is a 'public authority' for the purposes of section 6(3) of the Human Rights Act 1998 ("the HRA").

3. In November 2014, the First Respondent ("the FCO") appointed a leading criminal barrister specialising in child sex abuse cases, the Second Respondent Ms Sasha Wass QC, to chair a multidisciplinary panel to inquire into the truth of allegations that serious child sex abuse and corruption were taking place with impunity on the island of St Helena ("the Inquiry"). Other members of the panel included a serving Detective Superintendent with many years' experience of reviewing complex criminal cases, including the investigation of child abuse allegations on Pitcairn Island, and a former Head of Safeguarding at the Children's Society.

4. The Foreign Secretary, Philip Hammond, announced the appointment of Ms Wass to chair the Inquiry to the House of Commons and placed a copy of the terms of reference in the Library of both Houses. The Inquiry was non-statutory and so not governed by the Inquiries Act 2005 nor the Inquiry Rules 2006. The terms of reference for the Inquiry were broad and included:

    i) an assessment of the role of the FCO and the Department for International Development ("DFID") in responding to allegations made about child abuse;

    ii) an appraisal of the response of the St Helena authorities to specific child safety incidents detailed in the allegations and whether further investigation, including criminal investigation, was required;

    iii) a review of the relationship between St Helena's social services and its police service; and

    iv) an assessment of the treatment of and support given to whistle-blowers who bring child safety concerns to the authorities' attention.

5. On 25 June 2015 the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs told the House of Commons that he had laid a departmental minute proposing to provide an indemnity covering Ms Wass, the Inquiry Panel, its solicitor and staff members against any liability for the conduct of the Inquiry. The need to seek the approval of the House for the indemnity arose because the FCO recognised that the indemnity created a contingent liability in excess of £300,000 for which there was no statutory authority (Hansard 25 June 2015, vol 597).

6. The Inquiry took evidence from witnesses both in the United Kingdom and in St Helena. Those witnesses included the two claimants in these proceedings, Martin Warsama and Claire Gannon. They had been employed as social workers on St Helena between February 2013 and July 2014 in the case of Ms Gannon and between September 2013 and April 2014 in the case of Mr Warsama. They were the source, as whistle-blowers, of many of the most serious allegations that it was the Inquiry's task to investigate. In the course of the Inquiry, the Panel interviewed 145 witnesses and read over 2,677 documents including all police files dealing with sexual offences dating back to 2009. A detailed review of social services files relating to child welfare was also undertaken dating back to at least 2009.

7. When the Panel had completed its investigation, Ms Wass provided a copy of the report of the Panel to the FCO on 3 December 2015 ("the Report"). The Report concluded that the Inquiry had found no evidence that child abuse was either endemic or routine on St Helena. There was no evidence of corruption in the St Helena police force, the St Helena Government, the FCO or DFID. There was no evidence of a cover up. The Report contained criticism of Mr Warsama and Ms Gannon both professionally and personally. The Report described them as professionally incompetent and unable to fulfil the terms of their employment. Other people and organisations were also strongly criticised in the Report. Whilst exonerating the St Helena authorities of the child sex abuse allegations, the Report did find evidence of systemic failings by social services, particularly regarding the treatment of disabled adults. There had been serious failings in respect of vulnerable people on St Helena. The Panel described the treatment and neglect of one severely disabled person as "a matter of lasting shame to the St Helena Government". The Panel concluded that St Helena suffered from bad management and a lack of strategic organisation. The ultimate responsibility for those failings lay with the Governor. In the past, the Report said, when the FCO or DFID was called upon by the Governor to deal with a problem, the "only available response from a distance of 4,000 miles has been to commission another report". The Report made a series of recommendations including a better handover process from a retiring Governor to an incoming Governor, better induction for police recruits and proper training in safeguarding for all St Helenian Government employees likely to come into contact with children in the course of their work.

8. The FCO decided that the Report should be published and that it should be published by Parliament. The procedure used to bring the Report into the public domain was the "Motion for an Unopposed Return" procedure which we describe in more detail below. The Report was published by the House of Commons on 10 December 2015.

9. On 8 December 2016 the claimants each issued a claim against the FCO and Ms Wass. The Wass Inquiry was also originally named as a Defendant, but it is now accepted that the Inquiry is not a separate entity capable of being sued. Its members are collectively responsible for the Report. The claimants served Particulars of Claim in materially the same terms in April 2017. In their pleadings they allege that the Report is full of factual inaccuracies and that the criticisms of them personally and professionally are untrue. They allege that the criticisms were expressed in unnecessarily severe terms and did not need to be included in the Report. They also complain about serious irregularities that they say arose from the procedures adopted by the Inquiry during the evidence gathering stage and at the final stages of preparation of the Report. In particular, they assert that they were not given advance

warning of the likely terms of the Report when it was in draft form and were not therefore given a proper opportunity to make representations on whether the criticisms of them should be included. Further, they had been assured that the response that they did provide to the complaints made against them would be included in the Report in full, but this had not happened. The claimants allege that the Report has damaged their reputations and had a serious effect on their private and professional lives including their ability to continue employment in their chosen profession. This has given rise to a breach of their right to a private life for the purposes of article 8 of the European Convention on Human Rights ("ECHR"). They rely on a number of authorities to establish that article 8 is engaged including most recently *Axel Springer AG v Germany* (App. No. 39954/08 judgment of 7 February 2012). They claim loss and damage under section 6 of the HRA. The damages claimed include past and future loss of earnings.

10. The FCO served its defence to both claims in June 2017. It denied the substance of the claims but also pleaded that the Report amounts to "proceedings in Parliament" for the purposes of article 9 of the Bill of Rights 1689. This means, according to the defence, that "pursuant to the fundamental principle of parliamentary privilege, this claim seeking to impeach the findings contained in the report and/or the procedure pursuant to which those findings were reached must fail."

11. The FCO applied to strike out the claims on the basis of article 9. Ms Wass also applied to strike out the claims on a number of grounds including that she is not a public authority for the purposes of section 6 of the HRA. The strike out applications were heard together by Master McCloud. Prior to the hearing, the master gave directions including that the Rt Hon the Speaker of the House of Commons be invited to make submissions. Speaker's Counsel, Ms Saira Salimi, made written submissions supporting the FCO's assertion of privilege before the master as she did before this Court.

12. Three issues were dealt with at the hearing and determined in Master McCloud's judgment handed down on 15 June 2018 ([2018] EWHC 1461 (QB)) ("the Main Judgment"). The first was whether and to what extent the claims were defeated by the defence of Parliamentary privilege. On this issue the Master held that the expression "proceedings in Parliament" did include the Unopposed Return procedure with the result that article 9 of the Bill of Rights barred the claims to the extent that they sought to challenge the accuracy of content of the Report: see para. 110 of the Main Judgment. However, Parliamentary privilege did not extend to claims relating to matters which occurred outside Parliament, such as the FCO's initial decision to undertake the Inquiry and the procedures adopted by the Panel in conducting the Inquiry, including the steps taken in the drafting of the Report: para. 113.

13. The second issue considered at the strike out hearing was whether Ms Wass is a 'public authority' within the meaning of section 6 HRA and hence whether she owes duties towards the claimants under the ECHR. The master held that Ms Wass was acting as a person some of whose functions were of a public nature. She did therefore owe duties under section 6 HRA to participants and others in the discharge of those functions, namely the conduct of the Inquiry and the production of the Report: para. 153.

14. The third issue considered by the master was whether the article 8 claims that she had held were not barred by privilege were ones that should nonetheless be struck out as having no real prospect of success. She held that it was a matter for evidence whether the decision of the Secretary of State to appoint a non-statutory inquiry and the procedures followed by Ms Wass caused sufficiently grave harm to the claimants' professional reputations to justify an article 8 claim independently of the content of the Report. She said that she did not know at the strike out stage whether there was evidence that the process itself caused harm "along the way". She therefore declined to strike the claims out as against either the FCO or Ms Wass. She granted permission to appeal on the Parliamentary privilege issue and on the issue of Ms Wass' status. She also directed that any appeal should lie directly to the Court of Appeal pursuant to CPR 52.23 in view of the constitutional significance of the questions arising and the senior level of many of the judicial authorities she cited.

15. Master McCloud handed down a supplementary judgment on 5 December 2018 after a short further hearing dealing with the form of order, reported at [2018] EWHC 3393 (QB) ("the Supplementary Judgment"). This was necessary because the parties could not agree about what parts of the claims could still be pursued and what parts were barred. The FCO and Ms Wass argued that the effect of the Main Judgment was in reality that there were no claims left: the whole basis of the claims depended on the content of the Report. The master held that that was wrong. There were clearly some complaints made, such as about the way the interview sessions were conducted during the Inquiry, that related to matters arising before the publication of the Report. As to whether there was any pleading of loss that could be said not to arise from the publication of the Report, she said that there was. There was a pleaded case that the breach of article 8 had led to the loss of a chance to change the content of the Report so that it avoided the harm to the Claimants' professional standing, a chance they would have had if the Inquiry had been properly conducted.

16. The master's order stated on the Parliamentary privilege point:

> "1. The Claimants are not prevented on the grounds that the Wass Inquiry Report is privileged as a proceeding in Parliament pursuant to Article IX of the Bill of Rights 1689, from continuing to pursue any grounds of claim which relate to actionable harms (including loss of a chance of a better outcome), which neither seek to impugn or call into question the correctness of the content of the report nor to claim remedies arising from consequences of its publication in the form in which it was published by Parliament.
>
> 2. In particular (for avoidance of doubt and non-exhaustively) the grounds pleaded in the Particulars of Claim in relation to the decision to conduct the inquiry in the form in which it was conducted, the process and procedure of the inquiry (including in respect of forewarning and seeking explanations from the Claimants prior to conclusion of the report), and decisions made as to disclosures of information during the process of the inquiry are not barred by virtue of Parliamentary Privilege. (See para. 113 of judgment).

> 3. The Claimants are prevented, on the grounds that the Wass Inquiry Report is privileged as a proceeding in Parliament pursuant to Article IX of the Bill of Rights 1689, from pursuing claims which seek to impugn or otherwise challenge the correctness or otherwise of the content of the Wass Inquiry Report or from pursuing claims arising from the consequences of its publication in the form in which it was published by Parliament. (See paras. 115-116 of judgment but as to admissibility in evidence of the report on other matters see also para. 112)."

17. Master McCloud also held that the claimants had been the successful parties overall because the claims had not been struck out in their entirety. She ordered that the FCO and Ms Wass should pay the claimants' costs of the applications on the standard basis.

18. There are two appeals before this court from the judgments of Master McCloud. The first appeal brought by the FCO and Ms Wass asserts broadly that, having correctly identified that the Report was a proceeding in Parliament and therefore protected by privilege, the master was wrong to conclude in the Supplementary Judgment that it was open to the claimants to pursue a viable claim under article 8 either as a matter of principle or on the basis of the claimants' pleaded case. They also both challenge the costs order made by the master on the basis that she was wrong to conclude that the claimants were the successful parties. Ms Wass pursues an additional ground of appeal against the finding that she and her co-panel members constituted a public authority within the meaning of section 6 HRA.

19. The claimants lodged their own appeal against the Main Judgment challenging Master McCloud's decision that they are prevented on the grounds of Parliamentary privilege from pursuing claims which seek to impugn or otherwise challenge the correctness or otherwise of the content of the Report or from pursuing claims arising from the consequences of the publication of the Report by Parliament.

20. At the hearing before us we heard submissions on the privilege issue from Mr Nicholas Bowen QC leading Mr David Lemer on behalf of the claimants to which Mr Neil Sheldon QC responded on behalf of the FCO. He also made submissions on the FCO's appeal about what if anything remained of the claimants' cause of action. Mr Alan Payne QC adopted Mr Sheldon's submissions on the privilege issue on behalf of Ms Wass and presented Ms Wass' arguments on the issue of her status for the purposes of section 6 HRA. We have already noted the written submissions from Ms Salimi on behalf of the Speaker.

21. The main issues are therefore:

    i) **The Parliamentary privilege issue:** is the Report a proceeding in Parliament for the purposes of article 9 of the Bill of Rights 1689 and, if so, what is the extent of the protection conferred by that privilege?

    ii) **The effect of Parliamentary privilege on the claims:** having regard to the answer to the first issue, should the claimants' proceedings be struck out in their entirety or does some of their pleaded case survive to go forward to trial?

iii) **Ms Wass' status as a public authority:** is Ms Wass and the inquiry panel a public authority for the purposes of section 6 HRA?

ISSUE 1: PARLIAMENTARY PRIVILEGE

(a) Some preliminary matters

22. Article 9 encapsulates the relevant facet of the privilege for our purposes, although Parliamentary privilege extends further. Article 9 of the Bill of Rights 1689 (1 Will. and Mary sess. 2 c.2) states:

> "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

23. Comprehensive definitions of the scope of Parliamentary privilege have proved elusive but the classic statement of what privilege comprises is that of Lord Chief Justice Cockburn in *Ex parte Watson* (1869) QB 573 at 576:

> "It is clear that statements made by Members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third party."

24. It was common ground before us that it is for the court and not for Parliament to decide the scope of Parliamentary privilege. That proposition was confirmed by Lord Phillips of Worth Matravers in *R v Chaytor* [2010] UKSC 52, [2011] AC 684 at paras 14 and 15. However, the Supreme Court stated that in determining any such issue, a court should pay careful regard to the views of those who are in a position to speak with authority on the matter and that would include the Speaker of the House of Commons. The case law establishes not only that the courts are able to identify the current boundaries of Parliamentary privilege but that they are able to adapt the scope of privilege where appropriate as occurred when the House of Lords held in *Pepper (Inspector of Taxes) v Hart* [1993] AC 59 that clear statements made in Parliament concerning the purpose of legislation in course of enactment may be used by the courts as a guide to the interpretation of ambiguous statutory provisions. The courts have also redrawn the boundaries of privilege to allow examination in judicial review proceedings of the reasons given by a Minister in Parliament for a particular decision under challenge.

25. It was common ground before us that the Parliamentary Papers Act 1840 does not assist in the resolution of these appeals. That Act was passed following the judgment in the case of *Stockdale v Hansard* (1839) EWHC QB J21 in which an action had been brought in defamation against Hansard as publishers of proceedings in Parliament. Messrs Hansard printed by order of the House of Commons a report prepared by the inspector of prisons. The inspector's report described as indecent and obscene a book on anatomy found in Newgate prison library. Mr Stockdale, the publisher of the anatomy book, sued for libel. The court held that Parliamentary privilege protected papers printed by order of the House for the use of its own members, but that this protection did not extend to papers made available outside the

House to members of the public. The Parliamentary Papers Act 1840 was passed to reverse this decision. The effect of this for our purposes is that the publisher of any document ordered to be printed by Parliament will be protected by the 1840 Act, but that Act cannot of itself confer privilege on the document if the document is not otherwise privileged.

(b) The case law of the European Court of Human Rights

26. The Bill of Rights, like any other enactment, must be interpreted, so far as possible, in a manner which conforms to the ECHR (section 3 HRA), including rights of access to the court under article 6 ECHR. The Strasbourg Court has considered the compatibility of Parliamentary privilege with article 6 on a number of occasions. In *Zollmann v United Kingdom* App. No. 62902/00 [2003] ECHR 731 the applicants were diamond merchants who were accused of having broken sanctions prohibiting the importation into the United Kingdom of diamonds from Angola. The accusation came in the form of a statement made in the House of Commons by the then Minister of State at the FCO responsible for Africa. The accusation was published in Hansard and was available on Parliament's website. The press reported the matter including the applicants' names. They complained of a breach of their rights under article 6 ECHR because they were unable to sue the minister for defamation. They also complained under article 8 ECHR that the accusation attacked their reputation and was defamatory and a breach of their right to respect for their private life. The Zollmanns' action was declared inadmissible. The Strasbourg Court referred to the earlier case of *A v United Kingdom* App. No. 35373/97 [2002] ECHR 811 in which the Court had said it was satisfied that the immunity given to statements made by members of Parliament in the House of Commons pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary. Most if not all Contracting States had in place some form of immunity for members of their national legislatures. The constitutions of the Council of Europe and the European Parliament also conferred privileges and immunities on their members. This could not therefore be regarded as imposing a disproportionate restriction on the right of access to courts. In *Zollmann* the Strasbourg Court quoted from the Parliamentary Select Committee on Procedure describing the wide range of avenues which can be pursued by an aggrieved person who wishes to correct or rebut remarks made about him in the House. The applicants complained that because they were not British citizens they were unable to seek redress through these avenues. The Court said:

> "That members of Parliament cannot act with impunity even within the House is shown by the fact that in extreme cases, deliberately misleading statements may be punishable by Parliament as a contempt, while general control is exercised over debates by the Speaker of each House. It is true that neither of these aspects served to prevent, or sanction, the statement being made concerning the applicants. However, they remain relevant to the overall proportionality of the system and the balance between the competing interests."

27. A case falling on the other side of the line was *Cordova v Italy (No. 1)* App. No. 40877/98 [2003] ECHR 47. That case arose from the prosecution of an Italian senator for insulting a prosecutor at the Palmi public prosecutor's office by sending him

sarcastic letters and gifts of children's toys. The Italian Senate approved a resolution that declared that the acts of which the senator was accused were covered by the immunity provided for in article 68 para 1 of the Italian Constitution. Article 68 provided that "Members of Parliament shall not be required to account for the opinions they express or the votes they cast in the exercise of their functions". The Italian District Court dismissed the action saying that the senator had no case to answer. It observed that it was for the Senate, whose resolutions were not subject to review by the courts, to determine whether the conditions set out in article 68 were met. The Strasbourg Court had little difficulty in deciding that there had been an interference with the applicant's right of access to a court under article 6 ECHR. The Court went on:

> "54. Moreover, it notes that this right is not absolute, but may be subject to implied limitations. Nonetheless, such limitations must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, they will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among many other authorities, *Khalfaoui v. France*, no. 34791/97, §§ 35-36, ECHR 1999-IX, and *Papon v. France*, no. 54210/00, § 90, ECHR 2002-VII; see also a reminder of the relevant principles in *Fayed*, cited above, pp. 49-50, § 65)."

28. The Strasbourg Court held that what had passed between the senator and the applicant was the result of a personal quarrel and could not be construed as falling within the scope of parliamentary functions. The barring of the claim did not strike a fair balance between the requirements of the general interest of the community and the need to safeguard the fundamental rights of individuals.

29. The court addressed the defence of privilege in a case closer to the facts of the present appeal in *Fayed v United Kingdom* (1994) 18 EHRR 393. That case concerned the publication of the report of two inspectors appointed to investigate the circumstances surrounding the acquisition by the Fayed brothers of the House of Fraser group in 1985. The appointment was made under the Companies Act 1985. The report was highly critical of the Fayed brothers who claimed that it had seriously damaged their personal and commercial reputations. It was common ground that as a matter of domestic law, any proceedings in defamation against the inspectors or the Secretary of State would be defeated by a claim of absolute or qualified privilege. The Strasbourg Court held that article 6 was not engaged because the report did not make a legal determination of the applicants' criminal or civil liability. It went on to consider whether the limitation on the applicants' ability to initiate legal proceedings to challenge the findings and conclusions of the report struck a fair balance between the general interests of the community and the protection of the applicants' fundamental rights. At [69] the court described the underlying aim of the system of investigation and reporting under the Companies Act 1985 as clearly in the furtherance of the public interest. They cited the statement of Lord Denning MR in *Re Pergamon Press Ltd* [1971] 1 Ch 388, 400C that "Inspectors should make their report with courage and frankness, keeping nothing back. The public interest demands it."

The court concluded that the underlying objective in allowing the inspectors freedom to report in such a manner was legitimate. It remained to be determined whether in the circumstances of the particular case there was a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the contested limitation. The Strasbourg Court expressed its conclusion as follows:

> "81 … The risk of some uncompensated damage to reputation is inevitable if independent investigators in circumstances such as those of the present case are to have the necessary freedom to report without fear, not only to the authorities but also in the final resort to the public. It is in the first place for the national authorities to determine the extent to which the individual's interest in full protection of his or her reputation should yield to the requirements of the community's interest in the independent investigation of the affairs of large public companies. The applicants' argument would amount to reading into Article 6(1) an entitlement to have a report such as the one in the present case not published until after a full judicial hearing repeating, doubtless over a longer time-scale, the same fact-finding exercise as that already carried out by the Inspectors. Such an entitlement could effectively destroy the utility of informing the public of the results of the administrative investigations provided for under section 434(2) of the Companies Act 1985. Having found the aim of not only making but also publishing the Inspectors' reports to be legitimate, the Court cannot apply the test of proportionality in such a way as to render publication impracticable."

30. The court held therefore that the national authorities had not exceeded their margin of appreciation in limiting the applicants' access to the courts.

(c) The Unopposed Return procedure

31. The Unopposed Return procedure contrasts with the procedure followed for many documents which are expressly required to be laid before the House by a statutory provision. These are referred to as papers laid "by Act". The following description of the Unopposed Return procedure, also referred to as a Return to an Address, is gleaned from a number of sources that were presented to us at the hearing: the submissions by Counsel to the Speaker, the relevant passages of *Erskine May Parliamentary Practice* (25th ed 2019) and the Guide to Laying Papers published by the Journal Office of the House of Commons. We were also helpfully provided with two academic articles by Professor Patricia M Leopold, then at the Department of Law at Reading University, discussing the use of the Unopposed Return procedure for the publication of controversial reports, in particular her article *The Parliamentary Papers Act 1840 and its application today* which appeared in Public Law (P.L. 1990, Sum, 183-206) ("the *Public Law* Article").

32. Each House has the power to call for the production of papers by means of a motion for a Return. This is an historic method used by Parliament for obtaining papers, reports or information from departments and other non-parliamentary bodies. The papers sought must be of a public and official character and not private or

confidential. The paper or information sought is therefore "returned" to Parliament by the individual or body concerned. This means that although the Minister initiates the process by which the House resolves to call for the papers, he or she is also on the receiving end of that resolution as the person who is required to return the papers to the House.

33. The practice of using Returns to call for information from (in particular) departmental committees was frequently used until about the mid-nineteenth century. In the eighteenth and early nineteenth centuries Returns could be put in the hands of members only by printing, and it became virtually automatic for the Houses to order the printing of any Return made to them. This culminated in a resolution of the House of Commons in 1836 that an order to print normally meant an order to publish. The purpose of this resolution was to make any papers and reports which were printed for the use of members also accessible to the public. The Returns procedure is used routinely as the means whereby certain annual information is provided to the House. However, it is also used non-routinely as a means whereby a minister can move for the production of a document, for example, a report of an inquiry into some matter of public concern. In the *Public Law* article, Prof Leopold describes the increased use of the Returns procedure for controversial reports which contain criticism of individuals: (footnotes omitted):

> "It is not necessarily the case that all non-routine use of the Return procedure to publish reports is because of their controversial content. However, many of the reports published in this way have contained criticisms of individuals. In the 1950s and 1960s, there is very little evidence of the use of the Return procedure for the production of controversial documents. In the next two decades there was an increase in the number of occasions upon which the Return procedure was used for the production of documents. In the 1970s, in respect of about 10 of the reports published by the Return procedure, it would appear that there was some potential risk of legal action had they not been published in a way that ensured the protection of the 1840 Act. In the 1980s, probably six fell into this category. In both decades the greatest use of the procedure was by the Home Secretary, in two broad areas, namely prisons and the police. The reports on these areas were invariably critical of individuals and their work methods. Other examples were reports into a mental hospital, a fatal accident on the falsework for a new bridge, the Crown Agents affair, the smallpox outbreak in Birmingham, and the departmental handling of matters relating to Barlow Clowes. In several of these reports alterations had been made to minimise the risk of an individual thinking himself defamed without legal redress."

34. Prof Leopold explains that it is for the minister who returns the paper to Parliament to decide whether and how much of the report should be published in consultation with the legal advisers in the department. The decision not to publish or to delay publication is amenable to judicial review: see *Lonrho plc v. Secretary of State for Trade and Industry* [1989] 2 All E.R. 609.

35. The second article by Prof Leopold was prompted by the fact that in 1992/93, five reports were published using the Unopposed Return procedure. This article was called *The Publication of Controversial Parliamentary Papers* and was published in the Modern Law Review 1993. She records that only in one instance was there adverse comment on the manner of publication. That concerned the publication of the Nimmo-Smith/Friel report following an inquiry headed by a Scottish barrister and the Regional Procurator Fiscal of North Strathclyde into an allegation by a senior police officer of a conspiracy to pervert the course of justice in Scotland. The Inquiry found no evidence of a conspiracy. The report was published as a Return to an Address in the House of Lords, but the Secretary of State for Scotland made a statement about it to the House of Commons. He was asked the reasons for making the report in the form of a return to an address. Did the apparent desire for the protection of Parliamentary privilege imply that parts of the report were a little dubious or uncertain? The Secretary of State replied that,

> "As for the publication of the report as a return to an address, it is a well-established procedure which has been in place for more than 150 years. Its use does not imply any value judgment as to liabilities that might arise on particular individuals from the report, but it protects against that possibility, sets aside any uncertainty and enables all aspects of the report to be laid fully and clearly before the House." (HC Deb vol 217 col 880 (26 January 1993)

36. The Journal Office Guidance deals with Papers laid by Return to an Address (Unopposed Returns). It states:

> "44. In some cases the government may wish to lay a particularly sensitive report for which there is no statutory requirement or authority to lay, but for which the protection of Parliamentary privilege is needed (the Report of the Hallett Review is a recent example). You should contact the Journal Office as soon as possible if you are preparing a paper which falls into this category. The Journal Office can offer further written and oral advice. You should note that the advance agreement of the Clerk of the Journals is required and that a motion has to be tabled at least one sitting day in advance and moved and agreed to on the Floor of the House to allow the laying of a Return to an Address".

37. At paragraph 7.31, *Erskine May* notes that the use of motions calling for a return of papers, both as a basis for debate and in pursuit of the papers themselves, has been revived in the House of Commons in recent years. The long-standing practice of the House has been that papers should be ordered only on subjects which are of public or official character. At paragraph 7.32 *Erskine May* states:

> "In the Commons the procedure also survives in the form of 'Motions for Unopposed Returns' (see para 19.12) for particular documents which the Minister responsible for the

> government department concerned wishes to make public—hence they are 'unopposed'—but in respect of which the protection of statute afforded by an order of the House for printing or other publication is sought. Certain annual returns are, by custom, also presented to the House in the form of returns to orders."

38. Recent examples given in the footnote to this paragraph in *Erskine May* of papers presented as Returns to Addresses include the Report of the Saville Inquiry on 15 June 2010 and the Reports of the Iraq Inquiry on 6 July 2016.

39. The laying of papers before the House of Commons is the responsibility of the House of Commons Journal Office. It is the Journal Office's responsibility to check the authority relied on when someone seeks to lay a document before the House. Each paper must be accompanied by a covering letter which states, amongst other things, the name of the minister formally laying the document. The guidance issued by the Journal Office states that the purpose of laying a paper before the House is to make the information contained in the document available to the House and its members. A paper is considered to be formally laid before the House when a copy of it is accepted by the Journal Office at which point members may come to the Journal Office to look at the document. Once a paper has been laid before the House, it will appear in the Appendix to the Votes and Proceedings published overnight at the end of each sitting day and available online. "Votes and Proceedings" is the formal legal record of what happens in the House of Commons. According to a ruling of the Speaker, hard copies of the document are then made available to members in the Vote Office. The guidance of the Journal Office states that there should not be a long delay between laying and making the document publicly available. A paper cannot be laid when the House is not sitting.

40. At paragraph 19.12 dealing with Motions for Unopposed Returns, *Erskine May* states:

> "Immediately after private business is the usual time for moving motions for returns (of accounts and other documents) of which notice stands upon the notice paper for the day, and which the Minister responsible for the government department concerned has signified a readiness to render. Such motions are made by Ministers and may be made either at this time or at any other convenient opportunity.
>
> It is a settled principle that a motion for a return which is proposed by the Minister responsible for the department concerned ought not to be opposed by any other Member and such opposition has been overruled by the Speaker."

41. The procedure followed in relation to the Report of the Wass Inquiry was that a motion was moved in the Commons by the Crown in the following terms:

> "That an humble Address be presented to Her Majesty, that she will be graciously pleased to give directions that there be laid before this House a Return of parts of a Paper, entitled The Wass Inquiry Report into Allegations Surrounding Child

> Safeguarding Issues on St Helena and Ascension Island, dated 10 December 2015."

42. That resolution was approved by the House and the Report was duly laid before the House of Commons which ordered that the Report be printed on the same day. It was published and given a reference number HC662.

43. Although the Inquiry was not appointed under the Inquiries Act 2005 it is useful to consider the position of reports of inquiries which are. Under section 24 of that Act the chairman of an inquiry must deliver a report to the relevant minister setting out the facts determined by the panel and their recommendations. The minister is under a duty pursuant to section 25 to arrange for the report to be published unless he has arranged for the chairman to be responsible for publication. Whether it is the minister or the chairman who is under a duty to publish, the report must be laid by the minister before Parliament: section 26. Section 27 deals with immunity from suit of, amongst others, members of the inquiry panel but it is expressly limited by subsection (2) to acts done or omissions made during the course of the inquiry. The purpose of the immunity is to protect the inquiry in the public interest from legal action.

(d) The main authorities on "proceedings in Parliament"

44. *Erskine May* says at para. 13.12 that the term "proceedings in Parliament" has received judicial attention but comprehensive lines of decision have not emerged and "indeed it has been concluded that an exhaustive definition could not be achieved":

> "The primary meaning of proceedings, as a technical parliamentary term, which it had at least as early as the seventeenth century, is some formal action, usually a decision, taken by the House in its collective capacity. While business which involves actions and decisions of the House are clearly proceedings, debate is an intrinsic part of that process which is recognised by its inclusion in the formulation of Article IX. An individual Member takes part in a proceeding usually by speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking."

45. The leading authority on the meaning "proceedings in Parliament" in article 9 is *Chaytor* to which we have already referred. The appellants in that case had been committed for trial at the Crown Court on charges of false accounting arising from reimbursement of Parliamentary expenses received when each was a serving member of the House of Commons. Each asserted that the criminal proceedings infringed Parliamentary privilege. Lord Phillips gave a judgment with which the other eight justices of the Supreme Court agreed. Lord Phillips concluded:

> "47. The jurisprudence to which I have referred is sparse and does not bear directly on the facts of these appeals. It supports the proposition, however, that the principal matter to which article 9 is directed is freedom of speech and debate in the Houses of Parliament and in Parliamentary committees. This is

> where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament."

46. Lord Phillips said later at [61]:

> "61. There are good reasons of policy for giving article 9 a narrow ambit that restricts it to the important purpose for which it was enacted – freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown's judges. The protection of article 9 is absolute. It is capable of variation by primary legislation, but not capable of waiver, even by Parliamentary resolution. Its effect where it applies is to prevent those injured by civil wrongdoing from obtaining redress and to prevent the prosecution of Members for conduct which is criminal."

47. Applying that approach, Lord Phillips held that the submission of claim forms for allowances and expenses did not qualify for the protection of privilege. Scrutiny of claims by the courts would not have an adverse impact on the core or essential business of Parliament and would not inhibit debate or free speech.

48. A different conclusion was reached in the earlier case of *R v Parliamentary Commissioner for Standards ex parte Al-Fayed* [1998] 1 WLR 669. There the Court of Appeal considered the application of article 9 to the activities of the Parliamentary Commissioner for Standards who is an independent officer appointed under the Standing Orders of the House of Commons to exercise an investigative function. Lord Woolf MR, giving the judgment of the court, noted that the expression "proceedings in Parliament" is not defined by the Bill of Rights. He took the view that:

> "the issue….is best approached by consideration of the broader principles which underline the relationship between Parliament and the courts. That relationship was elegantly described by Sedley J as 'a mutuality of respect between two constitutional sovereignties'." (para. 63)

49. The Court concluded that the work of the Commissioner for Standards was part of proceedings in Parliament, notwithstanding that it is not carried out in the course of the business in the Chamber or Committees or in debate. The functions of the Parliamentary Commissioner for Standards are one of the means by which the select committee set up by the House carries out its functions, and those functions are accepted to be part of the proceedings of the House.

50. We were also referred to the recent judgment of the Supreme Court in *R (oao Miller) v The Prime Minister, Cherry and others v Advocate General for Scotland* [2019] UKSC 41, [2019] 3 WLR 589 ('*Miller (No 2)*'). One question that arose in that case

was whether the prorogation of Parliament was a proceeding in Parliament within article 9. Having quoted with approval from *Erskine May* at para.13.12 (see para. 42 above), the court held that it was not precluded by article 9 or any wider Parliamentary privilege from considering the validity of the prorogation:

> "The prorogation itself takes place in the House of Lords and in the presence of Members of both Houses. But it cannot sensibly be described as a "proceeding in Parliament". It is not a decision of either House of Parliament. Quite the contrary: it is something which is imposed upon them from outside. It is not something upon which the Members of Parliament can speak or vote. The Commissioners are not acting in their capacity as members of the House of Lords but in their capacity as Royal Commissioners carrying out the Queen's bidding. They have no freedom of speech. This is not the core or essential business of Parliament. Quite the contrary: it brings that core or essential business of Parliament to an end." (para. 68)

51. So far as extra-judicial materials are concerned, Mr Bowen took us to the Report of the Joint Committee on Parliamentary Privilege published on 9 April 1999. The Joint Committee Report recommended that the meaning of "proceedings in Parliament" should be clarified and defined. The Joint Committee described the immunity conferred by article 9 as comprehensive and absolute; it should therefore be confined to activities justifying such a high degree of protection. The Joint Committee Report also stated that:

> "Papers published by order of either House have absolute privilege under the Parliamentary Papers Act 1840. The extent to which such orders are currently made by the House of Commons conflicts with the principle that absolute privilege should be confined to areas where it is needed. The House of Commons procedure committee should look into this matter."

52. The recommendations of the Joint Committee included that a statutory definition of proceedings in Parliament be enacted along the following lines:

> "(1) For the purposes of article 9 of the Bill of Rights 1689 'proceedings in Parliament' means all words spoken and acts done in the course of, or for the purposes of, or necessarily incidental to, transacting the business of either House of Parliament or of a committee.
>
> (2) Without limiting (1), this includes:
>
> (a) the giving of evidence before a House or a committee or an officer appointed by a House to receive such evidence
>
> (b) the presentation or submission of a document to a House or a committee or an officer appointed by a House to receive it, once the document is accepted

> (c) the preparation of a document for the purposes of transacting the business of a House or a committee, provided any drafts, notes, advice or the like are not circulated more widely than is reasonable for the purposes of preparation
>
> (d) the formulation, making or publication of a document by a House or a committee
>
> (e) the maintenance of any register of the interests of the members of a House and any other register of interests prescribed by resolution of a House.
>
> (3) A 'committee' means a committee appointed by either House or a joint committee appointed by both Houses of Parliament and includes a sub-committee.
>
> (4) A document includes any disc, tape or device in which data are embodied so as to be capable of being reproduced therefrom."

53. On the question of the privilege conferred on papers laid before Parliament, the Joint Committee noted that:

> "Presenting papers to the House of Commons is a well-established means used by government to publish its documents. The House of Commons has long insisted that it should be fully informed by government and should be the first to be informed.".

54. The Joint Committee referred to the Unopposed Return at para. 350 saying that there are occasions where the balance of the public interest is on the side of absolute protection. Although the Unopposed Return procedure was "a curious survival" it seemed to fulfil a useful purpose. The Committee's conclusion was:

> "351. This is primarily a House of Commons matter. We recognise that considerations other than privilege are involved. Disentangling practices developed over two centuries will require detailed examination. The 1970 joint committee on the publication of proceedings in Parliament drew attention to the 'somewhat haphazard manner' in which printing orders were accorded to some Act papers but not others, and recommended that rules should be prescribed. Neither House took any action on this recommendation. In 1980 the House of Commons Journal Office sought to institute a policy whereby printing orders would be restricted to reports and associated papers of committees of the House and reports and accounts accompanied by reports of the Comptroller and Auditor General. The policy met with opposition.
>
> 352. The Joint Committee considers the presumption should be that, unless there are strong reasons in the public interest, no

> paper other than one emanating from the House or its committees should be absolutely privileged. We recommend that the House of Commons procedure committee should act on this matter."

55. Mr Bowen accepts that the recommendations of the Joint Committee were not implemented by either House; there is no statutory definition of "proceedings in Parliament".

(e) The submissions of Counsel to the Speaker

56. Although we are not bound to accept the view of Counsel for the Speaker on what is or should be the scope of privilege, we should "pay careful regard" (to adopt Lord Phillips' phrase) to her view, reflecting that of the Speaker on behalf of the House of Commons, as a person in a position to speak on the matter with authority. Ms Salimi submits that a motion for an Unopposed Return for the publication of a report is a proceeding in Parliament because it should be regarded as a time-saving substitute for speaking. If the minister were to stand up and read out the Report, or the parts of it that he or she wished to put in the public domain, that would unquestionably be a proceeding protected by article 9. The moving of the motion for the Report to be laid before Parliament is an alternative means of achieving the same aim. The fact that the motion is by convention unopposed does not affect this. It is one of many instances of proceedings recorded in the Votes and Proceedings of the House where in fact no discussion or debate has taken place, such as the first readings of bills received from the House of Lords. In many cases these are also instances where the House has adopted procedures which save time on the floor of the House either because the matter is uncontroversial or because the opportunity for scrutiny and endorsement is provided elsewhere, such as in committees. Those matters form part of proceedings in Parliament even though they are not part of speech or debate in the Chamber.

57. Further, Speaker's Counsel submits that once the motion has been agreed, it becomes a resolution of the House that the Address be presented to Her Majesty, in the expectation that she will then direct that it be complied with. Compliance by the Minister with that direction from Her Majesty to lay the paper before the House is itself a proceeding, in the same way as compliance with any other order of the House.

58. Ms Salimi points out that the courts have recognised many kinds of proceeding in Parliament which do not constitute speech or debate, such as the case concerning the Parliamentary Commissioner for Standards cited earlier.

(f) 'Proceedings in Parliament': discussion

59. There is no doubt that the power of the House of Commons to call for papers is of long-standing. Counsel for the Speaker referred in her submissions before Master McCloud to extracts from Parliamentary debates in 1734 during which members on both sides of the House acknowledged that power. However, as Lord Denman CJ said in *Stockdale v Hansard* (1839) 9 Ad & Ell 96: "The practice of a ruling power in the state is but a feeble proof of its legality". There is also no doubt that the intention and expectation of the Houses' officers and ministers is that the publication of a paper by this means confers privilege on the content of the paper. That also is not sufficient

to establish that privilege is conferred; we bear in mind the warning of Lord Rodger in *Chaytor* at [101]:

> " … An invocation of parliamentary privilege is apt to dazzle lawyers and judges outside Parliament. In *Wellesley v Duke of Beaufort* (1831) 2 Russ & M 639, 660, Lord Brougham LC warned courts of justice against acceding to claims of privilege "the instant they hear that once magical word pronounced …"

60. Despite that warning, we have no doubt that the Unopposed Return is a proceeding in Parliament for the purposes of article 9 of the Bill of Rights 1689 and does confer on the content of the Report the protection of Parliamentary privilege. We have arrived at that conclusion for the following reasons.

61. The substance of what happens in an Unopposed Return is that the House as a collective body calls for the provision of information from someone outside the House on a matter about which the members resolve they wish to be informed. Here, that person is the minister. The information that the House resolved that it wanted to know was the outcome of the Inquiry which had been announced to the House in 2014. The subject matter of the Report, setting out the conclusion of an investigation into allegations that the FCO and DFID had colluded with the police and Government of St Helena to cover up widespread child sex abuse, was of great public concern. One of Parliament's primary functions is to ensure the public accountability of Ministers and their departments, to investigate and expose wrongdoing or abuse of power on the part of the executive and to insist on remedial action. The provision of the Report to Parliament was an essential part of that process. That accountability continued after the publication of the Report. On 7 July 2016 the Parliamentary Under-Secretary of State at the FCO reported to the House that a UK Government special representative had been appointed and was working with the St Helena and Ascension Island Government to implement the recommendations of the Report. The special representative's report would also be published on the Government's website. The Minister told the House:

> "Good progress has been made in implementing the recommendations of the inquiry report. The UK Government have increased the funding they provide to the St Helena Government for child safeguarding and for health and social care more generally, and improved co-ordinated efforts are bringing about real change. For example, Jamestown hospital is undergoing a £2.8 million refurbishment of its medical wing ... In addition, a funding uplift has enabled the rebuilding of a dedicated community nursing team and re-opening of three local health clinics. The safeguarding directorate and police service have rolled out a locally adapted version of "Working Together 2015" ... The Ascension Island Government have done likewise. All schools now have a designated child safeguarding lead. Most recommendations have been fully implemented, others are on course to being completed."

62. The detailed response from the Minister to Parliament on the progress made in implementing the Report reflects the continuing obligation of the executive to explain

its response to Ms Wass' recommendations. Such reporting would make less sense if the Report had not itself been provided to Parliament. It is instructive to imagine what the position would have been if the Inquiry Panel had found that the allegations made by the claimants were all true and that there had indeed been widespread corruption and collusion by the FCO and DFID in the commission of serious crimes against children. The Report might well in those circumstances have contained allegations of criminal conduct against a number of people and would have prompted criminal investigations. Members of both Houses would have been fully involved in considering what needed to be done to put things right and in monitoring the actions taken by the FCO and DFID to implement any recommendations of the Report.

63. The fact that it is the minister's department that organises the request by the House (or by the Queen to that Minister) does not detract from the fact that this process forms part of the essential business of Parliament. It is the business of keeping Members informed of the important work being carried out within Government departments so that they can hold those departments to account. We cannot accept the claimants' characterisation of the procedure as a "device" or a "magic trick". Although it is not a legislative action, it is a collective action of the House and not an action of the executive. Further, we do not read the concerns expressed in the 1999 report of the Joint Committee on Parliamentary Privilege as recommending a different answer in this case. The conclusions recognise (para. 349) the useful purpose of the Unopposed Return procedure and accepted that some of the papers laid, such as the annual reports of the Comptroller and Auditor General "should not be inhibited by the risk of actions for defamation". Its criticism was reserved for papers where it was hard to see any such risk. The touchstone suggested by the Joint Committee (but not enacted) was that absolute protection should be confined to those areas which need this immunity if Parliament is to be effective. In our judgment, the publication of the Report falls well within that area.

64. For many years the corollary of such a report being provided to Members of the House is that the report is also made available to the public at large by its publication by the House. Master McCloud referred to a submission that conferring privilege on the Report was like supplying the authors with a Harry Potter invisibility cloak. In our view, the contrary is true; it is by the mechanism of the Unopposed Return that the House ensures that the contents of the Report can become visible to Members and to anyone who wishes to read them. The ability of Parliament to publish information it has called for and which is of interest to members, and hence also to the public, without the risk of exposing the authors of that information to litigation is an important freedom and part of what Lord Phillips referred to in *Chaytor* as the House's 'deliberative business'.

65. Moreover, we accept the submissions of Counsel to the Speaker that from a procedural point of view the laying by the Minister of the Report constitutes his compliance with the direction of Her Majesty given following the Address presented to her as resolved upon by the House. The format, content and manner of laying is prescribed by the House and the Journal Office is responsible for checking the authority by which the Report is laid and for making the Report available to members. The call for the Report involves a formal Parliamentary motion which has to be presented in the House and returned on a day when the House is sitting.

66. Mr Bowen argued that it was unrealistic to describe the Unopposed Return procedure as a substitute for the Minister reading out the whole Report, running to 181 pages, in the Chamber because it would never be permitted by the Speaker. The justification of the Unopposed Return on grounds that it is a time-saving device seems to us beside the point, since it is well established that conduct can amount to a proceeding in Parliament even if it takes place outside the Chamber. Article 9 itself refers to freedom of speech and debates **or** proceedings in Parliament and the authorities to which we have referred, including *Chaytor*, would have been much easier to decide if the term was limited to what is spoken in the House. Similarly, the fact that the motion for the return of the Report could not under the rules of the House be the subject of debate does not prevent it being a proceeding in Parliament.

67. Mr Lemer argued that the Unopposed Return procedure is no substitute for reading out the whole Report but only a substitute for reading out the motion that was moved in the Commons on 10 December 2015. We do not accept this point. The Members of Parliament and the public are not interested in the wording of the motion – the House is calling for the return of the Report itself.

68. We are also satisfied, having regard to the Strasbourg decisions in *Zollmann* and *Cordova*, that such a construction of article 9 does not violate the claimants' rights under the ECHR. We do not accept the claimants' submission that the Strasbourg Court regarded Parliamentary privilege as legitimate only in so far as it protected free speech in the context of the debate on the floor of the House. That was the context in which the disputes in *Zollmann* and *A v UK* arose, but the court in *Cordova* did not find an infringement simply on the basis that the senator's conduct was something other than speaking in a debate in the Senate. The primary legitimate aim pursued by the invocation of privilege in this case is the same aim as the court identified in the *Fayed* case: an ability to produce a report on an investigation that provides a frank and detailed assessment of the actual or alleged failings of institutions or people acting in the public sphere. The Claimants are by no means the only people criticised by the Report; it makes uncomfortable reading for many others including a former Governor of the Island and the authors of a report on child safeguarding commissioned in 2012, described by the Inquiry as "heavily biased". Again, one can imagine that if the allegations the Inquiry was investigating had turned out to be true there would have been many more people adversely affected by the outcome. Inquiries of this kind are an important means by which matters of public concern can be investigated and the results made public. That process would be hindered if those criticised were able to bring proceedings for defamation or for breach of their ECHR rights and seek to reargue aspects of the investigation in the courts. It would also make it more difficult to persuade suitably qualified people to accept appointment to conduct such inquiries. Although, as in this case, the panel members may be given a financial indemnity by the appointing department against any liability, the possibility of many years of litigation following the inquiry would be a powerful disincentive for undertaking this form of public service. On this point too, the analysis of the Strasbourg Court in the *Fayed* case supports our conclusion because any entitlement of the Fayed brothers to bring legal proceedings "could effectively destroy the utility of informing the public of the results of the administrative investigations".

69. We also consider that affording the protection of Parliamentary privilege for reports of this kind is a proportionate response to that legitimate aim. The House retains

control over the papers that can be laid to ensure that they are limited to papers which deal with public matters likely to be of interest or concern to members and to the general public. There is nothing to suggest that the House allows the publication of controversial material simply at the minister's request where it would be inappropriate for it to be covered by privilege. It is open to the Government department laying the paper to redact passages from it and, again, there is no suggestion that the FCO behaved irresponsibly in this regard. In the present case, the Report was published in redacted form with substantial passages provided by the Inquiry to the FCO blanked out. Of course, the Report itself anonymised the children and vulnerable adults involved but the redactions from the published version went further. The redactions were explained by the minister to the House as being appropriate because of police investigations into serious criminal offences.

70. We therefore conclude that the Report constitutes proceedings in Parliament for the purposes of article 9 of the Bill of Rights. It enjoys the protection of Parliamentary privilege and of the Parliamentary Papers Act 1840.

(g) The scope of the protection conferred by Article 9

71. The Speaker accepts that the conduct of the Inquiry prior to the publication of the Report is not covered by Parliamentary privilege even if it was always the intention that the result of the investigation would be published using the Unopposed Return procedure. The House of Commons does not assert any privilege in relation to the preparation of the report. We agree, and therefore find that the pleaded Defence of the FCO goes too far in asserting that any claim seeking to impeach the procedure pursuant to which the Report's findings were reached must fail. Privilege could not therefore have been relied on to prevent, for example, a judicial review challenge by the claimants to a decision taken during the course of the Inquiry as to what procedure to adopt. Such judicial review challenges are possible in respect of inquiries established under the Tribunals of Inquiry (Evidence) Act 1921 and the Inquiries Act 2005. The Bloody Sunday Inquiry was established under the former Act. Procedural decisions were repeatedly challenged; e.g. *R (A) v Lord Saville & others* [2000] 1 WLR 1855. The inquiry chaired by Lord Justice Leveson into the culture, practices and ethics of the press was challenged in judicial review proceedings: (*R (Associated Newspapers Ltd) v. The Rt Hon Lord Justice Leveson* [2012] EWHC 57 (Admin).

72. We respectfully agree with the conclusion of Master McCloud at para 113 of the Main Judgment that privilege does not extend to the decision to set up the Inquiry or the decisions of the Panel about how to conduct the Inquiry. The consequences of that for the claimants' causes of action are considered below.

73. In our judgment, Ms Wass is entitled to rely on Parliamentary privilege to preclude any claim against her to the same extent as the Foreign Secretary. Parliamentary privilege operates not only where it is the Member of Parliament who is defending himself against an action for defamation arising from privileged material. In *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 a television programme transmitted by the defendant alleged that a Minister in the New Zealand Government had secretly conspired to promote sales of assets to businessmen on unduly favourable terms. The minister brought an action for defamation and the defendant sought to rely on certain statements made by the minister in the House of Representatives to establish the defence of justification. The Privy Council rejected the submission that that article 9

only applies to cases in which a court is being asked to expose the maker of the statement to legal liability. They held that the defendants were precluded by privilege from relying on the minister's statements. Lord Browne-Wilkinson (giving the opinion of the Board) said at p. 337A: (emphasis added)

> "For these reasons (which are in substance those of the courts below) their Lordships are of the view that parties to litigation, **by whomsoever commenced**, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading."

74. That principle was applied by Stanley Burnton J in *Office of Government Commerce v Information Commissioner (AG Intervening)* [2008] EWHC 774 (Admin), [2010] QB 98 where he held that the Information Commissioner had been right to refuse to treat a Parliamentary Question as a valid request under the Freedom of Information Act 2000. It could not be a valid request because a court or tribunal would be precluded, in any subsequent proceedings between the person making the request and the Government department concerned, from adjudicating on whether the Parliamentary answer was adequate or accurate. The privilege thus prevents questioning or impeaching beyond the context of proceedings seeking to impose liability on a Member of Parliament.

75. In the present case the claimants do not plead any publication or repetition of the criticisms made of them other than those set out in the Report itself. The allegation of inaccuracies and untruths are levelled at the content of the Report. The only passages cited in the Particulars of Claim are extracts from the Report and the disclosure of information complained of is disclosure in the Report. If material that is covered by Parliamentary privilege is repeated in another forum which is not protected either by the 1840 Act or the qualified privilege attaching to bona fide reporting of Parliamentary proceedings, then a challenge to that repetition will not infringe article 9 even if the effect of that challenge would be to show, by a side wind, that what was said in Parliament was untrue: see *Buchanan v Jennings* [2005] 1 AC 115, *per* Lord Bingham at para. 13. The same issues of wrongdoing that are addressed in a report laid before Parliament may later form the subject of disciplinary, criminal or civil proceedings against people criticised in the Report. Such people are entitled to defend themselves in those proceedings even though their success would cast doubt on the findings of the Report.

76. In our judgment, the effect of the absolute privilege conferred on the Report by article 9 is that neither party in these proceedings can rely on the Report to support or rebut the claims for damages put forward by the claimants.

ISSUE 2: THE EFFECT OF PRIVILEGE ON THE CLAIMS

77. We have concluded that the content of the Report is protected by Parliamentary privilege. The respondents submit that there is nothing left in the pleaded claims and that they should have been struck out by Master McCloud. The claimants submit that she was right to conclude that an alternative claim survives, based on the proposition that if the procedure adopted by the Inquiry had been different there is a substantial

chance that the conclusions in the Report would also have been different, and that therefore there is a claim which avoids the protection of privilege.

78. We accept that a claim based on the procedure adopted by the Inquiry would not necessarily fail because of the privilege that protects the content and conclusions of the Report itself. That said, on the facts of this case, and having regard to the claimants' respective pleadings, we conclude that there is no arguable alternative claim.

79. The claimants' pleaded claims are very similar. We set out the detail from Mr Warsama's Particulars of Claim:

i) Paras 1 to 3 constitute an introductory section.

ii) Paras 4 to 11 comprise a section entitled 'Factual Background'. Para. 11 (which is mirrored in style, if not substance, by para. 14 of Ms Gannon's pleading) sets out in detail the unflattering evidence about Mr Warsama recorded in the Report. This consists of 12 extracts from the evidence of nine witnesses who gave evidence to the Inquiry, each of whom was critical of him. It also notes the conclusion at para. 6.48 of the Report that Mr Warsama was 'incompetent, lazy and divisive'.

iii) Paras 12 to 16 set out article 8 ECHR and extracts from the case law. Para. 13 emphasises that excluding a person from employment in his chosen field can have serious repercussions on the enjoyment of his private life. Para. 14 refers to the procedural rights which it is said arise implicitly from article 8.

iv) Para. 17 sets out the alleged breaches of article 8. The master concluded that only sub-paragraphs 17(b) and 17(f) (highlighted below) survived the finding of privilege but, in deference to the submissions of Mr Bowen, we set out all those with a specific reference to 'procedure' as follows:

> "17 **(b) The conduct and procedure of the Inquiry and the publication of the report concerns allegations about the Claimant's professional performance while in St Helena which has had a significant impact on his professional career and his ability to continue employment in his chosen professions.**
>
> (c) The procedures and framework of the Inquiry which preceded the publication of the criticisms and the publication of the Inquiry report amount to an interference with the Claimant's right to respect for private life which cannot be justified under Article 8(2) …
>
> (e) Even if (which is denied) a legitimate aim *is* established, then the Defendants would need to show that the procedure adopted by the Inquiry (in circumstances where the performance of the Claimant was not included in the terms of reference) and the publication of criticism about our client was proportionate.

> (f) The procedure adopted by the Inquiry and the disclosure was well beyond the realms of the proportionate and was unnecessary, in particular given the Inquiry's terms of reference. There is no evidence that, in deciding what to publish or investigate, the Inquiry has balanced the rights of the Claimant against the rights of those it says it is trying to protect. If it had done so, the trenchant criticisms of the Claimant would not have been published, and sufficient safeguards in the Inquiry procedure would have been included.
>
> (g) **The Claimant takes further issue with the procedure adopted by the Inquiry before disclosure was made. Although the letter sent in September 2015 refers briefly to the nature of the criticisms to be made, there are no specific details or evidence to which the Claimant can respond, and no indication that the Claimant's detailed statement has been taken into account at all prior to the publication of the Inquiry report (other than the bald assertion that it has been)…**
>
> (k) The Inquiry, having been minded to include such trenchant (but unnecessary) criticism of the Claimant in the report, should have provided full information about those criticisms to have allowed the Claimant to express his views as to why the criticisms should not be included, and to take these into account before publication took place: See Lord Neuberger in the *L* case at paragraph 82…"

v) Paras 18 to 20 address the Parliamentary Papers Act 1840.

vi) Paras 21 to 25 deal with loss and damage. Paras 21 and 22 emphasise the direct link between the alleged breaches of article 8 and the alleged exclusion of Mr Warsama from his chosen profession:

> "21 The breaches of Article 8 as set out above have had the effect of excluding the Claimant from his chosen profession, leading directly to the loss of employment, withdrawal of offers of employment and rejection of job applications. The devastating effects on the Claimant's future employment prospects would have been obvious from the breaches of Article 8 set out above.
>
> 22 There has been a significant impact on both the Claimant's ability to secure and retain a position, as well as on his personal and financial situation. When the Claimant left St Helena he secured employment through an agency, and held several successful posts with very good references stating his depth of knowledge to how hard he worked. At the time the Inquiry report was published the Claimant was employed by Norfolk County Council, but was asked to leave on 21 January 2016 as

> a result of the Inquiry Report. The Claimant has not been able to secure employment since."

Paras 24 to 26 of Ms Gannon's Particulars of Claim are in materially similar terms.

80. The master was initially not impressed by the argument that the pleadings set out an alternative claim based on procedure that did not seek to challenge the conclusions of the Report. At para 158 of the Main Judgment, she noted the relatively low threshold for a strike out and accepted that she was taking "an admittedly generous view of the pleading". She added that the claims in respect of procedure "would need to be pleaded in a manner which spells out the nature of those aspects clearly so as to distinguish them from aspects which require the Court to decide on the merits of the Report". In making that observation the master recognised that the Particulars of Claim as they stood did not set out the alternative claim.

81. She repeated her criticism of the pleadings at paras. 25 to 26 of the Supplementary Judgment. Yet because of the references to "procedure" in paragraphs 17(b) and (f) above, she concluded that there was enough of a claim alleging harm caused "along the way" (her words, at para. 158 of the Main Judgment). It was for that reason that she did not strike out these proceedings.

82. We respectfully agree with the master's criticisms of the claimants' pleaded claims. They were pleaded at the end of the limitation period of one year for ECHR claims and are now themselves three years old. At no stage, either before or after the first or second hearings before the master, has there been any application to amend. Following her clear finding in June 2018 that the Particulars of Claim required amendment, the claimants' solicitors indicated in correspondence that the claimants would do so, but that did not happen.

83. On a fair reading of the Particulars of Claim, the claim advanced is straightforward. The Inquiry did not take sufficient or any notice of the claimants' rights and did not give them a proper opportunity to respond to the evidence or the draft criticisms of them. As a result, the conclusions in the Report were unfairly critical of them with the consequence that they will never work again in their chosen profession (or at least not at the same level).

84. Such a claim puts the conclusions of the Report directly in issue. That is confirmed by para 11 of the claimants' skeleton argument prepared for this appeal, which states that "the consequences of the criticisms published in the Report has had a profound impact of their private and professional lives". In respectful disagreement with the master, we consider that such a claim is not open to the claimants because privilege attaches to those criticisms. It is inescapable that the claimants would deploy the Report in evidence to establish the benchmark against which they would attack its conclusions, just as surely if they commenced defamation proceedings.

85. That aim is illustrated by paras 1a and b of Mr Bowen's written reply on the alternative case, produced at the start of the second day of the appeal hearing:

> "1. We say that:

> a. On a loss of chance/opportunity approach we are not challenging the content of the report but arguing that had an Article 8-compliant process been followed there was a real chance that a more favourable outcome would have been achieved – **i.e. the conclusions would have been different.**
>
> b. **These different conclusions** would not have resulted in the professional damage suffered by these claimants – who have suffered the loss of an opportunity of a better outcome." (Emphasis supplied)

86. In our view, the claimants' acceptance that they want to argue for "different conclusions" demonstrates this fundamental difficulty. Mr Bowen submitted that this was conceptually different from questioning the actual conclusions of the Report, because those conclusions were based on the evidence and representations that were in fact made in the Inquiry, whilst the counterfactual representations and evidence would give rise to hypothetical conclusions that would be different. In our judgment, that is not a realistic distinction. The claimants would still be seeking to argue for "different conclusions" and, in so doing, would inevitably be calling into question the actual conclusions in the Report.

87. It is unreal to suppose that any of the adverse consequences alleged by the claimants regarding employment are the direct consequence of the process. The complaint is that the criticisms made in the Report damaged their reputations. Had the conclusions being favourable there would be no question of any complaint under article 8.

88. There are repeated references to the "procedure of the Inquiry" in paragraph 17 of the Warsama Particulars of Claim. With one exception, there are no particulars of any specific inadequacies. The exception is the allegation that the claimants should have been given full details either of the evidence which criticised them, or the draft conclusions of the Inquiry, or both. These lie at the heart of the allegations of procedural unfairness. That said, the purpose of the pleading is to explain the underlying factual basis which supports the conclusions of the report are unfair and wrong.

89. In addition, there is no pleaded claim for loss caused by the alleged procedural unfairness (as opposed to the content of the Report itself). In order to know the case they have to meet, the respondents (and the court) would need to know what further representations would have been made, what different conclusions would have been reached, and why it is said that those different conclusions would have meant that their prospects of future employment would have been improved. At this stage, we assume in the claimants' favour that in principle this can be done by way of a loss of a chance claim, but such a categorisation does not provide a magic wand that avoids the need for a proper pleading of causation. Such a claim needs to be pleaded like any other.

90. Furthermore, there is no sign of a free-standing claim founded on alleged procedural deficiencies which is not linked to the outcome of the Inquiry. It is not clear whether the claimants are mounting an article 8 claim which is entirely divorced from the Report. In other words, a theoretical claim which would be good whatever the Report had said. None is pleaded.

91. For these reasons, we consider that the Particulars of Claim do not support the claims now contended for and must be struck out.

92. Underlying many of Mr Bowen's submissions was a theme to the effect that, if the claims were struck out, the claimants would have been denied access to justice. We do not agree. If procedural concerns arise during an inquiry such as this, then the right course is for those concerns to be the subject of an application for judicial review. Such an application should be made promptly, so as to ensure that, if an inquiry is going off the rails procedurally, it can be righted by the timely intervention of the court. That has the additional advantage of resolving the problem before the conclusion of the inquiry itself. This recognises the reality that, absent such a judicial review application, once an inquiry of this kind has been concluded, it may realistically be too late to mount an effective challenge to its conclusions.

93. Our discussion of the issue concerning the consequences of Parliamentary privilege attaching to the Report has proceeded on the assumption that a failure to accord procedural fairness to a person affected by an inquiry might, without more, involve a violation of article 8 rights. It is unnecessary to decide that point.

94. We heard argument on whether an article 8 claim could proceed in this jurisdiction on a loss of chance basis as contended for by the claimants. The respondents rely upon the decision of the Supreme Court in *R (Sturnham) v. Parole Board and another* [2013] 2 AC 254 for the proposition that when considering awards of damages under section 8 of the HRA for breach of a right guaranteed by the ECHR "courts should resolve disputed issues of fact in the usual way, even if the European court, in similar circumstances would not do so": see Lord Reed, summary of conclusions, No. 5 at para. 13. Lord Reed gave a judgment with which Lord Neuberger of Abbotsbury, Lord Mance and Lord Kerr of Tonaghmore agreed. Lord Carnwath gave a concurring judgment. The conclusion was drawn from para. 39 which followed a discussion of the issues in para. 37, where Lord Reed said:

> "A second difference between the European court and a national court is that the European court does not normally undertake detailed fact-finding in relation to damages in the way which a national court of first instance would do, at least in jurisdictions such as those of the UK. As it observed in *Denizci v Cyprus* 2, Reports of Judgments and Decisions, 2001-V, p. 225, para 315, "the court is acutely aware of its own shortcomings as a first instance tribunal of fact". The court referred in that connection to problems of language, to an inevitable lack of detailed and direct familiarity with the local conditions, and to its inability to compel the attendance of witnesses (or, it might have added, to secure the production of evidence). In consequence, it is often dependent upon the information and arguments put before it by the parties. If they conflict, rather than resolving the conflict it may say that it declines to speculate, or it may award damages for a loss of opportunity rather than undertaking a more definite assessment of the harm suffered. If, on the other hand, the material placed before it by the parties enables it to proceed upon a more detailed basis, it will do so. That will be the case, in particular,

> where the relevant facts have been found by the national court. To the extent that domestic courts, applying their ordinary rules of evidence and procedure, are able to resolve disputed issues of fact in circumstances in which the European court would not, and are therefore able to proceed upon the basis of proven facts in situations in which the European court could not, their decisions in relation to the award of damages under section 8 of the 1998 Act may consequently have a different factual basis from that which the European court would have adopted."

95. At para. 82 Lord Reed said that Hooper LJ has been correct to adopt that approach and added, "a domestic court … should establish the facts of the case in the usual way, and apply the normal domestic principle that the claimant has to establish on the balance of probabilities that he has suffered loss."

96. Mr Sheldon submits that the claimants' contention that they can argue this claim on the basis of a loss of chance to achieve a better outcome is unsustainable in the face of *Sturnham.*

97. *Sturnham* was concerned with article 5 ECHR and whether delay in consideration of a serving prisoner's case by the Parole Board violated article 5.4. The Supreme Court decided that damages for extended detention should be awarded only where it was established on the balance of probabilities that a violation of article 5.4 had resulted in detention beyond the date on which he would otherwise have been released.

98. Mr Bowen submits that the ratio of *Sturnham* applies only to cases involving loss of liberty and that it should not be applied to other articles of the ECHR. He submits that it is inconsistent with dicta of Lord Brown of Eaton under Heywood in *Van Colle v. Chief Constable of Hertfordshire* [2009] 1 AC 225 at paras 138 and 139 and with *R (Greenfield) v. Secretary of State for the Home Department* [2005] 1 WLR 673.

99. Lord Brown's *obiter dictum* was in tentative terms: "under the Convention it appears sufficient generally to establish that he lost a substantial chance …". It was not part of the ratio of *Van Colle. Greenfield* was extensively discussed in Lord Reed's judgment in *Sturnham* and was applied by the Supreme Court. It is clear that Lord Reed's discussion of the approach to damages for breach of the ECHR was not confined to article 5 cases. His discussion concerned the award of damages under section 8 HRA generally.

100. In so far as the claimants seek to argue their claims on the basis of the lost chance of a better outcome, and thus a chance that they would not have suffered the loss of earnings claimed, on the authority of *Sturnham,* it is not open to them to do so.

ISSUE 3: THE STATUS OF MS WASS UNDER THE HRA

101. Ms Wass was one of the panel members conducting an inquiry on behalf of the Government. The question is whether the Inquiry, a collective description of the panel members, was a 'public authority' for the purpose of the HRA, and thus obliged to act compatibly with the ECHR rights of those affected by its actions. Section 6(3) provides:

> "(3) In this section "public authority" includes -
>
> (a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature,
>
> But does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
>
> (5) In relation to a particular act, a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private."

102. Mr Payne QC, for Ms Wass, accepts that if the Inquiry had been established under the Inquiries Act 2005 its members would have been a public authority for the purposes of the HRA. They would have been performing "functions of a public nature". He submits, however, that a combination of features points away from the conclusion that she (and her colleagues) were a public authority when conducting the Inquiry because its functions were not of a public nature. First, and in contradistinction to a statutory inquiry, she had no statutory powers. Secondly, she was paid her day rate as a barrister and undertook other professional work whilst conducting the Inquiry. Thirdly, she was not taking the place of government nor providing a public service. Fourthly, the Inquiry did not carry out its functions in public.

103. The question whether a function is one of a public nature is one that has raised some difficulty in connection with private organisations that perform functions which have a public aspect. That question was reviewed in *YL v. Birmingham City Council* [2007] UKHL 27, [2008] AC 95. The issue in that appeal was whether a care home, when providing accommodation and care to a resident pursuant to arrangements made with a local authority under sections 21 and 26 of the National Assistance Act 1948, was performing functions of a public nature for the purposes of section 6(3)(b) of the HRA. If so, in that respect was it a public authority obliged to act compatibly with Convention rights under section 6(1)? The House of Lords was divided but by a majority decided that the answer was no.

104. Earlier, in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v. Wallbank* [2003] UKHL 37, [2004] 1 AC 546, Lord Nicholls of Birkenhead had observed that:

> "6. The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights.
>
> 7. Conformably with this purpose, the phrase 'a public authority' in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression. It is in respect of organisations of this nature that the government is answerable under the European Convention

> on Human Rights. Hence, under the Human Rights Act a body of this nature is required to act compatibly with Convention rights in everything it does. The most obvious examples are government departments, local authorities, the police and the armed forces. Behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution: see the valuable article by Professor Dawn Oliver, 'The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act', [2000] PL 476."

At paras 11 and 12 he explained that there was no single test of universal application to determine whether a function was of a public nature. He indicated that public funding, the extent to which statutory powers were being exercised and whether the place of central government was being taken were factors.

105. The parties before us developed submissions by reference to criteria which had been discussed in the *Aston Cantlow* and *YL* cases and also *R (Weaver) v. London and Quadrant Housing Trust* [2010] 1 WLR 363. There Elias LJ considered the position of a housing association providing social housing. The issue was whether when terminating a tenancy, the housing association was constrained by the ECHR. These cases concerned bodies that were essentially private but nonetheless performed functions on behalf of local or central government or which had a public character.

106. In the *YL* case Lord Bingham of Cornhill drew together a number of factors that may be relevant when deciding the issue of whether someone (or a body) is a public authority for the purposes of the HRA. He explained that none is likely to be determinative on its own and the weight of different factors will vary from case to case. He cautioned against trying to formulate a general test applicable to all cases which may arise. The courts should decide on the facts of particular cases where the dividing line should be drawn. He identified factors which are likely to be relevant, as Lord Nicholls had done at para. 12 of his opinion in *Aston Cantlow.* He continued:

> "10. It will be relevant first of all to examine with some care the nature of the function in question. It is the nature of the function - public or private? - which is decisive under the section.
>
> 11. It is also relevant to consider the role and responsibility of the state in relation to the subject matter in question. In some fields the involvement of the state is long-standing and governmental in a strict sense: one might instance defence or the running of prisons. In other fields, such as sport or the arts, the involvement of the state is more recent and more remote. It is relevant to consider the nature and extent of the public interest in the function in question.
>
> 12. It will be relevant to consider the nature and extent of any statutory power or duty in relation to the function in question.

> This will throw light on the nature and extent of the state's concern and of the responsibility (if any) undertaken. Conversely, the absence of any statutory intervention will tend to indicate parliamentary recognition that the function in question is private and so an inappropriate subject for public regulation."

107. The additional factors he discussed in paras 13 and 14 have no direct bearing on the circumstances with which this appeal is concerned, namely the extent of state regulation of the function in question and whether the function is one for which the state is willing to pay (medical treatment, care etc). At para. 15 he identified as relevant the extent to which the function might violate a person's Convention rights and at para. 16 some features that would not be relevant. He concluded by saying:

> "17. It is necessary to stress that no summary of factors likely to be relevant or irrelevant can be comprehensive or exhaustive. The present question may arise in widely varying contexts and on widely varying facts. Other factors may then call for consideration."

108. Lord Bingham was in the minority in the result in *YL* but his discussion of the indicia which aid a decision on the public authority question was not controversial.

109. We have set out the circumstances in which the Inquiry came to be established in para 4, above. Its function was to investigate on behalf of Her Majesty's Government a matter of public concern about the safeguarding of children in the context of allegations of serious impropriety by public servants. It might have been established under the Inquiries Act 2005 but, as has been the case with other inquiries, was not clothed with statutory powers (another example of a non-statutory inquiry into matters of serious public concern was that established to investigate the convictions of the Guildford Four and the Maguire Family chaired by Sir John May (1990 Cmd 556 and 1994 Cmd 449)). The announcement of the Inquiry included an assurance from the Minister that all relevant papers would be made available to the Inquiry. Ms Wass's inquiry was funded by the FCO and was provided with a secretariat (solicitor and administrative support). Its establishment was announced in Parliament and its very detailed terms of reference were made available in the library of the House of Commons. Those terms of reference explained that the Panel would produce a public report of its findings. Its progress was marked by statements by Ministers in Parliament.

110. Whilst it is true that the concerns that led to this Inquiry being established could have been left to the police, at least in so far as they raised the spectre of criminal conduct, their broad nature was such that only government could initiate a comprehensive inquiry. That was a core governmental function. Ms Wass and her team were performing a function on behalf of the Government in the public interest to establish the truth about worrying allegations and make a public report. Given the nature of the inquiry and the likelihood that its report would include criticism of individuals, publication through Parliament would always have been the most likely option.

111. All of these factors point inexorably, in our view, to the conclusion that the Inquiry was performing a public and not private function and that Ms Wass and her

colleagues were a 'public authority' for the purposes of section 6 of the HRA. Whilst the Strasbourg Court has not had occasion to consider an argument that an independent inquiry established by the government of a State party to investigate a matter of public concern is not subject to the ECHR, we consider that such an argument is unsustainable.

Costs

112. The FCO and Ms Wass had a further ground of appeal, namely that the master was wrong to give the claimants all their costs because, although the claims were not struck out, the respondents won the main argument. In view of our conclusion that the claims must be struck out this ground of appeal becomes academic. The costs order made by the master will fall.

Conclusion

113. In the result we allow the appeal and dismiss the cross-appeal with the consequence that the claims are struck out.