

**INTERNATIONAL COURT OF JUSTICE**

**LEGAL CONSEQUENCES OF THE SEPARATION OF THE  
CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965  
(REQUEST BY THE UNITED NATIONS GENERAL  
ASSEMBLY FOR AN ADVISORY OPINION)**

**JUDGMENTS**

**THE UNITED KINGDOM OF GREAT BRITAIN AND  
NORTHERN IRELAND**

**15 FEBRUARY 2018**



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**TAB 1**

*Permal v The Ilois Trust Fund* Mauritius Law Reports [1984]

PERMAL  
v.  
THE ILOIS TRUST FUND

*Statutory Interpretation—Cause of Action—Public Right—Private Right—Locus standi.*

Following the dismemberment of Mauritian territory when the then administering power, the United Kingdom, excised the Chagos Archipelago from it, the Mauritians who were living there were either made to depart or else were removed from there by the British Authorities. An Agreement was eventually concluded between the two Governments for the payment of compensation to those Mauritians for the prejudice they had thereby suffered and the defendant Fund was set up by statute for the purpose of administering funds made available under the Agreement.

In a claim entered against the Ilois Trust Fund by a person describing himself as an *Ilois*, it was held that—

- (a) an Agreement between Mauritius and another state has, as such, no force of law in Mauritius except to the extent that its provisions are specifically given effect to by statute in Mauritius. However, where the Agreement is the basis of a particular statute and is referred to therein, it may properly be resorted to for purposes of interpretation in the event of an ambiguity;
- (b) whether a particular statute creates a public right which confers no cause of action on an individual or a private right which does or else creates both depends on the scope and purpose of the statute;
- (c) the Ilois Trust Fund Act did confer a cause of action on *Ilois* people individually against the Fund and the plaintiff was an *Ilois* who was entitled to claim from the Fund what the latter had granted to other *Ilois*.

*P. R. Cheong Leong*, for the plaintiff.

*D. Basset, Acting Principal Crown Counsel*, for the defendant.

The judgment of the court (Lallah, Ag. S.P.J.) was delivered on the 2nd May, 1984, as follows:—

In a statement of claim entered in April last year against the defendant which I will call the Trust Fund, the plaintiff claimed Rs 100,000 as compensation from the Trust Fund on the ground that—

- (a) soon after his birth in Agalega in the early thirties he went to Peros Banhos where he lived and worked until he was forcibly removed from there in 1968;
- (b) by reason of the adoption of residence and of his domicile in Peros Banhos, he became a member of the Ilois Community and, by reason of his displacement in 1968, he became entitled to be compensated by the Trust Fund;
- (c) the Trust Fund had refused to award any compensation to him.

It is to be noted that the statement of claim did not explain why the Trust Fund was liable to compensate displaced members of the Ilois Community. This initial deficiency seems to have put the advisers of the Trust Fund in a quandary as to how to meet the case. They initially pleaded that they "had no knowledge" of the status of the plaintiff and simply denied that the plaintiff was entitled to compensation. However, a few days before trial, they amended their statement of defence to include a new defence *in limine litis* to the effect that the statement of claim disclosed no cause of action, since the Trust Fund was under no obligation to pay any compensation to the plaintiff.

The amendment provoked the advisers of the plaintiff to look closer at the statement of claim and, in the result, they moved to amend it by averring in substance (a) that the Trust Fund had, in pursuance of an Agreement between the Governments of Mauritius and the United Kingdom of Great Britain and Northern Ireland received some £4 million and land to the value of £1 million for the promotion of the economic and social welfare of the Ilois and the Ilois Community, including the making of cash grants, as a result of their removal or displacement from the Chagos Archipelago or for any other reason mentioned in the agreement, and (b) that the Trust Fund had made cash grants to other members of the Ilois Community.

Counsel for the Trust Fund objected to the motion for amendment on the ground that, first, part of the proposed amendment was factually incorrect; secondly, it would not be possible, for this reason, to argue the point taken *in limine litis* and, lastly, the proposed amendment could not be said to have been the result of the amended statement of defence introducing the point *in limine litis*. I did not retain the objection to the proposed amendment which I thereupon granted, indicating that I would give my reasons in my final judgment. I also indicated that Counsel for the Trust Fund would be given a postponement, if he so wished, in order to deal with the case in the light of the amendment. As it turned out, Counsel preferred to carry on with the case and made consequential amendments to the statement of defence, denying the substance of the amendments save and except that the Trust Fund had received £4 million and had indeed made certain cash grants in pursuance of section 4(b) and 6 of the Ilois Trust Fund Act 1982.

As regards the reasons which prompted me to allow the motion for the amendment, I need only say that it seemed right to do so with a view to enabling the Court to determine the real issue that separates the parties. To this issue, I now turn by first examining what has been established in evidence.

The evidence consists of the testimony of the plaintiff alone, together with certain documents like civil status acts and the Agreement between the Mauritian and the United Kingdom Governments. The Trust Fund adduced no evidence. In the result, the evidence of the plaintiff has remained uncontradicted on the facts that he has deposed to.

It has been established that—

- (a) the plaintiff was born in Agalega in 1933 and, shortly thereafter, went with his parents to Peros Banhos where he grew up got married, settled down, built a home, raised a family of ten children, of whom some are still alive and worked there all his life until, like other people living in the Chagos Archipelago, he was forcibly removed from there by the British Authorities and brought to the island of Mauritius; but for his expulsion, he would have lived there till the end of his days.
- (b) in 1965, while Mauritius was still a British colony and shortly before it became a sovereign state, the United Kingdom legislatively (vide the Order in Council made on 8th November 1965— S.I. 1965 No. 1920) dismembered the territory of Mauritius and that of the Seychelles, then also still a colony, by removing the Chagos Archipelago (Diego Garcia, Egmont or Six Islands, Peros Banhos, Salomon Islands, Trois Frères, Danger Island and Eagle Island) from the territory of Mauritius and other islands from the territory of the Seychelles. The territories so removed were constituted into a new colony under the name of the British Indian Ocean Territories (BIOT) and full legislative and executive powers were vested in a Commissioner for the BIOT. No provisions were made in the Order in Council with regard to the nationality of the persons living in the territories so removed. Nor do I have any evidence that the Commissioner of the BIOT made any provisions in this regard. With the result that people who either were born in the Chagos Archipelago or else, having been born in the then colony of Mauritius and its dependencies and lesser dependencies, had acquired a permanent home in the Chagos Archipelago still retained their original status and formally became Mauritian citizens in pursuance of section 20(1) and (4) of our Constitution;
- (c) on the 7th July 1982, the Governments of Mauritius and the United Kingdom “desiring to settle certain problems which have arisen concerning the Ilois who went to Mauritius on their departure or removal from the Chagos Archipelago after November 1965”, entered into an Agreement the full text of which is appended to this judgment and the main features of which were as follows—
  - (i) the U.K. Government would make available to the Government of Mauritius, without any admission of liability, a total sum of £4 million for and on behalf of the Ilois and the Ilois Community in Mauritius;
  - (ii) that sum would be in settlement of all claims of the Ilois against the British Authorities arising out of the closure of all plantations in the Chagos Archipelago, the departure or removal of all those living or working there, their transfer to and resettlement in Mauritius and their preclusion from there returning or any attendant or consequential acts of the British Authorities;
  - (iii) the Government of Mauritius would procure for the United Kingdom Government a signed renunciation of his claim from every member of the Ilois Community and, if any claim were successfully made against the United Kingdom Government by an Ilois, the Trust Fund which the Government of Mauritius undertook to establish by Act of Parliament to administer the money would indemnify the United Kingdom Government failing which the Government of Mauritius itself would do so;
  - (iv) the Trust Fund would disburse the money received under the Agreement expeditiously and solely in promoting the economic and social welfare of the Ilois and the Ilois Community in Mauritius;
- (d) some three weeks after the signature of the Agreement, the Trust Fund envisaged in the Agreement was in fact established by the Parliament of Mauritius in enacting the Ilois Trust Fund Act 1982 (Act No. 6 of 1982);



(e) the Trust Fund has since, in accordance with sections 4(b) and 6 of the Act and for the purpose of promoting the economic and social welfare of Ilois and the Ilois Community, made a grant of Rs 74,000 to other displaced members of the Ilois Community, presumably for the purposes of their re-settlement; but the Trust Fund has not done so in the case of the plaintiff.

In order to succeed the plaintiff has to show, first, that he is an Ilois to whom the Act applies and, secondly, that the Trust Fund has an obligation to make a grant to him similar to grants made to other Ilois.

Is the plaintiff such an Ilois? The Act most unfortunately does not define an Ilois but simply assumes that he exists. However, the Agreement entered into between the Governments of Mauritius and the United Kingdom is defined in section 2 and is specifically referred to in the provisions of section 4(a) and (d) which (a) empower the Trust Fund to receive the money payable to the Government of Mauritius under the Agreement so as to apply it for the promotion of the economic and social welfare of the Ilois and their community and (b) impose upon the Trust Fund an obligation to indemnify the United Kingdom Government as envisaged in the Agreement. Although the Agreement as such has the force of law in Mauritius only to the extent that its provisions are specifically given effect to in the Act, nevertheless it is legitimate to resort to it for purposes of interpretation. And the Agreement does make specific provisions regarding who among the people who have been described as Ilois would be the beneficiaries of the sum paid under the Agreement. It thus appears from the terms of the second preambular paragraph of the Agreement, in conjunction with its Articles 1 and 2(a), that the Ilois who were envisaged to obtain the benefit of the Agreement are solely those persons who (a) had been living or working in the Chagos Archipelago and (b) had, after November 1965 and as a result of the acts of the British Authorities under the BIOT Order in Council of 1965, gone to Mauritius on their departure or removal from the Chagos Archipelago. The plaintiff clearly satisfies those two requirements both by reason of having, though born elsewhere in Mauritian territory, lived all his life in the Archipelago or worked there and of having been removed from his permanent home by the British Authorities in 1968 and sent to Mauritius.

I must now approach the question whether the Trust Fund has a legal obligation to make a grant by way of compensation to the plaintiff as an Ilois. Counsel for the Trust Fund submitted that the plaintiff had no *locus standi* in these proceedings; that the conferment of a right on a person against an entity assumes the creation of a correlative obligation upon that entity to give effect to that right; that no such right or obligation was specifically created in the Act; that the statutory duties or obligations imposed upon the Trust Fund under the Act were of a public nature and were, for this reason, not enforceable by an individual Ilois; that the Act had, at best, conferred upon the Trust Fund a discretion to make grants as best it chose; and that the recourse of the plaintiff possibly lay against the United Kingdom Government but not against the Trust Fund. Counsel referred to a number of English cases in support of his argument and, before we examine them, it is best to dispel some confusion which, it would appear, has crept into the arguments of counsel, between the concept of *locus standi*, which is essentially a procedural question, and that of a cause of action, a substantive question.

First, there is a distinction between, on the one hand, an action for damages or other form of compensation arising from a breach of contract, from a delict or tort, or else from the breach or non-performance of a statutory duty and, on the other hand, a declaratory action or other discretionary relief deriving from the prerogative jurisdiction of the Courts and arising out of a statutory breach or non-performance. It is in the latter kind of action that the concept of *locus standi* normally arises. Admittedly, a declaratory action is now open to an individual, irrespective of whether or not he possesses a subsisting cause of action or a right to some other relief as well, provided that he has sufficient *locus standi*. In this regard the new Order 53 [Rules 1(i) and 2] enables an application to cover all the remedies

of certiorari, mandamus, prohibition, a declaration and an injunction. The requirement for *locus standi* in all these remedies is that the applicant must have "a sufficient interest in the matter to which the application relates" [Rule 3(7)]. It would not, therefore, be correct to equate *locus standi* with a right to sue for damages (Vide, in this connection, De Smith Judicial Review of Administrative Action, note 27 on page 515).

Secondly, a declaratory or other action where a prerogative and discretionary remedy is being sought from the Courts would not lie, in my understanding, at the suit of an individual where the breach of duty complained of is, in its essence and its effects, a public wrong which is sanctioned by a criminal offence but which does not also create a civil right on behalf of the individual or otherwise adversely affect his particular interests. No *actio popularis* would in these circumstances lie, except at the suit of public authorities who have statutory power to act or else at the suit of the Attorney General acting *ex-officio*, as the representative of the public interest, or *ex relatione*, on the facts "related" to him by an individual. The case of *Gouriet v. The Union of Post Office Workers* 1978 AC 435 belongs to this category of cases. In that case, it will be recalled, an individual was seeking various orders from the Court with the object of preventing the Union of Post Office Workers and the postmen themselves from committing a breach of the criminal law, respectively by instructing the postmen to "black" South African mail and by the postmen giving effect to those instructions, in response to a call from the International Confederation of Free Trade Unions to its member unions for protest action against the South African regime's policy of "apartheid". The House of Lords held that, save in so far as a statute conferred upon particular Authorities a limited power to do so, only the Attorney General, so says the head-note to the case, could sue on behalf of the public for the purpose of preventing public wrongs and that a private individual could not do so on behalf of the public, though he might be able to do so if he would sustain injury as a result of a public wrong, for the Courts had no jurisdiction to entertain such claims by a private individual who had not suffered and would not suffer damage.

The present case is not a declaratory action. The question of *locus standi* does not properly arise. The question which does arise is whether the statute creating the Trust Fund imposes a specific obligation on the Trust Fund vis-a-vis not merely the public but a specific class of persons of which the plaintiff forms part and in respect of which obligation the plaintiff has a correlative right which is enforceable. Counsel referred, in particular, to three cases where a statute imposed a specific obligation the breach of which was sanctioned by a criminal offence and where it was held that the Statute did not intend to confer any specific right on individuals.

The first case is that of *Cutler v. Wandsworth Stadium Ltd.* 1949 A.C. 398. That case was a declaratory action where the question of *locus standi* did not arise, for the plaintiff was seeking the declaration of a personal right. The principles governing the creation of obligations and rights by a statute were examined and pronounced upon by the House of Lords. The case involved the interpretation of the Betting and Lotteries Act of 1934. That Act provided for the operation of a totalisator on dog racing tracks whereas previously betting on such tracks could be legally carried on by the public with bookmakers only. The appellant was a bookmaker. Section 11(2)(b) of the Act imposed an obligation on the occupier of a licensed track to ensure that, so long as a totalisator was at any time being operated on the track, there was available for bookmakers space where they could carry on bookmaking. That obligation was sanctioned by a criminal offence. It was held that the obligation could only be enforced by criminal proceedings in respect of the offence specifically created by the Act on the ground that, far from creating a private right in favour of bookmakers, who would no doubt also benefit from the performance of the obligation, the real purpose of this provision was to benefit the general public and that the breach of the provision was a public and not a private wrong. The result was that an individual bookmaker had no cause of action in this regard.

The considerations upon which Lord Simonds (who recalled the pronouncements of Lord Tenterden C.J. in *Doe v. Bridges*, of the Earl of Halsbury L. C. in *Pasmore v. Oswald Twistle* U. D. C. 1898 AC 387, and of Lord Kinnear in *Black v. Fife Coal Co. Ltd.* 1912 AC 149) relied so to construct the Act may be summed up thus: there are no rules by reference to which the question whether a right is created, irrespective of the existence of a criminal sanction, can be infallibly answered. The only rule which in all the circumstances is valid is that the answer must depend upon the consideration of the whole statute and the circumstances in which it was enacted. If a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. But where the performance of a statutory obligation is enforced by the creation of a criminal offence or penalty, the general rule is that it cannot be enforced in any other manner. This general rule is, however, subject to the reservation that, even when a penalty is specifically provided by a statute, that would not be the only remedy where the scope and purpose of the statute indicate that the provisions were intended for the benefit of a particular category of persons. In which case, those persons have a right of action arising from the breach of those provisions. An instance would be provisions compelling mine owners to take safety measures with regard to mine workers and which have been construed as conferring on this category of persons a right of action in respect of injuries caused by the non-compliance of the mine owners with those provisions (Vide the cases cited by Lord Simonds at page 407 and 408 in *Cutler* (supra)). As pointed out by counsel, there are other cases where the statutory duties created do not necessarily confer on persons injured a right of action which they would not otherwise have had. Opinions in this sense were expressed *obiter*, admittedly, in *Solomons v. Gertzenstein Ltd. & Ors.* 1954 2 Q.B. 243. But an instance of the application of this principle is *Mc Call v. Abelesz & anor* 1976 1 QB 585.

In the light of the principles I have attempted to describe, it is now appropriate to examine the scope and purpose of the Ilois Trust Fund Act 1982 as a whole and the circumstances which led to its enactment, of course, in the context of the facts which have been established in evidence and which I have set out in the 7th paragraph of this judgment.

First, when in November 1965, the United Kingdom dismembered part of what was then Mauritian territory under colonial administration and included it into the newly created colony of the BIOT, it did not also make provision for a new nationality with regard to the people who lived there and who then belonged to the colony of Mauritius. The land and the people became juridically separate. History did not repeat itself. Unlike the case when the islands of the Seychelles were excised from the then colony of Mauritius in 1903 and when the people who lived there did not retain their status as still belonging to Mauritius, the people who lived in the Chagos retained their status of belonging to the colony of Mauritius. But I must assume that those people still lived under the rule of law protecting their freedom of residence in the land of their birth or where they had settled, the integrity of their person, their family life, work and property among other rights, and that the removal of those people after November 1965 by the British Authorities entitled them to a right of action in this regard either against the Government of the United Kingdom or the United Kingdom Administration in its new possession of the Chagos Archipelago or any of its servants or agents, depending on which authority was responsible for the removal. Incidentally, Article 3 of the Mauritius/United Kingdom Agreement of July 1982 must have been designed to ensure the discharge of all these juridical entities of their liability arising from the removal of those people.

Secondly, the Government of Mauritius, whether before or after Mauritius achieved its sovereignty, must have considered itself still responsible for the fate of those people, by reason of their belonging to Mauritius, and must have sought reparation for the wrong done



to them as is evidenced by the Agreement of July 1982 and its implementation by the Ilois Trust Fund Act of 1982 enacted by the Parliament of Mauritius. The Agreement itself does not take away or extinguish any right of action that those people had against the British Authorities as a result of their removal or expulsion. Nor did it, on the other hand, record any admission of liability on the part of the United Kingdom Authorities. What the Agreement did provide for, however, was payment in anticipation and in full settlement of all claims that might be made by those people against the United Kingdom Authorities. The payment was designed to be administered by Mauritius through the Trust Fund which the Government of Mauritius undertook to set up and, if any claims were made by those people against the British Authorities, the Trust Fund, and failing it, the Government of Mauritius would indemnify the United Kingdom Government. The undoubted purpose of the Agreement, as is abundantly clear from its terms, was to provide the means of an amicable settlement of claims by those people and thus conferred on those people a remedy obtainable in Mauritius as an alternative to their right of action against the United Kingdom Authorities which itself would have been cognisable by the Courts of the BIOT or else by the Courts of the United Kingdom.

Thirdly, further evidence of this undoubted purpose is to be found in (a) Article 7(1) of the Agreement which requires that the funds made available by the United Kingdom should be disbursed not only for those people as a collectivity but also for them individually and (b) Article 4 of the Agreement which requires the Government of Mauritius to use its best endeavours to procure from those people individually a renunciation of their claims against the United Kingdom Authorities.

Fourthly, while it remains true that the Agreement by itself does not have the force of law, because our Constitution has conferred the power to make laws on Parliament and not on the Executive which is the organ of the State which has power to enter into these kinds of agreements, nevertheless specific provisions of an agreement, treaty or convention do have the force of law in the kind of legal system that we have to the extent that they are given effect to in an Act of Parliament or other enactment. And the provisions of section 4(c) and (d) the Ilois Trust Fund Act do indicate in no uncertain terms that the Trust Fund has as its object, first, to use the money obtained under the Agreement for the welfare of "the Ilois and the Ilois Community" and, secondly, to indemnify the Government of the United Kingdom in respect of claims by members of the Ilois community. In addition, section 6(2)(a) of the Act does empower the Trust Fund to make cash grants.

I conclude, therefore, that the scope and purpose of the Act in all the circumstances was to benefit members of the Ilois Community both individually and as a collectivity and that any individual Ilois does have a cause of action under the Act in Mauritius so as to avail himself of the remedy there provided as a statutory alternative to any other cause of action in the United Kingdom or the BIOT against the United Kingdom Authorities that he might also possess. This statutory cause of action is without prejudice, and additional, to the power of the Attorney-General to seek orders from the Courts to compel the Trust Fund to perform its duties, if only for the fact that the Government of Mauritius did undertake certain obligations to indemnify the United Kingdom in the event of successful claims by Ilois against the United Kingdom if the Trust Fund were itself unable to do so.

The question, however, still arises as to what kind of cause of action has the Act conferred on members of the Ilois community. Is it a cause of action which enables them to seek a prerogative order from the Courts compelling the Trust Fund to carry out its duties under the Act in accordance with the discretion conferred upon the Trust Fund under section 6 of the Act? And section 6 reads as follows—

6. (1) The Board may do all such things as appear requisite and advantageous in furtherance of the objects of the Fund.

(2) Without prejudice to the generality of subsection (1) the Board may—

(a) make cash grants; and

(b) allot portion of land either absolutely or on such conditions as it thinks fit to impose.



Or, rather, is it a cause of action which enables them to seek performance of those duties in a particular way and the exercise of the Trust Fund's discretion in a particular way, that is to say, by the payment of a particular sum of money? The answer to these two questions is to be found in the evidence that I have heard.

The Trust Fund adduced no evidence. But I have it from the plaintiff that other members of the Ilois community have received a cash grant consisting of Rs 54,000 and a further sum of Rs 20,000 representing the value of land on which to build a house. This evidence has remained uncontradicted. I must take it, therefore, that the Trust Fund has decided to exercise the discretion it undoubtedly has under section 6, by the making of a grant of Rs 74,000 to members of the Ilois community individually. It has not been suggested by the Trust Fund that there was any reason why, in the case of the plaintiff, its discretion should properly be exercised in a different way. A mere decision not to exercise the discretion at all is not a sufficient answer. I hold, therefore, that the plaintiff is entitled to judgment in the sum of Rs 74,000. With costs.

I ought to observe that both counsel canvassed an alternative issue as to whether the plaintiff might or might not have had a cause of action based on a "stipulation pour autrui" or a "mandat" on the strength of the Agreement and of the Act. Given the conclusions I have reached on the statutory cause of action conferred upon the plaintiff by the Act, I have not thought it expedient to pronounce on the submissions of both counsel on the alternative issue.

*Attorneys:*

*E. J. Chang Kye*, for the plaintiff.

*Senior Crown Attorney*, for the defendant.

Record No. 28488.

# AGREEMENT BETWEEN

THE GOVERNMENT OF MAURITIUS

AND

THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT  
BRITAIN AND NORTHERN IRELAND

The Government of Mauritius and the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as the Government of the United Kingdom),

Desiring to settle certain problems which have arisen concerning the Ilois who went to Mauritius on their departure or removal from the Chagos Archipelago after November 1965 (hereinafter referred to as "the Ilois");

Wishing to assist with the resettlement of the Ilois in Mauritius as viable members of the community;

Noting that the Government of Mauritius has undertaken to the Ilois to vest absolutely in the Board of Trustees established under Article 7 of this Agreement, and within one year from the date of the entry into force of this Agreement, land to the value of £1 million as at 31 March 1982, for the benefit of the Ilois and the Ilois community in Mauritius;

Have agreed as follows:—

#### ARTICLE 1

The Government of the United Kingdom shall *ex gratia* with no admission of liability pay to the Government of Mauritius for and on behalf of the Ilois and the Ilois community in Mauritius in accordance with Article 7 of this Agreement the sum of £4 million which, taken together with the payment of £650,000 already made to the Government of Mauritius, shall be in full and final settlement of all claims whatsoever of the kind referred to in Article 2 of this Agreement against the Government of the United Kingdom by or on behalf of the Ilois.

#### ARTICLE 2

The claims referred to in Article 1 of this Agreement are solely claims by or on behalf of the Ilois arising out of:

(a) all acts, matters and things done by or pursuant to the British Indian Ocean Territory Order 1965, including the closure of the plantations in the Chagos Archipelago, the departure or removal of those living or working there, the termination of their contracts, their transfer to and resettlement in Mauritius and their preclusion from returning to the Chagos Archipelago (hereinafter referred to as 'the events'); and

(b) any incidents, facts or situations, whether past, present or future, occurring in the course of the events or arising out of the consequences of the events.

#### ARTICLE 3

The reference in Article 1 of this Agreement to claim against the Government of the United Kingdom includes claims against the Crown in right of the United Kingdom and the Crown in right of any British possession, together with claims against the servants, agents and contractors of the Government of the United Kingdom.

#### ARTICLE 4

The Government of Mauritius shall use its best endeavours to procure from each member of the Ilois community in Mauritius a signed renunciation of the claims referred to in Article 2 of this Agreement, and shall hold such renunciations of claims at the disposal of the Government of the United Kingdom.

#### ARTICLE 5

(1) Should any claim against the Government of the United Kingdom (or other defendant referred to in Article 3 of this Agreement) be advanced or maintained by or on behalf of any of the Ilois notwithstanding the provisions of Article 1 of this Agreement, the Government of the United Kingdom (or other defendant as aforesaid) shall be indemnified out of the Trust Fund established pursuant to Article 6 of this Agreement against all loss, costs, damages or expenses which the Government of the United Kingdom (or other defendant as aforesaid) may reasonably incur or be called upon to pay as a result of any such claim. For this purpose the Board of Trustees shall retain the sum of £250,000 in the Trust Fund until 31 December 1985 or until any claim presented before that date is concluded, whichever is the later. If any claim of the kind referred to in this Article is advanced, whether before or after 31 December 1985, and the Trust Fund does not have adequate funds to meet the indemnity provided in this Article, the Government of Mauritius shall, if the claim is successful, indemnify the Government of the United Kingdom as aforesaid.

(2) Notwithstanding the provisions of paragraph (1) of this Article the Government of the United Kingdom may authorise the Board of Trustees to release all or part of the retained sum of £250,000 before the date specified if the Government of the United Kingdom is satisfied with the adequacy of the renunciations of claims procured pursuant to Article 4 of this Agreement.

## ARTICLE 6

The sum to be paid to the Government of Mauritius in accordance with the provisions of Article 1 of this Agreement shall immediately upon payment be paid by the Government of Mauritius into a Trust Fund to be established by Act of Parliament as soon as possible by the Government of Mauritius.

## ARTICLE 7

- (1) The Trust Fund referred to in Article 6 of this Agreement shall have the object of ensuring that the payments of capital (namely £4 million), and any income arising from the investment thereof, shall be disbursed expeditiously and solely in promoting the social and economic welfare of the Ilois and the Ilois community in Mauritius, and the Government of Mauritius shall ensure that such capital and income are devoted solely to that purpose.
- (2) Full powers of administration and management of the Trust Fund shall be vested in a Board of Trustees, which shall be composed of representatives of the Government of Mauritius and of the Ilois in equal numbers and an independent chairman, the first members of the Board of Trustees to be named in the Act of Parliament. The Board of Trustees shall as soon as possible after the end of each year prepare and submit to the Government of Mauritius an annual report on the operation of the Fund, a copy of which shall immediately be passed by that Government to the Government of the United Kingdom.

## ARTICLE 8

This Agreement shall enter into force on the twenty eighth day after the date on which the two Governments have informed each other that the necessary internal procedures, including the enactment of the Act of Parliament and the establishment of the Board of Trustees pursuant to Articles 6 and 7 of this Agreement, have been completed.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate in Port Louis this 7th day of July 1982.

For the Government of Mauritius

J. C. DE LESTRAC  
*Minister of External Affairs,  
Tourism, & Emigration*

For the Government of the United Kingdom of Great Britain and Northern Ireland.

J. N. ALLAN  
*British High Commissioner*

**TAB 2**

*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs and another* [2001]  
1 QB 1067

A Queen's Bench Division

**Regina (Bancoult) v Secretary of State for Foreign and  
Commonwealth Affairs and another**2000 July 17, 18, 19, 20;  
Nov 3

Laws LJ and Gibbs J

B

*Crown — Colony — Subordinate legislation — Validity — Ordinance purporting to banish and prohibit return of resident citizens — Whether ultra vires — Whether for “peace, order and good government” of territory — Whether susceptible to judicial review — Colonial Laws Validity Act 1865 (28 & 29 Vict c 63), ss 2, 3<sup>1</sup> — British Indian Ocean Territory Order 1965 (SI 1965/1920), s 11(1)<sup>2</sup> — Immigration Ordinance 1971 (British Indian Ocean Territory Ordinance No 1 of 1971), s 4<sup>3</sup>*

C

In 1965 the Chagos Archipelago in the Indian Ocean, formerly governed as part of the British colony of Mauritius, became a separate colony called the “British Indian Ocean Territory” by virtue of the British Indian Ocean Territory Order 1965, which provided for the appointment of a Commissioner and by section 11(1) that the Commissioner “may make laws for the peace, order and good government of the Territory”. The Immigration Ordinance 1971 of the British Indian Ocean Territory, purportedly made under section 11 of the 1965 Order, provided by section 4 for the compulsory removal of the whole of the existing civilian population of the territory to Mauritius and prohibited their return. The purpose of the 1965 Order and the 1971 Ordinance was to facilitate the establishment of a strategic American military base on the main island of the archipelago, Diego Garcia, pursuant to an agreement between the governments of the United Kingdom and United States of America. The applicant, a British Dependent Territory citizen born in the Chagos Archipelago who had been prevented from returning there since 1971, requested the Commissioner on behalf of the Foreign and Commonwealth Office to declare that both the Ordinance and the policy by which he had been prevented from returning to and residing in the territory were unlawful. His request was denied and he applied for judicial review.

E

On the application—

*Held*, granting the application and quashing section 4 of the 1971 Ordinance, (1) that the power to legislate for the British Indian Ocean Territory arose from the Queen's prerogative to make laws for a ceded colony; that a court of the Queen's Bench Division had jurisdiction to issue a prerogative writ such as an order of certiorari to any place under the Crown's subjection notwithstanding the existence of effective local courts; and that since the 1971 Ordinance had been made on the direction of the United Kingdom government its interpretation was properly a matter for the Queen's Bench Division and not just the territory's own courts (see post, pp 1091C–D, H–1092E, 1106C, F–G).

G

*Ex p Mwenya* [1960] 1 QB 241, CA applied.*In re Mansergh* (1861) 1 B & S 400 considered.

(2) That the principle that fundamental or constitutional rights might not be abrogated by a subordinate instrument made pursuant to legislation cast in general terms, but only pursuant to a specific provision in an Act of Parliament, did not apply to colonial laws which, by virtue of sections 2 and 3 of the Colonial Laws Validity Act 1865, were only void if and to the extent that they were repugnant to an Act of the United Kingdom Parliament applicable to that colony, and not on the ground of

H

<sup>1</sup> Colonial Laws Validity Act 1865, s 2: see post, pp 1092H–1093A.

S 3: see post, p 1093B.

<sup>2</sup> British Indian Ocean Territory Order 1965, s 11(1): see post, p 1077A.<sup>3</sup> Immigration Ordinance 1971, s 4: see post, pp 1077H–1078A.



repugnancy to the law of England generally; that, as regards fundamental or constitutional rights, there was a difference of approach between the developed law of England and the law applicable in the colonies; that “belongers” in the United Kingdom took the benefit of constraints imposed by the common law on the construction of legislation which interfered with such rights whereas “belongers” in colonies did not, since their rights would normally be protected by that territory’s written constitution, even though the British Indian Ocean Territory had no such constitution (see post, pp 1095G–H, 1096H–1097B, G–1098B, 1099D–1100B, 1106C). A  
B

*Liyanage v The Queen* [1967] 1 AC 259, PC applied.

*R v Lord Chancellor, Ex p Witham* [1998] QB 575, DC distinguished.

*R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, HL(E) considered.

(3) That a power to make laws for the “peace, order and good government” of a territory, such as that conferred by section 11(1) of the 1965 Order, required its people to be governed, not removed; that in the absence of exceptional circumstances, such as where the land became toxic or uninhabitable, the removal of its entire civilian population was not conducive to a territory’s peace, order and good government; that, although the political reasons for such removal were good reasons dictated by pressing considerations of military security, they could not by any forensic test of reasonableness be said to touch the peace, order and good government of the territory; and that in the absence, apart from section 11 of the 1965 Order, of any principled basis on which section 4 of the 1971 Ordinance could be justified it had to be declared unlawful (see post, pp 1104A–1105B, 1106C, 1107A–E). C  
D

*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, CA applied.

*Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733, PC considered.

The following cases are referred to in the judgments: E

*Abeysekera v Jayatilake* [1932] AC 260, PC

*Anderson, Ex p* (1861) 3 E & E 487

*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; [1947] 2 All ER 680, CA

*Calder v Attorney General of British Columbia* (1973) 34 DLR (3d) 145

*Calvin’s Case* (1609) 7 Co Rep 1

*Entick v Carrington* (1765) 19 State Tr 1029 F

*Ibralebbe v The Queen* [1964] AC 900; [1964] 2 WLR 76; [1964] 1 All ER 251, PC

*Li Hong Mi v Attorney General for Hong Kong* [1920] AC 735, PC

*Liyanage v The Queen* [1967] 1 AC 259; [1966] 2 WLR 682; [1966] 1 All ER 650, PC

*Mansergh, In re* (1861) 1 B & S 400

*Mwenya, Ex p* [1960] 1 QB 241; [1959] 3 WLR 767; [1959] 3 All ER 525, CA G

*Phillips v Eyre* (1870) LR 6 QB 1

*R v Burah* (1878) 3 App Cas 889, PC

*R v Cowle* (1759) 2 Burr 834

*R v Earl of Crewe, Ex p Sekgome* [1910] 2 KB 576, CA

*R v Lord Chancellor, Ex p Witham* [1998] QB 575; [1998] 2 WLR 849; [1997] 2 All ER 779, DC

*R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Indian Association of Alberta* [1982] QB 892; [1982] 2 WLR 641; [1982] 2 All ER 118, CA H

*R v Secretary of State for the Home Department, Ex p Bhurosah* [1968] 1 QB 266; [1967] 3 WLR 1259; [1967] 3 All ER 831, DC and CA

*R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539; [1997] 3 WLR 492; [1997] 3 All ER 577, HL(E)

- A *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115; [1999] 3 WLR 328; [1999] 3 All ER 400, HL(E)  
*Riel v The Queen* (1885) 10 App Cas 675, PC  
*Sabally and N'Jie v Attorney General* [1965] 1 QB 273; [1964] 3 WLR 732; [1964] 3 All ER 377, CA  
*Sammut v Strickland* [1938] AC 678; [1938] 3 All ER 693, PC  
*Staples v The Queen* (unreported) 27 January 1899, PC
- B *Tito v Waddell* (No 2) [1977] Ch 106; [1977] 2 WLR 496; [1977] 3 All ER 129  
*Trustees Executors and Agency Co Ltd v Federal Commr of Taxation* (1933) 49 CLR 220  
*Van Duyn v Home Office* (Case 41/74) [1975] Ch 358; [1975] 2 WLR 760; [1975] 3 All ER 190; [1974] ECR 1337, ECJ  
*Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733; [1985] 2 WLR 786; [1985] 3 All ER 17, PC
- C The following additional cases were cited in argument:  
*Attorney General for Canada v Hallet & Carey Ltd* [1952] AC 427, PC  
*Attorney General's Reference* (No 1 of 1990) [1992] QB 630; [1992] 3 WLR 9; [1992] 3 All ER 169, CA  
*Bateman's Trust, In re* (1873) LR 15 Eq 355  
*Blackburn v Attorney General* [1971] 1 WLR 1037; [1971] 2 All ER 1380, CA
- D *Bui van Thanh v United Kingdom* (Application No 16137/90) (unreported) 12 March 1990, E Comm HR  
*Campbell v Hall* (1774) 1 Cowp 204; Lofft 655  
*Cobb & Co Ltd v Kropp* [1967] 1 AC 141; [1966] 3 WLR 416; [1966] 2 All ER 913, PC  
*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; [1984] 3 WLR 1174; [1984] 3 All ER 935, HL(E)  
*Hodge v The Queen* (1883) 9 App Cas 117, PC
- E *Holmes, In re* (1861) 2 J & H 527  
*Madzimbamuto v Lardner-Burke* [1969] 1 AC 645; [1968] 3 WLR 1229; [1968] 3 All ER 561, PC  
*Nissan v Attorney General* [1970] AC 179; [1969] 2 WLR 926; [1969] 1 All ER 629, HL(E)  
*Nyali Ltd v Attorney General* [1956] 1 QB 1; [1955] 2 WLR 649; [1955] 1 All ER 646, CA; [1957] AC 253; [1956] 3 WLR 341; [1956] 2 All ER 689, HL(E)
- F *Pickin v British Railways Board* [1974] AC 765; [1974] 2 WLR 208; [1974] 1 All ER 609, HL(E)  
*R v Bhagwan* [1972] AC 60; [1970] 3 WLR 501; [1970] 3 All ER 97, HL(E)  
*R v Lord Chancellor Ex p Lightfoot* [2000] QB 597; [1999] 2 WLR 1126; [1998] 4 All ER 764  
*R v Ministry of Defence, Ex p Smith* [1996] QB 517; [1996] 2 WLR 305; [1996] 1 All ER 257, CA
- G *R v Secretary of State for Social Security, Ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275; [1996] 4 All ER 385, CA  
*R v Secretary of State for the Environment, Ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521; [1990] 3 WLR 898; [1990] 3 All ER 589, HL(E)  
*R v Secretary of State for the Home Department, Ex p Muboyayi* [1992] QB 244; [1991] 3 WLR 442; [1991] 4 All ER 72, CA
- H *R v Secretary of State for War, Ex p Price* [1949] 1 KB 1, DC  
*Rayner (J H) (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72; [1988] 3 WLR 1033; [1988] 3 All ER 257, CA; [1990] 2 AC 418; [1989] 3 WLR 969; [1989] 3 All ER 523, HL(E)  
*Thornton v The Police* [1962] AC 339; [1962] 2 WLR 1141; [1962] 3 All ER 88, PC  
*Toohy, In re, Ex p Northern Land Council* (1981) 38 ALR 439

The following additional cases, although not cited, were referred to in the skeleton arguments: A

*R v Cambridge Health Authority, Ex p B* [1995] 1 WLR 898; [1995] 2 All ER 129, CA

*R v Secretary of State for the Home Department, Ex p Fayed* [1998] 1 WLR 763; [1998] 1 All ER 228, CA

#### APPLICATION for judicial review B

On an application for judicial review made with leave granted by Scott Baker J on 3 March 1999, the applicant, Louis Olivier Bancoult, a British Dependent Territory citizen formerly resident on Peros Banhos Island in the Chagos Islands, now known as the British Indian Ocean Territory, sought an order of certiorari to quash the decisions made by the second respondent, Her Majesty's Commissioner for the British Indian Ocean Territory, on behalf of the first respondent, the Foreign and Commonwealth Office, on 30 June 1998 and 6 August 1998, that the Immigration Ordinance 1971 of the British Indian Ocean Territory, which purported to authorise the banishment of British Dependent Territory citizens resident in the British Indian Ocean Territory, and the policy adopted under it by which the applicant was excluded from returning to and residing in the territory, were lawful. The grounds for the application were that: (1) the Crown had no prerogative power to exclude the applicant as a British national from a British territory; (2) as a British Dependent Territory citizen the applicant's fundamental constitutional right to reside in the territory of which he was a citizen could not be abrogated by the general words of section 11 of the British Indian Ocean Territory Order 1965 (SI 1965/1920); (3) the immigration legislation of a British dependent territory could not authorise the complete exclusion of its inhabitants from the territory; (4) judicial review of the 1971 Ordinance was not barred by the Colonial Laws Validity Act 1865; and (5) that the making of the 1971 Ordinance was not within the powers of the Commissioner and alternatively the policy followed by him under the Ordinance was unlawful and disproportionate. C D E

The facts are stated in the judgment of Laws LJ. F

Sir Sydney Kentridge QC, Laurie Fransman QC and Anthony Bradley for the applicant. The English High Court has jurisdiction to grant prerogative writs, including judicial review, against the Crown in Britain or overseas where the subject matter of the application arises in relation to Crown territory: see *R v Cowle* (1759) 2 Burr 834; *Sabally and N'Jie v Attorney General* [1965] 1 QB 273 and *Ex p Mwenya* [1960] 1 QB 241. [Reference was also made to *Ex p Anderson* (1861) 3 E & E 487.] The application arises directly out of the actions and policies of the United Kingdom Government. The Ordinance and policy were made by the Commissioner, as an official of the Foreign and Commonwealth Office in Whitehall, on the instructions of the Secretary of State. There is no distinction between the Crown in right of the Government of The British Indian Ocean Territory and the Crown in right of the Government of the United Kingdom. British Indian Ocean Territory affairs are administered by the Foreign and Commonwealth Office in London. [Reference was made to *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Indian Association of Alberta* [1982] QB 892.] There are no reasons G H



- A of practical convenience why the applicant should seek redress in the British Indian Ocean Territory Supreme Court.

The 1971 Immigration Ordinance made by the United Kingdom Government in London is unlawful. The Commissioner's policy under the Ordinance is unduly narrow and unreasonable. Save in time of war the Queen has no power to abridge the liberty of her subjects without the authority of a valid statute or an established common law prerogative. State necessity or act of state is no justification: see *Entick v Carrington* (1765) 19 State Tr 1029. [Reference was also made to *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645; *In re Bateman's Trust* (1873) LR 15 Eq 355 and *Nyali Ltd v Attorney General* [1956] 1 QB 1.] There is no prerogative power to banish or remove a British subject from a British territory or prevent him from returning to it: see *R v Bhagwan* [1972] AC 60. A British subject has a fundamental right to reside in or return to that part of the British dominions of which he is a citizen or "belonger". He cannot be deprived of rights or subjected to obligations by any treaty unless it has been incorporated into law by legislation: see *Nissan v Attorney General* [1970] AC 179 and *Rayner (J H) (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72.

C When the Chagos Islands became part of a British colony by cession, it is doubtful that it had any permanent inhabitants and so should not be classified as a conquered or ceded colony. By the time the British Indian Ocean Territory was created as a separate colony it had a settled population of United Kingdom and Colonies citizens and so the British Settlements Act 1887 (50 & 51 Vict c 54), which empowered the Crown to legislate for settled colonies, applied, and by section 2 such legislation had to be necessary for the peace, order and good government of Her Majesty's subjects and those in a British settlement.

D In so far as the 1971 Ordinance banishes and excludes citizens of the British Indian Ocean Territory from the territory it is void and of no effect. It is repugnant to article 29 of Magna Carta 1297 (25 Edw 1 c 1), a statute of the United Kingdom which extends to the British Indian Ocean Territory because it follows the flag, and therefore void by virtue of section 2 of the Colonial Laws Validity Act 1865: see *Calder v Attorney General of British Columbia* (1973) 34 DLR (3d) 145; *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Indian Association of Alberta* [1982] QB 892 and *Attorney General's Reference (No 1 of 1990)* [1992] QB 630. [Reference was also made to *Nissan v Attorney General* [1970] AC 179.] The British Indian Ocean Territory is a colony, not a protectorate, and as such its citizens are the Queen's subjects who enjoy the legal heritage of Magna Carta. [Reference was made to *Staples v The Queen* (unreported) 27 January 1899.] By article 29 of Magna Carta no freeman can be outlawed or exiled except by the law of the land. "Law of the land" means an Act of Parliament or established common law rule and cannot include an Order in Council or act of a Governor or Commissioner.

E The legislative power conferred on the Commissioner is a delegated power and cannot be used to remove the fundamental constitutional right of a British subject to live in or return to the part of the Queen's dominion of which he is a citizen; that can only be done by the executive where specifically authorised by an Act of Parliament: see *R v Lord Chancellor, Ex p Witham* [1998] QB 575; *Van Duyn v Home Office* (Case 41/74) [1975] Ch 358 and *R v Secretary of State for the Home Department, Ex p Muboyayi* [1992] QB 244. [Reference was also made to *Campbell v Hall* (1774)

1 Cowp 204; *Staples v The Queen* 27 January 1899; *R v Earl of Crewe, Ex p Sekgome* [1910] 2 KB 576; *R v Lord Chancellor Ex p Lightfoot* [1999] 2 WLR 1126; *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539 and *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115.] The decisions of the Privy Council that (i) the power to make laws for the peace, order and good government of a territory conferred plenary powers of legislation; (ii) that the legislature on which those powers were conferred was not a mere agent or delegate of the Imperial Parliament; and (iii) that there was nothing to preclude that legislature from passing laws contrary to fundamental principles of justice, apply where legislative powers are conferred by the Imperial Parliament on a representative colonial legislature, and not where a law-making power in general terms is conferred by the Executive on one of its own officials: see *R v Burah* (1878) 3 App Cas 889; *Hodge v The Queen* (1883) 9 App Cas 117; *Cobb & Co Ltd v Kropp* [1967] 1 AC 141; *Liyanage v The Queen* [1967] 1 AC 259 and *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733. In any event, the words “for the peace, order and good government” limit the exercise of an otherwise plenary power. [Reference was also made to *R v Secretary of State for Social Security, Ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 and *Trustees Executors and Agency Co Ltd v The Federal Comr of Taxation* [1933] 49 CLR 220.] Removal of the whole population of a territory cannot be for the “good government” of the territory and, therefore, the 1971 Ordinance is ultra vires. The rule that an Act of Parliament cannot be challenged on the grounds of improper motive does not apply to subordinate legislation. [Reference was made to *Pickin v British Railways Board* [1974] AC 765; *Attorney General for Canada v Hallet & Carey Ltd* [1952] AC 427 and *In re Toohey, Ex p Northern Land Council* (1981) 38 ALR 439.]

The 1971 Ordinance and policy breached the applicant’s right to protection from inhuman and degrading treatment, right to respect for his private and family life and home and right to liberty and security of his person, under articles 3, 8 and 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953).

*David Pannick QC, Philip Sales and Cecilia Ivimy* for the respondents. The application for judicial review arises not from the actions of the Crown in right of the United Kingdom Government, but actions and legislation taken and enacted by the British Indian Ocean Territory Commissioner acting on behalf of the Crown in right of the Government of The British Indian Ocean Territory, which possesses a separate and distinct sovereignty of its own. The English High Court in London has nothing to do with it. [Reference was made to *In re Holmes* (1861) 2 J & H 527.] The Crown is divisible and is to be treated as a separate sovereign entity in relation to each territory where its sovereign writ runs: see *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Indian Association of Alberta* [1982] QB 892; *R v Secretary of State for the Home Department, Ex p Bhurosah* [1968] 1 QB 266 and *Tito v Waddell (No 2)* [1977] Ch 106. The fact that the British Indian Ocean Territory legislature is not representative in character does not render it or the British Indian Ocean Territory Government indistinct from the Crown in right of the United Kingdom. In enacting the 1971 Ordinance and formulating the policy under it the

A Commissioner was not acting as agent or delegate of the Crown in right of the United Kingdom, but on behalf of the British Indian Ocean Territory Government, irrespective of whether the Ordinance and policy fell within a policy area controlled by the United Kingdom: see *R v Secretary of State for the Home Department, Ex p Bhurosah* [1968] 1 QB 266.

B The British Indian Ocean Territory has a municipal court of competent jurisdiction which is the more appropriate forum for the application and therefore the Queen's Bench Division lacks or should decline jurisdiction to review such local acts of an administrative or legislative nature: see *In re Mansergh* (1861) 1 B & S 400 and *R v Secretary of State for War, Ex p Price* [1949] 1 KB 1. By section 1 of the Habeas Corpus Act 1862 (25 & 26 Vict c 20), writs of habeas corpus cannot issue from the English court to colonies or dominions where there is a lawfully established court having authority to grant the writ. It does not make sense that lesser forms of prerogative writ such as certiorari can issue but habeas corpus cannot. [Reference was made to *Ex p Anderson* (1861) 3 E & E 487 and *Ex p Mwenya* [1960] 1 QB 241.] If the English High Court accepts jurisdiction to determine the application, there is a possibility of conflicting judicial opinion because its decision may differ from that of the British Indian Ocean Territory Supreme Court if other proceedings concerning the rights of the citizens are brought before that court. Appeal from the British Indian Ocean Territory Supreme Court is to the Judicial Committee of the Privy Council, but appeal from the English Court is ultimately to the House of Lords.

The British Indian Ocean Territory is a ceded colony and therefore the power to legislate for it arose from the Queen's prerogative (see *Campbell v Hall* 1 Cowp 204 and *Abeysekera v Jayatilake* [1932] AC 260) and not from the British Settlements Act 1887. [Reference was also made to *Sammut v Strickland* [1938] AC 678.] To apply a special rule of construction which protects fundamental or constitutional rights to the 1965 Order and the 1971 Ordinance would undercut sections 2 and 3 of the Colonial Laws Validity Act 1865, which provide by sections 2 and 3 that colonial laws are void to the extent that they are repugnant to an Act of the United Kingdom Parliament applicable to that colony, but not otherwise, and the authority of *Liyanage v The Queen* [1967] 1 AC 259. The Commissioner was empowered to enact the 1971 Ordinance even if it conflicts with fundamental rights under English or international law. [Reference was made to *Phillips v Eyre* (1870) LR 6 QB 1.] Magna Carta does not apply to British Indian Ocean Territory legislation because it is not "an act of Parliament" within the meaning of section 2 of the 1865 Act and does not extend outside England: see *Staples v The Queen* (unreported) 27 January 1899. The British Indian Ocean Territory is a ceded, not settled, colony and so did not automatically adopt English common law and statute law. [Reference was made to *Calder v Attorney General of British Columbia* 34 DLR (3d) 145 and *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Indian Association of Alberta* [1982] QB 892.] In any case, there is no infringement of chapter 29 of Magna Carta as removal of the citizens was authorised by "the law of the land", i.e., the valid and operative 1971 Ordinance, and the applicant is not "exiled" because he lives in the original state of Mauritius where he has always had full citizenship rights.

H The words "make laws for the peace, order and good government of the Territory" in section 11 of the 1965 Order give the widest law-making

powers appropriate to a sovereign, thereby giving sufficient vires for the 1971 Ordinance. [Reference was made to *Ibralebbe v The Queen* [1964] AC 900 and *Riel v The Queen* (1885) 10 App Cas 675.] A colonial legislature having power to make laws for the peace, order and good government of the territory where it possesses jurisdiction is not the agent or delegate of the body which created it: see *Hodge v The Queen* 9 App Cas 117 and *R v Burah* 3 App Cas 889. A

Before the creation of the British Indian Ocean Territory the population of the Chagos Islands had no proprietary interest in the land there, were employees or relatives of employees of the plantation company which owned the freehold in the Island and resided there subject to the owners' permission. They had no absolute right under Mauritian law to reside there. In respect of land rights the Crown stepped into the shoes of the previous owners when it purchased the islands. The applicant is in the same position as a person who has to move upon consensual or compulsory acquisition of land by the state for public purposes. The applicant and the other citizens are not and have never been stateless. He was a citizen of the United Kingdom and Colonies before and after the creation of The British Indian Ocean Territory and became a British Dependent Territories citizen and a Mauritian citizen when Mauritius became independent. He does not and never had a fundamental right to reside in the British Indian Ocean Territory. A dependent territory is entitled to make laws regulating entry into and residence in the territory of persons of any status (see *Thornton v The Police* [1962] AC 339) and the applicant's right as a British Dependent Territory citizen to enter the British Indian Ocean Territory depends on such laws. B C D

The 1971 Ordinance does not infringe any rights of the applicant under English, Mauritian, British Indian Ocean Territory or international law. The applicant has no rights under the European Convention on Human Rights because the United Kingdom has not declared it to apply to the British Indian Ocean Territory: see *Bui van Thanh v United Kingdom* (unreported) 12 March 1990. Neither does he have rights under the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights (1977) (Cmnd 6702) as it was not ratified by the United Kingdom in respect of the British Indian Ocean Territory. E F

Large scale investment in industry and facilities required for the exercise of any permanent right of residence in the islands is not economically viable. People able to establish sufficient connection with the Chagos Islands have already been paid substantial compensation for their removal by the United Kingdom Government.

The English court should not consider the complaint against the Commissioner's policy under the 1971 Ordinance because the applicant has failed to exhaust statutory remedies, in that he has not applied to the Commissioner for permission to visit the islands. Refusal of the application would give rise to a right of appeal. The policy is not unreasonable, but is necessary for national security and safety reasons. [Reference was made to *R v Ministry of Defence, Ex p Smith* [1996] QB 517.] The English court cannot require the United Kingdom to breach its treaty obligations to the United States of America by declaring the Commissioner's policy prohibiting permanent residence unlawful. [Reference was made to *Blackburn v Attorney General* [1971] 1 WLR 1037; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and *Rayner (J H) (Mincing* G H

- A *Lane) Ltd v Department of Trade and Industry* [1989] Ch 72.] A decision of the executive requiring a balance of national security interests against other interests and allocation of central government funds is a matter for the executive, not the courts: see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and *R v Secretary of State for the Environment, Ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521.

B *Kentridge QC* made submissions in reply.

*Cur adv vult*

3 November. The following judgments were handed down.

C LAWS LJ

*Introductory*

- D 1 The Chagos Archipelago is in the middle of the Indian Ocean. Its islands and Mauritius were ceded by France to Great Britain in 1814. From that date until 1965 the archipelago was governed as part of the British colony of Mauritius, though Mauritius itself is some 1,000 to 1,200 miles distant from the archipelago. On at least some of the islands there lived in the 1960s a people called the Ilois. They were an indigenous people: they were born there, as were one or both of their parents, in many cases one or more of their grandparents, in some cases (it is said) one or more of their great-grandparents. Some may perhaps have traced an earlier indigenous ancestry. In the 1960s by agreement between the governments of the United
- E Kingdom and the United States of America it was resolved that there be established a major American military base upon the chief island of the archipelago, Diego Garcia. There is no doubt but that the defence facility which the base provides is of the highest importance. In a letter of 21 June 2000 from the US Department of State it is described as “an all but indispensable platform” for the fulfilment of defence and security responsibilities in the Arabian Gulf, the Middle East, South Asia and East
- F Africa. In order to facilitate the establishment of the base, the archipelago was first divided from Mauritius and constituted (together with certain other islands) as a separate colony to be known as the “British Indian Ocean Territory” (“BIOT”). That was done by the British Indian Ocean Territory Order (SI 1965/1920) (“the BIOT Order”). Then in 1971 the whole of the Ilois population of BIOT (and other civilians living there) were compulsorily
- G removed to Mauritius. Their removal was effected under a measure called the Immigration Ordinance (“the Ordinance”). The Ordinance was made by the Commissioner for BIOT (“the Commissioner”), who is the second respondent in these proceedings for judicial review. He was an official created by section 4 of the BIOT Order. He made, or purportedly made, the Ordinance under powers conferred by section 11 of the BIOT Order. As a matter of fact he made it, as is effectively accepted by Mr Pannick for the
- H respondents, upon the orders of the Queen’s ministers in London. The first respondent is the Secretary of State for the Foreign and Commonwealth Office. The principal issue in the case is whether there was any lawful power to remove the Ilois from BIOT, in the manner in which that was done. There is also a question whether this court has any jurisdiction to entertain the

case. The applicant is an Ilois from Peros Banhos in the archipelago. Leave to seek judicial review was granted by Scott Baker J on 3 March 1999 after a hearing on notice. No point is now or was then taken by either respondent as to time or delay. A

2 Though it will be necessary to examine other legislation, it is convenient by way of introduction to set out the relevant terms of the BIOT Order and the Ordinance. I should first say that the BIOT Order was made on 8 November 1965 by “Her Majesty, by virtue and in exercise of the powers in that behalf by the Colonial Boundaries Act 1895, or otherwise in Her Majesty vested”. The 1895 Act merely regulates the alteration of a colonial boundary, when that is sought to be done: it affords no source of the vires of the BIOT Order for presently relevant purposes. It was common ground at the Bar, and it seems to me plainly to be right, that the BIOT Order is an Order in Council made under the powers of the royal prerogative. B C

3 Sections 3 to 5 of the BIOT Order provide:

“3. As from the date of this Order—(a) the Chagos Archipelago, being islands which immediately before the date of this Order were included in the Dependencies of Mauritius, and (b) the Farquhar Islands, the Aldabra Group and the Island of Desroches, being islands which immediately before the date of this Order were part of the Colony of Seychelles, shall together form a separate colony which shall be known as the British Indian Ocean Territory. D

“4. There shall be a Commissioner for the Territory who shall be appointed by Her Majesty by Commission under Her Majesty’s Sign Manual and Signet and shall hold office during Her Majesty’s pleasure.

“5. The Commissioner shall have such powers and duties as are conferred or imposed upon him by or under this Order or any other law and such other functions as Her Majesty may from time to time be pleased to assign to him, and, subject to the provisions of this Order and any other law by which any such powers or duties are conferred or imposed, shall do and execute all things that belong to his office according to such instructions, if any, as Her Majesty may from time to time see fit to give him.” E F

Section 8 empowers the Commissioner to authorise a delegate to discharge functions of his as may be specified. Section 8(3) authorises the Queen acting through a Secretary of State to vary or revoke any such authorisation. Section 10 provides:

“The Commissioner, in the name and on behalf of Her Majesty, may constitute such offices for the Territory as may lawfully be constituted by Her Majesty and, subject to the provisions of any law for the time being in force in the Territory and to such instructions as may from time to time be given to him by Her Majesty through a Secretary of State, the Commissioner may likewise—(a) make appointments, to be held during Her Majesty’s pleasure, to any office so constituted; and (b) dismiss any person so appointed or take such other disciplinary action in relation to him as the Commissioner may think fit.” G H

Section 11 of the BIOT Order is of critical importance to the central arguments in the case. So far as relevant it provides:

A “(1) The Commissioner may make laws for the peace, order and good government of the Territory, and such laws shall be published in such manner as the Commissioner may direct.

“ (2) Any laws made by the Commissioner may be disallowed by Her Majesty through a Secretary of State.

B “ (3) Whenever any law has been disallowed by Her Majesty, the Commissioner shall cause notice of such disallowance to be published in such manner as he may direct.

“ (4) Every law disallowed shall cease to have effect as soon as notice of disallowance is published as aforesaid, and thereupon any enactment amended or repealed by, or in pursuance of, the law disallowed shall have effect as if the law had not been made.”

C Section 15(1) provides:

“Except to the extent that they may be repealed, amended or modified by laws made under section 11 of this Order or by other lawful authority, the enactments and rules of law that are in force immediately before the date of this Order in any of the islands comprised in the Territory shall, on and after that date, continue in force therein but shall be applied with such adaptations, modifications and exceptions as are necessary to bring them into conformity with the provisions of this Order.”

D Sections 16 and 17 deal with the establishment of courts and judicial proceedings. This is important for the purposes of the point taken by the Crown to the effect that this court lacks all jurisdiction to entertain these proceedings, and it is convenient here to summarise what has been done under these provisions. There has been established a Supreme Court for E BIOT, designated as a superior court of record. It possesses, by section 6 of the Courts Ordinance 1983 (BIOT Ordinance No 3 of 1983):

“unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law and with all the powers, privileges and authority which is vested in or capable of being exercised by the High Court of Justice in England.”

F Thus it plainly has power, at least in general terms, to entertain judicial review proceedings against the Commissioner. It may sit in Diego Garcia or in England. An appeal from the Supreme Court lies to the BIOT Court of Appeal, from which a final appeal lies (no doubt only with special leave) to the Privy Council.

G 4 Lastly, section 19 of the BIOT Order provides:

“There is reserved to Her Majesty full power to make laws from time to time for the peace, order and good government of the British Indian Ocean Territory (including, without prejudice to the generality of the foregoing, laws amending or revoking this Order).”

H 5 The relevant provisions of the Ordinance are as follows. Section 4, which is the critical measure for the purposes of this case, was in these terms:

“ (1) No person shall enter the Territory or, being in the Territory, shall be present or remain in the Territory, unless he is in possession of a permit or his name is endorsed on a permit in accordance with the provisions of section 5 and section 7 of this Ordinance respectively.

“(2) The provisions of this section shall not apply to members of Her Majesty’s Forces, or to persons in the public service of Seychelles or the Territory or in the service of any of Her Majesty’s Departments of State, while on duty, or to such other persons as may be prescribed.” A

Section 9 provides: “It shall be unlawful for any person to enter the Territory or to be present or to remain in the Territory in contravention of the provisions of section 4 of this Ordinance . . .” Section 10 provides in part: B

“(1) The Commissioner may make an order directing that any person whose presence within the Territory is, under the provisions of this Ordinance, unlawful, shall be removed from and remain out of the Territory, either indefinitely or for a period to be specified in the order.

“(2) An order made under this section shall be carried into effect in such manner as the Commissioner may direct. C

“(3) A person against whom an order under this section is made may, if the Commissioner so directs, while awaiting removal and while being conveyed to the place of departure, be kept in custody, and while so kept shall be deemed to be in lawful custody.”

#### *The background facts*

6 This is not a case where there exists any dispute of primary fact which it is the court’s duty to resolve. That is not to say that all the relevant facts are agreed. In particular, there is no agreement as to the numbers of Ilois living in BIOT in 1965 or 1971. Mr Pannick was, however, content to accept, if I may say so, obviously rightly, that the numbers were significant, at any rate in the hundreds. Sir Sydney Kentridge for the applicant asserts that there is evidence showing that the numbers ran well into four figures. D  
E But the difference is not material to anything we have to decide; Sir Sydney would be entitled to succeed on the lower estimate, if all else is in his favour. We have one estimate of the numbers of Ilois, contained in a report written by a British official in March 1971, very close in time to the making of the Ordinance. It includes this passage:

“There are now about 829 people in the Chagos Archipelago, of whom about 359 live on Diego Garcia itself and the remainder on the two other inhabited atolls of Peros Banhos and Salomon. Of the total, 386 are dual citizens of the United Kingdom and Colonies and of Mauritius (they are known as Ilois). As far as we know, neither the Ilois themselves nor the Mauritius authorities are aware of their dual nationality. There are also 35 citizens of Mauritius, and 408 citizens of the UK and Colonies from Seychelles.” F  
G

The applicant was born in 1964 on Peros Banhos. He is an Ilois, as were his parents before him. In 1967 the family travelled to Mauritius to seek medical treatment for the applicant’s infant sister, who had been badly injured: a cartwheel had run over her leg. The applicant has never since 1967 returned to Peros Banhos. Though it is suggested that the applicant and his family (and other Ilois) were prevented from returning to the Chagos Archipelago by the British authorities before 1971, that is not accepted, and there is no challenge to any order or decision before the Ordinance. The last inhabitants were removed from Diego Garcia in 1971, from Salomon Island in 1972 and from Peros Banhos in 1973. H



A 7 Before these upheavals the principal, effectively the only, economic  
activity on the islands had been the production of copra from coconut  
plantations. As a matter of private law, title to the islands had been vested in  
the plantation company, Chagos Agalega Ltd, but the Crown purchased the  
company's rights in 1967. At first, thereafter, they were managed by the  
company under lease. Then, as I understand it, the company was  
B reconstituted and renamed Moulinie & Co Ltd. It continued to manage the  
islands under contract with the Crown. Both before and after the company's  
acquisition by the Crown the inhabitants, including the Ilois, were all  
contract workers on the plantations, or family members of such workers.  
None of them enjoyed property rights in any of the land. This is of some  
importance, since from time to time before the making of the Ordinance, the  
documents show that the British authorities (I mean the term neutrally as  
C between Her Majesty's Government in the United Kingdom and the, or any,  
distinct government of BIOT) have had it in mind to rely on the inhabitants'  
lack of such rights, and their status as contract workers wholly dependent on  
the plantations, as being in some way inconsistent with their possession of  
any public law rights to remain in the territory as citizens of it. This position  
is reflected in Mr Pannick's extremely helpful skeleton argument,  
D paragraph 17 of which (referring to Mr Peter Westmacott's affidavit) states  
that:

E "in 1968 all the Ilois living on the islands were employed as labourers  
by the plantation owners (or were members of the families of such  
labourers) and none pursued a livelihood independent of the plantations.  
The Ilois accepted that they could be moved by their employers from one  
island to another and even from the islands as a whole if, for example,  
they were guilty of misconduct. None of them owned any land or had the  
right to permanent use of the land."

8 I should next describe those features of the history which lay bare the  
concerns and attitudes of British officials and ministers at the material  
time, that is from 1964 until 1971. I do so primarily because it is part of  
F Sir Sydney's case for the applicant that the making of the Ordinance and the  
actions taken under it were things done for an improper motive or purpose,  
that is, a purpose not contemplated by the enabling legislation contained in  
the BIOT Order; and in this context he relies on much of the content of  
notes, reports and other documents coming into existence between the dates  
in question, which speak loud of the points of view entertained within  
government circles upon the future of the BIOT islanders in general and the  
G Ilois in particular. In any event, it seems to me that fairness to both sides  
requires the court to demonstrate that it has at least a reasonable  
understanding of the issues which exercised the decision makers of the time,  
and how they responded to them; although, of course, nothing is more  
elementary than that we are not policy makers ourselves and must decide the  
case by reference only to the applicable law.

H 9 Discussions between the governments of the United Kingdom and the  
United States concerning the establishment of defence facilities in the Indian  
Ocean were held in February 1964. The agreement ultimately arrived at is  
contained in an Exchange of Notes between the Government of the United  
Kingdom of Great Britain and Northern Ireland and the Government of the  
United States of America concerning the Availability for Defence Purposes of

the British Indian Ocean Territory (1967) (Cmnd 3231), dated 30 December 1966, which is before us. It is clear that by 11 May 1964, the date of a secret memorandum headed "Defence Interests in the Indian Ocean" by C M Rose, prospective initiatives relating to the arrangements which would need to be made were well advanced. The document states, at paragraph 3:

"In his telegram No 977 Sir P Dean draws attention to the difficulties we are likely to have to face in the United Nations if these proposals became known at the present time. In connection with our proposal for placing the various territories concerned under direct UK administration, he draws attention to paragraph 6 of Resolution No 1514 (of 14 December 1960) which reads:—'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.' He also suggests that we might face demands for separate transmission of information about these territories under article 73 of the Charter which requires members 'to transmit regularly to the Secretary General . . . statistical and other information of a technical nature relating to economic, social and educational conditions in the territories for which they are responsible'."

10 A revised memorandum of May 1964 jointly agreed between the UK and American governments, headed "Indian Ocean Territories" refers in terms to "the repatriation or resettlement of persons currently living on the islands selected". Paragraph 9 of that document states:

"The line taken with regard to those persons now living and working in the dependencies would relate to their exact status. If, in fact, they are only contract laborers rather than permanent residents, they would be evacuated with appropriate compensation and re-employment. If, on the other hand some of the persons now living and working on the islands could be considered permanent residents, i.e., their families have lived there for a number of generations, then political effects of their removal might be reduced if some element of choice could be introduced in their resettlement and compensation."

No element of choice was in the event provided.

11 In another document dated 20 October 1964 from the Colonial Office, headed "Defence Interests in the Indian Ocean" it is made clear that:

"It would be unacceptable to both the British and the American defence authorities if facilities of the kind proposed were in any way to be subject to the political control of Ministers of a newly emergent independent state (Mauritius is expected to become independent some time after 1966) . . . it is hoped that the Mauritius Government may agree to the islands being detached and directly administered by Britain."

In January 1965 the Americans were making plain their view that "detachment proceedings should include the entire Chagos Archipelago, primarily in the interest of security, but also to have other sites in this archipelago available for future contingencies". Then in an outward saving telegram from the Foreign Office to the United Kingdom delegation to Nato, Paris, dated 16 July 1965, the Foreign Office in London was saying:

- A “The islands will be administered direct by Her Majesty’s Government with the object of making them available in the long term for the construction of such defence facilities as may be required. The islands in question are the Chagos Archipelago.”

Then, on 28 July 1965, a Foreign Office memorandum from Mr T C D Jerrom stated:

- B “Our understanding is that the great majority of [those people at present on the islands] are there as contract labourers on the copra plantations on a number of the islands; a small number of people were born there and, in some cases, their parents were born there too. The intention is, however, that none of them should be regarded as being permanent inhabitants of the islands. Islands will be evacuated as and
- C when defence interests require this. Those who remain, whether as workers on those copra plantations which continue to function or as labourers on the construction of defence installations, will be regarded as being there on a temporary basis and will continue to look either to Mauritius or to Seychelles as their home territory . . . In the absence of
- D permanent inhabitants the obligations of Chapter XI of the United Nations Charter will not apply to the territory and we shall not transmit information on it to the Secretary-General (cf the British Antarctic Territory).”

- I2 On 5 November 1965 the Prime Minister was briefed by the Colonial Secretary. The Prime Minister was told that the proposal was to put the islands “under direct British administration” with arrangements to
- E be made for compensation, and to seek the making of an appropriate Order in Council (which would create the new colony) on 8 November 1965; and as I have said, that was the date of the BIOT Order. There follow in the papers a series of notes and memoranda, which we examined in the course of argument, showing the concern of the British authorities to present to the outside world a scenario in which there were no permanent inhabitants on the archipelago. I found the flavour of these documents a little odd. It is as if
- F some of the officials felt that if they willed it hard enough, they might bring about the desired result, and there would *be* no such permanent population. There was, plainly, an awareness of a real difficulty in the way of the smooth transformation of the territory into its intended role as a defence establishment with no settled civilians. A note of 12 November 1965 read:

- G “I agree that there is an awkward problem here which the Secretary of State should know about. The present idea is that the inhabitants (1,500 altogether) would not be removed from any of the islands until they are required for defence purposes. This is going to make it very difficult to avoid having to report on the new territory under article 73(e) of the Charter.”

- H Then on 15 November 1965, in the words of another official:

“the territory is a non-self-governing territory and there is a civilian population even though it is small. In practice, however, I would advise a policy of ‘quiet disregard’—in other words, let’s forget about this one until the United Nations challenge us on it.”

13 It seems to have been in early 1966 that first thoughts were given as to the form which an Immigration Ordinance relating to BIOT might take. A manuscript note dated to February 1966 read in part: A

“In this particular case it occurs to me that we do not really want anything as elaborate as the Seychelles Immigration Ordinance but something pretty rudimentary which merely allows for entry under permit and grants as few rights with as little formality as possible.” B

At about the same time, on 25 February 1966, a confidential missive from the Secretary of State for the Colonies to the Commissioner of BIOT in the Seychelles shows a recognition at a very high level in government of the tensions between British policy interests and the interests of the islanders:

“3. Our primary objective in dealing with the people who are at present in the Territory must be to deal with them in the way which will best meet our future administrative and military needs and will at the same time ensure that they are given fair and just treatment . . . 4. With these objectives in view we propose to avoid any reference to ‘permanent inhabitants’, instead, to refer to the people in the islands as Mauritians and Seychellois . . . We are . . . taking steps to acquire ownership of the land on the islands and consider that it would be desirable . . . for the inhabitants to be given some form of temporary residence permit. We could then more effectively take the line in discussion that these people are Mauritians and Seychellois; that they are temporarily resident in BIOT for the purpose of making a living on the basis of contract or day to day employment with the companies engaged in exploiting the islands; and that when the new use of the islands makes it impossible for these operations to continue on the old scale the people concerned will be resettled in Mauritius or Seychelles. 5. We understand from a recent discussion with Mr Robert Newton”—who had visited the islands—“that, in his opinion, the people on the islands cannot be regarded as permanent inhabitants but are in fact in the category of contract labour employed by the estate owners or commercial concerns . . . 6. Against this background we assume that there would be unlikely to be any undue difficulty with the inhabitants of BIOT themselves in moving over to a position in which they all held temporary residence permits on the basis of which their presence in the Territory would be allowed . . . 7. Whatever arrangements are made to establish the status of the people in the BIOT as belongers of either Mauritius or Seychelles, there will in any case be a need for the enactment of appropriate immigration legislation for the Territory itself.” C  
D  
E  
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The Commissioner’s views were sought as to the proposal relating to temporary residence permits and other matters. A minute of June 1966 confronts the nub of the problem with considerable candour:

“They”—the Colonial Office—“wish to avoid using the phrase ‘permanent inhabitants’ in relation to any of the islands in the territory because to recognise that there are permanent inhabitants will imply that there is a population whose democratic rights will have to be safeguarded and which will therefore be deemed by the UN Committee of Twentyfour to come within its purview . . . It is . . . of particular importance that the H

A decision taken by the Colonial Office should be that there are no permanent inhabitants in the BIOT. First and foremost it is necessary to establish beyond doubt what inhabitants there are at present in the islands, how long they have been resident there and whether any were born on the islands. Subsequently it may be necessary to issue them with documents making it clear that they are 'belongers' of Mauritius or the Seychelles and only temporarily resident in the BIOT. This device, though rather transparent, would at least give us a defensible position to take up in the Committee of Twentyfour . . . It would be highly embarrassing to us if, after giving the Americans to understand that the islands in BIOT would be available to them for defence purposes, we then had to tell them that we proposed to admit that they fell within the purview of the UN Committee of Twentyfour."

C There is a manuscript note by another official which comments on this minute. It refers to "a certain old fashioned reluctance to tell a whopping fib, or even a little fib, depending on the number of permanent inhabitants". A note dated 24 August 1966 to an official, Mr D A Greenhill, quotes a minute from the Permanent Under Secretary (I assume at the Colonial Office). The Permanent Under Secretary unburdened himself thus:

D "We must surely be very tough about this. The object of the exercise was to get some rocks which will remain *ours*; there will be no indigenous population except seagulls who have not yet got a committee (the Status of Women Committee does *not* cover the rights of birds)."

This attracted a comment from Mr D A Greenhill, who spoke the same language:

E "Unfortunately along with the birds go some few Tarzans or Men Fridays whose origins are obscure, and who are being hopefully wished on to Mauritius etc. When this has been done I agree we must be very tough and a submission is being done accordingly."

F 14 A document headed "Presentation of British Indian Ocean Territory in the United Nations" which bears no date, but whose context shows it was written after 12 August 1966, contains a section headed "Objectives". This is of particular importance in relation to Sir Sydney's contention that the Ordinance was made for an improper purpose. Here are the material passages:

G "10. The primary objective in acquiring these islands from Mauritius and the Seychelles to form the new 'British Indian Ocean Territory' was to ensure that Her Majesty's Government had full title to, and control over, these islands so that they could be used for the construction of defence facilities without hindrance or political agitation and so that when a particular island would be needed for the construction of British or United States defence facilities *Britain or the United States should be able to clear it of its current population. The Americans in particular attached great importance to this freedom of manoeuvre, divorced from the normal considerations applying to a populated dependent territory.* These islands were therefore chosen not only for their strategic location but also because they had, for all practical purposes, no permanent population."

"11. It was implied in this objective, and recognised at the time, that *we could not accept the principles governing our otherwise universal behaviour in our dependent territories, e g we could not accept that the interests of the inhabitants were paramount and that we should develop self-government there.* We therefore consider that the best way in which we can satisfy these objectives, when our action comes under scrutiny in the United Nations, would be to assert from the start, if the need arose, that this territory did not fall within the scope of Chapter XI of the United Nations Charter." (My emphasis.)

On 2 March 1967 the Commissioner for BIOT submitted a draft Ordinance to the Secretary of State under cover of a minute which set out the results of his own researches into the makeup of the Chagos population. His figures (for which, however, he did not claim "a high degree of accuracy") showed 563 Ilois spread over Diego Garcia, Salomon and Peros Banhos, of whom no less than 327 were children. The minute proceeds to address the question whether these Ilois could be regarded as "belonging" to Mauritius:

"I think it is arguable that they can, for although they have been in Chagos for a long time, they have lived there only on sufferance of the owners of the islands and could at any time have been sent back to Mauritius if no longer wanted in connection with the estate. They have never in the past had any *right* to reside permanently in Chagos."

The Officer Administering the Government of Mauritius saw the potential flaw in this approach. In a missive to the Secretary of State (by now for Commonwealth Affairs, rather than the Colonies) of 29 September 1967, he stated:

"I am not sure myself about the validity of the argument that the Ilois have lived in Chagos 'only on sufferance of the owners', since the point at issue is 'belonging' in the national sense rather than rights of residence on private property."

15 By a detailed minute of 25 July 1968 the Prime Minister was briefed by the Foreign Secretary, Mr Michael Stewart, as to the overall position relating to the defence facility plans for the Chagos. An annex was attached headed "Position of Inhabitants", which in effect repeated the argument that the Ilois lived in the Archipelago only on sufferance of the private law owners: "In this sense it can be contended that no one has any right to reside permanently on the islands . . ." But there was growing anxiety among senior officials who were, so to speak, living close to the problem. On 4 September 1968, a Mr J H Lambert stated in a note to Mr Jerrom:

"We advised the Foreign Secretary that the latter argument might be difficult to sustain in view of the recent discovery that the numbers of second generation 'Ilois' were much greater than originally anticipated . . . It may be helpful to set out the situation as I understand it: (a) all the inhabitants of BIOT (totalling under 1,500) are citizens of the UK and Colonies and they are all entitled to a UK passport with the colonial endorsement; (b)"—deals with the Seychellois living in BIOT, who were "unlikely to exceed 1,000"—"(c) some 500 others (including the 434 second generation 'Ilois') have dual nationality. *If they applied for a UK passport, presumably the Colonial endorsement could only*

- A *reveal that they belonged to BIOT since there was no other British colony to which they could belong.*" (My emphasis.)

16 There is an interesting reflection upon the position in international law in a minute of 23 October 1968, written by a Foreign Office legal adviser, Mr A I Aust:

- B "6. There is nothing wrong in law or in principle to enacting an immigration law which enables the Commissioner to deport inhabitants of BIOT. Even in international law there is no established rule that a citizen has a right to enter or remain in his country of origin/birth/nationality etc. A provision to this effect is contained in Protocol No 4 to the European Convention on Human Rights but that has not been ratified by us"—as I understand it, it still has not—"and thus we  
C do not regard the UK as bound by such a rule. In this respect *we are able to make up the rules as we go along and treat the inhabitants of BIOT as not 'belonging' to it in any sense.*" (My emphasis.)

- 17 On 21 April 1969 the Foreign Secretary submitted a further detailed minute to the Prime Minister, with copies to the Chancellor of the Exchequer, the Secretary of State for Defence, the Minister of Power and the  
D Cabinet Secretary. Its occasion was the decision of the new US government to proceed with the military project on the Chagos subject to Congressional approval. Its importance is that it demonstrates the direct involvement of the United Kingdom government at the very highest level in the process of deciding how the Ilois should be dealt with in light of that project. The minute includes these passages:

- E "4. The problem of the future of these people exists independently of American plans, but the decision to proceed with a communications facility on Diego Garcia, which will necessitate evacuating that atoll, has brought it to a head . . .

- F "5. There is no ideal solution . . . I agree with the conclusion reached in the paper that on balance the best plan will be to try to arrange for these people, all of whom are citizens of the United Kingdom and Colonies or of Mauritius or both, to return to the Seychelles or Mauritius. The people with whom we are concerned are working in the Chagos under contract and own no property or other fixed assets there. However, some of them have established roots in Chagos and I should naturally have wished to consult at least these in advance of any decisions about their future, if this had been possible. Officials have examined closely the possibility of  
G giving them some element of choice, but have advised that this would seem wholly impracticable . . .

- "10. In short I ask my colleagues to agree that . . . we should aim at the return of the inhabitants of the whole Chagos Archipelago to the Seychelles and Mauritius and should enter into negotiations with the Mauritian Government to that end."

- H There was a reply from 10 Downing Street on 26 April 1969 indicating the Prime Minister's agreement.

18 On 16 January 1970 Mr Aust gave written advice upon the question whether the then extant draft Immigration Ordinance should be enacted. His advice starts with this paragraph:

“2. *Purpose of Immigration Ordinance.* (a) To provide legal power to deport people who will not leave voluntarily; (b) to prevent people entering; (c) to maintain the fiction that the inhabitants of Chagos are not a permanent or semi-permanent population. I will consider these separately.” A

He addresses (c) above in paragraph 6, headed “Maintaining the fiction”:

“As long as only part of BIOT is evacuated the British Government will have to continue to argue that the local people are only a floating population. This may be easier in the case of the non-Chagos part of BIOT . . . where most of the people are Seychellois labourers and their families. However, the longer that such a population remains, and perhaps increases, the greater the risk of our being accused of setting up a mini-colony about which we would have to report to the United Nations under article 73 of the Charter. Therefore strict immigration legislation giving such labourers and their families very restricted rights of residence would bolster our arguments that the territory has no indigenous or settled population.” B C

19 It was at length decided, at the turn of the year 1970–71, to enact the Ordinance in the form in which it was in fact made. This was preceded by an exchange of minutes which demonstrates the earnest desire of the British Government to ensure that its making should be attended by as little publicity as possible. A minute of 11 January 1971 stated: D

“2. The ordinance would be published in the BIOT Gazette, which has only very limited circulation both here and overseas, after signature by the Commissioner. Publicity will therefore be minimal.” E

20 That is a sufficient recital of the facts which culminated in the making of the Ordinance.

### *Jurisdiction*

21 At the bottom of Mr Pannick’s argument upon this part of the case lie two elements. The first is the fact that these proceedings are directed against an act (the Ordinance) of the BIOT legislature (the Commissioner). The second is the rule or principle, which Mr Pannick would I think characterise as a basic principle of our constitutional law, that the Crown is divisible: that is, it falls to be treated as a separate sovereign entity vis-à-vis each territory where its sovereign writ runs. The rule is supported by well known authority: Mr Pannick cites *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Indian Association of Alberta* [1982] QB 892, *Tito v Waddell (No 2)* [1977] Ch 106, 255A–B and *R v Secretary of State for the Home Department, Ex p Bhurosah* [1968] 1 QB 266 (“In Mauritius the Queen is the Queen of Mauritius”: per Lord Denning MR, at p 284E). F C

22 Mr Pannick’s two elements are obviously present in the case. But he must show that together they establish that this court has no power to supervise the legality of the Ordinance, else his argument is one of discretion only, whose reach at most would be to persuade us that the BIOT Supreme Court would be a more convenient forum for the resolution of the dispute in hand. That was not a position which Mr Pannick pressed with any great vigour—save for this, and it is a factor we must bear carefully in mind: there H



A exists the possibility, theoretical perhaps, of other proceedings before the BIOT Supreme Court, touching the status and rights of the Ilois, in which that court might reach a conclusion inconsistent with that arrived at here. The appeal routes are not the same. From this court, the ultimate court of appeal is their Lordships' House. From the BIOT Supreme Court, the ultimate court of appeal is the Judicial Committee of the Privy Council. There thus exists the possibility of conflicting judicial opinion at the highest level.

B 23 But the possibility is altogether more apparent than real, and in any case, as I have indicated, this argument was in truth advanced to persuade the court that as a matter of *discretion*, rather than *jurisdiction*, it should not adjudicate upon the Ordinance. In relation to jurisdiction properly so called, I will refer first to Lord Mansfield CJ's dictum in *R v Cowle* (1759) 2 Burr 834. The case concerned the jurisdiction of the King's Bench over doings in Berwick-on-Tweed; the details do not assist us. Lord Mansfield CJ's judgment has great learning as to the status of Berwick, but I need only cite this passage, at pp 855–856:

D “Writs, not ministerially directed, (sometimes called prerogative writs, because they are supposed to issue on the part of the King), such as writs of mandamus, prohibition, habeas corpus, certiorari, are restrained by no clause in the constitution given to Berwick: upon a proper case, they may issue to every dominion of the Crown of England. There is no doubt as to the power of this court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety. To foreign dominions, which belong to a prince who succeeds to the throne of England, this court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland, or to the electorate: but to Ireland, the Isle of Man, the plantations, and, as since the loss of the Duchy of Normandy, they have been considered as annexed to the Crown, in some respects, to Guernsey and Jersey, we may; and formerly, it lay to Calais; which was a conquest, and yielded to the Crown of England by the treaty of Bretigny.”

F I should cite also a sentence from the judgment of Lord Denning MR in *Sabally and N'jie v Attorney General* [1965] 1 QB 273, 290 (the case's context, I think, adds nothing): “If the Crown exceeds its jurisdiction over the colony, its conduct can be challenged in these courts.” Now, the statement of Lord Mansfield CJ in *Cowle* was very wide; wider, it may be, than he needed to go to decide the case. Mr Pannick draws attention to *In re Mansergh* (1861) 1 B & S 400. That case concerned an officer's conviction by a court-martial in India of an offence of grossly insubordinate conduct. Three years later, the officer, who had been dismissed from the service, applied for a rule that the Judge Advocate General show cause why a certiorari should not issue to bring up the record of the conviction so that it might be quashed; it being asserted that the court-martial had had no power to try Major Mansergh on the charges brought. The Queen's Bench declined to interfere. In the course of argument, Cockburn CJ said of Lord Mansfield CJ's statement in *Cowle*, at p 404: “That must be taken with considerable qualification. Those terms are very general.” Also in the argument, he said, at p 405:

“If a court-martial were to assume jurisdiction over a man who was not subject to military discipline at all, this court would interfere. But

I very much doubt if it could interfere because a military man was tried by one court-martial instead of another. Moreover, the sentence of this court-martial does not touch the civil rights, and only affects the military status of the applicant. Does not every person who enters the military service of the Crown give the Crown a right to determine his military status at pleasure?" A

Wightman J asked counsel, at p 405: "Can we issue a certiorari to bring up the proceedings of a court abroad?" Counsel answered, at pp 405-406: B

"A habeas corpus has been issued to Canada; *In re Anderson* (1861) 3 E & E 487; and a habeas corpus or certiorari will go to St Helena; *Ex p Lees* (1858) EB & E 828. Besides, the certiorari here would not be directed to the court-martial, but to the Judge Advocate General, to bring up a document which is now a record in England." C

Giving judgment, Cockburn CJ said, at p 407:

"Then there is the additional fact that these proceedings originated abroad, in a place the tribunals of which are not subject to our jurisdiction. Mr Lush, indeed, contends that because the record of the proceedings is in this country we have jurisdiction over it. Assuming that for a moment, yet when we look at the particular nature of the case before us, we see that the military status of the applicant alone is affected, and consequently, if he had just cause of exception to the act of the tribunal by which he was sentenced, he might have appealed to the Queen to reconsider the matter with the advice of her Judge Advocate. For these reasons I am of opinion that in this case we have no jurisdiction to grant a certiorari; besides which, certiorari being a discretionary writ, we most certainly ought not, in the exercise of our discretion, to grant it if we had the jurisdiction." D E

Their other Lordships agreed. Crompton J reasoned as follows, at pp 409-410:

"it does not appear that this court has ever sent a certiorari beyond seas. The case is said to be analogous to that of habeas corpus, and this, perhaps, is the strongest argument in support of the present application. When a person is improperly imprisoned, as in *In re Allen* (1860) 7 Jur NS 234, we have a right to inquire into the cause of the imprisonment; but I am far from saying that a habeas corpus would go in such a case as the present. In *In re Anderson* 3 E & E 487, which has been referred to, application was made for a habeas corpus to Canada, and precedents were adduced so expressly in point that, according to the great principle regulating these prerogative writs, the party had a prima facie right to have the writ issued. Besides, if a habeas corpus is improperly issued, it may be questioned on the return to the writ. We did not grant a rule to shew cause in that case, because there was immediate danger to the party. For these reasons that case must not be taken as an authority that a habeas corpus will go to a colony. The only other case mentioned was the St Helena case, *Ex p Lees* EB & E 828; but there, after the court had refused to interfere, a writ of error had been allowed by the Crown, and the habeas corpus was afterwards issued by a judge at chambers merely as an ancillary step. I therefore think that we have no jurisdiction in this case, F G H

- A or at least that, if we have, we ought not, in our discretion, to exercise it. It is part of our duty to control inferior courts in this country, but I have yet to learn that that doctrine is applicable to courts in the colonies.”

Blackburn J said, at p 411:

- B “can this court quash the proceedings of a court held in India? No more I think than they could quash the proceedings of a court in France. The Court of Queen’s Bench in England controls local tribunals within England, and such of its dependencies as are integral parts of England, e.g., Berwick-upon-Tweed, &c, and probably the Isle of Man. But there is no authority that it will send a prohibition or a certiorari to the colonies or to India.”

- C 24 In terms of the authorities, though there is some other learning, *In re Mansergh* 1 B & S 400 is I think the high watermark of Mr Pannick’s case, and I have therefore given full citations of its reasoning. His argument on jurisdiction, however, is not unqualified or absolute. He places particular focus on the existence, if that be the fact, of an effective court structure in the colony, dominion or protectorate in relation to which the Queen’s Bench jurisdiction is sought to be invoked. I have already described the system of courts established for BIOT. Mr Pannick submits that although *Mansergh* D may justify a wider proposition, it is *at least* the case that where in the territory in question there is, as here, a municipal court of competent jurisdiction, the Queen’s Bench for its part lacks or will decline jurisdiction to review any local acts of an administrative or legislative nature. The argument’s emphasis on the presence or otherwise of effective domestic courts is to some extent driven by Sir Sydney’s reliance on the authority of E *Ex p Mwenya* [1960] 1 QB 241, in which the Court of Appeal held that a writ of habeas corpus might issue to Northern Rhodesia. Mr Pannick was at pains to point out that the court in that case proceeded on the assumption that there was no court in Northern Rhodesia competent to give equivalent relief. *Mansergh* was cited in *Ex p Mwenya* (see [1960] 1 QB 241, 269–270, 285). It is by no means without interest to notice the contrast between the dismissive reasoning of Crompton J (which I have cited) in the former case F and the approach of Lord Evershed MR in the latter, relating to the issue of habeas corpus overseas. Lord Evershed MR said, at pp 292–293:

- G “it is clearly stated in the quotation from Bacon’s Abridgement and the Commentaries of Sir William Blackstone (and in almost identical language) that the writ (of habeas corpus) runs into all parts of the King’s dominions: ‘for the King is at all times entitled to have an account why the liberty of any of his subjects is restrained wherever that restraint be inflicted’ (Blackstone, 1768, vol 3, p 131). The Divisional Court [viz the lower court in *Ex p Mwenya* itself] proceeded to refer also to the passages from Lord Mansfield CJ in *R v Cowle* 2 Burr 834, 853, 854, 855, 856 . . . To these citations I add also the cited passage from Sir Edward Coke’s report in *Calvin’s Case* (1609) 7 Co Rep 1, 20a, also much relied upon by H *Mwenya*: ‘But the other kind of writs that are mandatory and not remedial, are not tied to any place, but do follow subjection and ligeance in what country or nation soever the subject is . . .’ These passages from Bacon, Blackstone, Lord Mansfield and Sir Edward Coke were the basis of the decision of Cockburn CJ in *Ex p Anderson* 3 E & E 487 that the

writ of habeas corpus might be issued to ‘all parts of the dominions of the Crown of England’ . . .” A

Lord Evershed MR proceeded to cite Cockburn CJ’s judgment in *Ex p Anderson*, but with respect I need not set out the passage. In *Ex p Mwenya* [1960] 1 QB 241, 306, Romer LJ said:

“there is no authority, so far as I am aware, compelling this court to hold that the writ of habeas corpus will not issue into any British Protectorate. The decisions and judicial utterances relevant to the question have been exhaustively reviewed and considered in the judgment of the Divisional Court and by the Master of the Rolls, and I do not propose to consider them again. In *Cowle’s* case 2 Burr 834 Lord Mansfield used language which, if taken at its face value, is inconsistent with the Crown’s contention. Vaughan Williams LJ, in *R v Earl of Crewe, Ex p Sekgome* [1910] 2 KB 576, clearly took the view that the writ could, in a proper case, issue into a protectorate, and I agree with that view notwithstanding the contrary opinion entertained by Kennedy LJ on the question.” B C

Then Sellers LJ said, at pp 309–311:

“The judges in the earliest cases had not in mind the issue which arises here, but I think it would be difficult to read into any of them (until as late as Kennedy LJ in *Ex p Sekgome*) a refutation of the powers of the English court to issue the writ to safeguard a subject’s freedom in a territory over which this country had wide powers of jurisdiction and control, wide enough to enforce as a matter of ordinary administration any order the court might make . . . I would have felt that the substance, if not the precise words, of Lord Mansfield’s judgment in *R v Cowle* 2 Burr 834, tended to support the argument for the applicant here on the issue of jurisdiction . . . I would join Vaughan Williams LJ in this part of his judgment [in *Ex p Sekgome* [1910] 2 KB 576, 605]: ‘I ask myself why, if the writ of habeas corpus can be issued to the King’s territorial dominions, the writ should not be ordered to go to any country or place under the subjection of the Crown whenever it is suggested to the court in England that a subject of the Crown is illegally imprisoned’ . . .” D E F

25 *R v Earl of Crewe, Ex p Sekgome* [1910] 2 KB 576, referred to by all three judges in *Ex p Mwenya* [1960] 1 QB 241, was a case in which the applicant, who claimed to be the chief of a native tribe, had been detained at a place within the Bechuanaland Protectorate by virtue of a proclamation, allegedly made under powers conferred by Order in Council, on the ground that his detention was necessary for the preservation of peace within the Protectorate. He applied for a writ of habeas corpus, which was refused, but on the ground that Sekgome’s detention was lawful, not that the Queen’s Bench lacked jurisdiction. The case is one of a number falling for consideration in that part of the argument relating to the true interpretation of section 11 of the Ordinance—“peace order and good government”. However, Sir Sydney relies on it also for the purposes of the argument as to jurisdiction. I need not with respect set out the passages referred to in *Ex p Mwenya* [1960] 1 QB 241, save for that given by Sellers LJ from the judgment of Vaughan Williams LJ, which I have already cited, but I should G H

- A note these words from the judgment of Farwell LJ, which in their context are obiter but which possess the clearest resonance for the present case, at [1910] 2 KB 576, 618:

B “I must not, however, be taken to assent . . . to the view that the Secretary of State would not be the proper person to make a return to a writ of habeas corpus if there had been no Proclamation of 5 December 1906. Where a man who owes obedience to laws imposed by England is imprisoned and kept imprisoned without trial in a place maintained by England, and placed under the control of an officer of the Crown who acts under the orders of the Colonial Office, and who has acted in the particular case with the assent and approval of and is supported by the Colonial Office, I should be slow to conclude that the Secretary of State could not be called on to make a return to the writ.”

C 26 It is plain that the court in *Ex p Mwenya* [1960] 1 QB 241, and at least the majority (Vaughan Williams and Farwell LJJ) in *Ex p Sekgome* [1910] 2 KB 576, saw nothing in any earlier jurisprudence, thus including *In re Mansergh* 1 B & S 400, to inhibit them from concluding that the writ of habeas corpus might in a proper case issue beyond the seas, “to any place under the subjection of the Crown”. Indeed the weight of authority pointed  
D firmly towards just such a conclusion. It seems to me that we should ourselves do injury to our rules of precedent if we were to hold that in light of *Mansergh* the writ might not so issue. Here, of course, we are not concerned with habeas corpus but with an application for a certiorari. I can see no basis for distinguishing between one prerogative writ and another upon the question, what is the reach of this court’s jurisdiction? Lord  
E Mansfield CJ stated expressly that all the prerogative writs may go to every dominion of the Crown of England; Sir Edward Coke was, I think, to the same effect in the short passage from *Calvin’s Case* 7 Co Rep 1, 20a set out by Lord Evershed MR in *Ex p Mwenya* [1960] 1 QB 241, 293, which I have cited; the judgments in *In re Mansergh* 1 B & S 400, whatever, with respect, they in fact decide, draw no distinction between habeas corpus and the other prerogative writs in relation to jurisdiction; and lastly, no such distinction  
F could in my judgment survive the glare of reason: habeas corpus is a high constitutional writ because it protects the individual from unlawful detention, but an order of certiorari, while not necessarily concerned to secure the freedom of the person, is just as surely provided as a remedy against arbitrary, capricious and oppressive conduct.

G 27 If there is no absolute prohibition upon the court’s jurisdiction to issue certiorari to overseas territories subject to the Queen’s dominion, might there at least be a qualified or partial restriction, having effect in any case where there are established local courts themselves possessing the power to adjudicate upon the complaint put forward? This, as I have indicated, is Mr Pannick’s true case. But such a position is in reality a paradigm of a familiar rule of *discretion*, namely that judicial review is a legal recourse of last resort and an applicant must exhaust any proper  
H alternative remedy open to him before the judicial review court will consider his case. This, surely, is the category to which Mr Pannick’s argument on jurisdiction truly belongs. There is no authority at all—none in *In re Mansergh*—for the proposition that the existence of effective local courts negatives the *jurisdiction* of the Queen’s Bench to issue certiorari extra-

territorially. It may be that the reasoning in *In re Mansergh*, though undoubtedly deploying the language of jurisdiction, is in truth directed to this powerful principle of discretion. At all events one has in mind that in that case their Lordships found very strong reasons why the power to order certiorari, if on the facts they possessed it, should not be exercised. A

28 I conclude that this court owns ample jurisdiction to make the order sought in this case, if it be right to make it. That result is not contradicted by the “two elements” in Mr Pannick’s submission which I identified at paragraph 21. Indeed, I have to say that the Crown’s reliance on the proposition that the Ordinance is a legal creature of the government of BIOT which must be taken to possess a separate and distinct sovereignty of its own, such that the Queen’s courts sitting here in London have nothing to do with the matter, represents in my judgment an abject surrender of substance to form. Nothing is plainer, from the history of events which I have recounted by reference to the contemporary documents, that the making of the Ordinance and its critical provision, section 4, were done on the orders or at the direction of Her Majesty’s ministers here, Her ministers in right of the government of the United Kingdom. That government had entered into obligations and understandings with the Americans, not with the government of BIOT. The government of BIOT, indeed, was itself a very creature of those understandings. If the applicant in these proceedings had sought to sue in the BIOT courts, the reply might have been that those courts had no authority to control the Secretary of State sitting in Whitehall, and it would have been a true reply. B C D

29 The question for this court is whether to quash an instrument, the Ordinance, whose making was wholly procured by the United Kingdom Government. If the suggestion that the court lacks the power to do so has a place in our legal tradition, it is not one which I recognise. I would hold that we possess ample jurisdiction to make the order sought. E

### *Magna Carta*

30 I may turn now to the substantive grounds of challenge to the Ordinance. To some extent these run into one another. The first which I will take is the most florid: it is to the effect that section 4 of the Ordinance constitutes an affront to the rights and liberties enshrined in Chapter 29 of Magna Carta 1297 (25 Edw 1 c 1). I cite the modernised text given in *Halsbury’s Statutes of England and Wales*, 4th ed, vol 10 (1995 reissue), p 16: F

“No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.” G

In order to understand this part of the case, it is necessary also to set out sections 2 and 3 of the Colonial Laws Validity Act 1865. Section 2 bears the sidenote “Colonial law when void for repugnancy”; section 3, “Colonial law when not void for repugnancy”. Section 2 provides: H

“Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such



- A law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.”

Section 3 provides:

- B “No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.”

- C An “Act of Parliament extending to the colony”, within section 2, is by section 1 an Act which is “made applicable to such colony by the express words or necessary intendment of any Act of Parliament”.

31 Sir Sydney’s argument possesses a beguiling simplicity. It is that section 4 of the Ordinance is repugnant to Chapter 29 of Magna Carta: the Ilois are by section 4 exiled from their homeland. Accordingly, section 4 is “absolutely void” within the meaning of section 2 of the 1865 Act.

- D 32 Mr Pannick was at first disposed to argue that Magna Carta did not constitute a statute at all, properly so called, at any rate for the purpose of the 1865 Act. Upon an examination of the Charter’s history, and its repeated confirmation by Parliament (not least in the late Middle Ages), he rightly abandoned this position. I confess to having been dismayed to hear the government submit (as Mr Pannick’s first position necessarily implied) that Magna Carta belonged to some unspecified category of subordinate law. But Mr Pannick rightly resiled from that position, in the course of
- E Sir Sydney’s submissions.

- 33 It is clear that Magna Carta is not applied to any colony by express words. It may only be so, therefore, by “necessary intendment”. There was much argument at the bar as to the extent to which Magna Carta “followed the flag.” That expression appeared in a judgment in the Canadian Supreme Court in *Calder v Attorney General of British Columbia* (1973) 34 DLR (3d) 145, 203 where it was said that Magna Carta: “has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories.” This statement, much pressed by Sir Sydney, was approved by Lord Denning MR in *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Indian Association of Alberta* [1982] QB 892, 912. Mr Pannick sought to rely on the decision of the Judicial Committee of the Privy Council in *Staples v The Queen* (unreported) 27 January 1899. Their Lordships’ reasoning in that case has come down to us in a curious form. There is no report in the books, in the ordinary way, rather their Lordships issued a memorandum dated 27 January 1899, stating:
- F
- G

- H “As it has been intimated to their Lordships that their reasons for giving this advice were not in all points sufficiently explained by what fell from them during the argument, they have authorised the Registrar to make the statement following.”

The question in the case was whether the petitioner, who had upon a charge of theft been tried and convicted by a judge and four assessors in the High

Court of Matabeleland, had been unlawfully deprived of the right to trial by jury vouchsafed, so it was said, by Chapter 29 of Magna Carta. Now, Matabeleland was a protectorate, not a colony. The Privy Council held that Magna Carta did not extend to such a protectorate, to which section 12 of the Foreign Jurisdiction Act 1890 applied. Section 12(1) and (2) of that Act are in substantially the same terms as sections 2 and 3 of the 1865 Act. Their Lordships stated, at pp 2–3 of the memorandum:

“the repugnancy contemplated by the Foreign Jurisdiction Act must mean repugnancy to a statute or order applied in some special way to British subjects in the foreign country in question. It would be a most unreasonable limit on the Crown’s power of introducing laws fitting to the circumstances of its subjects in a foreign country if it were made impossible to modify any Act of Parliament which prior to the Order in Council might be invoked as applicable to a British subject.”

Sir Sydney took the position that this authority has no application to the case in hand, because it was dealing with a protectorate, not a colony. The citizens of a colony are, distinctly, the Queen’s subjects, and as such enjoy the legal heritage of Magna Carta. The reasoning in *Staples v The Queen* is nothing to the contrary.

34 There were further points to be made as regards the incorporation or otherwise of Magna Carta into the law of BIOT: see paragraph 50 below. I do not set them out here, since with great respect to counsel’s submissions and the learning which they deployed, in my judgment the argument as to Magna Carta is, in the end, barren. Even if the Charter “followed the flag” to BIOT, its potency would not suffice to condemn what has been done here, *if it was done in accordance with the law*, not merely the letter of the law, but in accordance with our substantive constitutional law. Magna Carta does not, as I understand it, curtail the sovereignty of the proper lawmaker to make what laws seem fit to him. Chapter 29 states: “No freeman shall be . . . exiled . . . but . . . by the law of the land.” Now, there may be questions whether any law is in the proper form, without which it is not law, and there may be questions whether the lawmaker, if he is not the Queen in Parliament, has the power—the vires—to make the law in issue. But if those questions are answered in the lawmaker’s favour, his law is not then to be condemned for breach of Magna Carta.

35 Indeed, Sir Sydney does not submit that what was purportedly done by section 4 of the Ordinance could not by any means at all have been properly done according to law. His case is that it could only have been done by Act of Parliament of the United Kingdom, or possibly by a legislative measure authorised and made by virtue of the royal prerogative, a possibility to which I will return. In his skeleton argument:

“It is submitted that the ‘law of the land’ [in Chapter 29 of Magna Carta] means an Act of Parliament, or an established rule of common law. It cannot include an Order in Council or an act of a governor or commissioner, even if put into legislative form, as that would be destructive of the great principle enshrined in article 29.”

With respect, this reasoning is a little opaque. If the submission intended is simply that a measure such as section 4 of the Ordinance could not lawfully be done by executive discretion, with no sure foundation in legislation,

- A I would without cavil accept it. Sir Sydney is plainly right to submit that, save in time of war, the executive has no power to abridge the freedoms of the Queen's subjects save by authority of a valid statute or an established common law prerogative. He cites the celebrated decision in *Entick v Carrington* (1765) 19 State Tr 1029. But if the submission means that the measure could in no event be done by Order in Council, I have some difficulty. An Order in Council may in the context of the Crown's powers to
- B make law for a colony amount to an act of primary legislation under the prerogative.

- 36 Accordingly Magna Carta does not in my judgment offer a resolution of this case in the applicant's favour. It provides no answer to the question whether section 4 of the Ordinance was made in accordance with "the law of the land". But it is very important to notice that, as I see the
- C matter, Magna Carta is in truth the first general declaration (I do not think it was done by King Alfred in the 9th century), in the long run of our constitutional jurisprudence, of the principle of the rule of law. I will only cite *Pollock & Maitland, The History of English Law*, 2nd ed (1923), vol 1, p 173:

- D "this document becomes and rightly becomes a sacred text, the nearest approach to an irrevocable 'fundamental statute' that England has ever had. In age after age a confirmation of it will be demanded and granted as a remedy for those oppressions from which the realm is suffering, and this when some of its clauses, at least in their original meaning, have become hopelessly antiquated. For in brief it means this, that the king is and shall be below the law."

- E This describes the enduring significance of Magna Carta today. So far as it is a proclamation of the rule of law, it may indeed be said to follow the flag—certainly as far as BIOT, for unless the removal of the Ilois from the archipelago is shown to have been done according to law, the applicant in these proceedings must succeed, and while in that case there might perhaps be questions as to the appropriate form of relief, it cannot be and is not suggested that any prudential considerations (such as the strategic
- F importance of the military base) should stay the court's hand. The true questions in the case are: what is the form and substance of any such legal authority as would justify what has been done here, and whether section 4 of the Ordinance lies within it. To these questions Magna Carta does not provide the answer.

- G The "Witham principle"

- 37 *R v Lord Chancellor, Ex p Witham* [1998] QB 575 was a case in which a fundamental or constitutional right, there the right of access to the Queen's courts, was effectively withheld from a class of persons (those with no means to pay court fees) by a subordinate instrument whose purported vires was a provision in main legislation cast in very general terms. The
- H Divisional Court struck down the relevant part of the subordinate measure, holding that a fundamental or constitutional right could only be abrogated by the executive where that was specifically authorised by Act of Parliament. The first judgment in the case was given by myself at the invitation of Rose LJ (perhaps I may be allowed to protest that the case's elevation from a mere authority into a principle only arises from the way Sir Sydney,

seductively enough, categorised it in the course of his argument). The submission was that section 4 of the Ordinance could not lawfully be authorised by the general words of section 11 of the BIOT Order, any more than the Supreme Court Fees (Amendment) Order 1996 (SI 1996/3191) in *Ex p Witham* could be justified by the general words of section 130 of the Supreme Court Act 1981. A British citizen, Sir Sydney submitted, enjoys a constitutional or fundamental right to reside in or return to that part of the Queen's dominions of which he is a citizen, where he is a "belonger", a term used, as I have shown, in some of the documents which trace the history of the case as it was viewed in Whitehall. I need only set out one passage from what I said in *Ex p Witham*, at p 581:

"In the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice. And any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it."

Rose LJ said, at p 587:

"There is nothing in [section 130 of the Supreme Court Act 1981] or elsewhere to suggest that Parliament contemplated, still less conferred, a power for the Lord Chancellor to prescribe fees so as totally to preclude the poor from access to the courts. Clear legislation would in my view be necessary to confer such a power and there is none."

I should also cite this passage from Lord Hoffmann's speech in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131:

"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

38 In *Ex p Witham* [1998] QB 575 I considered that only *express* words in main legislation would suffice to abrogate such a constitutional right. There is some controversy as to that: see, with respect, *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 575 per Lord

- A Browne-Wilkinson, and indeed Lord Hoffmann's reference to "necessary implication" in the passage from *Ex p Simms* [2000] 2 AC 115, 131 just cited. But I conceive it is generally accepted that interference with a constitutional or fundamental right requires at least *specific* authority given by Parliament, and this is a principle of the common law, independent of our incorporation by the Human Rights Act 1998 of the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953). At all events, the question for present purposes is how far it advances Sir Sydney's cause to the effect that section 4 of the Ordinance is not lawfully authorised.

- 39 For my part I would certainly accept that a British subject enjoys a constitutional right to reside in or return to that part of the Queen's dominions of which he is a citizen. Sir William Blackstone says in *Commentaries on the Laws of England*, 15th ed (1809), vol 1, p 137: "But no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no not even a criminal." Compare *Chitty, A Treatise on the law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (1820), pp 18, 21. Plender, *International Migration Law*, 2nd ed (1988), ch 4, p 133 states: "The principle that every state must admit its own nationals to its territory is accepted so widely that its existence as a rule of law is virtually beyond dispute . . ." and cites authority of the European Court of Justice in *Van Duyn v Home Office* (Case 41/74) [1975] Ch 358, 378-379 in which the court held that "it is a principle of international law . . . that a state is precluded from refusing its own nationals the right of entry or residence". Dr Plender further observes, *International Migration Law*, p 135: "A significant number of modern national constitutions characterise the right to enter one's own country as a fundamental or human right", and a long list is given. And I should cite this passage, at pp 142-143:

- "Without exception, the remaining dependencies of the United Kingdom impose systems of immigration control applicable to British citizens coming from the United Kingdom and to those from other dependencies. In two very exceptional cases, immigration control is applied to all persons whatever. Elsewhere, a distinction is drawn between those who belong to the territory and are accordingly immune from immigration control and those who do not belong. In several instances, the statute uses the very word 'belonger'. Thus, a person has the right to land in Hong Kong if he is a 'Hong Kong believer'."

- G Dr Plender's "two very exceptional cases" are the British Antarctic Territory and BIOT. The British Antarctic Territory has no believers. BIOT has.

- 40 Now *R v Lord Chancellor, Ex p Witham* [1998] QB 575 proceeded upon the premise that, adopting what might be called a standard approach to the task of statutory construction, the enabling words in the Act would have sufficed to provide the vires for the regulation under assault; the regulation was bad only because its interference with a constitutional right invoked the application of a stricter rule, the requirement of specific authorisation. In the present case the question whether, *Ex p Witham* (and indeed *Magna Carta*) aside, there was any vires for section 4 of the Ordinance is at the heart of the case. One of Sir Sydney's submissions, to which I shall come in due course, was that section 11 of the BIOT Order,

upon ordinary principles of construction and without the assistance of any special rule, failed utterly to empower the Commissioner to make section 4 of the Ordinance. If that submission is right, then of course he need have no recourse to *Ex p Witham*. If the submission is wrong, it will be because the court would have accepted Mr Pannick's argument that in the context of the making of colonial laws the words used in section 11, "make laws for the peace, order and good government of the Territory", "connote, in British constitutional language, the widest law-making powers appropriate to a sovereign": see *Ibrelebbe v The Queen* [1964] AC 900, 923; and that this suffices to clothe section 4 with vires given by section 11. I very much doubt whether an appeal to *Ex p Witham* would retain the least force in face of such a conclusion.

41 Mr Pannick also submits that the application of a special rule of construction whose purpose is to protect fundamental or constitutional rights would undercut sections 2 and 3 of the Colonial Laws Validity Act 1865 (which I have already set out) and would be contrary to authority of the Privy Council in *Liyanage v The Queen* [1967] 1 AC 259. In that case the appellants had been convicted of grave criminal offences under laws of the Parliament of Ceylon, specifically passed so as to deprive, retrospectively, the appellants of what would have been their right to trial by jury. The laws had other effects also. The convictions were quashed by the Privy Council on the footing that the laws offended against Ceylon's written constitution, but that aspect of the case is not germane here. The appellants' first argument had been, as stated at p 283, that "the Ceylon Parliament is limited by an inability to pass legislation which is contrary to fundamental principles of justice". Their Lordships stated, at p 283:

"The first argument starts with a judgment of Lord Mansfield CJ. In *Campbell v Hall* (1774) 1 Cowp 204, 209 he laid down as a clear proposition that 'if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles'."

Reciting the argument based on Lord Mansfield CJ's statement, their Lordships in *Liyanage v The Queen* continued, at pp 284–285:

"Therefore the legislative power of Ceylon is still limited by the inability (which it inherits from the Crown) to pass laws which offend against fundamental principles. This vague and uncertain phrase might arguably be called in aid against some of the statutes passed by any Sovereign power. And it would be regrettable if the procedure adopted in giving independence to Ceylon has produced the situation for which the appellants contend.

"In view of their Lordships, however, such a contention is not maintainable. Before the passing of the Colonial Laws Validity Act 1865 considerable difficulties had been caused by the over-insistence of a Colonial judge in South Australia that colonial legislative Acts must not be repugnant to English law."—*Wheare, The Statute of Westminster and Dominion Status*, 4th ed (1949), pp 75, 76, 77 is referred to. Sir Kenneth Wheare was a distinguished Rector of Exeter College, Oxford—"That



A Act was intended to and did overcome the difficulties. It provided that colonial laws should be void to the extent in which they were repugnant to an Act of the United Kingdom parliament applicable to that colony, 'but not otherwise' (section 2) and that they should not be void or inoperative on the ground of repugnancy to the law of England (section 3). 'The essential feature of this measure is that it abolished once and for all the vague doctrine of repugnancy to the principles of English law as a source of invalidity of any colonial Act . . . The boon thus secured was enormous; it was now necessary only for the colonial legislator to ascertain that there was no Imperial Act applicable and his field of action and choice of means became unfettered.' (*Keith, The Sovereignty of the British Dominions* 1929 ed, p 45.)

B  
C "Their Lordships cannot accept the view that the legislature while removing the fetter of repugnancy to English law, left in existence a fetter of repugnancy to some vague unspecified law of natural justice. The terms of the Colonial Laws Validity Act and especially the words 'but not otherwise' in section 2 make it clear that Parliament was intending to deal with the whole question of repugnancy. Moreover their Lordships doubt whether Lord Mansfield was intending to say that what was not repugnant to English law might yet be repugnant to fundamental principles or to set up the latter as a different test from the former. Whatever may have been the possible arguments in this matter prior to the passing of the Colonial Laws Validity Act, they are not maintainable at the present date."

D  
E 42 I did not understand Sir Sydney to submit that we should feel free not to follow this authority on the footing that, as a decision of the Privy Council, it is persuasive only, however great the respect it may command. This is of some importance. As a municipal court of England and Wales we are in this case treading in the field of colonial law. We are, as I see the matter, justified in doing so for the reasons I have given upon the jurisdiction issue. But there is a trade-off. It seems to me particularly important that we should respect the decisions of the Privy Council upon relevant issues of colonial law. Where there is a body of jurisprudence, possessing high authority, which addresses the legal relation between the United Kingdom and its colonies, we should, sitting in this court, treat it as settled and binding. Otherwise we risk the spectre of conflicting judicial opinion to which I referred earlier, in paragraph 22.

F  
G 43 So approaching the issue, I cannot see that Sir Sydney's appeal to constitutional principle as it was described in *R v Lord Chancellor, Ex p Witham* [1998] QB 575 can withstand the authority of *Liyanage v The Queen* [1967] 1 AC 259. I acknowledge a consequence of this conclusion, namely that as regards fundamental or constitutional rights, there is a difference of approach between the developed law of England and the law applicable in the colonies. Belongers here take the benefit of the constraints which the common law imposes upon the construction of legislation which interferes with such rights; belongers there do not. However I think it plain that in practice, in the post-imperial world as it is, this is a misfit which nearly always will be nothing but theoretical; territories such as Gibraltar possess written constitutions which enshrine fundamental rights based on or akin to the model of the European Convention on Human Rights. But

BIOT does not, and there is therefore a dissonance, one which may strike real lives, between the richness of the rights which our municipal law today affords and the wintry asperity of authority such as *Liyanage v The Queen*. The court's task here is accordingly acute. We should, however, ourselves affront the rule of law if we translated the liberal perceptions of today, even if they have become the warp and weave of our domestic public law, into law binding on established colonial powers in the face of authority that we should do no such thing.

44 I would therefore hold that *Ex p Witham* [1998] QB 575 and like decisions do not assist the applicant.

*The legal nature of section 4 of the Ordinance*

(1) *The Commissioner—agent/delegate?*

45 Here lie the real issues in the case. I will deal first with Mr Pannick's submission that a colonial legislature, enjoying power to make laws for the peace, order and good government of the territory where it possesses jurisdiction, is by our law not the agent or delegate of the body which created it. Translated into this case, it is said that the Commissioner is not the agent or delegate of the Queen in Council who made the BIOT Order. But this submission has no teeth unless it is intended to persuade us that the Commissioner may legislate absolutely as he chooses. Such an argument would of necessity suggest that section 4 of the Ordinance is valid irrespective of the terms of section 11 of the BIOT Order, and would be valid whatever happened to be stated in an enabling provision such as section 11. So understood the submission merely invites our entry into a barbarous world where there is no rule of law. The Commissioner would be above the law, save I suppose to the extent that his masters in London might correct him, acting under section 11(2) of the BIOT Order.

46 An important authority on the status of a colonial legislature is *R v Burah* (1878) 3 App Cas 889. The Privy Council there stated, at p 904:

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself."

Here then it was plainly accepted that a legislature created by a measure passed by a body which is legally prior to it must act within the confines of the power thereby conferred. With great respect, I would say that nothing could be more elementary. In this area, there is as it seems to me a risk of some obfuscation arising from descriptions of bodies in the Commissioner's position as a legislature, even a sovereign legislature. Certainly he legislates, but he does so only within the powers conferred upon him by higher authority. This argument that the Commissioner is not the agent or delegate of the Queen in Council is wholly bloodless.

(2) *The Colonial Laws Validity Act 1865*

47 Mr Pannick was also disposed at first to submit that the effect of sections 2 and 3 of the Colonial Laws Validity Act 1865 was that the

A making of a law by the Commissioner, here section 4 of the Ordinance, could not be challenged as ultra vires on any ground whatever save that it offended a British statute which extended to BIOT. So if there were no such statute the Commissioner's powers would presumably be untrammelled; and again we are in the badlands, to use John Wyndham's expression, where there is no rule of law. But Mr Pannick resiled from this position. He accepted that it was undermined by the passage from *R v Burah* 3 App Cas 889, 904 which I have already set out. There is also authority of the Court of Exchequer Chamber in *Phillips v Eyre* (1870) LR 6 QB 1, 20:

C "We are satisfied that it is sound law, and that a confirmed act of the local legislature lawfully constituted, whether in a settled or conquered colony, has, *as to matters within its competence and the limits of its jurisdiction*, the operation and force of sovereign legislation, though subject to be controlled by the imperial parliament." (My emphasis.)

(3) *The Commissioner's powers: section 11 of the BIOT Order*

D 48 As it seems to me, then, neither an appeal to those dicta which assert that a colonial legislature is neither agent nor delegate of the Imperial Parliament (or the Queen in Council), nor any reliance on the Colonial Laws Validity Act, can suffice to enlarge the power of the Commissioner to make laws beyond what, on its true construction, section 11 of the BIOT Order gives him. However broad the power in point of theory to legislate for a colony such as BIOT, here it has been done by a particular means. If the chosen last is section 11, the boot of section 4 can be no bigger.

E (4) *The British Settlements Act 1887*

F 49 At this point it is convenient to refer to a subsidiary debate upon which Sir Sydney and Mr Pannick embarked at various points in the case. This was whether the power to legislate for BIOT arose ultimately from the Queen's prerogative, or the British Settlements Act 1887 (50 & 51 Vict c 54). It is clear law that the Queen enjoys prerogative power to make laws for a ceded colony: see *Abeysekera v Jayatilake* [1932] AC 260, 264. But in relation to a settled colony legislative power is conferred on the Queen in Council by statute, the British Settlements Act 1887, and the prerogative gives no authority to legislate in such a case: see *Sammut v Strickland* [1938] AC 678, 701. Section 6 of the 1887 Act, the interpretation provision, defines "British settlement" as

C "any British possession which has not been acquired by cession or conquest, and is not for the time being within the jurisdiction of the Legislature, constituted otherwise than by virtue of this Act or of any Act repealed by this Act, of any British possession."

Section 2 of that Act provides in part:

H "It shall be lawful for Her Majesty the Queen in Council from time to time to establish all such laws and institutions . . . as may appear to Her Majesty in Council to be necessary for the peace, order, and good government of Her Majesty's subjects and others within any British settlement."

Section 3 confers a power “to delegate to any three or more persons within the settlement all or any of the powers conferred by this Act on Her Majesty in Council”.

50 Sir Sydney submitted that BIOT should be regarded as a settled colony. His purpose or one of his purposes in doing so was to assert that the legislative power of the Commissioner could only be that of a delegate. But for reasons I have given, the Commissioner’s power of legislation is no bigger than what section 11 of the BIOT Order gives him, delegate or no delegate. In addition, in the context of the argument relating to the Magna Carta, Sir Sydney desired to refute Mr Pannick’s submission that, in a ceded colony, the law of England does not without more become the law of the colony following cession; earlier laws remain in place until new laws are made, so that the Magna Carta would not form part of the law of the colony unless it, or, it may be, the law of England generally, were expressly applied. It seems from Mr Steel’s evidence that English law was not generally applied in Mauritius, nor therefore was it applied in BIOT (pursuant to section 15(1) of the BIOT Order) at the time of its creation. However all this may be, I have explained in paragraphs 34 to 36 why the argument based on the Magna Carta does not advance the case, whatever one makes of the proposition that it “followed the flag” to BIOT.

51 Whether the prerogative or the British Settlements Act 1887 is the source of the power to legislate for BIOT may, however, matter for another reason. There is a question, arising upon Sir Sydney’s argument, whether what was purportedly done by section 4 of the Ordinance could only lawfully have been done by Act of the United Kingdom Parliament, or whether it could be done by a legislative act under the prerogative. If BIOT is a “British settlement” within the meaning of the 1887 Act, the Queen’s power of legislation is given and curtailed by section 2, which, like section 11 of the BIOT Order, has the formula “peace, order, and good government”. If section 11 does not give the power to make a law like section 4 of the Ordinance, then neither, surely, does section 2 of the Act. In that case it could only be done by fresh main legislation. But if the source of the power to make laws for BIOT is the royal prerogative, the position may be different. I have already said at paragraph 35 that I will return to this question.

52 I should say that, in my judgment, the 1887 Act has no application to this case. It is beyond question that BIOT was in 1814 part of a ceded colony. When it was split from Mauritius by the BIOT Order, that position cannot have been changed. Sir Sydney submits, in his skeleton argument, that in 1965 BIOT had a settled population of citizens of the United Kingdom and colonies. Plainly that is so. But the question, ceded or settled, has surely to be determined as at the time when the territory concerned becomes subject to the Queen’s dominion.

(5) “Peace, order, and good government”

53 I turn at length to the issue whose resolution, in my judgment, will decide this case. Did section 11 of the BIOT Order empower section 4 of the Ordinance? Mr Pannick marshalled a formidable body of authority to support the proposition that the formula “peace, order, and good government”, used so often in measures conferring powers to make colonial law, was to be taken as having the widest possible intendment. *Riel v The*

- A *Queen* (1885) 10 App Cas 675 concerned an Act of the Imperial Parliament authorising the Canadian Parliament to make laws “for the administration, peace, order, and good government of any territory”. Their Lordships in the Privy Council stated, at p 678:

B “it appears to be suggested that any provision differing from the provisions which in this country have been made for administration, peace, order, and good, government cannot, as matters of law, be provisions for peace, order, and good government in the territories to which the statute relates, and further that, if a court of law should come to the conclusion that a particular enactment was not calculated as a matter of fact and policy to secure peace, order, and good government, that they would be entitled to regard any statute directed to those objects, but which a court should think likely to fail of that effect, as ultra vires and beyond the competency of the Dominion Parliament to enact. Their Lordships are of opinion that there is not the least colour for such a contention. The words of the statute are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to.”

- D 54 I have already referred in paragraph 40 to what was said in *Ibrelebbe v The Queen* [1964] AC 900, 923: the words peace, order and good government “connote, in British constitutional language, the widest law-making powers appropriate to a sovereign”. This was approved in *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733, 747 (which shows also that it makes no difference to the power’s breadth that the colonial legislature in question is not established on representative principles: cf *Li Hong Mi v Attorney General for Hong Kong* [1920] AC 735). *R v Earl of Crewe, Ex p Sekgome* [1910] 2 KB 576, which I have cited in dealing with the argument as to this court’s jurisdiction, is also a case concerned with a “peace, order and good government” provision, under whose authority the applicant’s detention was held to have been plainly justified.

- F 55 The authorities demonstrate beyond the possibility of argument that a colonial legislature empowered to make law for the peace, order and good government of its territory is the sole judge of what those considerations factually require. It is not obliged to respect precepts of the common law, or English traditions of fair treatment. This conclusion marches with the cases on the Colonial Laws Validity Act 1865, and I have dealt with that. But the colonial legislature’s authority is not wholly unrestrained. Peace, order and good government may be a very large tapestry, but every tapestry has a border. In *Trustees Executors and Agency Co Ltd v Federal Comr of Taxation* (1933) 49 CLR 220, 234–235, Evatt J in the High Court of Australia stated:

- H “The correct general principle is . . . whether the law in question can be truly described as being for the peace, order and good government of the Dominion concerned . . . The judgment of Lord Macmillan [in *Croft v Dunphy* [1933] AC 156] affirms the broad principle that the powers possessed are to be treated as analogous to those of ‘a fully sovereign state’, so long as they answer the description of laws for the peace, order, and good government of the constitutional unit in question . . .”

56 In answering the question whether a particular measure, here section 4 of the Ordinance, can be described as conducing to the territory's peace, order and good government, it is I think no anachronism, and may have much utility, for the court to apply the classic touchstone given by our domestic public law for the legality of discretionary public power as it is enshrined in *Associated Provincial Picture Houses Ltd v Wednesbury Corp'n* [1948] 1 KB 223. Could a reasonable legislator regard the provisions of section 4 as conducing to the aims of section 11? In answering the question, the force of the cases shows that a very wide margin of discretion is to be accorded to the decision-maker; yet in stark contrast our modern domestic law tends in favour of a narrower margin, and a more intrusive judicial review, wherever fundamental or constitutional rights are involved. This recalls the dissonance to which I referred at paragraph 43 between the rights which the common law confers here, and the thinner rule of law which the jurisprudence has accorded the colonies. But the dissonance is historic, and in my judgment does not in any event drive the result in this present case.

#### *The legality of the Ordinance*

57 Section 4 of the Ordinance effectively exiles the Ilois from the territory where they are belongers and forbids their return. But the "peace, order and good government" of any territory means nothing, surely, save by reference to the territory's population. They are to be *governed* not removed. In the course of argument Gibbs J gave what with respect seems to me to be an illuminating example of the rare and exceptional kind of case in which an order removing a people from their lawful homeland might indeed make for the territory's peace, order and good government: it would arise where because of some natural or man-made catastrophe the land had become toxic and uninhabitable. Short of an extraordinary instance of that kind, I cannot see how the wholesale removal of a people from the land where they belong can be said to conduce to the territory's peace, order and good government. The people may be taxed; they should be housed; laws will criminalise some of the things they do; maybe they will be tried with no juries, and subject to severe, even brutal penalties; the laws made for their marriages, their property, and much besides may be far different from what obtains in England. All this is vouchsafed by the authorities. But that is not all the learning gives. These people are subjects of the Crown, in right of their British nationality as belongers in the Chagos Archipelago. As Joseph Chitty said in 1820 (*A Treatise on the law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject*, pp 18, 21), the Queen has an interest in all her subjects, who rightly look to the Crown, today, to the rule of law which is given in the Queen's name, for the security of their homeland within the Queen's dominions. But in this case they have been excluded from it. It has been done for high political reasons: good reasons, certainly, dictated by pressing considerations of military security. But they are not reasons which may reasonably be said to touch the peace, order and good government of BIOT, and in my judgment this is so whether the test is to be found in our domestic public law, exemplified by the *Wednesbury* doctrine or in a more, or less, intrusive approach. In short, there is no principled basis upon which section 4 of the Ordinance can be justified as having been empowered by section 11 of the BIOT Order. And it has no other conceivable source of lawful authority.

A 58 The respondents' position is not, I think, bettered by the consideration (see paragraph 7 above) that the Ilois owned no real estate on the islands, which until 1967 were in private hands. That cannot affect the position in public or constitutional law. Nor can the making of any monetary compensation.

B 59 In my judgment, for all these reasons, the apparatus of section 4 of the Ordinance has no colour of lawful authority. It was Tacitus who said "They make a desert and call it peace": "Solitudinem faciunt pacem appellant" (Agricola 30). He meant it as an irony, but here, it was an abject legal failure.

*The government's motives*

C 60 Sir Sydney advanced a further argument to the effect that section 4 of the Ordinance was made for an ulterior motive. He submitted it was done as it was done not only to facilitate the base on Diego Garcia (itself an impermissible purpose, given section 11 of the BIOT Order), but also to keep the whole business as secret as possible, having regard to the concerns of the British government as to the possible scrutiny to which their intentions might be subjected by the United Nations. It is in part out of respect to this argument that I have set out in detail the course of the government's approach to the establishment of the military base in the years leading up to 1971. However, I would not hold that the applicant is entitled to succeed on this ground so far as it is put forward as a freestanding head of challenge. If the vires of section 11 of the BIOT Order were as wide as Mr Pannick contended, I conceive that what was done would have been justified in law; in particular, the dictates of the desired military base would have fallen within section 11 of the BIOT Order. The desire for secrecy would have been ancillary, not separately objectionable.

*Prerogative or statute?*

F 61 In light of the conclusions which I have reached, the question whether and how the result sought to be achieved by section 4 of the Ordinance might lawfully have been arrived at is perhaps moot. Could it be done by exercise of the royal prerogative, or only by Act of the United Kingdom Parliament? It is a question to which I have twice said I will return, but I will express my view shortly. Although as I would hold (see paragraph 52) the British Settlements Act 1887 does not apply to this case so that the power to legislate for BIOT derives from the royal prerogative, I entertain considerable doubt whether the prerogative power extends so far as to permit the Queen in Council to exile her subjects from the territory where they belong. I have in mind those passages in *Blackstone's Commentaries*, vol 1, p 137 and *Chitty's Treatise*, pp 18, 21, and the argument of Dr Plender in *International Migration Law*, ch 4, p 133, to which I have referred in paragraph 39. There is unexplored ground here: it would be one thing to send a Chagos believer to another part of the Queen's dominions, and quite another to send him out of the Queen's dominions altogether. I would certainly hold this latter act could only be done by statute. Now, of course, Mauritius is an independent state.



*Conclusion*

62 For all the reasons I have given I would allow the application. If Gibbs J agrees, we will hear argument as to the relief to be granted. I apprehend it will be appropriate merely to quash section 4 of the Ordinance.

63 At the end, I wish to commend the wholly admirable conduct of the relevant government servants and counsel instructed for the respondents who have examined and then disclosed without cavil or argument all the material documents contained in the files of government departments, some of which (as will be obvious from the narrative I have given) are embarrassing and worse. This has exemplified a high tradition of co-operation between the executive and the judiciary in the doing of justice, and upholding the rule of law.

**GIBBS J**

64 I have read the judgment of Laws LJ and respectfully agree with his conclusions as well as the comprehensive and authoritative analysis which led to those conclusions. I add a few brief words of my own because of the importance of the case to those involved.

65 It is beyond argument that the purposes of the BIOT Order and the Ordinance were to facilitate the use of Diego Garcia as a strategic military base and to restrict the use and occupation of that and the other islands within the territory to the extent necessary to ensure the effectiveness and security of the base. Those purposes were, or could at least reasonably be described as, of great benefit to the United Kingdom and the western powers as a whole. The applicant acknowledges this.

66 For the reasons given in paragraphs 49 and 52 of his judgment, I agree with Laws LJ that the power to enact these measures does not derive from the British Settlements Act 1887, but rather from the exercise of royal prerogative. The measures came into being as the direct result of advice given to the Crown by ministers of the United Kingdom government in order to achieve the purposes referred to in the preceding paragraph. The Commissioner and other officials to be appointed under the Order were effectively agents of the Crown under the control and direction of the Secretary of State.

67 Upon this analysis of the real purposes of the legislative scheme which created the Ordinance, it becomes plain that it concerned the furtherance of the interests of the United Kingdom by the Crown acting through the Secretary of State of the United Kingdom government. That is the context in which the submission that the interpretation of the Ordinance is an internal matter for the courts of BIOT to the exclusion of the Queen's Bench Division falls to be considered. Thus considered, it becomes unreal. I therefore agree with the reasoning and conclusions set out in paragraphs 21 to 29 of Laws LJ's judgment.

68 This court thus has jurisdiction to review the legality of the BIOT Ordinance, in particular whether it was ultra vires the BIOT Order, section 11. If Magna Carta had applied to people such as the applicant, I might have found assistance in the provisions of Chapter 29 in interpreting the legality of the Ordinance, at least in the resolution of any doubts on the point. However, for the reasons discussed by Laws LJ at paragraph 50 of his judgment, I would hold that BIOT is a "ceded" rather than a "settled"

A colony. On the basis of this, admittedly in modern context, arcane distinction I accept the respondent's submission that Magna Carta cannot be relied on in support of the application.

69 The crucial question on the legality of the Ordinance is whether it can reasonably be described as "for the peace, order and good government" of BIOT. In the case law cited, the interpretation of that expression most favourable to the respondents is that they "connote, in British constitutional language, the widest law-making powers appropriate to the sovereign": see *Ibralebbe v The Queen* [1964] AC 900, 923. I am unable to accept that those words, even from such an authoritative source, compel this court to abandon the ordinary meaning of language, and instead to treat the expression "for the peace, order and good government" as a mere formula conferring unfettered powers on the Commissioner.

70 The respondents' case has to be that the expression used in the enabling BIOT Order is wide enough to include a measure which could and did compel the detention of the citizens of that territory who enjoyed a public law right to live there, and the removal and permanent exclusion of such people from the territory without their consent. The public law rights of these people derived from their status as citizens of the United Kingdom and colonies. Their rights of citizenship attached particularly to BIOT.

71 Each of the words "peace", "order" and "good government" in relation to a territory necessarily carries with it the implication that citizens of the territory are there to take the benefits. Their detention, removal and exclusion from the territory are inconsistent with any or all of those words. To hold that the expression used in the Order could justify the provisions of the Ordinance would thus in my judgment be an affront to any reasonable approach to the construction of language. I conclude therefore that the Ordinance was unlawful.

72 The Ordinance was, on the other hand, entirely consistent with the purposes mentioned in paragraph 65 above, but that is another matter. It is clear from some of the disclosed documents that, in some quarters, official zeal in implementing those policies went beyond any proper limits. It would be no answer to say that these documents reflected the standards of a different period. I venture to think that the impression on right thinking people upon reading them would have been similar, then as now. The respondent does not seek to excuse them, and is to be commended for that, as well as for the openness with which disclosure of and access to all relevant documents have been afforded. I associate myself expressly with paragraph 63 of Laws LJ's judgment.

G  
*Application granted with costs.*  
*Section 4 of 1971 Ordinance quashed.*  
*Permission to appeal granted.*

*Solicitors: Sheridans; Treasury Solicitor.*

Reported by SHARENE P DEWAN, Barrister

H

**TAB 3**

*Chagos Islanders v Attorney General and the BIOT Commissioner* [2003] EWHC 2222

Case No: HQ02X01287, Neutral Citation No: [2003] EWHC 2222 (QB)  
IN THE HIGH COURT OF JUSTICE  
IN THE QUEENS BENCH DIVISION

Royal Courts of Justice  
Strand, London, WC2A 2LL

Thursday 9th October, 2003

B e f o r e:

THE HONOURABLE MR JUSTICE OUSELEY

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CHAGOS ISLANDERS

Claimant

- v -

1.THE ATTORNEY GENERAL,  
2.HER MAJESTY'S BRITISH INDIAN OCEAN TERRITORY COMMISSIONER

Defendant

- - - - -

Robin Allen QC, Simon Taylor QC, Anthony Bradley & Thomas Coghlin (instructed by  
Sheridan's Solicitors) for the Claimants  
John Howell QC, Rhodri Thompson QC & Kieron Beal (instructed by Treasury Solicitor) for  
the Defendants

Hearing dates : 31 Oct, 1-15, 19, 21, 25, 27-29 Nov, 2-9, 11-20 Dec, 6-10 Jan.

J U D G M E N T

## Mr Justice Ouseley:

### Overview

1. The Chagos Archipelago lies in the middle of the Indian Ocean. It is approximately 2,200 miles east of Mombasa in Kenya and a little over 1,000 miles south by west of the southern tip of India, and so about 1,000 miles east of Mahe, the chief island in the Seychelles, and 800 miles north-east of Port Louis in Mauritius. The largest island in the group is Diego Garcia; its irregular u-shaped sides enclose a large, deep lagoon. The group includes the Salomon islands, the islands of Peros Banhos, as well as a number of smaller islands.
2. The Chagos islands, with Mauritius, were ceded by France to the Crown by the Treaty of Paris in 1814. They were administered by the Crown from Mauritius as its "*Lesser Dependencies*" along with St Brandon and Agalega, which was about 1,000 miles from the Chagos islands, half way between Mauritius and the Seychelles.
3. Their economy was based on the production of copra and its by-product, coconut oil, from the coconut plantations. During the 19<sup>th</sup> century, the freeholds, as it is convenient to call them, passed into the private hands of the companies which ran the plantations, although there was an issue as to whether these private freeholds applied to the full extent of Diego Garcia, Peros Banhos and the Salomon Islands.
4. The companies ran the islands in a somewhat feudal manner. The vast distance from Mauritius left the plantation managers in day-to-day charge; visits by Mauritian officials were rare and the Magistrate was at best an annual visitor. Plantation managers had powers as Peace Officers to imprison insubordinate labourers for short periods, or to detain those threatening to breach the peace.
5. The plantation companies provided the sole source of employment on the islands, save for a meteorological station on Diego Garcia, though a few children, women and elderly people worked as servants for plantation company staff. They did this to earn their rations, although it does not appear to have been a universal requirement that the young and old should work. A few worked for the plantation companies in construction, administration or, perhaps, in fishing.
6. Company shops provided for simple purchases; wages were very low but the companies provided food rations, a small dispensary, very basic medical attention, limited educational facilities and a priest. Their agent, helped by a Mauritius Government subsidy, provided transportation by ship to and from Mauritius for departing or leave-taking workers or for those seeking more serious medical attention; often mothers-to-be went to Mauritius to give birth. The ship brought rations and other necessities or comforts.
7. The abolition of slavery in 1833, and the entitlement of slaves to remain in the colony in which they were freed, meant that many freed slaves had continued to work the plantations.
8. Although in theory from 1838, all Mauritian labourers were on contracts of one to two years' duration, renewable annually, many plantation workers continued working without a written renewal of their contracts. The contracts could only be renewed in front of a Magistrate on his occasional, supposedly annual, visits but even that was not routinely done, at least in latter years. Contracts were sometimes renewed when a worker returned from Mauritius following leave or a trip for medical purposes.
9. Over time, the plantation workers, whether recruits from Mauritius who stayed on or the descendants of slaves who never left, had families. Some of the children would leave for Mauritius, where relatives might be and to which they looked for a more varied life; they might simply not return. Others would become, from an early age, and after at best the most rudimentary and brief education, plantation workers. They would inter-marry, or marry Mauritian recruited labourers and in turn have families. After the Second World War, Seychelles' labourers were recruited as well, and some too inter-married, or married existing residents starting families on the islands.

10. The population, then, consisted of three strands, Mauritian and Seychelles contract workers and, to a degree intermingled with them, those who had been born on the islands and whose families had lived there for one or more generations. These latter were known as the Ilois, a term not always used with a precise or commonly agreed definition. Most of them lived on Diego Garcia, the largest island. They now, but again with no precise or commonly agreed definition, describe themselves as "*Chagossians*", a name which they prefer to "*Ilois*" because that has come to have pejorative connotations.
11. It is their existence, legal status and rights and what the United Kingdom Government and colonial administrations have believed about them, which lie at the heart of this case.
12. By the early 1960s, the islands' population was in decline, as low wages, monotonous work, the lack of facilities and the great distance to Mauritius and the Seychelles discouraged recruitment or the retention of labour. The plantations suffered from a lack of investment.
13. In 1962, a company called Chagos Agalega Company Limited was formed in the Seychelles. One of its main shareholders was a Mr Paul Moulinie. The company acquired almost all of the plantation islands, of Diego Garcia, Peros Banhos, the Salomon Islands, and Agalega from the Mauritian companies which had owned them. The company intended to and did run the coconut plantations for the production of copra; it believed that they could be revived and run profitably, notwithstanding years of decline.
14. In 1964, discussions started in earnest between the United States and the United Kingdom Governments over the possible establishment of American defence facilities in the Chagos Archipelago, or other Indian Ocean islands which formed part of the dependant territory of the Seychelles. A joint UK/US memorandum agreed on a course of political action, including the need to separate the requisite dependencies from Mauritius and the Seychelles.
15. The independence of Mauritius was imminent and the independence of the Seychelles was at least anticipated. The United States did not wish its facilities to be dependant on the goodwill and stability of such newly independent countries, whose view of American defence facilities in the Indian Ocean might not have coincided with its own. It proposed that the islands be detached from Mauritius and the Seychelles and formed into another, separate dependant territory. It was recognised that the establishment of a new dependency or colony would attract criticism in the United Nations, even more so were it to be created to facilitate an American military presence in the Indian Ocean. From an early stage, the United Kingdom and United States Governments recognised that the transfer or resettlement of those on the islands would be necessary, both for the effective security and operation of the military facility and to avoid the prospect of the new dependency becoming subject to international obligations in Article 73 of the UN Charter to protect the population and to develop their constitutional rights, perhaps towards independence. Islands populated by contract workers or with an insignificant population which could be transferred or easily resettled were obviously attractive in those respects.
16. In 1964, in pursuit of this objective, a joint Anglo-American survey of the islands including their population was undertaken. Its purpose was not publicised. It found little trace of the once distinctive Diego Garcian community. In 1965, the United Kingdom decided to proceed with the detachment of the islands. Discussions were held between the UK Government and the Governments of Mauritius and of the Seychelles upon the terms of the detachment of the Chagos Archipelago from Mauritius and of Aldabra, Farquhar and Desroches from the Seychelles. Agreement was reached on the detachment of the islands subject to the payment of compensation to the governments, compensation to the landowners and the payment of resettlement costs. The Mauritius Government was to receive compensation of £3m plus the resettlement costs; the Seychelles Government was to be provided with a new civil airport on Mahe.

17. On 8<sup>th</sup> November 1965, the British Indian Ocean Territory Order in Council, SI 1965/1920 was made. It established a new colony, the British Indian Ocean Territory. It comprised the Chagos Archipelago, Aldabra, Farquhar and Desroches. The Governor of the Seychelles became its Commissioner. The Order in Council provided its constitution, gave legislative powers to the Commissioner and provided for a general continuance in force of the existing laws applicable in the islands, either Seychellois or Mauritian.
18. On 30<sup>th</sup> December 1966, in an Exchange of Notes, the UK and US Governments agreed that the islands should be available to meet their various defence needs for an initial period of 50 years, and thereafter for 20 years, unless either Government gave notice to terminate the agreement.
19. The next stage was for the UK Government to acquire the land interests held by Chagos Agalega Company Limited. At this point, however, the US proposals were neither public nor approved by Congress. It was only a general defence interest which, publicly, underlay the creation of BIOT. If the land interests were acquired, the UK Government still wanted the plantations to operate, to bring in an income to offset the acquisition costs, until the defence facility was definitely proceeding to a known timetable.
20. On 8<sup>th</sup> February 1967, the BIOT Ordinance No 1, the Compulsory Acquisition of Land for Public Purposes Ordinance, was made; it empowered the Commissioner to acquire land compulsorily for a public purpose, notably and explicitly the defence purposes of the UK or Commonwealth or other foreign countries in agreement with the UK.
21. On 22<sup>nd</sup> March 1967, the Commissioner made the BIOT Ordinance No 2, the Acquisition of Land for Public Purposes (Private Treaty) Ordinance, enabling him to acquire land by agreement for the same public purposes. It was under this power that, on 3<sup>rd</sup> April 1967, Chagos Agalega Company Limited vested its lands in Diego Garcia, Peros Banhos, the Salomon Islands and others in the Crown, for £660,000. The Crown also acquired Farquhar and Desroches; it already owned Aldabra.
22. However, in order to maintain an income and to delay the need for resettlement of the population for as long as possible, the Commissioner granted a lease of the islands to Chagos Agalega Company Limited on 15<sup>th</sup> April 1967. It was terminable on six months' notice. The company gave notice in June 1967 for tax reasons, created by the compensation payment. Moulinie & Co (Seychelles) Limited, for which Paul Moulinie and his nephew Marcel Moulinie worked, took over the management of the plantations in January 1968. There was no signed management agreement, but the terms of an unsigned written agreement were put into operation.
23. On 12<sup>th</sup> March 1968, Mauritius became independent. By its constitution, Mauritian citizenship was conferred on everyone born in Mauritius by that date, including those born in that part of BIOT which had previously been part of the colony of Mauritius. They would also remain citizens of the United Kingdom and Colonies. This dual citizenship was not publicised at the time. Before the creation of BIOT, and yet more so thereafter, it was becoming clearer than perhaps had been thought in 1964, following the survey report, that there were inhabitants of Chagos who had been born there and some were second or third generation Ilois. This was a problem, and the morality and lawfulness of their removal in principle, of its manner, of the way in which others who had left voluntarily were unable to return to the Chagos and of their subsequent treatment has been debated for more than 30 years.
24. Thus, from 1964 onwards, the UK Government had been dealing with a number of aspects: the operation of the plantations, the ascertainment of the numbers and status of those working and living on the islands, the contemplation of their removal and resettlement somewhere, the means of achieving those ends, political relations with Mauritius, in particular over those matters, and suspicions or hostilities faced or risked in the UN.
25. To the plantation workers, little of this would have been known. They, and certainly the Ilois, were poorly educated, very largely illiterate, Creole speakers who lived a simple life with few modern facilities, dependent on their employer for their jobs and the necessities of life; they led no independent existence. The Moulinies were aware



of more of the background. Marcel Moulinie gave evidence of telling them in January 1966 and of his uncle telling them in May 1967 that they might be asked to leave to make way for an American base.

26. In 1967 and 1968, on two voyages, the "*Mauritius*" brought plantation workers, including Ilois, to Port Louis in Mauritius. They came on leave, or on the expiry of their contract or for medical reasons. The "*Mauritius*" was operated by Rogers & Co, the Moulinie & Co agent in Port Louis; half the cost of it was met by the Mauritius Government, as it provided the means of transport between Mauritius and the various dependant islands. When those who had arrived in Mauritius in 1967 and 1968 eventually tried to return to the Chagos islands in 1968 and later, they were refused passage and were unable to return. The Mauritius Government made representations to the UK Government in September 1968 about the fate of some of those stranded in Mauritius. These Ilois are among the Claimants, asserting that the UK prevented their return by instructing Moulinie & Co or its shipping agent not to permit their return, and asserting that that was unlawful. In July 1968, the "*Nordvaer*", a 500-ton cargo ship, had been acquired by the BIOT Administration to connect the Seychelles, where it was based, and BIOT; the shipping link between Mauritius and Chagos largely ceased.
27. On 5<sup>th</sup> July 1968, the UK Government was told that the US Government had decided to proceed with an "*austere*" communication and other facilities on Diego Garcia. Plans which hitherto had been uncertain in all respects were by now becoming more certain, but they were still not publicly known. It was an important decision.
28. Approval for the US proposal was sought from the Prime Minister in submissions from the Foreign Office and the Commonwealth Office, drawing upon the advice of officials including legal advisers and the BIOT Commissioner, among others, (paragraph A144). The submission said that some 128 or 34% of the inhabitants of Diego Garcia were second-generation inhabitants. Various possibilities for their resettlement and the resettlement of other workers were canvassed. Agalega, Peros Banhos and the Salomon Islands were seen as possibilities because of their coconut plantations, working in which was the only skill which the Ilois and many other contract workers possessed. But the US was still unable to say whether any other islands would be required or when; and even after acceptance of its request in September 1968, it did not want its proposals publicised. This, unsurprisingly, discouraged commercial investment in other island plantations. Even if no defence facilities were ultimately constructed, the UK Government considered that it would be useful to avoid there being any permanent inhabitants in BIOT, so as to preclude obligations arising under Article 73 of the UN Charter or any other costs if the plantations were to close for economic reasons.
29. A further important submission, vital for these proceedings and backed by extensive working papers, was made to the Prime Minister in April 1969 (paragraphs A226-239). It covered the relevant issues comprehensively and without deceit or excess zeal by any officials. It contemplated the complete evacuation of BIOT. It was approved by the Prime Minister, the Chancellor of the Exchequer and the Secretary of State for Defence.
30. Discussions about resettlement options continued through 1969 and 1970; a number of ideas were canvassed and assessed but no firm conclusion was reached. The uncertain future of the islands of Peros Banhos and the Salomon Islands, as possible defence facilities, inhibited investment in them; the question of who would provide investment in plantations in Agalega was long discussed and remained unresolved for years. Resettlement in Mauritius or the Seychelles were options also to be pursued. The need for immigration legislation to back up the Government's stated position as to the absence of an indigenous population, as well as to prevent people entering BIOT after the islands had been evacuated came to the fore. The nature of the powers, statutory or private land ownership powers, which would be involved in ensuring the evacuation of the islands, was also considered.

31. In December 1970, Congressional approval for the construction of the defence facility was announced. The US Government had told the UK Government shortly beforehand that it wanted Diego Garcia evacuated by July 1971.
32. The BIOT Administrator, Mr Todd, visited the islands in January 1971. On 24<sup>th</sup> January 1971, he told the assembled inhabitants of Diego Garcia that "*we intended to close the island in July*". He said that Peros Banhos and Salomon could run for some time. This was seen by him as a temporary solution to resettlement whilst longer term arrangements were put in place.
33. The longer term arrangements were seen as resettlement in the Seychelles of the contract workers, who were predominantly Seychellois, and in Mauritius, subject to Mauritius Government approval, or Agalega, of the families of Mauritian origin. Discussions between the UK and Mauritius Governments began in March 1971 when that approach was accepted, but a resettlement scheme remained to be determined and implemented.
34. On 16<sup>th</sup> April 1971, the BIOT Commissioner enacted the Immigration Ordinance 1971, No 1 of 1971. It made it unlawful for someone to enter or remain in the territory without a permit; it provided for the Commissioner to make an order directing that person's removal from the territory. It was given the minimum lawful publicity. There was an issue as to whether this provision was ever in fact relied on by the UK Government or the BIOT Commissioner in the evacuation of the islands.
35. Throughout the first half of 1971, internal discussions took place between the Foreign and Commonwealth Office, the Overseas Development Administration, the Treasury and externally with the High Commission of Mauritius, the Mauritius and Seychelles Governments and the US Embassy, seeking to establish work and resettlement opportunities and schemes. The potential of Agalega was raised.
36. In July 1971, the "*Nordvaer*" left Mahe to effect the evacuation of Diego Garcia, arriving on 25<sup>th</sup> July 1971 with engine trouble. It took some Ilois to Salomon and Peros Banhos before limping to Mahe, on the Seychelles. The "*Isle of Farquhar*", a schooner belonging to Moulinie & Co, was chartered, arriving in Diego Garcia early in September and then sailing to Peros Banhos and Salomon with mainly Ilois families. The Ilois left behind their homes, their pets and domestic animals, their larger items of moveable property, taking only a small quantity of personal possessions. They regarded Diego Garcia, rather than the Chagos Archipelago, as home. There is no evidence of physical force being used, but most of their dogs were rounded up and gassed or burnt in the "*calorifer*" used in copra production. The sadness and bitterness was continuing and evident. The task of closing down Diego Garcia was handled on the island wholly or almost wholly by Moulinie & Co and not by the BIOT Administration.
37. In early September, the "*Nordvaer*" arrived in Diego Garcia to take some wild horses, which the BIOT Administration had organised a team to take to the Seychelles, copra, equipment and the remaining Seychelles workers and Ilois who did not want to go to Peros Banhos or Salomon.
38. The conditions of the voyage to Mahe were dreadful and engendered many bitter memories of the horses being better cared for than the passengers. The Ilois numbered 7 men, 6 women and 17 children, outnumbered by Seychellois. In Mahe, they were accommodated in the unused section of the prison, between arrival on 30<sup>th</sup> September and departure on the "*Mauritius*" for Port Louis, Mauritius, on 8<sup>th</sup> October 1971. Some Ilois, receiving medical treatment, were left behind.
39. The evacuation of Diego Garcia was completed by the "*Isle of Farquhar*" which arrived in Mahe on 31<sup>st</sup> October 1971 with 9 Seychellois and one Ilois woman and child.
40. The population of Peros Banhos and Salomon was now 65 men, 70 women and 197 children, of whom 18 men, 18 women and 49 children had been transferred from Diego Garcia. In January 1971, the FCO thought that there had been 37 Ilois families on Diego Garcia.
41. About 100 Seychellois labourers had returned to the Seychelles. But the Mauritian authorities were estimating that there were about 1,000 Ilois already in Mauritius,

evacuated, more recently stranded or looking to return after a longer absence, having arrived since the formation of BIOT in 1965.

42. Resettlement discussions continued meanwhile with the Mauritius Government; how much should be paid, to whom, and for what purpose remained unresolved. The focus at this stage was on resettlement of as many as possible on Agalega where Moulinie & Co operated coconut plantations, and on maintaining those on Peros Banhos and Salomon for as long as possible. Less complex discussions in respect of Seychelles contract workers were undertaken with the Seychelles Government. Mauritius and the Seychelles also faced internal difficulties with the receipt of funds which might appear to favour one group of residents over another and give them employment advantages over other poor inhabitants grappling with high unemployment. The cost of setting up BIOT and of constructing the new civil airport on Mahe had exceeded their financial allocations; the UK Government debated which Department should pay for any resettlement costs which had not been budgeted for.
43. It was not until 4<sup>th</sup> September 1972 that a payment of £650,000 was agreed between the UK and Mauritius Governments in discharge of the obligation undertaken in 1965 to meet the cost of resettlement of those displaced from the Archipelago since 1965 and who were yet to come. It was paid in March 1973.
44. The Seychelles contract workers were simply paid the balance of the contract sums due to them.
45. Meanwhile, the operation of the coconut plantations and copra production on Peros Banhos and the Salomon Islands was becoming economically unsupportable and was running down. The prospect of further closures and moves was becoming clearer to the Ilois; they were becoming resigned and apathetic. Those on Salomon were told to move to Peros Banhos in May 1972, so as to concentrate population and production on one island, but they refused. In June 1972, the "*Nordvaer*" sailed to Mahe with 53 Ilois (15 men, 15 women and 23 children) from Peros Banhos and Salomon; they went on to Mauritius. They were warned that they might not be able to return.
46. In November 1972, the "*Nordvaer*" took a further 120 Ilois (73 adults and 55 children) from Peros Banhos and Salomon to Mauritius, arriving on 14<sup>th</sup> November. By now, Salomon had closed down.
47. In October 1972, a UK/US Exchange of Notes agreed to the construction of a limited naval base at Diego Garcia. It was no longer economic for Moulinie & Co to run copra production on Peros Banhos; the management fee which they received from BIOT was too small. Paul Moulinie and the BIOT Administrator, Mr Todd, sought closure and an evacuation in March or April 1973.
48. On 27<sup>th</sup> April 1973, the "*Nordvaer*" left Peros Banhos for Mauritius carrying 26 men, 27 women and 80 children, but on arrival at Port Louis, they refused to disembark: they had nowhere to go, no money and no employment. They received an offer of accommodation in the Dockers Flats area of Port Louis and a small sum of money.
49. On 26<sup>th</sup> May 1973, the "*Nordvaer*" left Peros Banhos for Mauritius via the Seychelles; it arrived on 13<sup>th</sup> June 1973 carrying 8 men, 9 women and 47 children or infants, according to the shipping list. This was the last of the population; the plantations closed.
50. The Ilois were experienced in working on coconut plantations but lacked other employment experience. They were largely illiterate and spoke only Creole. Some had relatives with whom they could stay for a while; some had savings from their wages; some received social security, but extreme poverty routinely marked their lives. Mauritius already itself experienced high unemployment and considerable poverty. Jobs, including very low paid domestic service, were hard to find. The Ilois were marked by their poverty and background for insults and discrimination. Their diet, when they could eat, was very different from what they were used to. They were unused to having to fend for themselves in finding jobs and accommodation and they had little enough with which to do either. The contrast with the simple island life which they had left behind could scarcely have been more marked.
51. There was no resettlement scheme when they arrived. Various schemes, including pig breeding, of improbable viability and in which the Ilois had no experience, were

debated over time before being abandoned as unworkable. Rampant inflation between 1973 and 1978 substantially reduced the value of the payment of £650,000. Nothing concrete was done with it for years despite the pressing housing needs of the Ilois. The £650,000 paid to the Mauritius Government in 1973 was eventually expended, with accrued interest, in 1977 and 1978, not just to the 426 families who had been identified as having left the Chagos since 1965, but also to a further 169 families who had returned earlier, making 595 in all. It was paid in the form of a cash distribution. There was nothing for Ilois on the Seychelles.

52. The Ilois had, however, begun to organise themselves early on to improve their conditions and some Mauritian and Seychellois politicians became interested in their plight, whether to obtain votes, or out of genuine concern or as a means of criticising the Government of the day.
53. From an early stage, in 1974, Ilois were petitioning the UK Government for permission to return to Diego Garcia to tend their forefathers' graves; the Government said that it would consider this. But it refused to intervene with the Mauritius Government in relation to their resettlement.
54. In February 1975, Michel Vencatessen issued a writ in the High Court in London against the Attorney General, for the Secretaries of State for Defence and for Foreign and Commonwealth Affairs. Michel Vencatessen had left Diego Garcia on the "*Nordvaer's*" last voyage. Legal advice had been taken from Sheridans, solicitors, who, in turn, had consulted notable English barristers. He received legal aid. He had been put in touch with Sheridans through Gaetan Duval, an important Mauritius lawyer-politician. It was not in form a representative, let alone a group, action although in its inception and conduct it had a number of those features.
55. The writ claimed damages, aggravated and exemplary, for intimidation, deprivation of liberty and assault in the BIOT, Seychelles and Mauritius in connection with his departure from Diego Garcia, the voyage and subsequent events.
56. The action proceeded through the 1970s with a range of distinguished advocates on both sides. Discovery was to be particularly complex. By 1978, however, it was clear on both sides that the litigation, in practice, had to be regarded as a form of group litigation. The UK Government made an open offer to settle all the claims of all the Ilois for £500,000 plus costs in February 1978.
57. By mid-1978, Sheridans, following a visit to Mauritius, had obtained instructions on a wider basis, "*on behalf of all the Ilois*", they said. But the issues of whom Sheridans represented and what their status was as Ilois in relation to any offer, together with the mechanics of how all the potential claims of the Ilois other than Mr Vencatessen could be resolved, remained thorny ones.
58. Legal aid was not available in this action for Sheridans to advise all the Ilois. The Treasury Solicitor agreed to pay Bernard Sheridan's costs of going to Mauritius to represent the Ilois. Bernard Sheridan went to Mauritius in October 1979, taking with him the offer from the UK Government which had been raised to £1.25m, and 1,000 copies in English, of a form of quittance for the Ilois' claims, together with a French translation, (A480). He had received advice from Louis Blom-Cooper QC that the settlement was fair in view of the difficulties in the litigation, and that a trust fund should be set up to oversee its distribution.
59. Publicity was given to his visit; he held a number of meetings with the Ilois; over 1,200 quittances were signed. But there was considerable hostility from some Ilois who objected to any renunciation of their right to return to Diego Garcia. He was unable to conclude his work and he returned to London to report.
60. Various committees of Ilois now joined together to become the Joint Ilois Committee, which comprised the older committee of Christian Ramdass with which Mr Vencatessen had been associated, the Beau Bassin Committee which had led the rejection of the quittances brought by Mr Sheridan, and the Ilois Support Committee of Kishore Mundil, a Mauritian politician.
61. Mauritian politicians had a particular interest in the renunciation by the Ilois of any right to return, as well as in using the fact, manner and purpose of the excision of the Chagos from Mauritius as a means of attacking the Government of Sir

Seewoosegar Ramgoolam, which was in power from 1961 through independence until 1982. This interest was in the way in which the continued right of Mauritian citizens to return to the Chagos islands could be used as a means of asserting Mauritius' entitlement to the islands when the defence interests ceased.

62. The Joint Ilois Committee wished to continue negotiations. On the oral evidence given to me by those involved, it was said that most of the documents of this era did not represent accurately what they wished to say and had been written without their authority and indeed deceitfully by those whom they now realised had taken advantage of them, acting only as politicians pursuing their own political ends. However, they were taken at face value by Sheridans and the Treasury Solicitor.
63. In March 1980, a petition with 800 thumbprints or signatures of Ilois was sent by the JIC to Sheridans with a detailed letter of instruction. The renunciation of the right to return to Diego Garcia in exchange for a proper amount of compensation was proposed by the Ilois, at least on paper.
64. In July 1980, the Ilois who had led the rejection of the offer in 1979 set up a new committee, the Committee Ilois Organisation Fraternelle, CIOF (sometimes CIF). They would not renounce their right to return. The Front National de Soutien aux Ilois was formed from a number of groups including the JIC.
65. The formation, splitting, reformation of Ilois committees at this time reflected not just the differing locations of groups of Ilois in Port Louis and Mauritius, but also differing views as to the extent to which renunciation of the right to return should be resisted at the price of delaying a settlement or whether an enhanced sum would justify renunciation. Political protest and hunger strikes by women became a feature of the campaign by the Ilois for what they saw as their rights. The various Ilois committees made claims for £8m in compensation from the UK Government in the spring of 1981. In April 1981, the Mauritian Government agreed with Ilois representatives to send a Government delegation of three Ilois representatives and three representatives from the Mauritian Government to negotiate with the UK Government.
66. Meanwhile, the Vencatessen litigation and the looming contests over the disclosure of documents provided a continuous spur to the London end of the negotiations over a wider settlement. In April 1981, an Ilois delegation had met a visiting UK Minister in Mauritius and had discussed with her compensation, the Vencatessen case and nationality issues. Negotiations were to continue in London in June 1981; the Mauritius Government agreed that Christian Ramdass should join the delegation as the representative of Mr Vencatessen. But before the delegation arrived in London, the CIOF decided to instruct Bindmans, solicitors.
67. The Mauritian delegation met with the UK Government in London at the end of June and the beginning of July, over four days. The Government increased its £1.25m offer with aid of £300,000, but this was not accepted. Negotiations broke down amidst powerful criticism of the stance taken by the UK Government towards the plight of the Ilois. Bindmans took the advice in consultation of John Macdonald QC. Mr Vencatessen wanted to press forward with his claim. This was the only non-political lever which the Ilois had. But Ilois demonstrations and rallies continued in Mauritius.
68. In November 1981, the CIOF said that it would be prepared to accept £1.25m now as a part payment towards the £8m still claimed. By early December, the CIOF, recognising that any settlement would have to be supported by the whole Ilois community, nonetheless put forward a figure of £6m as further and final compensation, without abandoning its contention that £8m was fully justified. Various Ilois groups met the High Commissioner to Mauritius to press their urgent cause; he made the same point: any settlement had to have the support of the whole community. No-one wanted a repeat of the events in 1979 when an agreement appeared to have been reached with many Ilois, but not on terms which were acceptable to all shades of opinion. As at other times, the definition of an Ilois and an assessment of their numbers were problematic for both sides, because that had a crucial effect on the calculation of compensation on a per capita basis as well as

reflecting on the numbers whose agreement had to be obtained once they had been identified. Bindmans, advising the CIOF, were investigating the rights which the Ilois had over land, in contrast to the Vencatessen case which focused on tortious aspects. Sheridans pressed on with the case which was seen as capable of having a beneficial effect on the Ilois as a whole.

69. The UK Government recognised that further talks had to take place. Their resumption in Mauritius was announced and they restarted on 22<sup>nd</sup> March 1982. The Mauritian Government delegation again included representatives of the Ilois. Stephen Grosz, a solicitor with Bindmans, and John Macdonald QC were present to advise the CIOF, to which the majority of Ilois delegates belonged, but they saw themselves as advising the Ilois generally because of the extent to which the CIOF represented their interests; they were paid for by the Mauritius Government. Mr Ramdass was again a delegate because of the Vencatessen case. The UK Government's opening offer was £2.5m based on 426 families or 1,150 people who had left Chagos for Mauritius after the creation of BIOT. The sum was calculated by reference to the cost of a plot of land, the building of a house, and a capital sum for the establishment of a business. The disbursing of the fund was to be managed by a trust fund.
70. During the negotiations, one of the issues had been the way in which the language of the agreement and the settlement of claims might affect the right to return asserted by the Ilois and the assertion of Mauritian sovereignty over the Chagos islands. A second issue was as to how the UK Government could be satisfied that, if it were to pay over the settlement sum, there would be no further claims. The nature and effectiveness of those provisions was at issue in this case. But it was clearly understood by the UK and Mauritius Governments, if by no others, that the Vencatessen litigation had to be withdrawn, if a settlement with the Ilois as a whole were to be reached.
71. In the course of negotiations, the offer was raised twice, ultimately to £4m in addition to the £650,000 previously paid to the Mauritius Government. The Mauritius Government also agreed to put in land to the value of £1m. The English lawyers advising the Ilois recommended acceptance of the offer as a fair settlement. A trust fund was to be set up to disburse the monies.
72. On 27<sup>th</sup> March 1982, the agreement between the two Governments was initialled; it was also initialled by Ilois representatives. Between the initialling of the agreement and its formal signing, the CIOF pressed the view of its English legal advisers that the agreement provided for compensation, but did not affect Mauritian sovereignty. It became a formal agreement signed by the two Governments on 7<sup>th</sup> July 1982 in the presence of Ilois representatives. It contained provision for Ilois to sign individual renunciation forms, for the retention of some money against further action and for a Mauritius Government indemnity, (paragraph A580).
73. Varying degrees of satisfaction were expressed at the agreement; as a compromise, not everything that everyone had wanted had been achieved. Widespread publicity was given to the agreement and to the formal signing ceremony.
74. On 30<sup>th</sup> July 1982, the Ilois Trust Fund Act 1982 was enacted by the Mauritius Parliament. The Trust Fund was to be managed by a Board of Trustees which included five representatives of the Ilois, initially appointed and subsequently subject to elections. The purpose of the Fund was to disburse the UK and Mauritius Government monies, together with a sum provided by the Indian Government, in promoting the economic and social welfare of the Ilois and of the Ilois community in Mauritius. The Seychelles workers, Ilois and Government were not involved in these discussions. The Seychelles islands within BIOT, Aldabra, Farquhar and Desroches were never evacuated and they were returned to the Seychelles on its independence in 1976.
75. There was then a delay in the withdrawal of the Vencatessen litigation for reasons connected with his personal view of what was his due as the person who had initiated the litigation which had led to this settlement. But, meanwhile, no money was paid over by the UK Government. Public and intense pressure was brought to bear on Mr Vencatessen by the Ilois and eventually he agreed to give instructions to Sheridans

that the action was to be withdrawn. Proceedings were stayed by agreement on 8<sup>th</sup> October 1982.

76. On 22<sup>nd</sup> October 1982, a cheque for £4m was handed over at a ceremony at which Ilois representatives were present.
77. By December 1982, the Ilois Trust Fund Board had decided to whom the money would be disbursed. 1,260 Ilois adults and 80 minors were recorded as receiving an initial tranche of Rs 10,000 (£556 at the then prevailing exchange rate), although 250 or so more were registered (1,419 adults and 160 minors).
78. Elections took place in December 1982 for the Ilois representatives to the ITFB; Mr Michel Vencatessen's two sons and a nephew were elected. The ITFB began to discuss whether it was responsible for obtaining "*renunciation forms*" from those who received compensation. These forms renounced claims against the UK Government, as set out in the 1982 Agreement and the Mauritius Government had agreed to use its best endeavours to obtain one from every Ilois. This question would be discussed through 1983.
79. On 1<sup>st</sup> January 1983, the British Nationality Act 1981 made British Dependant Territories citizens of those Ilois who had been citizens of the United Kingdom and Colonies. During June 1983, a further Rs 36,000 per adult and Rs 23,000 per child were disbursed to Ilois for the purchase of a plot of land. Many families and individuals clubbed together to do so. But a number of Ilois were discontented with the ITFB decisions and two Ilois representatives resigned, including Simon Vencatessen. A new group, the Groupe Refugies de Chagos, or CRG, came into being.
80. Between 5<sup>th</sup> and 22<sup>nd</sup> September 1983, the final tranche of compensation, Rs 8,000 was made. Some Rs 75m, or just over £4m, was disbursed during 1983 to 1984 to 1,344 Ilois by the ITFB. When the Ilois went to the Social Security Office to collect this final sum, they were presented with a renunciation form to sign, or far more commonly, to put their thumbprint to. This form was a one-page legal document, written in legal English, without a Creole translation, (A647). Ilois members of the ITFB were on hand to witness the thumbprint or to identify the individual, but on the Claimants' case, they did not, and were in no position to, translate or explain the purport of the document. Only 12 refused to sign, including Simon Vencatessen; he did not receive this last tranche of money, although his wife did. He understood the purport of the renunciation form.
81. Simon Vencatessen later brought proceedings against the ITFB in the Supreme Court in Mauritius, claiming that it had no power to impose on him a requirement to sign a renunciation form as a condition of obtaining this last sum of money. He lost on the grounds that the 1982 Agreement and the ITFB provided a statutory remedy for the Ilois as an alternative to proceeding by an action in the UK or BIOT Courts. In 1989, the Supreme Court of Mauritius dismissed his claim. This decision was based on its decision in 1984 in *Permal v ITFB* to that same effect, (A698 and A749).
82. In January 1984, Ilois members of the ITFB wrote to the US President seeking an additional £4m compensation because the £4m paid by the UK Government was a full and final settlement. These endeavours were pursued sporadically over subsequent years. The £4m was already being seen as inadequate by at least some Ilois.
83. Over £250,000 remained in the ITF at the beginning of 1984. It was being withheld from distribution as part of the means of protecting the UK Government from any further litigation by those Ilois who had not signed renunciation forms. Should such an action be commenced, the UK Government could look to that £250,000 to meet the cost of the action. But the Ilois, short of money and needing every penny, were seeking its release in view of the large number of renunciation forms, at least 1,332 and later 1,339, which had been signed. It appears from the Claimants' case that at least 1,344 Ilois had received compensation. But the money was still retained by the ITFB because it had claims outstanding from 238 workers who had established an entitlement, before the ITF Act was amended in 1984.



84. By mid 1985, the Chagos Refugee Group, amongst the leaders of which was Olivier Bancoult, were contending that the Ilois had been exiled through coercion, in violation of their human rights; they continued to claim that the compensation was inadequate. In 1986, certain Ilois sought the advice of US lawyers as to whether or not a claim existed. They wished to press for their return to the Chagos Islands. These matters rumbled on through the late 1980s. The ITFB in 1989 noted that an Ilois demonstration, seeking another delegation from the Mauritius Government to negotiate further compensation from the UK Government, was told by the President that the 1982 Agreement meant that compensation could now only be sought on a humanitarian basis. There was a further distribution of about £250,000 in 1987.
85. In May 1992, Bindmans were again approached for advice by Ilois representatives; among other issues being considered in September and October were land rights, nationality and citizenship. In October, Professor Anthony Bradley was instructed. In April 1993, he advised that any arguable claim against the UK Government was time barred (A756). In October 1993, he gave advice on constitutional rights, including the right to return (A759). A Mauritian lawyer suggested investigating the constitutionality of BIOT laws. The citizenship and nationality of Ilois were to be pursued.
86. In order to press the issue of the right to return, Bindmans advised that Ilois make applications to visit the Chagos Islands; applications were made in December 1993. The BIOT Commissioner sought details of who wanted to go and why.
87. The Principal Immigration Officer for BIOT through the BIOT Commissioner informed Bindmans that permission had been refused. The Commissioner provided details of the BIOT Court Registrar so that the decision could be appealed. Bindmans' advice was that the appeal should precede any Judicial Review of the constitutionality of BIOT laws.
88. Mr Wenban-Smith was given delegated powers by the BIOT Commissioner to determine the appeal, because of the risk of apparent bias, and on 12<sup>th</sup> May 1995, he allowed the appeals subject to various conditions. A debate ensued over timing and the presence of a television crew on the trip. It never took place. The fissiparousness of Chagossian groups continued, but Bindmans still dealt with the CIOF. A BIOT Social Committee was set up in October 1995 by other Chagossians.
89. In December 1996, a group of Seychelles Ilois petitioned the UN, the Queen and Prime Minister and the USA for fair compensation. Till then, very little had been done by the Seychelles Ilois; they had not been involved in the 1982 Agreement and although some were aware of the ITFB, no payments were made to them or intended for them. Seychelles politicians, in what had become, by a coup, essentially a one-party state, had not persisted with the Ilois cause; they now saw them as Seychellois and not as a special category. In January 1997, the FCO wrote to the Ilois Group of Seychelles denying any obligation to pay compensation.
90. In October 1997, the Chagos Social Committee (Seychelles) Association was registered to establish the rights of the Ilois in the Seychelles as British citizens and passport holders, who would seek compensation. They were said to number 200. On 24<sup>th</sup> November 1997, the British High Commission in the Seychelles rejected the claims: those who returned to the Seychelles were mostly contract labourers, the conditions and the scale of the economic problems in Mauritius, which the compensation addressed, did not exist in the Seychelles; there was no scope for a return to the islands.
91. Sheridans became involved again in 1998. They took up the validity of the 1971 BIOT Immigration Ordinance. Olivier Bancoult instructed them to proceed with Judicial Review proceedings in the High Court in England in August 1998. In March 1999, leave was granted by Scott-Baker J. On 3<sup>rd</sup> November 2000, the Divisional Court (Laws LJ, Gibbs J) held that section 4 of the Immigration Ordinance was *ultra vires* the BIOT constitution. A constitutional power to make legislation for "*peace, order and good government*" was held not to permit legislation which excluded the population from the territory. There was no appeal against this decision although,

- before me, the Defendants took issue with some of the facts stated in the judgment and at least questioned, "*reserving their position*", the correctness of the decision.
92. Subsequently, the Immigration Ordinance was amended, in effect to permit the return of Chagossians to Peros Banhos and Salomon. There were no defence reasons why islanders could not return to Peros Banhos and the Salomon Islands. But none have taken advantage of that possibility.
93. Through 1999 and 2000, Sheridans pressed the case for compensation for the Ilois and for the provision of infrastructure on the islands to permit a return by the Ilois.
94. The very fact of the success of the Bancourt Judicial Review, together with the conclusion from the judgment that the Ilois had been excluded under an unlawful Ordinance, gave them hope and confidence to organise and pursue other litigation. Documents hitherto withheld under the 30-year rule could now be examined at the Public Record Office. A lawyer in Mauritius, Mr Mardemootoo, in whom the various groups all felt able to repose their confidence, was found.
95. This litigation commenced in April 2002.
96. I have endeavoured to provide a brief introduction to the complex and long-evolving circumstances in which this litigation was brought; the detail is contained in the Appendix to this judgment. I have considered in more detail later in the main body of the judgment certain relevant topics: employment, property, the nature of the Vencatessen litigation as seen by the Ilois, and the organisation of the Chagossians. I describe and assess the evidence, but more detail is provided in the Appendix.

## **The Proceedings**

97. This litigation commenced with a Claim Form and Group Particulars of Claim dated 25<sup>th</sup> and 23<sup>rd</sup> April 2002 respectively. Sheridans again are the solicitors. Anthony Bradley, who had advised the CIOF in the 1990s, is second junior Counsel. A Group Litigation Order was made with the consent of the Lord Chief Justice on 11<sup>th</sup> April and sealed on 3<sup>rd</sup> July 2002.
98. The Claimants, the Chagos Islanders, are those born in the Chagos islands and their children. The claim form seeks: (i) compensation and restoration of their property rights, in respect of their unlawful removal or exclusion from the Chagos islands by the Defendants; and, (ii) declarations of their entitlement to return to all Chagos islands and to measures facilitating their return. The Group Particulars of Claim also seek declarations as to their property rights and restitution of property.
99. The Group Particulars of Claim identify two sub-groups: Claimants resident in Mauritius and Agalega represented by the Chagos Refugees Group, chaired by Olivier Bancourt, and Claimants resident in the Seychelles, represented by the Chagos Social Committee (Seychelles), chaired by Jeanette Alexis. There were 5,023 (4,959) Claimants; the Particulars of Claim provide a breakdown; all but 631 (570) were related to Mauritius; only 58 (24) related to Agalega; the rest, 573 (546), related to the Seychelles. Only 1,075 (1,072) of the 5,023 (4,959) were born on the islands; 557 (542) were deceased natives claiming through their heirs. The rest were the children of natives, alive or dead; of those 475 (461) were under 12. They are all listed by name in Schedule 2 to the Group Litigation Order. I should add at this stage that in the course of closing submissions, the Claimants handed in revised figures which total 4,959, though the accompanying note suggests 4,466 Claimants. I have put the breakdown of the figures totalling 4,959 in brackets above. Nothing much turns on the differences, but it illustrates the difficulties of testing individual claims.
100. The GLO was advertised in Mauritius and the Seychelles. The GLO required that the Group Particulars of Claim "*contain general allegations relating to all the claims*", and be verified. Questionnaires completed by each Claimant, supposedly explaining the basis upon which they fall within the group were made part of the Particulars of Claim, (paragraph 14 of the GLO). There were complaints from the

Defendants about the absence or incompleteness of questionnaires for a number of Claimants. The questionnaires do not permit it to be seen how the large number of Claimants, particularly those who were not displaced from the islands at any time, relate to the multifarious claims. Some questions are irrelevant; relevant questions are omitted.

101. The Group Particulars are unhelpful: a partial selection of quotes from documents, and two sample life histories, from Olivier Bancoult and Therese Mein, with a lack of focus on the categories of Claimants making which claims, and how their circumstances relate to the two examples given. But its drafting invites those individuals' circumstances to be taken as typifying the Claimants. I leave aside at this stage justifiable criticisms of the way in which the relevant ingredients of the torts are related to the facts relied on, but the particulars are most notable for the range of significant events from the mid-1970s onwards which are simply ignored, particularly any reference to the receipt of any compensation or the 1982 Agreement, and the role of the ITFB.
102. The Group Particulars rely on six separate wrongs: misfeasance in public office, a new tort to be called "*unlawful exile*", negligence, infringement of property rights, infringement of rights under the Mauritian constitution and deceit. The Claimants' Reply to the Defendants' contentions in the Defence as to abuse of process and limitation periods said that the claim also included damages for personal injury created by diseases linked to poor living conditions and mental illnesses. It is far from easy to find that pleaded in the original or amended Group Particulars of Claim, but that is a remediable pleading deficiency.
103. The Group Particulars specifically assert in paragraph 4: "*This action does not address or seek to interfere with matters of foreign policy, national security or defence policy decisions, but merely seeks redress for the Defendant's tortious conduct against the Claimants*". The Claimants' subsequent submissions, when pressed, did not sustain that seemingly simple dividing line.
104. Schedule 1 to the GLO contains the list of common or related issues of fact or law to which the GLO applies: 11 of fact, 21 of law. They appear to cover comprehensively the issues in the case.
105. The misfeasance case originally simply contended that the removals or exclusions of the Ilois were unlawful, whether or not they were carried out pursuant to the 1971 Immigration Ordinance.
106. By Amended Group Particulars of 3<sup>rd</sup> October 2002, this allegation was considerably elaborated. It was pleaded that the Defendants, their servants or agents as before, knew that the 1971 Immigration Ordinance was unlawful, or were reckless as to its lawfulness, knowing or being reckless as to its purpose in giving effect to an "*unlawful or wrongful*" policy, based on a conscious disregard of the Claimants' interests. The judgment in *R v Secretary of State for the Foreign and Commonwealth Office ex p Bancoult* was relied on.
107. Insofar as evictions and prevention of return were not based on that Ordinance, the Claimants relied on other illegal acts made up of (i) the Defendants' knowledge of a significant permanent population, (ii) the births, deaths and marriages of which the state possessed records, and whose homes and possessions were there to be seen, the nature and extent of which could have been surveyed but was not, (iii) the concealment from the UN, the Commonwealth Governments and Parliament of the true position, because the existence of a permanent population would impede the UK/US agreement and give rise to obligations on the UK Government under the UN Charter, and (iv) the related pretence that there was no such permanent population and taking of policy and administrative measures to ensure that there was no permanent population.

108. Such measures included (i) instructing Rogers & Co, the shipping agents for Moulinie & Co, not to allow Chagossians who had left voluntarily to return, (ii) failing to warn those who left voluntarily that they would be unable to return, (iii) in effect coercing islanders to leave without lawful authority, (iv) failing to balance their interests against the UK Government's interests through a failure to tell them what was happening and what their true position was, (v) failing to provide any adequate system for compensation before the islanders were displaced, and (vi) continuing to refuse to allow the islanders to return. In proposed Re-Amended Group Particulars, the Claimants also alleged (vii) that there had been no consultation with the Chagossians about their future or the future of the islands, and (viii) that the acquisition of land had been done in such a way that those in apparent occupation of land had no recourse to a judicial tribunal.
109. Further acts of illegality pleaded were that it was at the Defendants' behest that the plantations were run down and closed, and that the Defendants could not lawfully either exclude the entire population of BIOT from "*the one part of the territory that, in 1971, had an assured economic future (because of the planned US base)*" compounded by the running down of the plantations knowing that this would remove the economic support for the entire population of the territory.
110. It was also pleaded that it was illegal for the Defendants in 1970 and subsequently to have adopted a policy of concealing the Claimants' status as citizens of the United Kingdom and Colonies from the Mauritius Government, the Chagossians and others. Deceiving citizens as to their citizenship, which deceit continued towards the Ilois after 1972 was itself an illegal act.
111. It was specifically and controversially pleaded, by way of pre-emptive strike, that the disclosed documents showed the Defendants' liability but that "*it is not necessary as a matter of law for the Claimants to be able to identify bad faith on the part of a single officer for the Defendants to be liable*". This was not so much a point as to evidence but a point as to the substantive law as to the requirements of the tort of misfeasance in public office.
112. The Defendants acted dishonestly, it was alleged, for the purposes of this tort because they acted in bad faith, knowing that what they said was untrue and that what they did was unlawful, or being reckless as to the truthfulness or lawfulness of what they said or did. No individual is named.
113. The dishonest statements were (i) that there were no permanent inhabitants of the Chagos islands when they knew that there were, (ii) that they failed to report to the UN on BIOT when they knew that they should have done, (iii) that they failed to inform Chagossians as to their rights as "*belongers*" and as British citizens, (iv) withheld information from the Mauritius Government as to their status, and (v) minimised publicity over the BIOT Immigration Ordinance.
114. It was pleaded that the Defendants knew that what they did illegally would injure the Claimants or were recklessly indifferent to that consequence because they knew or ought to have known of the Chagossians' property rights, their family and community connections in the islands, of their distinctive cultural identity which "*could not readily survive intact*" transplantation to Mauritius or the Seychelles and that their skills working the coconut plantations could not avail them elsewhere. They were removed under duress, without consultation and without proper facilities on their arrival in Mauritius or the Seychelles.
115. The misfeasance case relates to the period commencing with the lead up to the 1964 UK/US agreement and the creation of BIOT, and its principal aspects conclude with the arrival in 1973 of the last of the Chagossians in Mauritius and the Seychelles, although some later acts are relied on.
116. The initial contentions of the Defence as to the inadequacy of the pleaded allegations in constituting the tort of misfeasance were removed by the Amended Group Particulars. The real issues raised by the Defence were first as to the existence of any real prospects of the Claimants showing knowledge or

recklessness as to any of the allegedly unlawful acts or the likelihood of harm to the Claimants from them; the Defence was not amended in response to the new allegations of knowledge and unlawfulness in the Amended Particulars of Claim but that response continued to be made in respect of them. Summary judgment was sought, in any event, in respect of the claims of those who were not in BIOT or who were unborn at the relevant times.

117. The misfeasance claim is closely related to the new tort of "*unlawful exile*" asserted by the Claimants. The ingredients of this tort, not on an exhaustive basis however, were set out by the Claimants in a note of 18<sup>th</sup> October 2002. The Crown cannot remove from or prevent the return to British Territory of a British citizen or "*belonger*" without statutory authority or the "*free, voluntary and informed consent*" of that person. The rights derived from Magna Carta, and from common, constitutional and international law. If the rights existed, there was a tortious remedy for their breach. This tort covered not just the events surrounding the evacuation of the islands but also the refusal to allow those from Diego Garcia and their descendants to return there; it is said to be a continuing tort.
118. The negligence case, as often stated, relates to the period which starts with the arrival in Mauritius and the Seychelles of those displaced from the Chagos. It does not assert that the decision to remove the inhabitants was itself negligent nor does it cover the immediate manner of their removal. It does not therefore appear to cover those who were not removed from the islands but were prevented from returning. I am not sure that that is the Claimants' intention. It too is said to be a continuing tort. The duty of care was said to arise from the Defendants' decision to close the islands; that led to a duty to make adequate provision for those whom closure had displaced, by way of funds and facilities which would provide a "*roughly comparable lifestyle*" to that which they had enjoyed on the islands. This duty was breached because not even their most basic needs were met, leading to great deprivation: adequate provision had never been made.
119. The Claimants' property rights were said to have been acquired by prescription or succession. Mauritius property law, including the Civil Code in force from 1805, applied and granted rights to those in unequivocal possession of non-Crown lands with an intention to own it. Those rights were protected by the Mauritius Constitution.
120. The Claimants' contention that the Mauritius Constitution also provided rights in respect of inhuman treatment was not further particularised.
121. The deceit case was that false statements of existing facts had been made in documents, or even impliedly through inaction, to the Chagossians, the UN, the UK Parliament, the press and the Government of Mauritius. The false statements were that the Chagossians were not permanent residents of, and had no rights to remain in, the Chagos islands, had no rights under the UN Charter and were not British citizens. The Claimants relied on the same facts as to dishonesty as they relied on in relation to misfeasance in public office. The purpose of the deceit was to procure the quiescent removal of the islanders, without their asserting any of their rights and to prevent other persons assisting them to assert those rights. The Claimants and others relied on those representations, as was said to be demonstrated by the unhindered and unopposed evacuations, and the lack of public dissent. The Defendants had wilfully taken advantage of the poverty, ignorance, illiteracy and isolation of the Claimants.
122. This tort appears to cover the period from the inception of the proposal to create BIOT until the Bancourt Judicial Review proceedings.
123. The various torts and wrongful acts are said to have caused the islanders first, broadly, to have been deprived of the right to reside in the Chagos, enjoying the lifestyle, grants and assistance to which they would have been entitled as a permanent population, and second, to suffer individual losses of real and moveable property, jobs, income and "*security, dignity and a sense of identity*".

They suffered instead a minority status, characterised by discrimination and poverty in many manifestations. Damages, aggravated and exemplary, are sought. Also sought are declarations (i) that the continued refusal of the Defendants to allow the Chagossians to return is unlawful, and (ii) as to the steps necessary to make that right of return, to live in each of the previously inhabited Chagos islands, practicable.

124. The Group Defence of 28<sup>th</sup> June 2002 stated that the Defendants would seek to strike out the Particulars of Claim and seek summary judgment on the grounds that there were no reasonable grounds disclosed for bringing the claim and the Claimants had no real prospect of succeeding. The claims either did not satisfy the requirements of the pleaded causes of action, or were unknown to English law, or, if the laws of Mauritius were relied on, were irrelevant to BIOT, and were in any event statute barred or an abuse of process. A detailed response followed but it did not purport to be the full factual response.
125. The jurisdiction of the High Court was not challenged for the purposes of this action, although the BIOT Commissioner did not abandon his contention that the BIOT Courts were the proper forum. The nature and whereabouts of the BIOT Courts make a curious footnote in colonial legal history.
126. The essence of the Defendants' pleaded case in response was that those present on the islands at the point of closure, were present as licensees at will of the owners of the islands, initially Chagos Agalega Company Limited, and subsequently the Crown. It was Chagos Agalega Company Limited and the subsequent management company, Moulinie & Co, which was responsible for reducing the number of workers, for recruitment and organising the transport of the workers and their dependants to Mauritius, Agalega and the Seychelles upon closure of the islands. BIOT was created to enable the United Kingdom to enter into an agreement with the United States of America for the advancement of their mutual defence and security interests. It was admitted that the plantations were run down and closed as a result of the UK/US Agreements and the subsequent decisions of the United States in respect of Diego Garcia. The plantations on Peros Banhos and Salomon closed because they were not economic after the closure of the Diego Garcia plantations. The Defendants said that they had made adequate provision for resettlement through the agreement with Mauritius and the arrangement for the transfer of people to Peros Banhos and the Salomon Islands.
127. It was denied that the Defendants removed individuals against their will or did so dishonestly or in bad faith; instead, they co-operated to minimise the disruption to those engaged on the plantations by seeking to give a degree of choice as to where those displaced from Diego Garcia and the other islands were subsequently settled, by providing financial support to the Government of Mauritius and obtaining their agreement to a sum of money in discharge of the resettlement obligation which the United Kingdom Government had undertaken.
128. It was said that it was only after the creation of BIOT that the Defendants were aware that there were individuals who had been living on the islands for at least one generation. It was arranged that they should have the status of Mauritian citizens on the independence of Mauritius in 1968. It was denied that they had any right personally or by virtue of property to remain on the islands or that they were permanent inhabitants or "*belongers*" of BIOT. It was disputed that the Defendants knew of or were reckless as to the possible legality of section 4 of the Immigration Ordinance 1971. As to the allegation that the Defendants knew or were reckless as to the probability of their action injuring the Claimants, the Defendants contended in the Defence that they were concerned to ensure their proper treatment and entered into a commitment to the Mauritius

Government to meet the resettlement costs, protected their rights of citizenship and thereafter sought to maintain plantation working where possible, to obtain employment for them on the islands, and examined development and investment.

129. The Defendants asserted that they recognised the need to make appropriate financial and administration arrangements for the resettlement of individuals but they believed that it was only a small number of those working on the plantations who had substantial personal links to the Chagos islands and that there would be no real difficulties in making appropriate arrangements of them which they did. It was denied that the Defendants knew or ought to have known that the compensation arrangements might prove unacceptable or inadequate or that they were aware that any losses would be caused for which they would not be compensated by their departure from the islands in terms of real or moveable property.
130. Once the state of Mauritius became independent, it was not for the Defendants to control the way in which the independent Government carried out the arrangements for resettling the Ilois. The two commercial operators of the copra plantations exercised their own judgment in respect of recruitment and operation in the circumstances prevailing after the 1965 UK/US Agreement; the Defendants were not obliged to provide a subsidy to copra production and the copra plantation operators did not act as agents of the Defendants. The Defendants did not have control either over the implementation of the UK/US Agreement and the policy decisions under that Agreement made by the US.
131. Much of the Defendants' pleading in relation of the alleged tort of unlawful exile drew upon the defence in relation to misfeasance. It was said in those circumstances that there had been no breach of any common law or international law. It was denied that the Defendants removed any individuals from the islands or that if they did so, they did so pursuant to the 1971 Immigration Ordinance, but rather asserted that they did so in the exercise of the private rights which they had as operators of the plantation. In respect of Diego Garcia, it was said that it was not practical in view of the importance of Diego Garcia to defence interests for any Claimants to return to Diego Garcia, and that in respect of the other islands, the practicalities of the American attitude in 1969 onwards for a number of years made investment in those islands impracticable. Although the Immigration Ordinance 2000 permitted Chagossians to return to BIOT except for Diego Garcia, the Defendants were not obliged to undertake the investment required for a viable resettlement of those islands.
132. The Defendants asserted that the pleading of negligence was wholly inadequate and that insofar as there was a duty of care owed, that duty had been discharged by the agreement with the Government of Mauritius in 1972, the payment of the resettlement costs in 1973 and the further payment of £4m in 1982. No admissions were made as to loss or damage or causation.
133. The Defendants denied that the Chagossians had acquired any ownership of real property within the islands, denied the relevance of Mauritian law to any claim and any breach of Mauritian law, and asserted that these claims as with the others was statute barred.
134. The Defendants asserted that the pleadings on deceit were wholly inadequate and should be struck out as frivolous, vexatious and embarrassing. This was because of the very generalised allegations as to what was said to have been said to a very wide and heterogeneous group of individuals, businesses and organisations.
135. It was specifically pleaded that the Claimants must have known of their rights before the Bancoult litigation because of the pleadings in the Vencatessen action. Various allegations about abuse of process were made.
136. The Reply of the Claimants on abuse of process and limitation contended in summary:

- i. that the Limitation Act 1980 had no application because for all or the vast majority of the Claimants, the Defendants' acts had denied them any real and substantive access to justice, and in any event, it would be unconscionable to permit the Defendants to rely on the Act;
- ii. that the Foreign Limitation Periods Acts 1984 excluded or modified the operation of the Limitation Act 1980;
- iii. that Article 3 of the BIOT Courts Ordinance 1983 required the time limits in the Limitation Act 1980 to be adjusted to meet the particular circumstances of these Claimants;
- iv. that the Limitation Periods were not applicable to the continuing torts of unlawful exile and deceit which latter had only ended with the Bancoult litigation;
- v. that the Claimants were disabled within the meaning of the Limitation Act because they had been outside the jurisdiction of the BIOT Courts and of the High Court of England and Wales as a result of the Defendants' actions, which had also caused them to be impoverished, ignorant, illiterate and physically separated from those Courts;
- vi. that the action was based upon the fraud of the Defendants and deliberate concealment of relevant facts, in particular in concealing their citizenship removing the islanders, preventing their return and infringing other rights of theirs and failing to make adequate provision for them, accordingly section 32 of the Limitation Act 1980 meant that the actions were not statute barred; and
- vii. that the actions were also actions for personal injury and it would be equitable pursuant to Section 33 of the Limitation Act 1980 to allow the actions to proceed. The injuries included diseases linked to poverty, poor living conditions, malnutrition and included such illnesses as malaria, gastro-intestinal infections, drug addictions and mental illnesses.

137. The Claimants were unable to discover with reasonable diligence that the Defendants had behaved fraudulently and unconscionably at an earlier stage because they were uneducated, trusting, without access to pre-legal advice and effectively under the control of the Defendants who had misled the islanders at all stages as to their rights and status.

138. It was said that there was no abuse of process arising out of the Bancoult litigation; there was no duty to test the validity of the 2000 Ordinance by applying for permission to return to Diego Garcia and it was not necessary for the validity of the 2000 Ordinance to be challenged in Judicial Review because of the factual relationship between a decision as to its validity and the material relied on for the rest of the Claimants' claim. This was not a case of *Henderson v Henderson* abuse.

139. The Reply also denied that the renunciation forms could found an allegation that the Claimants were abusing the process of the courts in these proceedings because they would not have been aware of the content or purport of those documents and so there was no clear and unequivocal waiver of rights by persons fully informed as to them. Indeed, it was said to have been unlawful for a Government with governing responsibilities to treat its citizens in that way.

140. A Case Management Conference was held before Master Turner on 16<sup>th</sup> July 2002, who ordered a trial of a number of preliminary issues.

141. The preliminary issues were (i) "*whether the Claimants were unlawfully removed from or prevented from returning to the Chagos Islands as pleaded*" and (ii) a long list of scheduled issues, the detail of which the parties were to agree, including whether the action was statute barred, whether the pleaded case constituted the tort of misfeasance in public office, and whether they could establish its ingredients, in respect of which a variety of aspects were raised. The existence of a tort of unlawful exile, the justiciability of the national security and



international obligation issues raised by the asserted right to return to Diego Garcia, the inadequacy of the pleading of the negligence and deceit case, and the applicability of Mauritius law and the Mauritius Constitution were also issues raised in the Schedule.

142. Master Turner also made orders for disclosure and the exchange of witness statements for the purposes of that trial. The time estimate was 7-10 days. It was not then thought by either side that there would be much more disclosure of documents. There had been a debate as to whether the issues should be dealt with on the pleaded facts or whether, as the Claimants wished, live evidence at least on their side should be called. Master Turner, plainly encouraged by the Claimants' submission that the evidence of comparatively few witnesses for the Claimants would suffice to provide the factual matrix necessary for the determination of the Defendants' preliminary issues, ruled that live evidence should be called. The Defendants did not appeal that decision.
143. The basis for Master Turner's decision was common sense case management and justice. The pleadings were vague or incomplete as to many factual assertions; yet filling in those gaps, the full extent or implications of which could lead to further facts becoming relevant, through the taking of instructions over long distances from largely illiterate people dealing with events long ago via interpreters and then rendering the answers into pleadings, would be very expensive, time consuming and of debateable completeness or accuracy; live witnesses would be able to deal with those issues immediately, and the true scope of what they wished to say ascertained, clarified and checked or tested. As the aim of the Defendants was to defeat the whole or large parts of the case without a full trial, in circumstances where the Claimants were elderly, at least in their eyes had suffered at the hands of the very colonial power from which they were seeking justice, and were suspicious that as illiterate Creole citizens they were discriminated against in comparison with other colonial citizens, it was only just that the Claimants should have their opportunity to have their say, and should not feel as though the lawyers had dealt with it behind their backs.
144. Although not all of those aspects were explicitly part of Master Turner's thinking, it became increasingly clear to me as the case was prepared for trial and being tried, that he was right to have ordered as he did and the considerations to which I have referred weighed heavily in favour of the process undertaken, very prolonged though it turned out to be.
145. Unfortunately, the nature of the issues thus to be dealt with was not altogether clear and the parties could not agree. Part of the problem related to the question of which witnesses were necessary for which issues and, more importantly, what factual issues if any were to be finally decided at the preliminary stage. I held two pre-trial reviews, on 26<sup>th</sup> September and 11<sup>th</sup> October 2002. The list of issues was refined and the questions for the Court became generally expressed in terms of whether there was a reasonable prospect of the Claimants establishing the facts necessary for their claim or for defeating the Defendants' contention that the claims were statute barred. In general, binding findings of fact would not be made except in relation to abuse of process and so far as was necessarily implicit in the formulation of the limitation issue. The Defendants did not therefore have to provide oral evidence lest binding findings of fact were made against them at this preliminary stage. There were issues of law to be resolved. In summary, the fifteen issues covered:
- i. the factual evidence of compulsory removal of Claimants or the prevention of their return to the Chagos Archipelago and the lawfulness of such acts;
  - ii. in relation to the tort of misfeasance in public office, the prospects of it being shown that the Defendants acted unlawfully or if they did so, whether they knew or were reckless as to that unlawfulness;
  - iii. the existence of and legal requirements of the alleged tort of unlawful exile;

- iv. whether the alleged duty of care arose;
- v. the prospects of Claimants showing that they had any real property rights, in particular in the light of the acquisitions by the Crown, and the possible applicability of Mauritian law;
- vi. the relevance of the Mauritian Constitution;
- vii. the ingredients of the tort of deceit and the Claimants' prospects of showing that the tort had been committed;
- viii. the prospects of any cause of action not being statute barred or property right not being extinguished;
- ix. abuse of process in the light of the settlement of the Michel Vencatessen litigation and the later Bancoult litigation.

146. Various other orders were made in an endeavour to clarify what the pleadings were actually contending for; the Particulars of Claim were amended. The Claimants' Reply on Limitation and Abuse of Process went through a number of editions, the last one accompanying their closing submissions.

147. The hearing in the end lasted 37 days, not without some gaps. Many more witnesses were called by the Claimants than had been anticipated. They were called to deal with concerns which I raised during the hearing, with particular reference to the limitation and abuse arguments. Those concerns revolved around what the Claimants knew generally about the 1982 settlement, the Vencatessen litigation, the distribution of the £4m by the ITFB and, as it transpired, subsequent occasions when legal advice was sought by the Ilois. I felt that there were many significant witnesses who had not been called, the absence of whom was very surprising in the light of the contentions. The disclosure of documents from both the Defendants' and Claimants' files continued through the hearing and while written closing submissions were being prepared. Both sides complained about the inadequacy of the others disclosure. Some relevant documents were not in the control of either party.

148. The giving of evidence was slowed not just by the need for almost all the Claimants who gave evidence to do so through an interpreter. Documents had to be translated orally, and even if written in Creole, read to witnesses and at least in part translated for the Court. I am grateful to the many who acted as interpreters, for a language with few interpreters, many of whom, including a former President of Mauritius, came at short notice, at some disruption to their own lives.

149. Written closing submissions with a brief flurry of rebuttals and counter-rebuttals were provided for those submissions not concluded by 10<sup>th</sup> January 2003. The process ended towards the end of March.

## General

150. Mr Allen QC for the Claimants submitted that the Defendants' applications were unjust as a matter of intuition or perception. It was unjust that they should have no personal adjudication on the wrongs which they had suffered and the claims which they brought. His clients had been treated unjustly; it was unthinkable that a British Government could so treat the Chagossians. They had been displaced as a people by the Government of the United Kingdom which had eschewed any governmental obligation to them and was now seeking to prevent adjudication on the wrongs done to them. They had never had "*any independent comprehensive high level review*" of their rights or of the wrongs done to them. They had been treated in a way which it was inconceivable that, eg the Scots would be treated.

151. Paradoxically, however, it was the creation of BIOT in 1965, in advance of the removals which, as Mr Allen accepted, provided the opportunity for some of

the Chagossians' grievances to be raised. Had they been removed by the UK from the Archipelago to Mauritius while the islands were still part of Mauritius before independence, or had they been removed by Mauritius after independence from islands which had remained constitutionally part of Mauritius, the removal itself would not have generated claims about exile or a removal which was in principle one which no Government could inflict on its citizens. They would have been removed from one part of Mauritius to another part in the public interest, whether for defence purposes or because the islands' economy could no longer sustain them. Of course, the politics involved in such a route would have been completely different; it would not have been sufficiently certain for the UK or US Governments and the internal politics of Mauritius never contemplated such a course.

152. As Mr Allen reminded me, the fact that this application has lasted so long and has involved so many witnesses and bundles of documents (some newly arriving during the hearing), does not alter the purpose of the hearing: it is not a mini-trial. But it is to deal with the issues ordered to be dealt with, as to an extent they evolved during the hearing; it includes strike-out proceedings but it is also an application for summary judgment. Still less, however, would any trial of the action be a form of public inquiry into the overall actions or omissions of the UK Government towards the Chagossians over three decades and more, notwithstanding many comments and arguments from him which were more addressed to heaping moral opprobrium on the Defendants than to dealing with the issues to which the applications give rise. Neither the applications nor any trial of the action would constitute a high level, independent and comprehensive review of the rights of the Chagossians, the absence of which Mr Allen complained about. Nor could any trial constitute an inquiry at a general level into governmental wrongdoing or incompetence.

153. If, as Mr Howell QC said, the actions or parts of it should be struck out or summary judgment entered in whole or in part, that is the application of the system of law to the case. It would be the proper form of personal adjudication. Justice does not require an obviously unmeritorious case to be allowed to proceed. Ill-treatment does not require a hopeless case to be allowed to continue. Indeed, to raise false hopes would not be fair. There is every good reason to avoid the waste of public money and court resources which the continuation of hopeless claims or contentions would otherwise create.

154. In saying that, I am acutely conscious of the position of at least some of the Claimants. I have not heard oral evidence from the Defendants on any issues of real significance, although I have had a great deal of material in the form of documentary evidence about what happened over the years, upon which the Defendants rely. It does appear that, in the absence of unexpectedly compelling evidence to the contrary, at least some Claimant Chagossians could show that they were treated shamefully by successive UK Governments. Whatever view might be taken of the importance of the strategic defence aims underlying the creation of BIOT, the evacuation of the islands and the establishment of the base on Diego Garcia, some who had lived there for generations were uprooted from the only way of life which they knew and were taken to Mauritius and the Seychelles where little or no provision for their reception, accommodation, future employment and well-being had been made. Ill-suited to their surroundings, poverty and misery became their common lot for years. The Chagossians alone were made to pay a personal price for the defence establishment on Diego Garcia, which was regarded by the UK and US Governments as necessary for the defence of the West and its values. Many were given nothing for years but a callous separation from their homes, belongings and way of life and a terrible journey to privation and hardship. Such arrangements as were made in the early 1970s did not take effect for several years and came too little and too late to alleviate their problems. An eventual accord in 1982, driven by litigation, produced an offer which was intended to improve their sad conditions but which

was not evidently generous. Their poverty, sadness and sense of loss and displacement impel their continuing desire to return to the islands which were their home.

### **The Chagossians' Oral Evidence**

155. It was the Claimants who wanted to provide some oral evidence for the purpose of these applications. Initially, this evidence was to show the way of life which they had led on the Chagos, the manner in which they had been compelled to leave the islands or prevented from returning to them, the harsh conditions of their voyages to Seychelles and Mauritius and the destitution in which they had been left there for so long, without assistance or compensation from the UK Government. It was to re-assert their entitlement to return, and their strong attachment to the Chagos, indeed to particular islands within the Archipelago. But it became clear to me during the cross-examination of the witnesses whom the Claimants had initially decided to call, that there was much relevant evidence on other issues in respect of which obvious witnesses were not being called. Those issues related to the series of negotiations leading to the 1982 Agreement, the Agreement itself, the signing or thumbing of renunciation forms, the way in which the ITFB had dealt with those forms, the withdrawal of the Vencatessen litigation and the nature and extent of the legal advice which, over the years, the Ilois, or some of them at any rate, had received and to which publicity had been given. Those issues were directly relevant to the Claimants' case on limitation.
156. The evidence of the individual Chagossians was given through interpreters of varying experience. Some of the Chagossians were elderly; some had been very young when they left the Chagos and arrived in Mauritius and the Seychelles. Inevitably, for all, the events surrounding the 1982 Agreement were twenty years past. The individuals were mostly illiterate in any language, spoke only Creole, and lacked significant education. Documents had to be translated in the witness box, and could not be read by them to assist understanding or recollection. Legal concepts were, not surprisingly, poorly understood, at least at any level of complexity, though the witnesses all had and expressed a strong sense of their rights as they perceived them and what rights they would or would not give up. Some legal ideas, notably the making of a claim or bringing proceedings, lacked a clear or consistent Creole translation. Witnesses were also often troubled by ideas of time, how long ago something had happened, and whether something had happened at the same time as something else. Witnesses would sometimes lose the thread of the questions, and could not be brought back to it, and when reminded of what they had recently said, would deny it or give a very different answer as that earlier question was then put again. Accordingly, their evidence requires a careful appraisal.
157. But certain observations are apposite at this stage. It was plain that the written witness statements, which for the most part the witnesses were prepared to adopt as true, could not be regarded as accurate or reliable or as the witnesses' testimony on many aspects. The language of many of the witness statements was far too advanced and detailed to be the true recollection of the actual witness in anything approaching their own words. It appears that one of the problems with the way in which the statements were taken in Mauritius is that the person preparing the statement provided information in it which may be true, for example exchange rates, but which is not within the knowledge of the deponent. This leads to a false impression of the witness' knowledge. It is impossible to tell the extent to which the written statement has been influenced by the statement taker, no doubt acting in good faith, or the extent to which the statement has been affected by the way in which the story has been taken down in Creole and translated into English and then back again.

158. But, even making those allowances, there are some surprising errors in the witness statements and some surprising omissions. There was a surprising lack of material in the witness statements on issues of real importance including the relevant material for the claim to property rights by prescription, as to their beliefs about the nature and purpose of the 1982 Agreement, the existence of the renunciation forms and what they and the Chagossian community more generally had known or believed about the availability of legal advice, and about certain of the wrongs said to have been done, such as the alleged denial of British citizenship. This is not a criticism that each document upon which the witnesses were cross-examined should have been previously considered, but there was often scarcely a reference to important aspects.
159. The witnesses, quite properly in this case, gave evidence in chief at some length; this evidence was often at variance, in matters large or small, with their statements. The oral evidence itself was frequently self-contradictory; what was said in cross-examination being at variance with evidence in chief, or with earlier answers in cross-examination.
160. The lack of reliability may, in part, be attributed to a lack of understanding of the questions and a loss of the thread, but it also reflected an unreliable memory. Some answers would be given to questions about events which they at other times would deny happened or deny that they remembered. The frequency with which witnesses were unable to remember events or simply did not know about them itself suggested that they had unreliable memories of events now too long ago for more reliable evidence to be forthcoming. Indeed, the lawyers who gave evidence were often unable to do more than rely upon the documents for their recollection as to what had happened.
161. Evidence was also given, as if at first hand, about events which the witness could not have seen or heard. As Mr Allen put it, there was an element of "*collective*" or "*folk memory*". As Mr Howell suggested, stories went round which became lodged in people's minds as events which had happened and then as events which they had witnessed. Those amount to much the same, but the evidence thus given is of little practical help, for it is impossible to know whether it has any foundation in fact or not. There might be value in "*collective*" or "*folk memory*" evidence, or in a fairly sound general picture in which the individual details were more uncertain, if one were seeking a generalised or collective view for the purposes of an inquiry into the conduct of the UK Government. But I am concerned with litigation in which, on issues such as negligence and damages for personal injury, what happened to each individual Claimant would need to be measured with rather greater precision.
162. The unreliability of so many memories and the large gaps in recollection and knowledge were compounded by the willingness of a number of Chagossian witnesses to take refuge in a loss of memory and a denial of knowledge in order to evade questions on obvious problems: in particular, about the Vencatessen litigation, the withholding by the ITFB of £250,000 while sufficient renunciation forms were collected, and the occasions when legal advice had been sought. At times, Mr Allen's repeated emphasis on their naivety and ignorance as an explanation was overstated and did the Chagossians in their determination and endeavour less than justice. Many were, I concluded, alive to the significance of the passage of time since 1982 and the importance of what they had or had not been told about their rights and used their asserted poor recollections as a device to avoid facing up to evidential problems. For some, this did not appear to be an unfamiliar refuge. Even if that were too harsh a judgment, those gaps in memory show how difficult it now is for reliable evidence to be given on important issues.
163. I also concluded that some Chagossian witnesses gave deliberately false evidence on a number of issues, notably, but not only, Mrs Charlesia Alexis.

## The Witnesses

164. **Mrs Talate** was the first witness and gave much evidence which other Chagossians were to agree with or to be affected by. She had been born, she said, on Diego Garcia but she could not remember when, because of her suffering.
165. She was asked in cross-examination why the statement which she had sworn in the Bancourt Judicial Review proceedings said that she had been born on Peros Banhos and said that it was a mistake on the birth certificate for it to record that she had been born on Diego Garcia, the mistake having arisen because she had moved from Peros Banhos to Diego Garcia when she was one month old. In that statement, it had said that her principal interest would be to return to Peros Banhos where her grandparents were buried, and her parents and she had been born. In order to explain the discrepancy, she said that she had told the truth but the person who wrote down what was in the first statement had written down a lie, which I found surprising. She could not remember when she was born but her witness statement said it was 19<sup>th</sup> March 1941, which I assume someone inserted from her birth certificate. She was unable to read or write or to speak English.
166. She had left Diego Garcia when the island was sold, as she put it, and had gone to Peros Banhos. She described how she was told that they had to leave Peros Banhos, the terrible conditions on the "*Nordvaer*", and the poor conditions in Mauritius. Over time, she became closely associated with the CRG, one of its leaders from the very beginning although she denied being its Treasurer. She was elected to the ITFB in December 1983.
167. Her evidence was striking for the difference between her witness statement and her oral evidence, in style and content, and for the contradictions and changes to which her evidence was subject. She was an important Chagossian figure, and their main witness on many areas. When the renunciation form was translated to her, it was for many subsequent witnesses, they said, the first time they had heard of any such document or its contents. But the gaps in her evidence about what she had known or understood, or what the Chagossians generally had thought were very extensive.
168. I concluded that Mrs Talate was not a credible or reliable witness, certainly on any matter of detail, and could be persuaded that things had happened which either did not happen to her or did not happen at all, or that she had seen things which she had not. Her witness statement bore no resemblance to any evidence which she could give in her own way; it drew conclusions eg over poverty, which were far too legalistic and sophisticated for her; its language was not hers, translation apart; so much of it she disagreed with that it cannot be taken, beyond the most general level, as an accurate or reliable piece of evidence.
169. Her oral evidence gave rise to many problems. Initially in chief she remembered signing her statement after it had been read to her in Creole and she said that the statement was true. She told me, however, that her statement was read back to her in French, some of which she understood and some of which she did not; it had all been read back to her in one go, reading from a prepared document, although she had spent nearly a whole day being asked questions. There was an element in her evidence of collective memory, that is, evidence which describes what happened to others, where she was absent, as if she had been present and which might be true. There was also undoubtedly confusion of language and thought and an inability to relate questions and answers to specific times. The strength and depth of feeling for Diego Garcia and the emotions attached to her experiences are entirely genuine. The general picture of life on Chagos, the fears of simple and in every sense ill-informed people, and the general picture of life in Mauritius can be taken, for present purposes and in view of the limited scope for challenge, as a basis for showing the general picture which the Claimants' overall might be able to prove at trial. Mr Howell did not take substantive issue with them for these purposes. It is much more problematic

when it comes to the details of what happened to whom, when, and to what degree; here it is unreliable.

170. I also formed the strong view that she was being evasive when answering questions about what she knew of the Vencatessen litigation, the 1982 negotiations, what she knew when she was on the ITFB about the 1982 Agreement, the existence of a possible legal remedy which either had been used or could still be used, and of the extent to which Ilois were informed of what was going on through their various organisations. She was in a general sense aware of the significance which that had for the case as a whole. I do not regard her as having been a truthful witness in a number of instances. If that judgment is too harsh, she is, by reason of the passage of time, a witness whose memory is no longer reliable on specific and important individual details. Her evidence had real significance because, overall, it showed how difficult it would be, with the passage of time, to place reliance on what she said in detail. She was not alone in this; it was commonplace among the Chagossian witnesses. It goes directly to their prospects of success.
171. **Jeanette Alexis** was the Chairman of the Chagos Social Committee (Seychelles) and a personnel manager in a Seychelles Ministry. She was the daughter of Mrs Mein, who was Charlesia Alexis' sister. Her father had been the Assistant Administrator and the shopkeeper on Diego Garcia at East Point, registering those who came to work, doing administrative jobs and taking Mass when there was no priest. She was born on Diego Garcia in 1961 and her parents and her grandparents had also been born on the Chagos islands. Her brothers and sisters had been born there too. She described a stress-free existence. Her mother had never had to work. She had had a happy childhood with plenty to eat. She left Diego Garcia in 1971 for Peros Banhos and then had gone to the Seychelles with her parents. She described the harshness of life there, the difficulties of obtaining Seychelles citizenship, and the occasional contacts with Mauritian Ilois groups. Her father had set up an informal group which she helped with. The Seychelles Government had done nothing to help and the Ilois were frightened of making a fuss in what became a one-party state in case they were deported. She could afford no lawyers.
172. Her committee was set up in 1997. Her correspondence with the Foreign Secretary had been ignored until the FCO wrote explaining why there had been no compensation for Ilois on the Seychelles: there had been few Ilois there and the resettlement problems of Mauritius did not exist.
173. She struck me as a generally honest and intelligent witness, except she was surprisingly now unaware of her father's efforts to obtain compensation or her aunt's campaign in the 1980s. Other evidence showed that she must have known of Mrs Alexis' activities. She may have forgotten subsequently, what she once knew.
174. **Mrs Mein**, the mother of Jeanette Alexis, was born in 1933 on Diego Garcia as her parents, grandparents, and sisters and brothers had been. She had gone from Diego Garcia to Peros Banhos before coming to the Seychelles. She had met her husband when he came to work on Diego Garcia. He was a Seychellois. Her husband did administrative work for the company, accounting work and keeping the registers. She did no employed work. Her house was in concrete blocks with iron sheets, four bedrooms and other rooms. When she left Diego Garcia, she had had to leave behind all her furniture, all the flowers and fruits of her garden, all her animals, ducks, chickens and so on. They had to leave behind the small boat her husband used for fishing. She described her evacuation and the life in Seychelles.
175. She was an honest witness, although clearly some of the detail had dimmed in her memory and her ability to follow a line of questions had diminished over time and with ill health, because I would judge that she had a clear general picture of what life was like on Diego Garcia and how it had subsequently changed. She had no recollection at all of making her witness

statement, though her daughter explained how carefully it had been done. She could not remember her age or when she was born, nor going to see a lawyer about a case.

176. **Mrs Piron** was born on Diego Garcia and left when she was 26. She was now 57. Diego Garcia had been her home, but her mother had been born on Peros Banhos, her father in Farquhar, and her mother's parents had been born in the Seychelles and Mauritius. She was 20 years old when she started work. Her evidence supported the general picture of life in the Seychelles to which she had gone from Diego Garcia with her husband or partner, who was a Seychellois and their three children. (It was not altogether clear whether one or more gentlemen were involved but a certain informality in family arrangements appears not to have been uncommon.) Some of her descriptions, in particular living in a ditch with her family after having lived with her mother-in-law, seemed exaggerated and affected by a failing memory.
177. **Rita David** was born in 1947 on Diego Garcia, as were her brothers, sisters and all the ancestors she could trace, back to her great-great-grandparents who had been born on Chagos. She had worked on the copra plantations as a child; her parents worked on them. She had lived on Salomon when she got married and appears to have lived on Peros Banhos from 1969 to 1971 after which she went to Mauritius. Her evidence about the general conditions on Chagos or Mauritius fitted with other evidence. She was half-sister to Simon Vencatessen, but not Michel's daughter, and niece to Mr Saminaden. She said she did not remember receiving any money after Michel's case, contrary to her witness statement. She could neither read nor write.
178. Mrs David's evidence was of importance because it demonstrated the high level of fragility of memory about events so long ago and the unreliability of the witness. Events which one would have expected to have been firmly in her mind, and about which she had made sworn statements, were the subject of contradictory evidence from her.
179. **Marie Elyse** was 77 and the mother of Olivier Bancoult. She was born on Peros Banhos, as was all the rest of her family. She worked for the plantation company doing a variety of lighter jobs and her husband was in the heavy copra industry, a sawyer. She had six children on Peros Banhos, but one of them Noellie was injured in 1968 and the Administrator said that she had to take the baby to Mauritius for an operation. She went with her husband and all the young children. She expected to be in Mauritius for just three months, but after her child had died on Mauritius, she went to the office of Rogers & Co to seek to return. Mr Autard of Rogers & Co said to her in Creole three times that Peros Banhos had been closed and he could not arrange for her passage back to Peros Banhos, that all the islands had been sold by the English, and that it would be too dangerous there because of the bombs. She had to go back to tell her children and husband what had happened and that she could not return; she was very upset in court.
180. But for all the personal trauma of which she spoke, she agreed that paragraph 3 of her present statement was wrong when it said she had lived all her life on Peros Banhos until 1973 (because she had left in 1968) and that she was forced to leave (whereas her evidence was that she was not forced to leave at all). The contradiction between 1968 and 1973 is plain on the face of her statement, however. There was other confusion over whom she travelled with, her son Alex and his five children or not; her Judicial Review statement had said so, but this time she denied it. Later, she said Alex was nine when they left but that could not be right as Olivier was four and is ten or so years younger.
181. She was a confused witness, not reliable on matters of significance in her life, in particular in her description of what she had discussed or not discussed with her son, Olivier Bancoult, about litigation and the activities of the Chagos Refugee Group. He did not describe any problems with his father's health in his statements in the way in which his mother had done in hers. She could not remember making her statement, but at another stage apparently did so.



182. **Marie Jaffar** had been born in 1952 on Salomon and her father and grandfather were also Chagossians. In 1966, she had left the Chagos islands voluntarily when her mother needed medical help in Mauritius. After she was better again, she and her mother had gone to Rogers & Co in April 1967 to book the return journey but Rogers & Co had said that the British had sold the islands because of independence but did not say to whom. Her witness statement said her mother had returned from Rogers & Co to tell her what had been said which included the islands had been sold to the Americans. They did not know what to do because all their belongings were on Salomon. They cried in despair. They quickly had to find work. After two years, her mother found work as a part-time maid, but her step-father got no employment at all. She started work as a maid servant at the age of sixteen, which would mean it was about 1968. Later, she said she had got a small children's allowance (child provision) of Rs 15 and had started work straight away on arrival at fourteen. Her written statement endorsed what Mrs Elyse and Mrs Talate said about conditions in Mauritius.
183. It was difficult to reconcile the various pieces of her evidence. The only issue in my mind was whether she was deliberately untruthful or whether, as I would prefer to believe, the major discrepancies and improbabilities over relevant and significant features of her experiences were the product of the passage of time and the unreliability of her memories over that period, which undermine the value of what she had to say except at the most general level. It was the quality of recollection which, as with others, was the most telling feature of her evidence.
184. **Joseph Laval** had been born on Diego Garcia in 1955, as had his parents and grandparents. He described leaving in 1971 and going to the Seychelles en route for Mauritius where he and his family were put up in the prison on the other side of the courtyard from the prisoners, but they were still locked up by 6 o'clock in the evening.
185. When he was asked questions about the money received from the ITFB, he was very slow in answering and rather resistant to explaining what he knew about where the money had come from. He had been in debt and unable to pay his debts from the money which he had received. He was unable to read or write or speak English. He seemed unaware that he was one of the Claimants in the case. He had never thought of bringing a case before.
186. He then remembered that he had received Rs 7,000 from the ITFB which, he said, was because he was a Chagossian; then Rs 10,000 and finally Rs 36,000 for a house. He thought that the Mauritian Government had paid this because they had taken him from the islands. He had not understood that if he signed the document to get the last sum of money which he got that he would lose his rights. He had met Mr Mardemootoo and now understood his rights, although previously he had said he only knew Mr Mardemootoo by name. His written statement makes reference to the value of rupees in 1982, part of which is said to explain why the sum he received was an insignificant amount. He did not know before he came to England that the currency in England was pounds, nor did he know how many rupees were necessary in 1982 to buy pounds. He could not remember anybody telling him anything about that, although he had agreed that he had told his story to Mr Mardemootoo who had written it down and that it had been read back to him by someone else in Creole and that he had signed to show that it was correct.
187. He said that he earned Rs 10,000 a month. But in one of the claim form documents, the questionnaire, about which he had no recollection, his monthly income had been given as Rs 1,500. He could not remember how much he was earning in 1982 either. He did not know either how much he could have earned in 1982. He thought that the Mauritian Government was giving them money in 1982 so that they could feed themselves. He said he did not know that people were trying to get money from the British Government. They just put their thumbprint down when they got money. He had forgotten about signing any form when he got money from the ITFB in 1983. He could see his signature but had never asked

what he was signing. He never went to any meetings or supported any Ilois groups. He had only got to know Mr Bancoult four years ago, and was in favour of the Chagos Refugee Group.

188. He had used the Rs 36,000 to buy property, although in his written statement he said that it had all been used to pay off money lenders. I asked him about this and he then said that he had used the money to repay Mauritian money lenders. He said that he had forgotten that he had used the money to repay the money lenders, but that in fact is what he had done. It was his brother who bought the land, but he then said that he did own the house in Baie du Tombeau and the Government had given him the land.

189. Baie du Tombeau and Point aux Sable were the areas where, according to Mr Bancoult's Judicial Review statement, 85 houses were built for the Ilois by the Central Housing Authority and 450 plots of land were made available free for house building by the Ilois but which they had to pay for. But he said, many Ilois needed the money and used compensation to pay debts and so sold the land or house.

190. Mr Laval's evidence was somewhat unreliable and not always truthful. It may be that some allowance has to be made for the way in which the statement was taken and information inserted which the maker of the statement could not possibly know. It may mean that the witness statement itself is of limited value, but even making that allowance, the oral evidence which he gave was nonetheless self-contradictory on a number of occasions. He rather exemplified the evidential problems of the Chagossians so long after the event.

191. **Mr Ramdass** said that he had gone to Mauritius from Diego Garcia where he was born in 1934, with his mother for her medical treatment. He was then an adult, already married, but they had been unable to return. He was somewhat vague about when this was but agreed that his son, Eddy, had been born in Mauritius in 1957 and that he, the father, had never subsequently returned to the islands. This suggested either that he was mistaken about being refused a return passage, or that such refusals happened because of employment reasons quite independently of BIOT. At all events, by 1971, he must have known something of Mauritian ways. He said that he established not so much a committee as a small family group, which included Mr Piron and Mr Saminaden. Michel Vencatessen was his uncle. Committee or not, he organised petitions and by 1974 agreed that he had become recognised as an Ilois leader along with others in his group. He was in contact with Ilois in different communities including Mrs Alexis. He had been an Ilois representative on the Resettlement Committee and had been involved in setting up the Michel Vencatessen litigation and in meeting with Mr Sheridan in 1979 when 1,200 quittances were signed. In 1981 and 1982, he was part of the Ilois group in the Mauritius Government delegations. He had witnessed the signing of the renunciation forms in 1983 and had become an elected Ilois ITFB member in December 1982.

192. It was plain from Mr Ramdass' evidence, as to events in 1979 to 1981 as it was in relation to later events, that his memory had faded, as he himself asserted. He said that he often got confused. What he could remember was often unreliable and plainly in conflict with reliable contemporaneous material. His evidence changed repeatedly. He could not remember evidence he had given recently. Although he was elderly, not in good health and his wife in Mauritius was unwell, he was clearly evasive at times when his memory was not playing him tricks, and some of his answers were untrue. There was clearly some pressure on him from Mrs Alexis, not just as a result of past disagreements in 1979, 1980 and subsequently, but also directly as a result of him accusing her in court, correctly as it happens, of having been engaged in fraud on the ITFB. (This led to an altercation outside court. Mr Ramdass repeatedly denied that there had been any communication between them; but he later changed his evidence to say that they had only spoken about food; Mrs Alexis always spoke in a loud voice. He explained that he could not remember why he had said what he had said and

denied that there had been any conversation at all and wanted to apologise to Mrs Alexis. He denied being afraid of her. From all that I had been told, this was plainly untrue. Indeed, after a sequence of denials by Mrs Alexis that there had been any conversation at all between them, she admitted that in fact they had been talking but only about what to eat. She too persistently lied over that.)

193. Whether or not his evidence was the result of evasion or forgetfulness, I am quite satisfied that in 1981 he knew of the role of the litigation in the settlement negotiations and of his role as the representative of Mr Vencatessen's interests. I reject as incredible the idea that in 1979 and 1980 he had no idea what were the basic requirements of the UK Government in relation to a settlement as relayed to his group by Mr Sheridan. Likewise, I regard as incredible his contention that he had no idea what was in the letters or petition which were organised by the JIC. Mrs Alexis, according to reports, had denounced the petition saying that people had not understood what was in it. There is nothing to suggest that Mr Ramdass was surprised at what had been done in his name in 1980. It was all of a piece with what had happened in 1979. It is difficult to see how he could only have found out about the contents of the letters in court in the light of his witness statement or in the light of his answer that he had begun to distance himself from Mr Mundil because Mr Mundil had betrayed them. He could not remember the manner in which he was saying he had been betrayed. Mr Ramdass said also in his evidence that he could no longer understand all the letters that were written relating to his group and in his name, in which negotiations leading to a final settlement had been discussed, because he was now too old. That may be the explanation, but it does not add to the reliability of his evidence.
194. **Mr Sheridan** had been the senior partner in Sheridans. It was when Mr Ramdass contacted Gaetan Duval, a leading lawyer-politician in Mauritius, who had put him in touch with Donald Chesworth, an English adviser to the Mauritius Government, that Mr Ramdass' group contacted Mr Sheridan. Thereafter, he was involved in the Vencatessen litigation, though Mr Glasser, the Head of Litigation, had day-to-day procedural charge of the case. He had been to Mauritius often, was involved in the settlement attempt in 1979 and his firm had been involved in giving subsequent advice on settlement before and after the 1982 Agreement. He regarded his firm as acting for Mr Vencatessen in a test case for the Ilois, and indeed he came to regard the Ilois more generally as clients.
195. It was plain from many answers which Mr Sheridan gave that his memory of the events of the late 1970s and early 1980s had faded. He could not remember many matters which were referred to in the documents or which, from other sources, it was plain had happened in fact. He had a good recollection of the specific events surrounding the signing of the quittances in 1979 but not of those to whom he spoke and for whom he acted, but was very dependent on documentary material. He did not disagree with what it showed.
196. **Mr Glasser's** evidence was largely superseded by Mr Sheridan's. He could recollect little beyond the correspondence and that did not always remind him of what had happened anyway.
197. **Mr Gifford**, the partner of Sheridans in charge of this case, gave evidence about its origin in the Bancoult Judicial Review and the impediments, including lack of leadership, confidence and important documents to the bringing of an action earlier than was done. He was asked about the Statements of Truth attached to various Particulars of Claim and the investigations made to establish them.
198. **Mr Grosz** of Bindmans was instructed in about April 1981 by the CIOF. He advised the Ilois delegates on the 1982 negotiations and Agreement with the benefit of the advice of Mr Macdonald QC whom he instructed. He advised that it was a fair settlement including the provision of renunciation forms, as did all the English lawyers. He was involved again in 1990 and through till the mid 1990s for the CIOF, first in seeing what proceedings could be brought against the UK and

Mauritius Governments and then in seeking entry permits to Chagos. He instructed Professor Bradley who considered much of the same ground as this current action covers. The view arrived at was that no case in the UK had a reasonable prospect of success.

199. His evidence, as was not surprising, was very much drawn from the documents. He had limited independent recollection as he often said, even though his evidence goes back only twenty years.

200. **Mrs Alexis** also gave evidence about the events in 1979 and subsequently. She had been born on Diego Garcia on 8<sup>th</sup> September 1934, the same year as Mr Ramdass. Her parents, grandparents, and great-grandparents had also been born there as had her husband and all but two of her children. She, her husband and children had gone to Mauritius in 1967 when her husband needed medical treatment. When that was concluded, Rogers & Co said that the islands were closed. They had suffered terribly after that because they were unable to return and all their things were left behind. They got a small house through an aunt of her husband. It was plain from all the documentary material, though not from her witness statement, that she had been a leading figure in the endeavours by the Chagossians over twenty or more years to gain compensation and the right to return to the islands. She was involved in setting up a committee in July 1979 which was instrumental in leading opposition to the quittances brought by Mr Sheridan. This Beau Bassin Committee evolved into the CIOF of which she became President. She was on the delegations which negotiated in 1981 in London and in 1982 in Mauritius. Subsequently, she was on the ITFB for a number of years. She became President of and remained active in the CRG. She was a regular visitor to the British High Commission in Mauritius seeking more money and assistance in various ways. She participated in various campaigns including demonstrations and hunger strikes over the years. She was convicted of making a fraudulent claim on the ITFB in respect of her two dead children; she served three months. She had an undoubted strength of character, a conviction in the rightness of her cause and in the ill done to the Chagossians. She said if things were going wrong, Ilois would come to her and if a row or noise were necessary, she would play her part. She was also willing to lie and did so on a number of occasions, including about her altercation with Mr Ramdass over his pointing out that she had been involved in fraud. Her manner on that occasion, about which there is no doubt that she was lying, sullen, downcast and dogged, was repeated on a number of occasions, although I recognise the limitations of demeanour as a guide to truthfulness, especially of a witness from a different background mediated through a translator. Like other Chagossian witnesses, she took refuge in her illiteracy and in the passage of time since a number of the events about which she gave evidence, to avoid facing up to important but difficult questions for their case.

201. It is difficult to convey without going through all the questions and answers, how reluctant Mrs Alexis was to answer even simple questions if she could see that there was some element of difficulty for her case which an answer would create, but it happened time and time again.

202. **Mr Rosamund Saminaden** was born on Salomon Island in 1936, but he grew up in Diego Garcia. When he was sixteen, his mother moved back to Mauritius where she had been born and although she returned to the Chagos later, he stayed behind in Mauritius until, in 1967, he went to Peros Banhos as the Administrator needed a blacksmith, but he had not signed a contract. His witness statement did not mention his living in Mauritius for fifteen years up to 1967 because he had not been asked about it. He then said he had gone from Peros Banhos to work on Diego Garcia, but on his timings he must have returned to Peros Banhos. In 1973, the islands closed. He was forced to leave and they went to Mauritius. He lived in Dockers Flats for fifteen years after he returned to Mauritius. In 1973, he met Christian and Eddy Ramdass and Michel Vencatessen and they started to make representations to the Governments for financial

support. Michel Vencatessen was his brother-in-law. He became part of a group with those three, together with Mr Piron and Mrs Vythilingam. He was on it to represent people deported in 1973. The others represented those who had come earlier. He represented the Dockers Flats area, Mr Piron another area and Mr Ramdass and Mrs Vythilingam lived in Roche Bois. He agreed that he remained an elected Ilois representative, working with Olivier Bancoult on the Welfare Trust Fund.

203. Mr Saminaden was, at times, rather an evasive witness but he was also one, like others, whose age slowed his ability to remember what had happened. Not all the problems were down to the lapse of time, although, with him, there was clearly a good deal of room for an honest lack of comprehension of all the details, as well as for the comprehension, which there might once have been, to have disappeared. Mr Saminaden was inclined to downplay the significance of his role in advancing the Vencatessen litigation, in liaising with Mr Sheridan and his role on the Resettlement Committee as a representative of the Ilois from Dockers Flats. The impression might be gained that the Chagos organisation in the 1970s was rather less than in fact it had been. There were a number of discrepancies between the oral evidence and the witness statement, for example over whether he saw Mr Sheridan speaking in 1979 or merely heard about it. I do not regard those as of any real significance as to honesty, but they demonstrate the problems of reliability which events so long ago give rise to.
204. **Simon Vencatessen**, who was born in 1944 on Diego Garcia, is the son of the late Michel Vencatessen and a cousin of Christian Ramdass. He said his father had stayed in Mauritius for seven years until 1971; he thought he had left Diego Garcia for Mauritius in 1968 and was still there when his father went back. He could read and write a bit in Creole and French, but not English. He was involved in the withdrawal of the Vencatessen litigation in 1982. He became a member of the ITFB with his half-brother, Francois Louis. He brought a case against the ITFB claiming that it was not entitled to require Ilois to sign renunciation forms in order to receive compensation from it. He was another whose evidence was unreliable, evasive and not credible in important areas, particular over the nature of his father's case and over the significance of what he knew about the renunciation forms in 1983.
205. **Mrs Kattick** now lives in France, but she was born in 1953 on Peros Banhos, leaving in 1967 to go to Mauritius from where she was unable to return to the Chagos. She learned no English but had learned a little reading and writing in French when she left school in Mauritius. She supported the CIOF in around 1977 or 1978 and did various organising tasks for it; she was elected to the ITFB in December 1982, beating her sister, Mrs Naick, and Mrs Alexis. She witnessed, with Mr Ramdass, the thumbing of the renunciation forms in September 1983. Thereafter, she lost interest in Ilois affairs, left the ITFB and went to France in the late 1980s. When she was in Mauritius she only got one year's schooling, but it was free because she was too old for entry to school when she arrived there. She learned to read some French when she was in France.
206. Her questionnaire as a Claimant in this case said that she had been forced on board the boat to leave Peros Banhos like animals. She was asked about that. She said she had to go with her parents. She could not remember exactly whether anybody had forced her parents on board. She had to go because her parents went. She was asked why she had said on the form they would have to be deported because the island had been sold. She said that was true. She had a brother whose form said that they left in 1965 and his parents went to Mauritius for vacation but she said that was not so. She did not know that her sister also said that her parents went for a vacation. All she could remember was that they had to leave the island as it had been sold. But a 1967 departure does not fit with deportation. Her evidence in chief was contradictory and one version contradicted her questionnaire. She had said in chief that she had been at school in Peros Banhos and was still there when she left. In cross-examination, she said that she

had had three years' education in Peros Banhos, leaving school at ten, some three to four years before she left. That fits with a departure in 1967, but contradicts deportation. (Otherwise, she would have had some six to seven years' education in Peros Banhos.)

207. Mrs Kattick was intelligent and astute; she knew where the problems lay for the Ilois in terms of the length of time that had elapsed and the importance of their knowing or not knowing what had been said or done in 1982. She frequently contradicted herself because, although she did not want to lie, she did not want to say things which would harm the Ilois case. She was prepared, however, to give completely untruthful answers if she thought that it was necessary. Again, if that is too harsh a judgment on her, her evidence is completely unreliable. Many of the things that she said are simply not credible for someone who had been active in Ilois affairs in the late 1970s and early 1980s. She had not pursued obvious questions with her sister and colleagues in the CIOF. She had been keen to point out the anger which Chagossians would have felt about renunciation forms, but gave the feeblest of reasons as to why she herself had not pursued the matter at the ITFB or later with anyone else when she heard renunciation forms being mentioned. She again took refuge in saying that she could not remember and in what she said she had not been told.
208. **Olivier Bancoult** was born on Peros Banhos in 1964. His family had come to Mauritius in 1967 for medical treatment for a younger sister who had died. They had been unable to return to the islands because his mother had been told that the islands were sold and there was no shipping. He recalled the poverty and family misery and desperation that followed.
209. He had attended Port Louis College where he was taught in English and French and attained Grade 5 School Certificate in subjects including English, French, Maths and Commerce. He could write French, but he did not have to read in English in order to pass his exam at school. His English was very poor when he spoke to the High Commissioners in Mauritius whom he met. He had recently taken steps to improve it.
210. He had been a founder of the CRG in 1983, as an Ilois group for Ilois, because they felt betrayed by Mauritian politicians and intellectuals. He was its first Secretary. After his success in the Judicial Review, the CRG, which had been dormant for some time, had come back to life. His mother, he said, had been in the CIOF. He had served in the ITFB from 1984. I did not find all aspects of his evidence wholly reliable; on many aspects, including importantly what he knew and understood had been the impact of the Vencatessen case, the final nature of the 1982 Agreement, backed up by renunciation forms, and the subsequent actions of the Chagossians in pursuing various political and legal avenues, he was, I regret, not straightforward or truthful. He knew why it was a problem.
211. **Mr Marcel Moulinie** relied upon his witness statement used in the Bancoult Judicial Review dated November 1999 to which he annexed an unsigned statement which had been prepared for the Government in 1977 in connection with the Vencatessen litigation. He made a number of comments, correcting what he had said in that 1977 statement, but he appeared to have very limited recollection, if any, of giving it. He also produced a supplementary witness statement. He described the background to events over the years. He had been born in the Seychelles in 1938. In 1965, he had begun to work for his uncle Paul in the Chagos Agalega Company, going to Diego Garcia in 1966. He was the company manager there, Peace Officer and the BIOT agent. He received instructions, after 1970 by telex, from Mr Todd and Sir Bruce Greatbatch, the Commissioner and Governor of the Seychelles. He managed the plantations and workforce and had been involved in the meetings at which the Ilois were told what was happening to them. He gave evidence about the interaction between Government and plantation operations, workforce and evacuation. Although his memory was unclear at times, he did his best as a witness.

212. **Mr Henry Steel**, Principal Legal Adviser to the BIOT Government, gave evidence about the legal system in BIOT. He was one of only two witnesses called by the Defendants. There was no registrar or judge of the BIOT Court until 1981 and no registry either, even though the relevant ordinance had been in force in 1976. The relevant laws were published in the BIOT Gazette in London and he thought copies would have been sent to BIOT, but not Mauritius or the Seychelles. Until 1984, the registry would have been in BIOT, but there was a sub-registry in England publicly notified for the first time in 1994. The BIOT Supreme Court could exercise all its powers in the UK. There was no formal legal aid system in the BIOT courts. A complicated table setting out the history of the BIOT courts, its registry and powers, was agreed by Mr Steel, it having been prepared by Mr Taylor.
213. **Mr Canter**, a former RN Lieutenant Commander, gave unchallenged evidence that he arrived on Diego Garcia in November 1971 after all the plantation workers had left, that there were no RN Officers there when he arrived and that he was the first to be stationed there permanently.

## Employment

214. It was clear from the evidence that, with very few exceptions, there was no employment on the islands other than that provided directly by the plantation company, by the company staff or in its administration. In his 1977 statement, apparently prepared for the purposes of the Vencatessen case, but not signed, Mr Marcel Moulinie had said that all persons on the islands were employed by the company but he corrected that in his statement for the Bancoult Judicial Review to say that there were some Ilois employed privately by the administrators in domestic work. In his statement for the Judicial Review, Mr Moulinie said that although it was not the practice to require Ilois to sign written contracts, he thought that there was a practice adopted by the company's shipping agents to require all workers returning from holidays in Mauritius and the Seychelles to sign contracts before returning. Contracts were not signed on the Chagos islands anyway because they had to be signed in front of a magistrate who came rarely and no-one saw the need for Ilois to sign or renew contracts on such occasions. The contracts contained standard terms which required a worker to be returned either to Mauritius or the Seychelles, or rather an obligation on the company to pay for a return fare, but he said that he did not see how those terms could properly be applied to those settled on the Chagos islands for generations. They spent most of their working life engaged under purely informal contracts. Children could work without a written contract.
215. He said in evidence to me that the workers were the company workers employed by the Seychelles-based Chagos Agalega Company Limited. The practice of requiring contracts to be signed upon return from leave was maintained lest young Mauritians decided to take advantage of the boat trip to go for a free ride and then come back. Most people who went on holiday had to sign contracts when they returned, just like Michel Vencatessen. These were for two or three years. (But Mrs Talate and Mrs David said that they had not signed contracts on return.) The nurse and teacher worked for the company, which also provided the priest. The meteorological station on Diego Garcia was rather separate. All needed and earned rations through working for the company or its staff, and had a variety of spare-time activities.
216. There was no evidence, nor even a suggestion, that people came to the islands other than to work for the plantation company or its staff, or on the Meteorological station. There were no independent traders or craftsmen, farmers or fishermen. Although people went fishing and built boats and houses, this was not an independent means of existence. Indeed, the low pay, and payment in kind through rations and other supplements such as assistance with

accommodation at least in the form of construction labour and materials, would have prevented such an independent economy arising. It was the plantation company which employed those who helped in the company shop or in house building and all the evidence pointed to those as being activities directed by the company to make necessary provision for its workers. See also paragraph A63 for example.

217. There was no evidence that people left employment with the company and stayed on the islands, and found some other occupation or survived with no occupation at all, except for those too old to work who could receive a pension and rations. As Mrs Talate said, everyone got rations. Even pensioners often did light work for the company. There would have been no basis for rations to be distributed to such people, and as the witnesses said, the provision of rations was necessary. Women in general worked; there do not appear to have been any who declined to work, and it was exceptional if someone lived or could live off their husband's wages. Mrs Mein was one such – her husband was in a senior position. She said no-one stopped working – even people without pensions had an easy job like cutting grass. The children, by the same paternalistic or feudal process, were given company jobs after their education finished at 12; they were not left unemployed, to fend for themselves without rations. They worked and, in turn, their own offspring, if they stayed, became workers. There was no unemployment because everyone worked and had to work for the company. Mr Bancoult's evidence in the Judicial Review suggested that people could choose not to work for the company though, in practice, they did, or had domestic jobs. Some wives or "*co-habitees*" were not employed but were housewives. The unfit or disabled were not forced to work or leave the islands. Mrs Piron said that parents might let a child stay in the house and not work but she had not known it.
218. There was no sufficient evidence at this stage as to ascertain the contractual terms of employment of those who had no written contract or whose written contracts had expired but who remained on the islands working for the plantation company. The evidence suggested that it was rare for people to be compelled to leave, though unruly or un-co-operative workers were occasionally removed.

## Property

219. In 1965, there were 12 villages in Diego Garcia, of which the largest was East Point which had a church, cemetery, school, sanatorium and senior management housing. Mr Moulinie, in his witness statement, said that houses were restricted to residential areas to maintain security and sanitation. There was a traditional labourer's house type with a concrete base and wooden frame, and a roof which needed replacing every two years. It would typically have three bedrooms and one living room, with toilet, shower, kitchen and a front and rear garden on which families were encouraged to grow fruit, vegetables and to rear animals. He said that it was clear when he arrived in 1966 that many families had lived in the same house for many years and even generations.
220. When somebody wanted to start their own home, they would look for a plot of land within a designated residential area and, having found that, would come to him to identify the plot, because he needed to know where each worker lived. He organised the labour force to build the home, and had a more or less permanent labour force of eight workers skilled in building houses. He would refuse anyone permission to build on a remote part of the island. It would take about two weeks to build a house and the couple who then moved in would occupy it "*as their home, free from interruption as far as I was concerned. It was*



*their home to live in until they chose to leave. If either or both of them died, then their children might take over occupation of it or alternatively, if they were of age, they could arrange for friends or other relatives to take over the home when they died. I know many examples of children who inherited their parents' property but cannot actually say that I know of a case where friends inherited. In principle, I would not have objected to this taking place".* In cross-examination, he said that the land always belonged to the company but they gave the land when someone came to ask for a piece of land, providing it was in a building area. He meant that if permission was asked and it was in the right area, then they always allowed them to live there. In the 1977 statement, he had said that the island belonged to the company, they never allowed anyone to own plots of land or houses and the islanders understood who owned the land. If he had to relocate a worker, which happened occasionally, arrangements would be made for a suitable house of equivalent quality to be built and a payment would be made to compensate for the loss of garden produce. But he did not recall any occasion when he forced a labourer to move from one home to another against his wish. Islanders were free to go wherever they liked all over the islands except for the private property of individuals, and they could do so on carts, on foot, on bicycles or walking. They could go where they wanted by boat.

221. Mrs Talate said that on Diego Garcia she had moved from house to house, from time to time, but all of the houses had been close to the beach. She had had a four-bedroomed house on Diego Garcia with a kitchen, living area and toilet, but no shower. The houses were boarded with iron sheets and some had concrete. The houses she lived in had not been built by her husband. There had always been land by the house for cultivation and rearing poultry. She said that when people moved house on Diego Garcia, they did so because there was different work which they were required to do in different places on Diego Garcia. But when people moved house, nobody gave them any money for it. People did not move into a house that someone else had occupied, although she did not accept that that necessarily meant that they moved into a new house every time. *"We knew from the Administrator that we could take the land for the house".*

222. Mrs Mein said that people would choose a piece of land and build a house; they did not choose a house. Once they had chosen the piece of land, they would consult the Administrator who would agree because he was a good man and he would then get male workers to go and help build it. It then belonged to them, and if the father and mother died it would go to the children; it would be the Administrator who would tell them that the house was for the children in such circumstances. They would be able to give their house to someone else if they had no children. It was unclear whether she could remember that happening. But the Administrator had to agree because he had given them the land. She said that people did not change houses, it was a question of finding another place to make a house. They did not just agree to change with friends. There were one or two empty houses where people had gone away but not come back. I found it difficult to get a clear answer as to what would happen if a coconut worker had to leave working in a particular place and go somewhere else, but eventually she said that if someone had to change the place at which they worked, the house would remain empty just as if someone had gone abroad; but the Administrator could permit someone to move into it, and if the worker came back then they would build another house for him. But it was a rare occurrence for Ilois to be sent to Mauritius for bad behaviour and when the person she had in mind was sent, his house just rotted and fell down. If they got a pension, they could stay in that house. The Administrator did not force people to leave their houses.

223. Mrs Elyse went further – they did not even need the Administrator's permission; they would choose the land and he would provide the building materials. Mrs Jaffar's and Mrs David's evidence was similar. There does not appear to have been any difference between the three island groups in this respect.

224. Mrs Talate's witness statement, for what it is worth, said that they were all regarded as owners of their plots of land and houses. They chose "*free, private and available land*", telling the Administrator so that he knew who occupied which land but "*everybody respected other's property rights*". They lived on their property "*continuously, without interruption, peacefully, publicly, without challenge as owners*". Those are not her words; I rather doubt she ever thought in those terms. Someone has drawn inferences from what she may have said and expressed that as her evidence.
225. Mrs Elyse said all they had to do to get a house was to tell the Administrator where they wanted it and he would provide the materials.

### **The nature of the Vencatessen litigation**

226. It had been apparent to the Treasury Solicitor and Sheridans that the Vencatessen case was in the nature of a test case and they negotiated accordingly. The Mauritius Government knew that it was an important case. A number of Ilois witnesses said what they had believed the significance of the Vencatessen litigation to be. Mr Ramdass insisted that he did not know Mr Vencatessen's approach to a settlement because it was Mr Vencatessen's decision about a case which he had brought for his own family on his own account. Mr Allen suggested that Mr Vencatessen was "*a cipher*". The evidence does not support that, but Mr Allen's submission involves rejecting the reliability of what Mr Ramdass said. Mr Ramdass agreed that he had been to London in 1981 as an observer, to represent Mr Vencatessen's interests but when it was suggested that that was because the British needed to know the terms upon which the Vencatessen litigation would be withdrawn, he simply said that he did not know about it. He was not sure whether the Vencatessen case had been a way of putting pressure on the British Government. He denied that they had ever sought publicity for their cause.
227. Mr Ramdass gave inconsistent evidence about this aspect of the litigation. He said variously that the case had not been brought for the benefit of the Ilois but for Mr Vencatessen personally and that Mr Ramdass did not know if it was hoped that if he won everyone would benefit. The case was Mr Vencatessen's idea. Very shortly afterwards, he said that he had helped in the case for the well-being of the Ilois because he thought that compensation to Mr Vencatessen could be distributed for their benefit. He could not say whether his uncle hoped that all Chagossians would benefit but he imagined that if he took the money and distributed it, it would be good for the Ilois. Mr Ramdass' curiously contradictory evidence derives, in my judgment, from a realisation as to the importance for this case of the extent of knowledge about the existence of the Vencatessen litigation.
228. Mr Saminaden in his witness statement said that he had first learned about the Vencatessen case from Mr Duval in 1978. It was a family affair which Mr Vencatessen kept to himself. In chief, he said that he had learned about the case when he disembarked in Mauritius years earlier. Later, he said that the committee of his group had not been in existence before the Vencatessen case started but asserted that he had still only learned of the case through Mr Duval and had then become a member of the group but then said that the group had been in existence in 1974. He agreed he had been on the committee when he had to sign the paper (in 1975) in order for Mr Vencatessen to get legal aid. He did not know why Mr Vencatessen had been chosen to bring the case in Britain but he was seeking compensation from the British Government because it had done something wrong in uprooting him from Chagos and thought that others would benefit if Mr Vencatessen won his case. He described the case as Mr Vencatessen's, but said that Mr Ramdass looked after it. Although Mr Vencatessen was his brother-in-law, at no time did he mention it to him. It was

clear, notwithstanding what his witness statement said about 1978, that he knew of the case from the outset. This was an unsurprising confusion over dates.

229. His committee, he said, helped Mr Vencatessen decide what to do by discussing matters with the committee, although the letters went to Mr Ramdass' address because Eddy, his son, knew English; sometimes they would go there to be told what was in the correspondence. He had left the committee after a while because he needed to go to work.
230. Mrs Alexis claimed that she had first heard of the Vencatessen case only after 1982 which I simply do not believe. Later, she said that Mr Ramdass had been on the 1981 delegation because there was something related to the court case which Mr Ramdass could sign for Mr Vencatessen. It was only in 1981 that she knew that Mr Vencatessen had a case in court but she said that was a case for his family. I do not believe that that is how she understood things in reality. Later, she said, when explaining that Mr Ramdass was there to represent Mr Vencatessen's interests because he could not travel, that she did not know that he had a case in court. She might have been tired or confused, but my very firm impression is that she knew very well why Mr Ramdass was there but equally knew very well the problem of admitting that in 1981 she knew that someone had brought a case which led to the payment of money to the Ilois. The problem was, if what she later said about the Agreement and the renunciation forms were true, why had others not been pressed to bring cases? She said she had not asked Mr Ramdass what he was doing there because his case was a family thing and she did not have the right to enter into discussions about it. It was not a case for the Chagossians but for him alone.
231. Mrs Talate, in her witness statement, said she was aware of the case and at first, in chief, said she knew nothing of it, though she had known Mr Vencatessen, because they lived far apart in Mauritius. Later, she agreed that she did know about it when the English came to Mauritius and brought money. She had known Mr Vencatessen as an important Ilois in Diego Garcia. Later still, she remembered that Mr Ramdass had gone to London as Mr Vencatessen's representative because of the case, and that was when she had found out. She recalled no lawyers from the 1970s, but agreed that she had known Mr Sheridan had been helping the Ilois. She was wary and unwilling to be truthful; she was aware of the importance of what had been known of the potential for litigation. Later, she agreed she had become aware of it when Mr Ramdass went to England – her third version.
232. Simon Vencatessen knew Christian Ramdass because he was his cousin but knew nothing of any committee, saying that they simply had meetings within family groups. He remembered his father bringing a case; so far as he knew it was a private or family case brought in England and he could not remember whether any other Ilois would benefit if he won, and that he did not think that the other Ilois knew about the case in effect until 1982, when he first knew of it, when it had to be withdrawn. But he later agreed that it was Mr Ramdass' committee which looked after his father's case and that his brother, Joseph Fleurie, was also on that committee. He took some interest in the case, as his father's son and agreed that he remembered signing a letter of 21<sup>st</sup> May 1981 to Sheridans, (16/326), about the case, somewhat before it was withdrawn, in contradiction to his other evidence. He could not remember any discussions with his father or Mr Ramdass about the case. He said he was quite unaware of whether the Ilois took any interest in his father's case at all. He simply did not know. He did not remember any newspaper articles about it because he did not read the newspapers.
233. Others gave equally vague and contradictory answers. Mrs Kattick denied knowing of the case or that Mr Vencatessen had had to withdraw it in 1982, until very recently.
234. Rita David, half-sister of Simon Vencatessen (but not the daughter of Michel), and niece of Mr Saminaden, had heard of the case as she heard a lot of

people talking about it. Olivier Bancoult's mother, Marie Elyse, had heard of it, according to her statement, some three to four years ago. But despite a possible translation problem as to when she knew, in oral evidence she denied three times ever having known. She looked very bemused.

235. Mrs Jaffar's witness statement said she knew Michel Vencatessen and was aware of his case and that it had led to the compensation in 1984. In chief, she said she did not know him till four or so years ago, when she met Mr Mardemootoo, and did not know where the ITFB got its money from. Her witness statement, which she earlier confirmed as correct, was untrue she said. She also said at one point that it was only now in court that she had heard his name. This was not credible.
236. Olivier Bancoult had heard of the case but said that it had been a family case. So far as he knew, no Ilois had received legal advice about proceedings in an English court until 1998. He agreed that he had known that Mr Vencatessen had had to withdraw his case in order for the Ilois to receive the money under the 1982 Agreement. This, he thought, was because there were people outside the scope of the Agreement who wanted a share, but he was unable to say why he thought the UK Government might pay £4m and still leave themselves open to be sued.

### **The organisation of the Chagossians**

237. There were Ilois on Mauritius by 1971, who had left the islands voluntarily or who had done so and had been unable to return. Others arrived at various stages, some, rightly or wrongly, under the impression that they had been promised some assistance in resettlement.
238. An Ilois committee of some sort was set up by Christian Ramdass in the early 1970s. However representative or otherwise Mr Ramdass' committee was, it had organised petitions and held meetings for the Ilois. Mr Ramdass said that by 1974 he was recognised as an Ilois leader. Mr Sheridan's judgment that they were a representative body was informed in 1978 and 1979 by his experiences of meeting them and the Mauritius Government. It was also the Mauritius Government's judgment that they were representative because they were on the Resettlement Committee. They played a part in the collection of 1,200 signatures for the quittances in 1979 in the first attempt to settle the Vencatessen case on a group basis. Simon Vencatessen said it was a family group, but that underplays the role. This group, according to Mr Saminaden, had about 100 adult members, but the CIOF was rather larger. Even after the departure of the rival CIOF from the JIC, Mr Ramdass continued to represent the JIC with Mr Mundil in the 1981 and 1982 negotiations which received advice from Sheridans before and after the negotiations of 1981 and 1982. Even though the JIC was wound up in September 1982 because it regarded its work as having been completed, Mr Ramdass, Simon Vencatessen and Francois Louis were made members of the ITFB in December 1982.
239. Although there was to be much criticism by the Chagossian witnesses of political interference by Mauritians who were alleged to have been seeking to use the condition of the Ilois for their own ends, the intervention of the Mouvement Militant Mauricien or MMM in 1979 seems to have had the support of some Ilois of a more militant tendency. A committee was elected on 8<sup>th</sup> July at Beau-Bassin, a meeting of what the press reported to be 1,400 Ilois. There are reports that a committee of 28 was elected. The President was Mrs Alexis and other committee members included Elie Michel and Mrs Talate. This committee was to become the Ilois Committee of a Mauritius Creole organisation, the Organisation Fraternelle. Mrs Kattick said when she joined in 1977 or 1978, it had more than 1,000 supporters particularly from Roche Bois. It was this group that was responsible for the campaign to stop the quittances in 1979. The disagreements between Mrs

Alexis and Mr Ramdass were still reverberating in 2002 before me. They joined together in the Joint Ilois Committee along with the Ilois Support Committee of Mr Mundil (which, according to Mr Saminaden, did not include Ilois) and the FNSC. Initially, the JIC appointed Sheridans to act for them after the return of Mr Sheridan to London in November 1979. But the CIOF broke away in June 1980 and pursued its more militant line with demonstrations and hunger strikes. The CIOF, with the backing of the OF, were able to instruct Bindmans in 1981 to bring a case for 225 Ilois against the Mauritius Government. It was accepted as the main representative body for the Ilois, although it combined with the JIC to seek £8m from the UK Government. Three of its members were part of the Mauritius Government delegation to the negotiations in 1981 and 1982. They were Mrs Alexis, Mrs Naick and Elie Michel.

240. Mrs Alexis said that her committee received publicity and sometimes held press conferences so that the Ilois' needs would be known. She knew that Ministers read the newspapers and so would hear about what the Ilois wanted. They also held public meetings, and not just in relation to the period 1979 to 1981, attended by a large number of Ilois at which what was happening would have been explained. She agreed that her committee, the CIOF, had had quite a number of members who came from the different places where Ilois had communities in Mauritius. At one point, in 1980, she had wished to persuade the Mauritius Government that the CIOF represented the Ilois, but she could not remember obtaining a document signed by over 1,100 Ilois in order to prove that point to them. Later, she remembered a meeting of 400 Ilois at Beau-Bassin in 1980 which had passed resolutions when it was trying to prove that it represented the majority of Ilois. She remembered resolutions about interest on the money paid to the Mauritius Government and about their rights on Diego Garcia. She and Mrs Naick were, she said, the Ilois representatives rather than Mr Mundil, Mr Michel or Mr Ramdass.
241. The CIOF instructed Bindmans initially in 1981 and then again in 1982 together with Mr Macdonald during and after the negotiations for the Agreement. The CIOF supported the Agreement and urged the Mauritius Government to sign it. At some point around 1983, it lost the support of the Ilois and was supplanted by the Chagos Refugee Group of which Mrs Alexis became the first President. She was joined in the CRG by Mrs Talate, Mrs Lafade and Olivier Bancoult. Mr Bancoult said that the CRG was founded because Mauritian intellectuals and politicians such as Elie Michel had taken decisions above their heads of which they were not aware, and would say that they would find solutions for the Ilois in the Creole constituencies as a way of getting votes and yet betrayed them. I asked him what betrayal there had been up to the point where the Chagos Refugee Group had been created, to which he replied that he knew they had been betrayed when he saw the letters to which reference had been made in court during the course of his cross-examination, which he had not been aware of at the time. He said that the 1982 Agreement was an act of betrayal and he thought so at the time. He then said that today they could see that there were conditions attached, but he did not know about them in 1982 and 1983.
242. He said that the Chagos Refugee Group became more official from the time when they started to combat fraud because a lot of people were trying to get money dishonestly in the name of Chagossians who had died. (In fact one of those was its leading light, Mrs Alexis.) The Group had gone dormant for a time, coming back to life about two years ago. Insofar as the Chagos Refugee Group was founded because by 1983 (and before the renunciation forms) the Chagossians had lost confidence in the ability of Mauritian politicians and intellectuals to help them, I found it difficult to see why reliance was placed on them for the purposes of subsequent correspondence and meetings and that there was not greater suspicion sooner about the forms. Mrs Alexis said it was founded in 1980.

243. Mr Michel remained in the CIOF. CRG representatives were elected to the ITFB in September 1983 and launched their campaign to unblock the £250,000, to establish that the Ilois were British citizens, to obtain social benefits accordingly, to obtain £4m from the USA and to raise complaints against the UK Government in an international forum. They persuaded the ITFB to pay for a US lawyer to advise them. They too appear to have lost influence in turn in about 1989 when the CIOF regained support and Elie Michel was re-elected to the ITFB and remained there until 1994. As Mr Grosz said, the Ilois had then come back to the CIOF. The CIOF again instructed Bindmans and obtained legal advice from Mr Grosz, Mr Macdonald, Mr Bradley and Mr Lassemillante. They held general meetings with the Ilois.
244. In October 1995, the BIOT Social Committee was formed which garnered individual support on a large scale and had some involvement with Bindmans.
245. It was surprising, as Mr Howell said, that in view of the issues so little was said in the witness statements of the Chagossians about the organisations which, during the 1980s and 1990s, had taken up the Ilois interests. The documentary material, much of it press reports, contains many references to substantial meetings of the Ilois both before 1981 and on many subsequent occasions. Significant publicity was given to demonstrations, hunger strikes and press conferences organised by Ilois. Ilois affairs were a matter of keen political interest in Mauritius because they related to international affairs and defence; they also provided an opportunity for Mauritian politicians to attack the Mauritius Government for the way in which it had allowed the Chagos Islands to be separated from Mauritius before independence, for the way in which it had handled resettlement and for the way in which various conditions attached to any agreement with the UK might affect the claims over the islands which Mauritius was keen to maintain. A meeting was held and publicised during the 1982 negotiations at Roche Bois on 27<sup>th</sup> March 1982. Many witnesses said that they had been betrayed by Mauritian politicians. Mauritian politicians may have had their own interest to pursue, whether gaining Ilois votes to secure election, or using Ilois issues as a means of attacking the Government of the day or other rival political organisations. But the number of people who, from differing standpoints, were interested in Ilois affairs, however selfishly, can only mean that the range of interests of the Ilois would have been kept to the fore in Mauritius by its politicians. They would have taken opportunities to advance rather than to hinder the Ilois cause as a means of enhancing their own position, however selfishly. There was a community rather than a diversity of interest in maintaining the right of the Ilois to return to the Chagos as a component of the claim by Mauritius. That is a feature which comes out strongly in the material relating to the 1982 Agreement and subsequently.
246. There was no evidence of any act of betrayal by Mauritius politicians; a number of witnesses complained that they had been betrayed by Mauritian politicians, when faced with correspondence in English or other statements which they were said to have made which referred to the renunciation of certain claims. These usually related to claims for money. But there is no justification for that thought, if the thought was indeed a genuine one rather than a dishonest means of denying knowledge of what they had done. To agree to take a sum of money in full and final settlement of financial claims or to offer to do so did no more than reflect what the UK Government had required as a matter of principle before any sum was paid to the Ilois. It was also what all the English lawyers advised was appropriate so long as the sum itself was satisfactory. No-one advising or leading the Ilois can have supposed otherwise and it cannot honestly be regarded as an act of betrayal for such finality to have been offered in return for the sums of money which the Ilois were asking for. If there was a point at which the interests of Mauritius politicians and the Ilois diverged, it arose either after the 1982 Agreement when the Mauritius Prime Minister in 1984 said that to pursue claims against the UK Government would be an act of bad faith or, when during and

after the 1982 negotiations, it was suggested that the Agreement should not be completed because it did not retain sufficiently clearly the rights of the Ilois to return to Chagos. I am dealing here with the Mauritius politicians such as Mr Michel and Mr Mundil who were helping the Ilois, rather than the Mauritius politicians in power against whom complaint was made about the insertion of Article 4 into the 1982 Agreement and the obtaining of renunciation forms in respect of claims against the Mauritius Government as well. It is not that I regard those complaints as well-founded, it is simply that they are irrelevant to the Ilois claims that those who were helping them were in fact betraying them. They attributed the betrayal to the fact that they were either not Creole and were clever such as Mr Mundil, who was Rector of the University of Mauritius, or were Creole but not Ilois such as the Michel brothers of the CIOF.

247. The picture painted by the Chagossian witnesses of the community of Chagossians in Mauritius in the late 1970s, 1980s and 1990s was also too partial to be realistic. I accept Mr Howell's submissions that the evidence shows that the Ilois constituted a relatively small community, largely concentrated in a few areas of Port Louis. Some of the groups, notably CRG and CIOF, had local representatives as Mr Ramdass and Mr Saminaden made clear. Many were inter-related through the fairly informal familial arrangements which appeared to have existed among many. It is not credible that relatives would not talk to each other about matters which went to the very heart of the conditions in which they lived. Quite apart from general meetings, it is clear that news and rumours would travel fast by word of mouth. What happened in 1979 over Mr Sheridan's quittances illustrates the point. It was further illustrated by the pressure put on Mr Vencatessen in 1982 to withdraw his case. It was a constant refrain of Mr Allen that the Ilois were poor and illiterate, unused to the ways of the world or of Mauritius. They themselves were happy to describe themselves as stupid and childlike but that too is only a very partial picture. Some had received modest education in Mauritius, such as Mrs Kattick, Eddy Ramdass and Francois Louis. Some could speak and read a little English. The ITFB placed press advertisements in relation to the distribution of money. There were press communiqués. The Ilois listened to radio and television and had wanted major decisions of the ITFB broadcast. Mrs Jaffar and Mr Ramdass could read newspapers which often contained substantive material about the Ilois and their cause. Mrs Alexis said that a number of Ilois had come to claim part of the distribution of funds under the 1982 Agreement from France, the UK and the USA because they had been written to by their families.
248. The Ilois were capable of organising, not merely demonstrations and hunger strikes or contact with lawyers in Mauritius, the UK and the USA; they also organised petitions. Some of these were designed to show how much support a particular group had and both Sheridans and Bindmans received such petitions although some thumbprints were duplicated on the 800 thumbprint or signature petition to Sheridans in 1980 and this may have been the position on others as well and although not all of the Ilois may have known the substance of what they were petitioning for, it is not credible that there was a general unawareness of what the groups were doing for the Ilois community and what progress was being made, with what outcome.
249. It is unrealistic for the Chagossians on Mauritius to portray themselves as ineffectual and ignorant, led by the nose by cynical Mauritians who would betray them or as people who knew nothing over a period of twenty years of what had been happening. The groups showed themselves able to obtain legal advice, to obtain the support of the Mauritius Government financially for the payment of their fees. They persuaded the Mauritius Government to organise a delegation at Government level to press the cause with the UK Government in 1981 and 1982. This was notwithstanding the agreement which Mauritius itself had reached with the UK over resettlement costs and concerns which had been expressed about whether the Ilois might become better off than Mauritians, however fanciful that

might seem. The Chagossians were able to and did reject offers which they regarded as too low and were supported in that by those who led them including Mr Mundil. Although a number of the Chagossian witnesses, notably Mrs Alexis, Mr Ramdass, Mr Saminaden, Mrs Kattick, Mr Vencatessen and Mr Bancoult, were not always reliable witnesses, whether because they were forgetful or not altogether truthful, they were not stupid. The development of the Ilois cause over the years showed that they were extremely determined and in their varying ways had been effective in obtaining for the Ilois compensation which the UK Government had never wished to pay.

250. It is inconceivable, after the storm created in 1979 by the Sheridan quittances, that Mr Ramdass, Mrs Alexis and other Ilois leaders such as Mr Michel and Mr Mundil would have been unaware of the importance of what was in documents which they were asked to sign in connection with the receipt of money from the UK Government or in relation to any compensation claim. I accept Mr Howell's point that if someone had wanted to deceive the Ilois about the negotiations in 1982, the terms of the Agreement or the renunciation forms, there would always have been others, whether politicians or Ilois, who would have been only too keen to expose that deception. There were ample means because of the press publicity and political debate whereby any such attempted deception would have come to the notice of such leaders and politicians. Gaetan Duval, Paul Berenger and other leading politicians had taken an interest in the Ilois cause. There had been debates in the Mauritius Assembly about Mr Sheridan's visit and the attitude of the Government towards the quittances. Indeed, there had been a critical report to the Mauritius Parliament about the very creation of BIOT and the excision from the Mauritian dependencies of the Chagos Archipelago. A report in 1980 (para 586) to the Mauritius Parliament was critical of the way in which the £650,000 had been distributed and of the delay in its distribution.
251. In November 1980, a further Ilois committee came into being, the FNSI which included the MMM, the PSM, the JIC and nine other Ilois bodies. It did not include the CIOF. This appears to have split away in June 1980 as a result of a petition which suggested that the right to return to Chagos might be given up. Mrs Alexis denounced that petition although she had put her thumbprint to it because she said many of those signing it had not understood what they were doing and the Ilois would never renounce their right to return to Chagos. She then set out to show that her committee represented the majority of Ilois and had obtained a petition containing 1,133 signatures out of the 1,300 Ilois in the country (para 580).
252. The Ilois also had a degree of political support in the UK from MPs, including Mr Dalyell and Mr Cook, from a religious leader, Trevor Huddleston, and a support committee. Journalists were interested in what had been done to them by the UK Government. If any Ilois had wished to be put in contact with solicitors with a view to advice or litigation, there were means directly or indirectly for them to use, as Mr Ramdass had done, with fewer support resources in 1974, and Mr Michel in 1981.
253. None of the Chagossian witnesses described any of their political activities on behalf of the Ilois, how they were organised and how the groups related to each other and the Mauritius Government except in the most perfunctory way. Cross-examination elicited information grudgingly and not wholly truthfully. Mrs Alexis' witness statement did not mention that she had been President of the CIOF and of the CRG. Mr Allen suggested that a false impression of their organisation could easily be gained. I agree, but that would only be by taking their witness statements at face value.
254. On all the evidence, there was a very different level of organisation among the smaller number of Ilois on the Seychelles. Mrs Charlesia Alexis, who was Mr Mein's sister-in-law and aunt to Jeanette Alexis, had gone to the Seychelles in 1980 with Mr Michel for the CIOF. There had been a Comite Fraternelle des Ilois



de Seychelles, and Mrs Alexis explained to them at a meeting to which Mr Mein and Jeanette Alexis went, that they were demanding compensation. Mr Berenger by 1981 did not think much of Mr Michel's endeavours to involve the Seychellois Ilois in the negotiations. The UK Government did not want to involve them and thought that the Seychelles Government did not want to involve them either. A few, it appears, tried to make claims on the ITFB but were unsuccessful.

255. There had only been one group of Ilois on the Seychelles before Jeanette Alexis' group, the Ilois Group of Seychelles. It existed when they had visits from Mauritius in the 1980s and she helped at the committee to register people, but it never did anything. She was just assisting her father as the unofficial secretary. He died in 1989. It had just faded away. She was unaware, though she assisted in his letter-writing, that her father had sought compensation from the British in 1978, (8/1473 and 1478). He had not mentioned it to her, or indeed to her mother. I found that odd. Her eldest sister had gone to live in Mauritius, but they had had little contact with her, but she had said that there were payments being made in the 1980s and Jeanette Alexis said that they had tried to get their names registered, but she had been told that the list was closed and the payments were for Mauritius residents only. She said that they had visits in the 1980s from two Mauritian Ilois groups who took their names and birth certificates, but that nothing came out of it. But it is surprising that she could not remember more of what Mrs Alexis, I am sure, had explained about what she was doing on her visits.

256. The Seychelles Government had done nothing to help because it did not want to get involved or to upset the Mauritius or UK Governments. After the Seychelles became a one-party state run by the SPUP, she had become scared because there were threats that if they continued asking for money they would be deported. She had not been aware in the 1970s and 1980s that she was a sort of British citizen because they had been told they were Mauritians. She had found out later. It was not until 1997 that the committee of which she was Chairman had been set up and there had been no contact with lawyers or professional advisors in the early 1980s.

## **Misfeasance in Public Office**

### The Bancoult decision

257. It is important before turning to the detail of the submissions, to ascertain the limits of the *Bancoult* case because of the effect which it has on what is reasonably arguable. I accept that the *Bancoult* decision makes it reasonably arguable that the passing of section 4 of the 1971 Immigration Ordinance was unlawful because it permitted the wholesale removal or exclusion of the population from BIOT. It is also reasonably arguable that the exercise of prerogative powers to achieve that same end would be unlawful; see paragraph 61 where Laws LJ expressed considerable doubt as to whether the prerogative could enable such an end, and he concluded that there was no other existing legislation which empowered the enactment of section 4. If it were desired to achieve the aim of clearing the whole of BIOT, specific legislative power would have been necessary. It is to be noted that the Divisional Court accepted the high importance of the defence facility and did not suggest that that its provision could not have been a proper purpose for the clearance of the population, quite the contrary. Its point was confined to the need for a different legislative power to achieve that end. That legislative power could have been provided by Her Majesty, for the Court concluded that BIOT was a ceded and not a settled colony, judged, as it had to be, at the time when it became part of the Crown's dominions in 1814 and so was not subject to the same limiting effect of the words "*peace, order and good government*" as is found in the British Settlements Act 1887; paragraph 52 of *Bancoult*. That was not suggested to be incorrect by the parties

in this case. Both those last conclusions are obiter and Mr Howell was inclined to submit that the conclusions should be given a narrow reading and he reserved the right, if it existed, to argue that the whole decision was wrong. For my part, whatever reservations I have about the decision and various parts of it, I do not see that the conclusions which I have referred to can possibly be said to be unarguable. It follows from that that if the Defendants excluded the Chagossians from returning to the islands between 1965 and 1971, in 1967 and 1968 in particular, and did so as a step towards the removal of the BIOT population, that too would be arguably unlawful. It may have been unlawful to prevent Ilois returning whatever the reason in the absence of legislation. Indeed, the same reasoning would apply to all subsequent exclusions up to the enactment of the BIOT Immigration Ordinance 2000.

258. I have expressed my conclusion that it is reasonably arguable that section 4 of the Immigration Ordinance was unlawful even though that is the clear conclusion of the Divisional Court, from which there was no appeal on the leave granted. I put it that way because I do not consider that the Divisional Court is by any means clearly correct in treating section 4 as empowering the removal of the population. Section 4 sets up a permit system, and requires anyone present in BIOT to have a permit to be there or to be exempted from that requirement. These permits are to be issued by an immigration officer who is given the widest possible discretion as to their issue or cancellation; a four year period is the normal period of grant. An appeal lies against the refusal of a permit to the Commissioner. It is an offence to remain without a permit after the coming into force of the Ordinance. The removal power in sections 10 and 11 permits the Commissioner to make an order directing the removal, of someone unlawfully present, from out of the territory, indefinitely or for a period, and to direct how that order be carried into effect. That removal *"out of the territory"* can be either *"to the place whence he came, or, with the approval of the Commissioner, to a place in the country to which he belongs, or to a place to which he consents to be removed"* if its government consents. Section 4 is thus an essential component in the system of control over residence but it is not sufficient by itself as a matter of the structure of the Ordinance to achieve removal of a person or population. Its operation requires an order. It is inapplicable to intra-BIOT movement.

259. It is the making of the removal direction which, it could well be said and indeed was said by Mr Howell, is the point at which any unlawfulness in the exercise of the power to remove would arise, were it to be used against an Ilois; the restrictions on the place to which he could be removed needed to be considered in judging the lawfulness of section 4 of the Ordinance or its operation. What therefore needs to be examined is the lawfulness of section 4 in an Ordinance with those removal restrictions. I see some force in those points and they have not been considered in the *Bancoult* case. I do not accept Mr Allen's submission that Mr Howell is precluded from taking them because there was no appeal. The parties are different and more importantly, there was no misfeasance action then envisaged which would have made a substantial difference to the way in which the evidence was presented and analysed. This matters because of the evidence about the way in which it was envisaged that the discretionary removal power would be exercised, by those framing the 1971 Ordinance, and whose purposes, deduced from the documents, were given such weight by the Divisional Court. The nature of any unlawfulness and the purposes of the officials or Ministers is plainly relevant to the mental component of misfeasance.

260. Mr Howell's point takes on a wider significance in this case because he submits that there is no evidence at all of the making of any removal order by the Commissioner and that is correct. Therefore he submits the Divisional Court was wrong to hold that the removals were effected under the 1971 Ordinance. I shall deal later with why he is obviously right but I have had the advantage of much fuller documentation and argument on these aspects than the Divisional Court

and so I feel less anxiety about differing from their briefly stated and factual premise on that point. Mr Howell was also critical of the Divisional Court's approach to the concept of "*belongs*" and citizenship.

261. I do not consider on the material before me that I should be influenced by the Divisional Court conclusion, in paragraph 1, that in 1971 the whole of the population of BIOT was compulsorily removed to Mauritius. Leaving aside the fact that the removals took place over a period of 18 months, and that the inhabited islands in the Seychelles part of BIOT were never depopulated, there is no dispute but that when Diego Garcia was evacuated, a choice was given to the Ilois of going to Peros Banhos, Salomon, (both in BIOT), Agalega or Mauritius. There was only no choice available of staying on. Moreover, section 4 did not apply to this choice: they could choose and some did to go to other BIOT islands; even if they had been forced to do so, sections 4, 10 and 11 had no application to such a transfer within BIOT; it had no application to a decision not to stay in BIOT. Although the Defendants admitted that their acts led to the run down of Peros Banhos and Salomon, there is at least room for argument on the evidence that the later departures from Salomon, whether of the Ilois who were long term residents of those islands or of those who chose to go there when Diego Garcia was evacuated, were voluntary albeit in the context of a Government caused run down, and that it was only the last departures from Peros Banhos which were a compulsory removal out of BIOT. I am for those reasons unable to regard the *Bancoult* decision as closing off what may be a raft of arguments which can properly be developed on the fuller evidence which I have had. The Claimants too, took issue with the apparent conclusion that the Chagossians had no real property rights on Chagos.

262. It seems to me also to follow from the *Bancoult* decision that where the Crown acquires land for a public purpose, as it did, there may be a public law limitation on the way in which it exercises its rights of ownership, and not necessarily simply to ensure that it uses it for the purpose for which it was acquired; this is reflected in paragraph 58 of *Bancoult*.

263. I have difficulty, however, with the obiter comment that the use of private property rights makes no difference. I can see no basis upon which it can be said that a private landowner would have been obliged to permit an islander to remain on his land or to create property rights in his favour. The authorities would have been obliged, if upholding the rule of law, to assist in removing the trespassers. The solution to the evident problems would have lain in the realm of politics and legislation. Further, if the power to acquire land compulsorily, or by agreement is exercised for the purpose provided for by statute, the exercise of private land ownership powers is necessary to give effect to what is a proper public purpose. I have seen no authority which, absent statutory provision, requires the former owner or occupier of land so acquired to be given further rights or entitles him to defy the new owner in the exercise of his rights. If the Crown is inhibited from removing the Ilois as a landowner, it is difficult to see how that inhibition alone could impose some obligation on the Crown to keep some plantations going, with whatever else is necessary such as managers, transportation, rations and subsidies, for an indefinite period. The purpose of compulsory purchase, or of acquisition by agreement in its stead, is to enable land ownership powers to be exercised.

264. Additionally, the *Bancoult* reasoning was that the purpose behind the taking of the powers in the Immigration Ordinance was what mattered. I say that because of the weight apparently given to the documents which record the thinking of various officers at various times. The reasoning does not appear to have been, or at least confined to, an analysis of the powers actually obtained set against the limits of section 11. Indeed, it appears to have been contemplated that the same powers could lawfully have been obtained for the purpose of dealing with a catastrophe. The reasoning does not appear either to be that the powers obtained were lawful but that the assumed exercise of those powers was

an unlawful exercise of the discretionary powers. It follows that if a part, or a substantial part, of the purpose behind the taking of the powers in the Private Treaty Ordinance was to assist in the removal of the population from BIOT, then it is arguably open to the same objection as was the Immigration Ordinance.

265. There was an issue as to whether it was unlawful for the UK to evict the Chagossians for the purposes of the defence interests of the UK itself even though such a step might have been entirely unnecessary for the defence interests of BIOT judged in isolation. Mr Allen said that it was unlawful to clear BIOT completely for those purposes; there was an obligation to leave so much of the islands as would enable Chagos (which was only part of BIOT) to function as an economic entity, supporting the Chagossians. He said that there had been no defence requirement for a base on Diego Garcia in order to protect BIOT. Accordingly, and paragraph 4 of the Group Particulars notwithstanding, Mr Allen submitted that no power existed which could permit defence interests to assume such an importance that the islanders were unable to continue their way of life, not just somewhere in BIOT or Chagos, but moreover on each island notably Diego Garcia. I did not understand him to submit that it would be unlawful under the BIOT Order for the defence interests of the UK and Colonies to be taken into account in passing BIOT Ordinances, provided that the islanders could continue their way of life, the logic of the *Bancoult* decision notwithstanding.

266. It is clear from *Bancoult* that the defence needs of the UK, and of its colonies as parts of the world which shared its security and defence interests, entitled the Sovereign to permit the creation of the US defence facilities and to evict the entire population of BIOT in order to advance their effectiveness in protecting the interests of the UK. The issue was only whether, in order to give effect to that, albeit upon the creation of a colony with the express intention that it should be used for precisely such defence purposes, it was sufficient to give to the Commissioner power to legislate for "*peace, order and good government*" of the territory or whether some other legislative power had to be invoked. There was no issue as to whether it could be done at all. Mr Howell rightly pointed out that the constitutional reality was that the external affairs of BIOT were the responsibility of the Crown; the colony had been created for the collective security of the UK, its colonies and her allies.

267. I do not regard it as arguable that there could be no power at all, however it might be enacted or expressed, to remove the whole indigenous population of BIOT for defence purposes. It might not be necessary to do so; it might be disproportionate; whether it should be done is a matter of political judgement. But to say that it could not be done, where the people were removed to countries of which they were also citizens and which were willing to accept them, is to deny the essence of sovereignty, and its essence in a Parliamentary democracy with power over the Crown in right of its colonies and is to substitute for it the rule, not of law but of judges. If there were such governing responsibilities as those of which Mr Allen spoke, they were the responsibilities of politicians elected and answerable to Parliament. Misfeasance is not an action in respect of the views of Parliament still less a judgment on its failures.

268. *Bancoult* however seems to me to proceed on a wider basis than simply that a restriction on the relevance of UK defence interests arose, only at the point where the inhabitants were removed from BIOT. It is an arguable consequence of the line of reasoning in *Bancoult* that the sole interests relevant to the exercise of the powers under section 11 are those of the inhabitants, or as paragraph 57 of *Bancoult* suggests variously, its population, belongs, or "*subjects of the Crown, in right of their British nationality as belongs in the Chagos Archipelago*". The high political reasons underlying the creation of the defence facility "*are not reasons which may reasonably be said to touch the peace, order and good government of BIOT ...*". To my mind, UK and Colonies defence interests are thereby excluded from relevance in the exercise of section 11 powers. It follows that the very declaration of the public purpose behind the Private Treaty

Ordinance shows that it was enacted for a purpose which lies outside section 11. It would not matter for these purposes what property interests the population might or might not have had, or simply moved within BIOT. I have some difficulty with the starting point of that line of reasoning but the consequence seems to me to follow from the central thinking in *Bancoult*.

269. Mr Allen's more limited submission as to the scope of the powers contained in the BIOT Order is not one which is addressed in *Bancoult*. But the limitations, which he suggests, go further than that the BIOT Order did not empower legislation to permit the exclusion of all the islanders from the whole of BIOT. Mr Allen accepts that it is relevant for the Commissioner to have regard to the defence interests of the UK and Colonies when passing legislation. But, for *Bancoult*, I would have thought that is obviously right. The UK is responsible for BIOT's defence and foreign policy affairs; indeed it is difficult to see that BIOT could have any such interests distinct from those of the UK and Colonies. For the Commissioner to be unable to enact legislation to advance the interests of the UK and Colonies, of which BIOT was part, in the sphere for which the UK was responsible would be a considerable restriction. But if that interest is a relevant interest, it is difficult to see how the Commissioner is limited as a matter of law in the significance which he attaches to that interest as opposed to those of the islanders. They are both relevant interests for the territory. Again, this is relevant to the mental ingredient of the tort.
270. It cannot be for the Court to assess the degree of disturbance to the islanders which any given defence or foreign policy interest might justify, and to rule an enactment or its use unlawful or lawful accordingly.
271. It may well be that *Bancoult*, should be taken as imposing a limit, on the scope of the BIOT Order, only to the extent that it cannot permit the total removal of a population, the logic of *Bancoult's* reasoning notwithstanding. Any more extensive limit as contended for by Mr Allen would inevitably involve the Court in making judgments as to defence and foreign policy matters, weighed against the islanders' interests and economic prospects which it is not for the Courts to do.
272. The alternative views would then be either that the UK and Colonies' defence interests had no part to play under the BIOT Order at all (which has not been suggested by the Claimants), or that *Bancoult* is wrong in its approach to the existence of a limit at all on the powers in the BIOT Order, and in its underlying reasoning that the defence interests of the UK and Colonies are irrelevant to the exercise of powers for the peace, order and good government of a territory created to advance those very interests.
273. Either way, I do not regard Mr Allen's more limited submission as arguable; it is either too bold or insufficiently bold.

## 1. The Law

274. The Claimants and Defendants agreed that the starting point for a consideration of this tort was the decision of the House of Lords in *Three Rivers District Council v The Bank of England (No 3)* [2003] 2 AC 1, [2000] 2 WLR 1220. The essence of the tort is the deliberate abuse of his powers by a public officer, dishonestly or in bad faith, a conscious disregard for the interests of those who will be affected by official decision making. It is an intentional tort which cannot be committed accidentally or negligently or from a mere failure to act or from a misunderstanding of the legal position. The tort had two forms. The first arose where a public officer used his power for an improper purpose with the specific intention of injuring a person, known as targeted malice. The second form arose where a public officer acted in a way in which he knew he had no power to act, or was recklessly indifferent to the legality of his act, knowing that his act would probably injure the Claimant or a class of persons of which the Claimant was

member, or recklessly indifferent as to the probability of such harm. It was sufficient recklessness if the act was done, not caring whether it was illegal or whether the consequences happened. It is sufficient if the act is done without an honest belief that it is lawful because misfeasance is the purported exercise of power otherwise than in an honest attempt to perform the relevant duty. A decision not to act can also give rise to liability. The illegality can arise from a straightforward breach of statutory provisions, from acting in excess of powers or from exercising them for an improper purpose. The only recoverable losses were those which the public officer had foreseen as the probable consequence of his act. There was general agreement on those principles.

275. In this case, the Claimants did not allege targeted malice, though Mr Allen suggested that disclosure of the papers behind the drafting of the various property Ordinances might show that they had been drafted with a view to circumventing the property rights of the Chagossians and so justify a pleading of targeted malice. Subsequently, more documents were disclosed to deal with this new allegation, volume 23. There is nothing in those documents to support any such case and the Claimants' supplementary written closing submissions did not suggest that there was. The Claimants' case is of deliberate misconduct with foresight of injury.

#### The identification of individuals

276. The first issue which I deal with arises from paragraph 79(k) of the Amended Particulars of Claim, in which the Claimants say that it is unnecessary as a matter of law for them to identify bad faith on the part of a single officer in order for the Defendants to be liable. The Defendants say that that pleading should struck out and that as the Claimants do not identify any individuals who are said to have acted in bad faith the whole claim under this head should be struck out; it also has no reasonable prospects of success.
277. Mr Howell accepted that a corporate body could be liable for misfeasance, where the actions of some individuals could be attributed to a corporate body other than by vicarious liability, such as in the case of a decision by councillors, and that there could also be vicarious liability for employees if the appropriate tests were satisfied for such liability. But none of those situations were what this pleading had in mind.
278. Mr Howell also accepted that it was not always necessary for a pleading to name an individual if, from the particulars given and from the documents, it was possible for sufficient notice of the case against the officials to be given for the Defendants to prepare their defence. This was the position in the *Three Rivers District Council* case when the strike out application was considered in the House of Lords on the detail of the allegations; [2001] UKHL 16, [2001] 2 All ER 513 4 and 62 per Lords Steyn and Hope respectively. But the averment at issue here was so framed for a different reason; it was not because the Claimants thought that adequate particulars had been already been given one way or another of the case against the individual Ministers and officials. A perhaps different approach is to be found in the speech of Lord Hutton at paragraph 126, where he says that particulars do not have to be given of the individual officials whose actions brought about the misfeasance alleged, if the allegation is one of corporate misfeasance.
279. The vice in the pleading, submitted Mr Howell, was that it was intended to support an argument that the tort, which involves bad faith, could be committed even though no one individual satisfied the necessary ingredients of the tort. So, one official could reach a decision on the basis that he honestly believed that an act would be lawful, while another official knew that it would be unlawful to so act but did not know that anyone was going to do that. That would not involve committing the tort. Mr Howell relied on *Armstrong v Strain* (1951) 1 TLR 856 at 872. Devlin J held that the necessary knowledge for the tort of deceit could not

be found by adding the innocent mind of a principal, who knew facts which showed what his agent said to be untrue but did not know what the agent was saying, to the innocent mind of the agent who did not know that what he was saying was untrue. This was not a case of someone being used as an innocent dupe for the purposes of furthering the deceit. This decision was upheld in the Court of Appeal, [1952] 1 KB 232. The necessary mental ingredients for the tort of deceit have a close relationship to the mental ingredients for misfeasance. This approach was applied in the context of corporate contempt in *Z Ltd v A* [1982] 1 All ER 556 CA.

280. I am not at all sure that the Claimants had thought through the point of this pleading. Mr Allen suggested that it covered the position of a policy maker who possessed the necessary mental ingredients for the tort, but whose policy was implemented by others who lacked it. It might cover the adviser, who knew that a policy was unlawful but did not advise the decision maker of that. Otherwise he invited me simply to prefer the approach of the House of Lords in *Three Rivers* to the pleading of names.
281. This averment should be struck out. It is misconceived in law and cannot afford a basis upon which the claim can succeed; if it remained, it would cause the focus of this part of the litigation to move from the knowledge of individuals, which lies at its heart, to a more general inquiry into governmental wrongdoing. From the whole tenor of Mr Allen's submissions, I am satisfied that is what underlies this pleading. He complained that the Defendants' applications were intuitively unjust partly because there had never been "*an independent comprehensive high-level review*" of the rights of the Chagossians or of the wrongs done to them. He argued that the starting point for the examination of the misfeasance claim was the catalogue of maladministration, bias, unfairness, reckless incompetence, omissions, buck passing and evasions over the years. I do not accept this approach. Misfeasance is a tort of personal bad faith; it is a serious allegation. At trial the necessary ingredients will have to be shown. The making of the allegation should not be the vehicle for a general inquiry into wrongdoing.
282. Mr Howell is entirely right in his submission that the tort cannot be shown by adding one innocent mind to another innocent mind. The averment is not necessary in order to provide for the policy maker who knows of the illegality where those he knew to be implementing it did not, or for the adviser who deliberately kept the decision maker in the dark about the illegality. Each of those cases involves a guilty mind, deliberate silence and innocent dupes; liability, perhaps vicariously, for misfeasance can be found. *Armstrong v Strain* does not preclude that at all. What would not constitute misfeasance would be the situation where an official knew that a policy would be unlawful but did not know that it would be carried out, and the person carrying it out did not know that it was unlawful. It would not show competence in government and it might not be readily believed on the facts but it would not involve misfeasance.
283. Insofar as Mr Allen suggests, by his reference to preferring the approach in *Three Rivers*, that in corporate misfeasance it is unnecessary to identify individuals, he is wrong. If Lord Hutton was differing from the other two in the majority as to the basis upon which the pleadings were adequate, and suggesting that in corporate misfeasance it was not necessary to show that anyone had the requisite knowledge, I do not think that the authorities cited by him bear out the point. In *Bourgoin SA v MAFF* [1986] QB 716, it was an agreed assumption that the Minister himself had the relevant knowledge; in *Dunlop v Woollahra Municipal Council* [1982] AC 158 PC, it was clear against which persons the allegation as to knowledge were made and it was their acts and knowledge as councillors which would have been attributed to the Council for the purposes of corporate misfeasance. I think that in reality Lord Hutton, like Lords Steyn and Hope, is making a narrower point as to pleading adequacy in the context of the pleadings and documentation in that case.

284. Viewed in that light, I do not derive much assistance from *Three Rivers*; the state of the pleadings and documentation is not discussed in detail and in any event any detailed comparison of that case compared to this would be wrong. Each case has to be decided on its own material. All that can be drawn from it is the pleading point that it is not always necessary for the Particulars of Claim to identify the individuals who it is alleged had the requisite knowledge and who did the acts complained of, provided, and this is important, that the nature of the case which the Defendants have to meet appears adequately for the just, effective and expeditious preparation and disposal of the case, from the pleadings with the documentation. On that basis, I reject Mr Howell's further submission that if I struck out the contentious averment, I should dismiss the whole misfeasance case. It is not always necessary as a matter of pleading that the individuals should be identified, whether by name or position or in some other way, such as by authorship of a particular document. Whether it should be required depends on the whole documentation and the nature of the case.

285. A very large amount of Government documentation has been produced. There are several strands of correspondence: internal FCO memos between various of its departments and between various officials some of which related to the preparation of advice to Ministers, advice to Ministers, correspondence with and between the FCO and the two Governors or High Commissioners, correspondence between the FCO and the UK Mission to the UN. Some are advisory, some are drafts or comments on drafts and internal debate. There are many officials who appear in the written material and Ministers as well. The Claimants rely on this documentation for their misfeasance case. I regard it as wholly unfair for this serious allegation to be made without any attempt in the light of all this material to identify in the pleadings those against whom so serious an allegation is made. It must be possible for the Claimants to identify them, or the major ones, by name or position, or authorship of documents. The Defendants could not possibly know how far back and how widely they would have to interview potential witnesses and those witnesses would not know whether an allegation was being made against them which their statements had to answer. The Claimants argued that the claim should not be struck out as having no reasonable prospect of success because cross-examination might help their case. For the immediate purposes of this pleading, that only reinforces my conclusion: how are the Defendants to know whom to call for any such cross-examination without any particulars of the persons against whom this allegation is made? Are they to face a speculative cross-examination to see if an allegation can be made against them? That would be a wholly unfair and wasteful way of conducting litigation. Whatever else may result from these applications, the Claimants must plead the names, or other identifying material, of those who they say had the relevant knowledge, of what precisely and what they are alleged to have done. These allegations should have been tied in to the documents disclosed. There is ample material for them to have been working on if they truly have a case of misfeasance.

286. I am reinforced in my firm conclusion by what Mr Allen said, under some judicial prodding, as to whether he did indeed contend that certain individuals had the requisite knowledge or whether he accepted that the striking out of the averment would end his misfeasance case. I received the distinct impression that this aspect of the case had not been thought through with the care it deserved for the making of such serious allegations. He said that the Prime Ministers and Foreign and Colonial Secretaries between 1964 and 1973 would be included. (The Prime Ministers are not actually parties at all.) The Foreign Secretary in 1982 was included and, it appeared, all subsequent ones because the policy of denying that there was a permanent population on the islands had been maintained throughout the 1990s. All Permanent Under-Secretaries involved in drafting advice to Ministers were included because, if they removed relevant material from the eyes of the decision maker, that would be misfeasance for which the UK



Government would be vicariously liable. The BIOT Administrators and the Commissioners over time were also to be named. Mr Aust was then too junior for reliance to be placed on his advice. But Mr Allen also seemed to suggest that any officials who wrote the documents upon which he relies would have the relevant knowledge. Such extemporising is not the way litigation should be conducted. The allegation must be properly pleaded if the action is to continue.

287. Once the misconception underlying this averment is recognised and the averment is struck from the Claimants' case, the importance of the 1968 and 1969 Prime Ministerial submissions is undeniable. The decisions made in reliance on approval of those submissions were the justification for what followed, not some excess of official zeal concealed from Ministers, whilst officials somewhat improbably took the burden of implementing their own policy, politically and morally controversial, leaving Ministers free from any opprobrium over the execution of policies of the highest importance, sensitivity and controversy. But it means that for the Claimants to succeed, they have to have reasonable prospects of contending that the Prime Minister of the day knew of or was recklessly indifferent to the illegality of his policy, or that his Foreign Secretary was or that the Commissioner of the day was or that unnamed officials duped them over illegalities to which they alone were alive. There is nothing to suggest that officials were acting off their own bat.

#### The "framework" submissions

288. Mr Allen outlined the history of what he called the Defendants' "*wrongs*". The UK and US Governments wanted an island which had no resident population. The UK Government had earlier information available which contradicted the conclusions of the Newton report which had probably been slanted to assist defence purposes. They also had subsequent information which put matters in a different light. The UK Government had always been aware that there would be difficulties at the UN and so sought to conceal from it that there was a permanent population, to represent them as transient workers who belonged to the Seychelles or to Mauritius. Misleading information about the purpose behind the creation of BIOT was provided to the UN. After the Government bought the islands in 1967, the decisions which it made or permitted to be made, eg about permitting Ilois to return from Mauritius, impinged on its "*governmental obligations*".
289. Notwithstanding fresh statistics in 1967 which showed that there were more Ilois than had been thought there was no modification in policy and approval was given to the US proposal. By 1969, the Government had decided that all the Chagos had to be evacuated even though there were no definite defence plans beyond the use of Diego Garcia. This was to prevent a permanent resident population giving rise to obligations under Article 73 of the UN Charter and also because the Treasury were reluctant to invest in the plantations. The approval of the Mauritius Government to the resettlement of the Ilois was a temporary expedient but to assist in obtaining the approval of that Government, the UK Government, as a matter of policy withheld information from the Ilois that they were UK Citizens.
290. Those Ilois who went to Mauritius expecting to be able to return to Chagos were left to their fate, and not brought back. The Government either decided this itself or acquiesced in Mr Moulinie's policy. Negotiations over resettlement were deliberately stalled.
291. The Immigration Ordinance was brought in to clothe the expulsion of the Ilois with apparent legality but was given the minimum possible publicity. The Ilois were given no real choice; the offer to go to Peros Banhos and Salomon was illusory because the Government intended to close them anyway. Those clearances were managed inhumanely and the departing Ilois had no choice of where to go. The resettlement negotiations were slow, the sum paid inadequate,

the pig-breeding scheme known to be unworkable and the payment of anything for the benefit of the Ilois long delayed.

292. The UK Government received frequently inadequate and misleading advice, and relied on its position as plantation owner to remove all the population without statutory or other public law authority. Later, at the 1982 negotiations, the UK Government seemingly abandoned individual quittances but later included them in the Agreement and insisted that the Mauritius Government collect them. Mr Allen identified fifteen wrongs perpetrated in that history some of which could not be tortious, eg letting the plantations run down, and others could not be justiciable, eg failing to honour UN Charter obligations.

293. I have already adumbrated the way in which the Claimants advance their case on the pleadings. The overarching theme was that the Defendants and their officials knew at all relevant times that there was an indigenous population of two or more generations on the Chagos, and pretended to the outside world that these were only, or virtually only, contract labourers by which they meant transient or temporary workers. They then removed that population when they knew or were recklessly indifferent to the illegality of so doing. They did so not only for defence purposes but also because, BIOT having been created, an indigenous population in that new colony would attract the protection of Article 73 of the UN Charter. The structure of Mr Allen's submissions did not therefore involve any analysis, by tracing through the documents in a coherent way, what any one official or Minister did and knew in relation to any one of the allegations of illegality and dishonesty. The evidence upon which they rely at this stage is largely the documentary material disclosed by the Defendants, but it is supplemented by the Ilois' own evidence about their way of life, their ancestry, their employment, the way property was dealt with, about what happened to them at the time of the expulsions or when they were unable to return, their reception and subsequent life in Mauritius and the Seychelles, and their dealings with the UK Government. But it is the documentary material upon which the Claimants rely for showing what the Ministers and officials were doing and with what knowledge. The documentary material has been set out at length in Appendix A and I do not propose to summarise the material here. The Claimants' case was that they had a reasonable prospect of success in their allegations from that material alone and in effect submitted that reading it made out their case sufficiently for this stage of proceedings.

294. The attack mounted by the Defendants is their contention that there are no reasonable prospects of success for this claim.

295. Mr Allen made a number of what he called "key" submissions as to illegalities which did not as such feature as allegations in the Particulars of Claim under that head, but which can be seen as the underlying theme of a number of his specific allegations. These related to what he called the governmental obligations which the Defendants owed to Chagossians because the Defendants remained collectively their Government; alternatively the Commissioner of BIOT was their Government with the UK Government in a governmental relationship with them because of the control which it could exercise, albeit only through the lawful use of the prerogative or legislative act. Mr Allen drew on what was said by Laws LJ in *Bancoult* at paragraph 57: "*peace, order and good government of any territory means nothing, surely, save by reference to the territory's population*". They were to be governed not removed under that power. This was said to require fair consultation, a recognition that no international agreement could trump all their rights, adequate funding for resettlement, and a duty of good faith which required the Government to put right in the 1982 negotiations, and to acknowledge, what it had done wrong. These were mandatory duties which the Defendants could never abandon nor could it contrive to get its citizens to forego those rights. They could only be removed by legislative act by a body with the power to pass such legislation. This asserted governmental relationship ran through other parts of the Claim, such as the claim in negligence. The

consequence for the misfeasance claim was that, just as the Defendants were not able to rely on section 4 of the Immigration Ordinance for the removal of the population, they were unable to rely on any other power, such as the prerogative or private landowner powers. Those powers might enable the base to be set up but they could not make lawful the exclusion of the population or taking so much land that it was impossible for them to live on the islands.

296. A good deal of this was not particularised at all; it is not in the pleadings and the source of the duty to act justly, to whom it was owed, and what all these governmental obligations entailed was not clear. They appeared to be very extensive with positively enforceable obligations to care for the citizens, to house and educate, to provide for community life and employment opportunities without any limit in time or cost.

297. Expressed in those broad terms, Mr Allen's framework submissions are untenable. The Commissioner of BIOT has no positive duty to do anything other than that which relevant legislation and the Royal Instructions may require him to do. A power to do only that which is in the interests of "*peace, order, and good government*" may impose a limit on what the Commissioner can do, but it does not impose any legally enforceable duty to act in some vague way for "*the people*". No legislative power of the width necessary for Mr Allen's submission was identified. The Commissioner is subject to the limitations of the BIOT Order and is neither compelled to enact the legislation for which the Claimants contend, nor has he done so. Neither the Commissioner nor the UK Government has any duty to provide for a welfare state in the absence of legislation. I can see no basis for saying that there is a legal duty to provide employment, or housing on or transportation to Chagos, including Diego Garcia or to compel the private landowner and employer to do so for any individual Chagossian or all of them. There was no obligation to maintain an economy and to prevent the coconut plantations closing or to provide substitute work. There was no obligation to prevent landowners exercising their private rights to prevent someone living on a particular piece of land or to require them to provide land for Chagossians to live on, or to permit the landowners' rights to be overridden by a form of mass trespass; that would be the antithesis of a civil society unless accomplished by legislation. If the landowner had decided to give up running coconut plantations and to remove the islanders from the land to make way for tourist enterprises, there would have been room for political debate as to what should happen but not for legal debate as to the power of the landowners, (assuming that the Ilois had no property rights themselves). There is no obligation on the legislature to prevent private landowners exercising their rights and refusing to permit onto land those whom they are not willing to allow to reside there. There is no obligation to require employers to employ particular individuals or to provide them with transportation to or from the Chagos. There is no obligation on the legislature to so enact nor has the Sovereign required the Commissioner to so legislate nor has She passed any such Act herself. I do not see anything in *Bancoult* which would support such an approach.

#### The components of the misfeasance claim: prevention of return

298. I propose to deal with the sequence of allegations as to misfeasance in chronological order. I have already accepted that it is reasonably arguable that if the prevention of the return of Ilois in 1967 and 1968 was on the instructions or, indeed at the request of the Defendants, that was unlawful. I think that it is also reasonably arguable that, in those circumstances, if the Commissioner or his agents knew that those who were going to Mauritius might not be able to return for that same reason, there was a duty on them to forewarn the Ilois. However, there is no evidence that any Defendant or its agents knew or thought that those who left would be prevented from returning. Mr Moulinie may have known what the general pattern of recruitment would be and it may have been a common

expectation that Ilois would be re-employed and transported back to the Chagos if they so wished; of course there was no obligation on them to return or to do so at any particular time. It is clear from the evidence of the Chagossians that they regarded themselves as free to make that choice and some stayed for substantial periods in Mauritius, some arriving before BIOT was even created. It must have been obvious to the islanders that there were no new recruits or returners from Mauritius in 1967 and yet others left in March 1968 apparently without inquiry as to their prospects for return. Mrs Talate's witness statement for what that is worth suggests that they were aware of the decline in numbers and of the absence of people who had gone to Mauritius. There is also some evidence that, even before the creation of BIOT, there could be difficulties for those who left the islands for Mauritius as others were recruited to take their place, as would seem inevitable, as there appears to have been no obligation on the Ilois to return after a particular period. But Moulinie was not the agent of BIOT in transporting to Mauritius those who wished to go there nor when they said or failed to say anything about whether they might return. The fact that some Ilois were advised to go to Mauritius in connection with medical treatment imposed no different duty and certainly not upon the Defendants. Mr Moulinie may have realised that recruitment of those leaving in 1967 and 1968 was not certain and nothing was said; he might be criticised for that. But that is not something for which any responsibility arguably lies with the Defendants as a breach of any duty by them or other illegality, let alone one of which they knew or were recklessly indifferent to.

299. Mr Howell's main point was that there was no evidence that the Defendants had been instrumental in fact in preventing the return of anyone in 1967 or 1968. Those decisions were the consequence of the Moulinies' recruitment policies. The position to my mind is as follows. The contemporaneous material shows that there were two boatloads of Ilois, one in May 1967 and the other in March 1968, some or all of whom were unable to obtain passage back and were left stranded. First, it is quite plain that the proposals for the defence facility were at the root of the problem because of the uncertainty which they created for investment and the related need for labour; the company had given notice to quit its lease, effective at the end of 1967 and there were negotiations about a management agreement in the latter part of 1967. The UK Government in that period faced the prospect of direct management of the plantations. Second, the focus of Moulinies' recruitment was to become the Seychellois because the islands' economic links and shipping ties from July 1968, following acquisition of the "*Nordvaer*", were focussed on the Seychelles. That refocus itself may well have been independent of the defence proposals. Third, the evidence of Marcel Moulinie was that there had been no instructions, so far as he knew, from Mr Todd to Rogers & Co not to take returning Ilois, although he had also said that they had given no such instructions either and was not aware that his uncle had done so. The documentary evidence shows, however, that recruitment instructions were given by the company to Rogers & Co to take no more workers from Mauritius. Fourth, the evidence of Mrs Jaffar and Mrs Elyse on what was said, to whom and in what circumstances or when, suffers from certain problems, but does not assist in answering the question of who gave instructions that they were not to be recruited. They said that they were refused passage for reasons connected with the creation of BIOT, the defence arrangements with the Americans and the closing of the islands (even though at that time their closure was not imminent). The telegram of 29<sup>th</sup> February 1968 from Moulinie & Co to Rogers is consistent with their evidence.

300. In my judgment, it is clear that the decisions were made by Moulinie & Co on the basis of what it thought necessary for employment purposes. First, there was a clear change in recruitment pattern so as to employ more Seychellois than Mauritians as contract workers. The uncertainty of what would happen to the islands or any of them and when was an obvious factor for Moulinie & Co to worry

about. This pattern is evident in the May 1967 Administrator's Report of his visit to the islands. The discussions between the Commissioner and the CO refer to Mr Moulinie saying that he would not be recruiting additional labour from Mauritius on the second trip there of the "*Mauritius*". Second, the Commissioner's concern, as it was of the CO, was to make the most of the asset for which it had paid and to make appropriate arrangements for running the plantations, not for removing the population or running down the plantations. The references upon which the Claimants rely need to be seen in that overall context. Third, the Mauritius Government raised the question of those who had arrived in May 1967 when the "*Mauritius*" was due to return to the islands in March 1968; it wanted them re-employed on Chagos. But it was dealt with by the Commissioner as an employment matter for Moulinie & Co. Moulinie had no need for the 75 workers. So the Commissioner told the CO that it would tell him to recruit what labour was needed for the efficient running of the islands and who was employed was up to him. That reflects a legitimate position from a plantation management point of view and there is no reason to suppose that Moulinie would have acted any differently if he had not been told that. Fourth, it is clear that Moulinie told Rogers & Co not to recruit any more in its telegram of 29<sup>th</sup> February 1968 because the islands were fully manned; the reference to concluding negotiations with the MoD shows the effect of uncertainty and not interference. This may be the source of the information which Rogers gave to the Ilois who were refused a return passage. Fifth, the degree of control exercised over the cost of running the plantations can be seen from the extent of approval necessary for materials. Mr Allen argues that this shows the extent to which the BIOT administration would have been involved in the decisions about recruitment. That may be so but the evidence points clearly to the reason for that: the desire to make the plantations work economically; that may have affected the levels of recruitment and that may have affected indirectly who was recruited. But that is not the point. The question, sixth, is: did the Defendants try to stop the recruitment of the Ilois in Mauritius? There is nothing in the Commissioner's advice, if it was advice, to Moulinie about what to do over the Mauritius Government request which amounts to a prevention of the Ilois returning, let alone that it was so advised in order to exclude them so as to assist in depopulating the islands. That is the nub of the point.

301. There is a recognition, at least arguably, in the May 1968 BIOT memorandum, (23/171-5), that recruitment could be used as an aid to resettlement, but it is merely a discussion document and one which precedes the July 1968 US decision, which affected the future planning significantly. There is no suggestion in any other of the pre- July documents that the recruitment of Ilois on Mauritius should be minimised for resettlement or other reasons; the concern was with the overall level of the workforce. The emphasis is on making the islands economically efficient.

302. Again, in relation to the Ilois stranded after their arrival in March 1968, a similar picture emerges clearly. The Defendants' line at that time was that the matter was one between employer and employee. It is also plain that the CO and High Commissioner in Mauritius were aware that there were Ilois who had connection by descent with the islands and who might have been affected by the defence proposals. There is nothing in the exchanges to suggest that they were however trying to prevent the recruitment of Ilois. The most that can be said is that they were not trying to encourage or to facilitate it, or to bring about their return to Chagos; they were more washing their hands of the problem. The notes reiterate that it is an employment matter, or one for resolution as the picture became more certain as to how long the islands would be functioning. It was also pointed out in the FCO paper of 24<sup>th</sup> October 1968 that Moulinie now wanted to recruit more Ilois for Diego Garcia; the documents also show that they were aware that recruitment of Ilois would pose additional resettlement problems and that there was a potential problem if only some of those stranded in Mauritius

were recruited. Thus recruitment of those Ilois was seen as unadvisable. Nonetheless, and to my mind crucially, the upshot of it was that because Moulinie wanted to recruit 100 Ilois from Mauritius in November 1968, he was authorised to do so albeit on one year contracts only. That latter requirement shows a degree of control over recruitment being exercised by the Defendants; but, generally, the signing of a contract upon return to the islands is something which at least some Ilois certainly did, because some contracts have been produced, and there was a company concern about recruits joyriding around the islands on the boat and then returning free of cost. It shows however that the Defendants did not prevent the return of the Chagossians. It does not matter for these purposes that the recruitment did not in fact proceed.

303. The language of the documents of 28<sup>th</sup> October 1968 certainly shows that the Defendants could and at times did exercise control directly over recruitment of Ilois. It was not simply a matter left entirely to Moulinies' commercial judgement. But the general tenor of the documents is that the Defendants were looking at the economics of the plantations and save at the last were not concerned with whom Moulinie recruited, whether Ilois or not. There is nothing in the pre-November 1968 documents to suggest that they had given secret instructions that Ilois were not to be recruited and were deceiving each other about their motives or decisions. I do not consider it to be a reasonable inference that what was seen in October or November 1968 to be the attitude of the Defendants towards Ilois recruitment must have been their attitude at an earlier date. The Mauritius Government in March 1968 might have thought the non-return was a BIOT responsibility but that is simply not borne out by the evidence. By October 1968, after the July 1968 US decision, there is evidence that the Defendants contemplated preventing the recruitment of Ilois because of the resettlement implications, but they did not in fact do so. Indeed there was a limit, according to Mr Moulinie, of 250 on the number of male adult workers on Diego Garcia. There is no documentary evidence to support that, but if it is correct, the population figures show that that limit was not in danger of being exceeded and so it never acted as a constraint on the recruitment of Ilois.

304. The Defendants did not do anything to assist or to require the return of the Ilois but that is not the basis of the allegation of misfeasance here. There is no domestic legal obligation on a Government to arrange for the return of its citizens to those territories where they can reside. It cannot be said that there was a duty on the Defendants to arrange for the Ilois to return to the islands, let alone one which left aside any question of employment or how they would be fed or housed. It is not sufficient for this allegation of misfeasance for the Claimants to show that the defence proposal was an unsettling factor which contributed to or even caused the company's refusal to recruit the stranded Ilois. Nor is it sufficient to identify some discussion about what numbers should be employed, for the Defendants had a legitimate interest in the size of the labour force whether they were to manage the plantations directly or through an agreement under which they would bear the cost burden. I consider that the Claimants have no reasonable prospect of showing that the Defendants in fact prevented the return of the stranded Ilois.

305. In any event, if there had been a duty not to prevent the return of the islanders or even to facilitate it, there is no evidence at all that any Defendant or official knew of any such duty, or was recklessly indifferent to it. There is nothing to suggest that there was or was ever thought to be a duty to re-employ those who went to Mauritius or to require their re-employment regardless of economic needs or to provide transportation or a means of subsistence for them. Neither Defendant had ever employed the Ilois or transported them; they were not abandoned by either Defendant in a remote or inaccessible spot to which they had taken them. These Ilois went voluntarily to a country of which they were citizens and with which some enjoyed varying degrees of family connection.

#### Components of misfeasance: a duty to consult

306. Mr Allen, in the re-amended Particulars of Claim, for which amendment I give permission, contended that there was a failure and I suppose therefore he suggests a duty, to consult islanders over "*important decisions*" as to the future of the islands or as to their own futures. As an allegation of fact, that failure is undeniable. Reading between Mr Allen's lines, he means that they should have been consulted about where they were to go and with what provision for housing, employment and the replacement of the amenities of life which they had hitherto enjoyed. It is reasonably arguable that, as the law has developed and notwithstanding the absence of supporting analysis, there was a duty to consult the Chagossians over what their future was to be, once it had been decided to clear any island for defence purposes. I find rather difficult, however, the notion that there was an obligation to consult the Ilois, (and if them why not the temporary residents or the Moulinies, or UK residents and taxpayers?) about the defence interests of the UK and its colonies. There is plainly no obligation to consult those who might be affected by any international obligation which the UK Government might have it in mind to enter and I cannot see why there was any obligation to consult on whether BIOT itself should have been created. There is no obligation to consult before legislation is proposed or enacted in the absence of a statutory duty or a promise to do so. Neither is alleged to have existed here. If there were, as the Claimants say, any obligation to carry out an assessment, as a Government, of the consequences of the setting up of the base, and there plainly was such an assessment pursued over time, that does not itself oblige consultation about those consequences more generally.

307. I do not regard there as being any prospect at all of the Claimants being able to succeed in demonstrating that such a duty was one of which the relevant officials were aware in 1971 or 1973 or to which they were recklessly indifferent. The wider he seeks to make the duty, the more hugely improbable his case becomes. It was recognised by Ministers that it would have been desirable to consult the Ilois about their future, but there were reasons why that could not be done. There is nothing to suggest that they realised that they were under some obligation to consult or that they were recklessly indifferent to any such duty. I think that in the late sixties and early seventies there would have been some surprise at the thought that there could be an enforceable legal duty to consult at all, let alone over defence matters. Even were the Claimants to succeed in establishing that there had been a duty to consult the Ilois over whether there should be a defence facility on Diego Garcia, it is not conceivable that it would have made the remotest difference to the outcome. It must have been perfectly obvious to the Defendants that the Ilois would wish for no change for the worse in their situation but their desires were not important in this context. They were given an element of choice about where to go when Diego Garcia was evacuated.

#### Components of misfeasance: removals

308. I have already set out the brief facts as to the evacuation of the islands which shows why what is said in *Bancoult* about the timetable of removals is wrong. It was not a process of compulsory removal all at one go. That is what gives rise to the Defendants' argument that, on the ratio of *Bancoult*, the removal from Diego Garcia was lawful because only those who chose to do so left BIOT, and thereafter it was economic circumstance rather than Government compulsion which led to the evacuation of the other Chagos islands in BIOT, coupled with the voluntary decisions of the islanders exercised so as to leave Salomon, and then so as to leave Peros Banhos in part before its final closure. At worst, say the Defendants, the only ones compelled to leave BIOT were those left on Peros Banhos who had not left voluntarily beforehand.

309. One allegation of the Claimants was that it was unlawful to close Diego Garcia because it was the one part of BIOT which had an assured economic future, as a result of the base. But the UK Government tried on a number of occasions to persuade the US to allow Chagossians to work on the defence facility, particularly in construction work. It had no success at all ever. The US adhered to the position which it had adopted at the outset. The UK tested whether there was any need to close the whole of Diego Garcia for defence reasons but the US asserted that it was so and the UK accepted that position. It is more than a little odd to take advantage of the defence proposal to argue that that is what gave Diego Garcia its future, but at the same to deny an essential feature of it as seen by those responsible for creating it, namely that it had or would have no resident population to limit its effectiveness as a location for that very facility. In substance, this is an allegation that the base should not have been created on the terms upon which it was. The Court is not in a position to judge the defence assessment which underlies that and will not do so. It is inconceivable that the Defendants could have thought that there was a legal obligation to compel the US to accept Ilois workers or to forego the facility, or were recklessly indifferent to the legalities of the position.
310. In the same paragraph of the Particulars, there is a different allegation that it was unlawful to close the one part of Chagos with an assured future as a coconut plantation and thereby to withdraw support from the other islands' plantation economies. The two allegations do not fit easily together nor does the allegation fit easily with the contention that the departures from Peros Banhos and Salomon were engendered for other than economic reasons. It was pleaded that the Defendants had run down the plantations deliberately or allowed that to happen knowing that they were thereby depriving the entire population of the territory of economic support. This is untenable. The Defendants wanted to keep the plantations going for as long as possible as is evident from all the documentation. There was a tension between that and their desire to avoid having a permanent population on BIOT. That latter objective argued for a rapid decision. I cannot see what the illegality is in what they did in the interim between 1965 and 1971. If, however, the allegation includes any later period, the allegation becomes in effect that they could not remove the islanders from the whole of BIOT and that they had to leave enough land for the Ilois to maintain a viable economy. The agreement with the US could not be given effect, therefore, whatever the route taken to provide for the removal of the Ilois. This is an example of the governmental obligations which Mr Allen relies upon. I deal with that point as part of the allegation that the removal of the Ilois from the whole of BIOT was unlawful, regardless of the means whereby that was accomplished.
311. Mr Allen put the allegations of unlawfulness over the removal of the population in a number of ways. The Defendants ignored their governmental obligations to the permanent inhabitants; their interests were a material consideration which was ignored in the formulation of policy. It was unlawful to clear the Ilois off Diego Garcia if there was nowhere else for them to go which had a viable economy. The Defendants proceeded as if they were operating a private estate. There was no authority for the removal of a British citizen as such from the place where he was entitled to reside. The 1971 Immigration Ordinance clothed the BIOT administration with an ostensible power even if it had not been used in fact to bring about the evacuations. He made an allied submission to the effect that it was unlawful to have a policy of clearing the islands which was based upon the deceit that there was no permanent population and to seek to give effect to that deceit. Whether there is a reasonably arguable case depends, for so many of these allegations, upon what power was used and upon whether it could ever be lawful to remove the whole BIOT population for defence or other purposes in the absence of specific legislation.
312. I have already expressed the view that *Bancoult* held, strictly obiter, that legislation enacted through the Sovereign's powers could provide that authority



and certainly could do so where the people are citizens of the country to which they are removed and that country is willing to receive them. Although it may be necessary to consider some of Mr Allen's arguments in more detail when dealing with the existence of a tort of unlawful exile, much of the material upon which he relies demonstrates that exile is permitted if done by legislative authority but not if done by virtue of the prerogative. English history contains legislation which has had that effect, in the Transportation Acts. The UK has not ratified the 4<sup>th</sup> Protocol to the ECHR, which in Article 3 prohibits expulsion of a national from the territory of the state of which he is a national and requires him to be permitted entry there. There is some authority which supports the permissible scope of legislative authority. In *Thornton v The Police* [1962] AC 339 PC, leave to appeal was refused on the ground that the judgment of Hammet J was clearly correct. He held that nothing in the British Nationality Act 1948 "*precludes either the United Kingdom or any of the colonies from enacting such legislation as they chose to regulate and control the entry into their territory or residence therein of persons whatever their status may be*". In the same vein, Lord Denning MR held in *R v Secretary of State ex p Thakrar* [1974] QB 684 CA that the obligation in international law owed by one state to another to admit its nationals expelled by another could not be relied on by an individual, conflicted with immigration legislation and in any event only arose if the national had nowhere else to go. It is perfectly clear that the Ilois were not removed until arrangements had been made for them to go to countries of which they were citizens and which were willing to take them. The legal issue is as to the lawfulness of so acting without specific legislative power. I have said that in the light of *Bancoult* that unlawfulness is reasonably arguable. The other factual issues relate to which power was used or whether the departures were voluntary and whether the Claimants have reasonable prospects of showing that the Defendants knew that they were acting unlawfully or were recklessly indifferent to that.

313. The starting point for the Defendants' submissions is the acceptance that the relevant international agreements with the US were ones which the UK Government could properly enter into and seek to implement. The point at which that implementation cut across the rights of individuals is the point at which it would require to be examined for its legality in the absence of legislative powers. The Defendants were entitled to take steps to procure the implementation of the defence facilities subject only to any supervening rights which the islanders had. It cannot by itself justify the breach of the rights of individuals. Once the lease to Chagos Agalega Company Limited had terminated, there was no individually enforceable domestic legal obligation on the Commissioner or on the UK Government to cause the plantations to continue to operate in order to provide employment opportunities or the other concomitants of a viable society, food, housing or education and so on. The Ilois contracts might come to an end, but there would be no obligation on the Defendants to employ them or to procure that the company renewed their contracts. There would be no legally enforceable obligation to prevent the company landowner requiring the workers to leave its property if they had no rights to be there. To my mind, this otherwise compelling analysis has to recognise that the thinking in *Bancoult* was not confined to the specific effect of the Immigration Ordinance but extended to any legislation with the same purpose or effect and was thought also to cover the use of private landownership rights by the Crown, albeit obiter.
314. The Defendants' case is that it is clear upon all the evidence, including that of the Chagossians, that a choice was offered to the Ilois of Diego Garcia as to whether to go to another BIOT island. They were encouraged to go to those islands, or to Agalega. They were not at that stage all removed from BIOT or required to leave. There were also Ilois who subsequently left Peros Banhos and Salomon voluntarily. It may have been uncertainty which caused some to choose to go to Mauritius rather than to a BIOT island or to leave when they did, but that does not alter the position and does not amount to a compulsion to leave BIOT.

But the illegality contemplated by the Divisional Court is a compulsory removal through the specific exercise of a purported statutory power. Accordingly, whilst the Divisional Court may be right as to the legal position if the facts had been as it apprehended them to be, on the incontestable facts, the illegality which it contemplated could only arise for those who were compelled to leave Peros Banhos. There is no evidence that that was accomplished by use of the Immigration Ordinance. The evidence is that the island had become unviable as a coconut plantation; there were too few workers and the company and the Defendants decided to close them as the landowner and to evacuate the inhabitants. The dependency of the Ilois on work for rations, building materials and transportation was evident from the way in which they described life on Chagos and the problems they felt arose when the rations were running down; that may not have happened in fact but they perceived it as an attempt to starve them out. There would have been no comparable means of the Ilois subsisting there alone without employment or other subsidy. This is a powerful analysis, but it has to be seen in the light of what I see as the thinking in *Bancoult*.

315. At the stage of seeing whether there is an arguable case, I appreciate that it can be said that the offer of employment on another island in BIOT was illusory because of the uncertainty over the future of the islands created by the defence proposals and no guarantees were offered as to the future of Peros Banhos and Salomon. Mr Todd told the Ilois, according to his notes, that the other islands would be open for some time. The reality was that the Ilois could see that the time would come when the plantations would close and they would be compelled to leave. Additionally, the US had always made it clear to the UK Government that it might want to have the whole of Chagos. There was, in the background, also the concern of the UK Government that unless the population were removed from BIOT, there would eventually be a permanent population, if there were not one already, which would attract the obligations of Article 73 of the UN Charter and constitute an economic problem for the UK. All the decisions on the future of the island plantations after 1965 can be attributed to the creation of BIOT, the defence proposal and to the uncertainty which it created. The UK Government compelled the closure of Diego Garcia and the removal of the Ilois from it. Even on the Defendants' own case, it was the economic conditions created by the closure of the plantations on Diego Garcia for defence purposes and the subsequent uncertainties, which led to the drift of Ilois away from Salomon and then from Peros Banhos leading to their ultimate economic collapse. It is possible to say that in those circumstances the Defendants closed the islands and compelled the removal of the population from BIOT. Whether they used the Immigration Ordinance, or as I think overwhelmingly probable, they used their private law rights, a possible case, derived from *Bancoult*, could be mounted that the actions were unlawful as a sequence of events which flowed from the closure of Diego Garcia, which foreseeably led to the enforced removal of the whole population without specific legal authority. I saw no evidence to support Mr Allen's contention that the closure of Peros Banhos was brought about by subtle pressure from the Defendants on Moulinie & Co.

316. I regard it as being clear that the private law rights were used because there is no evidence that the procedures envisaged by the Immigration Ordinance were ever deployed even in a vestigial form, second the language used at the meetings was that the islands were being closed, and third, having acquired the land and as they believed all the interests in it, private powers would have been the simplest method of saying that the Ilois had to go. It would have been consistent with the argument that they had no rights there, property or otherwise. The documents show that the Ordinance was a back up to stop Ilois making for another island and to control their return should it be attempted. It could not apply to transfers within BIOT, or to the making of a choice to stay in or leave BIOT; it could only have applied to the final closure of Peros Banhos anyway and there is no evidence that it was used at that stage.

317. I turn from whether the actions were arguably unlawful in achieving the complete removal of the Ilois from BIOT, to examine whether there is an arguable case that any Defendant knew that to be the case or was recklessly indifferent to it.
318. Even if the Ilois from one or more islands had been compelled to leave under the Immigration Ordinance, there is no evidence that anyone thought that that was unlawful or was recklessly indifferent to that. This is closely related to the allegation that the enactment of the Ordinance was unlawful because of the purpose to which it was to be put, but again there is no evidence whatsoever that anyone knew or was recklessly indifferent as to its lawfulness. It is useful to put this in the context of what the law was. Specific legislative power was necessary on the assumption, which I make for these purposes, that the private powers could not be used. The form of Immigration Ordinance was more than a simple vehicle for expulsion as I have explained. The provision of the BIOT Order under which it was made enabled the Commissioner to make laws for "*peace, order and good government*" and that plainly encompasses the ability to pass immigration and residence controls. The only question is as to the limits on that power and whether it is more limited than the full power of the Sovereign who retains the power to make laws outside those limits. There is no issue but that the complete, removal of all the inhabitants could lawfully be achieved. If anyone had researched the scope of that phrase in 1971, they would have come to the case of *Ibralebbe v The Queen* [1964] AC 900,923. Viscount Radcliffe said of that phrase, which was used to confer legislative power on the Parliament of independent Ceylon, that it connotes "*in British constitutional language, the widest law-making powers appropriate to a Sovereign*". This was not an unusual conclusion for in *Winfat Enterprise (Hong Kong) Co Ltd v A-G of Hong Kong* [1985] AC 733, the Privy Council remarked that that had been repeatedly stated. It was argued in *Liyanage v The Queen* [1967] 1 AC 259 PC, again in relation to Ceylon that a Ceylon Act, passed after an abortive coup, which severely trammelled the rights of suspects, was unlawful because it offended against fundamental principles which had been inherited into the Ceylon constitutional framework. But it was held that the Ceylon (Constitution) Order in Council, which contained the phrase in issue, coupled with the Ceylon Independence Act were intended to and did give the full legislative powers of a sovereign independent state. The Independence Act provided for certain limits on UK legislation which had previously been enacted and for the removal of a bar to enactments repugnant to UK laws. It did not enlarge the law-making power. "*Commonwealth and Colonial Law*" by Roberts-Wray 1966 contains much in the same vein at p 369.
319. The Divisional Court's conclusion that those words were something less than the full sovereign power in the case of BIOT may be right but it could not possibly be said that someone enacting the 1971 Ordinance could have known that that was so or could have been recklessly indifferent to legality. The phrase is capable of permitting acts which infringe the fundamental rights of citizens as they might be regarded conventionally; a lawyer pre-*Bancoult* might have asked why it would not cover the removal of the inhabitants to a place of which they were citizens and which had agreed to take them especially where it was being done was for a sound reason in the interest of the security of the UK and her allies. The UK was responsible for the external relations of BIOT. Although the Sovereign might be divisible, Queen of Mauritius or BIOT and separately Queen of the United Kingdom, the power to legislate in section 11 was provided for the territory to be governed by reference to the needs of the UK and Colonies as a whole and their defence and foreign policy needs in particular for which aspect of BIOT the UK was responsible. Indeed it had specifically created BIOT for defence of the UK and Colonies. Section 11, if the scope of the phrase in issue varied with context, has to be read in that light. The restrictions on the legislative power would be found in the Royal Instructions, the power of disallowance, any

applicable UK law and the BIOT Order. The Chagos population could all have been removed to Mauritius, if BIOT had not been created. Indeed, as the only evacuation to which the Ordinance could conceivably have applied was that of Peros Banhos in 1973, there would have been a reasonable argument along the lines referred to by Gibbs J, that the removal of those who had lost all practical means of support and life was a proper use of such powers.

320. None of the material leading up to the enactment of the 1971 Ordinance suggests that any lawyer, draftsman, policy maker or whoever thought that the powers in the BIOT Order did not permit the Ordinance to be enacted. Nor is there any suggestion that there was no power to pass such an enactment because of the object for which it was to be passed, taking that to be the removal of the Ilois to Mauritius and the Seychelles. Insofar as its objective was to back up or permit the evacuation of the colony, that objective was seen as a necessary one and the Ordinance was a way of achieving it. There is no suggestion that anyone doubted that that could lawfully be done. It was recognised that politically the objective of permitting a US defence facility to be created in the Indian Ocean at the expense of people who had lived there for a number of generations would be controversial; but never that it could not be done lawfully. Nor do I see any evidence from the whole of the documents that this was because the Ministers and officials were ignoring the possibility, suspecting that it could not be done. The purpose of obtaining such powers, in so far as they related to the removal of the population, was to promote the defence interests of the UK, its Colonies and allies. The use of powers taken under section 11 of the BIOT Order with the aim of promoting that interest had been made explicit in the 1967 Property Ordinances and the subsequent acquisition which was not a secret. No one suggested until the Bancourt judicial review that that might be unlawful. The passage or use of an Immigration Ordinance to promote that same interest would not have been any more obviously unlawful, once defence interests were acknowledged to be relevant under section 11, whatever the political controversies.

321. Legal advice was obtained, and not just about how to draft the legislation. The Commissioner received some legal advice; he was entitled to suppose that if it had been thought unlawful, the Legal Adviser would have raised the point, but he did not. I do not think that, in view of the material disclosed, it could be that he gave advice orally and that there are no notes of it or that the notes have not been disclosed. There is no reason to suppose that the Legal Adviser would have kept the Commissioner in the dark about it. It is perfectly clear that if a lawyer is involved, the Commissioner is entitled to take it that he is not doing something which may be unlawful. He would have realised the controversial nature of it and I can see why he would agree to give the Ordinance no more publicity than the legal minimum. But I do not accept Mr Allen's basic point that any politician would have known that the Ordinance was outside the powers of the Order because it was to be used to assist in the removal of the Ilois.

322. The Prime Minister was told of the position in a Brief from the Foreign Secretary attached to the Defence. It is a full brief. It refers to the numbers of Ilois, their status and nationality and to the advantages of preparing to resettle all of them out of BIOT. This would be achieved by negotiations with Mauritius and the Seychelles. It was approved by the Prime Minister. There is no suggestion in the Brief or in the Annex, or in any of the working papers which contributed to the Brief, that the proposal to resettle the Ilois was unlawful although the precise means were not discussed. It was clear that they were not to be given the option of staying. Legal advice was given in Paper No 3 that an Immigration Ordinance, which was necessary for other reasons too, could provide for the Ilois to be removed but that it could not be administered so as to leave them with nowhere to go.

323. There had already been a debate within the FO on 23<sup>rd</sup> October 1968, (5/555), between Mr Aust, the Legal Adviser and others about immigration

legislation which was needed for other reasons too, including the need to reconcile the former Mauritius and Seychelles laws which applied to the different parts of BIOT depending on their previous attachment. There were further discussions in February and March 1969. Again, none of them suggest that the removal of the Ilois from BIOT, whether by an Ordinance or through private rights would be unlawful. That is not because they thought that it would be, but that it would be better to keep quiet or to keep Ministers in the dark. Ministers were fully briefed and there is no suggestion in the documents that officials would carry out the dirty work or leave Ministers out of it or ill-informed nor that they exceeded their authority or instructions. There is no realism to the notion that they were trying to deceive themselves and not say what they thought. It is because they did not think that it would be unlawful. It was not obvious to Ministers that there was some illegal act afoot as Mr Allen suggested it should have been; there was an appreciation that this would be unpopular with the Ilois and others, but not that it could not lawfully be done. The same applies to lawyers. They saw wide powers under the BIOT Order and there were no legal restrictions on what they did. The actual or incipient application to BIOT of Article 73 of the UN Charter did not create a relevant legal obligation for these purposes although it added to the political problems. In January, February and December 1970, there were further discussions about the way in which removal might be effected, with the private law rights more to the fore, but again there is nothing to suggest that anyone knew, or was recklessly indifferent to the legality of what was being proposed. It is clear that the many individuals involved all thought that it was lawful to remove the Ilois from BIOT using either an Immigration Ordinance or private rights or both. In December 1970, Miss Emery suggested to the PIOD that there was something repugnant to the general tenor of British immigration legislation in the Ordinance. Mr Aust replied that it was severe but not so very different from the then proposed reforms to UK immigration law.

324. Mr Allen made some play, understandably, of Mr Aust's note of 16<sup>th</sup> January 1970, (6/842), in which Mr Aust spoke of the role of the Immigration Ordinance in "*maintaining the fiction*". The fiction was that there was no permanent population. It could then be said that they had no permanent rights. Mr Howell said that it had not been passed for that purpose in the end but to provide the power to deport and to control entry. I think that the real point of this is in the recommendation which is that the whole of BIOT should be cleared because of the problems which a partial evacuation would pose for the fiction, enabling the permanent population to grow. There is a different issue here, which I shall deal with later which arises from what Mr Allen submits is a whole series of deceptions about the true status of the islanders. But I do not see that that remark shows that Mr Aust was recklessly indifferent to the law. After all, a major purpose of the Ordinance was to remove or to provide legal back up for the removal of the permanent population and that fiction does not suggest that he thought that it might be unlawful to remove them.

325. Mr Allen also said that the Foreign Office could not shelter behind the advice of Mr Aust, because he was only comparatively junior at the time although he has subsequently attained some eminence. In March 1971, he was only 29, and 27 when he wrote the above memo. He had been in post as an Assistant Legal Adviser for only a few years; it should have been obvious that he lacked the seniority to be dealing with these issues. Mr Allen said that Mr Aust had been instructed to advise on how to maintain the fiction. I do not see such instructions. That is his worldly wise assessment of the position which the Government was maintaining. I have only read his notes; they do not read as though he was out of his depth in the law or in dealing with those who sought his advice. On the face of it, there is nothing to warrant Mr Allen's submission.

326. It is not alleged that subsequently, the Defendants became aware of or were recklessly indifferent to the unlawfulness of the Ordinance until the *Bancoult* decision. That decision is the reason why the UK accepted before the UN Human

Rights Committee that its prohibition on Ilois returning to the islands was unlawful and only to that extent. The Immigration Ordinance 2000 was enacted so that, in short, British Dependant Territories citizens connected with BIOT could return to the islands, save Diego Garcia. But that still does not entitle them to go on private land.

327. I turn from the Immigration Ordinance to the use of private landowner powers. It can only be said that the Defendants were not entitled to close an island to pursue the defence facility on the basis of the *Bancoult* reasoning, that no public body's powers could be exercised, having regard to the defence interests of the UK and Colonies. Dealing first with the enactment of the relevant land acquisition Ordinances, which I accept *Bancoult's* reasoning as to the irrelevance of defence interests to section 11 makes arguably unlawful, I find nothing in the evidence to suggest that anyone ever contemplated that such a limitation existed, let alone knew or was recklessly indifferent to it. Mr Allen's own advocacy shied away from the underlying reasoning. I am less than persuaded as to the correctness of the underlying reasoning as to the scope of section 11 in *Bancoult*.

328. Mr Allen argued that there was an obligation to leave so much of the island of Diego Garcia as would enable the Chagossian way of life on the main island to continue so that there would be work for the Chagossians. This is unarguable, as I have already said. There is no obligation on a government to provide for a particular level of economic activity; how many was it to provide for given that the Ilois were not obliged to stay? Were they obliged to work? If so, on what terms? The argument becomes no more than an argument that a government owes a legally enforceable duty to provide some form of welfare state and subsidised economy for its people, even if its legislature has not so enacted. But whatever the merit in that argument, which is somewhat beyond the cutting edge of public law jurisprudence, it is quite impossible to suppose that any Defendant or any official should have put his mind to such a legal proposition and realised that that was the law or that anyone who did not do so was recklessly indifferent to the legality of what he was doing.

329. I have accepted that it is reasonably arguable that the use of private land ownership rights to remove the whole population of BIOT was unlawful, because of the obiter remarks of the Divisional Court. I assume for these purposes that the earlier acquisition Ordinances were lawful. But there are real problems with that dictum which go directly to whether someone arguably knew that private law powers could not be so used or was recklessly indifferent to that. It is commonplace for compulsory purchase powers to be taken but for a private purchase agreement to be reached instead. The removal of those who once had rights or none is achieved through the exercise of private ownership powers for the public purpose. It has not been suggested that, if relevant, a balanced assessment of defence needs against the needs of the population could not properly lead to the conclusion that the former were the weightier. But the Crown in those circumstances is nevertheless, on the obiter remarks, disabled from using the private powers which it has taken under an unchallenged public Act for an unchallenged public purpose. The basis for the illegality must be that, even though the Ilois were arguably compelled to leave the whole of BIOT for a country of which they were citizens and which was prepared to take them, specific legislation was necessary for that specific removal. The Divisional Court does not contemplate any obligations on the Commissioner once the lands had been lawfully acquired: was he to provide jobs and if so what and for how long, or housing and education? Insofar as there was an inhibition on the use of the private landowner powers, it is difficult to see why it should endure once arrangements had been made for the islanders to go to a country of which they were citizens and which was prepared to take them. No-one was compelled to leave BIOT until that point. However, whatever the true legal position, there is no

basis for saying that any Defendant knew that the dicta of the Divisional Court represented the legal position or was recklessly indifferent to it.

330. The points which I have already made about legal advice apply to this power too.

331. It is said, of the re-amended Particulars of Claim, (paragraph 79/E/5), that there was no lawful authority for the removals, which were achieved by coercion. This adds nothing; if it is intended to do so it should be particularised or struck out. There is no evidence that coercion in a physical sense was used in the removals. The pleading and the Claimants' statements have used language which suggests it but there is no evidence for that. If the allegation is that the Ilois had no choice about leaving Diego Garcia and that they had no choice about leaving Peros Banhos, because none were given the unappealing option of staying without support, that is obviously true, but I do not think that that is what is meant. There is no allegation that there was any trespass to the person to anyone nor that anyone on behalf of the Defendants authorised or carried out any such act. The assertions about intimidation through threats of bombing or of being killed were not sustained in any evidence; the witnesses who claimed in their witness statements to have had such conversations with US or British officers did not speak English and did not support those allegations in their oral evidence. Mrs Talate's evidence is pleaded as typical of the Ilois experience. There was a fear of the planes which they saw taking off low over where they lived on Diego Garcia. I do not find it difficult that fears and rumours spread but that does not make them true, however real the fear. Mr Prosper, according to Mrs David, said that there might be bombs on the base which would make Peros Banhos unsafe; but she agreed that what was in her recent statement about being removed by British Officers was wrong and she agreed that there was no British official present at that meeting. There was understandable distress and fear created by the killing of the dogs. But there were no British Officers present at the evacuations, although there is photographic evidence appended to the witness statement of Mr Mandary, who was not called, that an American Officer was present at a meeting in January 1971 where the closure of Diego Garcia was announced to the Ilois. There was no evidence as to the position on Salomon when the last worker left and the evidence about what happened on Peros Banhos was vague. There were inconsistencies in the evidence of Mrs Mein and her daughter as to when they left but it appeared from her oral evidence that they left before the end because other labourers stayed and Mr D'Offay replaced her husband. Mrs Talate left in 1972, before the end having chosen to go there from Diego Garcia; she was told by Mr Prosper that the islands were closing. There is not the slightest evidence of the threat of or the actual use of force or intimidation to bring about the removal of the Ilois, or that there was any for which either Defendant was responsible.

332. The allegation in paragraph 79(e)(7) of the re-amended Particulars of Claim that the removals were unlawful because no adequate system for compensating the displaced population had been set up is not a basis for alleging misfeasance. There was some form of compensation, Rs 500 for those who went to BIOT, and the resettlement agreement with the Mauritius Government which had been reached before the closure of Peros Banhos. I have no difficulty with that being arguably inadequate if there were a legally enforceable duty to provide an adequate scheme but no such duty has been identified. There is no duty to so legislate and no existing power has been identified; if there were a duty to legislate, there is simply no basis for saying that anyone knew of such a duty or was recklessly indifferent to it. This should be struck out.

333. It is not an allegation which appears to derive from the evidence about promises of compensation which were said to have been made by Moulinie or Mr Prosper or Mr Todd before people left the islands. Even if it did, it would not arguably found a case of misfeasance. Mr Todd's note of the meeting on Diego Garcia does not suggest that any promise was made by him and it would have

been against policy for him to have done so; it is not realistic to suppose that he would have done so in advance of arrangements being made with Mauritius. Mr Moulinie had no authority to say anything about compensation being paid by the UK in 1966 which is the only vaguely recollected occasion when he might have done so. So far as statements by Paul Moulinie are concerned, there is no evidence that he had any authority to make them for the Defendants or that any such authority would have been given earlier than the agreement with the Mauritius Government in 1973. The real problem with the oral evidence, apart from its many unreliabilities generally looking back over 30 years, is that is inconsistent with the compensation intentions which the Defendants had before any arrangement with Mauritius in 1972. The sum was agreed at £650,000 in September 1972 and paid in spring 1973. The UK aim was to persuade those leaving Diego Garcia not to go to Mauritius and to go instead to the other islands, so it would have been especially surprising if the promises of compensation had been related to the option which the UK did not wish them to take. There is ample room for confusion in Ilois minds over what was promised to those on Diego Garcia if they would go to Peros Banhos and Salomon. There is no evidence about what was said on Salomon. What Mrs David said was said on Peros Banhos could have related to that agreement with Mauritius. The Ilois petition of about October 1974, referring to the promises made by a "*military chief*" that money would be paid to the Mauritius Government by the UK for compensation for the Ilois could also refer to that agreement but it would not have been said before the departures from Diego Garcia. Accordingly, it does not seem remotely likely that anything before the agreement with Mauritius or before the departures from Diego Garcia about compensation in Mauritius, was said with the permission or authority of the UK Government. If it was said after the agreement with Mauritius, and affected the Ilois' decision as to whether or when to leave, it is not untrue. There was provision for compensation; it turned out to be far smaller in practice when eventually disbursed in part because of the rampant inflation over the period in Mauritius and the growing debts of the Ilois.

#### Components of misfeasance: land acquisition

334. It is now alleged that the purchase of the lands of Chagos Agalega Company Limited under the Acquisition of Land for Public Purposes (Private Treaty) Ordinance 1967 was additionally unlawful because the Ilois had some property interests which meant that they should have been notified of the purchase. The method had been adopted to avoid giving them notice. There are a good many hurdles in the way of that as an argument as to illegality at all. The Commissioner had legal advice about the making of the Ordinance. There is no evidence that he knew or was recklessly indifferent to any illegality in the making of the Ordinance or in its use on this occasion. No Particulars are provided to assist. This allegation should be struck out of the misfeasance claim. I deal further with this point when considering the property claim.

#### Components of misfeasance: deceit and the UN

335. There are a series of allegations about deceit and pretence. In summary, the Claimants allege that the Defendants had a policy of denying that there was a permanent population of Ilois even though they knew the truth; they used language in public which was designed to convey a picture which they knew to be untrue and to quiet anxieties and controversies which would otherwise have arisen. This was done to deceive the UN in relation to the application of Article 73 to BIOT, the Commonwealth Heads of Government, and MPs. It is pleaded that it was unlawful for a policy and administrative decisions to be based on a pretence and that that constitutes an illegality for the purposes of misfeasance. This was



given effect to in the removals and exclusions with which I have dealt. There is a related allegation that the Defendants adopted a policy in 1970 of concealing from the Chagossians, the Mauritius Government, (until 1972), and others that the Chagossians were Citizens of the UK and Colonies in order to encourage the Mauritius Government to take them in and on more favourable terms than might otherwise have been negotiated. Deceiving one's citizens is also illegality for the purposes of misfeasance. There is also an allegation that the Defendants wilfully failed to balance the individual needs of the Ilois against the foreign and defence interests of the UK by failing to communicate to them their true legal position and the Government policies that affected them.

336. The pleading of these allegations suffers from some drawbacks. It looks as though they are intended to form the basis for saying that the removals were unlawful, but some relate to subsequent periods. So they must be free standing allegations of misfeasance.

337. It is quite clear that the decisions and actions of the Defendants were not taken on a false basis, which appears to be the first allegation. They investigated through surveys what the population was and certainly knew by the Todd report of 1967 that the Newton Report might have underestimated the numbers of Ilois at a time after the creation of BIOT, which some of the documents show was intended to have no permanent population at all. They were very well aware of the dual citizenship which was acquired upon the independence of Mauritius and that therefore the BIOT population retained its UK and Colonies citizenship. They had a clear and honest picture that the Ilois had no property rights. It is not said in this respect that the Defendants deceived the Claimants, who obviously also knew the true position.

338. I accept that, without going through all the documents, the Government arguably sought to paint a different picture from the one it knew to be correct in its dealings with the UN over whether there was a permanent population. The Defendants would have maintained that same stance generally. But this does not advance the Claimants. This is not an allegation of deceit on the Chagossians who knew what the true position was. I do not see how it can be alleged that there is an actionable legal duty of candour and truthfulness towards the UN, other governments or politicians or MPs, let alone one which can ground an action for misfeasance by those to whom the remarks were not made. The consequence of the lack of candour or half truths may have been that those who might have created more political controversy in support of the Ilois or in opposition to the defence facility, did not do so, but that does not ground an action for misfeasance. It is perfectly possible to recoil from some of the comments without them grounding an action in misfeasance. But whether or not it is wise to conceal facts from the UN or to give a false impression to other Governments must depend on a political judgement which it is for Parliament to judge. There might have been good reasons for not giving ammunition to those who would oppose the UK's defence policy and for trying to find formulae which are partial truths and only to be used if necessary. The judgement that the defence policy might require UN obligations not to be fulfilled is a matter which is not justiciable in this Court. This is a matter of foreign relations and defence strategy. The way questions are answered in the House of Commons is a matter for the House of Commons.

339. Mr Allen made broader submissions about the UN in relation to deceit, but it is convenient to deal with them here. The essence is that the Defendants made false representations to the UN knowing them to be false in order to prevent the protection of Article 73, which it is said the UK knew would apply to BIOT, being afforded to the islanders. But for those deceptions, the UN would have tried at least to give effect to their rights. Mr Howell submitted that this was in effect either trying to enforce rights under an international treaty or trying to obtain the ruling of the Court on the meaning of an international treaty, because the essence of Mr Allen's argument was that what the UK did was in breach of the UN

Charter, which was a matter which could not be determined without reaching a conclusion on what it meant or how it applied to the facts. This was not the same as the deception of A, through representations to B, intending B to be the conduit for A to be told.

340. Mr Howell relied upon a number of authorities. In *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 499-501, Lord Oliver said that municipal courts could not adjudicate on or enforce rights arising out of international treaties, unless they had been incorporated into domestic law. Individuals cannot derive rights from such treaties nor are their rights affected by them, as Mr Allen pointed out correctly was the position with the various UK/US agreements which led to the establishment of the defence facility. The UN Charter was outside the purview of the court not only because it had been made in the pursuit of foreign relations but also because it was irrelevant. This was said to be well established. In a thorough review of the authorities in *Lonrho Exports Ltd v Export Credit Guarantee Department* [1999] Ch 158 at p179, Lightman J said that the court had to follow the interpretation of the Crown and cannot venture its own interpretation of international treaties, nor could it seek to see whether the Crown had implemented its provisions in good faith as required; there are of course exceptions but they do not apply here.
341. It is not possible to reach a view on whether the UK acted in breach of the Charter without analysing what the Charter means. Mr Howell persuaded me that I could not say that the UK Government had decided what it meant; it had acted because of the way in which it knew others might seek to interpret it. He illustrated that in relation to BIOT: it was not clear that all non-independent territories were non self-governing for the purposes of Article 73 and had a duty to be brought to independence; that would rather depend on the circumstances. There had been no General Assembly resolution that BIOT was a NSGT. The UN's concern has been with the detachment of BIOT. Here Mauritius would be, and would have been after the creation of BIOT, anxious lest BIOT became independent and would not support the UK in achieving that; the Seychelles likewise till its islands were restored in 1976.
342. In *R (Abbasi) v Secretary of State for Foreign Affairs* [2002] EWCA Civ 1598, 6<sup>th</sup> November 2002, [2003 UKHRR76] the Court of Appeal held that there was no authority which supported the imposition of an enforceable duty to protect the citizen, and that although the court was able to intervene, in limited ways, in the way in which the FCO used its discretion whether to exercise its right to protect a citizen, the court would not interfere with matters of foreign policy. The question of whether a court would intervene rather depended on how administrative the decision was or whether there was a policy which might give rise to a legitimate expectation. Here, the relationship with the UN and other states over how to deal with the proposal for an internationally controversial defence arrangement and the consequences for the people on the islands in terms of UN rights is plainly a matter of high policy, in which relationship the Court should not interfere. This allegation should be struck out anyway. I am also satisfied that the Claimants' broader submissions seek to recover damages for misfeasance or deceit by reference to what was said to the UN or to other Governments and to that extent those claims are unarguable. But, as Mr Allen pointed out, the terms could be referred to for what they showed about the factual background and I shall deal later with whether this is a case of deceit through a third party who was intended to be the conduit for the deceit.
343. I accept that the Government also arguably sought to avoid referring to the dual citizenship of the Ilois between 1970 and 1972 when dealing with the Mauritius Government. Again, I do not see how that can ground an allegation of illegality, let alone one upon which the Claimants can rely in a misfeasance action. This is a matter of foreign relations. Besides, the Mauritius Government only had to look at its Constitution and the Mauritius Independence Act which made the position clear. The Prime Minister of Mauritius knew of the position.

344. One needs to be careful about what is deduced from the documents anyway about what was known or said about the status of the Ilois. Some are drafts or discussion documents and not necessarily the actual public stance adopted. Some are only for use if necessary and it is not in evidence whether what was proposed to be said actually was said. Some contain comments to protect or advance a particular departmental interest. I say that because there is a danger that the internal documents are treated as the final acts, although they may suggest an outlook, thought process, intention or knowledge. At this stage it is reasonably arguable that what was the agreed line was used on some occasions to the UN or other bodies. However, the description of the Ilois as workers is true on the evidence. No-one worked other than for the plantation company or in a domestic capacity for senior staff. There was no independent economy. Even if for those who were too old to work, there was a company pension or rations, many did light work. There may have been women who did not work at various times but their husbands were working for the company. But there is no evidence of self-employed labourers or fishermen or retailers. At least that is a view which could properly and honestly be held and the reports of Mr Todd suggest that all the Ilois were employed. It is also clear that no-one thought that the Ilois had any property rights to any part of the islands; the islands were owned either by the plantation company or by the Crown. It may be that that view is possibly wrong, but it is a view that was genuinely held and there were perfectly good reasons for holding it. How such a position fits with the rights of those same people who have been there for a number of generations is a matter of some difficulty. The partial truths focussed on the former and ignored the latter part of the problem. The problem with the phrase "*contract workers*" is that whilst it is true in one sense, it also conveys, perhaps intentionally, the different impression that they are short term or transient. At other times the language shifted to refer to "*transients*" which pushes further still away from the truth and the numbers who might have a wider right were minimised by aligning them with the short term workers. But the arguable factual point needs to be seen in that light.
345. I do not consider that it is misfeasance for the Defendants, without more, to seek to make the facts fit what they have said the position is. That simply goes to the question of whether the removals were lawful or not, and whether it was lawful to remove a permanent population. If it is, the fact that their status has not been told truthfully and fully to the world does not alter the lawfulness of the act. I do not consider that the Defendants' approach to the description of the Ilois' status evidences the requisite mental state for misfeasance. The purpose of the half truths or lies was not to deceive themselves as to the law and to enable decisions to be taken on a false basis. They knew only too well what the true position was and that is why they acted to bring about the clearance of BIOT, if that is what they actually did. They misrepresented the position to others for political reasons so as to quell opposition to the defence proposal, to the creation of BIOT and to the removals.
346. I do not consider that the fact of such an approach to the existence of a permanent population, as is arguably revealed by the documents, evidences guilty knowledge in relation to other acts which are alleged to be illegal. There is no connection between them. Nor do I consider that the sometimes harsh and contemptuous language used about the Chagossians shows any requisite knowledge or recklessness, much though I understand why Mr Allen sought to rely on it.

Components of misfeasance: deceit and citizenship

347. So far as citizenship and the Chagossians is concerned, this pleading, unlike the allegation over the permanent population does contend that the true position was kept from the Ilois. It is said that the Defendants sought to conceal

the position and also that they deceived the Ilois, which is I suppose, an allegation that the Defendants' endeavours were successful. This latter allegation is entirely unparticularised. There is no documentary evidence suggesting that the Ilois should be told that they were not UK citizens or that the Mauritius Government be asked not to tell them. There is no evidence of any Ilois being told that he was not a UK citizen when he was, whether in their oral evidence or in the documents. The evidence is all the other way: when they asked they were told. Michel Vencatessen had "*British Citizen*" stamped in his travel card in the Seychelles. It was set out perfectly clearly and accurately in the Defence to the Vencatessen litigation in 1975. The Minister, Mrs Chalker, was asked about the position in 1981 before the delegation came to London and replied correctly. Cherry Alexis applied for and got his British passport in 1985.

348. As to the former allegation that the Defendants sought to conceal the position, it is readily arguable that the UK Government was deliberately not forthcoming to the Ilois, and especially not in the early days of the decision to evacuate or during the removals and the early years in Mauritius. It arguably adopted the policy of saying something less than the whole truth in the hope that the implicit denial would be effective. In October 1974, (8/1373-1374), it declined to assist the Ilois, in response to a petition seeking its help, by saying that Mauritius had accepted responsibility for their resettlement and that it could not intervene between Mauritians and their Government. A Mauritian newspaper was pursuing the line that the Ilois were British citizens. Mr Howell said that it was an accepted principle of nationality law that one Government would not intervene between its citizens and the Government of the other country of which they were nationals when they were in that country and that is the principle which underlay the stance. Mr Allen said that that principle could not apply where the individuals were in that other country as a result of wrongs done to them by the country from which they were now seeking protection. Either contention may be the legal position, but the principle of dominant nationality was not the reason, arguably, for the non-intervention. The documents are consistent with a desire to avoid it being known that the Ilois were dual nationals, unless the truth had to be told. The UK Government may well have known that the Ilois did not know really what their British status was, and have done nothing to enlighten them.

349. I do not consider that omission to be an arguably illegal act or one which would have been known to be illegal. I do not accept the general premise of so much of Mr Allen's argument which relies on the assertions of a governmental responsibility arising out of the fact of citizenship. I do not see the source of a positive obligation on a Government, unpalatable though it may be, to tell its citizens of their legal status. No untruth was said; although the Defendants were avoiding telling the whole truth, they did tell the truth when the issue directly came up. If the author intended to create a false impression, I can see a basis for his acknowledging that that was wrong in a moral or political sense; but, if that were illegal, there is nothing to suggest that he suspected that it might be. The Defendants' actions were on a number of occasions harsh, callous and less than wholly candid, arguably. It may be that the Defendants should have communicated more with the Ilois about their situation as a matter of responsible politics; it may be that there are many views possible on that. But I am unable to find the illegality in that which would ground an action for misfeasance, arguably.

#### Components of misfeasance: overriding the islanders' interests

350. Finally, it is alleged that the Defendants acted with a conscious disregard for the rights of the islanders and allowed other interests to override them completely. This may in part be the same point in fresh language as I have already considered. It is also wrong on the facts. The documents show some concern about whether the US can be persuaded not to take the whole of BIOT; there were some albeit fruitless endeavours to persuade the US to take Ilois

workers. The submission to the Prime Minister and other documents show that although the removal of all the islanders was envisaged, their welfare was to be regarded as an important consideration. There were no removals until after arrangements had been put in place for them to go to countries of which they were citizens and which would take them. Some already had a degree of connection with those countries. There was an agreement for a resettlement fund which would have been more effective had it been distributed earlier by the Mauritius Government. Some thought went into provision for their resettlement. What was done and omitted can readily be criticised but it is simply wrong to say that all was done in disregard of the Ilois and conscious disregard is not justified at all. The fundamental problem was that there was an irreconcilable clash between the interests of the Ilois and the defence interests of the UK and USA. The resolution of that clash was a matter of politics at a fraught time internationally. Whether as the losers in that clash, the Ilois were treated as they should have been is another matter.

#### Misfeasance: conclusion

351. Accordingly, I do not regard there as being an arguable case of misfeasance. If there were, I would stay proceedings until there were a proper pleading of who did what and with what knowledge or recklessness. The pleading is wholly inadequate for allegations of that gravity and the material exists for a far more explicit pleading, if the case exists. Some of the individual allegations are inadequately pleaded, or are too vague to remain anyway and I have indicated those which I would have struck out. It is also impossible to see how the tort could apply to those who left Chagos whilst the islands were still part of Mauritius, or who had not been born there by 1973.
352. Mr Allen says that it is premature to reach a conclusion on this, as on other matters, in advance of full disclosure of documents and cross-examination. This, he reminds me correctly, is not a mini-trial. He pointed out all that was said by the majority in the House of Lords in *Three Rivers*, although there is also an application for summary judgment here. I am acutely conscious of the gravity of the allegations and of the treatment meted out to the Chagossians by this country as a colonial power. But I cannot allow an argument to continue for no better reason than sympathy with the Claimants' collective misfortune. There is no basis for supposing that there are any significant documents on the Defendants' side which have not been disclosed. The spirit in which the Defendants have conducted this litigation is different from that in which the earlier litigation started so long ago by Michel Vencatessen was conducted according to Mr Gifford. In any event, the Claimants can read all the relevant documents released under the 30 year rule. Mr Allen proclaims the arrival of volume 23 as the proof that it could not be said that there were no more documents. I accept that there may be documents which have not been disclosed; but that is because the allegation leading to their disclosure has not been made. Volume 23 responds to the allegation that the Private Treaty Ordinance documents had not been disclosed and the Claimants might have wished to make an allegation of targeted malice, a late piece of speculation by the Claimants. The disclosed documents do not support that allegation, they show it to be unsustainable and it has not been pursued. Mr Allen seeks to make something of the documents which have been revealed in another context. But that amounts to saying that if he makes more unfounded allegations, some other documents may emerge by that sidewind. I do not think that anything of significance emerged from that late volume. I am wholly unpersuaded that I should allow the misfeasance case to continue on the speculative possibility that something significant will be thrown up in view of what has already been disclosed, the 30 year rule, the evident openness of the Defendants, and in the absence of any obvious undisclosed stream of correspondence.

353. One of the factors which persuaded the House of Lords to allow the *Three Rivers* case to continue was the prospect that cross-examination of the Bank's witnesses might throw light on events. Mr Allen suggested some topics upon which he would like to cross-examine. It is not helpful to his cause in that respect that he was, until his closing submissions, unwilling to identify anybody against whom an allegation personally was made. How was the witness to be identified to whom he might wish to put these points? As I understood his case, after taking up some time trying to discern the legal framework to what he had painted with a broad brush and general feeling, the senior Ministers were not the only targets of these allegations but anybody who featured as the author of the documents which he relied on. So he had a large cast list. But the Prime Minister and Foreign Secretary in office from 1964 to 1970 are dead; the Foreign Secretary from 1970 to 1974 is also dead. Sir Edward Heath is not recorded as having any personal involvement, unlike his Foreign Secretary. A number of other Ministers, from that and later periods are dead, though not all. I do not know about the Commissioners or High Commissioners and Governors. But Mr Todd is dead. Many of those who are alive or who might be are elderly. All those who gave evidence about that period would be doing so about what they had known or believed thirty or more years ago, and however wide Mr Allen casts his net the period crucial for this claim is 1965 to 1974 or thereabouts. I do not believe that they would be able to do more than to rely upon what the documents say. Mr Sheridan, giving evidence about events 20 to 25 years ago was reliant on the documents for his understanding; he accepted what they showed even though he had no actual memory of many events. Mr Glasser was in much the same position. Mr Grosz, who is not elderly, dealing with events of 10 to 20 years ago was unable to remember important details and was reliant on interpreting documents, which did not always refresh his memory. The evidence of the Chagossian witnesses showed how the passage of time had diminished the accuracy and extent of their memories. Where the evidence of a witness is inconsistent with the extensive array of contemporaneous material, it is very difficult to see how the former rather than the latter would be preferred.
354. There is no reason to suppose that the role of a witness, linking and explaining documents, is of particular importance in this case. The documents are extensive. They were not written for public consumption for the most part and there is no reason to suppose that they do not contain the actual views and beliefs of the authors. They had no reason to deceive each other. The documents, by their very tone, suggest internal candour. There may, of course, be an element of self-protection in some of what is written by one official to another on a controversial plan in case of trouble later if it all unravels, but that aspect is unhelpful to Mr Allen's approach. Mr Allen's case as to the iniquity of the Defendants' actions and motives is that the documents show it. I have dealt with what they may show, but it is difficult to see that a new case could be fashioned out of cross-examination. A witness might be asked about what he knew or suspected for the purpose of the mental element of the tort, but the documents explain what was known and believed and why the stances and lines which Mr Allen criticises were adopted. Appealing though it might be, and in one sense perhaps justified, it is not the function of litigation to provide a forum in which, outside of the framework of the torts alleged, cross-examination is permitted so as to achieve the effect of an inquiry into possible government failings and wrongdoings of the nature generally alleged by Mr Allen as his starting point for the consideration of this tort.
355. Mr Allen suggested that particular areas where cross-examination would advance his case were about why the Chagossians were not consulted in relation to the plans for the Chagos, what was said in Whitehall but which is not referred to in the documents and what historical research was done into the position of the Chagossians in the 1960s and if none, why not. As to the first, I have already dealt with the possible duties as a matter of law. I would have thought that the

answer as to why they were not consulted about whether there should be a defence facility was tolerably obvious; it is discussed by the then Foreign Secretary in the memo of April 1969. I cannot see what any cross-examination would advance. They could have been consulted about what was to become of them; that failure is arguably unlawful. But I cannot see how cross-examination has any prospect of showing what the documents do not even hint at, which is that whoever Mr Allen targets as a relevant malefactor, knew or suspected that there was a legal duty to do so.

356. As to the second, I have already dealt with the significance of the documents. People communicated by documentary means, they minuted meetings, they wrote notes on each others' memos. Communications with the UN mission or the BIOT Commissioner or High Commissioners were in writing. There was every reason for officials to put down what they thought in writing. So many were involved that it is difficult to see that there could have been some general conspiracy or even a tight knit one to keep off paper the supposed recognition that there was something perhaps unlawful about what was proposed. More curious still, the notion that they were prepared in robust or callous language to deal with the way in which the political problems were to be handled, upon which Mr Allen relies so heavily, and yet were to deal with other, legal, anxieties in conversations never to be recorded. His case is that the papers raise an arguable case of misfeasance; they do not. He cannot hope to make it good by a speculative, wide-ranging cross-examination of whomsoever he eventually identifies, who is still alive and can remember what he thought at the time other than through the documents. It is not without importance in this context that, at any trial, the burden will be on the Claimants to prove their case and to do so with the cogency required in relation to allegations of such gravity.

357. As to the third, it is clear from the documents what research was done. There are also subsequent internal reviews, one in particular by the FCO in 1983. Whilst in certain respects its conclusions may be inadmissible, it is a relevant document in showing what material was available within the FCO at the relevant times. None of his other suggested topics bear upon this tort eg why was no provision made for Seychelles Ilois, to which the answer appears many times in the documents, or why did the UK Government not insist on simultaneous Creole translations in 1981 and 1982 (for which no-one asked).

358. It may be right that there is more evidence which the Chagossians could give on the evacuations and their inability to return. But it was their wish to give oral evidence about these matters so as to establish that their various allegations had a factual base and to give colour and context to the legal issues. They were put forward as typical. If they did not support all the allegations of fact in the pleadings, as they did not, there is no reason to suppose that any others would do any better. The pleadings were presumably based on the witness statements which had been prepared for the hearing and on those prepared for the Bancourt Judicial Review. In certain respects the basis of the pleading has been shown to be inaccurate. I do not accept that an allegation should be made and then the witness found to sustain it. In other respects, the evidence has clarified what was ambiguously alleged in a way which was capable of suggesting one thing while meaning another. I refer to the use of the words "*forced*" and "*coercion*" in relation to the actual evacuations which suggest possibly that physical force was used when it plainly was not; it means that they had no choice.

## **Deceit**

359. There is a familial resemblance between the pleadings, and their deficiencies, in this tort and misfeasance. It is pleaded that the Defendants made false statements of existing fact to a range of people, including but not limited to the Chagossians, knowing them to be false, intending the Chagossians and others to act on them to the detriment of the Chagossians. Although the individuals

making the representations are not specified, this is a case where the pleadings incorporate by reference specific documents which may or may not identify some of those against whom this serious allegation is made. But the pleading makes it clear that it relies as well on other unspecified documents. As with the inadequate pleading of the misfeasance claim, this vagueness is not appropriate for the reasons which I have given. A claim of dishonesty against a large group of individuals, or some and perhaps not others, is unfair and a wasteful way of conducting proceedings. There is no reason why they should not be identified even if it is only as the author of the document. I would require that to be done before any further steps were taken. That should enable it to be seen what is alleged to have been represented to whom and how. Anything less would make the efficient preparation of the case very much more difficult. There is no more scope for corporate dishonesty in deceit than in misfeasance, other than by the attribution to a corporate body of the dishonesty of an individual. *Jaffray v Society of Lloyd's* [2002] EWCA Civ 1101 CA 26<sup>th</sup> July 2002 at 65, 70-74, and the individual conclusions, illustrate that in the context of deceit.

360. The false statements of past or existing fact alleged were that the Chagossians were not permanent residents or belongers of the Chagos islands, that they had no right to remain in the Chagos islands, that they were not British citizens and that they had no rights under the UN Charter. These representations were made expressly in the identified documents or impliedly "*from non-disclosure or inaction*" to the Chagossians, the UN, the UK Parliament, the British press and to the Government of Mauritius. There was a duty on the UK to provide full and frank information to the UN so that it could carry out its obligations to protect the Chagossians. The Defendants acted dishonestly because they created and maintained the fiction that there was no permanent population even though they knew that not to be true. They did not tell the Chagossians of their possible rights as belongers or British citizens and they deceived the Mauritius Government on the same point. They failed to report to the UN on BIOT as they knew they should have done. They tried to mislead the press and Parliament and tried to minimise the publicity given to the Immigration Ordinance.

361. What was pleaded as the purport of the identified documents, and of the whole documentary record, was that the Defendants knew that there was a permanent population, that they devised terminology to convey the opposite to others than the Chagossians, and sought to conceal their UK citizenship from the Mauritius Government. Those particular representations are acknowledged not to have been made to the Chagossians to whom the representations are rather different. The purpose of this pleading was to allege that the deceitful representations were made so that those who might have helped the Chagossians to assert their rights did not do so. These agencies and organisations included the UN, Parliament, the press and the Government of Mauritius. This led, as intended, to evacuations without international interference and significant demur from those bodies, so they acted on the misrepresentations as intended by doing nothing.

362. Recognising that the Chagossians would have known that a representation to them that there was no permanent population was untrue, Mr Allen pleaded that different but related representations were made. These were that they had no choice but to move out when required and were not told of their rights or their position as UK citizens. They had rights as the permanent population of a non self-governing territory under the UN Charter. Unfolding events were presented as a *fait accompli*. The representations were "*buttressed*" by statements at meetings that the islands would become dangerous, that the US needed all the islands, that compensation and homes would be provided. They were "*reinforced*" by intimidation: the arrival of troops, low flights and the killing of the dogs. The Chagossians acted as expected and left, complying with instructions with which they thought, wrongly, they had to comply, unaware of their rights. The



Defendants took advantage of their poverty, ignorance and illiteracy; they controlled their means of communication with the outside world.

363. Mr Allen argued that the representations to others than the Chagossians were relevant because misrepresentations did not have to be made directly to the person for whom they were intended. He referred to *Swift v Winterbotham* 1873 [LR] 8QB 244. A bank employee gave a false reference to another bank, inquiring of it as to the solvency of its customer, intending that the inquirer's customer should act on the lie and engage in a business deal which failed. The misled customer sued the bank which had given the false reference. This does not support the sort of case which Mr Allen mounts. It is plain that a misrepresentation can be made through a conduit, and that it can be made to an agent. It can be made to someone who, having sought the information as an agent, is expected to pass it on to the person who acts upon it in the way intended. But Mr Allen's case is that the representations were not passed on. They were acted on by others in an entirely different way. I also found the case of *Farah v Home Office*, 6<sup>th</sup> December 1999 CA (unreported) of no assistance. It concerned a representation about immigration status to a carrier in the expectation that it would decide not to carry the passenger; such a representation arguably founded a negligence action because there was arguably a sufficient degree of proximity between the Home Office and the passenger to give rise to a duty of care.

364. I do not consider that it is arguable that the Claimants can sue in deceit in respect of representations which were not made to them directly or to an agent and in reliance upon which they did not act, being unaware of them. I regard that as obvious. *Jaffray* illustrates it, but it is incontrovertible. I accept that it is arguable that false statements were knowingly made to third parties about the status of the Ilois as residents on Chagos, but with the intent that those third parties should act on them, rather than communicate them to the Ilois, who would have known that the statements were untrue. They may have been intended to persuade those third parties to do nothing to investigate or assist the Ilois, or to reduce opposition to the Defendants' defence policies. Mr Allen sought to create a variant tort of deceit to fit the problem. He urged that it was arguable that if a false representation is made to a third party, intending him not to alert the Claimant to harm which is intended to be done to him by the representor, but which he would have helped to avert or to warn the Claimant about, the variant tort of deceit would have been committed. This he said was consistent with principle. It was stronger if there was a duty owed to the Claimant by either of the others but not essential. I do not follow this. If the act done or representation made to the Claimant, whether by word or deed, is a wrong which sounds in damages as a tort, the Claimant has his remedy. If it is not, I do not understand why the fact that a lie has been told to a third party converts it into one. This whole basis of claim is posited on an absence of communication between third party and Claimant. This is not a case where the third party owed a legal duty to communicate with or to look after the interests of the Claimants, in the exercise of which the false statements interfered, deceiving the Claimants. Indeed, Mr Allen really sees this part of his argument as strengthening his case that there was a deception practised on the Chagossians.

365. The only relevant representations are, indisputably, those which were made to the Chagossians. There are no agents to whom they were made. It has to be pleaded that they were as to past or present fact, the natural and probable result of which was to induce the Chagossians to act on them in the way in which they did act, that they were intended to act in reliance on them and suffered loss in consequence. The representation must have been known to be untrue or to have been made recklessly, not caring whether it was true. As with misfeasance, this is a tort which requires to be proved with cogent evidence.

366. The specific documents pleaded cannot constitute any relevant representations because they are all internal documents with a restricted

circulation and there is no evidence, and it would be hugely improbable anyway, that they came into the hands of the Claimants or were read by them. Other documents may evidence what was said to them at various times, but the striking feature of those documents is that not one was for public consumption and although some may have led to a public statement, those are not referred to specifically. What is meant by the assertion that they were made by implication from non-disclosure, is that the specified representation was not made and that its content was not expressly denied either. There may be occasions where there is a duty to speak such as where a representation was made believing it to be true but the representor discovers that it was untrue, but none of those circumstances apply here. Silence does not ground deceit by itself in the absence of a duty to speak and no such duty is alleged.

367. There are a series of allegations about the way in which the evacuations were effected through the representation that the Chagossians had no right to remain on the Chagos islands and no choice but to go, buttressed and reinforced in various ways. The representation is not alleged to have been that they could not remain on any individual island, or that they could not remain because their contracts had been terminated or their employment ceased with the closure of the plantations. It is not said that they were falsely told that they had no right to be on any particular island, only that they were falsely told that they had no right to remain on even one island.

368. There is very limited oral evidence that any such representation was made but I can see an argument that it is implicit in the conduct of the Defendants, is consistent with what they reveal about their thoughts in the documents and is what would have been said if the issue had come up. So I think the Claimants have some prospects of getting some kind of case to that effect off the ground even before the evacuation of the last island in 1973. If it were said it would, arguably, have been to encourage islanders to go peacefully when the time came. I have already expressed my views on the prospects of the intimidation allegations, the promises of compensation and the statements of danger being made good but that does not mean that the basic premise for the allegation that the representation was made is ill-founded. I have also dealt with the absence of evidence to show that they were made on behalf of the Defendants.

369. The representation is alleged to be false because the islanders were the permanent population of a NSGT and thereby entitled to the protection of the UN under Article 73. I do not understand how this can be thought to be arguable. The Article confers no individual rights and can scarcely be thought to have done so. The UK is entitled so far as any domestic law obligations go to ignore it. It is fanciful to suppose that there could have been representation which was intended to cover international treaty obligations between states. Mr Todd, for example, would not have intended any statement to cover that. He would have been focusing on the contract and residence position. Even if there had been such a representation, it would be necessary to show that it conferred rights against the UK on the people of BIOT. I have already explained that the nature of those obligations, as between states and the UN, are not justiciable nor are any representations about them capable of founding any arguable deceit claim. There is no evidence that anyone who might have made any such representation to the Ilois knew of or was reckless as to the falsity of that statement. As the Article could not ground a right anyway, even if the position was falsely stated, it would not have entitled them to stay and so no loss flows. The representation, arguments about the UN apart, is either true or, insofar as the effect of the *Bancoult* case is to falsify it, it is not arguable from any of the material that it would have been known to be false or suspected to be false. There is no evidence which suggests that those who made the statement did so other than in the belief that what they did and said was true.

370. It is not clear whether the allegation that they were said not to be belongers was something which was said to the Chagossians. I rather doubt it,

but the concept is sufficiently uncertain for it to be very difficult to see how any statement about it could be made deceitfully. Neither of those representations are of existing fact either. There is no evidence that any Claimant was intended to or did act upon any such representation anyway.

371. Dealing with what was said about UK citizenship in connection with achieving the removals, there is simply no evidence that any representation about it was made at all. It is therefore alleged that the position was concealed. That goes nowhere in the absence of an arguable duty to state the position. The usual suspect of "*governing responsibility*" is the only candidate, no duty being specifically identified in this context. It is not an arguable basis for imposing a duty, breach of which amounts to deceit. There is no arguable case in relation to the tort of deceit.

## Exile

372. Mr Allen submitted that there was arguably a tort of unlawful exile but that the court should be slow to attempt any compendious definition. I am prepared to go along with that. Its essential features would be that the Crown could not send out of British territory a British citizen of the territory or a believer of that territory without either the free consent of the person or by statutory authority. Similarly the Crown may not prevent or obstruct the return of such a person without statutory authority. The tort continues to be committed from the moment of wrongful departure until return. Here, it was alleged that the Chagossians were "*belongers*" to Chagos (rather than BIOT), and were citizens of the UK and Colonies or British Dependant Territory citizens by connection only with BIOT. They were removed without their consent, or without fully informed consent, and those who had left voluntarily were prevented from returning or their return was obstructed as was that of the islanders who left on the evacuations. The tort continues in relation to Diego Garcia because the Crown has not contemplated that they can return there at least to live; it continues in relation to Peros Banhos and Salomon because the Crown has not removed the practical impediments to that return, which include the cost of transportation and the creation of an infrastructure which would sustain a modest but viable way of life.

373. Mr Allen submitted that the right not to be exiled otherwise than with consent or statutory authority is well established. He referred me to Magna Carta: "*No man shall be ... exiled ... but by lawful judgment of his peers or by the law of the land*". A number of academic histories of the law and well known commentaries from Blackstone, Holdsworth, Stephen and others broadly support that position. Exile or transportation as a punishment, to which consent was given to avoid something worse, was replaced by statutory provisions for the transportation of convicts to colonies. International treaties, to which the UK is a party, reflect that developing law. The Universal Declaration of Human Rights, 1948 states in Article 13(2) that "*Everyone has the right to leave any country including his own and to return to his country*". The International Covenant on Civil and Political Rights, 1966 states in Article 12(4) that "*No-one shall be arbitrarily deprived of the right to enter his own country*", a Covenant ratified by the UK in 1976.

374. He next reasoned that those treaties and the developing jurisprudence over the years meant that there was a common law right not to be exiled. In *Plender on "International Migration Law"* 2<sup>nd</sup> ed 1988 p133, it is said that "*The principle that every State must admit its own nationals to its territory is accepted so widely that its existence as a rule of law is virtually beyond dispute*". But he also considers who can enforce that right, whether it is the expelling state or the individual and whether it is the enforcement of a right at international law which requires the domestic law to have incorporated the principle of international law. He does not set it out as a principle of common law in the UK which can only be removed by specific legislation; that may be the position but the quote relied on

by Mr Allen does not support his proposition read in context. In *Van Duyn v Home Office* [1974] ECR I 1337 at p1351, the European Court of Justice remarked, in relation to its approach to the free movement of workers and public policy within the Treaty of Rome, that "*Furthermore, it is a principle of international law ... that a state is precluded from refusing its own nationals the right of entry or residence*".

375. Mr Allen then made the very broad submission that such rules of international law were incorporated into English law without Act of Parliament being necessary even though Protocol 4 of the ECHR had not been ratified. I have referred to this earlier. Mr Allen relied upon the analysis of the doctrines of incorporation or transformation of international law by Lord Denning MR in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 553. The case concerned the developing international law to cope with the commercial activities of state bodies which might enjoy state immunity. Lord Denning took the view that international law was incorporated into domestic law unless it was in conflict with statutory provision; his change of view since *Thakrar* was to enable domestic law to respond to changes in international law rather than it being bound by the interpretation of international law upon a particular point when it was first decided, if international law had later evolved. Domestic law could evolve as the incorporated international law evolved. It may be that Mr Allen has put somewhat too broad an interpretation on *Trendtex* if he regards it as authority for the proposition that international law is enforceable without more by subject against Crown so long as no Act of Parliament is contravened.

376. Mr Allen also suggested that no Government could sever its connection with its citizens; it owed the obligations to them which reciprocated the duties and loyalties owed by them. But he appears also to have accepted that the state could sever that relationship, if it did so by lawful means.

377. He said that where there was a right, there was a remedy for its breach in tort citing *Ashby v White* [1703] 92 ER 126 at p134 and in what he called modern jurisprudence, *Neville v London Express Newspaper* [1919] AC 368 at p392 and 405. I am not sure how far this sort of general point can advance his case. The first case is the earliest in the line of authority which developed into misfeasance. The question in the second case was not whether a tort should be held to exist, nor was the conclusion that wherever loss was suffered through a wrong, a tort should be created so that damages could be awarded. If that were so, damages would be available routinely for administrative acts which were unlawful, but they are not. The question was whether in order to recover damages for the tort which existed, it was necessary to show specific loss. He said that there were analogies with other torts such as trespass to the person or to property. That may be so but tells against rather than for another tort to be recognised, after so many years of the developing law on exile, during which time it has never been the subject of any argument, that I was shown, that it was a tort. An additional reason why it was argued that it should be a tort was that it would provide a remedy for wrongs and in that way hold liable those who did wrong, maintain the obligations of those who wield power to wield for its lawful ends only and thus vindicate the rule of law in a civil society.

378. The fundamental reason why the existence of this tort is unarguable derives from the very nature of the tort. It does not rely on any allegation of trespass to person or property. It is not a tort of deceit or misfeasance. It is not a tort of false imprisonment or negligence. It is no more and no less than a particular example of a tort for unlawful administrative acts, attempted in the field of immigration. It would be of wide scope. There is no logical reason why it should not apply to any judicially reviewable error in a deportation or entry visa decision. If the justification is that the Government should be encouraged to act lawfully, that argument would apply to very many categories of case. It is difficult to see why one group of people should have the benefit of tortious protection from unlawful acts, on the basis of citizenship or nationality or "*belonging*"

whereas others entitled to enter or to consideration should not. It has been clear for many years that an *ultra vires* act does not of itself give rise to tortious liability; *Three Rivers DC v Bank of England (No 3)*, per Lord Steyn at p190 (AC) and at p1230 WLR citing other recent House of Lords authority.

379. Mr Allen put forward no reasons why those principles should not apply to this case. Accepting for present purposes that a citizen could not be exiled as a matter of common law, that provides no reason for a tort to be created. The remedy is by way of Judicial Review, and the difficulties in that respect faced by these Claimants do not afford a basis for creating a tort sounding in damages. There is no parallel in false imprisonment; this is false exclusion and there are no analogous cases such as exclusion from the highway or a public place. There is no parallel in any general tort because this tort can by its very nature only be committed by the state; it was not seriously suggested that a private landowner other than the state would not be able to exercise its private law rights so as to exclude an individual from a territory if it owned the necessary land.
380. Nor did Mr Allen seek to rely on any statutory duty which he said was breached and which might sound in damages within the limited categories set out in *X (Minors) v Bedfordshire County Council [1995] 2 AC 633*. The Confirmation of the Charters, giving statutory effect to Magna Carta, was relied on by him to show how the common law had developed, not as the statute breach of which arguably founded a claim for damages. His references to international law do not directly assist. They create no individual rights. There was, contrary to what Mr Allen said, a relevant reservation to the ratification of the ICCPR 1966, which reserved the right not just to apply the Convention separately to each of the territories of the UK and Colonies, but also to apply such immigration legislation in each of its territories as it thought fit for those who did not have the right to enter or remain. This thus leaves open the question of who has such a right. I think that it is of some significance that Protocol Four of the ECHR has not been ratified. I do not find the concept of the "*belonger*" of real help. It is of significance where it is provided for in specific colonial legislation, but it was not part of the BIOT local statutory provision.
381. Mr Allen also alleges that the tort comprises the obstruction or prevention of the return of those who were exiled or who left voluntarily but wish to return. By "*obstruction*", Mr Allen has in mind, at least, a breach of an obligation to assist in the return of those who left voluntarily. An omission in that respect is said to be tortious. The indissoluble bonds of citizenship and the governing obligations imposed such a duty. This is untenable. There is no duty to provide transport, employment, the wherewithal to sustain life or accommodation and a refusal to do so cannot be tortious. There can be no obligation, still less a tort if it is breached, to make private land available. I have already dealt with the prevention of return on the facts, but there is no better justification for prevention of return being part of a tort of exile than there is for obstruction.
382. There can be no tortious liability for enacting the 1971 Immigration Ordinance, nor for enacting the property acquisition Ordinance which enabled the Crown to acquire the private rights which it then exercised. There can be no tort of exile in relation to the enforced move of islanders from one island to another; there is no possible right to stay on one particular island unless that particular island itself is the relevant territory of citizenship. There is no basis for arguing that there is any right, in principle, for the Chagossians who lived on Diego Garcia not to be removed from Diego Garcia to another BIOT island, let alone to another island within the Chagos Archipelago. If there is a right not to be exiled, and a right to return, it can only apply to BIOT and not to Chagos, let alone to every island within the Archipelago. None of the law relied on by Mr Allen would support such a right. It is a commonplace for people to have to leave the area in which they live because of Government proposals. Here the Claimants can only succeed in relation to the removals from Diego Garcia, because the move from Diego Garcia to another BIOT island was temporary and the other islands were closed

as a consequence of the effects of the defence proposals. Much of the pleading of this tort is designed to promote such a right and to apply it to the other islands individually. (There is some evidence that the islanders regarded themselves as residents of one particular island rather than as residents of the whole Archipelago.) It is also designed to counter the effect of the 2000 Immigration Ordinance which permits return to Peros Banhos and Salomon, and which puts an end to any argument about the tort continuing. One can see how this is important to the Claimants but that is not the point in law. It is reflected in a pleading which makes no distinction between those who left the Chagos before the creation of BIOT, those who were born there, and those who were born on Mauritius and have never been there.

383. The tort does not arguably exist.

### **Property and rights under the Constitution of Mauritius**

384. These two heads of claim did not entirely overlap but as most of the relevant argument in relation to the Mauritius Constitution concerned property rights it is convenient to deal with them all here. Once again, the pleadings, at the third attempt in the Re-Amended Particulars of Claim, do not contain all the allegations raised by the Claimants' submissions. I shall deal first with those which are raised by the pleadings. The other points could be the subject of a further amendment.

385. The property case as pleaded is that the Chagossians acquired ownership of the land which they occupied by prescription or succession under the French Civil Code which was applicable in Mauritius and hence in its Chagos Dependency both before the creation of BIOT and in 1967 when the land was acquired from the Chagos Agalega Company Limited. This required thirty years occupation of the land but that did not have to be by the same person for the whole period. Once acquired, those rights were capable of being transferred or inherited. The Chagossians did the acts of an owner, such as building a house or growing crops, with the intent that they should be owners. All this was manifest and uninterrupted. The rights thus acquired entitled them to enjoy, exploit and to alienate the land. The rights were not acquired over Crown land; and it must follow that the claim is that they were acquired over the private land of the plantation company. I say this because although there is some land on Diego Garcia, at least, which was not in the freehold ownership of the plantation company, that land was thought to be Crown land, and the land which the company did own covered on any view the main areas where houses were to be found. No other private owner has even been hinted at as the person against whom this acquisition by prescription has occurred.

386. There are obvious problems in the way of this as the source for some of the general assertions about the rights of Chagossians and of the wrongs which it is said, but not pleaded, were done by the passing of the relevant legislation and by the acquisition of the land from the Chagos Agalega Company Limited. The right asserted is not one which is confined to someone who was born on the islands but could apply to the last occupier in the thirty year period, who could have been a contract worker. There are many Chagossians who might not have lived in a house which had been erected for thirty years. The latest point at which someone's house would have had to be erected on Chagos, in order to take advantage of this argument, is 1937 because, if by 1967 the right had not accrued, there would have been no right which it could have been said the relevant legislation and purchase improperly removed. No witness gave evidence that there was any such property although Mr Marcel Moulinie said that when he arrived in 1965, he had understood that some houses had been lived in by generations of Chagossians. But from the evidence as to how the houses were built, it is plain that in the years about which the witnesses spoke, many Chagossians built the houses in which they lived far more recently than 1937.

Indeed, no person at all is identified as enjoying a right so acquired. The questionnaire which is supposed to be part of the Particulars of Claim is quite incapable, except by happenstance, of identifying any person who could claim to be the beneficiary of the right as pleaded. The actual evidence given revealed the difficulty of statements attributing legal concepts of ownership, possession and occupation to those who naturally say in respect of where they live, that that is their house. Their claims were not supported by Mr Marcel Moulinie who denied that they owned any land. In the *Bancoult* case, Laws LJ said at paragraph 7 that no Ilois enjoyed property rights in any of the land but he did not have the advantage of the current pleading or evidence. I do not consider that I can at this stage hold that it is not reasonably possible that such a claim could be made out and Mr Howell did not press its unlikelihood. So I shall proceed on that basis. Nonetheless, the very weakness of the evidence to support the claim is relevant to the assertion that there was any knowledge of or reckless indifference to illegality or that the legislation was enacted or used to acquire land in a manner which was designed to defeat the property rights of Chagossians.

387. The unpleaded allegations are, first, that the Acquisition of Land for Public Purposes (Private Treaty) Ordinance 1967 No 2 was *ultra vires* the BIOT Order, as was the subsequent acquisition because the Ordinance and the acquisition had been undertaken for the purpose at least in part of depopulating the islands. The logic of the *Bancoult* case, in relation to the Immigration Ordinance, meant that other legislation with the same purpose was likewise unlawful. Second, the Ordinance was unlawful because it contained no provision for notifying those Chagossians in apparent possession that their rights were to be over-reached into compensation, they had no means of challenging the lawfulness of the acquisition or of disputing the amount of compensation due or the portion which they might receive or even of knowing that any was available to be claimed. This was closely related to the submissions made about the Mauritius Constitution.

388. The pleading in relation to the Constitution was to the effect that the Mauritius (Constitution) Order 1964, an Order in Council, was part of the law of BIOT and that the fundamental rights which it contained were infringed by the actions of the Defendants. The rights relied on are property related save for the right to protection from inhumane treatment. The pleading is seriously deficient as it contains no particulars of any act relied on as constituting a breach of any of those rights; if the action were to proceed, the allegation should specify what acts are relied on under each head. At present, the best that can be said is that I have from the submissions some sort of sense of what the Claimants are driving at in relation to property and I assume that everything from the fact and manner of evacuation, the journey and the lack of reception or assistance in Mauritius is encompassed by the allegation of inhuman treatment. These allegations were said to encompass torts, unpleaded, which included trespass and conversion, which were torts by BIOT law and under English law.

389. I shall deal first with the pleaded property case on the basis that a Claimant might be found with the arguable real property interest. Mr Howell relied on a sequence of Ordinances to show that any property rights which the Chagossians might have had were extinguished. First, the Private Treaty Ordinance of 1967 provided in section 3 as follows:

"Whenever the Commissioner is satisfied that it is necessary or expedient to acquire on behalf of the Crown any land in the Territory for any purpose which in the opinion of the Commissioner is a public purpose he may, if the owner or apparent owner agrees to sell such land at the price offered by the Commissioner, acquire such land in accordance with the provisions of this Ordinance."

390. "Public purpose":

"... includes the provision of defence and other necessary facilities for or on behalf of the United Kingdom Government or for or on behalf of any Commonwealth or foreign Government with which the United Kingdom has agreed to the provision of such facilities."

391. Section 7 stated:

"A declaration in the instrument of acquisition that it was necessary or expedient to acquire the land for a public purpose or that the purpose for which the land was acquired is or was a public purpose shall be conclusive proof of the matters stated herein."

392. Section 5 provided for the vesting of the land in the Crown free of any other interests, and section 6 for those interests which thus extinguished to be related to the price paid; in effect they were over-reached into the purchase price. They stated:

"5. The land described in the Schedule of the instrument of acquisition shall ... vest absolutely and irrevocably in the Crown free from any mortgages, charges, interests or rights whatsoever of any interested party, except as may have been specially reserved in the aforesaid instrument.

6. (1) The rights, interests, charges or mortgages of any interested party in or over the land thus acquired shall, upon such land vesting in the Crown, be related to the price stated in the instrument of acquisition which shall be deemed for all purposes to be the price agreed upon between the Commissioner and the owner or apparent owner of the land so acquired."

393. An "*interested party*" and "*owner*" were defined as follows:

"'*Interested party*' means any person being an owner or co-owner of land the subject of acquisition under this Ordinance or having any right, beneficial interest, charge or mortgage in or over such land.

'*Owner*' includes a lessee, a usufructuary or any other person having a beneficial interest in the land."

394. Mr Howell's simple submission was that that vested land free of any other rights and so the Chagossians had no property rights thereafter. They had been extinguished insofar as they had had any in the first place. As a simple matter of statutory construction, I accept that is unanswerable. The claim related only to the price to which others could look to the vendor. If there had been any acquisition by prescription, the owner would have been an "*interested person*" within the definition of that word. The contrary was not argued.



395. Mr Taylor for the Claimants in response first pointed out that there was some land on Diego Garcia which did not belong to the vendor, Chagos Agalega Company Limited, at all. Without investigating title in any depth, this appears to be well-founded but unimportant in this context, for the areas which it did own were the areas of residence of the Ilois; they were the settlements round the coconut plantations and copra production areas. No-one has suggested that there was any other private freehold owner. The Crown already owned some land. The instrument of acquisition dated 3<sup>rd</sup> April 1967, (3/28), referred in the Schedule to what was conveyed as being the islands of Diego Garcia, Peros Banhos and Salomon and two other groups together with all buildings, rights and interests whatsoever. Any other land would have been acquired from the other owner anyway, under the same instrument, but no other owner has come forward to assert any title.

396. Mr Taylor next said that this instrument of acquisition meant that land vested, without notice to anyone in apparent possession as he said the Chagossians were, whereupon the interests became interests only in a purchase price which was distributed through a rapid procedure of which the Chagossians had no notice. He contrasted this with the notice provisions in the Compulsory Purchase Ordinance 1967 No 1. Notice had to be given to "*the owner or person in apparent possession*". Any "*interested person*" could then claim a higher price than that stated in the notice of acquisition and any dispute could go to arbitration. The Commissioner could then decide whether to proceed with the acquisition, if that were the price which he had to pay, and if he did so, the rights acquired would then relate to the purchase price in the same way. The relevant expressions were defined in the same way in both Ordinances. He suggested that the Private Treaty Ordinance had been enacted in bad faith to avoid these provisions in the Compulsory Purchase Ordinance. This was *ad hominem* legislation directed at the islanders.

397. There is no evidence to support that at all. It is commonplace to have the two powers. There is no legal obligation to proceed by one route as opposed to another. The legality of the purchase could have been challenged but never has been until now. There is a suggestion in the documents that it was seen as an advantage in the Private Treaty Ordinance to include some provisions from the Compulsory Purchase Ordinance. These appear to relate to the clearing of other interests off the title acquired. There is nothing at all to suggest that it was intended to avoid giving notice to any Chagossians. There is nothing to suggest that anyone thought that they might have any rights of possession at all; Mr Moulinie did not think that they did. It is perfectly clear that workers, even if there for many generations, can occupy property simply as service occupiers for the better performance of their duties. There is no contemporaneous evidence from any source that suggests that anyone thought the position was otherwise. There is no evidence of anyone erecting a house without the company's assistance to him as its worker. It is just simpler in those circumstances to proceed by private treaty. Moreover, occupation is not possession. If notice had to be given under the Compulsory Purchase Ordinance to the owner "*or person in apparent possession*", there is no basis for supposing that notice would have been given to anyone other than Chagos Agalega Company Limited; just as with the Private Treaty Ordinance, the agreement was with the owner "*or apparent owner*" looking at the definitions. I do not think that there is a difference in meaning in the two expressions or in the people to whom they might be applied. If the owner differed from the person in apparent possession, there was no obligation to give notice to more than one.

398. Mr Howell's first statutory provision clearly disposes of the claim.

399. The second statutory provision upon which Mr Howell relied was the Acquisition of Land for Public Purposes (Repeal) Ordinance 1983. This provided:

"Whereas all land in the Territory is Crown Land, the Compulsory Acquisition of Land for Public Purposes Ordinance 1967 and the Acquisition of Land for Public Purposes (Private Treaty) Ordinance 1967 are repealed, and it is hereby confirmed and declared that all land in the Territory is Crown Land."

400. The confirmation and declaration do not just have the effect of putting beyond doubt the effect of the repeal of the Acquisition Ordinances. Mr Taylor submitted that this could not add anything to the position which had already been arrived at. But, in my judgment, if "*confirmed*" adds nothing, it is quite clear that "*declared*" does. I can see no way round the construction which Mr Howell seeks to put upon this Ordinance. In *Winfat Enterprise (Hong Kong) Co Ltd v Attorney - General of Hong Kong* [1985] AC 733 PC, the effect of similar language in the New Territories Land Court Ordinance 1900 was considered. Section 15 of it provided: "*All land in the New Territories is hereby declared to be the property of the Crown ...*". It deemed the occupiers to be trespassers unless their occupation was authorised by the Crown. This replaced Chinese customary tenure, which was assignable and heritable. One of the issues in the case was whether that customary interest survived so that a developer whose land was being acquired for a price below its market value, could rely on it. It was held that the land vested in the Crown under that wide declaratory power. The effect of the BIOT Repeal Ordinance is thus unarguably to remove any Chagossian property rights which had survived the acquisition of land from Chagos Agalega Company Limited. If there were any surviving interests over the intervening fifteen years from the acquisition, and no claim had come forward, they were thus ended. More than twelve years had elapsed since the evacuation of Diego Garcia anyway, when the land was fully possessed by others.

401. Mr Taylor submitted that these two acquisition Ordinances were ineffective because they did not comply with the Royal Instructions to the Commissioner as to how he should legislate. He argued that they did not comply with sections 4(2) or 5(7). These provide:

"4. In the enacting of laws the Commissioner shall observe, so far as is practicable, the following rules:

(2) Matters having no proper relation to each other shall not be provided for by the same Ordinance: no Ordinance shall contain anything foreign to what the title of the Ordinance imports ...

5. The Commissioner shall not, without having previously obtained instructions through a Secretary of State, enact any Ordinance within any of the following classes ...

(7) Any Ordinance of an extraordinary nature and importance whereby Our prerogative, or the rights of property of Our subjects not residing in the British Indian Ocean Territory, or the trade, transport or communications of any part of Our dominions or any territory under Our protection or any territory in which We may for the time being have jurisdiction may be prejudiced."

402. He said that the former was breached because the one Ordinance made provision for both acquisition and for the consequences of acquisition; the latter

was breached because of the severe effects which the 1983 Ordinance had on the rights of the individuals who were not resident in BIOT. As to the former, I conclude that there is nothing which arguably breaches the Royal Instructions; the two matters relate to each other and are sensibly included in the one Ordinance, the title of which is apt to cover its total content. An extinguishment provision upon an acquisition for a public purpose is not unexpected. But, even if there had been a breach of the Instructions, that does not invalidate the Ordinances by virtue of section 4 of the Colonial Laws Validity Act 1865, which provides:

"No colonial law passed with the concurrence of or assented to by the governor of any colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any instructions with reference to such law or the subject thereof which may have been given to such governor by or on behalf of Her Majesty, by any instrument other than the letters patent or instrument authorising such governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent or last-mentioned instrument."

403. The BIOT Order itself provides, in section 11(2) and following, for the Sovereign to disallow legislation and She has not done so. As to the latter asserted breach, the same two points apply. In addition, any acquisition made in this tidying up provision, is no more than a tidying up acquisition where the principal power has been exercised or was thought to have been and where there were not thought to have been rights outstanding anyway.
404. The third Ordinance upon which Mr Howell relied was the Courts Ordinance 1983 No 3 in force from 1<sup>st</sup> February 1984. Section 3(1), (3) and (4) provide as follows:

"3. (1) Subject to and so far as it is not inconsistent with any specific law for the time being in force in the Territory and subject to subsections (3) and (4) of this section and to section 4, the law to be applied as part of the law of the Territory shall be the law of England as from time to time in force in England and the rules of equity as from time to time applied in England:

Provided that the said law of England shall apply in the Territory only so far as it is applicable and suitable to local circumstances, and shall be construed with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary.

(3) Subject to subsection (4) of this section, no enactment, rule of law or any other part of the law of Mauritius or Seychelles shall form part of the laws of the Territory after the appointed day, except to the extent that any such enactment, rule of law or part of such law may have been applied to the Territory by a law made by the Commissioner after the appointed day under section 9 of the British Indian Ocean Territory Order 1976 or any corresponding provision superseding that section.

(4) In any proceedings commenced before the appointed day, the law to be applied shall be the law in force immediately before the appointed day, unless all the parties to the proceedings agree that the law to be applied shall be as in subsections (1) to (3) of this section.

405. "Specific law" is defined as a law made under section 11 of the BIOT Order or its replacement in 1976, when the Seychelles islands were returned to the Seychelles, and an applicable UK Act or statutory instrument.

406. Mr Howell submitted that the effect of this was to disapply the Mauritian civil property law upon which the Claimants relied and hence to remove any rights which they may have had. (I accept that it is reasonably arguable that the "rules of law" in section 15 of the BIOT Order, below, is a phrase wide enough to include the common law or equitable principles which would be invoked as substitutes for the disapplied provisions of the Civil Code under which the Claimants might have enjoyed property rights.) This is too ambitious a submission at any rate for this stage of proceedings. Section 11 of the Interpretation and General Clauses Ordinance 1981 No 4 prevents the repeal of any local enactment affecting any right previously acquired under any enactment. Mr Taylor relied upon this provision and it may be that the Civil Code of Mauritius falls into that category. But I consider the stronger point to be that section 3 is inapt, arguably, to remove rights at all. If, despite the two Ordinances which were already effective, some property right had survived, I do not read section 3 as removing it. It would have to be transformed instead into something recognisable in English law, but subject to the permitted local variations which would give ample scope for adaptation. It does mean that any pleaded right would have to be couched in perhaps different language from that of the Civil Code but I have no difficulty in seeing that something could be pleaded. However, that still leaves intact Mr Howell's two earlier and better points, which are conclusive as to property rights subject to the effect of the Mauritius Constitution.

407. I now turn to the asserted application of the Mauritius Constitution which was relied on as a source of rights and to defeat the position in which the two Ordinances showed the Claimants clearly to be, in relation to property rights. Mr Taylor relied on the rights set out in the Schedule to the Mauritius (Constitution) Order 1964. It is the Schedule which contains the Constitution. The first Chapter contains the fundamental rights which represent the Claimants' primary target for inclusion in the BIOT legislative canon but, surprisingly, they did not limit their case to that part and said that other parts might also be included. Those other parts include Chapters dealing with the setting up of the legislature in Mauritius, the Council of Ministers, the judicature, the public service and the Governor. I regard the inclusion of those parts, other than Chapter 1, in the BIOT legislation as nonsense. It would be wholly inconsistent with the BIOT Order.

408. The rights relied on from Chapter 1 are as follows:

"1. It is hereby recognised and declared that in Mauritius there have existed and shall continued to exist ... each and all of the following human rights and fundamental freedoms, namely –

(c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation.

and the provisions of this Chapter shall have the effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

5. No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.

6. (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired,

except where the following conditions are satisfied, that is to say – ...

(b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition –

(i) for the prompt payment of adequate compensation; and

(ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation.

(5) Nothing in this section shall be construed as affecting the making or operation of any law for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided by the government of Mauritius.

7. (1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision that is reasonably required –

(a) in the interests of defence, ...

14. (1) Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 1 to 13 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may also apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section."

409. Mr Taylor submitted that these fundamental rights applied in the Chagos immediately before BIOT was created. It should not be assumed, without clear words, that the legislative structure of the new colony was designed to remove those rights, which the islanders had enjoyed hitherto. Although there might be power to do that when a colony was granted independence, as the case of *Liyanage v The Queen* [1967] 1 AC 259 PC showed in relation to the

independence of Ceylon and fundamental rights to a fair trial, that had no application to the creation of a new colony, especially when the territory had already enjoyed those rights. The BIOT Order should be construed accordingly. Accordingly, those rights were still enjoyed when the acquisition Ordinances were enacted, when the actual acquisitions took place and when the population was removed.

410. Mr Howell relied upon the wording of the BIOT Order. He also pointed out that Laws LJ in *Bancoult* had held that there was no written constitution embodying fundamental rights for BIOT; paragraph 43. I do not find the latter point conclusive in the light of the more extensive arguments which Mr Taylor has provided, a team overlap notwithstanding. Each side before me has relied on and taken issue with what was said in that case on a variety of issues. Whilst *Bancoult* can make something arguable, I am not disposed to accept it as making anything unarguable as far as the Claimants are concerned.

411. The relevant provisions of the BIOT Order are as follows:

"5. The Commissioner shall have such powers and duties as are conferred or imposed upon him by or under this Order or any other law and such other functions as Her Majesty may from time to time be pleased to assign to him, and subject to the provisions of this Order and any other law by which any such powers or duties are conferred or imposed, shall do and execute all things that belong to his office according to such instructions, if any, as Her Majesty may from time to time see fit to give him.

11. (1) The Commissioner may make laws for the peace, order and good government of the Territory, and such laws shall be published in such a manner as the Commissioner may direct.

15. (1) Except to the extent that they may be repealed, amended or modified by laws made under section 11 of this Order or by other lawful authority, the enactments and rules of law that are in force immediately before the date of this Order in any of the islands comprised in the Territory shall, on and after that date, continue in force therein but shall be applied with such adaptations, modifications and exceptions as are necessary to bring them into conformity with the provisions of this Order.

(2) In this section 'enactments' includes any instruments having the force of law."

412. Section 18 of the Order is also important. It alters the Mauritius Constitution by deleting from the definition of Mauritius in section 90, as from the creation of BIOT, those Mauritius Dependencies which became part of BIOT.

413. Mr Howell argued that the Mauritius Constitution had no application at all in BIOT. His first contention relied upon the geographical extent of "*Mauritius*" as redefined by the BIOT Order. If section 1 of Chapter 1 was indeed part of the BIOT legislation, it was immediately disapplied by its own terms because it only applied to Mauritius. It did not matter what had been the position immediately before the creation of BIOT, because the continued application of the Mauritius Constitution rendered it inapplicable on its own terms. It only declared rights to exist in Mauritius and therefore by necessary application of the definition of "*Mauritius*" did not declare those rights in BIOT. Mr Taylor submitted that section 15 of the BIOT Order permitted that wording to be adapted to meet the position in BIOT by treating "*Mauritius*" as being BIOT or as the Mauritius part of BIOT. I was not wholly persuaded by Mr Howell's argument on this in isolation though

there is force in it. It needs to be considered with other points to see if the Claimants' case is not reasonably arguable. I say that because the alteration to the Mauritius Constitution was obviously necessary to limit its future geographical application, and although it may be a pointer as to what was intended in BIOT, that has to be considered also against the pre-existing rights enjoyed in the Chagos.

414. To Mr Taylor what primarily mattered was the fact that the rights had been enjoyed in Chagos immediately before the creation of BIOT. It is upon the words of section 15 that the Claimants rely. That depends upon the meaning given to "*enactments and rules of law*". "*Enactments*" is defined as including "*instruments having the force of law*". The Constitution, submitted the Claimants, was one such instrument or enactment. There was no need to give the word a narrow meaning as contended for by the Defendants which would confine it to Acts of Parliament or a broader meaning which extended only to secondary legislation in addition. The significance of previously enjoyed fundamental rights was important here. Mr Taylor referred to *R v Conway* 1943 EDL 215, Gutsche J, who described "*enactment*" as a wide and general word; but however wide he said was its ambit, he did not suggest that it covered a constitutional Order in Council. Mr Howell found support in *Rathbone v Bundock* [1962] 2 QB 260 D Ct 273. This held, in the different context of road traffic regulation, that unless extended to statutory instruments expressly, "*enactment*" meant an Act of Parliament. I did not find that compelling in view of its very different context and the fact that, as in *Conway*, the issue here was not considered.
415. No resolution is to be found in the Interpretation and General Clauses Ordinance 1981, though in it "*Imperial*" or "*United Kingdom enactment*", to which the Ordinance does not apply, includes any Order in Council.
416. Notwithstanding the absence of decisive authority, (although what there is tends to support Mr Howell), I do not regard the position as doubtful. The phrase has to be construed in context. The BIOT Order was the Constitution for BIOT. It provided for a new colony, drawn from both the Seychelles and Mauritius. Its creation had a purpose. Mauritius was redefined by the BIOT Order so as to exclude BIOT from the Mauritius Constitution. It would be very odd if by the sidewind of the general incorporation of existing laws from the two colonies from which the islands had been detached, BIOT had incorporated a part of the Constitution of one colony from which it was being detached, and had provided for fundamental rights to be enjoyed only by those who were in the former Mauritius part. This is the importance of the definition of "*Mauritius*". It confirms what is clear enough from the other factors in the interpretative matrix. When Mr Howell's first point is joined to these others, it seems to me incontestable that the Mauritius Constitution was not incorporated. It is not controverted by authority or interpretative provision.
417. I recognise what Mr Taylor says about fundamental rights but that does not seem to me to be an argument of any real force in the light of those other factors. Had their incorporation been intended, there would have been an express incorporation or listing of the rights to be enjoyed. His distinction between what can be done upon the independence of a colony and upon the creation of a new colony is unsupported by any reason. I see no reason in law why there should be any difference; the rights created depend upon the way in which the sovereign power is exercised and that can deliver what Laws LJ described in *Bancoult* as "*wintry asperity*" instead of the benignity hitherto enjoyed if the sovereign power so wishes and can do so politically. It may be brutal but the context of the legislation shows that the preservation of fundamental rights, and in one part of BIOT only, was not a legislative objective. I do not consider that the phrase "*rules of law*" is apt to cover the constitutionally derived rights upon which Mr Taylor relies.
418. Even if Mr Taylor were right, I do not see how that would avail his property rights arguments. If the Ordinances are otherwise valid, they would take

precedence over any such rights as were preserved by the incorporation of part of the Mauritius Constitution. The Claimants' argument is that the rights in question are within the scope of section 15 of the Order and it is that which enables them to be preserved as an enactment. But it is clear from the terms of section 15 that it does not entrench them as rights which cannot be overridden or as rights against which the constitutionality or validity of Ordinances has to be measured. Accordingly, by virtue of section 15 (1), they can be repealed or modified by legislation passed under section 11 for the "*peace, order and good government*" of BIOT or passed under other lawful authority. I regard Mr Taylor's argument that an Ordinance could only have the effect of overriding existing law under section 15 if it expressly said so, as an understandable but untenable attempt to interpret section 15 as some half effective entrenching provision. It could only require clear words as to the legislative effect intended and there is no doubt about that in the Ordinances. If the Ordinances do conflict with any provisions of the constitution, their language is clear enough to enable them to override those constitutional provisions. I do not accept that the effect of section 3 of the Private Treaty Ordinance is to require all actual owners of all interests to agree to the sale of property; that is wholly contrary to the rest of the provisions of the Ordinance, including the overreaching provisions. Mr Howell pointed out that in *Winfat Enterprises*, above, the Crown Lands Resumption Ordinance was made under the power in the New Territories Order to make laws for the "*peace, order and good government*" of the Territories. That was held to permit the acquisition of land at a price which ignored the development value of the land, even though the Peking Convention, under which the New Territories were leased, forbade expropriation and required a fair price to be paid for land acquired. Unless an attack can be mounted on the legislation in question as not being within section 11, that legislation could remove property rights without compensation or compliance with other provisions of the Mauritius Constitution. There is no English law to which the Ordinance has been shown to be repugnant in the sense of section 2 of the Colonial Laws Validity Act.

419. Mr Howell further submitted that it would be very difficult for the Court to give effect to the Mauritius Constitution, even if somehow it were incorporated into BIOT legislation as entrenched rights. The rights are subject to the limitations set out in the Constitution. First, the right in section 6 was not breached nor that in section 1 because what happened was legislative extinction of title with the interest overreached into the purchase money. Section 1 dealt with deprivation of property and section 6 dealt with compulsory purchase; neither dealt with legislative extinction of title with a provision for overreaching into the purchase price; *La Compagnie Sucriere v Government of Mauritius* 1995 (3) LRC 494 PC. As a matter of dry legal analysis that is clearly correct. The Claimants might however have been able to make something of the manner in which the payments were made, to say that this was in reality a deprivation of property and that the availability of knowledge as to the acquisition and possible share of the purchase money was so limited as to amount to deprivation without compensation. But it is difficult to see how that would invalidate the legislation itself. Second, section 6 permits compulsory acquisition in the interests of defence; unless the defence interests of the UK and her Colonies are irrelevant, and the only relevant defence interest is that of BIOT itself, which was not suggested by Mr Allen, it is difficult to see how the Court could be in a position to assess the nature and extent of the defence needs, national security and foreign policy against the interests of the islanders. The only argument was that the UK had balanced the interests in a way which was unlawful because of the interests of the islanders which were completely overridden. However, that might go to the *vires* of the legislation and whether the appropriate compensation procedures had been emplaced and followed through. If the Claimants had overcome the many hurdles to establish an entrenched right in BIOT to the benefit of the property



provisions of the Mauritius Constitution, it is arguable that they were breached, but I do not see that they can achieve the necessary steps on the way.

420. There was some argument about the role of double actionability in relation to the Claimants' reliance upon the incorporated parts of the Mauritius Constitution, to the extent that it had been incorporated. Mr Howell launched the argument as yet another reason why the Claimants' case was hopeless. Part of the problem of analysis arises from the rather poor pleading which underlies this part of the case. If it is said that acts were done which were torts recognisable as such both in English law and in BIOT law, that meets the requirements of the principle of double actionability in tort and the Constitution is irrelevant. On that basis there is no need at all to examine the double actionability rule, even before the coming into force of the Private International Law (Miscellaneous Provisions) Act 1995 on 1<sup>st</sup> May 1996, which removes the double actionability rule in relation to acts done after that date. None of the acts relied on in relation to the property rights arise after 1996, and there are no pleaded acts in relation to inhuman treatment which arise after that date, or none which are not already pleaded in relation to other torts. For example, part of Mr Taylor's argument was that there had been a conversion of or trespass to the Claimants' property. But that raises no double actionability issue.
421. If it is said that there is a cause of action based directly upon the parts of the Constitution which were allegedly incorporated into BIOT law, that is not an action in tort, and since it is to torts alone to which the double actionability rule applies, its disapplication under the principles in *Red Sea Insurance Co v Bouygues SA* [1995] 1 AC 190, 197-200 does not arise. It appears, despite some of the submissions, that this is the Claimants' point and that it includes an argument that section 14 of the Mauritius Constitution was also incorporated into BIOT law, providing a direct means for enforcing those rights. If it had been, which it has not, there might have been a case for the direct enforcement of those rights through the English Courts, if the relevant property legislation did not override the property related rights including privacy here. I refer to enforcement through the English Courts rather than the BIOT Courts because the Defendants do not seek to take jurisdictional points and are prepared at present for the English Courts to be regarded as having the same powers as the BIOT Court. Jurisdiction, which is absent, cannot be created by consent but at this stage, that is no adequate reason for holding against the Claimants.
422. If the enforcement of rights said to be derived from the incorporation of the Mauritius Constitution is by way of an action for damages for tort, rather than directly, such a claim in the English Courts would infringe the principle of double actionability. There was and at present still is no cause of action in tort for breach of privacy or for taking property under statutory authority, if it clearly so provides, without compensation. An action in trespass in theory would satisfy the double actionability rule, but the alleged breach of the Constitution is not arguably the same as the tort of trespass. There is no tort as such of subjecting someone to inhuman treatment; it may constitute other recognised torts, in which case double actionability is satisfied but there is no pleading of any such tort or reference to the facts upon which it might be based. There is no tort of breaching a constitutional right.
423. Mr Allen submitted that it was inconsistent with the Defendants' position that it was not taking any forum or jurisdiction point, for the Defendants to argue that the tort must be doubly actionable in order to found the applicable law upon which the Claimants rely, in the forum in which they seek to contest matters. The choice of law is not a jurisdictional point. The Claimants relied on the *Red Sea* case and *Pearce v Ove Arup Partnership* [2000] Ch D 402 CA. These are two authorities relevant to the contentions that there are exceptions to the rule of double actionability in certain circumstances, in which the law of the place where the wrong was done could be enforced by the Court dealing with the case, even where there was no comparable tort in that country. At this stage, I would not

regard it as impossible for the exception to be made out if the torts existed in BIOT law; the problem lies with the inclusion of the rights in the first place.

424. I turn to the unpleaded argument that the Private Treaty Ordinance was outside the powers of section 11 of the BIOT Order because it was not made for the "*peace, order and good government*" of the territory. This argument proceeds by way of analogy with the Immigration Ordinance 1971 and the reasoning of the *Bancoult* decision. The purpose of the Ordinance and of the consequential acquisition of land from Chagos Agalega Company Limited was in part the legitimate one, on the Claimants' case, of providing for a defence facility for the UK and the USA. But it was also in part for the illegitimate purpose of removing the population of BIOT whether as an end in itself or as a means to the achievement of the particular defence facilities actually provided. However powerful a case could be made for the UK's defence interests, section 11 did not provide such an enabling power. On the *Bancoult* reasoning, this was not a matter of balance between the competing interests for the Commissioner to decide, but rather the Commissioner simply lacked the power to enact legislation under section 11 which was not in the interests of the people who were to be governed, regardless of the strength of the competing defence and foreign policy interests. The Private Treaty Ordinance was invalid, the acquisition of land under it and the consequential extinction of title was either ineffective or sounded in damages for trespass or conversion of real and personal property. The Compulsory Purchase Ordinance was likewise ineffective.
425. The Claimants' position was that the defence interests were a relevant matter for the colonial power to take into account but that it could not allow them to override the interests of the inhabitants or belongers of BIOT. The Claimants accept that the acquisition of land for the defence purposes of the UK is a legitimate purpose for the exercise of section 11 powers but with a limit on the extent to which the interests of the population can be affected. At this stage, the point being made by the Divisional Court as to the extent of the powers available under section 11, namely that those who represent the established population cannot be removed through the use of section 11 legislation, must be reasonably arguable, however persuasive Mr Howell's contrary arguments and whatever the possible extent to which the legal analysis was affected by an erroneous factual premise about the evacuations.
426. On a narrower basis, Mr Howell argued that the stated objective of the Private Treaty Ordinance, to permit the acquisition of land to give effect to the defence needs of the UK or other allied governments, falls within section 11 as providing a perfectly good reason for the acquisition of private land. The Claimants' argument was unsound because it posited that there was some obligation on the Commissioner to prevent a private land owner exercising his powers if that had the effect of removing the population. If there were some limit on the powers of acquisition, how much private land had to be left, for whom and why, when they had no right to reside there? The Government should not be in a worse position when exercising its powers to acquire and use land for a public purpose. There was no purpose, behind the legislation or the land acquisition, of removing the population but it would not have been unlawful if it had been part of the purpose to remove people from part of BIOT, Diego Garcia, to another part, as happened. A distinction should be drawn, in any event between the Ordinance and the acquisition which were perfectly lawful, and any unlawfulness associated with the removal of all the population which is what offended in *Bancoult*. Finally, any unlawfulness in the Ordinance or in the acquisition could not now affect the ownership or the lease subsequently granted to the US or the extinction of title.
427. I take the view that what is reasonably arguable in this context has been settled by *Bancoult*, whatever may be the position after all the argument as to what the true ratio is and whether it is right in what it says, as I have discussed earlier. I do regard it as reasonably arguable that one purpose behind the land acquisition was to enable private land owning powers to be used, if necessary, to

remove the whole population, even though that was not the prime aim in 1967. The memo of 25<sup>th</sup> February 1966, (4/179), (A62) from the Colonial Secretary to the BIOT Commissioner illustrates the point. It was moreover landowning powers which it is quite clear were used to remove the people who were removed. This is reasonably arguably not a case where powers to remove were taken but not used and powers taken for another purpose, entirely or substantially, were the powers used. Following *Bancoult's* reasoning, it is not the removals alone which might be unlawful, it is the taking of the power to do achieve that.

428. I accept, however, Mr Howell's submission that any unlawfulness in the Ordinance could not now affect the effectiveness of the acquisition, the lease granted to the US or the extinction of any title, Chagos Agalega Company Limited's or a Claimant's. Too long has passed with no challenge being raised. A return to the previous position is not possible.

429. There are plainly delay and prejudice considerations of some magnitude which lie in the way of an application for judicial review to quash the Private Treaty Ordinance, not least because it was repealed in 1983. Its purpose in relation to the UK's defence interests was plain on its face and had been so for the 16 years before its repeal without any point being taken. Third party interests had intervened together with those of the defence and foreign policy interests of the UK and the US. This argument would involve quashing the 1983 Ordinance. I do not see the basis upon which that could be done. It does not appear either to have the same continuing effect as the 1971 Immigration Ordinance and its quashing would have to be accompanied by restitution of interests acquired long ago for it to have a direct effect on any claim to return. Any claim for damages for trespass which relied upon the possible unlawfulness of the Private Treaty Ordinance to remove a defence argument as to lawful authority, but which left intact the 1983 Ordinance, would be governed and defeated by the ordinary law relating to limitation. There is no basis for that aspect of the pleadings to be amended to raise a case which cannot succeed.

430. There is no arguable claim for damages in relation to property rights, whether arising under the rights said to be incorporated from the Mauritius Constitution or otherwise, nor for breach of any other fundamental rights so derived.

### **Negligence**

431. This claim related solely to the conditions faced by the Chagossians upon their arrival in the Seychelles and in Mauritius after the evacuations and faced by those who were prevented from returning to Chagos after going to Mauritius for vacation, medical treatment or the like. It did not relate to the conditions experienced on some of the voyages and indeed despite the evidence about them, there is no specific cause of action pleaded which relates to them. They might be relevant to any claim for aggravated damages.

432. The basis of the claim is that there was and is a duty to provide for the well-being of those Chagossians who were removed from or prevented from returning to Chagos and for their descendants. The pleading is unclear as to whether it covers those who left the Chagos voluntarily before the creation of BIOT, or indeed afterwards. No limit on the number of generations to whom this duty is owed is stated, though in their further closing submissions, the Claimants say that this means those who are entitled to British citizenship as a result of their connection with the Chagos under the British Overseas Territories Act 2002. That is of limited help in defining those to whom the duty was owed before that date. It appears from submissions and from the contention that this is a continuing tort and that a duty is owed in 2003 to the children and grandchildren of someone removed in 1971. It is not clear if those who are not living on

Mauritius or the Seychelles are included. It is another piece of inadequately thought out pleading.

433. This duty continues so long as they suffer. The duty is to take reasonable steps to provide for their well-being, which includes housing, feeding, employment, healthcare, social needs and community facilities. It is a duty to take care of them. What was necessary was the wherewithal to lead a roughly comparable lifestyle to the one which they had enjoyed on the Chagos. Although the duty is said to be to take reasonable steps, the steps required are in fact those necessary to achieve that particular outcome; they involve the direct or indirect payment of money.
434. The source of this wide-ranging duty is the governmental obligation owed, the assumption of responsibility for them and the events to which they were subjected. Part of the unpleaded background but which surfaced in submissions was the Defendants' knowledge that the Chagossians were illiterate, did not speak English, had no access to lawyers to assist in the enforcement of their rights and were made indigent by the acts of the Defendants. Another part was the allegation that the Defendants were the employers or paymasters of the Chagossians or in a closely analogous position. (The former is just wrong; the latter merely an inaccurate way of saying that the Defendants exercised control indirectly over many aspects of their lives, daily and in the longer term.) The Defendants were responsible for the creation of communities of Chagossians in Mauritius and in the Seychelles "*many of whom were compelled to live in conditions of abject poverty with no means of escape ...*". The assumption of responsibility was evidenced by the payment of some compensation under the 1982 Agreement. The pleadings point to the creation of BIOT, the acquisition of the land and the day to day control which the Defendants had over the plantations and over their long term future, and over the islanders and their long term future as well. It was the Defendants who decided to close the plantations and to evacuate the islands. The Defendants had accepted that there would be a resettlement obligation upon them.
435. The breach of duty, it was said, started with the initial failure to make adequate provision for those who were stranded on Mauritius and prevented from returning, and then for those who were evacuated from the Chagos. The pleading assumes that all left involuntarily or that it makes no difference to the liability of the Defendants. There is a continuing failure to make adequate provision for them. The pleading refers to the great poverty in which most have lived, with few of the amenities of life or adequate facilities in relation to jobs, healthcare, education and housing. This had been caused by the displacement from the Chagos with inadequate resettlement arrangements. Such facilities have never been provided and so there is a continuing failure. The Agreements of 1972 and 1982 did not discharge those obligations in fact and could not do so in law, as they were Agreements with a third party, the Government of Mauritius.
436. The full scope of this pleading cannot be appreciated without regard to the second revision to the draft Amended Reply on Limitation and Abuse, which accompanied the written closing submissions. This repeated a point made at an earlier stage that the negligence claim, and the other causes of action, should be seen as including a claim for damages for personal injuries. I would not have realised that just from reading the original Particulars of Claim. But in the proposed Re-Amended Particulars of Claim it is said that the personal injuries included diseases linked to poverty and poor living conditions. These included malaria, stomach disorders, Hepatitis A, mental illness, suicide and drug addiction. These were caused by the Defendants' unspecified "*wrongful acts*" and by the poverty into which those acts cast the Claimants. It is not alleged that those personal injuries were reasonably foreseeable as a result of those acts. It is not clear, but I think it probable that there are two causes said to be at work, wrongful acts and poverty, which may act both separately or together. The pleaders excuse the vagueness about which individual Claimants have suffered

from what injuries, on the grounds that these are only group Particulars. I am not at all persuaded by that. This claim came in as a means of dealing with a very obvious and potent limitation argument, so as to try to take advantage of section 33 of the Limitation Act 1980. It does not appear to have been thought of before then. None of the questions on the individual questionnaires relate directly to such a head of claim and they are part of the group Particulars. If the questionnaires had yielded the basis for such a head of claim, it would only have been by happenstance.

437. Mr Howell contended that the pleadings gave rise to no arguable case, first, by contending that no duty of the width contended for could arguably arise in negligence; in effect it was a matter for legislation. Mr Taylor supported the pleadings by the following submissions. Whether a duty of care arose was a fact-dependant question of law. It would be a startling result if there were no duty requiring reasonable conduct from the Defendants towards the Claimants, leaving the behaviour of unreasonable governments to be moderated only by Judicial Review. This claim did not depend upon it being established that any of the removals or the prevention of return was itself an unlawful act. The Defendants had control over the Claimants' destinies, took the decisions which led to their departures and to their being unable to return, and did so knowing that they would be harmed thereby. The Defendants accepted in many documents before and after the removals that they were responsible for the Claimants' resettlement. BIOT had been created with removals in mind. The Claimants had been "*hijacked*". That made it fair, just and reasonable that there should be a duty of care imposed on their relationship. The level of control, the governing obligations and the weakness of the Chagossians created a relationship of sufficient proximity. There was a duty to take reasonable steps to avoid harm to them. The Claimants asserted that their case was close in principle to the circumstances in which liability arose in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004. The Home Office owed a duty of care to neighbouring owners to take reasonable steps to control the boys so as to avoid the manifest risk to their property if they did not do so. As Mr Howell correctly pointed out, the acts which the boys ought to have been inhibited from doing were unlawful acts. That decision is some distance away from this case.

438. Mr Taylor responded to Mr Howell's next submission that if there were any such duty, the discretionary or policy component was such that it could not be justiciable, by contending that the relevant decisions leading to the evacuation of the islands were unlawful, but that in any event, what was being complained of was not the removals as such but the lack of provision for those removed or prevented from returning. Anyone could see the scope for psychological or other harm. The governmental discretions exercised here were not of such a nature as to mean that the court would be substituting its views for those of the executive, in circumstances where it was Parliament's intention that the executive should make the decisions. Alternatively, this should be seen as an abuse of discretion.

439. Mr Howell had relied upon *X v Bedfordshire County Council* [1995] 2 AC 633 738h where Lord Browne-Wilkinson had held in relation to a statutory discretion, that a decision within it was not actionable at common law, and that a decision outside its ambit might be. The courts could not adjudicate on that ambit if the exercise of the discretion involved policy matters. So "*a common law duty of care in relation to the taking of decisions involving policy matters cannot exist*". Accordingly, for a decision in the exercise of a statutory discretion to be actionable at common law, it had to involve no element of policy matters, had to be outside the scope of the discretion, if that were justiciable, and then it had to be fair, just and reasonable for a duty of care to be imposed. Policy matters would include the allocation of resources and the determination of general policies. An allegation about the appropriate level of service for someone's needs might involve policy matters.

440. Mr Howell also relied on *Stovin v Wise* [1996] AC 923. It held that the minimum conditions for basing a duty of care on a statutory power were that there was in effect a public law duty to act and exceptional grounds for holding that the policy of the statute required compensation to be paid to those who suffered loss because the power was not exercised.
441. Mr Taylor responded with *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619. He rightly pointed out that there has been some qualification to the full breadth of what Lord Browne-Wilkinson said in *X*. Lord Slynn, at p653, held that the mere fact that an act was done within the ambit of a statutory discretion did not mean that no action at common law could arise from it. Whilst other conditions for tortious liability would have to be satisfied, it would only be non-justiciable if what had been done involved the weighing of competing public interests or was dictated by considerations upon which Parliament cannot have intended that the court should substitute its views for those of the executive. Lord Clyde, at p674, further stated that if what were done amounted to an abuse of the discretion because it was totally unreasonable, it too could be actionable.
442. Mr Taylor's primary case was that there had been no statutory power exercised when the resettlement provisions were being made. No power under the BIOT Order section 11 had been exercised and it did not matter thereafter whether the power was a prerogative power or some private power. This meant, submitted Mr Taylor that if the removals were an act of discretionary policy, the way in which it had been done, "*without the greatest care and planning for the well-being of the displaced Chagossians*" was such an abuse. He submitted that the Defendants were not exercising a statutory discretion when dealing with resettlement, but that if they had been exercising a power under the BIOT Order, it had been abused.
443. Mr Howell's third submission was that any duty to take reasonable steps had been discharged by the 1972 Agreement or by the 1982 Agreement. It did not matter that these were not agreements with the Chagossians individually because it was obvious that any duty of the sort pleaded by the Claimants was capable reasonably of being discharged by arrangements made with the Government of the country in which the Chagossians were residing. The situation in the Seychelles was different anyway. Mr Taylor submitted that the real issue was whether there had been a remedy for the breach of duty and that there could not have been a remedy as the damage continued to occur. The sum offered in 1972 was not and was known not to be sufficient. It was patently not possible to argue that a payment ten years after the Chagossians had left the islands discharged the duty of care. The only question was whether there had been a remedy for the breach of the duty not whether there had been a discharge; the 1982 payments could not be determined at this stage to be adequate compensation so as to remedy the breach. In any event this argument had no application to the Chagossians on the Seychelles.
444. This duty continued to the present because, according to Mr Taylor, there had been a pre-existing governmental relationship and the Defendants had knowingly put the Claimants in a position of destitution. I remained unclear as to whether this duty could ever be brought to an end because even if the Claimants were all to returned to Chagos, assuming that they all wanted to go there, there would be, claim the Chagossians, an obligation to provide them with a maintained economy to enable them to live a decent, basic life.
445. The starting point for an examination of the arguability of this pleading in relation to economic loss is the general approach to whether a duty of care arises. In addition to the foreseeability of damage, there must exist between the parties a relationship characterised by the law as one of "*proximity*" or "*neighbourhood*" and that the situation should be one in which the court considers it "*fair, just and reasonable*" that the law should impose a duty of a given scope upon one party for the benefit of the other. The law has moved towards attaching greater significance to the more traditional categorisation of

distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes; *Caparo Industries Plc v Dickman* [1990] 2 AC 605 618. Mr Taylor referred to Lord Slynn's comment in *McFarlane v Tayside Health Board* [2000] 2 AC 59 76, that an alternative test is to ask whether there has been an assumption of responsibility for the economic interest of the Claimant, with concomitant reliance upon that by the Claimant. It is to be noted that in that case, a duty of care in relation to contraception did not involve any assumption of responsibility for the costs of bringing up the child whose arrival pointed to earlier failings. Mr Howell drew my attention to *Williams v Natural Life Health Foods* [1998] 1 WLR 830 835 HL. This is consistent with *McFarlane* upon which the Claimants relied. The relevant assumption of responsibility has to create a special relationship; whether such an assumption of responsibility had occurred depended on an objective analysis of what was said or done by the Defendants, and whether the Claimants did in fact and could reasonably have relied upon an assumption of responsibility. So far as personal injury was concerned, all that had to be shown was that it was reasonably foreseeable that the Defendants' actions would lead to personal injury and that there was sufficient proximity of relationship, the former usually demonstrating the latter too.

446. I shall deal first with the claim as originally formulated and then with the claim based on personal injury. As pleaded, it is far too broad a claim to be arguable. Indeed it is scarcely possible to recognise it as a claim in negligence at all. It confuses the concept of a common law duty of care, with a general moral obligation to care for someone. It is not alleged to be a duty to avoid a reasonably foreseeable type of harm. It is not dependant upon an unlawful act. I understand why the case is pleaded in the broad terms in which it is; the Claimants seek redress for the treatment meted out to them in the 1970s, in circumstances where the idea that there is no legal redress at all, not even arguably, could seem to be an affront to moral justice. But the case has to be seen in a legal framework, nonetheless. An affront to justice is not a cause of action nor do unfulfilled moral or political obligations become the source of legal obligations.
447. The claim as pleaded, asserts a common law duty, owed by government to citizens of a very wide nature. It could not be argued that any such duty was owed by a private landowner to those who might be evicted from his land or by an employer to those whom he dismissed or to those who in consequence might lose tied accommodation. There is no duty on a contractor to renew a contract with a supplier who in consequence goes out of business. Neither the degree of proximity nor the policy component for the existence of the duty would be satisfied. There is no common law duty to avoid economic harm to others even if it is foreseeable or even if someone is knowingly put in a position where that harm may happen to him.
448. Given the asserted source of the duty in indissoluble governing obligations which endure from generation to generation, it is difficult to see how it could not also apply to anyone who was destitute or lacking their former lifestyle or basic amenities, whether they were in their country or in another one. It is not clear why it should not apply to any UK citizen resident in the UK, or to any UK citizen who was not in the UK but happened to be abroad. The pleaded case is not confined to those who were removed from the Chagos or prevented from returning, so that characteristic of some Claimants is not a necessary characteristic for the duty to arise. In any event there are many people who, in roughly analogous situations, may suffer at the hands of a government decision in respect of which compensation is either unavailable or inadequate to enable resumption of a previous lifestyle. That is an unhappy consequence of blight, aircraft noise, planning decisions and compulsory acquisition, particularly where the acquired interests have no real market value. The duty would apply to all those too. The restrictions which the Claimants may try to impose upon their

version of the tort are not principled but arbitrary, and disguise the wide and general ramifications which it would have. There is no reason why the duty should only arise upon removal to another country rather than upon removal to another BIOT island, or to another part of the same country upon which the means of sustaining the former lifestyle were absent or upon which conditions of destitution prevailed. Why should such a duty not exist to prevent the withdrawal of economic support for the plantations or transportation upon which the islanders depended for their lives in the islands? But the duty is more extensive yet. It covers not merely the then unborn children and grandchildren of those who were removed or prevented from returning, together with any who qualify under the British Overseas Territory Act 2002 as British subjects, but also all those who left the Chagos voluntarily even before the creation of BIOT. Indeed, the 2002 Act creates the further problem that section 6 gives British citizenship to people who were not British citizens before that Act, so the duty only began to apply to them when it was brought into force.

449. The scope of the duty is akin to a duty of equivalent reinstatement and perpetual maintenance whenever a Government decision impacts adversely on an individual. As pleaded, it is akin to the requirement to provide an advanced welfare state, with all the aspects of modern social welfare covered together with jobs. Although the duty is couched as a duty to take reasonable steps, it is in effect an obligation to achieve that outcome. This is to treat the law of negligence as requiring the sort of provision which it must be for the legislature to decide, for the implications for policy and expenditure are enormous. The claim does not depend upon any statutory duty being found nor upon any statutory power existing. The law of negligence would be exploited to impose on government a very extensive duty which no legislature has seen fit to impose. No power or duty has been identified either in UK legislation or in the BIOT legislation whereby either Defendant may undertake such extensive responsibilities for anyone, let alone citizens outside those territories. In the absence of such a statutory power, it cannot be negligent to act as if that power did not exist. Assuming that it is the prerogative which enabled the resettlement agreements to be made, it would be a quite extraordinary extension of the court's role for it to be enabled to impose such a duty on the exercise of the prerogative. The same would apply to any argument that section 5 of the BIOT Order gave the necessary power to the Commissioner. The law of negligence would be used not so much to regulate the exercise of a power but to impose duties and to make their non-performance actionable in damages in a way in which neither legislature has seen fit to do. It is akin to a judicially imposed duty to legislate with the terms imposed by the courts. I do not see any basis for the creation of such a duty at common law. A duty of care for its citizens, which is the fundament of the pleading, cannot comprise a duty to provide a welfare state for the citizenry wherever in the world they may be.

450. Nor can a government, without legislation, take upon itself so large an obligation and assume a responsibility sounding in damages for its breach. The 1982 Agreement cannot be relied on as the basis for any alleged assumption of responsibility in any case, because it was declared to be without acceptance of liability and was entered into several years after the arrival of the Chagossians in Mauritius. It could not help those who went to the Seychelles any more than could the 1972 Agreement. This too was only with the Government of Mauritius, and it was not an agreement with the Chagossians. It too could not be a source for the assumption of responsibility. Responsibility for the removal of the impoverished and dependent Chagossians cannot create an assumption of responsibility for these purposes. There was no communication of responsibility to them for or on behalf of the Defendants, and none is pleaded. There were no acts done by the Chagossians in reliance upon anything which was said or done by the Defendants, and none are pleaded. If any were to be, the action thus based could only be brought by those individuals who satisfy those requirements. However,



this claim is not so fine grained; quite deliberately, it is all-embracing. The questionnaire is incapable of refining the pleading.

451. Even if it were confined to a group of Chagossians who were removed or prevented from returning, the scope of the duty is so extensive that it cannot be found in any duty born of the tort of negligence. It is to be remembered that the case does not depend on any unlawfulness in the removals themselves. The claim assumes that the Commissioner could require the plantations to cease to operate, the islanders' employment and support to cease and even the islands to be cleared. I can see no reason in principle why the same duty on the Defendants would not arise if the Chagossians had been removed by the decision of the Chagos Agalega Company Limited. If a duty arises from the relationship of citizenship, it is difficult to see the rationale for such a restriction; why should there not be a duty imposed on a landowner who ceases to have a requirement for his workers and requires them to leave his land? His duty would be to provide for them as if they were still his workers. I note in parenthesis that the medical treatment which the Claimants receive on Mauritius is what they would have received in Mauritius had they remained on Chagos, and the education on Chagos was very limited indeed. But the duty appears to require not a 1971 Chagos lifestyle nor a 1971 Mauritius lifestyle but one which changes as the circumstances around them change.
452. There is no duty, nor even a power, let alone one actionable for damages, to do whatever may seem reasonable. The statutory power to do that has not been identified. The Claimants' contention that the Defendants' submissions stand in the way of the regulation of unreasonable conduct and impose no obligation to do what is reasonable shows how wide their submissions really have to be cast. There is no duty at common law to avoid even conditions of destitution for the citizen. This claim, in the guise of a negligence action, seeks to erect a duty to care and to create thereby a cause of action for circumstances in which neither misfeasance, statutory provision or constitutional right, or other recognised tort has provided.
453. As Mr Howell points out this is not a claim for breach of statutory duty. Nor is it a claim for damages for a negligent exercise of powers within the exercise of a statutory discretion. No such duty has been identified. If it had been, it is difficult how a duty of so wide an ambit could be justiciable; it plainly would give rise to major policy issues as to the allocation of resources and the determination of an appropriate lifestyle in which someone was to be kept. It would involve an interaction with a foreign government; it is plain that there was concern in Mauritius about the impact which special treatment for the Ilois would have on Mauritians; the Seychelles Government was of the view that all were Seychellois and that no differentiation should be made between its citizens. The definition of a form of welfare state, with foreign policy overtones, is not a judicial function. Parliament and the BIOT legislature could not have expected this to be an area in which the courts would substitute their views for those of the executive.
454. I regard as untenable the argument that the absence of the sort of provision for which Mr Taylor contends could show that there had been an abuse of some unidentified discretion. This is at present no more than a submission; no relevant parts of it have been pleaded. If the relevant statutory discretion were to be identified, as Lord Hoffmann said in *Stovin v Wise*, the Claimants would still have to show the exceptional grounds upon which the Court should hold that liability in damages arose for that irrational act. They have not attempted to address that point.
455. The claim in negligence for damages for economic loss is untenable. There is no duty situation of the sort necessary to justify the claim, and it could be neither fair, just or reasonable to impose the asserted duty if there were. Any claimed statutory duty of the sort which the Claimants would need to assert could

not be justiciable. I do not know whether a more narrowly and precisely pleaded claim might have something in it but this claim does not.

456. Does the claim for damages for personal injury provide a better prospect for those who suffered from personal injury, on the assumption that the deficiency in the pleading as to reasonable foreseeability of harm is remedied? I bear in mind the breadth of the concept of personal injuries for Limitation Act purposes revealed by *Phelps*, above. I do not think that at this stage it can be said that it is clear that personal injuries of that breadth were not reasonably foreseeable. The essential features of life for the islanders were well known: they were used only to a very dependant and simple existence, they had very limited education, work skills of no relevance in Mauritius, they were unused to coping with unemployment, or with seeking private or public housing or dealing routinely with cash, social security, officials or a modern way of life or Mauritian social attitudes towards them. Their dietary needs on Chagos were reasonably catered for and their housing was adequately provided with sanitation. Their roots were known to be in the Chagos. It is arguable that it was reasonably foreseeable, as evidenced by the resettlement agreement in 1972, the preparations for resettlement and the Prosser Report, that at least so far as those going to Mauritius were concerned, the inadequacies of the proposals for their reception, housing, transport of personal possessions, social assistance for immediate needs to obtain food, some training or education for the life ahead, would lead to serious psychological effects, recognisable psychiatric illnesses and the illnesses associated with malnutrition and insanitary housing conditions. This would apply not just to the limited category of those who were the last to leave Peros Banhos but arguably, to all those whom I have identified as arguably having been compelled to leave the Chagos through the sequence of decisions made by the Defendants which they then implemented over time. It could not cover their descendants. I would not draw a distinction between those who went to Mauritius and those who went to the Seychelles for these purposes. It would not cover those who were unable to return. The duty arose upon removal; it is not a continuing duty.

457. The duty to take reasonable steps to avoid that harm arises not just from its arguable reasonable foreseeability, but also from the fact that it was the Defendants' acts, lawful or unlawful, which put them in that position of risking harm, about which they had limited choice. Even those who went temporarily to Peros Banhos and Salomon were told that it would not be forever. There was an option of going to Agalega but it is arguable that the choice of another island so far away or Mauritius itself, or the Seychelles is not so obvious that to decline it makes for a voluntarily assumption of risk. There was no obvious means whereby the full extent of the information necessary for an informed choice to be made was provided to them. Accordingly, it is arguably not unreasonable for them to have chosen to go to Mauritius or to the Seychelles. It is arguable that that duty was breached. The material derives from the condition of the Chagossians some years after their arrival; after all they did not see any benefit from the 1972 agreement for several years during which inflation was rampant.

458. I accept that it is obvious that an agreement with the Mauritius Government, once it has been implemented, is capable of being a or indeed all the reasonable steps which it is necessary to take; but I do not regard it as unarguable that the 1972 Agreement was insufficient. The documentary material leading up to the evacuations shows an awareness of needs and of the difficulties which would be faced, but the Defendants arguably knew that the conclusion of the Agreement before the evacuation did not mean that anything would actually be done in practical terms by the time the islanders arrived. There is arguably no evidence that even any temporary arrangements for shelter, social security, money to tide them over and so on had been made, let alone anything which would give them a reasonable chance of avoiding personal injury. The evidence arguably shows that the Defendants knew that nothing was being done with the

£650,000 as inflation ate away at its capability to achieve what was needed, and did nothing. It is arguable that the minimum requirement of a reasonable step is that it achieve something for the intended beneficiary rather than be merely an agreement with another for the discharge of the obligation, with no subsequent actions to ensure that it has been implemented. It is not necessary for me to identify the reasonable steps which should have been taken in the 1970s to avoid the personal injuries which were suffered. I appreciate that there is a significant causation problem but that is not a matter for this stage.

459. So far as the 1982 Agreement is concerned, obviously it does not affect those who went to the Seychelles. It would arguably still leave a claim for delayed performance of the duty of care even if it were discharged in 1982. It was plainly not an unconscionable bargain as a matter of settling speculative litigation as I discuss later. But that is not conclusive as to whether it plainly discharged the duty to take reasonable steps. The problem with that argument is that on the necessary hypothesis that there was a duty of care to certain individuals, its discharge depends more upon individual circumstances than a general assessment of the needs of the Chagossians. It would be a significant hurdle in the way of any action but I do not consider that that Agreement can now be said to render unarguable any claim for damages for personal injury.

460. The claim should be re-examined for the way in which it is pleaded should this case proceed. It would apply to a limited category of Chagossians, those who were compulsorily removed, who would have to plead and then prove a personal injury for which damages are given at common law, and that it was caused by the lack of reasonable steps being taken by the Defendants to prevent personal injury arising from the removals among the Chagossians generally. The reasonable foreseeability of injury arises from it being reasonably foreseeable that, among those who were removed, there would be some who would so suffer, rather than from it being foreseeable that any particular individual would so suffer; the nature of the steps required would reflect that rather than being those required to prevent any identified individual suffering personal injury. Credit would have to be given for any sums received or facilities provided under the 1972 and 1982 Agreements, and allowance made for any facilities, treatment or funds made available by the Governments of Mauritius and the Seychelles.

461. There is an arguable claim in negligence but only for personal injuries.

### **Abuse of Process**

462. The abuse of process issues pursued before me were whether:

- i. it was an abuse of process for those who had signed renunciation forms (paragraph A642) and received Rs 8,000 in consequence from the ITFB, or for anyone claiming through such a person, to bring these proceedings; and
- ii. a lesser, but related issue, arose as to the position of Michel Vencatessen and his heirs, in the light of the withdrawal of his action in 1982.

462. The Defendants did not pursue their claims that these proceedings were an abuse of process because a challenge to the administrative conduct of the Defendants had been withdrawn in the *Bancoult* case, or because this present case involved a challenge to the vires of the 2000 Immigration Ordinance which ought to have been made by way of Judicial Review. That was a sensible position to adopt, in relation to the pleaded basis of challenge.

### **The effect of the Renunciation Forms**

464. It is not entirely clear how many of the Ilois eligible for compensation under the terms of the ITFB Act, as amended, signed these forms. There were either 1,332 who signed out of the 1,342 to whom ID cards were issued, or 1,344. Mr Beal for the Defendants had, however, found forms for all but four of those to whom ID cards had been issued, suggesting that a trickle of signatures were obtained after June 1984. Either way, it would affect a considerable number of Claimants and their heirs.

465. It is difficult, however, to relate the forms to Claimants directly; their questionnaires are silent about them and the Claimants have not referred to the forms or to the compensation in their pleadings, even by way of acknowledging that any credit was due for it against damages claimed. I found that silence surprising.

466. The Defendants' case was that the renunciation forms covered precisely the causes of action now being pursued. Although the 1982 Agreement was an inter-governmental agreement, and although the Defendants could not contend that the signing of the renunciations constituted a series of contracts of compromise, nonetheless as a matter of principle, the pursuit of these claims by those who had signed or were their heirs was properly characterised as an abuse of process.

467. Mr Howell submitted that where a person A (an Ilois) agrees with another person B (the ITFB) that he will receive payment in settlement of any claim that he may have against a third person C (the UK Government), he A may no longer sue that third person C, even though that person C is not a party to that agreement and the person undertaking to make the payment B is not the third person's agent. Any subsequent proceedings that he A may bring against that third person C are an abuse of the process of the court.

468. He relied on a number of authorities summarised in *Chitty on Contracts* 28<sup>th</sup> ed Vol 1 3-118; *Welby v Drake* [1825] 1 Car & P 557; *Hirachand Punamchand v Temple* [1911] 2 KB 11 CA; *Morris v Wentworth Stanley* [1999] QB 1004 CA 44-45. The Court, he submitted, would regard it as an abuse of process to allow a payee to take money to settle a case and thereafter to seek to maintain the original case. A litigant could not accept money on one basis and pursue the claim on another. If a form was signed in order to receive money, the money was accepted on the basis of what was in the form. *Non est factum* required both an absence of knowledge as to the document and that reasonable care had been taken in signing it. He recognised that a defence of *non est factum* would be available in principle and that its availability in practice to any Claimant would depend on the facts relating to that particular individual. But Mr Howell sought an indication from the court that that was to be the position. It was said that that would aid the future management of this case.

469. The Claimants' final position emerged in their latest version of the Amended Reply on Limitation and Abuse, for service of which I give permission. I appreciate the Defendants' submission that permission should be refused because it came too late and after evidence had been heard, a point made more in the context of the limitation arguments. But I do not consider that these applications should succeed on remediable pleading points or through the exclusion of relevant material. I was singularly unimpressed by the refusal of the Claimants to respond to the Defendants' request in February 2003 for information relating to the Amended Reply; the absence at that time for permission to amend was an inadequate basis for most of the information to be refused. But I do not regard that as a justification for refusing permission for the latest version to be served as the Amended Reply.

470. The Claimants submitted, first, that because, as the Defendants acknowledged, the proceedings could not be struck out in whole or against any individual Ilois, since any individual might be able to rely on *non est factum*, this ground of attack should fail immediately.
471. Second, Mr Allen sought to turn the tables and argue that on a generic basis, this abuse argument was untenable, and should be dismissed. The Chagossians had had only a hazy idea as to the effect of the 1982 Agreement and no idea at the time that they were being required to waive for all time any claims against the Defendants. The relative position of the parties mattered; the UK Government had abandoned any attempt to compromise claims in the legally binding ways which they knew and there was nothing wrong with the Chagossians taking advantage of their failure to do so. There was neither a contract of compromise nor a clear and unequivocal waiver of rights, either of which would have sufficed.
472. He referred to *Johnson v Gore Wood* [2001] 1 WLR 72 81-82 and *Gairy v Attorney General of Grenada* [2002] 1 AC 167 as setting out the relevant principles in an abuse claim. These were concerned with fundamental rules of justice between litigants, a necessary power to protect against oppressive or vexatious litigation. In the former, the House of Lords said that whether an action constituted an abuse of process should be judged broadly on the merits taking account of all the public and private interests involved. A scrupulous examination of all the circumstances was required before an action should be dismissed as an abuse. The authorities relied on by Mr Howell were not referred to. The Claimant had a personal claim which had not been compromised, separable from, though clearly related to, the community claim which had been. It would be unjust, submitted Mr Allen, for the court to allow the UK Government to rely upon those forms unless the point had been taken at the first opportunity; they had been held by the FCO since they were sent there in 1984 as the recently disclosed letter of 12<sup>th</sup> September 1984, (19A/D/44), had shown and they had not been disclosed until 25<sup>th</sup> October 2002. They could have been deployed against the Bancourt Judicial Review, because that raised issues about the lawfulness of the 1971 Immigration Ordinance which were covered by the renunciation forms, and he had signed such a form; indeed, their existence had been referred to in the evidence in that case by both sides. The Defendants' deployment of those forms in pursuit of an abuse of process argument did not arise in their pleadings or before Master Turner, but was first raised before me on 26<sup>th</sup> September 2002.
473. Mr Allen submitted, third, that the forms could not affect infants who signed or those under a disability. He submitted, fourth, that the form was not an agreement, or, if so, that it was not the entire agreement - who were the other parties? What was the resettlement in Mauritius and by whom? What was the consideration? What was the compensation? Could any person signing the form sue on it in respect of any deficiencies in resettlement? For how long was declaratory renunciation to be effective?
474. Fifth, there was no evidence that any person signing it knew what was in it; the evidence was that they thought it was a receipt not a promise or agreement. The Chagossians would not have signed away the right to return leaving no enforceable right to return, which is the apparent effect of the agreement. It was not a mere giving up of the ability to enforce a right. They could not be negligent in signing the forms, when so many were being processed and there was neither translation, explanation, forewarning or advice available.
475. The fact that Elie Michel sought Bindmans' advice again in the early 1990s suggests that the effect of taking the money was seen as simply postponing for five years the right to take proceedings. Besides, to the extent that *non est factum* is a rule of justice to protect third parties, the Defendants were not true third parties. It is a rule of justice and individual circumstances matter; illiteracy is very important. Their signature could not constitute a clear and unequivocal waiver.

476. Sixth, in essence, the court should approach this as it would a bilateral contract of compromise; the label of abuse of process, if correct, was not important. Seen in that way, the court should be very slow to infer that a party intended to surrender rights and claims of which neither party was or could be aware or of which the releasing party was not and could not have been aware: *BCCI v Ali* [2001] UKHL [2001] ICR 337 16017. The relevant words had to be read in the context of the Agreement, the parties' relationship and all the circumstances known to the parties; an objective view of the parties' intention would then be reached. If the words were to cover claims of which no party was aware, or of which one party was unaware, appropriately clear words would have to be used. The form, covering, as it did, what was done "*pursuant to the BIOT Order 1965*" could not cover common law claims or *ultra vires* acts. It did not use the language of "*full and final settlement*".
477. Seventh, the requirement for such forms was a surreptitious insert into the 1982 Agreement. The negotiations had commenced on the basis that the earlier requirement for individual quittances which had proved such a stumbling block for Mr Sheridan in 1970 would be abandoned, as had already been signalled. The provisions of Article 4 were introduced to protect the Mauritius Government which was ultimately at risk of indemnifying the UK Government and were not in the first draft of the Agreement. This Article was not translated for the Ilois. The Trust Fund Act did not place any duty on the ITFB to obtain them.
478. Eighth, no individual had legal advice, let alone on an individual basis looking at his or her individual circumstances; a mass meeting was not an equivalent. Negotiations could be collective but not advice. Ninth, it was unlawful for the Defendants to bargain away its governmental responsibilities or its citizens' fundamental rights. In the light of all the circumstances, it would be unconscionable for Defendants to be allowed to rely on this abuse argument. They were aware of the problems of the Ilois, with different groups, political interference, the difficulties in seeking individual advice, but it had a governmental relationship with them and knew how desperate they were and how inadequate the £650,000 had been.
479. Mr Allen recognised that group litigation had not existed in 1982 in the way it now does and that the settlement in the thalidomide litigation afforded some practical guidance. But for all the difficulties in 1982 in achieving a global settlement for all the Ilois, as they then all seem to have wanted, he submitted that the only proper way to have proceeded was by individual advice and explanation for each Ilois and by developing the sort of practices which have only been seen much more recently in the settlement of group litigation, with dissentients trying to carry on as best they can or being barred. He recognised that this would have given rise to considerable practical difficulties over, say, conflicts of interest between groups of Ilois with different views, and their legal advisers; this could have led to very considerable delays in Chagossians, in their plight, receiving any money. But Mr Allen said that the UK Government ought to have learned from the speed with which it had attempted a settlement in 1979 and ought to have made sure that there were opportunities and time for alternative advice, with copies of the Agreement in Creole, or ought to have sought a parallel oral agreement.
480. The Defendants, in response, submitted that the fact that some, but not all, Claimants' cases, might be an abuse of process was no reason not to strike out those which were. That I regard as obviously correct in principle. Here, the fact that those Claimants to whom the argument applies, if it is otherwise sound, cannot immediately be identified, does not deprive the argument of force. If it is sound, the Claimants will have to be more explicit about who received money having signed renunciation forms.
481. If Claimants could be barred from bringing proceedings because they are an abuse of process, and yet defences, in principle, may be available to some against such a step, it becomes matter for individual adjudication as to whether

such a case or defence succeeds in practice. To my mind, it assists effective case management for those issues to be so identified, focusing the minds of the parties upon the factual issues which they need to address. The fact that an argument as to abuse may not ultimately succeed, because particular facts may justify its defeat, is no reason to refuse to identify what the Claimants need to show in fact for their action to succeed. There is a force, which I accept, in the Defendants' submission that, if its abuse point is sound and if the Claimants' evidence that no-one asked about the contents of the forms is destructive of any potential defence of *non est factum*, the Defendants' abuse case should be allowed to succeed now. Likewise, it is relevant for the consideration of the group litigation as a whole if it proceeds, by way of establishing a benchmark, if I conclude that those who have given evidence would have no reasonable prospect of establishing any defence to this abuse of process argument.

482. I accept that the authorities bear out Mr Howell's submission as to circumstances in which an abuse of process can occur as a result of someone accepting money from B to settle C's debt, but then suing C. I also accept that cases such as *Johnson v Gore Wood* show that there are different categories of abuse for which no exhaustive list exists. One category is where an issue could have been raised in earlier litigation between the same parties; another is where settlement of a corporate action leaves open or is expressed to leave open a related action by a shareholder. This abuse argument relates to what Mr Howell described as a "*settlement*" case. The point which Mr Allen made, which I accept, is that in consequence, the way in which that sort of allegation of abuse is examined bears a close familial relationship to the way in which an allegation that proceedings were in breach of a compromise agreement would be analysed. However, categorisation of cases is not the answer by itself. Mr Allen's point is well made that *Johnson v Gore Wood* shows an overarching requirement that the action be abusive of processes of the court, on its merits, looking at all the interests after a careful examination.

483. However, if in fact a Claimant has accepted payment of a lesser sum from B than was his due from C, in circumstances where the payment by B was agreed to be a substitute for payment from C, usually because B's payment was certain but C's was not, there is nothing unjust at all in relation to the principles of *Johnson v Gore Wood* in that person being unable to sue C – quite the reverse – the court should not allow its procedures to be used to enforce the debt which the creditor had settled by payment from another. Mr Allen's arguments to the effect that in each of the cases relied on by Mr Howell there was an acknowledged debt, and in one an election made as to whom to sue, are beside the point. It is a point which can only be relied on by the payer by intervening in the action. Mr Allen did not suggest that the authorities relied on by Mr Howell had been disapproved of or overtaken by *Johnson v Gore Wood*.

484. The real issue is whether a signatory to the renunciation form accepted in so doing the Rs 8,000 in return for not suing the UK Government; in other words, did the facts here fit the settlement type of case where the court would intervene to prevent an abuse of process? I emphasise Rs 8,000 because no other component of the distribution of £4m plus £1m land was subject to such a requirement. I regard as untenable the suggestion by Mr Allen that what would otherwise be an abuse of process, ceases to be one because circumstances subsequently changed, whether to show increased prospects of success in litigation or to show the inadequacy of the sum accepted.

485. Mr Allen submitted that, viewed as a settlement type case, there were a number of reasons which showed that no agreement of the sort relied on by the Defendants had been reached. I do not understand his point, on the parole evidence rule, as to what other terms might have been part of the Agreement, as opposed to his argument about what the terms stated actually meant; no other orally agreed terms were suggested.

486. I do not accept Mr Allen's argument about the wording of the renunciation forms, to the extent that it goes to whether any agreement at all was reached when they were signed; it only goes to what was agreed. It does not matter that there was both a UK and a Mauritius Government form or that the ITFB were involved in their collection. Nor does it matter that no other party is specified; it is perfectly clear that the form involves acceptance of money from the ITFB in return for a renunciation of certain claims against the UK. For the purposes of this aspect of abuse, that is what matters.

487. I turn now to the various arguments as to the scope or meaning of the renunciation form, construing its language objectively in the relevant factual context. First, Mr Howell sought to distinguish the *BCCI* case, while not disputing its authority. It was, he said, a general release of all claims of any description; it was that which gave rise to the issue of whether or not a claim, the nature of which was not envisaged at the time of settlement by either party, fell within the scope of the compromised claims. *BCCI* was distinguishable on those grounds – the renounced claims are set out with some particularity in the renunciation form, although there may be room for debate as to their precise meaning. His case did not rely on general wording or unknown claims. *BCCI*, in my judgment, is concerned with the construction or application of the terms of a seemingly all embracing release to a claim the nature or existence or basis of which was unknown to all parties; the general release could not cover such claims; objectively judged in that factual matrix, the words did not cover such a claim. It would have applied also if one party had not known of the possibility of a claim. This was subject of course to clearer and more precise wording than had been provided in *BCCI*. There was also a concern that giving such a clause a very wide construction could be a vehicle for sharp practice, by someone with the relevant knowledge against another who acted in ignorance.

488. But that is rather different from the position here: the claims precluded are all claims arising out of an identified series of acts and omissions. The claims upon which the Claimants now rely and which the Defendants contend are covered by the form, were all in existence in 1984 as a matter of law, apart from the alleged tort of exile. They all bear a close kinship, albeit expressed in different language, to the Vencatessen claims, which the renunciation forms would obviously have been addressing, together with any similar claims however expressed. Indeed, much of the factual material was known or capable of being ascertained, although I accept that the question of what the UK Government knew, compared to what it said, was not fully known until papers were released under the 30-year rule, but the fact that some material had been withheld was known. Mr Allen's submission that a lack of knowledge of existing rights precludes an effective settlement, is too broad for *BCCI* to provide him with support. Assuming that the Ilois knew, or are to be taken to have known, what they were signing, none of the rights which they gave up were rights the very existence of which they were unaware of. They gave up rights which they say they were asserting. Their case is rather that they did not know that they had given up any rights, not that they had given up, through a form of words, rights which neither they nor the Government knew existed or even contemplated might exist. *BCCI* does not help Mr Allen. The Ilois were not obliged to sign the forms; they could decline the ITFB money and maintain an action.

489. I do not accept Mr Allen's next submission that the claims surrendered are not common law claims or claims in respect of *ultra vires* acts. Such a contention empties the form of meaning; the only claims which could arise were those in respect of unlawful acts, unlawful at common law or for want or abuse of statutory power. It is plainly not confined to future acts; it refers specifically to past acts.

490. It is perfectly clear that the form covers all the damages claims in these proceedings. It is less clear that it constitutes a renunciation of the right to return (as Mr Allen suggested) as opposed to the renunciation of a claim in respect of



preclusion from returning or enforcement of the right to return, which right remained in existence (as Mr Howell suggested). Certainly, a claim in respect of preclusion is renounced; but so too (using the material words of the form) is any claim relating to:

"Any future situation occurring in the course of or arising out of the consequences of what was done pursuant to BIOT or any such preclusion."

491. On any view, however, it covers all the claims in these present proceedings. I see no force in Mr Allen's question as to the duration of the renunciation of claims: it is indefinite. If Mauritius were to regain sovereignty or if the bases were to disappear (the lease has a maximum of 70 years from grant absent any renewal), the legal enforcement of any right to return would remain precluded; the claim could not be made.
492. Mr Allen's submissions about whether anyone could sue on the form, for compensation or resettlement and as to what the compensation was are not substantial responses to the issue raised by the Defendants as to the effect of these forms. Whatever else was included, the consideration clearly covered the Rs 8,000; it covered the remaining distributions by the ITFB including the anticipated community facilities. There is, I accept, past consideration as well in the references to compensation and resettlement, the bulk of the individuals' money having already been paid out. But that does not assist Mr Allen: this form of abuse may resemble the breach of a contract of compromise, but it is not the same as a breach. The real question is what was the basis upon which the ITFB paid over the Rs 8,000 and is that inconsistent with the claim now advanced?
493. There was no right to sue the Governments, who were not parties, so as to enforce more compensation and better resettlement. As was decided in the *Permal* case in 1984 and 1985, (paragraph A693), there were alternatives open: sign and bring a claim against the ITFB for the due portion; refuse to sign and sue either or both Governments. The Defendants' position on that aligns with what the Mauritius Supreme Court decided in both *Permal* and subsequently in the case brought by Simon Vencatessen, decided in 1989, (paragraph A743).
494. Accordingly, subject to the two substantive points remaining, I consider that the Defendants have clearly established that the form covers the claims in the present case and that, in principle, having accepted the money from the ITFB and signed the form renouncing claims, it is an abuse of process for those Claimants to bring these proceedings. The basis for the ITFB payment was that the form had to be signed; that issue was in fact litigated and upheld. There is no issue about that. The issue is about whether they knew what they were signing and nonetheless want to sue the Defendants in these proceedings.
495. I now turn to those two points which can be broadly described as the Claimants' absence of knowledge as to what they were signing and unconscionability. This entails some analysis of the factual material.

## **Knowledge**

496. The immediate evidence about how the renunciation forms were signed has to be put into the factual circumstances leading up to their signature and indeed some subsequent events cast a light upon what was known in 1983 and upon what was fair.
497. Mr Howell submitted that in view of the signatures or thumbprints, the signatories were bound and the proceedings were an abuse unless there were

reasonable prospects that the Chagossians could establish at trial the defence of *non est factum*. He referred me to *Norwich and Peterborough Building Society v Stead* [1993] Ch 116 12607 Court of Appeal, which also sets out the principles from *Gallie v Lee* [1971] AC 1004. It is for the person who has signed the document to show that the transaction which it effects is essentially different from the transaction intended so that the signatory can say that he did not consent to it. But he also has to show, even if illiterate or lacking in understanding of the law, that he acted responsibly and carefully according to his circumstances, although the law is readier to relieve him against hardship. That second requirement is expressed by reference to the position of innocent third parties who, knowing nothing of the circumstances of the signing of the document, may rely upon it.

498. There was no great dispute as to the law as opposed to its application to these facts. Mr Allen suggested, but I reject it, that because the principles in *Gallie v Lee* were expressed to originate in the need for protection for innocent third parties, *non est factum* did not apply where no innocent third party was at risk. I take the view that it protects the other party to the transaction as well, and is just as applicable to protect him, present at or absent from the signing by the person raising the plea. But the UK Government can also be seen here as an innocent third party, albeit that it would have been aware of the illiteracy of the Ilois; it was not in charge of the signing arrangements, and imposed no requirements as to how it was to be done. Nor did it "*connive*" in a particular form of process. It can be said, but that is another matter, that, despite the involvement of the Ilois on the delegations, the legal advice which they had and the publicity given to the full agreement, the UK Government organised no legal advice for the Ilois on an individual basis before they signed the form.
499. Mr Howell submitted that those signing had made no enquiries, or asked for it to be read or explained. The forms were evidently not simple receipts; they were asked to sign two forms, once for the UK and once for the Mauritius Governments. They could simply enquire whether these were receipts. Mr Abdullatif was present. Mrs Kattick and at least Mr Ramdass would have known what they were. They could have waited.
500. Besides, submitted Mr Howell, any appraisal of what the Ilois knew had to be set against the background of the long campaign for compensation. It had long been plain that the UK Government would only pay more money if there were to be no more claims like Michel Vencatessen's. It was absurd for the Ilois to seek to portray that case as a family case; the Ilois tended to be concentrated in a few places in Port Louis and word would travel fast. It had received considerable publicity, as a test case. All the negotiations in 1979, the subsequent correspondence, the legal advice showed the Ilois organisations to be well aware of the UK Government's requirement that a settlement to be final, even though they would not renounce their rights to return. The Ilois themselves were using the litigation route as well as the political route and cannot have supposed that one case could settle leaving others to be commenced.
501. Through the 1982 negotiations, the position of the UK Government on this point had been clear, though it would not insist on the individual abandonment of the right to return. The evidence showed that the issue of a renunciation form had been raised with some of the Ilois delegation before Mr Grosz and Mr Macdonald left; the Agreement had been discussed and it was in a final form.
502. The Ilois delegates would not just have sat quietly, as observers; they were vocal, activist and organised. Elie Michel could understand enough English to get the gist; Mr Mundil was bilingual; Paul Berenger and Mr Bacha spoke Creole. There were meetings with the Ilois delegates alone. There was no incentive for concealment; the Agreement, with Article 4, was widely reported in the press. The CIOF took subsequent advice about it.
503. Mrs Alexis had lied over her knowledge of what had been the focal achievement of her long and tireless campaign: the CIOF contact with lawyers in

correspondence before and after the 1982 negotiations, and their presence at the 1982 negotiations to advise the delegation, or that they had twice threatened litigation if negotiations failed; it was not credible that she had not known this was to be a full and final settlement, though she had written to President Reagan in those terms.

504. If she had thought that she had obtained £4m plus £1m and that anyone could still bring an action against the UK Government, it was a remarkable negotiating achievement and better than had been sought. But that had not been reflected in subsequent conduct: while dissatisfied with the amount of money, in practice once it had been distributed, no-one had brought an action against the UK; instead they had sought money from the USA. For her not to know about Article 4, and renunciation forms, there would have had to have been a conspiracy to deceive her whilst simultaneously all the relevant forms were being put in the press. She said she distrusted non-Ilois and so would not rely on the Mauritius Government. She said that the ITFB had no copy of the 1982 Agreement: "*we knew it well*", as she would have needed to do to tell the Ilois she represented about it. She had been an activist in 1983 in the CRG, not "*just sitting at home*" as she had said. She was pressing for payment of the money and for signatures to unblock the £250,000.

505. Mr Ramdass, submitted Mr Howell, was likewise not credible. Mr Mundil, with him on the JIC, had been his translator in 1981 and was fluent in English and Creole. It was not credible that he had no copy of the Agreement; his son sent one to Sheridans, who drew the renunciation obligation to the JIC's attention.

506. The 1982 Agreement was not difficult to understand in essence. It was highly improbable that the Ilois who initialled it were unaware of its essential features. There was every incentive for the Ilois representatives to understand it in light of what happened in 1979, when some of the Ilois delegates in 1982 had led the opposition. They would need to explain the position to those whom they represented. There were plenty of people who could assist with the 1982 Agreement quite apart from the CIOF's English lawyers. Mr Bacha was a governmental official; Mr Berenger, an important politician, was on good terms with the CIOF.

507. The 1982 Agreement was the major event for the Ilois for a decade; it would have been discussed widely and the 1979 experience would have made them aware of the importance of the conditions which might be attached. It was inconceivable that anyone would try to keep the Ilois in the dark; there was no value in doing so, nor with the legal advisers, publicity and political interests any prospect of doing so. There was nothing in 1981 or 1982 to suggest that the Ilois could not distinguish between compensation claims which were settled and the right to return, or that they had any objection to settling compensation whilst leaving intact any right to return.

508. The ITFB conducted its meetings in Creole. Mr Ramdass' suggestion that they reverted to English for important matters rather begged the question of how he knew they were important. There were five Ilois. There had been controversy at the ITFB in February to April 1983 about whether the ITFB should be involved in collecting renunciation forms: Elie Michel, Francois Louis, Simon Vencatessen, Josephine Kattick and Christian Ramdass were there.

509. Those last two were to play a part in witnessing forms, not to identify people, because ID cards had been produced for that purpose. The Rs 8,000 were to be paid at Astor Court and not through the Post Office. It was being paid in a different way – there would have been discussion as to why.

510. There was a delay in the planned timetable which oddly no Ilois witness could remember.

511. It was not believable that the Ilois did not know of the forms. Mr Bancoult and Mr Louis could read and write some English. It was implausible that Mr Bancoult, who was quite confident and assertive, would have signed the document when most of it had been hidden from him, as he answered when pressed on the fact that it did not look like a receipt. It was a lie for him to say that he did not know what was in it till Mrs Talate gave evidence. He lied because if he knew, as a "B", most others with later initials to their surnames would also have known. He himself witnessed some signatures. He had written to President Reagan in 1984; he said "*full and final*" was bandied about the whole time. He was involved on the ITFB in 1984 in seeking to unblock the £250,000 and expressed no surprise at renunciation forms being raised in that context. For him to say that he did not know was not credible in the light of the many references to them at the ITFB. The CRG raised the issue with the High Commission in Mauritius, and he was part of the 1985 delegation to it which raised it. His denial of ever having seen one was untrue; he witnessed a later one.
512. Others resisted signing because they saw the risk of the forms being used to support preclusion; Francois Louis and Kishore Mundil formed an organisation (KMLI) to make that point. There was no protest that this was a dreadful revelation. KMLI helped CRG prepare a claim for £4m from the US.
513. Simon Vencatessen and Francois Louis had been elected representatives on the ITFB; they held a press conference. He pursued litigation on the point. They had no desire to hide their position. If they had an incentive to do so, it would be lest Ilois wanting the £250,000 unblocked would try to make them sign. Simon Vencatessen's evidence had been implausible. His witness statement and oral evidence were inconsistent over when he said he found out about the forms. In the former, he said Mr Bacha had said they were necessary and he had protested. The Minutes show his presence when advice was given that they were not for the ITFB to collect. His oral evidence was that he did not know of them till September 1983. He knew that £250,000 would be retained unless they were signed. He knew that it was full and final and hence did not sign.
514. The ITFB Minutes are full of discussion about how to get the £250,000 unblocked through obtaining the last few renunciation forms or persuading the UK that they had enough.
515. If the Ilois had not known generally, there would have been a cry of betrayal. Mrs Alexis said that they would have revolted. Yet it is clear that they did not do so at any stage. It is clear that the existence of the renunciation forms was talked about before and after signature in 1983 in the KTFB, and the press. No-one kept them a secret. The obvious inference is that they were known about.
516. No litigation was started or thought about for some years, although fresh advice was sought by the CIOF in 1990. If the inhibition lasted till 1985 or five years from the Agreement as Ilois witnesses suggested, it is surprising that their poverty did not drive them to it. Mrs Alexis and Mr Saminaden exaggerated the lack of organisation and stupidity of the Ilois. It was implausible that Mr Ramdass had not known of the forms till after the 1982 Agreement, and after a protest heard nothing more till he met Mr Mardemootoo recently. He was on the ITFB in 1983 when the forms were discussed. His son had a copy of the Agreement. He was related to Francois Louis and Simon Vencatessen who refused to sign, the latter bringing a case about it.
517. Mr Howell described Josephine Kattick as evasive when it came to dealing with whether the settlement had been "*final*". She had been an activist, a member of the CIOF Committee and her sister had been prominent in Ilois affairs and part of the Ilois delegation. Her evidence was contradictory about her knowledge of the Agreement in 1982. She had been aware of the renunciation forms from discussions in September 1983 at the ITFB, and that those were the forms which she had witnessed. She made no protest and told no-one of them. It was obvious that she had known what they were. She was an intelligent witness, but not always honest or reliable as was shown by other aspects of her evidence,

- over her education and being deported from Chagos when she had left in 1967, later saying that she had been prevented from returning by Rogers & Co.
518. Mrs Talate was an active Ilois campaigner in the late 1970s and early 1980s; she was a leading member of the CIOF and was one of those who thumbed the CIOF letter instructing Bindmans. She knew Mr Ramdass and Mrs Alexis on the 1982 delegation. She had been on the ITFB for three years. She had received money from it. Her variable evidence about her knowledge of the source of the money, or of her receipt of it, and on other matters made her unreliable and at times untruthful. Her witness statement had not dealt with many important areas, failing to disclose her true role.
519. Rita David was similarly unreliable. She completely changed her evidence midstream about whether she had been aware of the 1982 Agreement, the payment of money and that no more would come from the UK Government from saying that she knew of those events to denying all knowledge.
520. Rita Elyse, Olivier Bancoult's mother, had said that she had been involved in meetings and protests seeking money from the UK Government. Her later claims not to know that the Agreement meant that no more could be sought were not credible. She played down her contact with her son and his ability to read English; she denied that what he said about that in his Judicial Review witness statement was correct. Given what he must have known about the unblocking of the £250,000 when he was on the ITFB, it is incredible that he would not have told her and of the associated renunciation forms.
521. Mrs Jaffar's evidence that she never went to meetings, thought committees merely took advantage of her, never heard of negotiations, lawyers or protests, was not credible and was contradicted in part by her witness statement and in part by her involvement as a CRG elected committee member. She denied the truth of her witness statement which referred to her knowledge of the Vencatessen case. Her CRG involvement would have led to knowledge of the renunciation forms. She was unreliable in other respects too.
522. Mr Laval was not credible. Mr Saminaden, however, did know that the £8m sought in 1981 had been final and that Michel Vencatessen had to withdraw his case. His evidence as to what he and the Ilois then thought they could do about other cases was vague, at one time accepting that they could bring no more cases, then resiling. He had known that the forms were not receipts. He had only recently heard of his nephew's, Simon Vencatessen, case.
523. None had asked for an explanation of what they were signing: none of those who gave evidence could discharge the burden. It was for the signer to take reasonable steps to obtain an explanation and to receive legal advice. None were compelled to sign or to sign that day. There was no evidence of adult disability. It was reasonable for parents to sign for those under eighteen.
524. Mr Allen put the renunciation forms into a different context in which he said that they were a manifestation of the deceit and dishonesty practised by the UK Government on the Chagossians for more than ten years by 1983, and subsequently. They were at a real and obvious disadvantage of which the UK Government was aware and which it did nothing to address. He developed those arguments further in relation to unconscionability.
525. He pointed out the absence of full and informed individual advice being given to each Chagossian being asked to sign away fundamental rights. The forms were in English, which he said showed that this was a wilful attempt to prevent the Chagossians understanding the document. (English, however, was the official language of Mauritius and there was no evidence of much greater literacy in Creole.)
526. It is my task at this stage to say whether or not there is a reasonable prospect of Ilois who signed those forms making out a defence of *non est factum*. I consider that it is important to focus primarily on what happened when the forms were signed and the immediately preceding period. I recognise the contextual arguments and regard them as relevant but not, at this stage, decisive

for most of the Ilois. I accept, however, Mr Howell's analysis of the sequence of events and the reliability and truthfulness of the Chagossian witnesses, as it is clear from the references to it in Appendix A. I can deal briefly with it here.

527. The Ilois had plainly become, to a significant degree, sensitised to the idea of renouncing their right to return to Chagos as a result of the political storm which led to Mr Sheridan's departure in 1979. It had been an issue in the run-up to the 1981 negotiations and again in 1982. It had become clear that there had to be some other solution if there were to be any agreements. It was envisaged and expressed in correspondence before the 1982 negotiations and again verbally at the 1982 negotiations that individual renunciations of that right would not be sought. The adverse reaction of the Ilois to suggestions of giving up that right had always been strong and genuine. I do not think that the difference between giving up the right and giving up the claim to the right would have been understood by them generally then, any more than it was now.
528. There was a mass meeting at which the outcome of the 1982 negotiations were explained, and the 1982 Agreement received widespread publicity. But it is not easy at this stage, indeed I doubt very much whether it will ever be possible, to be sure how well known it was in 1982 that there was a provision in the Agreement for some renunciation form, which individuals would have to sign.
529. This is by no means the same as saying that they did not know generally that the 1982 Agreement was final, that further actions could not now be brought against the UK, and that there might be some mechanism for preventing that.
530. There was a widespread awareness that the Vencatessen litigation had to be withdrawn because of the pressure put on Mr Vencatessen by the Ilois to withdraw it, so as to enable the money to be paid. It is obvious that that suggested that there would be some bar to the bringing of further money claims, but not necessarily that the precise means of prevention was known.
531. I regard as wholly unreliable or as positively untrue most of what the Chagossian witnesses said about the correspondence in 1979-1982 which referred to money being paid in full and final settlement. There was no reason for Mr Mundil to deceive them about his seeking compensation on that basis, or to keep them in the dark. Eddy Ramdass could read a little English. There were plenty of helpers. It would have reflected the UK Government's unvarying position, which it always sought to make clear, to everyone. I found their accounts of how the 1981 and 1982 negotiations proceeded to be untruthful and wholly unreliable. I do not believe that the Chagossian delegates were kept in the dark by anyone – it was not in anyone's interests for the Agreement to founder or to be torn up when its contents were made public. Nor do I believe that they did not ask what was going on or felt inhibited from doing so. They had felt no inhibitions in 1979. Their personal activities were demonstrations, allegations, protests, hunger strikes, organising committees, seeking publicity and political support.
532. There was advice available in 1981 and 1982 from Sheridans and Bindmans, though only Mr Grosz and Mr Macdonald were present in 1982. Both sets of lawyers were fully alive to and accepted the justification for the UK Government's persistent theme that it would not pay over any money without guarantees that it would not have to pay more. I am sure that that point was communicated to the Ilois delegates, even through translation, and was understood by them. It is not a difficult point. I find it very hard to believe that that broad position was not also obvious to the Ilois generally as a result of the mass meetings, press publicity, and discussions among themselves. The general air of congratulations and gratitude all round on this result after so long cannot have left an impression that more could be asked for. The means by which that was to be achieved, which included the individual renunciation form and the withholding of £250,000 was explained to the Ilois delegates by the English lawyers. I am less certain how far those precise requirements were known to the

Ilois in general as a result of the 1982 Agreement meetings, despite the report in "L'Express".

533. After the Agreement, the leaders of the CIOF took further advice on the Agreement. I do not believe that Mr Michel did not know what Bindmans advised, nor that he kept it from at least the leaders of the CIOF, including Mrs Alexis. I am sure that the renunciation forms were discussed by the English lawyers with the Ilois delegation before they left because Bindmans and Mr Macdonald did not raise it as a new clause in the Agreement they subsequently saw. I am sure they would have noticed it and specifically referred to it, if it had been new. Sheridans also advised the JIC on the Agreement specifically referring to the renunciation forms. I am quite satisfied that it was generally known this Agreement was intended to put an end to financial claims and that there was to be some mechanism for preventing further claims. I am not so clear that beyond the delegates and the leaders that it was appreciated that the mechanism included individually signed renunciation forms.
534. The Minutes of the ITFB record discussions on at least one occasion in March or April 1983 (Minutes signed 16<sup>th</sup> April) about the role of the ITFB in collecting the forms. The Ilois representatives on the ITFB at that time were Simon Vencatessen, Francois Louis, Christian Ramdass, Elie Michel and Mrs Kattick. However, no forms had been drafted by that stage.
535. There is also evidence that there was a hitch in the process on 29<sup>th</sup> August 1983; that may have been about the amount and not the forms. It does seem, however, that Mauritian politicians had been clear, at least with Ilois leaders including Mrs Alexis, that the forms had to be signed, but it is not clear at how large a meeting that was. Mr Berenger, Leader of the Opposition, and two MLAs representing the largest concentrations of Ilois, were there.
536. I turn now to focus more closely on the events surrounding the signing of the forms. It is to be remembered that the 1982 Agreement was reached in April of that year. The first tranche of payments of Rs 10,000 was made in December 1982, paid out at the central Post Office – no renunciation forms were required. The second, land purchase related, tranche was paid by June 1983 – no renunciation forms were required. The third tranche, where the forms were signed, proceeded without any radio or press announcement that renunciation forms were required. There is nothing in the fact that a Ministry Office was chosen as the venue for the distribution to alert anyone to a different process. True it is that the forms do not look like receipts – they are too long and there are no figures such as might have become familiar from handling money, wages in the Chagos "carnet", pension or other benefits. But if the document itself was thought sufficient to raise a query in someone's mind, it is surprising that the proposal to collect them was not announced in advance. The fact that two forms had to be signed, one for each Government, would not of itself have told the Ilois much.
537. There was no-one to read or translate the documents. Most Ilois were illiterate and spoke Creole, whereas these documents were in English with some legal complexity.
538. I am quite satisfied that Mr Ramdass and Mrs Kattick knew very broadly what function the forms performed in relation to the 1982 Agreement, as part of the mechanism for preventing further claims and making the settlement full and final and that they were not receipts; I do not think that they knew the precise terms especially in relation to the right to return. There is no evidence that they had had any opportunity to see them beforehand or to go through them. They were not in a position to offer more than a rudimentary explanation that they were part of making the 1982 Agreement full and final. They, too, were illiterate and unsophisticated.
539. But I am not clear at all that explanation was any part of their function anyway. They were there to witness, because the forms might have a legal significance, showing that the person who thumbled it was the person who should

have thumbed it. ID cards might well have sufficed, but this witnessing was also to invest the document with some legal proof in a simple way. They may not have been very efficient, but Mr Howell put over much weight at this stage on their presence. They were often not immediately beside the person as he thumbed or indeed always there at all.

540. It is not clear for how long Mr Abdullatif was there or what his role there was, although he could have furnished an explanation.

541. Mrs Talate said she asked a civil servant what the form was, but did not reveal the reply, beyond saying that they treated Ilois like dogs. One asked why there was more than one form to sign and was told that was because they were getting Rs 8,000. No-one else asked anything about them. One said they did not have the right to ask. Mr Saminaden said they were told that they had to sign to get the money. Others, however, described in similar language how they thought it was a receipt:

*"All that I know whenever I go to a bank, even to get my pension, I have to sign in order to get a sum of money."*

(Mrs Alexis)

*"What I understood was that I signed it and got my money, that was it."* (Mr Ramdass)

*"I thought I was signing for a sum of money."* (Mr Bancoult)

*"Wherever you go when you get money you have to sign."*

*"When I signed the paper I signed in order to get Rs 8,000."*  
(Mrs Jaffar)

No copies were available to be taken away. There was no separate arrangement for minors other than that their parents had to sign for them. There were no arrangements for those under other disabilities and there was no evidence that there were any.

542. Only a dozen or so refused to sign. Francois Louis could read and understand and told Simon Vencatessen. But there was seemingly no widespread dissemination of their views or other reaction. His later litigation provoked no uproar about renunciation. Renunciation forms were discussed in the ITFB when Mrs Alexis, Mr Bancoult, Mr Vencatessen and other Ilois representatives were present. The discussion was about the unblocking of the last £250,000 and the UK Government's requirement for the forms. But it provoked no outcry. All of that subsequent absence of reaction suggests strongly that the leaders at least knew that they had signed forms which put an end to compensation claims and assumed that the Chagossians generally knew it, because they had all understood that back in 1982. It also points strongly to their evidence that it was thought just to be a receipt being untrue.

543. However, even Mr Berenger seems to have been surprised to discover later that there were two forms, one in favour of the Mauritius Government, which covered the claim or right to return.

544. At this stage, however, notwithstanding the way in which the evidence points and the compelling analysis by Mr Howell, I cannot conclude that it is plain that the Chagossians in general knew that the document was more than a receipt. It is possible that they could show that that is what they thought. My reluctance derives from the lack of public notification some sixteen months after the 1982 Agreement that it was on the third and smallest tranche that these forms were to be signed. The Chagossians were poor and so in need of the money, illiterate and no explanation was offered of a written document in another language. They generally knew, I am satisfied, that the Agreement was final and contained some mechanism to give effect to that end; but that is not to say that when they signed these forms, they knew what they were signing was more than a receipt and was that mechanism in the form of promise to abandon all claims,



financial or otherwise. The distinction between a general awareness of a broad position and the knowledge of the particular document being signed at a particular time is one which I consider it necessary to draw.

545. I do not consider that the Chagossians generally have no reasonable prospects of showing that they took reasonable care in the circumstances. The first relevant circumstance is their knowledge of the potential legal significance of the document: they had not been alerted to its having any significance beyond that of a receipt by past events or current warning. On that assumption, there was no reason to ask. As I have discussed, I do not consider that the size of the document and the absence of figures is, at this stage, a compelling counter factor. Second, there was only limited evidence that there was anyone to ask – no-one had any translating, explanatory or advisory function. Mr Abdullatif may have been there, but that is not the same as his having an explicit function. They generally were illiterate, simple and trusting and English was not their language. I have already dealt with the role of Mrs Kattick and Mr Ramdass.

546. Third, the process was conducted with some rapidity; it was not a form of legal consultation or group meeting. It appears that people came in one at a time, approached a grille, took the money and signed the document: no signature, no money. Fourth, although a handful could read and some did object and it might have been possible to return having taken advice, there was an emphasis on achieving a timetabled distribution. Fifth, the Ilois were desperate for money; that would have reduced their opportunity for calm deliberation.

547. Mr Howell is right that being in a hurry or being illiterate is no cause for carelessness, but he has not yet the strength of case to succeed. There is force in Mr Allen's more general submission about the role of justice in abuse proceedings. I do not consider that it would be just for the individual Claimant to be precluded from showing individually what they knew or did not know. Those considerations do not, however, apply to some of those who gave evidence before me.

548. My strong impression was that the translation of the forms in court, which would have meant little enough as Creole legalese, caused the witnesses all to focus on the renunciation of the claims to return to Chagos. They denied knowledge of the form in consequence and were unable or unwilling thereafter to distinguish compensation from other claims. But that by itself is not enough to exclude all those witnesses. I am quite satisfied that any Claimant who was a member of the 1982 delegation or who served on the ITFB in 1983 and signed the forms is in a different position. First, the former knew of the requirement for individual forms as part of the mechanism for giving effect to the finality of the 1982 Agreement. The latter, if they did not know it before, would have known it through the ITFB discussions. They all would have appreciated that the document being signed in September 1983 was that form. The gap between agreement in April 1982 and the signing of the forms in September 1983, and the absence of forms for the first two tranches, would have been of much less significance for someone who knew what the mechanisms were.

549. Second, the form as signed is not radically different in character from what they expected. I say that despite the fact that it includes a renunciation of claims to return to Chagos which they may not have known of and would have resisted, had they known. The document is still a renunciation form; it deals with BIOT related claims and ends their ability to sue. The inclusion of an unknown but important provision does not make it radically different for these purposes.

550. Third, whatever their precise knowledge of that, they were in a position to ask about it and to ask for time to take advice. They had been in touch with English and Mauritian lawyers and could have asked for advice again. They had ready access to English speakers and to Mauritian politicians, civil servants, or indeed to the ITFB and Father Patient. They could have asked to see the form and take one away. Those on the ITFB were in a position to ask to see them in advance because of the April meeting and the emergency meeting on 30<sup>th</sup> August

1983. Mrs Alexis knew of them in advance; she could ask Mr Berenger what they said. They did not exercise reasonable care about what they were signing, and have no prospects of showing that they did. Olivier Bancoult is not within the category which I have referred to, but I am quite satisfied, from his position in the CRG, his relationship to other active Ilois leaders, and from all his evidence, that he knew that the forms were part of the mechanism for preventing further claims, albeit that he may not have known that they referred to claims to return to Chagos.

551. Mr Saminaden agreed that he knew that the forms were not receipts, that the £8m claim had been "*final*" and that Michel Vencatessen had had to withdraw his case. He initially agreed that it all meant that the Ilois could bring no more cases, and although he resiled from that, I am quite sure that that was not because he was correcting himself but because he realised the problems which his answers were creating for the case as a whole. I am satisfied that he knew that the forms were part of the mechanism for preventing any further claims being brought, although he too may not have known what it contained about claims to return to Chagos. Even if he thought that it was a restriction on bringing claims for five years, which I doubt, he knew the essence of the form, that it prevented claims. He took no step to inform himself better, which he too could have done through the contacts which had acquired over the years, up to 1983.
552. Mrs Talate had been an active Ilois campaigner at the relevant time, and a leading member of the CIOF. I accept what Mr Howell submitted about her, as set out earlier. The burden of proof would be upon her to show that she did not know what the document's essential character was, and that she had taken reasonable steps. Her evidence was so poor, of such unreliability that she has no prospect of discharging any evidential burden on this matter.
553. That same point is true of the evidence of Mrs David, Mrs Elyse, Mr Laval and Mrs Jaffar. Rita Elyse was also Olivier Bancoult's mother; they must have spoken about this. Accordingly, the inclusion of the following claims is an abuse of process: Mrs Talate, Mr Ramdass, Mr Saminaden, Mrs Kattick, Mrs David, Mrs Elyse, Mrs Jaffar, Mr Laval, Mr Bancoult, and should she become a Claimant, Mrs Alexis. Their heirs as such have no claim either other than in their own rights.
554. It is convenient at this stage to deal briefly with Michel Vencatessen's heirs. There was some prospect at one time that it might be said that the withdrawal of his action was vitiated by duress. That was not in the end pursued. Mr Thompson QC for the Defendants submitted that, as the present proceedings covered the same ground as that case and that Michel himself would be barred from bringing these proceedings, his heirs should likewise be barred from claiming through him. This was not disputed and is obviously correct. It does not, however, prevent any of his heirs suing in their own right.
555. At one time, it appeared that the Claimants were seeking to suggest that the forms had been signed knowingly but under the economic duress of their circumstances. This was in their skeleton argument, but not actually pleaded. (Indeed, it was not until the draft Re-Amended Reply of 29<sup>th</sup> November 2002 that it was pleaded that the Chagossians had not known what they were doing, although it had come out with their first witness.) But there was no evidence to support the contention of economic duress. The witnesses said that they would simply not have signed away their rights for Rs 8,000.
556. I turn now to deal with unconscionability.
557. Mr Allen put his case in two ways. First, the renunciation forms were not binding because there had been an unconscientious use of power by the Government in the way in which it had procured their signature. Second, it was not possible for the Government by a financial settlement to provide proper consideration for the forced removal of the fundamental rights of the Claimants; it ought to meet its inalienable governmental responsibility towards them.

558. For his first contention, Mr Allen submitted that what was necessary was for a party to make unconscientious use of its superior position or superior bargaining power to the detriment of someone suffering from some special disability or disadvantage. This weakness had to be exploited in some morally culpable manner, leading to an oppressive transaction. These propositions are drawn from the judgement of Mr Peter Millett QC in *Alec Lobb Ltd v Total Oil Ltd* [1983] 1 WLR 87 94-95. This decision was affirmed in the Court of Appeal [1985] 1 WLR 173; the principles were not in dispute but the Court emphasised the need for unconscientious behaviour rather than a mere disparity of bargaining power. That point was not at issue.
559. A serious disability was one which affected significantly the ability of the weaker party to make a judgement as to his best interests. Categories of disability which were well-established were illiteracy or lack of education, lack of assistance where explanation was necessary, age and poverty. The courts were ready to set aside unconscionable transactions with "*poor and ignorant persons*" where there had been no independent advice; *Fry v Lane* [1888] 15 Ch D 679. A modern description of those persons was provided by Megarry J in *Cresswell v Potter* 1968 reported in [1978] 1 WLR 255. "*Poor*" was "*of a lower income group*" and not destitute; "*ignorant*" was "*less highly educated*". This needs to be judged in the light of the transaction in question and of the documentation which it involves. Again, I regard those points as established.
560. It is also clear that the availability of legal advice will not necessarily save a transaction. *Cresswell v Potter* illustrates that. The need for advice and the true nature of the transaction would have to be drawn to the weaker party's attention before the availability of legal advice could save a transaction. The advice given would have to be independent. That I accept as a general point but much may depend on the circumstances.
561. Moreover, the quality of the advice had to be examined by the court. It was necessary to see whether the lawyers had access to all the relevant information, the time and resources to deal with the problem properly. The advice had to be sufficient to protect the weaker party's interests. Even if the lawyer explains the disadvantages and that the client is under no obligation to sign that may not be sufficient however forcibly that is done. It may be necessary to refuse to act. Mr Allen relied on *Credit Lyonnais Bank Nederland BV v Burch* [1997] 1 All ER 144 CA and *Boustany v Piggott* [1995] 69 P&CR 298 CA. These cases bear out Mr Allen's point. Mr Allen submitted that there was an analogy between that and the provision of advice collectively but not individually. That rather depends on the circumstances.
562. Usually, there had to be knowledge of the weakness of the other party and for these purposes it is clear enough that the Defendants were aware of the condition of the Ilois upon which Mr Allen relied as constituting disabilities: illiteracy, ignorance of legal matters and poverty. The UK Government was clearly aware that it had a stronger position than they had. It was also aware that they were very unlikely to have access individually to legal advice about the signing of the forms. If the disability and the absence of independent advice are established, the burden of showing that the transaction was not oppressive in conduct or in its terms is cast upon the stronger party, here the Government; *Cresswell v Potter* above, 257.
563. I shall for present purposes accept that argument as to the change in burden of proof, but I am not at all clear that it is right. It certainly is so said in that case and in *Burch's* case at page 152. However, in *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221 CA, Ward LJ 234 said that where a case was strong enough on its face in terms of conduct and terms, unconscionable conduct could be inferred if there was no explanation offered to displace that inference. The idea of a change in burden of proof was not supported. Yet the two

other cases are reasonably clear that there is a point at which the burden switches.

564. I accept that it is possible to infer from the terms of the transaction that the stronger party has exploited his position in an unconscionable way as well as from the manner in which the negotiations proceed. But the test is couched in strong terms; the transaction must be oppressive. There must be some impropriety in the conduct of the stronger party and in the terms of the transaction which offends the conscience of the court so that the stronger party should not retain what he has unfairly obtained. If an intermediary is involved, the stronger party must be shown to have actual or constructive notice of any relevant impropriety; *Credit Lyonnais*.
565. There was an issue as to whether it was necessary for the position of the parties to be restored in order for relief to be granted. It is not necessary for me to resolve that because I accept that, for these purposes, a sufficient restoration would be achieved by the giving of credit for the sums received against any damages awarded. The forms were only signed in return for Rs 8,000.
566. The relevant principles have recently been dealt with in *Dusangh* and what I have set out and accepted above reflects those principles. *Dusangh* makes it clear that the importance of legal advice is not so much that it is a necessity in all cases for the disproof of unconscionable conduct but that its absence assists in the drawing of the inference that there had been such conduct.
567. Both parties placed their submissions in the differing contexts as they saw them in which the forms were signed. The UK Government, submitted Mr Allen, had not merely known of the disabilities of the Chagossians, it had been responsible for them being in that state in Mauritius. They were a weak and vulnerable population engaged in adversarial negotiation with the very Government which should have been taking responsibility for them. They had been kept in the dark for years about the actions of the Government and it was only recently that its deceits had come to light.
568. The legal advice was inadequate. First, the lawyers were unaware of all that was to come out about those deceits and accordingly did not give advice with full knowledge of the relevant facts. Second, it was not clear how representative was any group which had instructed lawyers, whether the CIOF or Mr Ramdass' group. Nor could anyone know how far or how accurately any such advice had been disseminated; their structures and memberships were as far from clear as were their means of communicating with their members or the Chagossians generally. The Treasury Solicitor had been aware in 1979 of what was required for any settlement to be effective but those safeguards had been abandoned in 1983. As Mr Allen acknowledged, the scale of the task of getting everyone to agree or dealing with those who wanted more than others from an overall pot or who did not want to sign the forms at all would have been a huge task and could have involved many different lawyers as conflicts of interests arose. The lawyers in 1982 had neither the time nor the money to undertake the necessary work. The Claimants themselves were unfamiliar with lawyers and legal ways.
569. The conduct of the UK Government was unconscionable. It did not conduct the negotiations in 1982 in Creole or provide for adequate translations into Creole by those whom the Claimants could trust. It did not attempt to communicate the outcome of the negotiations to all the Chagossians. The requirement for the forms came into the Agreement late and despite Sir Leonard Allinson saying that individual renunciations of the right to return would not be required. There was evidence, (19/B/8), that the UK side was trying to keep that quiet because questions about how it was to be implemented were said to be best left until the agreement was signed. They were printed in English without any translation or explanation being available. The fact that they were in English was part of a deliberate attempt to prevent the Chagossians understanding what the forms were. There was no forewarning that they were to be required in return for the smallest tranche of money some sixteen months after the Agreement had been

reached. The sum paid was of the order of £2,500 for each Chagossian and the Rs 8,000 represented only £400.

570. Mr Howell submitted that the UK Government had plainly not acted in an unconscionable manner and that the terms of the form were not oppressive. The 1982 agreement was intended to be the solution to the problems faced by the Ilois and to their claims. It was intended to be final and to contain mechanisms to make that effective. This was understood by the Ilois, by their representatives and their lawyers with the latter at least understanding more of the detail as to how that was to happen. The lawyers had all realised that, whoever precisely their clients may have been, they were in effect advising the Ilois generally. In 1979, Mr Sheridan had been advised by Mr Blom-Cooper QC that £1.25m was a fair settlement. In 1982, Sheridans had advised that the Vencatessen case be withdrawn and had not suggested that the settlement was unfair; Mr Glasser confirmed in evidence that they had thought that it was fair. Mr Grosz and Mr Macdonald had both concluded that it was fair and should be accepted.
571. Measured by the claim, reduced to £6 million in December 1981 by the CIOF, the overall settlement was five sixths of what had been sought. That figure had been sought for distribution among 900 families and although the UK Government was not concerned to define how the money was to be distributed, it did its calculations on the basis that there were at most only 426 families to be compensated. It was the ITFB which decided who was to receive the money and widened the range of participants from those accepted as entitled to compensation by the UK Government, but not so extensively as to cover 900 families; it was the ITFB also which decided that the money was to be distributed on a per capita basis without reference to any difference in needs or losses which might have been experienced. There was no complaint from the Ilois about those decisions. Mr Beal, for the Defendants, produced a valuable table of the Ilois populations surveyed on the islands, (so it would not include those Ilois who were unable to return from Mauritius), which showed 680 Ilois individuals in total on the three island groups in July 1970.
572. That settlement was reached in relation to a case which was at best speculative, and indeed with the benefit of hindsight and more materials remained so, at its highest. Anyone rejecting the offer on the basis that he wished to pursue litigation would have had to calculate his possible claim, assess how long it would take, perhaps without legal aid and with limitation problems, and decide whether he would prefer the certainty of the money now.
573. It is not easy to compare exchange rates over time to obtain a real sense of what the money was worth but Mr Howell pointed out that the benefit income of the poor in Mauritius in 1981 could be as little as Rs 3,600 pa (although I think that that is too low to be realistic), but that each of 426 families would receive over Rs 111,000 from the original offer of £2.5m and Rs 223,000 from the total of £5m. That sum of £5m would be worth today about £10.5m. At the 1982 exchange rate of Rs 19: £1, Rs 111,000 was about £5,000.
574. Although each individual Ilois might be poor and ignorant, it was necessary to realise that they did not live in isolation from each other or from the groups which had campaigned for them. They were a well-organised community, represented on the 1981 and 1982 delegations, their groups had instructed lawyers and started what was in reality a test case. They had plenty of political support and access to lawyers and advisers in Mauritius. They were participants on the ITFB. In reality, unfair advantage could not be taken of their position.
575. There had been no morally culpable behaviour in seeking to make the agreement final and to make that finality effective. In reality, the Ilois had recognised that in their correspondence. The Ilois sought a settlement. The Claimants' criticisms of the 1982 negotiations were ill-founded; there was nothing wrong with Sir Leonard meeting privately with the Prime Minister of Mauritius or with the Foreign Secretary writing to him. The Ilois had legal advice to the UK Government's knowledge and the arrangements for translation were a matter for

the Mauritius Government. There was no evidence that the Ilois delegation was kept in the dark or that matters were concealed from them by the UK delegation. The inclusion of the requirement for individually signed forms during the 1982 negotiations was not done covertly nor did it hold up the payment of money to the ITFB nor did it hold up the bulk of the payments. There was no point in reaching an agreement which the Ilois were not prepared to sign up to. The terms of the agreement were the subject of a press communiqué. If there were failures on the part of the Ilois or their lawyers to keep up with or to explain what was happening, those were not matters for which the UK Government was to blame, let alone morally culpable.

576. The UK Government had not stipulated the terms of the renunciation forms nor drafted them. It had not specified how they were to be collected. The evidence showed only that the High Commissioner was aware that some Ilois had refused to sign, which would have suggested to him that they knew what they were, but that subsequently they had decided to do so and it showed that the few who then did not sign were under some Ilois pressure to do so. There was no Ilois complaint that they had been tricked at any stage when the forms were discussed, as they often were on the ITFB, and as the Ilois continued to campaign for more money particularly from the USA.
577. If there was any shocking conduct attendant upon the obtaining of the signatures, it was the responsibility of the ITFB or of the Mauritius Government but there is no evidence from them to that effect. In reality, there was no point in trying to keep the Ilois in the dark as the Claimants suggested. There was no evidence that they had been prevented from inquiring about the forms. There was no evidence of protest about them from those on the ITFB or when Simon Vencatessen brought his action. There was no satisfactory answer to why there was no protest other than that there was knowledge of the purpose of the forms.
578. Mr Howell submitted that the absence of individual legal advice only went to the question of whether someone was in a weaker position capable of being exploited and did not of itself show that they had in fact been treated in a morally culpable manner, shocking the conscience of the court. There was no evidence that even one claimant who signed the form had such prospects of success that he would have been advised individually to litigate rather than to accept what was then on offer, let alone such prospects that it could be said that his acceptance of the offer was oppressive. Indeed, a global offer was what the Ilois themselves sought, they did not seek to differentiate on an individual basis and none of them made the sort of complaint pursued by Mr Allen. Their complaint was a collective one that they would not have signed the forms at all if they had known what they contained and collectively lacked advice about them.
579. My task is to say whether the Claimants have a reasonable prospect of showing that they were in a position in which they could be exploited and if so, whether the Defendants have shown that the Claimants have no reasonable prospects of showing that the Defendants behaved in a morally culpable manner leading to an oppressive transaction from which the Claimants should be relieved. I put it that way in the light of the point I made earlier about the burden of proof.
580. It is clear that the signatory claimants have reasonable prospects of showing that they fall into a number of categories of weaker party: illiterate, ignorant or ill-educated and very poor and in real need of money. It is also clear that they have reasonable prospects of showing that the UK Government was fully alive to their problems. I consider that they may be able to show that as the forms were sought by the UK Government, indeed pressed for, to serve its interests under the agreement and that in collecting them the Mauritius Government was acting as its agent, the UK Government should be treated as being on constructive notice as to the manner in which they were collected. The High Commissioner was in a position to observe or to inquire, had he so wished but he did nothing so far as the evidence before me goes. There is scope for arguing that the manner in which the signatures were obtained involved the

exploitation of those weaknesses in a morally culpable manner. They were asked to sign a legal form without explanation at the time as to its purpose or content by those who knew of their weakness. I was wholly unpersuaded that there was any sound evidence that there had been any attempt to prevent them understanding what was in the form, it is rather that no positive attempt to inform them was made at the time. There is no justification for saying that there was any trickery. The signing of the forms was to the UK Government, to the Mauritius Government and to the ITFB the working out of what had been agreed in 1982 with the knowledge and consent of the Ilois. I do not think that it adds to the Claimants' case that the UK Government was, on any view, responsible for at least many of the signatories being in Mauritius.

581. The crucial issue is whether the transaction itself is clearly not oppressive or shocking to the conscience of the court. I am satisfied that the signatories cannot succeed on this first limb of Mr Allen's case. I accept the broad thrust though not necessarily all the detail of the arguments of Mr Howell on this matter, which I have set out above. The matter does have to be looked at in the context of the 1982 agreement which I am quite clear was understood by the Ilois in general to be a final agreement. It was generally known that that was an enduring requirement of the UK Government, if it were to pay over any more money. That had been accepted in correspondence, at least to the eyes of any reader, by the Ilois representatives. I have said elsewhere that I do not accept as remotely true that they did not know what was being said in that correspondence and would not have agreed to that point had they known; that would simply have ended negotiations straightaway and the litigation would have followed its course.
582. The delegates had legal advice and members who were able to translate what was said or to explain it. There was no reason for the UK Government to suppose that that had not been done. Although it may not have known about the subsequent legal advice, the fact that it was sought and no complaint was raised about the terms of the agreement, supports the conclusion that all that had been done properly. It also makes it more difficult for it to be said that the transaction envisaged, but to which no objection was taken, was oppressive. I do not accept that there was anything covert about the insertion of Article 4. It was not a secret protocol, it was discussed with the Ilois' lawyers and they advised on it. The agreement and all its terms were publicised. The UK government had no reason to suppose that the Ilois representatives were not representative or unable effectively to communicate with the Ilois. Indeed, there is plenty of evidence that the Ilois met and had the agreement explained to them at least in broad terms.
583. The advice which was given by two firms of solicitors and by a QC was that the terms were fair, including the obligation to sign an individual renunciation form or perhaps more accurately in the case of Sheridans, that requirement was not said to be unfair. The amount in total was seen as a fair settlement by the parties to the agreement, though no doubt any compromise leaves some desires unmet. There is no evidence that any part was seen as oppressive or obtained by unfair tactics or the exploitation of the weaknesses of the Ilois. They had not merely had legal advice but political assistance from people whose interests however selfishly coincided with theirs at that time. Whether measured against what the Ilois asked for in December 1981 or against some other measure, the sum in total could not remotely be described as evidencing an oppressive transaction. The Ilois were being asked to give up what all the lawyers knew was a speculative piece of litigation which might in due course provide some with an unknown amount of money in return for something now to relieve their poverty.
584. The subsequent working out of the distribution of the ITFB money was the responsibility of the Board and its Ilois members, initially appointed and then elected. There is no evidence that any Ilois disagreed with the per capita payment. There was disagreement over who should qualify but that working out of the agreement was not the responsibility of the UK Government.

585. Mr Allen exaggerates the need for individual legal advice. As I have said, it was not the concern of the Ilois at any stage to divide up the sum according to some assessment of individual losses or needs. The sort of process which he envisaged would have entailed each individual being advised as to the amount which he might receive if the litigation succeeded, discounting that by the prospects of success, reaching some agreement with his fellow Claimants as to how the sum was to be shared and meanwhile receiving nothing whilst lawyers got themselves utterly enmeshed in conflicts of interests between clients who disagreed on how to split the global sum and who should benefit. The sophistications of settling group actions would have had to be invented and given effect to among people who were admittedly not familiar with legal concepts. Alternatively, the matter would have been fought to an individual conclusion in a series of test cases. If any such process had been instituted in 1982 or 1983, holding up the payment either of the £4m or the payment of the Rs 8,000 for what, so far as I could tell from the way in which Mr Allen explained how it all ought to have been done, would have been a very long time, the lawyers would have had a very hard time of it from the Ilois people themselves who really needed the money. They would have been extremely cynical of the way in which the only beneficiaries of the proposed settlement would have been the lawyers. No one suggested this farandole in 1982 or 1983 as the way in which these matters should be done. His submission was a counsel of perfection, utterly remote from the real world of the Ilois' needs in 1983. The fact that it was not done does not remotely show the oppressiveness of the transaction. Neither Bindmans nor Sheridans were said to have been negligent at any stage yet they were responsible for advising Ilois about the wisdom and mechanics of the settlement. Bindmans thought that they were advising the Ilois generally through the CIOF and saw nothing wrong at any stage with the negotiations, the content of the Agreement, or the mechanics as described in the Agreement for procuring Ilois assent, generally or individually.

586. There was no obligation on the individual Ilois to abandon litigation before the agreement was signed and it remained open to any Ilois to bring proceedings rather than take the money if he so wished. If an individual Ilois had calculated that instead of taking Rs 8,000, he would be better suing for damages, he could have done so. But it is impossible to believe that anyone would have advised him to do so; he would have been told that the form was just what the agreement envisaged, that there would no more money without litigation for years and I do not see on what basis there would have been any legal aid for such a case. It would not have been privately funded. There is no evidence that in 1983 any lawyer would have offered such advice or that any Ilois would have heeded it. Indeed there is evidence, from the concern over the few non-signers after September 1983 needed to procure the unblocking of the £0.25m, that there would have been intense pressure placed upon those Ilois to sign, with the CRG and Mrs Alexis to the fore.

587. The advice which the Ilois needed was collective advice about whether the global sum with the conditions attached was a reasonable offer. The UK Government was entitled to approach the signing of the forms on the basis that that advice is what the Ilois had had and that the signing of the forms was the working through of the terms collectively agreed. I do not accept the picture painted by some of the Chagossian witnesses of the way in which there was no communication between them; it is wholly at odds with the evidence of meetings, protests, organisations, relationships and their concentration within a few parts of Port Louis. It is conceivable that there might have been collective advice in September 1983 not to sign the forms, to forego the Rs 8,000 and the blocked money in return for the right to continue litigating but that speculative possibility, which the evidence suggests would have been turned down flat, does not remotely show that the transaction was oppressive.



588. Mr Allen is wrong in his submission that the legal advice was deficient, and was to be discounted in judging the unconscionability of the Defendants' conduct and of the transaction, because the lawyers lacked the information which now has come to light about what the UK Government was doing. It is inevitable in settling litigation that the decision is not made in the light of all the information which a trial might bring. The lawyers all knew that the UK Government was resisting the disclosure of some documents and that the potential for argument about discovery had not been exhausted. Those advising at the time were aware of all those points. There is no suggestion that the agreement was procured by some deception practised at the negotiations which has only now come to light.
589. On that limb of his argument, Mr Allen fails to persuade me that he has any real prospects of showing that the transaction was oppressive or shocking to the conscience of the court. Viewed in 1982 and 1983, it was a reasonable offer which was worked through according to its terms. There was a global settlement in the form of the 1982 agreement with legal advice; the terms of the distribution, the amount and to whom, was decided by a Trust Fund; the renunciation forms gave effect to the other side of the deal in the way envisaged by the agreement. If an Ilois did not want to settle on that basis, the agreement left it open for him to bring proceedings if he were so minded. Ilois had instructed lawyers on a number of occasions and threatened litigation as well. They had rejected offers in the past which they did not find acceptable. Neither the *Permal* nor *Simon Vencatessen* cases in the Mauritius Supreme Court elicited any reaction that the settlement, with individual renunciation forms, was unconscionable.
590. I now turn to the second basis upon which Mr Allen said that the forms were unconscionable. As the Government responsible for the Ilois, it could not reach an agreement with them to wash its hands of responsibility for them or to remove their fundamental rights. This point goes to the content of the renunciation forms rather than to the manner in which they were signed. As I understood it, no matter how much advice had been given, the removal of those rights was not open to a government to accomplish. I was not clear as to the source or scope of this inhibition on the ability of two parties to litigation or potential litigation to settle their differences, nor as to whether a judgement in favour of the Government in the Vencatessen litigation would have suffered from the same disability.
591. This ground is untenable. It is no different from saying that there can be no settlement of a case against the Crown or of these cases.
592. Accordingly, I reject the contention that the signing of the forms, if otherwise effective in law, could arguably be set aside as unconscionable. Mr Howell complained that this contention came too late for it to be considered, that he would have asked questions about it in cross-examination had he known that this was to be argued and that I should not allow the amendment to the Reply which raised it. I disagree. It is not so very different a point from others which Mr Allen raised; it is rather a new garb for some well-known complaints about the Defendants' conduct over the years. I could not see how more cross-examination would have advanced Mr Howell's case whereas I could see every advantage in strike out proceedings for allowing pleadings to raise the full case which either party wished to raise.
593. So far as infants are concerned, I do not see any reason to reach a different conclusion on unconscionability because what was done seems to me to have been wholly sensible. But the question of capacity may affect the effectiveness of the forms in creating the foundation for the abuse argument in the first place. That is not a point which I consider I can deal with at this stage on the material before me; it may also be a matter which depends on individual cases.

594. The final point raised by Mr Allen against this abuse of process argument was that it should have been raised earlier either in the Bancoult Judicial Review, or in these proceedings. I do not accept either contention. It would have been pointless in the former; a Claimant could have been added to challenge the *vires* of the 1971 Immigration Ordinance who had not signed such a form. It would have provided the occasion for prolonged evidence and submission on an issue, in effect, of standing, when there was a real issue of general application in the *vires* of legislation. There is a significant difference between saying that a claim for compensation, made after a final settlement has been reached, is an abuse and saying that an application for Judicial Review to determine the validity of legislation in force is an abuse of process. The fact that such a point was not taken, so as to prevent or delay that application, is not a reason why it should not be deployed in this subsequent but related action. It is an argument mirrored by the Defendants' now abandoned arguments about what should have been dealt with in those or other Judicial Review proceedings.

595. There was no objection from the Claimants to this abuse issue being dealt with as part of this application. The question is not whether it is open for consideration in view of the timing or manner in which it was raised. The question is whether it could be dealt with fairly in those circumstances; the Claimants did not suggest to the contrary.

### **Limitation**

596. On the face of the claim, all the causes of action for damages are statute barred. The Claimants have raised a number of arguments as to why that is not so, or as to why time has not stopped running or should be extended. It is for the Claimants to show that they have reasonable prospects of success in their arguments. These were deployed in their revised form in a proposed Amended Reply.

#### Limitation: the applicability of the Limitation Act 1980

597. Mr Allen's first contention was that the Limitation Act 1980 did not apply to any person who had a good cause of action but was unable to enforce it. For this startling proposition, he did not refer to any part of the Act itself but rather to a dictum of Lord Atkinson in *Board of Trade v Cayzer, Irvine and Co Ltd* [1927] AC 610 628 at which he said that the whole purpose of the applicable Limitation Act "*is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for the number of years... and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use*". Upon this, Mr Allen constructed an argument that because the Defendants had deprived the impoverished and illiterate Claimants of access to the courts of BIOT or of the UK, they had not omitted to use their remedies and so the Act did not bite.

598. This is one of his weaker points. There is no relevant provision to that effect within the Act and this dictum does not constitute a rule of interpretation. All that was being said was that where the particular form of contract provided that a particular cause of action should not arise until certain conditions were fulfilled, in that case the making of an arbitrator's award, the Limitation Act did not bite at an earlier stage; see *O'Connor v Isaacs* [1956] 2 QB 288 326, Diplock J.

#### The Limitation Act and unconscionability

599. Mr Allen's next and related point was no more arguable. It was to the effect that the Court could suspend the effect of the Act where it would be unconscionable to allow the Defendants to rely upon it. He referred to the sort of wrongs which he regarded as the starting point for, though not the content of, his misfeasance claim. He added that there had been no legal system in BIOT to which the Claimants had had access and no legal aid system either. Even if all his facts were incontrovertible, he demonstrated no basis upon which a court could decide that a statute could be removed from the arena to which its language made it apply, simply because a court thought that it would be unconscionable to allow a party to rely upon the rights which Parliament had given him. The 1980 Act is quite explicit in prohibiting the bringing of a cause of action after the relevant time limit, and has made varied and explicit provision for the circumstances in which time should not run against a Claimant or should be extended. That represents the Parliamentary view of where it would be wrong to allow a Defendant to take advantage of the passage of time and marks the balancing of the interests of finality in litigation and fairness to a Claimant.

#### The Foreign Limitation Periods Act 1984

600. Thirdly, Mr Allen argued that the operation of the 1980 Act was excluded or modified by the Foreign Limitation Periods Act 1984 and the BIOT Courts Ordinance 1983. Section 1(1) and (2) of the 1984 Act provide:

"1 Application of foreign limitation law

(1) Subjection to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter -

- a. the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and
- b. except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.

(2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account."

601. Also relevant are the following parts of section 2 which make exceptions to section 1; Mr Howell relied upon them.

"Exceptions to s 1

2 (1) In any case in which the application of section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.

(2) The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings."

602. Mr Allen contended that the effect of the 1984 Act was that BIOT limitation law applied unless both BIOT law and English law fell to be taken into account, in which case the 1980 Act should still be discounted under section 2 of the FLPA because of the public policy and undue hardship considerations.

603. He related that argument to the provisions of the BIOT Courts Ordinance 1983 No 3, which contains the BIOT provisions on limitation, incorporating, subject to some scope for adaptation, the English law on limitation. Section 3 of the Ordinance, which I repeat here for convenience, provides:

"3. (1) Subject to and so far as it is not inconsistent with any specific law for the time being in force in the Territory and subject to subsections (3) and (4) of this section and to section 4, the law to be applied as part of the law of the Territory shall be the law of England as from time to time in force in England and the rules of equity as from time to time applied in England:

Provided that the said law of England shall apply in the Territory only so far as it is applicable and suitable to local circumstances, and shall be construed with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary."

604. Section 13 is also relevant. It reads so far as material:

"13. The jurisdiction of the Supreme Court shall be exercised, as regards practice and procedure  
(a) in civil matters, in accordance with rules of court made under section 14, and in default thereof, in substantial conformity with the practice and procedure for the time being observed in England by the High Court of Justice."

605. There are no Rules of Court under section 14.

606. Mr Allen drew the threads of his argument together by submitting that, whether under the undue hardship/public policy rubric in the 1984 Act or under the adaptation of English law to local circumstances as might be necessary under the proviso to the Courts Ordinance, the circumstances of the Claimants warranted the exclusion of the 1980 Act. He referred to the displacement of the Chagossians, their continued wrongful exclusion under the Immigration Ordinance, their extreme poverty, their lack of familiarity with a legal system in a paternalistic society, their general lack of access to legal advice, the lack of time, funding and access to information of those lawyers who had been involved; they had acted on behalf of only tiny numbers of Chagossians anyway and their advice was not communicated effectively to the community as a whole. Others who had helped had their own political motives.

607. Mr Howell objected to so late an amendment, after cross-examination, as unfair. He said that the form of pleading about legal access was vexatious and irrelevant. There are certain problems, as ever, with the loose and imprecise way in which the pleadings have been drafted. For the present I am prepared to see whether there is anything of substance in the Reply as proposed.

608. I do not consider that Mr Allen can be right in seeking to say that the 1984 Act permits the English law on limitation to be disapplied. It is the foreign law on limitation, which, if otherwise applicable, can be disapplied for reasons of public policy including hardship. Section 1 disapplies English law subject to exceptions set out in both subsection (2) and in section 2(1). The existence of the circumstances relied on by the Claimants are irrelevant unless they show that the

foreign law is to be disapplied, but they have been relied on to precisely the opposite effect by the Claimants. The language of the 1984 Act might be thought a trifle muddled in section 2, as to what parts of section 1 are to be disapplied but a little thought makes it tolerably clear. Evans J held in *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep 543 592 that the relevant hardship was that caused by the application of the section, that is the application of the foreign law. That assessment involves a comparison of the relevant competing laws on limitation. Besides, it is obvious that Parliament did not consider that the English laws on limitation were contrary to its public policy or created hardship, or did only so when compared to foreign law.

609. Even if Mr Allen were right and the question were whether English law on limitation fell to be disregarded in favour of BIOT law, the factors relied on are incapable themselves of giving rise to undue hardship or of being contrary to public policy unless they too were capable of leading to an extension, postponement or suspension of the running of time under the 1980 Act. That is because it is not for the Courts to hold that the balance contained within the 1980 Act is contrary to public policy, including the creation of undue hardship. Mr Allen also has some difficulty in showing that any tort upon which he relies falls outside the scope of section 1(2), though if he were to have a direct action upon the content of the Mauritius Constitution, it might be one within the scope of section 1 of the 1984 Act. I note that Mr Allen only relies upon the law of BIOT although it is far from clear that the negligence claim would not fall to be governed by Mauritius and English law.

610. If BIOT law does apply to any cause of action, and is not disapplied because of double actionability, or public policy including hardship, it is necessary to see what it consists of as a matter of limitation. I accept Mr Howell's submission that section 3 of the Courts Ordinance deals with substantive law and that it is sections 13 and 14 which are relevant here because it deals with procedural laws, of which limitation forms part. There may be exceptions to that general rule, where a right is barred and not just a remedy, but Mr. Allen did not take issue with it. As the practice and procedure is to be in substantial conformity with English law, there is no reason to disapply the relevant statutory provisions and no case was put forward under this section that they should be disallowed. Even if section 3 were the relevant section, there is nothing in the local circumstances which warrants an adaptation. No adaptation was specified; what was sought was a wholesale disallowing of the periods of limitation for a particular group of claimants who do not live in BIOT, and have not done so for almost the whole of the period in question, and where few of the acts relied on as constituting the various torts were done. This is misconceived; the process of adaptation is not one which varies according to the needs of various claimants, which is what they argue, but is something which would be good for all as a result of local conditions. It would be odd indeed if the English law on limitation were thought incapable of dealing with disability, access to lawyers, and the fact that someone has been disadvantaged in the pursuit of a claim by the very acts in respect of which he seeks to sue. There is nothing in this argument of Mr Allen's.

#### Limitation and continuing torts

611. The fourth argument is that there are continuing torts in respect of which, as I understand the argument, it is said, not that time is not barred in relation to anything which has continued to be done in the period of limitation, but that no limitation period has started yet to run. Presumably the argument is that until the tort has stopped, any damage can be sued for irrespective of when it was done and that remains the position for so long as the tort goes on. This was asserted to be the law. No reasons were given. I do not find this easy to follow. Limitation periods are expressed to run from when the cause of action accrued. If it has not started to run, that would mean that the cause of action had not yet accrued. The

claim should be struck out on that ground. I assume that the Claimants do not seek that. If the tort continues, it means that a fresh cause of action accrues daily or with each fresh damage. So, the continuing tort of exile, if it existed, would not be time barred in relation to the period of six years preceding the commencement of this action; but that is all. Deceit was alleged to be a continuing tort, but that is clearly wrong. No fresh act of deceit or further damage is alleged in the six years preceding the commencement of the action. The continuing duty of care towards citizens is said to be a duty which continues to be breached. If it existed in the form claimed, the breach would be continuing in the six years preceding the commencement of the action. Those are the only two claims which would be affected by this argument in isolation.

#### Limitation and disability

612. Mr Allen next relied upon disability. The relevant provision of the 1980 Act is section 28(1) which provides:

"28 Extension of limitation period in case of disability  
(1) Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired."

613. Section 38(2) declares that an infant or person of unsound mind is a person under a disability. Mr Allen contended that that was not an exhaustive definition of disability, and that "*disability*" could include being outside the jurisdiction of the BIOT Courts or of the High Court of England and Wales as a result of the Defendants' acts, and being impoverished, ignorant and illiterate and physically separated from those Courts as a result of their acts. The former had historically been a disability; he referred to the 1623 Limitation Act.

614. This is unarguable. The definition is not a deeming provision leaving other disabilities to be allowed for by judicial improvisation, or by reference to the repealed legislation of 1623. It is unwise to construe the 1980 Act as if it incorporated provisions from earlier repealed Acts without any express provision to that effect. Section 38(2) is clearly a definition section, as *Yates v Thakeham Tiles Ltd [1995] PIQR 135 CA* makes clear at pp139-140 and 143. It relates to legal not to physical disability. No Claimant under such a disability at the date when any cause of action accrued has been identified, though that is not to say that there are none, nor has the ending of any such period of disability been identified. In reality, there is only one arguable claim in tort, for negligence giving rise to personal injuries. It is difficult to see how even for an infant in 1973, the period of disability did not expire many years before this action was brought and indeed before 1998.

#### An action based on fraud

615. Mr Allen then contended that the running of the period of limitation had been postponed under section 32(1)(a) or (b) of the 1980 Act, because the whole action was based upon the fraud of the Defendants or the deliberate concealment of facts by them. Section 32 provides, so far as material:

"(1) Subject to [subsections (3) and (4A)] below, where in the case of any action for which a period of limitation is prescribed by this Act, either –

- a. the action is based upon the fraud of the defendant; or
- b. any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or ...

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

616. The whole action was said to be based on fraud, not just because an action in deceit was a case based on fraud, but rather because "*fraud*" in this context meant unconscionable behaviour, falling short of "*fraud*" or even of moral turpitude. What was required was behaviour which made it unconscionable for a defendant to rely on the lapse of time as a bar to the claim.
617. The acts of unconscionable behaviour relied on, in summary, were (1) the Defendants' failure to treat the Chagossians as their citizens, which they were, (2) concealing that the Chagossians were permanent inhabitants of the Chagos and citizens of the United Kingdom and Colonies and belongers to BIOT, (3) preventing the return to the islands, without lawful authority, of those who had left temporarily, (4) deporting Chagossians without lawful authority, (5) infringing their property and constitutional rights, and (6) knowingly making no or inadequate provision for the displaced Chagossians.
618. Mr Allen relied upon a number of authorities in support of his proposition that "*fraud*" for the purposes of section 31(1)(a) covered claims based on unconscionable behaviour. In *Applegate v Moss* [1971] 1QB 406 CA at p413, Lord Denning M R considered the predecessor provision of section 32, which was section 26 of the Limitation Act 1939. It is correct in one sense that Lord Denning gives "*fraud*" the meaning, wider than the common law meaning, for which Mr Allen contends. The context was a claim for concealed defective foundations. But the Court was considering, not the equivalent of section 32(1)(a), an action "*based on fraud*", but the rather different predecessor to "*deliberate concealment*" in section 32(1)(b) of "*fraudulent concealment*", a phrase not to be regarded as included in disguise in the 1980 Act. The same distinction is true of *Clark v Woor* [1965] 1 WLR 650 and *Kitchen v RAF Association* [1958] 1 WLR 563. *Sheldon v RHM Outhwaite Ltd* [1996] AC 102 HL, to which Mr Allen also referred, is not in point at all, save for the emphasis which it places, unhelpfully to him, on not construing the 1980 Act by reference to the 1939 Act.
619. Indeed, the importance of the distinction between an action based on fraud, (1)(a), and fraudulent concealment, (1)(b), was borne out by one of the other cases upon which Mr Allen relied, *Beaman v ARTS Ltd* [1949] 1 K B 550 CA at p558. It held that an action based on fraud requires an allegation of fraud to be a necessary part of the cause of action. So a claim for conversion, with the added but unnecessary epithet "*fraudulent*", was not a claim based on fraud. But the unconscionable conduct of the bailee of the goods postponed the running of

time under section 26(1)(b) of the 1939 Act, fraudulent concealment. As Mr Howell submitted, it is highly unlikely that now repealed and difficult expression "*fraudulent concealment*" which has disappeared from section 32(1)(b) was intended to reappear in section 32(1)(a). Lord Millett in *Cave v Robinson* [2002] UK HL 18, [2002] 2 WLR 1007 at p19 drew attention to the limited value of looking at new statutory expressions in the light of earlier expressions which they did not mean to reproduce.

620. On the Claimants' proposed Amended Reply, the only action which could fall within section 32(1)(a) is the deceit claim. Paragraph 19A(i) does not suggest that the misfeasance claim falls within section 32(1)(a). The Claimants plead that the fraud, and the unconscionable behaviour for that matter, was not discovered, or its full extent at any rate, until the Bancoult Judicial Review was being researched or until the availability of documents under the thirty year rule. Disclosure was given in *Bancoult* and again in this case and "*a truer and fuller picture began to emerge*". I deal later with when relevant matters were or could have been discovered, after dealing with deliberate concealment. But my conclusion is that even if the deceit claim were arguable, time began to run well before 1996, six years before the commencement of this action.

#### Deliberate concealment

621. The Claimants also relied on section 32(1)(b). An array of facts were said to have been deliberately concealed. In the original version of the Reply, paragraph 20, these were:

- "(1) The Claimants were citizens of the United Kingdom and Colonies.
- (2) The Claimants had rights to remain in the Chagos islands as belongers.
- (3) The Defendants knew that the Claimants (or at least some of them) had rights to remain in the Chagos islands as belongers.
- (4) The Defendants, their servant or agents, were responsible, directly or indirectly, for preventing the return to the Chagos islands of those who had lawfully left and wished to return between 1965 and 1973.
- (5) The Defendants had no lawful power to order the Chagossians to leave the Chagos islands or to require them to be so ordered.
- (6) The Defendants themselves had anticipated in numerous internal documents, the need to make adequate provision for the exiled Chagossians."

622. In the proposed Amended Reply, paragraph 20(vii), a further list was added by reference to parts of the Claimants' closing submissions:

- "(7) '*the fiction that there was no permanent population*' (the main point); this appears to relate to (5) above, but does not appear to be the sole basis for (5), but rather a related but distinct point.
- (8) in relation to *misfeasance*, the pleaded '*bad faith and illegality*';
- (9) in relation to *unlawful exile*, '*the fact that there had been no lawful authority for the exile*' and '*the fact that there had been no pressing need for the exile in any event*';



(10) in relation to *negligence*, certain facts relating to the calculation of £650,000, the fact that it was merely all that was left from an original budget which had been overspent and the fact the pig breeding scheme was impractical and underfunded;

(11) in relation to *property rights*, 'the fact ... that Chagos Agalega had been paid for its interests in the island' and that 'the UK Government had passed legislation which in its view overreached any subsidiary property rights onto the purchase price';

(12) in relation to *constitutional and property rights*, 'the fiction that there was no permanent population';

(13) in relation to *deceit*, the fact that the Government had deceived the UN in relation to the presence of a permanent population and that the Government had not given the Chagossians 'the choice to which they were entitled'. The 'nub' of these two alleged facts 'being that the Chagossians were entitled to stay on the islands'."

623. The acts principally relied on as the acts of deliberate concealment appear to be that documents had been withheld or redacted in the Vencatessen litigation under an extensive public interest immunity claim. At its conclusion, those disclosed had had to be destroyed. A number of documents were also not disclosed at all. He relied on the same processes of disclosure for the purposes of section 32(1)(b) as he did for section 32(1)(a), as showing that the concealment ceased, with the *Bancoult* case, this case and the ending of the thirty year period.

624. Documents from 1965 examined at the Public Record Office were said to illustrate some of the key points which the Claimants made. They showed that at that time, the Defendants knew (1) that there were second generation Chagossians, (2) that they had obligations (of an unspecified source, whether legal, moral, political, and if legal, whether domestic, colonial or international, public or private) to compensate them, to assist in their resettlement, to "ensure ... appropriate employment opportunities" for displaced Ilois, to consult them, and (3) that they had obligations under the UN Charter to secure the advancement of the Chagossians in a number of ways, to protect them, to develop their self-government, and to report on their conditions. (This latter is pleaded as a known UN obligation in 1965 – though Chagos was never a territory or political entity in 1965 either before or after the creation of BIOT.)

625. They also showed, submitted Mr Allen, that (unnamed) British officials (but not Ministers, seemingly at this stage) developed "an untrue account" of (I infer) the existence of a permanent population with the intention of evading obligations to the Ilois under the UN Charter and obtaining the support of other nations at the UN. The documents showed no immediate requirement for any evacuation from Diego Garcia, and a not so immediate requirement for Peros Banhos or Salomon. Acquisition of land was intended to reduce scrutiny of the UK Government's actions and the compensation payable to a minimum.

626. This was relevant to deceit, misfeasance and negligence. Mr Allen related the documents to the causes of action in this way. For misfeasance, they showed knowledge and concealment of the existence of a permanent population of Ilois, awareness of the "governmental obligations" owed which the concealment of the population's existence would assist in evading. They evidenced, as it was expressed, the Government's dishonesty and conscious disregard of the interests of those who were going to be affected by official decision-making. The same applied to deceit. For negligence, those documents which showed an early knowledge of the position of the population and the likelihood of harm to it were

relevant to the question of whether it was fair, just and reasonable that tortious liability should exist and whether there was a breach of a duty of care.

627. Mr Allen referred to volume 17 of the documents to support his point about the significance of what had been withheld in the Vencatessen case. It showed what, he said, had been concealed or redacted in the Vencatessen litigation. Mr Howell made submissions about it, to the opposite effect. Mr Allen said that the redactions showed that the UK Government had misled the UN about a permanent population, had taken decisions about clearance at the behest of the US, which were based on the geographical ignorance of the US as to the distance of Peros Banhos and Salomon from Diego Garcia and on an unformulated, distant and unspecified defence need, and had decided on a compensation/resettlement figure which had not been calculated by reference to individual or community needs. Those redactions related to all the causes of action. Essentially the same points emerged from the documents for which public interest immunity had been claimed in the Vencatessen litigation; added points were the different treatment of Ilois in the Seychelles, immigration control if the Ilois had no right to permanent residence and the deliberate policy, for a while, of not mentioning that the Ilois had British citizenship.
628. The proposed Amended Reply also includes a further contentious paragraph, 22A, which appears to relate either to the effect of the deliberate concealment of facts on the ability of the Claimants to bring an action, or to constitute a second set of acts of deliberate concealment. It is said that whenever a Chagossian, pre-Bancoult, sought legal advice, "*no lawyer has been able to advise with any confidence on the basis of evidence*" as to the rights and remedies now claimed. This was because of their lack of resources, "*the strategy and tactics*" of the Defendants, until the *Bancoult* case, not to reveal the truth as to what had been done to the Chagossians, to deny legal responsibility for their plight, to deny access to information which might help them, to ignore their destitution and to rely on their confusion. They were treated as a problem, to be solved by others and "*not as individual citizens for whom [the Defendants] had an inalienable governing responsibility*".
629. He further relied in this context upon the acceptance, only in October 2001, by the UK Government to the UN Human Rights Committee that the prohibition on the return of the Ilois, who had been removed from the Chagos, was unlawful. There is rather less in that last point than Mr Allen thought. There was no such general acceptance of unlawfulness. The UK Government's acceptance simply related to the limited effect of the *Bancoult* decision on section 4 of the Immigration Ordinance 1971.
630. Mr Allen relied thirdly on section 32(2) for the purposes of his deliberate concealment argument. There were, he said, a number of duties owed, although only those obligations under chapter XI of the UN Charter were actually specified in the pleading. Those obligations were to secure the advancement of the Chagossians in various ways, and to protect them, to develop their self-government and to send certain information about their condition to the UN Secretary-General on a regular basis. These duties were alleged to have been breached "*particularly*", but no other period was specified, in the late 1960s and early 1970s.
631. These breaches of duty were concealed, it was said, in the internal and confidential decision-making processes of the UK Government, and were only revealed thirty years after the events to which they related. It was thus unlikely that the breaches would be discovered for some time.
632. The facts involved in those breaches of duty, which were concealed deliberately, are pleaded in paragraph 29, they are similar but not identical to the first six facts relied on under section 32(1)(b), in paragraph 20. (Curiously, the newly pleaded facts in paragraph 20(vii) are not added to paragraph 29; the amendment to one fact in paragraph 20(v) to assert that the false premise for all important decisions was that there was no "*or no substantial*" permanent

population, is not carried across, but a new allegation is added only for the purposes of section 32(2) that the Defendants were engaged in a policy of clearances of the islands. The differences may not be great; but they appear to have been deliberate. The reference to there being concealment of the fact that there was "*no substantial permanent population*" is an unusual averment in the pleadings; "*substantial*" is omitted elsewhere. It may admit that the existence of a less than substantial population was not concealed. This is not surprising in view of the material disclosed in the Vencatessen case. It is highly debatable how sizeable a population has to be before it is "*substantial*".) It may be fairer to treat this part of the pleading as also having some of the vague and haphazard characteristics of all the Claimants' pleadings and to incorporate the other facts into this allegation as well. Insofar as there is an allegation of deliberate concealment through non-disclosure, it was wrapped up in the material deployed by Mr Allen in the course of those other submissions.

633. It was only in the final version of the proposed Amended Reply that the Claimants addressed the question of when they actually or with reasonable diligence could have discovered the fraud or concealment. So, despite the Defendants pointing out this omission at an early stage, it was only rectified as closing submissions were nearing completion.
634. Paragraphs 31A and 31B are a peculiar piece of pleading; they combine proper pleading with submission, and a little political theory. It asserts that the burden of proof in relation to this matter lies upon the Defendants. That is wrong and plainly so, as I shall deal with later. It next asserts, in my view uncontentiously, that in principle the behaviour of a Defendant is relevant to when the use of reasonable diligence might have uncovered fraud or concealment, and equally uncontentiously, that in principle the personal circumstances of a Claimant can likewise be relevant.
635. Their reasonable diligence case is that the relevant matters could not have been discovered earlier than they were, ie in the run-up to the *Bancoult* litigation, with the thirty year period expiring. That is said to be because of three broad contentions. First was the nature of the Chagossians: uneducated, illiterate, poor, unsophisticated, struggling merely to survive. Second was the absolute power of the Defendants over them, ignoring their rights, refusing any economic development in the Chagos, following the dictates of the US, unnecessarily allowing the closure of the plantations, not consulting the Chagossians and saying nothing about them to the UN. Third was the behaviour of the Defendants after the clearances: denying their British citizenship, refusing to look after them, paying to the Mauritius Government a sum which the UK Government knew to be inadequate, failing to ensure that it was properly spent, paying nothing for the Seychelles Chagossians, concealing the existence of a permanent population, setting up a scheme in 1982 which required its citizens to renounce their rights without ensuring their access to the BIOT Courts or legal aid, and denying their responsibility in preventing return to the islands or for evacuating them (as the Defendants still did).
636. In short, it was pleaded that the Defendants' persistent and deliberate deceit of its citizens as opposed to governing them with the good faith and concern for their welfare which was and is "*the hallmark of a modern reasonable government*", was the cause of the Claimants being unable, until 1998 or even later, to discover the fraud and deliberate concealment of facts.
637. There are very substantial hurdles in the way of the Claimants' contentions and they have no prospect of overcoming them overall. First, most of the so-called facts said to have been concealed are not facts at all, but contentious assertions as to law: (2), (3), (5), (8), (9), (13); or as to the inferences to be drawn from a complex of primary and secondary material: (4). Others are irrelevant to the existence of a cause of action: (6), (10), (11).
638. Second, what matters is not simply whether a fact which might provide evidential support for a claim has been concealed; what matters is that, as

section 32(1)(b) requires, the concealed fact be "*relevant to the plaintiff's right of action*". That means that a fact which suffices to constitute or to complete a cause of action. This is clear from *Johnson v Chief Constable of Surrey* 19<sup>th</sup> October 1992, CA (unreported), in which the "*concealment*" of the unreliability of a confession, made manifest by the quashing of the conviction, might evidentially assist but was not a necessary part of the action for false imprisonment. The Court of Appeal agreed with what was argued to be this narrow approach to section 32(1)(b) in *C v Mirror Group Newspapers* [1997] 1 WLR 131. It therefore behoves the Claimants to relate the concealed facts to the causes of action in that way. I shall deal later with how the asserted facts allegedly concealed relate to the cause of action in the statutory sense, but suffice it to say for the present that the Claimants have not drawn in their analyses the clear and vital distinction between facts necessary for a cause of action and facts which provide evidential support for it.

639. Third, it is necessary that the facts relevant to the right of action should have been "*deliberately concealed*". The first and principal act of deliberate concealment relied on by the Claimants is the claim for privilege and other related non-disclosures in the Vencatessen litigation. I should point out that the Claimants, when tested, disclaimed any allegation that there was any impropriety at all by anyone in the conduct of the Vencatessen litigation or in the processes of discovery: it was not said that privilege had been wrongly let alone dishonestly claimed. In any event, Mr Vencatessen, on the advice of Sheridans and leading counsel and on the accepted facts, voluntarily accepted a settlement rather than pursue the chances of success in a contested action, after the lawyers debated whether further discovery should be sought in court, in which Mr Vencatessen might or might not have been successful. Accordingly, the Claimants' contention that the untested but honest and legitimate non-disclosure of documents in the Vencatessen action was an act of deliberate concealment from all the current Claimants, rests entirely upon the assertion, which I accept as correct for current purposes, that the discovery decisions were conscious, and in that sense deliberate, decisions of the Defendants, which involved the withholding of material, and were in that sense alone acts of concealment.
640. This is not a realistic analysis of the statutory provisions. I do not consider that the honest use of the protections afforded by the law, let alone their untested use, can be regarded as deliberate concealment for these purposes. Were it otherwise, non-disclosure sanctioned by the Court on evidence honestly put forward by a defendant, would prevent time running if a writ were issued even on a specious or hopeful basis. The connotations of the statutory language are not those of the honest use of legitimate restrictions on disclosure.
641. It is also clear from *Cave v Robinson Jarvis & Rolf* [2002] UKHL 18, [2002] 2 WLR 1107 at pp23, 59 and 60 that section 32 requires more than a conscious or deliberate decision to withhold information, and more than mere non-disclosure. It requires active concealment, or withholding information which is actively sought, or withholding it when there is some other circumstance which imposes a duty to disclose it. It is possible only to conceal deliberately that which a person knows, not that which he ought to have known. It requires a deliberate breach of duty which is unlikely to be discovered for some time and which is then actively concealed or not disclosed when there was an obligation to disclose.
642. Accordingly, I regard it as clear that the Claimants cannot rely on the non-disclosure of documents in the Vencatessen litigation as constituting an act of deliberate concealment for the purposes of these proceedings.
643. It is in any event conceptually rather an odd position for the Claimants to have assumed. Implicit in their approach must be the contention that what had been withheld from Mr Vencatessen had been withheld from them all, and conversely that, if material had been disclosed to him, that would have precluded an assertion of deliberate concealment from any of them. Yet, the Claimants have been at pains to assert that the Vencatessen litigation was not in reality

representative litigation, settled in 1982 along with the individual Vencatessen case. But unless they do accept that, which creates other significant hurdles for them, it is nigh on impossible to see how non-disclosure to Mr Vencatessen can be an act of deliberate concealment so far as they are concerned; it would be in reality simply an irrelevance and the acts of deliberate concealment would have to be sought elsewhere.

644. The Claimants' difficulties in this are accentuated by their reliance on the obligation on Sheridans to destroy the documents, which had been disclosed, at the end of the Vencatessen litigation. This is not said to be an act of deliberate concealment undertaken on behalf of the Treasury Solicitor but some unspecified significance appears to be attached to it. But it is difficult to see how it could go to what could be discovered with reasonable diligence, if disclosure in the Vencatessen litigation was or would have been disclosure to all. And if it was not or would not have been such disclosure, how can the non-disclosure be other than confined to Mr Vencatessen himself?
645. Fourth, reliance on the degree of non-disclosure of documents in the Vencatessen case is itself incapable of satisfying the requirements of the statute. It is the fact, relevant to the right of action, which must have been deliberately concealed. As Mr Howell pointed out, that fact may have been disclosed in some other way or document or indeed never concealed at all.
646. Fifth, I do not accept what is implicit in Mr Allen's alternative argument on deliberate concealment which is that mere non-disclosure can of itself constitute deliberate concealment. There must be a duty to disclose the information withheld. No such duty has been identified. Deliberate concealment otherwise plainly entails a positive act.
647. Sixth, I shall deal later with other aspects of paragraph 22A of the proposed Amended Reply, but I cannot find in it any act of deliberate concealment. At its highest, it is an allegation of non-disclosure. The concealed but possible allegations of duties of disclosure can only derive from the "*governmental obligations*" of the Defendants, which I reject conceptually and as containing any duty of disclosure, or from the obligations in the UN Charter, which are not justiciable, for the reasons which I have given and are accordingly irrelevant to the legal position.
648. Seventh, and it is related, Mr Allen relies upon the UN Charter obligations, for the purposes of section 32(2). As I have said, these obligations are not justiciable. It is in any event far from clear that these alleged obligations existed at all. They are not pleaded as BIOT obligations. Had they been, the following problem would have been highlighted. Between 1965 and 1976, the Seychelles, and from 1965 to the present day, Mauritius, would have found moves to BIOT independence objectionable. This is only available as an argument against the UK Government anyway; it is not arguably an obligation on the BIOT Commissioner.
649. I accept Mr Howell's submission that such obligation as exists, if applicable, under the UN Charter is not within the scope of the "*duty*" in section 32(2). The duty in question in section 32(2) must be a duty in respect of a breach of which the Claimant seeks damages, but here they do not and cannot; they misconceivedly rely upon a deceit in relation to those obligations but they do not and cannot sue directly to enforce UN Charter obligations as individuals.
650. Moreover, it is perfectly obvious that the allegation that the breach was committed in circumstances where it would not be discovered for some time is unsustainable. It is all very well referring to the Government's internal and confidential decision-making process. It was clear what the UK Government was saying to the UN about the population (which the Claimants have been in a position to contest for years), that the population was not being nurtured to independence (because it was displaced thirty and more years ago) and that no information on its condition was passed to the Secretary General either before the evacuation of the Chagos or at any subsequent stage.

651. Further, the breach, if breach it was, was plain at all times from 1965 onwards, and it is hopeless for the Claimants, or any of them to argue, if that is the point upon which they rely, that the breach could not have been discovered with reasonable diligence at least twenty years ago.
652. Eighth, the approach which Mr Allen urged towards reasonable diligence is wrong. It is for the Claimants to plead and to show that they have reasonable prospects of proving that they could not have discovered the concealed facts earlier with reasonable diligence. They do not draw any distinction in the pleading between groups of Claimants other than, perhaps here, between those in the Seychelles and those in Mauritius. Otherwise, these pleadings treat them all alike. It is not arguable that the burden of proof rests on the Defendants. As Mr Howell submitted, it is for the Claimants to show that they could not have discovered the concealed fact, without taking exceptional measures of the sort which they could not reasonably have been expected to take. *Paragon Finance v DB Thakeran & Co* [1999] 1 All ER 400 at p418F per Millet LJ refers to the position, which I regard as generally understood and well-established. The Claimants know what they knew and when, and what steps they did or could take to discover matters. The dictum of Lord Millet in *BP Exploration Ltd v Chevron Shipping* [2001] UKHL 50, [2001] 3 WLR 949 at p111, deals with a provision in a different Act (though not dissimilar in import), was clearly a short comment obiter, which is not referred to, let alone assented to, by any other of their Lordships.
653. Ninth, in the light of those considerations, it is appropriate now to examine each of the purported facts, said to have been deliberately concealed.

1. The Claimants' UK citizenship: the desire on the part of the UK Government to avoid mentioning it to the Mauritius Government is not concealment from the Chagossians; the true position was in any event plain from the Mauritius Constitution and Independence Acts. Mr Allen's best point is the arguably implicit suggestion that they enjoyed no UK citizenship in the letter of 11<sup>th</sup> November 1974, (8/1374), emphasising that the UK Government could not intervene between the Mauritius Government and its citizens. But the evidence shows that whenever thereafter the direct question was raised, it was answered accurately by the UK Government eg by Mrs Chalker in 1981. It also shows that the Chagossians themselves actually knew of the position throughout eg Mr Vencatessen's case asserted it; lawyers such as Mr Duval knew of it. The publicity given to the breakdown of negotiations referred to it. All the lawyers advising in 1981 and 1982 knew of it; Mr Macdonald so advised the CIOF representatives in July 1981. Mrs Alexis' son, Mr Cherry, brought what was described as a test case in Mauritius, receiving widespread publicity in 1985 which confirmed their status. The CRG wrote many letters asserting their rights as UK citizens; Mr Bancoult's complaint was that he was not being given the fullness of the rights to which he thought he was entitled as a UK citizen. Bindmans advised on it again in the 1990s. All anyone who wished to know the position had to do was ask the UK Government or keep his eyes and ears open to events over the 1980s and 1990s, or ask any of the many lawyers who had been involved. Any Claimant could have discovered the position, if he did not already know it, at any time and well before 1998. This fact might be related to all the causes of action, in the sense required by section 31(1)(b).
2. Rights to remain in Chagos as belongers: I do not regard this as a fact at all, even if it had been expressed as right to remain in BIOT rather than the Chagos. The existence of such rights is perfectly reasonably in dispute. The position of the islanders in BIOT based upon their period of residence there was at least as much within their own knowledge as that of the Defendants. If they wanted to know what legal rights that might arguably give rise to, it is again difficult to see what act of deliberate concealment can be relied on. In any event, their various organisations were asserting their available rights; Mr Vencatessen asserted it;

some basis must have existed in their minds for the oft-repeated assertion in 1979 and subsequently in the 1980, 1981 and 1982 negotiations and in the ITFB that they would not renounce their rights to return to Chagos. That can only be based on some tie encapsulated by the concept of "*belonging*" there. The 1994 Common Declaration of the Ilois People, signed or thumbbed by 812 people asserted their right to live where they were connected by birth, descent, and citizenship. The CRG made similar points in 1985. I accept Mr Howell's submission that the Claimants have not begun to discharge the onus of proof on them in relation to showing that any of them did not know this "*fact*" or could not have discovered it with reasonable diligence well before 1998. This "*fact*" again might however relate to all causes of action.

3. The Defendants' knowledge of such rights: the evidence does not establish that such knowledge existed as a matter of fact. The Defendants clearly were uncertain as to whether there were belongers rights or whether such rights yet existed in the absence of legislative provision. But Mr Howell is right to point out that, if that knowledge were a fact, it is difficult to see that it was deliberately concealed for the purposes of the section. No-one asked either Defendant what it knew the position to be. It would be a basic act of diligence, reasonably to be undertaken, for someone to inquire what the Defendants thought about what to the Claimants was an important assertion. It is not an answer to say that the UK Government was pretending that there was no permanent population: the Newton report was disclosed in the Vencatessen case, and it shows a permanent population however much debate there may be over the numbers it shows. This fact might relate, as best I see it, to the misfeasance and deceit case.
4. The fact that the Defendants were responsible for preventing Chagossians returning before the evacuations: the problem with the Claimants' argument is that, whether or not in fact the Defendants were directly or indirectly responsible for that, they believed the Defendants to be responsible, for the most part. Their evidence was that Rogers & Co told them that the islands had been sold. Even if it were believed by some that Mauritius was behind it, or even Moulinie & Co at the time when they were unable to return, it is impossible to accept that any of the relevant Claimants have any prospect of establishing that they did not realise that fact, if such it be, a very long while ago, no later than the 1981 or 1982 negotiations or that they could not have discovered it by then with reasonable diligence. No evidence was given to me to suggest that those who could not return thought that the Defendants were not involved, until 1998 or thereabouts eg Mrs Elyse or Mr Bancoult, Mrs Jaffar. Mrs Jeanette Alexis, who was an evacuee and not in the same category as those prevented from returning, said she did not realise that the Defendants were involved till recently in the evacuations. It is a surprising view for her to have had, but she struck me as generally an honest witness. But even so, given the visits of Mrs Charlesia Alexis to the Seychelles in 1980, who stayed with the family, the discussions about compensation and claims which must have taken place, the visits of other politicians such as Mr Berenger and Mr Michel, it is inconceivable that reasonable diligence eg a simple question to Mrs Charlesia Alexis or any Mauritian group, would not have put her right many, many years ago. Mr Macdonald thought the Defendants responsible, (15/121-2). This fact might go to all causes of action.
5. The absence of lawful authority to require the Claimants to leave: this is not a fact, but a highly contentious issue of law. It is however an assertion plainly made in the Vencatessen litigation and was considered on a number of occasions. Reasonable diligence would have involved asking a lawyer. If section 11 of the BIOT Order is restricted as was concluded in the Bancoult Judicial Review, it is necessary only to juxtapose the legislative power granted with the legislation enacted to see that it was *ultra vires*. It had never been suggested that it was enacted to make provision for the sort of catastrophe which the Divisional Court thought might justify it. This arguably goes to all causes of action, save negligence.

6. Anticipation of the need to make adequate resettlement provision: it is difficult to see how this "*fact*" relates to the negligence cause of action in the statutory sense, still less to the one arguable way in which such a case could be put, as I see it. There was no assumption of responsibility communicated to the Claimants. Insofar as it said to relate to it because it shows that it would be fair, just and reasonable to impose a duty and that it was then breached, the relevant facts are shown by the 1972 Agreement, and the payment, indeed by the 1982 Agreement. Neither were concealed.
7. The fiction that there was no permanent population: in reality the fact alleged to have been deliberately concealed is the Defendants' knowledge that there was such a permanent population. Mr Allen says that this was "*a massive cover up and fundamental lie*". Yet the problem with this argument stems from the fact that the Claimants themselves knew the true position about their permanence. They were in a position to say, with the Newton Report albeit differing from its figures, that by the time it was disclosed in 1976 or thereabouts, the Defendants must have known that there had been some permanent population. Their legal advisors, notably Mr Macdonald, were seeking material to show that the description of "*contract workers*" to convey short-term residence was a myth. I find it impossible to accept that reasonable diligence, including asking the Moulinies what they had said to the Defendants or asking Mr Todd about his surveys, which the Moulinies could have told them about, could not have disclosed that the Defendants must have known that there was a permanent population, however sophisticated were their attempts to avoid actually having to say so. This fact goes arguably to all causes of action.
8. The bad faith and illegality in the misfeasance pleading: this is an unsatisfactory way of alleging the deliberate concealment of facts. I do not see any new point not otherwise covered.
9. The absence of lawful authority for the exile has already been covered above; the absence of pressing need is not a fact, or a relevant fact to a right of action. Diego Garcia was not evacuated until it was needed as a whole for defence purposes; it has only been the Claimants who say that the defence facilities and they can co-exist on Diego Garcia – the Court cannot weigh the competing defence needs. As to the outer islands, the US wanted them cleared at some stage and there was a longer term UK interest in removing the population too. But it is not possible to say that there was a concealed fact that the US did not want them cleared, or only wanted them cleared because one US Defence Official got his distances significantly wrong.
10. Negligence: the calculation of the £650,000 and various points about the resettlement scheme. Even if all those points are facts and correct, the negligence claim does not depend on those facts and they are irrelevant to section 32(1)(b). There is no evidence that anyone asked how the £650,000 was calculated or how much the Mauritius Government had asked for (though it was £650,000 – and there was an Ilois number based calculation). Reasonable diligence would have involved asking the Mauritius Government or the Resettlement Committee, on which Ilois were represented. That would also have been a reasonable step to take in relation to any other matters about the adequacy of the sum, and the progress or wisdom of the pig breeding scheme. The Prosser Report was published in 1976. Documents dealing with reservations about the pig breeding scheme were among those disclosed in the Vencatessen litigation. Mr Macdonald, (15/124), advised that the adequacy of the £650,000 offer be investigated to see if it was made in good faith. There is no evidence to support the claim that a Claimant, if ignorant of any relevant fact, could not with reasonable diligence have discovered it.
11. Property rights and the overreaching legislation: the legislation, the fact of purchase and the payment of the price were never concealed. There is no evidence of anyone asking or not being told the precise position. The purchase price was referred to in the press in 1975 and by Mr Macdonald in his advice. He



too knew of the Property Ordinances, (15/119, 128). He also advised that property rights be investigated.

12. Repeats (7) above in relation to constitutional and property rights.
13. Deceit: the deceit of the UN and the Chagossians entitlement to stay. This adds nothing to what I have already dealt with. Certainly what the UK actually said would have been ascertainable with reasonable diligence.

654. These "*facts*" therefore do not assist the Claimants in overcoming the statutory bar to these proceedings. It is necessary to say a little about their documentary analysis however.

655. The Claimants' Note on documents produced from the Public Record Office does not exemplify their contentions as to when they first saw what they contend was the true character of the Government's actions, even if that were a relevant concept within the Limitation Act. The fact that certain documents were not disclosed does not assist in showing that the relevant facts were concealed unless they are also known to be the only relevant source for the fact in question.

656. But, as Mr Howell, pointed out, volume 17 shows that the documents disclosed in the Vencatessen litigation, including the Newton Report, demonstrate the Defendants' awareness that there was a permanent population in the Chagos. The known population figures were disclosed eg in the March 1967 Report (paragraph A85), in the May 1967 Report (paragraphs A97-100), in the September 1967 despatch (paragraph A11), in the despatch of 4<sup>th</sup> June 1968 from the BIOT Commissioner to the CO (paragraph A134), of 1<sup>st</sup> August 1968 (paragraph A149), and in the report of Mr Todd's visit in July 1969 (paragraph A249). The position over the undertaking of the Mauritius Government in 1972 and its basis in humanitarian assistance not legal obligation had also been disclosed. Indeed, a limited amount of material about the stance at the UN had also been disclosed.

657. The newly disclosed documents do not bear out the implicit contentions by the Claimants that the Defendants thought that there were, or that there were in fact, legally binding obligations to compensate, consult, resettle, provide employment or to secure their political, economic and social advancement. They bear out a sense of moral or political or at best international but not individual legal obligation. The existence of the original undertaking by the UK Government to the Mauritius Government was publicly known, referred to in a Parliamentary Question by Mr Duval in the Mauritius Legislative Assembly; the agreement for £650,000 resettlement money was known, as was the way in which it was not spent for years. Whatever may be said about the dilatoriness or effectiveness or generosity of the UK Government's resettlement offer of £650,000, the newly disclosed documents do not show a conscious disregard for the Chagossians other than that their interest in remaining in BIOT was regarded as of too little significance when tested against its competition: defence and foreign policy interests.

658. The now disclosed correspondence between the Canadian Government official and the FCO over consultation does not begin to evidence any obligation to consult or promise to consult. All the correspondence as a whole shows that consultation was considered but thought pointless or impractical. After all, the one option which the Claimants really wanted was not open.

659. The correspondence now shows that the UK Government was very alive to the arguments that chapter XI might or did apply and to the political disadvantages which might attend its application. But the overall documentation shows the criticism of the stance adopted, by other countries and by Chagossian legal advisers such as Mr Macdonald. The contradiction between the UK's position and the facts as asserted by others or as said to be known to the UK was evident or readily ascertainable with reasonable diligence.

660. One of the real difficulties facing the Claimants with all their various causes of action is the extent to which the current arguments, sometimes in a different legal cloak, were foreshadowed by what was argued in the Vencatessen case. This means that it is very difficult to say that a fact relevant to the existence of the right of action was deliberately concealed as opposed to material which might advance or support the case, or offer flavour but not substance to it.
661. I have also tried to stand back from the detail to see to what extent in reality, shorn of the rhetoric, the Claimants needed either a fact contained only within the documents not disclosed in the Vencatessen or the documents themselves in order to make the averments necessary to set up the causes of action upon which they rely.
662. For misfeasance, the illegal actions are all acts of which the Claimants knew or could readily have discovered. I did not find in the documents, let alone only in the documents not so disclosed, the otherwise concealed fact of knowledge or reckless indifference to any illegality.
663. For deceit, the position as declared at the UN, if untrue, was at least known or discoverable to the Claimants. They have no chance of showing that they could not have discovered such deceits as they say exist with reasonable diligence. But the cause of action is misconceived anyway.
664. Exile depends on the unlawfulness of the acts of displacement or exclusion. What is necessary for that, as for illegality in misfeasance, is not dependant on what the Defendants knew. A permanent population cannot be displaced, in the absence of extraordinary circumstances which are not here relied on, by virtue of powers to make laws for the "*peace, order and good government*" of the territory, according to *Bancoult*. But I have no clear picture of what Mr Allen says the documentation relied on adds, beyond what is clear from the Order, the Ordinances and the known aim, for whatever reason (but not natural catastrophe or the like) of removing the islanders. The documentation does not provide that purpose, hitherto unknown. What was it supposed that the aim and upshot of the various legislative powers was? So, although the *Bancoult* judgment refers to various documents (but so far as I can see the decision should have been exactly the same if they had not existed, on the Divisional Court's reasoning), I do not see that they are necessary ingredients for the alleged illegality in the tort of exile. Indeed, if they are relevant to the vires of the Ordinance because, as the Divisional Court acknowledges through Gibbs J, precisely the same power can be taken for a proper and for an improper purpose, that suggests strongly to me that the documents really go only to the question of whether the use to which the power was put was within the proper scope of the discretionary power which had been enacted in the Ordinance. But the use to which the powers were put, whether the Immigration Ordinance or the private land ownership powers, was never disguised – it was all too manifest.
665. No facts only revealed in the documents "*relate*" to any property or constitutional rights based cause of action.
666. I cannot see how anything in the documents "*relates*" to the negligence case. The duty of care exists either because, on the Claimants' case citizens should be cared for, or because I see it, it is arguable that those so displaced should not be put at risk of personal injury. The breach is not dependant on the documents any more than the existence of the duty. The Claimants fail adequately to distinguish between documents which evidence facts relevant to rights of action in the statutory sense, documents which are only evidentially supportive, and documents relevant to the asserted catalogue of wrongs, which have never had the high-level review which they seek.
667. There is in essence only one point of substance which it might be said emerges from the documents – that is that the UK Government was prepared to give a deliberately false impression as to the existence, or rather extent of the permanent population, to the UN and others. That is not itself unlawful. That could in theory, but does not in practice, go to knowledge for the misfeasance or

deceit cases. The documents do not show that the true position was deliberately concealed and not ascertainable with reasonable diligence.

668. The next point which I deal with under this head is the collation of points made under paragraph 22A of the proposed Amended Reply. I regard this paragraph as misconceived if its aim is to establish an additional basis of concealment to the non-disclosure in the Vencatessen case. There is no evidence to support the very vague and ill-considered pleading of dishonesty and bad faith; had it been properly particularised, its weakness would have been yet clearer. Much of it is simply at odds with the documents and any known facts. I would not permit this paragraph to remain, whatever else happened to the case. It is irrelevant to concealment what a lawyer may have been able to advise about with confidence. Even with the documents, no rational advice could have been confident.
669. Finally, I turn to those other matters relied on by the Claimants in paragraph 31B of the proposed Amended Reply, as going to what could have been reasonably expected of them by way of taking steps to ascertain the facts which they said had been concealed.
670. The contentions in relation to access to legal advice for the ignorant, the struggling, poor, ill-educated and unsophisticated, are in principle relevant. The difficulty is the facts. Mr Ramdass' group was able indirectly through a Mauritian lawyer-politician to contact Sheridans to bring the Vencatessen case in 1975. Other committees which became the JIC pursued it; they all knew of its relevance for the negotiations, and Agreement. The litigant, and the supporting committees, plainly had access to lawyers notwithstanding all those disadvantages. What that group did, others could have done, if they had not all seen the Vencatessen case as an action leading to a global settlement from which they would all benefit. Others could have contacted Sheridans in 1979, 1980, 1981, 1982 and at any time subsequently. Sheridans' costs were in part paid by the legal aid fund and, for the Ilois community, by the Treasury Solicitor and the Mauritius Government. They thought they were advising the generality of Ilois and so conducted themselves.
671. There was nothing secret about their involvement; it was widely publicised. If any individual had wanted advice, they could have found their name through support groups, they could readily have ascertained what the variety of support groups were doing and the politicians whose interests at least at times coincided with those of the Chagossians. I do not accept the picture of the non-Ilois painted by the Chagossian witnesses; these were excuses and deceitful evasions.
672. But it was not just the one firm involved. By 1981, Bindmans were instructed by the main representative group, the CIOF. Their involvement, physical presence, and the counsel instructed were widely publicised. They too were part funded by the Mauritius Government and at the time saw themselves as representing the Ilois generally, and advised on that basis. They did so in 1982 before and after the Agreement. They were again involved in the 1990s, instructed by the CIOF and the BIOT Social Committee. The substance of the matters upon which they advised were many of those relevant to these proceedings.
673. It was the lack of prospects of success which meant that legal aid was not sought for proceedings in this country; with better prospects, Mr Grosz said that it would have been sought, as it was in the Vencatessen case.
674. I have already dealt with the extensive organisation and variety of groups available to the Chagossians. They could raise money for advice and support for actions. Their rights were a constant political issue. Their leaders were elected annually to the ITFB; they had contact with civil servants and the Mauritius Government. Lucien Permal and Simon Vencatessen were able to bring proceedings against the ITFB. A group brought proceedings against it in 1991 for

documents. With Bindmans' advice, proceedings were brought under the Immigration Ordinance.

675. If they thought that the 1982 Agreement had created but a temporary embargo on suing the UK Government, there is no reason for further proceedings not to have been brought along the lines of the Vencatessen case by 1985 or 1987. It was suggested that there were attempts in 1990 or thereabouts. To the extent that further advice was sought, that undermines the contention about the absence of access. To the extent that it was not sought, that undermines the view that the Chagossians genuinely, and however improbably, thought that the 1982 Agreement and the withdrawal of the Vencatessen case was not the end. Mr Gifford may well be right in saying that they had called their best shot in 1982, and after the inadequacies of the money became apparent, they had and knew they had nowhere else to go.
676. The attempts by the Chagossians to play down the role of their organisations was discreditable. They did not seek to present a reasonably complete and truthful picture to the Court, when they knew that limitation was a major issue. It was only when I pointed out that significant witnesses were omitted, who could speak to what was or was not known, that several relevant witnesses were called. The allegations that the organisations were not representative were not supported by evidence: the claimants simply challenged someone else to disprove their counsel's assertions and to prove the contrary of their witnesses' failing or untruthful recollections. The burden is on them to show the matters which would justify an extension of time.
677. Finally and highly contentiously, the Claimants plead in paragraph 34(vi) that "*a very large majority*" of the Claimants living in Mauritius did not obtain "*real and comprehensive*" legal advice and because of the deprivation created by the Defendants had no "*real effective and practical*" means of access to "*comprehensive*" advice on English law before the involvement of Mr Mardemootoo in 1998. Thereafter, documents freshly available in the Public Record Office and disclosed in the Bancourt Judicial Review enabled the Claimants, since the result of that action, to take decisive legal action. The lawyers whom individual Chagossians (unspecified) did instruct had faced difficulties (unspecified but I infer the Claimants rely on the same conduct by the Defendants and non-disclosure of documents as already referred to).
678. This last pleading was highly contentious first, because until the amendment made with the closing submissions (though the Claimants had acknowledged the need to make an amendment to their Reply) it had been asserted, plainly untruthfully and it ought to have been plain to all the Claimants' lawyers that it was untrue, that no Claimant had had any practical access to legal advice. The amendments so far as material are in quotation marks in the preceding paragraph. It ought to have been obvious because Sheridans were involved earlier on, it was known to Sheridans and Mr Bradley, and plain from Bindmans' documents that the CIOF had sought legal advice in the 1990s and that other lawyers too had been involved. I accept the explanation as to how the pleading had not been checked and that there was no intention to mislead the Court. But I am left with a deep concern that this pleading of the Reply was constructed on the basis of what the position was wished to be, and not on the basis of any thought or investigation such as would permit the original or first draft amended pleading to be supported by a statement of truth. That concern rather persists with the final amended Reply because, for reasons to which I shall come, it is so at odds with the evidence.
679. It was highly contentious for a second reason. The reference to "*a very large majority*" was said to "*de-particularise*" the claim, rendering it uncertain. The allegation was vexatious according to Mr Howell; the Claimants' disclosure had been late and partial, its witnesses were supposed to provide the best evidence which they could call and when all had failed, they had sought to avoid the consequence, the dismissal of time barred claims, by lumping Claimants

- together in a way which prevented the identification of those whose claims might or might not be statute barred. Mr Howell urged that the proposed amended Reply at least in this respect should be refused permission to be served.
680. In my judgment, although there is force in what Mr Howell says, it is not itself a sufficient basis to refuse permission for the amendment. The real problems with the pleadings should be dealt with on their merits which I have yet to come to. The assertion that almost all Claimants, as opposed to all Claimants, may be imprecise but the essence of the contention is clear enough. If the real issue was one of form, I would remedy the pleadings by staying the action, requiring the completion of a new questionnaire by all Claimants, which was directed to answering the more specific and detailed questions, to be approved by the Court, relevant to the issues which are now raised and identifying which issues related to which named Claimant. This would be necessary for many aspects of the pleaded claims.
681. It is perfectly clear that the JIC, the CIOF, the BIOT Social Committee, the CRG and others represented and were relied on by most Chagossians. Those they did not represent knew what organisations existed and could find out what they knew and had been advised.
682. In any event, through the long years of Chagossian struggle, they were advised by many lawyers in addition to Sheridans, Bindmans and English counsel. There was advice available from Mr Duval QC, Mr Marc David QC, Mr Lassemillante, Mr Ollivray, Mr Bhayat and others. I accept that not all the others would have been well placed to offer direct advice on the complex issues in the case. But Mr Duval was in a position at least to point Chagossians in the right direction as the instructions to Sheridans showed. In the UK, lawyers pointed the CIOF to Bindmans. Mr Ollivray and Mr Bhayat were at the 1982 negotiations. Mr Lassemillante may have been more noisy than effective, as Mr Bancourt in effect described him, (and he would not be the first advocate of whom that could be said), but that is not the point. He was a legal adviser with relevant knowledge.
683. The criticisms of the behaviour of the Defendants in paragraph 31B(ii) and (iii) do not show or tend to show that the Claimants could not have discovered the allegedly concealed facts with reasonable diligence. They do no more than explain why the Claimants were in the position set out in paragraph 31B(i).
684. The Seychellois Chagossians were not in so strong a position as those in Mauritius: there was no agreement on resettlement, or negotiations to settle litigation. The Seychelles Government was not interested in exploiting the Ilois for sovereignty claims, because on independence its islands were returned.
685. Nonetheless, there was information available to them, in 1980 about the Mauritian Chagossian claims and the Vencatessen litigation through the visits of Mrs Alexis and others. Some tried to claim under the 1982 Agreement. They could have contacted the Mauritius or English lawyers for their case to be pursued.
686. Mr Howell objected to these proposed amendments coming after cross-examination but I see no reason not to consider them, and to deal with the points which he raises against them on their merits. Section 32 is of no avail to the Claimants.

#### Limitation and personal injury

687. Mr Allen lastly relied upon the special provisions in relation to personal injury in section 33 of the 1980 Act. This provides:

"(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –

- a. the provisions of section 11 [or 11A] or 12 of this Act prejudice the plaintiff or any person whom he represents; and
- b. any decision of the court under this subsection would prejudice the defendant or any person whom he represents; the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to -

- a. the length of, and the reasons for, the delay on the part of the plaintiff;
- b. the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 [, by section 11A] or (as the case may be) by section 12;
- c. the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- d. the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
- e. the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
- f. the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

688. Sections 11 and 14 are also relevant. So far as material, they provide:

"11 Special time limit for actions in respect of personal injuries

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.

(4) Except where subsection (5) below applies, the period applicable is three years from -

- (a) the date on which the cause of action accrued; or
- (b) the date of knowledge (if later) of the person injured."

14 Definition of date of knowledge for purposes of sections 11 and 12

(1) [Subject to subsection (1A) below,] in sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts -

(a) that the injury in question was significant; and that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and

(c) the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant; and knowledge that any acts or omissions did nor did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire -

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek; but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

689. I have already referred to the Claimants' pleadings in respect of the personal injuries and to some of their drawbacks when dealing with the negligence claim. It was accepted by the pleading that, for the purposes of sections 11 and 14, all of the Claimants who made a claim in respect of personal injuries knew of the statutorily relevant facts before the start of the three year period ending with the issue of these proceedings. No specific date or dates for such knowledge is pleaded, but reliance is placed for the purposes of section 33 on the disclosure of information in the *Bancoult* proceedings. It is indisputable but that the causes of action accrued many years ago. So the key issue is whether or not there is any reasonable prospect of time being extended under section 33. I use the expression "*reasonable prospect*", not solely because that is how the question was formulated, but also because although I recognise that, in principle, a decision on the application of section 33 can be made before trial, it may also be appropriate for that decision to await trial in certain circumstances, unless the answer to its application is already clear.

690. The Claimants' pleadings and submissions on section 33 only partially follow the structure of section 33. So far as section 33(3) is concerned, the first submission is that the injuries will continue to occur until their previous "*basic decent living conditions*" are restored. I have already dealt with the unarguability of the general claim in negligence. If there is a continuing breach of duty leading to personal injuries in respect of those compelled to leave the Chagos by the sequence of decisions for which the Defendants were responsible, no individual has been identified nor his related circumstances so as to sustain such a case,

and I do not see how it can be said that there is a continuing duty to them anyway, of the limited nature which I regard arguably as existing.

691. The Claimants assert, without much elaboration, that the evidence of neither party would be made any less cogent by what delay (unspecified) there might have been. In support, they simply say that the evidence of the Defendants is "*largely contained in official documents*"; this suggests a very limited role for cross-examination and oral evidence from the Defendants. I consider that appraisal to be correct and such recollection as any witnesses had, would be almost wholly dependant on those documents, and even those documents could well fail to enable events accurately to be recalled; this was the nature of the evidence of Mr Sheridan, Mr Glasser, Mr Grosz and, to some extent, Mr Moulinie. But this assertion contradicts the Claimants' stance in relation to the continuance of the misfeasance proceedings, which posited that much of value could emerge from cross-examination of the Defendants' witnesses, whoever they might be. The evidence of what happened to the Chagossian community was said to be "*still plain for all to see*". But, to my mind, that can relate to current circumstances only; it cannot deal with the sequence of events or with causation, or the position in 1973, 1982-3, 1990 or at any other time. The pleading, so far as individual Claimants were concerned, was merely that what happened to individuals would be a matter of evidence in due course. As an attempt to deal with section 33(3), it provides nothing of value, and its very paucity suggests that there is little more to be said about the obvious difficulties which the Claimants face.
692. The Claimants blame the Defendants' conduct in not providing information which might have allowed the Claimants to ascertain the facts relevant to this cause of action, until the Bancourt Judicial Review proceedings. The partial disclosure and subsequently required destruction of what was disclosed in the Vencatessen action is also referred to. The Defendants' conduct was simply to deny responsibility for the Claimants, it is pleaded.
693. Next, it is asserted (without any being identified) that some had periods of disability as minors or through mental illness.
694. It is then pleaded that the Claimants, I infer all of them, acted promptly and reasonably in the circumstances in bringing this case (not just the personal injury claim) in the light of the information disclosed in the Bancourt Judicial Review. This is not further particularised or elaborated. The Claimants also rely on the highly contentious pleading in paragraph 34(vi) about what access to legal advice was available to the vast majority of Chagossians.
695. I accept Mr Howell's submission that the particulars of claim do not comply with the requirements of CPR 16 PD rule 4. This is because the relevant details are not available from the questionnaires as to injury, losses, or medical reports, if any are to be relied on. It is not clear if any of the suicides are alleged to be fatal accidents. Nonetheless, this deficiency is remediable and not a justification for summary judgment or strike out against the Claimants. But I propose to deal with these pleaded claims on their substantive merits, or lack of them. There is an interaction however; the vagueness and opacity of the pleadings, their rather uncertain approach to facts which ought to be set within a properly understood legal framework has resulted to an extent from or permitted the substantive problems to be overlooked, not wrestled with and thought through. Had that been done, the weaknesses of the case must have become clearer.
696. I do not regard the Claimants as having any reasonable prospects of success in their limitation argument in relation to personal injuries. For these purposes, I accept that some Chagossians might have suffered personal injuries of the type asserted, that those might constitute personal injuries for the purpose of sections 11 and 33, and that some might have been caused by the negligence of the Defendants. But it is to be emphasised that it is only the material relevant to the requirements of sections 11, 14 and 33 which matters; ie non-disclosure, say, is only relevant to the extent that it bites upon the claim for personal injuries. The question of when knowledge arose of relevant facts and what advice



- was available, and when, are relevant for and conceded by the Claimants for the purposes of sections 11 and 14 but arise again under section 33.
697. I accept that the burden of proving that the claim has been brought within the relevant period of limitation is on the Claimants; *London Congregational Union Inc v Harriss and Harriss* [1988] 1 All ER 15 CA at pp30, 34, 37. This also applies to the justifications for stopping time running and for extending it.
698. The relevant causes of action for the purposes of a claim for damages for personal injuries obviously encompasses the negligence claim. It also covers a breach of duty; the duty which must be breached for these purposes is not the broad duty to avoid infringing the rights of others, a duty to avoid committing torts or breaches of contracts; it is a duty to take care to avoid personal injury; *Stubbings v Webb* [1993] AC 498. So, the only relevant facts, knowledge, delay and legal advice for these purposes are those which relate to a negligence-based personal injuries claim. No other relevant duty has been pleaded.
699. The issue which section 33 raises is whether the application of section 11 would prejudice either party. Thus, the Court has a discretionary power to direct that the section shall or shall not apply. This more general power to disapply the time limit may well reflect the shorter three year time limit applicable to personal injury cases. The statute lists, non-exhaustively, the relevant factors.
700. It is self-evident that there is no prejudice from being unable to pursue an unarguable case. The personal injury claim is not unarguable but is not strong; at present it passes muster. Accordingly, the application of the three year limitation period does not prevent the Claimants putting forward a powerful claim, with good prospects of success.
701. The prejudice to the Defendants in relation to any personal injury claim, which for these purposes is the claim that matters, is clear and serious. It relates to the cogency of the evidence which they can produce, and so I shall consider it later under that head.
702. I now turn to the specific factors set out in of section 33(3) of the 1980 Act. First, the reasons for delay. In my judgment, the affected Claimants were in a position to bring proceedings for damages for personal injury when the asserted personal injury manifested itself in a significant way. These injuries, principally ill-health of one form or another, are relevant because they were supposedly unusual in Chagos. The conditions which led to them were evident; the change was evident. Even if a period is allowed for the realisation of what was happening, the establishment of trends, and the time taken for problems to manifest themselves, the first cases should have been started by the time of the 1982 Agreement. The Prosser Report, the slowness of resettlement, the submissions to the negotiations in 1981 and the experiences and claims of the Chagossians gave them the relevant knowledge. It is difficult to imagine any whose claims manifested themselves later than 1990, but again no such date with supporting justification are put forward in respect of any Claimant.
703. Their argument appears to be that relevant facts were not disclosed. This is wrong. The Claimants knew of their injury, the change of conditions, who was responsible for that change, and that, save for the 1972 and 1982 Agreements, nothing had been done for them. They knew of the availability or lack of health care and what those who provided them with health care thought about the impact on their well-being of the change of circumstances in which they lived. If they did not, it was in any event an obvious question to ask. They could reasonably have been expected to inquire of medical experts and of lawyers as to their position. The section provides that it is irrelevant whether the Claimants knew that the acts or omissions of the Defendants amounted to negligence or a breach of duty of care.
704. So, I conclude that the period of delay is between just under thirty years and a lesser period, unlikely to be less than ten years but varying from Claimant to Claimant, and in respect of which the Claimants have provided far too little

material to sustain any argument that the delay is not of a very substantial scale, given the obvious starting point.

705. The Claimants' reasons for any delay appear to be the Defendants' conduct in putting them in Mauritius and the Seychelles in the first place without proper provision, denying responsibility for them and not providing information. But these are inadequate reasons. The very existence of the cause of action is that they were displaced there without provision or adequate provision. They knew that all along. It is difficult to see what denial of responsibility or of information occurred which was relevant to this cause of action, or to delay.
706. The only documents of any possible significance which were not disclosed were those which related to the concern that the resettlement scheme by way of pig breeding would be unattractive to the Chagossians. The Claimants appear in their amended Reply, however, to be making assertions related to the generality of their claims rather than focusing on the reasons for delay and any non-disclosure of documents relating specifically to a claim in negligence for personal injuries.
707. Second, the reduction in the cogency of the Defendants' and Claimants' evidence by reference to the delay. I regard the Claimants' assertions as to the Defendants' evidence insofar as they relate to the personal injuries claim as wholly inadequate to justify any extension. The Defendants' evidence in relation to any duty of care or its breach may very well be confined to the written material in practice. But there are issues as to whether any Claimant suffered in fact the alleged personal injury eg was Claimant A depressed, did he or she suffer from stomach or respiratory disorders? The evidence of the Claimants was sufficiently unreliable to suggest that that itself would be a major issue. Yet how could that now be tested for a period of perhaps thirty years? Some of that may be a diagnosis unsupported by any medical evidence; if it is, there has been no disclosure of even one contemporaneous medical report to illustrate the point, nor of any hospital records. The Defendants' prospects of evidence challenging factual assertions as to past ill-health are obviously significantly and adversely affected.
708. Even more problematic would be issues as to causation. In view of the absence of sound illustration as to the nature of even one individual's case, how it might be supported by expert evidence, medical history and personal testimony, it is difficult to see how any evidence in response from the Defendants could be other than immensely reduced in cogency. They do not have the opportunity to test any history with anything approaching contemporaneity. Whatever wrongs the Defendants did in the past, they could not now fairly defend themselves on that score.
709. The evidence which the Claimants themselves called was to my mind the clearest proof of why the cogency of the evidence of both Claimants and Defendants would be seriously adversely affected. The evidence as to what happened to individuals in terms of accommodation and social security was usually self-contradictory and incomplete; what they did with the money which they received was at times problematic. The general picture must yield for these purposes to the specific details provided by individuals to what happened to them. Evidence as to the availability and use made of medical care was unreliable and incomplete. Evidence about when individuals became ill, and what form that illness took was likewise unreliable eg Mrs Elyse's and Mr Bancoult's evidence about his father's condition. It was of a piece with a general lack of reliability over the detail of the Claimants' evidence and yet the detailed reliability of each individual's evidence matters here. There was no evidence suggesting that what they had to say on an individual basis could be reinforced by medical records, and to what degree.
710. Section 33(3)(c) deals with the conduct of the Defendant. I have already dealt with this in part in relation to the reasons for delay. The relevant conduct is that which relates to the negligence claim for damages in personal injuries, rather

than the other claims. Such acts as were identified do not relate to delay or concealment or any other act relating to whether it was equitable for this claim to proceed. Certainly, no request for information and no refusal by the Defendants to supply requested information was identified for the purposes of this particular claim. General references to non-disclosure in the Vencatessen litigation and to a failure to provide unspecified information, which it was never said had been requested anyway, simply do not begin to grapple with the statutory provisions which the Claimants seek to invoke. The problems with reliance on non-disclosure in the Vencatessen litigation have been dealt with already; the Claimants face both ways on its significance for this case: what was disclosed to one, was not disclosed to all, yet what was not disclosed to one, was concealed from all. That litigation did not fully test discovery because it was settled. No fact, relevant to this cause of action, has been said, or plausibly said, to have been deliberately concealed. The Claimants may not have been aware of what transpired between the UK and Mauritius Governments in 1972 and onwards, or of the advice which the former received about the poor prospects of the pig breeding scheme, but this cannot advance their case. As Mr Howell pointed out, this shows that no assumption of responsibility, had been communicated to the Claimants, which is the opposite of what they wish to prove. In any event, the relevant agreements and the slowness of payment under the 1972 Agreement was a matter of contemporaneous public knowledge or ready ascertainment. The condition of the Chagossians and their health was known to them; they knew of the involvement of the Defendants in their removal. There were no equivalent agreements with the Seychelles but I do not think it plausible that the Seychelles Chagossians did not know or could not readily have found out, quite simply, about the Defendants' involvement.

711. As to "*disability*" in section 33(3)(d), if a narrow view is taken of its scope, it is correct that no "*disabled*" Claimant has been identified for this claim, still less the impact of any such disability after the accrual of the cause of action. If "*disability*" is given a wider interpretation than section 38 would provide, so as to encompass illiteracy, the arguments in relation to this particular claim do not change. The information in question was not unknown because unread; it was available from what the Claimants could see had happened, from any medical notes which they could see being written and from any inquiries which they could make in person, or through their organisations or representatives, whether in Mauritius or in the Seychelles. Poverty and ignorance of the law are not relevant disabilities.
712. Section 33(3)(e) requires a Claimant who seeks to persuade the Court that it would be equitable to allow his action to proceed, to provide some evidence about the promptness and reasonableness of what he did, once he knew that what the Defendant did or did not do could justify a claim in damages. Mr Howell submitted that this provision had not been addressed by the Claimants. That is correct.
713. The pleadings imply that the Claimants or almost all of them had no relevant knowledge until 1998. But it is plain that the generality of Claimants knew of their uprooting, that that had been caused by the Defendants' actions and had led to the poverty, malnutrition, unsanitary housing and the consequent physical and mental illnesses. If any Claimant had not known that, there were many Chagossians who would have put them in the picture without any difficulty upon a simple inquiry. The Claimants likewise knew that this might be capable of giving rise to an action either by the time of the start of the Vencatessen action, or at the latest by the time of the 1982 Agreement and the well-publicised withdrawal of that action. The reality is that the Bancoult Judicial Review and its outcome have nothing to do with the personal injuries claim. The documents disclosed may assist in arguing that the Defendants were negligent but it is not arguable that those documents reveal the ingredients of a cause of action for damages for personal injury which was hitherto unsuspected.

714. The Claimants identify no steps which they took promptly, because their argument is the untenable one that the starting point for an examination of what they did is 1998 or later. Hence they impliedly contend that these proceedings were started reasonably promptly (albeit more than three years after the relevant knowledge was obtained). Even on that basis, they have not acted promptly. But that is not the real point. The real point is that they did nothing after the 1982 Agreement.

715. After 1982, the Claimants face this problem. If, as most of the witnesses asserted, there was no individually binding settlement and the renunciation forms were ineffective, there is no reason for them not to have started proceedings at any subsequent time. If, as others thought, the upshot of the Agreement and the payment of money by the ITFB, merely meant that they could not sue until 1985 or for five years, there is no reason for proceedings not to have been begun by the late 1980s.

716. I do not believe that that is what they actually thought at the time. All their actions show that, whether or not the precise mechanism was fully understood, they knew that there was a full and final settlement and they could not have money from the ITFB and bring a claim against the Defendants. They started no proceedings, although legal advice was available; their organisations started no proceedings for personal injury whether before or after the late 1980s. They made claims on the US Government. They never asserted that damages became payable again. Yet they knew that they were still living in poverty and that they had concluded that the ITFB money was insufficient, and thus they had every incentive to sue again.

717. However, taking the Claimants' evidence at face value, they thought that they could start proceedings after 1985 or five years from the Agreement. But they did not do so. Their reasons were difficult to follow in view of the poverty and harsh conditions in which they were still living. They said they had no leaders; yet they elected representatives to the ITFB; they had organisations whether solely Chagossian or not; they had political contacts; they could obtain legal advice as to their position. Some in fact did so. Some asserted that they had been deceived by Mauritians; yet the evidence of that was no more than that there had been some letters or petitions suggesting full and final compensation in return for the giving up of claims, including at times but not always the right to return to Chagos. There was some potential for a conflict between the desire for Mauritius sovereignty eventually and a right of return to Chagos immediately, but there was and is a strong common interest in the islands becoming Mauritian. But they set up their own organisations led by Chagossians in 1983 to 1985, notably the CRG, so the alleged malign influence of those who had wanted to assist them, would by then have been neutralised.

718. Mr Gifford felt that the reason for inaction was that the Chagossians had called their best shot in the 1982 Agreement and had thought thereafter that there was nothing they could do until documents emerged in 1997 and 1998 making a re-examination of litigation, buoyed by the success of Olivier Bancoult, feasible. I am not sure that that fully reflects the seeking of advice in the 1990s but as a conclusion I felt that it indicated that the Claimants had reached a final agreement with the Defendants in 1982. In any event, I do not consider that the events of the late 1990s had any real bearing on the personal injury claim, which was advanced to assist the limitation argument.

719. The Seychelles Chagossians knew the same relevant facts at the same time as their counterparts in Mauritius or could readily have ascertained them. Some would have had an awareness of the 1982 negotiations, and that lawyers had been involved. I do not consider it realistic to conclude other than that they knew by 1982 at the latest that a damages claim might be capable of arising from any illnesses from which they suffered as a result of their poverty in changed circumstances. The pleadings do not differentiate between the Chagossians in this context.

720. I have regarded the Chagossians who have given evidence relevant to the limitation issues as in effect giving evidence which is of general relevance to the Claimants. The Claimants correctly submitted that their individual cases were not test cases. But the purpose of the applications being considered was quite clear; the Claimants selected the witnesses whom they thought appropriate in order to explain and illustrate, not just what they thought of their individual position, but what the Chagossians as a community had or had not known or done. When it became clear that relevant witnesses were not being called to deal with these issues, the Claimants were given a further opportunity to call other witnesses who were supposedly better able to deal with the issues.
721. Finally, section 33(3)(f). It is in relation to the obtaining of medical and legal advice that the highly contentious pleading, in paragraph 34(vi) of the amended Reply, to which I have referred is presumably made. It does not actually refer to any steps which were taken; it refers to the reasons why no steps were taken, by the "*very large majority*" of Claimants. It is said that the advice and access was not "*real*"; I assume it is meant that the opportunities were theoretical and some of the lawyers not skilled in the relevant areas. There was no legal aid. But, the assertions in the pleadings are simply and obviously wrong.
722. It is clear that the Chagossians, at least in Mauritius, had access to both Mauritian and English lawyers. A few used that access personally and very many did so through representatives. To the extent that any Chagossians were not represented by those groups, many more were aware of their activities.
723. In sequence, an illiterate Chagossian, with the support of a group of largely illiterate Chagossians, was able by 1975 to start legally aided litigation in the UK, having been put in touch with a firm which prides itself on being one of the few willing and able to take on such work. Mr Vencatessen had been able to use a Mauritian lawyer-politician and his contacts to instruct Sheridans. That case raised many of the issues now raised. It was quickly seen as a test case and generally beneficial. The description of it as a personal or family case, by some Chagossian witnesses, begs the question: each could have done likewise. No-one suggested some personal peculiarity possessed exclusively by Mr Vencatessen which entitled him alone to bring proceedings.
724. Sheridans instructed distinguished counsel who provided advice on causes of action, the conduct of litigation, prospects of success and the reasonableness of the settlement. If Mr Allen's point is that "*real*" advice cannot be given until disclosure is complete (including disclosure of that which is privileged), it is nonsense.
725. Sheridans visited Mauritius on three occasions. In 1979, the visit of English lawyers was not a secret. It was deliberately publicised by Sheridans. Their presence and activities were widely known. Of course, it is right that the advice given was short, was not tailored to individuals and may well have been partially grasped at best. But it was clear that access to English lawyers was possible and practical. The JIC continued to instruct Sheridans and to receive advice. Mr Ramdass went to the 1981 and 1982 negotiations on behalf of Mr Vencatessen. This was agreed to at a public meeting at which his role in relation to the Vencatessen case was explained – it was obvious that that case related to the ensuing negotiations.
726. Another group, the CIOF, also claiming to be the most representative, instructed Bindmans. They also, through a circuitous route, were able to instruct one of the other of the firms which Mr Gifford regarded as able to do this type of case. Bindmans also instructed distinguished counsel. They advised the CIOF before, during and after the 1982 Agreement. They regarded themselves as advising the Chagossian community, because of the representative nature of the CIOF. Their presence and role was publicised.
727. Bindmans were again instructed in 1990 and 1995 by the CIOF and then by the BIOT Social Committee. The advice given covered many areas of relevance

to those proceedings including the effect of the renunciation forms and the problems of limitation.

728. These bodies did not exist in a vacuum; representatives were elected to the ITFB, CIOF members brought an action against the ITFB in 1991 to obtain documents so that Bindmans could advise on them; the CIOF obtained 812 signatures in 1994 for the Common Declaration of the Ilois People and the BIOT Social Committee claimed to represent 1,000 people.
729. There were other lawyers, in Mauritius, who provided advice or could have done, notably Mr Duval, Mr Ollivray and Mr Lassemillante. It is all very well Mr Bancoult saying that the latter was always talking about human rights but was ineffective. There was a real opportunity for advice. Chagossians could have sought advice about a personal injuries claim from a wider range of lawyers than might have been available for a misfeasance claim.
730. There is no evidence that medical advice about the possible causes of the conditions from which they suffered was ever sought; perhaps it was regarded as obvious.
731. I do not consider it reasonable to suppose that a Court might regard it as equitable to extend the time for bringing the personal injuries claim. As Mr Howell pointed out, it was inherent in the negotiations in 1982 that there might be a claim by Chagossians. If it was thought that it had then been settled, it cannot now be said that those who took that view, even if wrongly, should now be entitled to sue. Those who were not of that view, chose not to proceed with a personal injuries claim.
732. The UK Government paid a substantial sum by way of settlement twenty years ago. The settlement was considered to be reasonable by two experienced firms of solicitors advised by leading English counsel. If the Claimants thought that there had been no effective settlement, they could have sought advice.
733. The Seychelles Chagossians did not benefit from that settlement but there was sufficient knowledge among them that it had occurred and that the ITFB would distribute money, for them to have been put on inquiry as to whether they too should pursue an action as Mr Vencatessen had done. It would have been quite simple for them to be in touch with the CIOF, Mr Berenger, Mr Michel and Mrs Alexis to find out how matters had evolved. Mrs Alexis had been to the Seychelles in 1980 and, I am quite sure, did explain what was happening at least in broad terms. Seychelles Chagossians knew enough to attempt to make claims on the ITFB, albeit unsuccessfully. It would not have been difficult, at any stage, for contact between the two groups to have revealed the names of the solicitors and to pursue the claims.
734. They may not have done so because of a fear of the Seychelles Government, which might not have welcomed a group of what it saw as Seychellois obtaining benefits which other Seychellois could not. This feeling may have been initially more intense at the time of the "*Liberation Day*" coup, but I have had no evidence which suggests that it was an abiding fear through till 1998 when, just coincidentally, Mauritian Chagossians instructed Mr Mardemootoo.
735. Accordingly, I conclude that the Claimants have no reasonable prospects of persuading a Court that it would be equitable to direct that this action for damages for personal injuries be allowed to proceed.

### **Property**

736. Section 17 of the Limitation Act operated so as to extinguish any title which the Claimants might have had in any property on the Chagos by say 1979 (twelve years from the acquisition from Chagos Agalega Company Limited) or 1983-1985 (twelve years from the removal of the Chagossians). No claim in relation to a breach of trust has been alleged. Mr Taylor submitted that the extinguishment of title left intact any other remedies which the Claimants might

have in respect of their property. This is misconceived. If there is no title, they have no cause of action or rights to be enforced by remedies.

### **The Specific Issues**

737. There were fifteen issues which I ordered to be dealt with. Although the issues developed, as a result of the evidence and submissions, beyond the precise scope of the questions contained in the amended Schedule to my Order of 26<sup>th</sup> September 2002, it would, I feel, be useful to set out in one place, my conclusions on those defined issues.
738. There are Claimants who arguably could show that they were compulsorily removed by the Defendants from Chagos. The compulsory removals were arguably unlawful. There are Claimants who were unable to return to the Chagos but those who arrived in Mauritius in 1967 and 1968 were not arguably prevented from returning by the Defendants. Nor were the Defendants under any arguable obligation to assist their return. After the evacuation of the Chagos, the Defendants have forbidden their return to any part (subject to scope for individual permits) until the 2000 Immigration Ordinance. It is arguable that any reliance on section 4 of the 1971 Immigration Ordinance to inhibit return to Chagos was unlawful.
739. There is however no prospect of the Claimants showing that the Defendants enacted the 1971 Immigration Ordinance knowing or being reckless that it was unlawful, or that any removal or prevention of return whether before or after 1973 was unlawful.
740. There is no arguable tort of unlawful exile.
741. There is no arguable duty of care to take reasonable steps for the well-being of the Claimants, as pleaded in paragraph 87 of the Group Particulars of Claim. There is an arguable duty of care to take reasonable steps to avoid personal injury to those who were compulsorily removed from BIOT between 1971 and 1973 but it is not a continuing duty. It arose upon removal and accrued when personal injury resulted, subject to the effects of the Limitation Act.
742. It is possible that some Claimants or their successors may be able to show that before 1967 they had real property interests in BIOT. The Crown acquired land in BIOT for a public purpose in 1967 by the agreement of 16<sup>th</sup> March 1967 pursuant to Ordinance No 2 of 1967. It is not arguable that any such rights were not thereby acquired and extinguished or extinguished by a later Ordinance even though it is arguable that that Ordinance of 1967 was *ultra vires*. If the Claimants had any surviving real property rights, it is arguable that the 1983 Courts Ordinance required those rights to be adapted from the Mauritius Civil Code into English law.
743. The Constitution of Mauritius did not arguably apply to any part of BIOT after the creation of BIOT, and could not override any BIOT legislation. If it had done, its effect would arguably not have been removed by the 1983 Courts Ordinance.
744. The matters pleaded in paragraph 96 of the Group Particulars do not constitute the tort of deceit. There is no real prospect of any Claimant showing that any false statement of existing fact was made to a Claimant by or on behalf of the Defendants, that it was intended that it should be acted on by that Claimant to his detriment or that any Claimant did so act. Although it is arguable that false statements of fact were made to third parties by the Defendants, it is not arguable that they were made so that the Claimants would act on them to their detriment. It is arguable that some third parties omitted in consequence to do what otherwise they would have done to support the Ilois or oppose the UK's defence policies or both, and that that was intended.

745. The Claimants have no prospects of success of recovery in view of the Limitation Act and any title to land in BIOT was extinguished at the latest by 1985 by the operation of section 17 of the Limitation Act 1980.
746. The present proceedings involve an abuse of process by the Claimants whom I have identified as a result of the signing of the renunciation forms. It may or may not be an abuse for other Claimants, which would have depended on their evidence. There are no other abuses involved.
747. These questions do not specifically cover the claim for a declaration as to the right to return to Diego Garcia, to receive assistance in doing so and in achieving in the Chagos a certain lifestyle. It is however plain from the conclusions which I have expressed that I do not regard the claim for the latter declaration to be arguable. The former is unarguable on the basis pleaded, which does not involve an attack on the vires of the 2000 Immigration Ordinance, by reference to the relevance under Section 11 of the BIOT Order of UK and Colonies defence interests. Those conclusions were arrived at in the course of dealing with the specific issues, notably misfeasance and exile.

### **Conclusion**

748. I shall hear counsel on the precise form of Order, but the Defendants succeed on their application for summary judgment against the Claimants. Had I not been of that view, there are a few passages in the Claimants' pleadings, which I give leave to serve, which I would have struck out as vexatious. Principally, however, I would have stayed proceedings until a proper questionnaire, relevant to all the claims in question had been drafted and filed, and I would have required Particulars of Claim to identify by category which Claimants pursued which claims. I would have required the many deficiencies in the pleadings to be remedied thereafter.

### **APPENDIX TO JUDGMENT**

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#### **APPENDIX A**

Note: The asterisk marks a document relied on by the Claimants in the misfeasance claim; two asterisks mark one upon which they placed particular reliance. P, R, D, ND indicate from the Claimants' markings or omissions, as best I could interpret what was not always a consistently applied methodology, those documents upon which the Claimants here relied on for their misfeasance case but which were claimed by the Defendant in the Vencatessen case to be Privileged, or were supplied in a Redacted form, were Disclosed or were Not Disclosed on the list at all.



## Events leading up to the creation of BIOT

1. In 1962, the Chagos Agalega Company Limited acquired the freehold of the greater part of Diego Garcia, Peros Banhos, the Salomon Islands and Agalega from the Mauritian companies which owned them. It saw an opportunity for a profitable coconut based enterprise, reversing the steady economic, and population, decline of the islands.
2. In February 1964, official discussions began in secret and in earnest between US and UK officials over their defence interests in the Indian Ocean. The US had no bases between the Mediterranean and the Philippines. Increasing influence and interest was being shown by the USSR in countries bordering the Indian Ocean. The US wished to be able to counter communist encroachment and to have a facility from which it could deal rapidly with situations developing in the countries around the Indian Ocean. It wanted to develop an island for a communications facility, anchorage, airfield and other related purposes. This was seen to be beneficial to UK foreign and defence interests, especially as its own presence east of Suez was diminishing. Diego Garcia was not the only island discussed but it was an important part of the discussion.
3. This proposal was very sensitive because of the reaction expected from countries hostile to the UK and US, and from others who simply did not wish to see a US presence in the Indian Ocean, a hostility expected to be expressed at the United Nations.
4. Mauritius and the Seychelles already enjoyed a considerable degree of local independence and some local politicians were feared likely to be hostile to such a development. The independence of Mauritius was imminent, and the independence of the Seychelles was at least anticipated. All of this meant that the defence facility could not be provided on an island or islands which might become subject to hostile political control. The islands which might be required therefore had to be separated from local control and detached from the colonies to which they were dependencies. That could only be done in consultation and in agreement with the Governments of the Seychelles and of Mauritius. Whatever the legal position, a variety of political reasons, including the assuaging of a hostile reaction at the UN and depriving the USSR of an argument with which to inflame hostilities, meant that such consent was necessary.
5. The proposal was agreed: the US would provide the defence facilities, to be shared with the UK; the UK would provide land, and provide for population resettlement and any necessary compensation.
6. An internal Foreign Office ('FO') minute of 11<sup>th</sup> May 1964, (4/03) shows an awareness of other risks at the UN. The partial disruption of a nation's territorial integrity was incompatible with the UN Charter. Article 73 of the Charter, to which the Claimants' submissions attached great weight, required "*non-self-governing territories*" to be administered according to the principle that the interests of the inhabitants were paramount. They had to be developed towards self-government with full regard for their culture, their economic and social advancement, and they had to be protected from abuse. Information about conditions in such territories had to be transmitted regularly to the UN Secretary-General.
7. But the FO also said internally that fear of criticism should not prevent the UK pursuing "*perfectly legitimate constitutional arrangements in support of genuine defence interests ...*".
8. On 30<sup>th</sup> May 1964 a joint US/UK memorandum recorded agreement on the next political steps towards implementation of the proposal, with the aim of minimising adverse reaction at the UN: a survey of the islands (Chagos Archipelago, Agalega and Aldabra) to determine their suitability for defence purposes, administrative arrangements for the islands selected and "*the repatriation or resettlement of*

*persons currently living on the islands selected". This survey should be done "to attract the least attention and should have some logical cover ...", (4/7).*

9. The memorandum reveals a concern that, if the intentions of the US/UK became known, the plans would be undermined by a campaign mounted by the USSR which Afro-Asian nations would feel obliged to support, but it was recognised that the third step involving *"the transfer of populations no matter how few ... is a very sensitive issue at the UN."* This should be undertaken on the basis that *"the populations must be induced to leave voluntarily rather than forcibly transferred. This may necessitate a readiness to spend more funds and energy than might normally be expected."* The need for discretion was emphasised by the fact that the UN Committee of 24, which dealt with non-self-governing territories was considering Mauritius and the Seychelles for the first time in May 1964.
10. It was also recommended that if the survey could not be carried out without revealing the true intentions behind it and an announcement therefore had to be made as to what was going on, *"the line taken with regard to those persons now living and working in the dependencies would relate to their exact status. If in fact they are only contract laborers rather than permanent residents, they would be evacuated with appropriate compensation and re-employment. If, on the other hand some of the persons now living and working on the islands could be considered permanent residents, ie their families have lived there for a number of generations, the political effects of their removal might be reduced if some element of choice could be introduced in their resettlement and compensation."* No reference was made to the possibility of their remaining there.
11. For the purposes of the first step, an Anglo-American survey team visited the islands from mid July to mid August 1964. The report of the survey was prepared by Mr Robert Newton of the Colonial Office \*(4/12)(D); it is a long report but it is important for the reliance placed on it by the Defendants as showing the official state of knowledge as to the Chagos population before the creation of the British Indian Ocean Territory ('BIOT'). The report describes its purpose as being to *"determine the implications for the civilian population of strategic planning, and especially to assess the problems likely to arise out of the acquisition of the islands of Diego Garcia and Coetivy for military purposes."* The primary problem was the *"practicability of providing continued and congenial employment and of evaluating the social and economic consequences of moving island communities"*. The only other island in which a strategic interest was said to be likely was Aldabra, (which was more noted for its turtles).
12. The total population of Diego Garcia in 1964 was reported to comprise 483 people of whom 172 were Mauritians and 311 Seychellois. The population of Peros Banhos was 291 of whom 30 were Seychellois. The population of Salomon was 219 of whom the vast majority were Mauritians and the population of Agalega was 371, of whom about 90% were Seychellois. This made a total population including children of 1364, some 80 or so fewer than in 1960, though the population of Diego Garcia itself had gone up in that period. There were only 3 people unemployed on Diego Garcia and Peros Banhos and a further 7 unemployed on Agalega.
13. The acquisition of the islands by Chagos Agalega Company Limited in 1962 was described. Mr Paul Moulinie's conclusion in March 1963 as to the scope for copra production in the islands was referred to: although Diego Garcia had been very badly neglected, it was capable of increasing its output considerably, and labour should be retained at its present level for the time being. A labour force of 80 was adequate for Peros Banhos and no increase in labour force was required for Salomon. The report commented that Mr Moulinie's appraisal was not objective but was rather a prospectus designed to raise speculative capital.
14. Paragraph 24 of the report referred to the difficulty of recruiting labour for Diego Garcia and to the fact that it was recruited from Mauritius and the Seychelles. All the Seychellois labourers and 7 Mauritians were said to be under contract. The report continued:

"There is certainly little trace of the sense of a distinct Diego Garcian community described by Sir Robert Scott in his book '*Limuria*'. Sir Robert Scott holds that '*physical characteristics of the island have made the Diego Garcians more down and hard headed than the residents in the other islands*'. They are said to be '*more diligent in supplementing their basic rations and their cash resources than the other islanders*'.

In the postscript to his book Sir Robert Scott discusses the impact of change and makes a plea '*for full understanding of the islanders' unique condition, in order to ensure that all that is wholesome and expansive in the island society is preserved*'."

15. Mr Newton reported that, judging by conversations with the manager, and with others on the island, most of the inhabitants of Diego Garcia would gladly work elsewhere if given the opportunity. Four fifths of the labour force were said to be Seychellois on short term contracts. He said that there were grounds for concluding that the evolution of life on Diego Garcia was fostered by the easy-going ways of the old company rather than by an attachment to the island itself.
16. In paragraph 26, Mr Newton dealt with the population make-up:

"Of the total population of Diego Garcia, perhaps 42 men and 38 women with 154 children, might be accepted as Ileois. According to the manager 32 men and 29 women made relatively frequent visits to relatives in Mauritius and perhaps no more than 3 men and 17 women including a woman of 62 who had never left Diego Garcia, could really be regarded as having their permanent homes on the island. The problem of the Ileois and the extent to which they form a distinct community is one of some subtlety and is not within the grasp of the present manager of Diego Garcia. But it may be accepted as a basis for further planning that if it becomes necessary to transfer the whole population there will be no problem resembling, for instance, the Hebridean evictions. Alternative employment on a new domicile under suitable conditions elsewhere should be acceptable."

17. In paragraph 35, Mr Newton said:

"HMG should therefore accept in principle responsibility for facilitating re-employment of the Mauritians and Seychellois on other islands and for the resettlement in Mauritius and the Seychelles of those unwilling or unable to accept re-employment. Settlement schemes would have the additional advantage of retaining the Diego Garcian labourers as a community subject to supervision and guidance. Very few are wholly ignorant of life in the main islands and the conditions of the Black River area of Mauritius might well be suitable for dispossessed Ileois. Even so, some guidance will be required. The cost will be relatively heavy."

18. Mr Newton recognised that Mr Moulinie had plans for increasing his labour force especially on Agalega, albeit that some Ilois might be reluctant to move there. The report also dealt with the administrative arrangements on the island and the way in which they had evolved their own way of life and self discipline. He considered that the islands were being drawn more closely into the Seychelles sphere of influence, a pull likely to be increased with the advent of Chagos Agalega Company Limited. There was nothing remotely resembling life in modern Mauritius.
19. In paragraph 67, he dealt with compensation for Mauritius.

"HMG should assume responsibility for Mauritians evicted from the islands and likely to lose their traditional livelihood. The cost of transfer to other islands and of the construction of houses should be borne by HMG as part of the disturbance element in compensation due to the Company. Otherwise the cost of resettlement in Mauritius should be met. Payments, of this nature however, are obligations towards private persons rather than to the Government of Mauritius."

20. In his summary, Mr Newton considered that expenditure had to be directed towards the resettlement of dispossessed labour unable or unwilling to find work in other islands and pensions for islanders beyond active work. Although there should be no obstacle in principle to the transfer of labour and there was a plan to increase the labour force in Agalega, resettlement on Mauritius or the Seychelles was not thought likely to involve more than a small residue of the existing island population.
21. It is this report, which on the material before me, appears to have been relied on at the time of the creation of BIOT, although on many subsequent occasions, Ministers sought further information as to the numbers and status of Ilois. Mr Allen said that it was "*slanted*" so as to advance defence interests; it did not strike me in that way – rather it seemed to me reasonable for Ministers to take steps in reliance upon it.
22. Mr Allen pointed out, perfectly correctly, that they also had available to them the book "*Limuria*" written in 1961 by a former Governor of Mauritius, Sir Robert Scott, about mid-50s Chagos, which described a "*permanent*" population of 1500. By this he meant "*the islanders*" who had been there for generations, many two or more, some for five or more. Mr Allen suggested that the Newton Report presented an atypical analysis, neither consistent with earlier material, of which "*Limuria*" was but an exemplar, nor with the FO's or BIOT's later surveys.
23. That is not correct. Mr Beal produced a careful analysis of the census and other survey figures for Chagos from 1883 onwards. None contain a separate figure for Ilois. The total population figures though the 1950s for the three islands drop from about 1100 in the early 1950s to 900 by the late 1950s, to 747 in 1962. This is all consistent with the evidence of economic decline. It is the Scott figure, if any, which is out of line. Mr Newton's overall figure of 993 with 483 on Diego Garcia is not significantly out of line. The figures for the islands thereafter fluctuate: 793 (431 Ilois), 924 (487 Ilois), both in 1967, the latter reflecting the last major recruitment, to 807 (434) in 1968, 691 (422) and 652 (350) in two 1969 visits, 680 (343) in 1970 and 630 (387) in February 1971. It is the number of Ilois, which was neither a readily defined nor ascertained category, which gave rise to the greater fluctuation in assessment. But the Newton report adverts to that problem of assessment and Ministers continued to seek more refined information. Mr Gifford produced in the Bancoult Judicial review (13/301) figures for births and deaths on the three island groups over similar periods of about 70 years; the registrations, assuming them to be only of Ilois which is not clear, show neither birth rate, nor population, nor do they relate to the same individual.

For Diego Garcia it suggests a crude average of 20 births a year, 14 for Peros Banhos and 9 for Salomon. This advances matters very little.

24. Mrs Talate's portrayal of life on Diego Garcia in her witness statement was largely unchallenged for the purposes of these proceedings and was adopted by a number of Chagossians in their witness statements. It was plain, at the conclusion of her evidence, that her statement bore no resemblance to anything which she might have said in her own words, by its style, phraseology or language. But the general picture was supported by other evidence and I am content for these proceedings to accept it as a reasonably accurate picture of life in the 1960s on Chagos, though seen through longing eyes and a misty recollection, engendered by the passage of time in a fairly wretched life in Mauritius.
25. There was a house for each family with a garden or land around to provide vegetables or poultry or pigs to add to the variety of the diet yielded by the company's rations. Fishing added to its variety. Many types of work were available, though mostly in the copra industry; there was also domestic work for women, construction, administration and fishing or boat building for the men. The small population had a varied, healthy diet, with no unemployment. The educational system, on Diego Garcia a missionary school, provided no more than was necessary for such a lifestyle; values were taught. They rarely handled cash. Contract workers had to sign contracts but never Chagossians. (She was clearly wrong about that.) There was no "*mad rush, we all lived according to our own rhythm*", without fear, stress, hunger, poverty or misery.
26. There was a community life, peculiar to the islands, which had their own food, drink, games and festivities. It was a religious, Roman Catholic community. The work, diet and life led to few diseases, but every so often, people would have to go to Mauritius for medical treatment. The climate was benign. From here, they were "*forcefully removed*"; there was no elaboration in the statement as to what "*forcefully*" meant, from violence, to threats, to an absence of choice. This vagueness was common and potentially misleading.
27. In October 1964 a Colonial Office minute, \*(4/38)(ND), to the Secretary of State recommended that the Chagos Islands be detached from Mauritius to enable the development of defence facilities on Diego Garcia, which was described as "*a coconut island whose present population under 500 is largely contract labour from Seychelles*". The Mauritius Prime Minister had reacted "*not unfavourably*" to the proposed detachment but compensation would clearly be required. The figures reflect the Newton report.
28. In January 1965 the US Embassy wrote to the Foreign Office Permanent Under-Secretary's Department stating that the consequence of the survey group report was that they had concluded that it was Diego Garcia which had the most potential for US military requirements, (4/42). They anticipated starting construction work in 1966 and being operational by 1968. They asked for the entire Chagos Archipelago to be detached both in the interests of security and so as to have other sites available for future contingencies. They also asked for other islands to be detached from the colonies to which they were dependencies. The Foreign Office enquired of the US Embassy (4/44) as to whether the islands would need to be completely cleared of population and if so which and when and whether local labour could be used on the proposed facilities. The reply on 10<sup>th</sup> February 1965 (4/52) was that there was no reason to re-locate population prior to an island's coming into use for defence purposes, other than Diego Garcia's if Diego Garcia were needed. Practical problems were raised about the use of local labour for construction work. The Officer administering the Seychelles Government wrote to the Colonial Office ('CO') in June 1965, (23/39), saying, in the course of a letter dealing with land valuation and resettlement, that for costing he had assumed that all "*locals*" would be evacuated from the islands taken, but he would be delighted to be wrong.

29. In a memo of 30<sup>th</sup> January 1965, \*(4/45)(P), the Secretary of State for the Colonies told the Foreign Secretary that the islands had "*few if any permanent inhabitants; contract labour works on them for limited period producing copra*" but "*substantial compensation payments both to dispossessed land owners and islanders and to the Mauritius and Seychelles governments would be involved. Resettlement problems might arise.*" By 25<sup>th</sup> February, the Foreign Office was estimating that clearance of the populations from all the Chagos group was not a likely eventuality. A resettlement cost for Diego Garcia, Peros Banhos and Salomon was put at approximately £350,000. A brief for a meeting between the Foreign Secretary and Dean Rusk, the US Secretary of State, in May 1965, \*(4/56)(ND), said that it might be pointed out that "*we were taking great care to see that the local inhabitants were fully protected*" in the context of a unique opportunity to detach "*the small and barely inhabited islands for strategic purposes*". The references to the population reflect Mr Newton's report, paragraph 23.
30. By June 1965, Chagos Agelaga Company Limited had become aware of rumours about defence facilities. It was recognised by the Treasury that, before the Mauritius and Seychelles Governments were approached which should be done soon, it was necessary to be clear on the compensation to be paid. The increasing cost of detachment, including compensation, led the US to agree to fund part of the cost by way of set-off from payments due to the US for Polaris submarines. The total cost of detachment was now estimated to be in the region of £10m.
31. In July 1965 the United Kingdom Government opened negotiations on detachment with the Council of Ministers in Mauritius and the Executive Council in the Seychelles, (12/182). Negotiations with the Seychelles proceeded on the basis that compensation would include the costs of resettling displaced labour and that the use of local labour would be difficult for the Americans. The new civil airport for the Seychelles would generate significant employment and other economic benefits. The Mauritius Government was to be told that the US Government was insisting on complete constitutional and administrative detachment and that leasing or defence agreements with Seychelles or Mauritius were not possible, (19/76a). Compensation needed for the consent of the two Governments would include the resettlement costs of displaced labour. American use of local labour was unlikely. It was intended, according to a telegram from the FCO to the Governor of the Seychelles, \*(19/76e and 4/77), that people from Diego Garcia should be resettled in the outer islands rather than in Mauritius or the Seychelles and that the resettlement of people from the other detached islands was to be avoided. As many Ilois as possible would be re-settled on Agelaga.
32. High Commissions were briefed, \*(4/67)(P), that the population of Diego Garcia was about 500, "*almost all contract labour*". The Canadian High Commissioner told, \*(4/82)(ND), the Canadian Head of the Commonwealth Division, as part of the information given to some countries to enlist their help at the UN that the Chagos population was "*mostly contract labour from Mauritius and the Seychelles*", meaning that they were not permanent residents. But the Canadian Government had sought more information which the High Commissioner asked the Commonwealth Relations Office to provide. The same point was made to the UK Embassy in the Philippines, (9/1962). The information reflected the Newton report.

33. A memo, \*(19/68a), from an official in the PIOD of the FO dealing with the detachment of the Islands sought to respond to points raised by another official about its administrative implications. The legal means of detaching Chagos was dealt with. The High Commissioner's only initial administrative task would be "*the evacuation of the population of Diego Garcia and their resettlement elsewhere*". An important point had been raised about improving the administration in the islands, which "*were managed by plantation owners by methods that are almost entirely feudal*". The publicity which would be given to the "*compulsory evacuation*" of Diego Garcia, which was anticipated to be in the near future, would generate strong demands for improved administration in the dependencies of Mauritius and Seychelles, which in context means the islands which were to make up BIOT.
34. Although this process had been carried out in secret, the UK Government had been aware that questions might well be asked about it at the UN, by the Committee of 24 and prepared its answers accordingly. They dealt with the anticipated status of the islands, their progress to self-government, and if there were no local inhabitants left, what arrangements would be made for the present inhabitants. The Colonial Office advised the UK Mission to the UN to say that the Government's understanding was that "*the great majority*" of the population were contract labourers on the copra plantations on the islands but that there were a small number of people who had been born there and in some cases their parents had been born there too. In a phrase on which the Claimants put weight, the memo of 28th July 1965, \*(4/84)(ND), continued: "*The intention is, however, that none of them should be regarded as being permanent inhabitants of the islands*". The islands were to be evacuated as and when defence interests required. "*Those who remain ... will be regarded as being there on a temporary basis and will continue to look either to Mauritius or to Seychelles as their home territory*". The memo emphasised that "*there will be no permanent inhabitants ... those remaining ... will have no separate national status*". In the absence of permanent inhabitants, no question of their constitutional development could arise. Details of the arrangements had yet to be settled. The internal Colonial office advice was therefore that the facts were to be made to fit or presented as fitting the assumptions upon which BIOT had been created. But this was neither a final nor consistent position.
35. In September 1965, during the constitutional conference at Lancaster House on the forthcoming independence of Mauritius, there was a meeting between the Prime Minister of Mauritius, Sir Seewoosagur Ramgoolam, and the Colonial Secretary at which the detachment of the Mauritian islands was discussed. The Mauritian Ministers present in London agreed to the detachment of the Chagos Islands in return for up to £3m in compensation, other benefits, the retention of mineral rights and the return of the islands once they were no longer required for defence purposes, (4/101). This was in addition to the payment of compensation to the landowners and the costs of resettling others affected from the Chagos. The possibility of a land resettlement scheme was touched upon and Mauritius agreed to produce some ideas. By October 1965, the agreement of the Mauritius Government and of its Prime Minister had been confirmed, (4/98). This was formalized in February 1966; the money was to be used in development projects which were to be agreed.
36. There was no process of consultation with the islanders and no part of the Mauritian islands were included within any constituency for the Mauritius Legislative Assembly; there was a Seychelles MP within whose constituency the Seychelles islands fell, but all discussions at this stage were confidential.
37. In a memo from Mr Greenwood, the Colonial Secretary to the Prime Minister dated 5th November 1965, \*(4/109)(P), he summarised the agreements reached with the two colonial governments, the compensation and resettlement provisions, the political hostility which the new colony could generate at the UN "*in an period of decolonisation*", and the pressure which would be placed on

Mauritius to withdraw its consent unless the creation of BIOT could be presented as a "*fait accompli*" according to a rapid timetable which was then set out. It was to be done before the UN Fourth Committee started discussing the Indian Ocean islands.

38. On 8th November 1965, the BIOT Order in Council, SI 1965/1920, was made. It detached the islands of the Chagos Archipelago from Mauritius, and Aldabra, Farquhar and Desroches from the Seychelles; it created a new territory, BIOT. The Governor of the Seychelles was appointed to be its Commissioner. It provided for the continuation of Mauritian law in the islands detached from Mauritius and for the continuation of Seychelles law in the islands detached from Seychelles, subject in each case to any necessary modification.
39. The detachment of the islands was effected under the Colonial Boundaries Act 1890, and the Constitution of BIOT within the same Order in Council was made under the Royal Prerogative. The Commissioner's powers effectively made him head of the Government of the Territory on behalf of the Crown, and also its legislature. He had power to make laws "*for the peace, order and good government*" of the territory, which had been created for the purpose of establishing defence facilities for an "*indefinitely long period*" according to the UK/US Agreement. There were Royal Instructions which prohibited the enactment of certain laws and regulated aspects of the manner in which enactments were framed.
40. The Colonial Secretary announced the creation of BIOT in a written answer to the House of Commons on 10<sup>th</sup> November 1965, (4/103, 127); he referred to the agreements of the two governments to the detachment, to the intention that the islands would be available for UK and US defence facilities and to the population of the islands, approximately 1,000 in the Chagos Archipelago and rather smaller numbers in the others and recorded that "*appropriate*" compensation would be paid.
41. On the same day, following discussions with the Colonial Office about how those populations should be described, the Governor of Mauritius released a press statement, (4/128), in the form of a more extended answer to the House of Commons than was in fact given to it. It referred to the £3m for expenditure on development projects to be agreed between the UK and Mauritius Governments. It said that the population of the Chagos Archipelago consisted "*apart from civil servants and estate managers, of a labour force, together with their dependants, which is drawn from Mauritius and Seychelles and employed on the copra plantations*". There were 638 Mauritians on the Archipelago of whom 176 were adult men employed on the plantations.
42. The draft guidance from the FO and CO to embassies and High Commissions about the creation of BIOT referred to there being "*virtually*" no permanent inhabitants, \*(4120)(D). The disadvantages of there being "*virtually*" no permanent inhabitants was that that implied that there were at least some, albeit small in number, who were permanent inhabitants of the Chagos with all that that might entail in terms of their rights under Article 73 of the UN Charter, and the inhibition which that might place upon their removal to make way for the defence facilities. The political hostility which could be fomented with so potent a weapon to hand was obvious. Part of the thinking behind the creation of BIOT in the first place had been to avoid the obligations towards an indigenous non-self-governing people which Article 73 imposed. In a foreshadowing of bitter comments which were to be made in 1982 by the Ilois, the existence of a small permanent population on the Falklands which the colonial power might wish to protect and whose rights it might wish to assert, was seen as a potential point of contrast which others could use against the UK. The memo of 9<sup>th</sup> November 1965, \*(4/118)(P), from the UK Mission to the UN to the FO said that these difficulties would not arise if "*we could say that there are (repeat are) no permanent inhabitants...but the use of 'virtually' seems to preclude this*". Further information about the numbers of "*permanent*" inhabitants was thought to be useful. The



reply, \*(4/125)(P), recognised the difficulties and that it could not be asserted that there were no permanent inhabitants, advantageous though that position would have been. It was advised that all references to "*permanent inhabitants*" be avoided. This advice underlay the formulations seen in the guidance for answers to the press. If questioned, the advice was to say that the Government had their interests very much in mind; many details had yet to be worked out. Similar advice was given to the Governor of Mauritius. This is internal advice to avoid saying what was untrue, without at the same time saying what the truth was.

43. This problem about how to describe the inhabitants of the Chagos who were born there or whose parents had also been born there, without declaring them to be permanent inhabitants, continued to tax the FO and the CO, with intermittent requests for more information about them.
44. On 12<sup>th</sup> November 1965, \*(4/130)(ND), Mr Jerrom of the CO had also written to Sir Hilton Poynton, Permanent Under-Secretary at the Colonial Office, saying that there was one awkward point which the Secretary of State wished to know about. *"It is: how can we avoid treating the new territory as a non-self-governing territory under Chapter XI of the Charter? The answer to this question depends on the status and treatment to be accorded to the civilian population who remain in, or go to the Islands"*. He said that in 1964 the understanding was that any population of the islands would be dealt with in such a way that they need not be regarded as "*belongers*", which would be reasonably straight forward if they were settled elsewhere or given citizenship rights elsewhere and then employed in the Islands under temporary residents' permits. He now understood however that only one of the islands would be taken and so the treatment of the civilian population in the other islands would require early consideration. This was recognised as an awkward problem and, because the inhabitants would not be removed from any of the islands until the islands were required for defence purposes, it would make it very difficult to avoid having to report on the new territory under Article 73 of the Charter. The matter was being discussed against the possibility that an awkward question would be asked in the House of Commons about this point. The hope was expressed by officials that it would be possible to avoid answering the question. One said: *"I have no doubt that the right answer under the Charter is that we should [transmit information to the United Nations] for the territory is a non-self-governing territory and there is a civilian population even though it is small. In practice however I would advise a policy of "quiet disregard"*. Hence the recommendation that it would be advantageous from the UN point of view to put into effect a general resettlement programme. The question was raised for discussion and advice; the issue was to be ducked if possible.
45. By a telegram dated 12<sup>th</sup> November 1965, (4/132), the Secretary of State for the Colonies to the Governor of the Seychelles said that the resettlement of populations would not be a serious problem, but that it was essential that contingency planning for the evacuation of the population from Diego Garcia should begin at once. The CO could not say, it told the Governor of Mauritius, that there were no permanent inhabitants, however advantageous that might have been, (4/134 and 136). However, because of a receding US interest in Diego Garcia for the time being, the plans, when prepared, were to remain contingency plans because there was no immediate need to evacuate anyone. The most urgent problem was to find a satisfactory basis for compensation. Mr Jerrom's memo of 18<sup>th</sup> November made it clear that his suggestions were given "*very much as a first thought*" and that legal advice would have to be taken on the local status of the persons and the nature of any UN Charter obligations, (4/116). One of the reasons why the issue of compensation had to be settled quickly was that Mr Paul Moulinie was complaining bitterly about what he saw as an intended forcible expropriation of his property; and his co-operation would be necessary if he was to be persuaded to take people from Diego Garcia to work on the Agalega

plantations, if they were willing to go there and if the UK Government paid for the cost of housing there (4/138).

46. In an exchange of memos between FO and CO officials on 18<sup>th</sup> and 19<sup>th</sup> November 1965, \*(4/115-117)(ND), each continued to advise against references to permanent inhabitants; they could be referred to instead as Mauritians or Seychellois.
47. Mr Jerrom's memo said that he thought it would be highly desirable from the UN point of view *"to put into effect a general resettlement programme"* which could tie up with arrangements for procuring the use of land on islands belonging to private citizens. *"One idea which occurs to me, probably impracticable, is that people at present engaged in copra plantations on the islands might be given some sort of alternative either resettlement in Mauritius or Seychelles, or continued engagement under contract in the islands with a temporary residents permit"*. It would be necessary to think about their *"belonger status"* and their rights of representation in the legislative assemblies of Mauritius and Seychelles. *"Subject to New York views I think that the best wicket for us to bat on in the United Nations would be that these people are Mauritians and Seychellois; that they were making a living on the basis of contract or day-to-day employment by the companies engaged in exploiting the islands ..."* They would be resettled in Mauritius or Seychelles when the defence facilities made those operations impossible and insofar as they could continue, they would do so with temporary residents' permits.
48. This line was approved by Mr Hall in a minute to Mr MacKenzie quoting what Mr Robert Newton had said following his 1964 survey, namely that the people on the islands *"could not be regarded as permanent inhabitants, but were in fact in the category of contract labour employed by the estate owners or commercial concerns. He stated that, as a matter of personal interest, he was anxious to try to find established communities on the islands ... . He failed to find any."* (4/116). The labour force could be expected to return to their permanent homes in Seychelles and Mauritius in due course.
49. Mr MacKenzie confirmed his agreement with Mr Hall's comments: *"These people are essentially comparable to residents of Basutoland who go off to work in the Republic of South Africa or even to those Spaniards who go daily to work in Gibraltar rather than to the permanent inhabitants of either Gibraltar or the Falklands Islands"*. (4/117)
50. On 16<sup>th</sup> December 1965 the UN General Assembly passed, too late, a resolution urging the UK not to dismember the territory of Mauritius or to violate its territorial integrity and viewed with deep concern any step by the UK to detach islands from Mauritius for the purpose of establishing a military base. (9/2072).
51. This led Mr MacKenzie of the CO to write a minute, \*(4/142)(ND), to the Cabinet Office saying, as had been said before, that even if no more than one island was to be cleared within the next few years, it might still be highly desirable from the UN point of view to put into effect a general resettlement programme; *"this would help us maintain the argument that the present inhabitants are Mauritians and Seychellois; that they are making a living on the basis of contract or day-to-day employment ... but that they will remain 'belongers' of Mauritius or Seychelles"*.
52. On 21<sup>st</sup> December 1965, Mr Gaeten Duval, a lawyer and Mauritian MP who was to become closely involved with representative groups of the Chagossians in the 1970's and 1980's, asked in the Mauritius Legislative Assembly whether the British Government had undertaken to meet the full cost of the resettlement of all Mauritians now living in Diego when re-settled in Mauritius. Mr Forget on behalf of the Premier and Minister of Finance said: *"The British Government has undertaken to meet the full cost of the resettlement of Mauritians at present living in the Chagos Archipelago"*. (4/104).
53. A Foreign Office minute to the Cabinet Office of 20<sup>th</sup> December 1965, \*(4/147)(ND), stated that there was *"an urgent need to take over the territory and evacuate its permanent inhabitants, so that it could be made clear that the*

*islands were defence installations and not a new colony*". This minute was but one view of the way to handle a problem which was to manifest itself on a number of occasions over the next five years, namely the need to continue commercial use of the territory until the construction of the defence facilities began, but on the other hand the desire for a formal evacuation to be completed as soon as possible. The minute advised that *"The best arrangement would be for the formal evacuation of the Company to be completed as soon as possible and for a new lease to be granted them for as long as seemed prudent."* The American Embassy said that they had no need for it at least during 1966 but nonetheless urged early acquisition of the land. The Permanent Under-Secretary's department at the FO agreed that an acquisition of title to the land throughout the territory followed by a leaseback at reasonably short notice would be an appropriate response. It was also recognised that it would be difficult to justify resettlement of the populations before there were any definitive plans for the use of the islands for defence purposes.

54. Thus at the end of 1965 BIOT had been created; there was uncertainty as to when or indeed whether any of the islands would be required for defence purposes. This uncertainty was damaging to the commercial interests operating the copra plantations. There was a tension between the need to use the islands commercially until they were required for defence purposes and the political problems which would arise at an international level if there were to be a permanent population on the islands which had to be resettled. There was no evidence before me that the generality of inhabitants of the islands of the Chagos Archipelago were aware at this stage of the creation of BIOT or of the plans for defence use and their resettlement.
55. It is also clear that before the creation of BIOT, some of those who are now Claimants had left the islands and that their departure had nothing whatever to do with its creation or the plans which underlay it.

### **Events leading up to the evacuation of Diego Garcia**

56. In January 1966, Mr Paul Moulinie was told by the Governor of Seychelles, the BIOT Commissioner, that the islands would not be needed for defence purposes in 1966, but that negotiations for the acquisition of the land interests would be undertaken and concluded during the year, (19/41(a)). The BIOT Administrator, who was also the Deputy Governor of the Seychelles, was told by the CO that a leaseback of the plantations was envisaged, although Paul Moulinie's position on this had yet to be ascertained, (19/156(a)). By February, the CO was envisaging negotiations backed up by compulsory purchase powers, but the Administrator complained to the Commissioner that the discussions which he had had with the CO were rather inconclusive, (19/161(a)). It would be necessary to ascertain what labour might be required on other islands, and what grants might be available for that purpose. The MoD were to negotiate the purchase and a specific BIOT Compulsory Purchase Ordinance was advised. The relevant legislation was not in fact enacted until 1967.
57. Meanwhile, the status of the islanders continued to trouble officials from a variety of angles and a draft Immigration Ordinance began to be discussed. CO minute of 6<sup>th</sup> January 1966, \*(4/153(ND)), seeking advice, said that they wanted to convert all existing residents into short term, temporary residents by giving them temporary immigration permits, and asked whether the existing Mauritius and Seychelles immigration enactments provided the basis for that. It was suggested by one official that something "*pretty rudimentary*", was all that was required with permits and as few rights with as little formality as possible, would be appropriate, (4/168). Mr Jerrom, in a minute of 3<sup>rd</sup> February 1966, \*(4/165-

166)(ND), said that it was necessary to regularise the position of those who lived on the islands, dealing with their position as temporary residents, with their "belonger" status and citizenship rights in Mauritius or the Seychelles. He did not know exactly what had been agreed between the Governments but it was important to avoid giving the impression that "we are trying to get rid of these people". It was recognised that the two parts of the issue went together and that the question of their status in Mauritius would have to be raised with the Mauritius Government.

58. The CO told the UK Mission to the UN in January 1966, \*(4/154)(ND), that there was no alternative to developing the line that the people on the islands were Mauritians and Seychellois, would remain "belongers" to those countries, that no Article 73 obligations would be accepted, but that until it was certain that there were no permanent inhabitants it could not be said that there were none. The CO indicated its supporting arguments and the steps to be taken to strengthen them. They had not risked the assertion yet although Mr Newton thought that it was arguable. An interim line was set out. The UK Mission continued to express to the CO its concerns about the status of the islanders and the impact which that could have on the status of BIOT as a non-self-governing territory on which it had to report to the UN, \*(4/157)(ND). It thought that some of the present inhabitants would remain and that presented the main difficulty; it was difficult to avoid the conclusion on the present information that BIOT was such a territory because it seemed to have "a more or less settled population, however small". A contemporaneous marginal note says "no". Various measures were proposed which would help what was nonetheless seen as a reasonable case, on the basis that the UK Government was doing its best for the few concerned. These measures dealt with clarifying the absence of property rights in the inhabitants and the availability of full political rights for them in Mauritius and the Seychelles in one of which they would enjoy citizenship. Mr MacKenzie, \*(4/172)(ND), suggested that it would be best to recognise that defence interests were paramount rather than pretend that the interests of the inhabitants were, beguiling though the arguments were in favour of accepting Article 73 obligations. But there remained no agreed line. Ministers had not considered the matter. These exchanges between officials, with differing responsibilities, deal with the way in which the line might be developed. The UK Mission to the UN emphasises what it saw as the UN Charter position and the problems which might be faced there.
59. On 14<sup>th</sup> February 1966, the Government of Mauritius agreed to accept £3m as full and final settlement for the transfer of the island; it was to be used for the Mauritius Development Programme which was to be agreed in due course. This was "without prejudice to direct compensation to landowners and to the cost of resettling others affected in the Chagos Islands". (4/171).
60. It appears from a note prepared in connection with the Vencatessen litigation, (8/1516), that MV "Mauritius" had arrived in Port Louis on 26<sup>th</sup> June 1965 with 53 passengers from Diego Garcia, 38 from Peros Banhos and 40 from the Salomons. It arrived again on 20<sup>th</sup> February 1966 with 63 from Diego Garcia, 20 from Peros Banhos and 25 from Salomon and a further voyage arrived in August 1966 and again on 24<sup>th</sup> June 1967.
61. In order to assist the development of an agreed line on the status of the inhabitants of the islands, Mr Jerrom concluded that their status should be clarified together with their position as belongers of Mauritius or the Seychelles, (4/175). A savingram, a communication in the name of superiors but not written by them, was sent by the Colonial Secretary to the BIOT Commissioner dated 25<sup>th</sup> February 1966, \*(4/179)(P). It was particularly concerned with the arguments about the application of Article 73. As a provisional view which had yet to be presented to Ministers, it was pointed out that the Government could hardly accept that the interests of the inhabitants should be regarded as paramount, but

that it had to be expected that such a stance would attract a good deal of criticism.

62. It says:

"3. Our primary objective in dealing with the people who are at present in the Territory must be to deal with them in the way which will best meet our future administrative and military needs and will at the same time ensure that they are given fair and just treatment. If it is decided to take up the position that Article 73 of the Charter does not apply to the Territory our secondary objective will be to make arrangements which will put us in as strong a position as possible in defending this policy in the United Nations.

4. With these objectives in view we propose to avoid any reference to '*permanent inhabitants*', instead, to refer to the people in the islands as Mauritians and Seychellois. It would be helpful if we were soon in the position to say that the existing inhabitants were being resettled; as you know, however, this is unlikely.

We are, however, taking steps to acquire ownership of the land on the islands and consider that it would be desirable, either at the same time or even earlier, for the inhabitants to be given some form of temporary residence permit.

We could then more effectively take the line in discussion that these people are Mauritians and Seychellois; that they are temporarily resident in BIOT for the purpose of making a living on the basis of contract or day to day employment with the companies engaged in exploiting the islands; and that when the new use of the islands makes it impossible for these operations to continue on the old scale the people concerned will be resettled in Mauritius or Seychelles.

5. We understand from a recent discussion with Mr Robert Newton that, in his opinion, the people on the islands cannot be regarded as permanent inhabitants but are in fact in the category of contract labour employed by the estate owners or commercial concerns. He said that as a matter of personal interest, he was anxious to try to find established communities on the islands, particularly people who have made their living by fishing or market gardening etc. He failed to find any. The labour force came from Seychelles and Mauritius and expected to return to their permanent homes in due course. He added that the estate managers on Diego Garcia would have welcomed local initiative on the

part of the labour in fishing and market gardening, but the labour force had been content to be entirely dependent on the company for all their means and showed no interest in trying to establish themselves as individuals on the islands.

6. Against this background we assume that there would be unlikely to be any undue difficulty with the inhabitants of BIOT themselves in moving over to a position in which they all held temporary residence permits on the basis of which their presence in the Territory would be allowed. For this to be a satisfactory arrangement however, it is essential that there should be no doubt that the individuals concerned are, and are accepted as being, belongers of Mauritius or Seychelles. . .

7. Whatever arrangements are made to establish the status of the people in the BIOT as belongers of either Mauritius or Seychelles, there will in any case be a need for the enactment of appropriate immigration legislation for the Territory itself. In this regard we are advised that until you make a law under section 11 of the BIOT Order of 1965, labourers working in the new territory will fall under Mauritius or Seychelles law by virtue of section 15(1) of the Order."

63. The Commissioner's views were sought on these points. Essentially, he agreed with the proposals, (4/187); he did not foresee serious problems with resettlement provided that this was not rushed and grants were available to assist Mr Moulinie in absorbing people from Diego Garcia on Agalega. In a later savingram of 28<sup>th</sup> March 1966, \*(4/196)(P), the Commissioner added these comments to the Colonial Secretary, sent also to the Governor of Mauritius:

"2. On the subject of the non-Seychellois I speak without first-hand knowledge, for, in the absence of a ship at my disposal, I have not yet had an opportunity to visit Chagos. I note that Mr Newton considers that all the non-Seychellois there may legitimately be classed as Mauritians and it may be that the Governor of Mauritius will feel able to share this view. My own impression, based largely, I admit, on hearsay but also on some written evidence, is that there are in Diego Garcia some people who, by normal standards, would be classed as 'belongers' of the Territory. In paragraph 26 of his Report, Mr Newton puts the number of people who '*might be accepted as Ilois*' at 80 adults and 154 children, and of these at least 20 adults (and presumably many of the children) had never left Diego and '*could really be regarded as having their permanent homes on the island*'.

3. It seems to me that the problem, if there is one, is created by the Ilois – or at any rate the more insulated of them. I do not mean by this that there should be any serious difficulty about their resettlement. But, seeing that the object of the exercise is to avert criticism by the United Nations, is there not some risk that, if these permanent or semi-permanent residents are now treated as '*belongers*' of

Mauritius, we may fail to achieve our object, since the whole operation may take on the appearance of a sham?"

64. The Commissioner suggested that a possible solution, although one which had its own disadvantages, would be to resettle all the Ilois on Agalega without waiting for further developments. He thought that the bulk of Ilois from Diego Garcia could be absorbed by Moulinie on Agalega without difficulty, (23/59). There was some discussion about whether Moulinie should be told that the Government would pay for transport and new houses on arrival for those resettled, a possible incentive to Moulinie to co-operate, (23/47 and 69/70). Nothing directly came of it and no such incentive was offered, but this might provide a context in which such matters were discussed orally with Paul Moulinie.
65. The Ilois continued to trouble the FO and the UK Mission to the UN, said an FO Briefing for US/UK talks on BIOT and the UN, \*(4/182)(P). It was thought preferable not to accept that Article 73 applied to BIOT, an approach which would be helped if there were no permanent inhabitants, although the present population included people who were born on the islands. But if they were not permanent inhabitants and were instead belongers of Mauritius or of Seychelles with full civil rights there, Article 73 would be irrelevant. Detail to support this line was required.
66. No line had yet been decided when, on 18<sup>th</sup> March 1966, an official within the Defence Department of the FO, reviewed the line which the CO was contemplating taking in an internal minute, \*(4/190)(ND), upon which the Claimants placed some weight. He recognised the problem which would arise at the UN under Article 73 and with the consequent attentions of the Committee of 24, if there were a permanent population whose rights had to be safeguarded. The whole of the defence aims in setting up BIOT would be jeopardised. Accordingly, the note continued; *"It is therefore of particular importance that the decision taken by the Colonial Office should be that there are no permanent inhabitants in the BIOT"*. A full examination was necessary of the numbers of residents, whether they were born there and how long they had lived there; then it might be necessary to issue them with documents of temporary residence, whilst making clear that they were belongers of Mauritius or the Seychelles. This was seen as a rather transparent device. But it would be embarrassing to tell the Americans that the islands which had been proposed as being suitable for defence purposes were now within the purview of the Committee of 24.
67. A respondent to the minute, \*(4/193)(ND), said that, in effect until the position of the inhabitants had been established, the line which the CO was proposing to take was like cooking the books before their contents were known: all would be well if in fact there were no permanent inhabitants, but that if there were some, *"we have a certain old-fashioned reluctance to tell a whopping fib, or even a little fib, depending on the number of permanent inhabitants"*. The information had to be established urgently. The 18<sup>th</sup> March 1966 minute cannot be regarded as establishing a line; it was a point for debate.
68. In April 1966, the BIOT Commissioner, responding to a CO suggestion that no one knew the make-up of the islands' population but that there appeared to be an increasing preponderance of Seychellois, said that whilst HMG might find it convenient to regard everyone in BIOT as Mauritian or Seychellois, he had suggested that there might be a third class at least in Diego Garcia who could be regarded as belongers of BIOT, (19/197(b)).
69. On 3<sup>rd</sup> May 1966, \*(4/198)(ND), the CO minuted to the FO its suggestion that the UN position could be dealt with by removing the inhabitants earlier than intended so as to present the Chagos as *"empty real estate"* or by finding some other way. The Governor of Mauritius, to whom this had been sent, responded that so far as

Mauritius was concerned, they had been regarded without distinction as Mauritians who would have to be resettled at the expense of the UK Government, (4/199). It minuted MoD Lands, at the end of May, (23/67), that as a fallback against Moulinie not co-operating over taking a lease back of the islands, alternative proposals for economic activity on Chagos should be sought or early resettlement.

70. Mr Darwin of the FO in an internal minute of 24<sup>th</sup> May 1966, \*(4/202)(ND), commented on this contemplated position in terms upon which again the Claimants put considerable reliance. It evidences the debate.

"This is really all fairly unsatisfactory. We detach these islands – in itself a matter which is criticised. We then find, apart from the transients, up to 240 '*Ilois*', whom we propose either to resettle (with how much vigour of persuasion?) or to certify, more or less fraudulently, as belonging somewhere else. This all seems difficult to reconcile with the '*sacred trust*' of Art 73, however convenient we or the US might find it from the viewpoint of defence. It is one thing to use '*empty real estate*'; another to find squatters in it and to make it empty.

To certify the more or less permanent Diego Garcians as belongers of Mauritius seems to strengthen the case of those who criticise its separation from Mauritius, or whichever it was detached from."

71. But even in June 1966, a note in reply from another official suggested that the most important point still was to establish their numbers and their transferability, (4/203).
72. A letter from the Commonwealth Office (Mr Donohoe) to the UK Mission to the UN of 12<sup>th</sup> August 1966, \*(4/215)(ND), continued the rather unproductive debate.

"6. The crux of our case must be the purely legal one that legally these people are Mauritians or Seychellois. So far as I understand it, there will never be citizens of the British Indian Ocean Territory. It helps us greatly in arguing this that all but about 100 of the present inhabitants are short-term contract labour: but it is again an untidy aspect of our case, that as far as can be ascertained about 100 or so were born there. Another untidy feature is that though these inhabitants are either Mauritians or Seychellois, neither have at present, while they remain in BIOT, an essential right of citizenship i.e. the right to vote in elections in their parent countries.

7. But it is a long way from showing that our case is untidy to showing that it is untenable, and, as you point out, we are in for trouble in any case on this issue in the UN. Birth has not conferred more right to remain in BIOT to the 100 or so second-generation inhabitants than several generations of occupation might confer on the inhabitants of a village about to be inundated to build a dam; the scale in fact



is somewhat less than usual. Voting rights were absent even before BIOT was created when its inhabitants were indubitably citizens either of Mauritius or Seychelles and it will be from their parent Governments, as it always has been for the new expatriated inhabitants to seek enfranchisement. Finally, though, it would not be a major administrative task to resettle 1,000 Mauritians or Seychellois back in their parent countries, there has so far been no practical need to do so and it would not be easy to do so while we are still coping with the essential preliminaries of setting up an administration in the Territory."

73. This was a personal view, (4/216), and the line remained to be settled; it was hoped, \*(4/219)(ND), that the issue would not be raised and a position would not have to be declared, just yet.
74. However, this met with a blast from the Permanent Under-Secretary of the FO, \*\*(4/221)(ND), which with the reply from Mr Greenhill presents the FO in a light which does it no credit, as the Defendants recognised. The former commented:

"We must surely be very tough about this. The object of the exercise was to get some rocks which will remain ours; there will be no indigenous populations except seagulls who have not yet got a Committee (the Status of Women Committee does not cover the rights of Birds). Unfortunately along with the Birds go some few Tarzans or Men Fridays whose origins are obscure, and who are being hopefully wished on to Mauritius etc. When this has been done I agree we must be very tough and a submission is being done accordingly."

75. In a better tone, another official said that the CO had to get with clarifying the status of those on the islands as soon as possible, making their status as Ilois as justifiable and real as possible, (4/222).
76. A CO memo to the Minister, Mr Stonehouse, dated 31<sup>st</sup> August 1966, \*(4/224-5)(ND), advised that the UK should stand firm on the application of the UN Charter to BIOT. The islands had been selected not just for their strategic location but also because they were not permanently settled, being almost entirely contract labourers:

"4. ... though having their permanent homes there. We are not certain of the number of these and opinions as to whether any should be so regarded vary but not more than about 100 or so are involved."

77. The Minister in September 1966 approved a Brief for the UN Mission, \*(4/228)(ND), prepared by the FO in conjunction with the CO and MoD, but it was secret and only prepared as a contingency document. This Brief reflected what had been discussed over the past months: the population was entirely or almost entirely contract labour with no interest in the islands other than their jobs but there was a small number in Diego Garcia who could be regarded as having their permanent homes there; no immediate need to resettle the population existed but should military needs arise, evacuation could be done at six months notice. Evacuation should not present any insuperable difficulty; the relevant islands were wholly owned by the Chagos Agalega Company Limited. *"From all accounts, none of the population would have a real interest in staying in the islands unless employers were to find them jobs there. In this sense there is no real community and the great majority should be happy with settled occupations elsewhere."* If they were forced to make their position clear on Chapter XI, they should say that there were no "peoples" in BIOT and although people might stay for greater or lesser periods that did not alter their essential character as a migratory labour force. If pressed they should say that *"genuinely"* they did not have precise records of the length of stay of individual families, but if necessary could find out.
78. During the second half of 1966, the CO, (which came under the Commonwealth Office in August), and the BIOT Commissioner discussed the acquisition of the land from Chagos Agalega Company Limited, the CO sought from MoD proposals for the maintenance of economic activity or resettlement in the event that Mr Moulinie was unwilling to cooperate during the period until the islands were required for defence purposes.
79. The passenger list for the sailing of the MV *"Mauritius"* from Diego Garcia to Mauritius in August 1966 shows that a number of Claimants sailed on that voyage, who must subsequently have returned to Diego Garcia, (4/209). One of them was Michel Vencatessen, who upon his return from Mauritius in 1964 had signed a two year contract starting 1<sup>st</sup> April 1964, (4/02a).
80. On 30<sup>th</sup> December 1966, the UK and US Governments exchanged Notes (Cmnd 3231) concerning the availability of BIOT for defence purposes. This was presented to Parliament in April 1967. It provided that the islands of BIOT should be made available for the defence needs of both Governments, *"for an indefinitely long period"*, comprising fifty years initially, followed by a twenty year period unless notice had been given to terminate it towards the end of the fifty year period. The agreement refers to using workers from Mauritius and the Seychelles as far as practicable. It was for the UK to take what were described as *"those administrative measures that may be necessary to enable any such defence requirement to be met"*, as the US might want. There was to be consultation with it over the time required for the taking of such measures provided that in the event of an emergency requirement, *"measures to ensure the welfare of the inhabitants are taken to the satisfaction of the Commissioner of the territory"*. There are no other provisions which deal with the islands' inhabitants.
81. A supplementary minute of agreement between the UK and US Governments dated 30<sup>th</sup> December 1966 identified the administrative measures referred to in the Exchange of Notes, (4/247). These included terminating or modifying any economic activity and the resettlement of any inhabitants. The notice given by the US of its requirements was expected to be sufficient for the UK to give the lessee of any of the land required by the US that notice which the lease might require; this could be six months. There had been prior discussion within the FO as to the position of the BIOT inhabitants which reiterated that they were for the most part transients but that their well-being could not be prejudiced, (4/242).

82. From mid-December 1966 onwards, discussions were afoot between the CO and the BIOT administration about a survey of the islands to examine their military potential. Aldabra had been surveyed, and a survey of Diego Garcia was planned for July 1967. Resettlement issues were discussed with the CO and FO; the anticipated UN concerns could be met by classifying all persons present in BIOT as either Mauritians or Seychellois, and by issuing travel documents to that effect which would be endorsed with phraseology which would enable the population to be moved on six months notice. It was pointed out that if the aim were to clear the BIOT islands as a whole, they could not be resettled on non-strategic islands. The BIOT administrator, Mr Todd, responded in January 1967 to the minute of those discussions by saying that it would not be possible to "*regularise*" the position of those present in BIOT by July, that the most which could be done by then would be a survey of the population "*in order to see whether the suggestion that there should be no Ilois is capable of implementation*", \*(19/152a,b,249a).
83. On 8<sup>th</sup> February 1967, the Earl of Oxford and Asquith, the Governor of the Seychelles and the BIOT Commissioner, enacted the BIOT Ordinance No 1 of 1967 which provided him with powers to acquire compulsorily on behalf of the Crown, land required for a public purpose. This was defined so as to include the defence purposes of the UK and other foreign governments with whom the UK had entered into an agreement.
84. In March 1967, the Commissioner enacted the BIOT Ordinance No 2 of 1967, which empowered the acquisition of land for the same public purpose by agreement.
85. On 2<sup>nd</sup> March 1967 the BIOT Commissioner reported to the CO, \*(4/250)(R), on the possibilities of immigration legislation for BIOT. This was a response to a savingram of 25<sup>th</sup> August 1966. The Commissioner said that he had recently had the opportunity of visiting Chagos and provided figures showing the approximate population structure in November/December 1966. The tables which he presented are muddled but they showed a total population on the islands of Peros Banhos, Salomon and Diego Garcia of 793 of which 563 were Ilois and 155 Seychellois. 166 of the 345 people on Diego Garcia were Ilois and only 46 Mauritian, the rest being Seychellois. 247 of the 280 on Peros Banhos were Ilois and 150 of the 168 on Salomon. Of the 563 Ilois, 327 were children and 236 adults. By contrast for the non-Ilois, children represented less than a quarter of the total.
86. The Commissioner commented that the figures did not represent the results of a close survey but were collected from the managers who might vary in their accuracy and their definition of "Ilois". He continued: "*It was however interesting to note that individuals questioned never felt any doubt about their status and would answer unhesitatingly 'Mauritian', 'Seychellois' or 'Creole des Iles'*". But whatever definition was placed on Ilois, it was apparent to him that there were a large number of children who appeared to be Ilois of at least a second generation.

"4. Although I do not claim a high degree of accuracy for the figures I have given, it is clear that, even allowing for a considerable margin of error they present a very different picture from that originally envisaged. Whether, for the purposes of the present draft legislation (in particular clause 11) this predominance of Ilois need cause us much concern, depends on whether or not the Ilois can be regarded as 'belonging' to Mauritius. I think it is arguable that they can, for although they have been in Chagos for a long time, they have lived there only on sufferance of owners of the islands and could at any time have been sent back to Mauritius if no longer wanted in connection with the estate. They have never in the past had any right to reside permanently in Chagos. It seems therefore that there may be nothing inappropriate in the way our law is framed."

87. The Commissioner then suggested that this point would at some stage have to be cleared with the Mauritius Government to avoid there being embarrassment with the Mauritians and the UN. He suggested that if the maximum numbers of Ilois to be evacuated in the foreseeable future were the 166 (comprising the 88 workers and 78 children) now living on Diego Garcia, the bulk of those should be capable of absorption on Agalega if BIOT had reasonable notice. Agalega was not part of BIOT but was rather an island of coconut plantations operated by Moulinie & Co.
88. It is plain that at this time there was already a draft Immigration Ordinance in existence, of which clause 11 dealt with the removal of persons from the Territory to the place whence they came or to any other place to which they consented to be removed with the consent of the Governor of that place.
89. In a note to the Commissioner, \*(4/257)(D), the CO referred to the discussions which it and other departments had had in London with Mr Todd, the BIOT Administrator, on the question of the status of the present inhabitants of BIOT. The note said that it had been explained to Mr Todd that:

"It has now been decided not to treat BIOT as a non-self-governing territory for the purpose of Article 73 (e) of the United Nations Charter. It is a matter therefore of some urgency to ensure that the status of all the present inhabitants of BIOT as belongers of either Mauritius or Seychelles is established. Although we have always realised that this would not be possible until the Administrator had been appointed and got around his enormous Parish."

It was recognised that Mr Todd had only recently arrived.

90. The Administrator replied on 15<sup>th</sup> March 1967, (4/258), saying that it seemed certain that the question of "*belongers*" only applied to Chagos and he was proposing to carry out a census on Chagos in April which should provide the necessary details on which to make resettlement plans.
91. March and April 1967 saw the acquisition of the land interests of Chagos Agalega Company Limited on behalf of the Crown and the lease back of the islands to that same company. Valuing the islands had been a contentious process both internally for the purchasers and in negotiations with the vendors; valuation presented unconventional problems. None of the documents suggest that anyone thought, the legally all-embracing language of the conveyances notwithstanding, that there were any interests or property rights of any sort enjoyed by Ilois. They featured as a resettlement cost or problem. On 16<sup>th</sup> March 1967 the BIOT Commissioner and Chagos Agalega Company Limited entered into an agreement whereby the company granted an option to the Crown to purchase for £660,000 all the company's rights in the islands with all buildings and other interests belonging to them. Those islands included Diego Garcia, Peros Banhos and the Salomon Islands. On the same day in March 1967 as the BIOT Ordinance No 2 was enacted, the BIOT Commissioner told the CO of its proposals for the acquisition of the various islands within BIOT. In brief terms, the negotiations

were covered by an answer given by the Secretary State for Defence, Mr D Healey, in the House of Commons on 17<sup>th</sup> April 1967, (4/269).

92. The islands were conveyed from Chagos Agalega Company Limited to the BIOT Commissioner on behalf of the Crown on 3<sup>rd</sup> April 1967. For the purposes of the conveyance the extent of the ownership within the islands of Chagos Agalega Company Limited was certified by the Conservator of Mortgages. It described the three "*etablisements*" on Diego Garcia owned by the company: these were "*Pointe de L'Est, Mini Mini and Pointe Marianne*". This is confirmed by the Domain Book (23/92). The conveyance also covered Agalega although it was not part of BIOT.
93. There is a certificate of freehold title from the Books of the Conservator of Mortgages of Mauritius dated 22<sup>nd</sup> July 1966, (4/208a), showing Chagos Agalega Company Limited as owners of three groups of properties on Diego Garcia, the islands of Perhos Banhos, the Salomon and other islands including Agalega, together with buildings, boats, animals, trees and more besides and everything else as befits a real property document. It appears to be a summary of the conveyancing document in French of 26<sup>th</sup> May 1962 whereby that company purchased its interests in the islands.
94. A note from the Attorney-General of the Seychelles dated March 1967, (19/249b), refers to the fact that the company did not appear to own six acres on and some small islands at the entrance to the bay of Diego Garcia which had been excluded from the 1962 sale because they belonged to the Government of Mauritius. It was thought that these properties had become vested in the Government of BIOT when it was created. The nature of the company's title was based on concessions made by the Crown in perpetuity, which was in practical terms a freehold.
95. On 6<sup>th</sup> May 1967 (23/140), the procedures for the attribution of the purchase price were completed, the provisional scheme having been advertised for 2 weeks on the verandah of the Registry Supreme Court in Victoria, Mahe, Seychelles. This was the means whereby those who wished to assert a property interest, overreached into the purchase price, were able to claim a proportion of that money. None did and it went to Chagos Agalega Company Limited.
96. On 15<sup>th</sup> April 1967 the Commissioner on behalf of the Crown leased back to Chagos Agalega Company Limited most of the islands of BIOT, including Diego Garcia, Peros Banhos and Salomon Islands. This lease covered the whole of the islands to which it related, with the exception of the meteorological station on Diego Garcia, and did not just extend to those parts of the islands owned formerly by Chagos Agalega Company Limited. The lease was to last for an unspecified period terminable by six calendar months notice in writing from either party, yielding a rent of 80% of the net income before taxation derived from the islands. The islands were to be cultivated beneficially in accordance with the principles of good husbandry.
97. Mr Todd, the BIOT Administrator, visited the islands of Diego Garcia, Peros Banhos and Salomon in the early part of May 1967. He prepared a report on the condition of the islands, \*(4/284)(P). On Diego Garcia he said that the plantation was generally in poor condition but that the labour force had been increased and a clearance programme had started; the plantation buildings were basically sound but in several cases required extensive maintenance. Labour relations appeared generally good; there were 15 quarters in the camp made from permanent materials and in good condition. Rations were supplied and there was a well stocked shop with prices appreciably less than on the Seychelles. The basic wage was Rs 25 per month for men and Rs 10 for women. He said:

"The male labour force consists of 16 artisans, 15 boys and 180 labourers, 7 women are employed as domestic servants and 5 in the hospital and crèche. Most of the other 87 women on the island are employed for one task per day on the plantation."

98. He referred to a medical dresser and midwife at the 12-bed hospital. The manager's wife assisted in the hospital. The school was staffed by the manager's daughter and the dresser's daughter. Communications and the function of the Peace Officer were described. The Civil Status records were said to be untidily kept but there was no indication that they were incomplete. The population was checked from the manager's figures and arrangements were made to enable full details to be collected on a subsequent visit. Conditions on the other islands visited were described in a similar format and essentially with similar conclusions. On Salomon a new detachment of labour had recently arrived from the Seychelles.
99. In his conclusions, Mr Todd said that the islands had been neglected for the past 18 months due to uncertainty as to their future but that on the basis of the present lease the company was increasing the labour force, and re-organising the management to increase the number of coconuts collected and their yield in areas at present neglected. He said that the company at present was experiencing no difficulty in recruiting especially from the Seychelles. He produced a table showing the number of workers and families taken by the MV "*Mauritius*" and the number returning during the present tour. These showed that of the Ilois (by their own definition and including those who had spent several contract periods on the islands), 24 men, 20 women and 50 children had arrived and 43 men, 39 women and 74 children had departed. 106 Seychellois men had arrived but with a much smaller number of women and children and only 3 had departed. The number of Mauritians arriving and departing was very low. In total 291 had arrived and 164 had departed. He recognised that the use of the MV "*Mauritius*" which had been run jointly by Rogers & Company, and the Mauritian Government, the former being one third shareholders in Chagos Agalega Company Limited, and the latter having responsibility for the islands, might no longer be possible with the change in ownership and responsibility and that other arrangements for communication by sea would have to be made. The administrative services run by the managers for the Government (as to legal and civil status) were generally satisfactory.
100. The Administrator's figures also showed the population totals after the departure of the MV "*Mauritius*". On Diego Garcia there were 166 Ilois, 327 Seychellois and 10 Mauritians. Of the Ilois 35 were men, 38 women and 93 children. By contrast, the Seychellois comprised 172 men, only 53 women and 102 children. On Peros Banhos there were 181 Ilois of whom 36 were men, 41 women and 104 children. There were 70 Seychellois, more than half of whom were men and there were only 6 women. 140 Ilois were present on Salomon, 29 of whom were men, 34 women and 77 children; there were only 28 Seychellois and Mauritians there altogether. In total therefore 487 of the 924 population of the Chagos were Ilois, 100 were men, 113 women and 274 children. Children were defined as those up to and including 12 year olds; Ilois were classified on the basis of their own assessment and included Mauritians who had worked on the islands for long periods and wished to continue doing so. With some overlaps and imprecision, I see this as showing 100 or so Ilois families on Diego Garcia.
101. The documents before me contained drafts of answers to Parliamentary questions about the status of BIOT and its population, (*"almost entirely temporary ... mainly contract labour and their dependants from Mauritius and the Seychelles."*), \*(4/278)(D).
102. It is convenient here to interject a little of the evidence given to me by Marcel Moulinie about events up to this point, as he understood them. It was in January 1966 that Marcel Moulinie told the people on Diego Garcia that BIOT had been created, that the Americans would put a base there and that they might be asked to leave; if there was any compensation they would get it, but he never

promised anything. His uncle had been told that, he said, by Lord Oxford. His uncle and Mr Todd spoke to the islanders in May 1967 and compensation probably cropped up again; however, no-one spoke of the British Government paying compensation.

103. In his Judicial Review statement for the Bancoult case, Mr Moulinie spoke of a meeting that had taken place before the May 1967 meeting, when the Ilois were addressed and were told they would have to leave, but that compensation would be paid. At the earlier meeting, he said that he remembered the shock of the announcement he made to 400 or 500 Ilois in the presence of Mr Mein. He was told by his uncle of the May 1967 meeting where both Mr Todd and his uncle had told the Ilois that there would be compensation.
104. They had been shocked to learn that the British Indian Ocean Territory had been created and that the islands had been given to the Americans for military purposes and that they would eventually have to leave. He had advised them to stay as long as possible, that compensation would be paid unless they left voluntarily, and he said that because he truly believed the British Government was going to make proper arrangements for them to be housed and employed. He said that the islanders were very sad.
105. Orally, he said that in mid-1967, which was shortly after the last major intake of labour, he went to Mauritius with his uncle; Mr Todd and Paul Moulinie went to a working lunch with the Governor. His uncle told him that he had suggested to Sir John Rennie and Mr Todd and others that either Crown land or housing compensation should be provided and a trust fund for the islanders should be set up, but had said that the reaction had been rather negative according to his uncle. There was discussion about Agalega and resettlement on other islands. He explained in his witness statement that his uncle and he had many discussions with Mr Todd about resettling the islanders over the next few years, but that nobody came forward from the Government with a sensible solution; this put a blight on the islands. There was no clarity to the Government's intentions and no answers to enquiries made of them. He complained in a statement, which was prepared for him in 1977, about the lack of communication between the BIOT Administration and the company about its intentions and its failure to exploit the islands properly. The advice given by the company to the Administration that proper compensation should be paid and that the Ilois should be properly looked after was not taken. They had never received any compensation other than small amounts given by the company.
106. Returning to the documents, on 29<sup>th</sup> June 1967 Chagos Agalega Company Limited gave six months notice to the BIOT Commissioner terminating its lease of the Chagos Islands; it referred to its Mauritian partners experiencing certain technical difficulties, (4/283). Those difficulties related to the tax which Mauritius contemplated levying following the payment to the company of the purchase monies by the UK Government.
107. Sir Hugh Norman-Walker, who was by now the BIOT Commissioner and Governor of the Seychelles, wrote to the CO explaining that the main difficulty in running the islands at a profit was the provision of transport with the "*Mauritius*" unlikely to continue, now that the Mauritius Government had no interest in subsidising its sailings as a means of communication between Mauritius and the islands. In the absence of shipping, Mr Moulinie would lose interest in the lease and no-one else would be able to solve the transportation difficulties either. A decision on a vessel for BIOT would be necessary soon so that the plantations would not be closed in the relatively near future, 4/336).
108. On 10<sup>th</sup> July 1967, the CO prepared a background note on BIOT which repeated some of the points which had been made in other documents over the preceding few years: namely, that the present population of the islands was believed to be entirely or almost entirely composed of contract labour, employed by the present lessees and living in housing provided by their employers, that they had no interest in the islands other than in their jobs, for which they had

short term contracts, that the pull of the islands had been solely the economic one of finding work there. It was followed by an interesting analysis of the origins of the population and its administration, \*(4/331)(D). The migratory nature of the inhabitants was given as the reason why no details of the BIOT population had been given in reply by the CO to a UN housing questionnaire, (4/341)(ND).

109. The July 1967 report to the CO from the BIOT Commissioner referred to the keen interest which there had been to join the island labour-force, which now exceeded the lessee's requirements, because it was thought that they would either have first chance of employment on a defence project, or alternatively of compensation should their contracts be terminated. It was said that there was no indication that the creation of BIOT was resented by the Ilois or that their co-operation in any resettlement scheme would be difficult to obtain. Indeed, the creation of BIOT had had little effect in the islands themselves.

110. In August 1967, (23/147), the MoD wrote to Mr Aust, a legal advisor in the CO, saying they understood there to be virtually no indigenous population which could call for independence, although a survey would be carried out; the concept of establishing BIOT *"was, to a large extent, influenced by that fact"*. Mr Aust responded that *"small, seemingly insignificant islands have a nasty habit nowadays of asserting themselves"*; although there was no substantial indigenous population at present, they had to look to the future, (23/149). On 15<sup>th</sup> August 1967, (23/153) dealing with whether title should be vested in MoD, a PIOD official wrote that so long as the Commissioner fully protected the *"inhabitants"* interests until they were cleared for defence use, who had title did not matter much.

111. In September 1967, concern was further expressed by the CO to the Defence Department of the Foreign Office about the implications of the notice of termination of the lease of the Chagos Islands and Farquhar by Chagos Agalega Company Limited. It reported on the problem created for the profitability of the islands by the provision of suitable transport, but another issue was the question of what the Americans might decide to do in Diego Garcia and what effect that would have on the copra plantations. The CO was concerned about the possible resulting unemployment if the islands were abandoned, as some 100 Mauritian labourers and their families would have to be repatriated and 200 Seychellois would be sent to the Seychelles. Defence Lands would lose the income which it expected from the rent on the plantations. The letter, \*(4/344)(ND), continued:

"While of course these developments had already been envisaged if Diego Garcia should be required for defence purposes, we had not bargained for these difficulties occurring as a result of the lessee's uncertainty as to the future."

The letter sought information to try and reduce the uncertainty.

112. On 18<sup>th</sup> September 1967, (4/346), the CO wrote to the Officer Administering the Government of Mauritius referring to the proposed Immigration Ordinance for BIOT; it set out the population structure in Chagos as at November-December 1966 which appears to be drawn from the March 1967 figures sent by the BIOT Commissioner to the CO, which are different in a number of respects from those reported on by the Administrator after his visit to the islands in May 1967. It was said that those figures did not represent a close or accurate survey, as indeed the March 1967 letter said. But it did say that it was apparent that there were a large number of children who appeared to be Ilois of at least the second generation and the question was whether or not the *"so-called Ilois"* can be regarded as belonging to Mauritius. The Commissioner felt that it was arguable that they could be so considered for *"although they have*



*been in Chagos for a long time, they have lived there only on sufferance of the owners, and could have been sent back to Mauritius if no longer wanted in connection with the estates. They have never in the past had any right to reside permanently in Chagos and it would appear that there may be nothing in appropriate in the way the law is framed".* This note draws significantly on the letters and notes previously exchanged. Nonetheless, the views of the Officer Administering the Government of Mauritius were sought in relation to the proposed Immigration Ordinance. The views were sought on the assumption that reasonable notice would enable the bulk of the workers on Diego Garcia to be absorbed in Agalega, to which it was not thought the Mauritius Government would have any objection.

113. However, that Officer replied, (4/348), on 29<sup>th</sup> September 1967 to the CO saying that the basic question of whether Ilois could be regarded as Mauritians was a legal question to which he could give no answer, and in respect of which legal advice should be taken. He said that he himself was not sure about the validity of the argument that the Ilois had lived in Chagos only on sufferance, since the question was whether they "*belonged*" in the national sense, rather than had rights of residence on private property. This thought was the precursor of some of the arguments which the Claimants were to raise before me.

114. The BIOT Commissioner, on 2<sup>nd</sup> October 1967, wrote to the CO with reference to Mr Todd's figures derived from his visit in May which he considered were "*pretty complete*", although further details were being sought, (4/353). Although the details might be relevant, the Commissioner expressed the rather cynical view, as he described it, that the details would do nothing to stifle criticism from those who were hostile to the existence of BIOT and the defence proposal and, in any event, the position could very readily be misrepresented by them. He said:

"It is true to say that all those on Chagos (with the exception of the Mauritian Meteorological Station staff) are contract labour on contracts of from one to two years and their dependants. But how often and over what period and over how many generations you have to renew contracts before becoming a believer is not something about which argument would produce any great profit. Nevertheless, we agree with you that we must have the facts ..."

And so a further visit by Mr Todd to Chagos was envisaged. His population figure, not separately identifying Ilois, was supplied to the UK Mission to the UN; it was not known how many would have to be removed if coconut production ceased, as the population fluctuated, \*(4/363)(ND).

115. At about the same time, discussions were under way between the BIOT Commissioner, the CO and Mr Paul Moulinie about the continued operation of the estates following the giving of notice to terminate the lease, which was to expire at the end of 1967. He had formed a new company, Moulinie & Company, which would manage Agalega on behalf of Chagos Agalega Company Limited, but which was not prepared to take the lease of Chagos but would probably be prepared to manage the BIOT islands on behalf of BIOT if a suitable agreement could be made. The two reasons why he was not prepared to continue with the lease were the transport difficulties and the cost of repairs to buildings and equipment. If these repairs were to be made under the present lease, they would be uneconomic for the company "*should the lease be terminated in the near future*". This was obviously the risk associated with a lease which, albeit for an indefinite period, was nonetheless terminable by the lessor at six months' notice; this was a

necessity given the uncertainty over the timing and extent of any American defence requirements.

116. The Commissioner pointed out to the CO that to abandon the islands would be to throw people out of work at a difficult time and would be a waste of an economic asset. To run the islands on a management basis might be less satisfactory, but on the other hand might turn out to be the only available solution and Mr Moulinie's attitude towards such a proposal had been sought. He was said to be arranging for one more voyage of the "*Mauritius*" in 1967, but would not be recruiting additional labour from Mauritius. Much of the Mauritian labour on the island was said to be due to return to Mauritius reducing the need for a regular shipping via an expensive vessel with Mauritius, but on the other hand an alternative shipping connection between the Seychelles and Chagos would have to be established. He needed to know whether the "*Nordvaer*" would be available because it was the only vessel capable of meeting the Chagos requirement, (4/350).
117. Thereafter, in October and on until December, discussions continued between the BIOT administration and Mr Paul Moulinie as to the terms upon which he might be prepared to take over the management of the plantations on behalf of the Crown under a management agreement. In November 1967, Mr Moulinie, on behalf of Moulinie & Co (Seychelles) Limited, which was based in the Seychelles, said that it was prepared to accept a management agreement for a trial period of six months at 8% commission, based on the gross value of the produce. Mr Moulinie did not think that the basis upon which the Administration wanted the plantations run was in accord with his ideas of good husbandry, (4/362).
118. On 21<sup>st</sup> December 1967, (4/365), the BIOT Administrator wrote to the CO about the negotiations with Mr Moulinie. He said that the new arrangements would involve the Administration more closely in the running the islands than it had wished. BIOT was to meet expenditure in relation to staff, to set maximum numbers of labourers which were not to be exceeded without permission, and no vessels were to be chartered without the agreement of the Administration. The company in return was to receive 8% of the gross sales. They were to set the wages for the labourers. The new management agreement was to run from 1<sup>st</sup> January 1968, even though at that stage it had not been prepared let alone signed; until that time Mr Moulinie said that he was prepared to continue co-operating.
119. Indeed, no management agreement was ever signed, although it was prepared and the management of the islands appears in fact to have been undertaken in accordance with its provisions.
120. Uncertainty, however, over the timing and extent of the American interest in Diego Garcia continued and that uncertainty was reflected in the notice periods in the management agreement and would necessarily affect the application of the principles of good husbandry. As the independence of Mauritius drew near, specific questions needed to be dealt with about who would be a Mauritian citizen or a citizen of the UK and Colonies, or both, on independence. In November 1967, an internal FO minute advised that there would be three categories: those who would remain solely citizens of the UK and Colonies which would normally be someone who was born in BIOT and whose father was also born there, but whose other parents and grandparents were born in Mauritius; those who would be of dual nationality, most commonly those born in BIOT whose fathers were born in Mauritius; and those who would become citizens of Mauritius and cease to be citizens of the UK and Colonies, who would normally be those who were born in Mauritius like their fathers and grandfathers before them, but who had lived in BIOT for many years, (4/360).
121. A set of internal minutes recording a debate within the FCO concerning citizenship in March 1968 includes a note from a legal advisor, (5/370). It advised that the effect of the Mauritius Constitution as proposed would be to give

automatic citizenship of Mauritius on independence to persons in the Mauritius section of BIOT except for people born there whose fathers were born in the Seychelles or the Seychelles section of BIOT. But automatic Mauritius citizenship would not deprive them of their citizenship of the UK and Colonies and their entitlement to British passports, though that would not give them a right of entry to the UK. The matter now came up for discussion because it had recently been proposed by Mauritius Ministers that the relevant constitutional provision should be changed so that those born in the Mauritius section of BIOT would only acquire Mauritian citizenship if their fathers or paternal grandfathers were born in Mauritius. However, the FCO foresaw that the evacuation of the islands would involve the population having somewhere else to go, and that they would have no right of entry to Mauritius unless they became Mauritian citizens. Otherwise, they could be in the same position as the Kenya-Asians. Accordingly, there was a concern about those who might retain citizenship of the UK and Colonies, but more importantly that there were some who might only have citizenship of the UK and Colonies. This memo was commented on by others, (5/374).

122. On 8<sup>th</sup> March 1968, Miss Terry of the FO, to whom the minute had been addressed amongst others, said that the automatic citizenship which those on BIOT would obtain upon Mauritius' independence would enable them to have a right of entry to Mauritius in the event of evacuation of islands, the position of which the Mauritius Government was aware.
123. Another official took the line that it had been arranged that those born in the Mauritius section of BIOT would be Mauritius citizens automatically with no retained UK and Colonies citizenship, so that if evacuated they could all go to Mauritius. Yet another commented that a person who automatically became a Mauritius citizen on its independence would cease to be a citizen of the UK and Colonies except for those categories specifically set out in the Mauritius Independence Act which included those born in BIOT. That official added that he did not see how citizenship could be taken away from someone born in what was still a colony, even though he acquired another citizenship. Anxiety was expressed by another as to the position if Mauritius, at some future date, legislated to deprive those persons of their Mauritian citizenship leaving the United Kingdom with responsibility for them. "*Fortunately, there are not many*", he ended, (5/371).
124. On 12<sup>th</sup> March 1968, Mauritius became independent and had a new constitution. Independence was granted by the Mauritius Independence Act 1968. Section 2 of that Act provided that, in general, any person who immediately before 12<sup>th</sup> March 1968 was a citizen of the UK and Colonies should from then on cease to be a citizen of UK and Colonies if he became on that day a citizen of Mauritius. By section 3, however, that did not apply to a citizen of the UK and Colonies if he or his father or his father's father had been born in a colony, which expression was defined in such a way as to include BIOT but not Mauritius. In effect, the Ilois retained their citizenship of the UK and Colonies and gained Mauritian citizenship.
125. Sections 2 and 3 of the Mauritius Independence Act were later to be repealed by the British Nationality Act 1981, section 52(8) and schedule 9.
126. From the point at which Moulinie & Co took over the management of the islands on the basis of the unsigned agreement, the question of labour recruitment reared its head. It appears that the Mauritius Government was insisting that some 75 persons of Ilois origin be re-employed in Chagos and should travel back on the "*Mauritius*" which was due to sail for the islands on 5<sup>th</sup> March 1968. The matter was raised between the BIOT Commissioner and the CO. The Commissioner said that it seemed probable that among the 75 were a number whose contracts were terminated as they were unsatisfactory labourers. It commented that, in any event, Moulinie had no need for the 75 additional labourers. The Commissioner questioned whether the pressure to re-employ these persons on Chagos came from Mauritius officials who were unaware of the

citizenship position set out in the Independence Act. Moreover, the labour recruitment from Mauritius was likely to reduce as shipping would be centred on voyages between the Seychelles and Chagos, (5/373). The Commissioner said to the CO, in a passage relied on by the Claimants as showing the role which the Commissioner and CO had in recruiting or managing labour on the islands:

"Unless you have any objections, I therefore wish to inform Moulinie that they should only recruit such labour as they need for efficient running of the Islands and that sources of recruitment and decision which individuals should be employed rests with them."

127. On the previous day, Moulinie had sent a telegram to Rogers & Co in Port Louis, \*(5/372)(ND), saying that the islands were fully manned and that he regretted that BIOT was not in favour of further labour intakes for the time being, until negotiations with the Ministry of Defence had concluded. It was contended by the Defendants that there were no negotiations with the MoD at that time, and that the message had not been sent on the Defendants' instructions, (10/49), but this does not entirely support the point. Other documents of the same time were relied on as showing the relationship between Moulinie & Co and the BIOT Administrator, (5/373)(P), limiting recruitment to what was necessary for the efficient running of the islands. Approval was sought for a detailed list of merchandise and goods required by the managers for the islands; ranging from specific quantities of various sorts of spices, to writing paper, onions, fish hooks and the like. Approval was sought because it was the Administrator who would be bearing the costs under the management agreement. Moulinie & Co also obtained the Administrator's approval for the employment of a manager on one of the BIOT islands. The Administrator approved the itinerary for the voyage of the "*Isle of Farquhar*" from Seychelles to the Chagos and revealed its intention to open postal services making the manager postal agent on a commission basis. A police presence was thought appropriate because of difficulties in Chagos "*with labourers demanding passages and a report of illegal tapping of toddy*". Again, the Administrator's approval was sought for the engagement or non-engagement of named persons from Mauritius as dressers and midwives, though it was left for decision by Moulinie & Co.

128. Mr Allen placed weight for the same theme of control by the Defendants on an internal memorandum of May 1968, (23/171-5). He suggested that volume 23 evidenced the potential for undisclosed documentation helpful to his case to exist, notwithstanding the volumes already produced. He said also that it showed the BIOT Government's use of recruitment policy to regulate the number of Ilois within Chagos. It refers to the Ilois population who had recently requested passage to Mauritius; "*How many will return depends on our recruitment policy*" and the communication with Mauritius maintained after the arrival of the "*Nordvaer*". The Ilois population would be left at its current level on Diego Garcia "*by adjusting our recruitment and posting of Ilois between the three atolls*". Various resettlement options were examined including resettlement of Diego Garcian Ilois on Agalega, which was seen as "*helping to prove our point that they have no right to permanent residence in BIOT*". They would also not have to be resettled if the whole of Chagos had to be cleared. This internal discussion document was followed up in 5/388 and 5/396; although it preceded the US requirement for Diego Garcia in July 1968, and in a sense can be seen as

contingency planning, at a time when there was no management agreement, it contemplates control of recruitment as an aid to resettlement planning.

129. On 10<sup>th</sup> May 1968 Paul Moulinie wrote to the BIOT Administrator dealing with the sailing of the "*Isle of Farquhar*" from Seychelles to Diego and back to collect a load of copra, saying "*since we consider that there are already enough labourers on the island, we are not engaging any more to send there this trip*". (10/49). Amongst the matters raised at the end of February in relation to the requirement for goods was that there was a rice shortage, that rice was unobtainable, that in consequence rations would be changed to ½ flour and ½ rice and flour should be sent as a replacement for the unobtainable rice. This exchange is relevant because of suggestions that there was a deliberate running down of provisions on the islands to encourage departure. Mr Marcel Moulinie disagreed with Mrs Talate's evidence of a severe ration shortage – he said there were enough basic rations, but an occasional shortage of cigarettes. This applied up to the evacuation.
130. Meanwhile, the shipping records show the arrival of the "*Mauritius*" in Port Louis on 30<sup>th</sup> March 1968, (5/377). The 142 steerage class passengers included a number of Claimants among whom were the 4 year old Olivier Bancoult and Rita Marie Elyse. They are listed as coming from Peros Banhos. The Bancoult family had gone to Mauritius to be with their daughter Noëlie who had suffered a serious accident and needed medical treatment which only Mauritius could provide. Sadly she died a few months later. Some of the passengers off this boat, as with those who arrived in 1967, were among those who later tried unsuccessfully to return to the islands in circumstances which were crucial to a number of issues in the case.
131. The issue of resettling the Ilois was a constant pre-occupation at various levels in the UK Government. In April 1968, a CO official circulated a memo, \*(5/382)(ND), to various Government departments including MoD and the Treasury concerning the costs so far of setting up BIOT and how the costs of the new Seychelles airport were to be met from the £10m budget set for the UK side of establishing the defence facilities on BIOT. £4.1m had been spent and the airport was estimated now to cost £5.7m. The uncertainty over whether and when that commitment to the Seychelles could be met needed to be resolved. To that end, the CO official proposed that the costs of resettling Ilois from Chagos should be met from CO funds for aid; thus the uncertainty as to how much they would amount to would no longer hold up the Seychelles airport. But the thinking behind the willingness of the CO to take on this financial responsibility was that there were very few permanent inhabitants who would require resettlement, and even those might well be accommodated upon other coconut islands in BIOT or Agalega. It was regarded as very questionable whether a defence facility would ever proceed and it would not be for some years anyway.
132. The reply from the Seychelles agreed that Ilois could be transferred as a resident labour force to other BIOT islands or to Agalega and that there was no need to pursue the suggestion once made by Robert Newton that they be resettled as smallholders; they would retain their "*present status as labourers resident on private property*". This reply was also sent to the MoD, (5/385).
133. The BIOT Commissioner followed this up on 3<sup>rd</sup> June, (5/388), with a detailed analysis of various resettlement schemes for those on Diego Garcia: resettlement on Peros Banhos and Salomon, or on Agalega or on one of the uninhabited islands of the Chagos archipelago such as Egmont or Three Brothers which had been used for coconut plantations in the past. Thought was also given to the possibility that the other Chagos islands might also have to be evacuated; Agalega was seen as the likely place for resettlement in that eventuality. Apart from that eventuality, however, the Commissioner thought that resettlement on one of the currently uninhabited Chagos islands was the best option.
134. The next day, he sent another despatch to the CO, \*(5/396)(D). It showed the total Ilois on the three inhabited islands of BIOT to number 434 in

March 1968. This figure was said to derive from an objective assessment of where individuals were born, which was contrasted with the earlier and higher assessments of November 1966 (563) and May 1967(487), which was based on how people classified themselves. There were 128 on Diego Garcia and 40 more on Peros Banhos. Of the 128 Ilois on Diego Garcia, there were 57 adults and 71 children. There were in addition on Diego Garcia 230 Seychellois, mostly adults and predominantly male, with a further 22 Mauritians. What then follows is important to the Claimants' case.

"4. The definition used for Ilois, (ie persons born in Chagos or Mauritius whose father, or in the case of illegitimate children whose mother was born in Chagos), means that all those shown under this heading are at least second generation Ilois, and that 354 of these are at least third generation Ilois. No attempt has been made to go further back, but the figures show 434 persons whose roots are firmly established in Chagos and who would not normally be thought of as temporary inhabitants. To this must be added an unknown number of people at present living in Mauritius who are also of Ilois origin.

5. If we are to maintain that there are no permanent inhabitants, it is therefore apparent that we shall have to find some other basis than birth to support our claim ... ."

135. He referred to the fact that a number of Ilois have taken holidays in Mauritius, or paid other visits there, but said:

"5. ... The length of their absence varies, but we cannot on this basis alone deny their more than temporary connection with the islands.

6. We must now turn to the question of the status of the Ilois on the islands, and it is here that we can find some justification for denying them the status of permanent inhabitants. As far as we are aware, the islands have been either leased or in private occupation ever since they were inhabited and the inhabitants have been on the island only because they were employed by the owners or lessees or were members of the family of persons so employed. None of the inhabitants owns any land on the islands and the houses in which they live are the property of the owners. Neither do they have the permanent right to use any land on the islands. The position therefore seems to be that the owners or lessees of the islands have a legal right to remove any person from any of the Chagos islands provided that in doing so they do not break the terms that persons' contract ... and equally that they have the right to refuse to allow any person to return to the islands. The fact that the islands are owned by the Crown and either leased or managed on behalf of the Crown does not change this position and we

may therefore contend that as no-one has any right to reside permanently on the islands, there can be no permanent inhabitants.

7. It seems to be accepted by the labourers that the owners have the right to transfer them to other islands and that, if their work or conduct is unsatisfactory, they may be dismissed and returned to Mauritius. Such cases do occur, although they are not numerous. On the other hand, we had in February the case of 70 Ilois in Mauritius, apparently claiming the right to return to work in Chagos and being supported in this by the Mauritius Immigration and Labour Authorities ... therefore, if we do have to remove Ilois from the islands, we shall have to expect some opposition from the people themselves and possibly from the Mauritius Government. When making resettlement plans, we can attempt to overcome the first problem by making the transfer advantageous to those moved (eg by providing better accommodation) and we shall have to attempt to forestall any objections by the Mauritius Government by securing their admission that the Ilois are Mauritians ... ."

136. On 19<sup>th</sup> June 1968, the Commissioner sent to the CO a draft Immigration Ordinance, \*(5/402)(P),: he said that as the Ilois were Mauritians with no right to permanent residence in Chagos, then all persons living in Chagos could be required to hold a pass allowing them to live there. He did recognise however that he was not an expert on the difficult question of domicile. The draft which he enclosed was not noticeably different from what had been previously discussed.

137. On 24<sup>th</sup> June 1968, in an internal CO minute, Mr Seller of the CO said to Mr Jerrom, (5/411):

"As you know, the prime objective of the BIOT exercise was that the Mauritian and Seychelles islands hived off into the new territory should be under the greatest possible degree of United Kingdom control."

138. He referred to the purchases of the freeholds in Chagos, using part of the £10,000,000 earmarked for the BIOT operation. He said that only Aldabra did not belong lock, stock and barrel to HMG. Defence Lands, on whose behalf the former owners were managing the plantations, had expressed themselves to be not entirely happy to have responsibility for the plantations to which they had no access and over which they could not exercise any real control. Defence Lands wanted responsibility for the management and administrative arrangements to be placed upon the Commissioner of BIOT. This memo also appears to initiate an intricate minuet between Defence Lands and the CO as to whether the title to the islands vested in the Commissioner should continue to be vested in him or the MoD on behalf of the Crown. Part of the problems about what to do with the islands is reflected in two letters from the BIOT Commissioner to the CO on 6<sup>th</sup> June 1968, (23/178 and 180). These reflect his belief that with capital investment

and a quick decision, the islands could be made to pay their way and be profitable within 3 to 4 years. This was at a time when the timescale of the American requirement was unknown but there was obviously a desire to make the most of the capital laid out on the purchase in the interim, as is clear from other documents. But it was to be affected by the unwillingness of the Americans to say that no other islands were to be required. It suggests that, absent US requirement, the islands could have been profitable but I do not accept Mr Allen's suggestion that it itself shows that Peros Banhos and Salomon alone could have been profitable and disproves the Defendant's contention that economic conditions caused the evacuation of Peros Banhos. But it points to the Chagos as a whole as having had the potential, on certain assumptions as to costs and investment, to be profitable over time.

139. On 2<sup>nd</sup> July 1968, Moulinie & Co wrote to the BIOT Administrator, referring to the temporary agreement under which it managed the islands, and sought confirmation that the agreement would be renewed under the same conditions as outlined in the November 1967 correspondence until the end of 1968, (5/412).
140. However, an important development occurred on 5<sup>th</sup> July 1968, when the US informed the FO that it had decided to go ahead with a facility on Diego Garcia described as an austere communications facility with runway, storage and anchorage. However, Congressional approval had yet to be obtained but it was hoped that that would be forthcoming within the next 12 months. This seemingly reduced uncertainties, but hastened the need to consider resettlement, but the timetable was to be stretched as time went by, (5/414).
141. The FO explained to the MoD the difficulties which would arise at the UN if BIOT were found to have a resident population, as the aim had been to find a territory without one, and pointed out that there were advantages in postponing the announcement of the project until 1969. It suggested that these difficulties should, however, not be spelt out to Ministers on the assumption that it was more important to facilitate the project at Diego Garcia than to provide a water-tight case at the UN. The minute of 18<sup>th</sup> July \*(5/421)(P), excused the FO's position by stating that when BIOT had been established *"we then had no precise idea of the degree of permanency of the inhabitants, although we knew that there were a few Ilois ie people born in the islands of parents who were also born in the islands"*. It was now aware of the March 1968 census showing that on Diego Garcia, 128 out of 380 were at least second generation inhabitants, and acknowledged that it would be very difficult to assert *"that normal objections to moving a population and the normal requirement to consult them do not apply"*.
142. A draft submission to the PM was prepared and comments requested. One of the comments from the FO related to the passage in the draft which said that there was no indigenous or permanent population. It commented that it would be advisable to establish, in advance if possible, what the *"shifting population"* of the islands consisted of and how they would be affected as this was seen as a key point for potential criticism, \*(5-420)(ND).
143. On 24<sup>th</sup> July, the CO commented, \*(5/428)(P), on the draft submission to the Prime Minister, dealing with the resettlement of the existing population and the employment of local labour. It acknowledged that resettlement would be complicated, but said that it did not need to be examined in detail at this stage. The Ilois were entitled to Mauritian citizenship, but the Mauritian Government's reaction was not yet clear over the recognition of that citizenship. It was recognised that the position in the United Nations could be difficult, but in the light of the fact that the islands were occupied *"largely by migrant workers, and that it could be said that there was no indigenous population"*, it would be possible, if necessary, to deny the competence of the United Nations to concern itself with that territory. However, the object had to be:

"(a) to demonstrate that we are dealing fairly and humanely with them, and (b) to do this in a way which does not



weaken our case for saying, if necessary, that the United Nations has no competence to concern itself with this territory. Clearly the Ilois present the main difficulty here."

144. The Foreign Secretary sent a minute to the Prime Minister dated 25<sup>th</sup> July 1968 seeking approval for the UK response to the US decision to proceed with the defence facility on Diego Garcia, \*(5/434)(P). Approval appears to have been given. The Defendants rely strongly on this. It was accompanied by an annex on the position of the inhabitants. The minute deals with the origin of the proposal, acknowledging that it was one of the reasons for the inclusion of the island in BIOT. Political concerns over the position of the Indian Government were touched on and then the position of the inhabitants was dealt with in these terms:

"It must be expected that the argument will be put forward in the General Assembly that the interests of the local population are being ignored, and this may receive appreciable support; but we have been able to resist such arguments by pointing out that the inhabitants consist mostly of migrant workers from Mauritius and Seychelles. We have not yet completed arrangements for resettlement of the inhabitants of Diego Garcia or for showing that they remain Mauritian or Seychellois, nor have we consulted the Mauritius Government. Resettlement will involve some small expenses, but it is not expected that there will be any financial difficulty in this. When the arrangements are complete, and they may be complicated by a recently completed survey which found that 128 individuals (about 34% of the total population of 389) are now second generation inhabitants of Diego Garcia, we would propose, as agreed at the time of the creation of the British Indian Ocean Territory, to deny, if necessary, the competence of the United Nations to concern itself with a territory which has no indigenous population." [An official has written beside that last sentence that it was difficult to square the beginning of it with its end.]

145. The annex on the position of the inhabitants said that there were at present 380 people living on Diego Garcia, of which 22 were Mauritians, 230 Seychellois and the remaining 128 were described as Ilois, who had some connection by descent with the Chagos Archipelago, "*eg some of them are now second-generation inhabitants of the Archipelago*". The annex said that it had been understood when BIOT was set up that the people living on islands required for defence purposes would probably have to be moved and that the majority in the UN might well protest against the movement of people from the islands. It had been agreed, however, that in the light of the fact "*that the islands were occupied largely by migrant workers, and that it could be said that there was no indigenous population*" it would be possible, if necessary, to deny the competence of the United Nations to concern itself with such a territory. The note repeated what had been said elsewhere, (5/449):

"It can be said that the Mauritians and Seychellois are temporary residents on Diego Garcia. From the point of view

of descent, most of the Ilois will be able to establish more than a temporary connexion with the Chagos Archipelago and some of them with Diego Garcia itself. But, as far as we are aware, the islands have been either leased or in private occupation ever since they were inhabited, and the inhabitants have been there only because they were employed by the owners or lessees or were dependants of persons so employed. None of them owns any land and the houses in which they live are the property of the owners. The position seems to be that the owners or lessees of the islands have legal right to remove any person from any of the islands (provided they do not break the terms of that person's contract of employment) and equally that they have the right to refuse to allow any person to return to the islands. In this sense, it can be contended that as no-one has any right to reside permanently on the islands, there can be no permanent inhabitants; and it seems to be accepted by the labourers that the owners of the islands (now the Crown) have the right to transfer them to other islands".

146. The Commonwealth Secretary also sent a minute to the Prime Minister in which he expressed his special concern about the resettlement of the 380 people living on Diego Garcia, none of whom could be classed as permanent inhabitants. He said that further information was required as to whether other islands would be required and whether the Americans would wish to keep some of the present inhabitants on the island of Diego Garcia, \*(5/451)(P,R).
147. As from around this time, resettlement plans began to be looked at in more detail, but there remained uncertainty over the timing of the US requirement on Diego Garcia, the extent of the displacement of its inhabitants which that would require and over the question of whether the US would require, for defence purposes, any other islands in the Chagos upon which otherwise the inhabitants of Diego Garcia might settle.
148. On 16<sup>th</sup> July 1968, the BIOT Administrator, Mr Todd, sent a letter to Mr Seller at the CO requesting advance details of the resettlement proposals and in particular details of whether plantations on islands other than Diego Garcia were to be maintained. He said that it would be a great help if Moulinie & Co could be taken into their confidence because of the resettlement plans which needed to be made, (5/418).
149. The BIOT Commissioner followed this up in a despatch to the CO on 1<sup>st</sup> August 1968 in which he raised the question of whether it would be possible to continue running some of the cultivated areas on Diego Garcia even with the US facility. He saw there as being a difficulty in relation to security and a difficulty in relation to the existence of a permanent population. This he saw as capable of being met by removing the Ilois and resettling them elsewhere and running the plantation with contract labour. Although he saw the advantages of being able to use Mauritian and Seychelles labour on construction projects associated with the facility, he said: (4/454)

"If the Ilois are to be resettled, I consider we should remove them as family units and not leave the men behind to work on the defence project."

150. He referred to the fact that on Diego Garcia male Seychellois outnumbered other labourers by three to one. He also assumed that the other islands would continue to be operated as coconut plantations.
151. A CO minute of 31<sup>st</sup> July 1968 raised, in the context of the uncertainty over the US requirement, the interests of the inhabitants of Diego Garcia and all the other BIOT islands, saying that those interests had to take first place in any "exercise" which might be undertaken by way of resettlement, \*(5/453)(R). (This links in with the correspondence about moving as family units and Seychellois outnumbering others 3-1.) A number of measures were proposed to deal with methods of resettlement and resolving these uncertainties. One matter in respect of which agreement was said to be necessary, at least between the CO and the FO, was "*on the form of words to be used in future regarding the limited status of the people in the islands from the point of view of permanency of tenure (ie we try the line of argument put forward by the Commissioner on the lawyers) and work out with them a formulation which can be used when necessary*", \*(5/458)(P). But it also sought agreement from the US that BIOT could use the other islands of the Chagos for the resettlement of the inhabitants of Diego Garcia and that was a feature of subsequent official discussions in August.
152. Officials met on 12<sup>th</sup> August 1968, (5/463)(P). It was generally agreed to be best that Diego Garcia be cleared of its population, from all points of view including presentation at the UN. Those concerned with the UN pointed out the need to maintain the stance that the population was "*merely a bunch of migrant labourers*" and that it was necessary to show that all those living on Diego Garcia were nationals of either Mauritius or the Seychelles and had no rights other than those of dismissed employees. This, in practical terms, made it desirable that there be a suitable nationality and immigration law and there be no treatment of the Ilois suggesting that their resettlement outside Diego Garcia was "*in some way contrary to their natural rights*". The wrong impression might be given if they were resettled within Chagos, particularly if this were done with compensation, ie that UK had "*some moral obligation to maintain the Ilois in this area because it was their natural home*", \*(5/463)(P). The representatives of the Foreign Office department concerned with the islands pointed out the difficulties which might arise if the islanders were settled outside the Chagos Archipelago and were offered opportunities for resettlement on a Mauritius dependency or in the Seychelles. The Americans had to give clear reasons if they wanted to clear any other islands of their inhabitants or prevent settlement on uninhabited islands. There was no definitive answer as to the US position and it was possible that they would not insist on the evacuation of the whole Archipelago. The minute records that the meeting came to no very firm conclusions, but that from all points of view it would be best to clear Diego Garcia of all plantation activity. The proposals for resettlement put forward by the Governor presented problems, some of which might be resolved if the US position were made clearer.
153. A minute by the CO, (5/466), to its legal adviser dealing with Ilois tenure and citizenship raised doubts about whether the Commissioner's view that the Ilois could be treated as Mauritians in the way in which he had described was right, and legal advice was sought. But Mr Jerrom expressed his own view that the peculiar system of property tenure did not justify the actions suggested by the Commissioner and confirmed that it would have to be accepted that the Ilois staying in BIOT would continue to possess dual nationality of Mauritius and of the UK and Colonies. These were, however, seen as only a small number and Article 73 could not apply either to the Mauritians or Seychellois migrant workers or just to a small section of population with dual citizenship. The legal adviser's response, \*(5/478)(P), on 26<sup>th</sup> August was to the effect that it would not be right to compel inhabitants of BIOT, who were citizens of the United Kingdom and

Colonies, to leave BIOT without giving them the option of settling either in some other UK dependency or in the UK itself or of going to some other country to the citizenship of which they were entitled or the Government of which was willing to admit them. It said that it should be possible to persuade them that it was in their best interests to leave voluntarily rather than to be deported. Although there was a need to take account of UN obligations, there was no objection in principle to immigration controls, including a system of revocable passes for all inhabitants. He took the view that it should be possible to meet the criticisms which might arise in the UN based on Article 73, on the grounds that BIOT had no indigenous population and that the interests of the inhabitants required their resettlement elsewhere. He concluded, however, that Clause 11 of the draft Immigration Ordinance was objectionable.

154. The aim, as expressed by one official, (5/482), was to establish "*a situation where there were no individuals with claims on BIOT or without claims on either Mauritius or Seychelles*" but that was still a matter for discussion within Whitehall.
155. In August 1968, UK Ministers approved the US proposal for the development of the defence facility on Diego Garcia and recognised the need for consequent negotiations with them about a range of issues. The CO said to the BIOT Commissioner that the UK had to give the Ilois "*special consideration (both on presentational and humanitarian grounds) but without broadcasting this aspect of our policy or acting in a way calculated to build up their existence as a separate community. It seems to us that it would be helpful from this point of view if some measure of choice for separate families could be included in resettlement planning*", \*(5/477)(P,R). This choice could consist of other Chagos islands or Agalega or even possibly the Seychelles for a few.
156. On 2<sup>nd</sup> September 1968, however, the BIOT Commissioner had written to the CO saying that if Diego Garcia had to be resettled, there were only 30 Ilois families, but if all the Chagos Ilois had to be resettled, there would be some 90 families and it was doubtful whether Agalega could accept all of those people. If only Diego Garcia were to be resettled, it was agreed by the Commissioner that a choice of elsewhere in the Chagos or Agalega should be offered as far as possible, (5/483).
157. An internal minute from the UN Political Department of the FO expressed surprise that the PIOD of the FO was said now to be coming to the view that the UK might have to resign itself to having a permanent population in BIOT. "*Since BIOT was created at great expense and some international criticism to avoid having a permanent population, I think Ministers would wish to be aware of the situation.*" This was said to be rather a different position from that presented by the Foreign Secretary to the Prime Minister on 25<sup>th</sup> July, (5/486).
158. The issue raised by Mr Donohoe in the minute of 3<sup>rd</sup> September was echoed in a further minute from Mr Lambert to Mr Jerrom on 4<sup>th</sup> September 1968 \*(5/492)(P), within the CO. It started by referring to the legal advisers minutes which suggested that "*rather more radical difficulties stand in the way of our originally agreed objective than those of which we advised the Foreign Secretary when he minuted to the Prime Minister on ... 25<sup>th</sup> July*". He referred to the inter-departmentally agreed objective of establishing "*a situation where there were no individuals with claims on BIOT or without claims on either Mauritius or Seychelles*". The purpose of this was to "*avoid acknowledging charter obligations towards these people*". Hence the public argument that the inhabitants are "*migratory labourers*". The note continued, in paragraph 3:

"We advised the Foreign Secretary that the latter argument might be difficult to sustain in view of the recent discovery that the numbers of second-generation 'Ilois' were much greater than originally anticipated. However, it then seemed to us possible, by the legislation proposed by the

Commissioner ... to require the inhabitants to have documents showing either that they were citizens of Mauritius or could be identified as coming from the Seychelles."

159. The fact that 500 from the Chagos, including the Ilois, had Mauritian citizenship and that the Governor of Seychelles had said that his Government would issue certificates of nationality in respect of the remaining 300 in Chagos underlay what had been written by the Foreign Secretary to the Prime Minister on 25<sup>th</sup> July. But he then pointed out:

"We did not then know that by virtue of Section 3(1), (2) and (3) of the Mauritius Independence Act, those inhabitants of BIOT which had acquired Mauritian citizenship when Mauritius became independent did not cease to be citizens of the UK and Colonies ... ."

160. As Mr Aust, a legal adviser at the FCO, noted on the minute, that only applied to certain BIOT inhabitants. This is described as a "*revelation*" by the author, who then set out the situation as he understands it:

"All the inhabitants of BIOT are citizens of the UK and Colonies and they are all entitled to a UK passport with the Colonial endorsement;

... In the case of Seychellois living in BIOT, no doubt the Governor of Seychelles could ensue that the colonial endorsement would record the fact that they belonged to Seychelles ...; these form the majority of persons living in BIOT, but are unlikely to exceed 1,000 [of the estimated population of under 1,500];

Some 500 others (including the 434 second-generation '*Ilois*') have dual nationality. If they applied for a UK passport, presumably the Colonial endorsement could only reveal that they belong to BIOT since there was no other British Colony to which they could belong. This would create difficulties for our public assertion that BIOT had no permanent population. On the other hand, if they applied for and got a Mauritian passport they would not automatically lose their UK citizenship, unless they formally renounced it. If they went to live in Mauritius, however, they could presumably be refused re-entry into BIOT. This latter point is worth bearing in mind.

If my analysis is correct, it clearly contains the seeds of a serious problem; viz. the original purpose of creating a territory without a permanent population is unlikely to be fulfilled unless something radical is done about it."

161. Mr Aust appears to have made some comments dissenting from parts of this analysis in handwriting. The author's suggested alternatives were leaving the inhabitants within BIOT, which would give rise to the problems of the Charter obligations which BIOT had been created to avoid, or the piecemeal removal of the inhabitants of BIOT as individual islands were required for military use, which, in the case of Diego Garcia, would be 380 people but up to 1,000 others could

remain in BIOT; or the complete removal of the inhabitants elsewhere which would require a far bigger resettlement scheme, but would solve the problem *"which the creation of BIOT was intended to solve, once and for all"*. It was recognised that this would face rather more criticism but that was inevitable anyway, and, from the point of view of justifying matters in the UN, he would prefer the latter course to be adopted. But he said that Ministers should be given the opportunity of choosing the alternatives and said *"Had Ministers known that there was a serious prospect of retaining a permanent population in BIOT, I doubt very much whether they would have approved the expenditure of several million pounds to create the territory"*.

162. On 3<sup>rd</sup> September 1968, the FO informed the US of its approval to the US proposal. The letter conveying this, \*(5/487-8)(P), reiterated that there were no permanent inhabitants on Diego Garcia and none owned land or houses, but that an early decision was necessary on which other islands, if any, would be required for the purposes of resettling any displaced people, an issue which could give rise to difficulties at the UN. An announcement was best left till after the end of the session of the UN General Assembly. But the problems facing the UK Government in making plans for resettlement or for the continued operation of the plantations were compounded by a letter from the US dated 19<sup>th</sup> October 1968 in which it was advised that the project was undergoing a review by the US military and a decision on budgetary implications could not be taken until the new administration had approved them in the new year and detailed discussions would have to wait until then; for public consumption the consideration of defence facilities was under review as it had been since 1966. Nonetheless the UK Government continued to press for answers to the questions which it had raised because of the resettlement problems which it anticipated.

163. The BIOT Administrator made a further visit to the Chagos islands in the first two weeks of September 1968. He went with Mr Marcel Moulinie, who was representing Moulinie & Co (Seychelles) Limited. He reported, (4/293), that the plantations on Diego Garcia were generally in poor condition and that much clearing remained to be done. *"The number of labourers on the island has decreased, as many of the Ilois have returned to Mauritius and it has not proved possible to replace them from Seychelles. This is the main reason for the drop in production for the first seven months ..."* There were pigs and cattle on the island and the labourers were noted as keeping hens and ducks. On Peros Banhos there had been a reduction in production, despite an increase in the number of labourers, although on Salomon the labour-force had remained the same. The Administrator's general comment was that the plantations were all producing less than could be produced, due to the uncertainty as to their future. If production were to be improved, a short-term increase in labour-force was necessary, but that depended upon the availability of labour and housing. Seychelles labour was not at present available in large numbers because of the airport project; Mauritius labour was available but it was more economic to reduce communications between the islands and Mauritius because the *"Nordvaer"* plied between the Seychelles and Chagos, but it should be possible, he thought, to increase the labour force to fill the housing. The general standard of that housing was low and unoccupied houses rapidly fell into disrepair. For the longer term, considerably more investment would be required in a number of ways, which would be unlikely with the prospect of the islands having to be abandoned at short notice.

164. The Administrator described the general standard of quarters on Chagos as poor, except for the new type of quarters on Diego Garcia. In general, the standard was lower than that on the average Seychelles outlying island. The camps were generally clean, but ration supplies suffered from periodic shortages because they were now being ordered on a three-monthly rather than a six-monthly basis by the management company so as to reduce the capital outlay on those items and to reduce the period over which they had to obtain a return. He commented that the physical conditions of the labourers were acceptable but

there was no provision for their social welfare. Medical provisions were good and the schools were run rather in the way they had been before, but attendance was irregular. The civil status records were in good order, but he referred to the high degree of mobility between families, reflected in the percentage of illegitimate births which would add to the problems of resettlement should that become necessary. He concluded overall that the islands were suffering from uncertainty as to their future, and that whilst this uncertainty lasted there was little that could be done to increase production except in the case of Diego Garcia where the present labour-force could be more economically used. In general, the condition of the islands was as good as could be expected with the present limitation on exploitation. There does not appear to have been a separate population count done for this visit but it lists a total of 232 people in employment on Diego Garcia, of which 175 were male and 57 female. 181 of the 232 were labourers, and 20 more are listed as "Boys". The remainder include managers, clerical staff, the teacher and 13 artisans and 6 overseers. There were 99 employed on Peros Banhos and 91 employed on Salomon.

165. The Administrator and the Commissioner of BIOT paid a visit to the islands in November 1968, again accompanied by Mr Marcel Moulinie. The notes of the visit maintain the position that the labour-force on Diego Garcia was too small to run the islands efficiently *"or even to maintain the present position"*. The ration supplies and shops on the islands were adequate, with the exception of that on Diego Garcia. The general conclusion was again that the Chagos islands functioned as coconut plantations *"but with a gradually declining population and an almost complete lack of capital investment, they are reaching the point where they are becoming uneconomic and the condition of the plantations and buildings is steadily deteriorating"*.(4/308).

166. It was after Mr Todd's return from his September visit to the Chagos that the BIOT Commissioner contemplated recommending an increase in the recruitment of Seychellois for Peros Banhos and Salomon, but proposed to delay that if Diego Garcia were to be evacuated because the Ilois could be recruited instead. But in the absence of an increase in the labour-force, there would be decreased production and economic loss so a decision soon was to be desired. A decision was sought before the beginning of November when Moulinie was expected to begin recruitment of additional Seychellois for Peros Banhos and Salomon. The PIOD suggested to Mr Jerrom that until the position of the Americans as to the clearance of the whole of the Chagos was known, the BIOT Commissioner could be advised *"to instruct Moulinie to cease recruitment of further labour"*. He suggested as a possible solution to the resettlement problem that action should be taken quickly before the American proposal became public when it was submitted to Congress, and that to *"preserve the image that these people [on Diego Garcia] are being offered alternative employment on other islands, or their contracts terminated resulting from the decision by management to terminate the lease, we have until say the end of 1969 to complete the operation. I would imagine this could be done gradually with not more than slight opposition by perhaps some of the plantation workers"*, \*(5/503) (R).

167. In another memo of 20<sup>th</sup> September 1968, the same official raised the question of whether, with the new management company on Chagos, Diego Garcia should not be allowed to run down leaving the management to gradually dispense with labour as contracts expired, whilst simultaneously offering jobs as they arose in the other Chagos islands and in Agalega. It was thought that if the management company could be taken into their confidence over the resettlement problem, they could divert the Ilois to Agalega and the Seychellois to other Chagos islands and thus dispose of the Diego Garcia problem. But it was said that: (5/505)

"As time appears to be all important if a smooth and economical exercise is to be carried out with the minimum

of publicity, it is for consideration whether a plan of this nature might resolve the situation well before the Diego Garcia project is presented to Congress and becomes public knowledge.

In summary, the recognition by the management that copra production in Chagos is not a sufficiently economic proposition for them to wish to continue with the lease, leaves the way open for us to abandon the plantation on this score, leaving the commercial management to gradually run down the plantation under guidance from the Commissioner."

Advantages were seen in removing as many Ilois as possible from Deigo Garcia before the US announcement.

168. The issue of citizenship continued to vex the CO's legal advisors and, in a note Mr Aust said, on 9<sup>th</sup> October 1968, \*(5/518)(P,R) that the only place to which UK citizens living in BIOT could "*belong*" if they did not belong to another colony would be the UK itself. He said that he imagined that this was not wanted but then continued that he could not see how "*we could therefore refuse such a person the right to re-enter BIOT even if he were also a Mauritian citizen*". Entry to BIOT could not be refused unless, someone added, they were given rights to enter some other colony eg Seychelles, to which the legal adviser, Mr Rushford, added "*no*". I doubt that this simply declines an invitation to a meeting.
169. The problems created in running the plantations by the uncertainty over their future was reflected in the accounts for the year ending 31<sup>st</sup> December 1967 submitted by Chagos Agalega Company Limited and which the BIOT Commissioner transmitted to the CO. It was noted that although it would be preferable to run the islands on a lease, because any such lease would require a provision enabling it to be terminated on six-months notice, such a basis would make it impossible to develop the islands because the necessary capital investment would not be forthcoming. Indeed, so long as the islands were run on a care and maintenance basis, the profit made in 1967 was expected to decrease year by year. He pointed out that there was no choice but to accept the management agreement proposed as long ago as December 1967, unless the politically unacceptable choice were made of not running the islands at all, (5/522).
170. The uncertainty created by the American proposal again featured in the BIOT Commissioner's dealings with the CO in October 1968. He pointed out that although the labour-force in the other islands had increased between May 1967 and March 1968 it had fallen in respect of Diego Garcia. The reduction in labour-force on Diego Garcia, said the BIOT Commissioner, "*undoubtedly results from uncertainty of the position*". The regular change-overs in the labour intakes could only be at a reduced rate dictated by the present position, \*(5/536)(R). "*You will understand even Ilois return regularly to Mauritius*." He thought that references to negotiations with the Ministry of Defence might relate to discussions over the management agreement.
171. Apart from the problems created by the uncertainty over the future of the other islands, and the timing of the US requirement on Diego Garcia, which in turn was counter-balanced by the desire of the UK Government to see some form of commercial exploitation of the coconut plantations for as long as possible, the physical arrangements for the accommodation of any Ilois displaced from Diego Garcia on the other islands was identified. Because there was insufficient housing for an increased labour-force on Peros Banhos or Salomon, either there would have to be a return of Seychellois to Seychelles or Diego Garcia, or an increase in housing. To move the Seychellois would cause adverse comment if they went to the Seychelles, or if to Diego Garcia, that would make it "*impossible to disguise*



*the move of the Ilois from Diego Garcia as a commercial operation*", \*(5/537), Seychelles Governor to CO, 12<sup>th</sup> October 1968. In any event, the Ilois needed some incentive to move and that could not be provided if they had to move to inferior quality houses on the other islands. Hence, there had to be suitable pre-fabricated buildings brought in from South Africa and to proceed on that basis would take six months.

172. Discussion over BIOT immigration continued within the FCO. Mr Aust set out a note on 23<sup>rd</sup> October 1968, (5/555) \*(P), explaining the position in some detail as he saw it. He urged that there be a definite policy with regard to the future of the inhabitants decided upon by the various departments before any decision could be taken in relation to passports or immigration. He added:

"Whilst the details of that policy are not my concern, I should make the point that the legal position of the inhabitants would be greatly simplified from our point of view (though not necessarily from theirs) if we decide to treat them as a floating population without real ties to BIOT".

173. Mr Aust next dealt with the term "*Belonger*". He said this was seldom used in legislation and was a much misunderstood concept. The term was found in non-statutory administrative rules where a decision had to be made as to whether a person had a sufficient connection with a particular territory to justify that territory issuing him with a passport. It had a more general use in a loose analytical way to describe a person with certain tangible connections with a particular country. I consider this analysis to be obvious and correct. But a person could be a "*Belonger*" for passport, but not for immigration, purposes. He added:

"With the present problem, we should be careful not to be misled into thinking that, because some of the inhabitants of BIOT were born there or have lived there for some years, they have thus acquired a 'Belonger' status which gives them a legal or moral right to remain there. By treating them so, we shall be tying our own hands when at present there is no reason why we should do so."

174. He then turned to immigration. He identified the problem that arose from the application of Seychelles immigration law to part of BIOT and of Mauritian law to the rest of it. He then said:

"6. There is nothing wrong in law or in principle to enacting an immigration law which enables the Commissioner to deport inhabitants of BIOT. Even in international law, there is no established rule that a citizen has a right to enter or remain in his country of origin/birth/nationality etc. A provision to this effect is contained in Protocol No 4 to the European Convention on Human Rights, but that Protocol has not been ratified by us and thus we do not regard the UK as bound by such a rule. In this respect, we are able to make the rules up as we go along and treat the inhabitants of BIOT as not 'belonging' to it in any sense. If, however, the inhabitants of BIOT become an established community in the future, then to take powers to deport them would have obvious political and moral objections. We may even ratify Protocol No 4."

175. Mr Aust then turned to passports, and said that subject to the odd exception, all the inhabitants of BIOT were citizens of the UK and Colonies and that many were also citizens of Mauritius whether or not they held Mauritian passports. He said that if a UK citizen asked for a passport, he would almost certainly be granted one, although that was a matter of prerogative and not entitlement. He then finished by saying that citizenship was only relevant to the question of whether a person was eligible for a passport. Both Claimants and Defendants relied on various passages in that note for their cases.
176. It was apparent from other internal memos that there had been as yet no policy agreed on the removal of citizenship of the UK and Colonies from someone born in a colony.
177. Discussion over the proposed BIOT Immigration Ordinance continued with a telegram from the FCO to the Commissioner and Administrator of BIOT on 25<sup>th</sup> October 1968 \*(5/564 and 568)(ND). The FCO said that the difficulty in dealing with this subject *"has arisen from the fact that it was not appreciated at the time that the grant of Mauritius citizenship to many of the Ilois would not affect their rights as citizens of the UK and Colonies"*. He then said that it was recognised that persons born in BIOT with automatic Mauritian citizenship would not be deprived of their UK and Colonies citizenship and could be granted UK passports, though without an unrestricted right of entry into the UK. It would not have been justified to take away citizenship of the UK and Colonies from a person born in the colony even if he had acquired another citizenship, but the point was not considered very far at the time. Retention of that citizenship put in question any action to prevent their return to Chagos particularly if they could not be settled elsewhere. The FCO then referred to the legal advice which had been given that it was not right to compel BIOT inhabitants who were CUKC to leave without options and that draft section 11 was objectionable. The FCO continued that as it was now clear that not all inhabitants of BIOT were either solely Mauritian nationals or citizens of the UK and Colonies entitled to a Seychelles passport, it was necessary to consider how to deal with any citizens of the UK and Colonies *"who may, by prolonged residence in BIOT, be able to claim 'Belonger' status in BIOT"*. If a UK passport were issued by the Commissioner of BIOT to those persons *"it seems to be inevitable that this would be regarded or interpreted as establishing 'Belonger' rights in the immigration sense, and we should rapidly reach a position where it was not possible to maintain that there were no persons with claims to permanent residence in BIOT"*. The only other course would be for citizens of the UK and Colonies who derived that status from being born in BIOT to be allowed unrestricted entry to the Seychelles and to be eligible for UK passports issued by that colonial government.
178. On 19<sup>th</sup> July 1968, the Mauritius Government, through its Ministry of Social Security, raised with the British High Commissioner in Mauritius the problem of people who had been working in BIOT who, in May 1967, had come to Mauritius to spend their leave and when they wanted to go back had found out in March 1968, from Messrs Rogers & Co *"who had taken up the matter with their Principals in that territory that they would not be recruited for further employment. A further batch of persons arrived in Mauritius from that territory on 30<sup>th</sup> March 1968."* (5/425). The Ministry pointed out that it had decided to give these people assistance on a temporary basis as they were destitute, that there were 120 persons, exclusive of children, who received assistance and that it had been decided that no further assistance should be given and the question of compensation should be raised with the British. In support of that, reference was made to the agreement between the British and Mauritius Governments in 1965 under which the British Government had undertaken to meet the full cost of the resettlement of Mauritians at present living in Chagos. The CO considered this

matter and in a minute of 10<sup>th</sup> September 1968, \*(5/496)(ND), said that this problem did not appear to arise from the question of possible future removal of workers and:

"... it appears, from the facts available, to be a matter between employer and employee in which BIOT would not be directly involved, and ... the persons ... would ... appear to have no right to further employment in BIOT. It would seem advisable not to go beyond this on the evidence available, but there could possibly be some further complication if it was proved that some of the party concerned could be described as Ilois and have some connexion by descent with Chagos Archipelago. Without arising suspicion, could the HC discreetly obtain further information on the party concerned – are they Mauritians or could they claim a connexion by descent?"

179. This was the line taken in the CO's advice to the High Commissioner in Mauritius; the problem was one between employer and employee and could not stem from any defence proposals, \*(5/498)(ND).
180. However, the matter did not end there because on 17<sup>th</sup> September 1968, (5/499), the Prime Minister's Office in Mauritius wrote to the British High Commission stating that there were 55 persons born in BIOT now in Mauritius who had asked to be repatriated with their families *"to their native island, where most have them have left their personal belongings"*. A list of names was attached. It said that the people had been employed by Chagos Agalega Company Limited but that, on expiry of their contract signed in Mauritius before a Magistrate, they had been returned to Mauritius on 19<sup>th</sup> May 1967 by the employers through Messrs Rogers & Co. (Some of those involved are among the Claimants.) The Prime Minister's Office said that it was understood that their contract had not been renewed *"because the BIOT was not in favour of further labour intakes and that the Chagos-Agalega Limited have started negotiations with the British Ministry of Defence on this question"*. (This appears to be a reference to the telegram from Moulinie to Rogers.) In addition, it was said that there were 84 adults and 56 children from the Chagos who had arrived in Mauritius on 30<sup>th</sup> March 1968 and were also *"stranded here"*. Relief provision had now been stopped. The Mauritius Government wanted proposals from the British Government for their resettlement.
181. The High Commissioner followed up this matter by asking his official to call on the Chairman of Rogers & Co to see if he *"could throw any additional light on the problem of 'displaced persons' from Diego Garcia and the Chagos and Salomon groups of islands"*. The official reported to the High Commissioner that Rogers & Co claimed to know nothing about the actual recruitment of workers, merely providing passages for them on instruction from the Chagos Agalega Company Limited. He said that he could well understand that with the cessation of operations by that company, the majority of workers had little option but to leave the islands. The High Commissioner did not accept that because the departures preceded the development on Diego Garcia that they stemmed primarily from an employer/employee dispute, and indeed thought that subsequent information suggested the contrary, (5/513-4).
182. However, in reply on 9<sup>th</sup> October 1968, the CO said to the High Commissioner in Mauritius and to the BIOT Commissioner that there had been no formal written agreement between the two Governments on the cost of resettling

Mauritians formerly living on the Chagos Archipelago but there had been a verbal acceptance in principle of payment to the Mauritius Government of the cost of resettling others in the Chagos islands who were affected. It emphasised that the phrase "*others affected*" referred to persons "*necessarily removed from one or other of the islands because of the development of defence facilities thereon. Obviously there are not yet 'any persons affected' in this context. It is difficult to see how HMG can be held in any way responsible for action taken by Rogers & Co in 1967 in deciding against re-employment of these Mauritians*". This was suggested to be the basis of a reply to the Mauritius Government, \*(5/515; 19/52(a))(ND). The removal of all Ilois from Diego Garcia to Peros Banhos and Salomon in November was suggested by the CO.

183. The BIOT Administrator, writing to the CO on 17<sup>th</sup> October 1968 and dealing in particular with the Ilois in respect of whom the Mauritius Government had been making representations, said that the employment of additional labour on the Chagos and the consequent acceptance of responsibility for their resettlement was an expensive commitment which could not be justified economically unless it were decided to develop the islands. He expressed sympathy with those displaced Ilois who had been, by their own standards, among the most fortunate of labourers in that they had had almost guaranteed employment. But now, for defence reasons, the guarantee had gone and they now found themselves in Mauritius, a country with an acute unemployment problem and as Mauritius had virtually no copra industry, with no opportunity to use the skills they possessed. He recognised that the relief provided for them by the Mauritius Government had been cut off. He recognised the advantages, however, of re-employing the Ilois before any announcement was made of the Diego Garcia project as a matter of a moral obligation but that doing so would place the Government in an economically very disadvantageous position as against the political advantage. He referred to Moulinie & Co's desire to recruit 100 extra labourers and expressed the view that the families thus recruited from the displaced Ilois on Mauritius could be resettled on Peros Banhos and Salomon because of its needs for labour should Diego Garcia have to be evacuated. The risk of a loss would only arise if the whole of the Chagos had to be evacuated. Hence the advantage of obtaining agreement from the Americans and then securing the agreement to the development of Peros Banhos and Salomon. The development of such an idea would require Moulinie & Co to be taken into their confidence as well as a certain future for Peros Banhos and Salomon, (5/541).

184. By this stage, it had become apparent as what, on 17<sup>th</sup> October 1968, had become the FCO, minuted to the BIOT Commissioner that it was not worth waiting for an American response any more. The FCO told the High Commissioner in Mauritius that the decision to curtail further labour intakes did not stem from the BIOT authorities, (5/550). But it did agree, \*(5/551)(P), that it would be very ill-advised to have any Mauritians back on Diego Garcia or any BIOT island. In connection with the Ilois on Mauritius, the FCO suggested to the BIOT Commissioner and High Commissioner of Mauritius, (5/553), that the obvious course was to avoid any reinforcement of labour-force in the islands until American plans were clearer, but that a strictly limited recruitment of labour in Mauritius could take place if a refusal to recruit any labour would lead to a serious political outcry there. It was obviously desirable not to increase the possible future resettlement problem.

185. The prospect of recruiting some of those who were the subject matter of these exchanges was raised in October 1968 as Moulinie & Co were looking for further recruitment. An FCO paper of 24<sup>th</sup> October 1968, \*(5/558)(P), said that any question of resettlement in Mauritius of former residents of Chagos could presumably only arise when plans for the development of Chagos were announced; this had not yet occurred. However, the present position appeared to be that Moulinie & Co wished to recruit more Ilois from Mauritius in order to increase its labour-force on Diego Garcia. This appeared to suggest that their

cutbacks, if any, in their labour-force had not been because of the suggestions for defence facilities on Diego Garcia. The note continued:

"Nevertheless, from our point of view this might raise longer term problems if any future labour intakes have eventually to be resettled elsewhere. The possibility is at present being explored confining any labour intakes to a limited number of persons only."

186. The note also said that the BIOT Commissioner had been consulted by the FO who had told them *"that the decision to curtail labour intakes did not stem from the BIOT authorities as the Mauritians later suggested. Moreover, no negotiations had taken place, as the Mauritians also suggested, between the Chagos-Agalega Company and the Ministry of Defence."*

187. The BIOT Commissioner said to the FCO in a telegram of 28<sup>th</sup> October 1968 dealing with various aspects of the resettlement of the Ilois that, so far as those currently in Mauritius were concerned, that even though many would be acceptable to Moulinie, any selective recruitment would give rise to intensified pressure for the remainder to be taken back and that a one-year contract could lead to greater future embarrassment. Refusals of extensions to contracts *"and possible subsequent forcible removal to Mauritius would presumably cause acute embarrassment and I consider that if we accept any returning Ilois, we must also accept responsibility for their ultimate resettlement,"* \*(5/578)(DR). This was in line with FCO advice of 28<sup>th</sup> October that it would be very ill-advised to have any Mauritians back on Diego Garcia or any BIOT island.

188. On 30<sup>th</sup> October 1968, Mr Johnston of the FCO reported on discussions which he had had with the US Administration in which he had explained why *"we were authorising Moulinie to recruit a limited amount of extra labour for Chagos, and also our intention of continuing to develop the copra industry on Peros Banhos and Salomon"*, (5/585). The purpose was to explain how the UK needed to take decisions and wished to know whether the Americans really intended that Peros Banhos and Salomon be cleared of its population. He sent a minute dated 31<sup>st</sup> October 1968, (51/586), to the Minister in which the problem was raised, in these terms:

"Whether we should permit some 100 labourers who left Diego Garcia and other islands in the Chagos Archipelago over the past two years to return there from Mauritius on 6<sup>th</sup> November with their wives and families who may number up to two hundred and fifty."

189. In favour of allowing their return was the fact that they were mostly born in the Chagos, and could claim to be *"Belongers"* of BIOT itself. Mr Moulinie wished to bring them back from Mauritius, and such a decision would avoid further friction with the Mauritius Government which was urging that the UK was financially responsible for the resettlement of these people who were, at present, unemployed and destitute. A refusal to allow them to return would lead the Government of India to assume that *"we are planning to use Diego Garcia for defence purposes"*. The alternative argument was that the *"British Indian Ocean Territory was established for Defence purposes, and we have agreed that the Americans may establish an 'austere Naval facility' on Diego Garcia"*. That island would probably have to be evacuated and Peros Banhos and Salomon, which

could take those evacuated from Diego Garcia, and the extra labour proposed from Mauritius, might nonetheless also be evacuated at the Americans request.

190. The issue was put as whether "*our long term aim is to 'sterilise' the Territory by resettling elsewhere the whole of the existing population (and thus avoid our United Nations Charter obligations to a 'people'); or whether we should try to run those parts of the Territory, not required for Defence purposes at any given time, as an economic unit*". Ultimately, authority was given to Moulinie & Co for him to recruit the labour on one year contracts.
191. Eventually, because Moulinie wished to ship 100 Ilois and families from Mauritius for BIOT on 6<sup>th</sup> November 1968 with a survey party on a one-year contract of employment, it was decided at a meeting on 29<sup>th</sup> October 1968 that he would be told that 100 Ilois would be readmitted on this occasion on one-year contracts only but that no commitment could be made about the renewal of these contracts at this stage or about similar entry permits for others. Nonetheless, none of the officials in the FCO or MoD liked the position but yielded to that course to avoid a row with the Mauritius Government and the risk of early exposure of the plans for Diego Garcia. Those objections did not apply to a medium-term expansion of the population on other islands in the Chagos group, in respect of which the Americans were to be asked to make their position clear quickly. It was now agreed that the Commissioner of BIOT could authorise Moulinie to employ the displaced Ilois which he could do profitably, as soon as he received authorisation, he would authorise Moulinie to recruit and ship the labour to BIOT. On 1<sup>st</sup> November, those instructions were given by the FCO to the Seychelles with the associated restrictions. It was suggested to the BIOT Commissioner, however, that although it was a matter for him how he handled it, it might be put to Mr Moulinie that in view of the uncertainty about the future working of the plantations, the arrangements had been limited to a one-year contract and that that would act as a warning against future recruitment, (5/594).
192. The BIOT Commissioner sent a telegram to the FCO on 5<sup>th</sup> November 1968, (5/601), saying that Moulinie & Co were today requesting Rogers & Co to recruit up to 100 men if passage could be obtained. It said that Moulinie's have accepted the terms which were imposed (one year contracts limited to Ilois and maximum 100 men) and that that had been accepted "*as normal commercial operation, without our needing to give further explanation*".
193. After all of that, on 5<sup>th</sup> November 1968 the Commissioner of BIOT informed the FCO that Mr Moulinie had told him that the "*Mauritius*" was now unable to carry labourers as she was carrying petroleum products and no proposals were made for any other ship to carry the labourers and their families. The availability of any other ships is unknown and it appears that there had been no further voyages after that one by the "*Mauritius*" to Chagos by May 1969. Accordingly, the Ilois who had arrived in Mauritius in 1967 and 1968 remained there. The focus of shipping connections had changed as well, with the arrival in July 1968 of the "*Nordvaer*" in the Seychelles.
194. The BIOT Commissioner responded to the FCO on 28<sup>th</sup> October 1968 dealing with the resettlement of the Ilois currently on Mauritius. Once again, the problem of recruitment of such labourers in relation to resettlement was raised, particularly as the Americans had not decided whether outer islands would need to be cleared, (5/578).
195. Evidence was given to me by some Chagossians affected by these events who had gone to Mauritius in 1966 and 1968. Mrs Elyse said that after the death of her daughter, Noellie, she had gone to Rogers & Co, the shipping agent, to book their return passage but had been told that there were no more sailings, the islands or Diego Garcia had been sold to the Americans, and it would not be safe to return to Peros Banhos because of bombs kept on Diego Garcia. When her husband had heard that the islands had been sold he became ill as if paralysed and just sat there doing nothing for two to three days. He then with his hand and

leg paralysed lay on the bed until he died in about maybe 1976. He was suffering from "*congestion*" which means a stroke and its after-effects. She said that her husband fell down and became paralysed when she told them the news that they could not go back to Peros Banhos. Her son, in his statement, said that from 1971 onwards his father, distressed at the loss of his home and way of life, had had heart problems and died of a heart attack in May 1976. Mrs Elyse said that after they had tried to return to Chagos in 1968 they were living in one room with just one mattress, paying Rs 150 rent, but eventually they could not pay even that. They had left with all their savings which were Rs 10,000. While they were in the island they got lots of rice and foodstuffs given to them. All their personal possessions were left behind there. After one month and a half they went to live in another house, and she found domestic work and paid Rs 200 a month. She described the severe difficulties of life on Mauritius. She went to stay with her mother for about six years because she could no longer afford the rent. Mrs Elyse then said that when she left Peros Banhos for Mauritius she had gone to stay with her mother, who had come for a stomach operation before her, and she had stayed with her for two to three months before taking a house. When she had said that she had stayed six years with her mother, her head had been spinning. She had gone to stay with her mother first then to a family where she had to pay Rs 150 a month. She had got money from her brother, who worked in the docks, when she first arrived. Although her statement said that after she had seen Rogers & Co they found a small plot of land and squatted on it, building a small shelter with tin and wood and lived there for twenty years, she had said in her evidence how they rented houses. She said the reason for the contradiction was because her head was turning and she was distressed. They were now living in a house made by a South African company with four rooms and a drainage system, and had been for 14 years; previously she had bought land but the accommodation had been very bad. She was still working as a maid, because the pension was insufficient. If she got ill, she got free healthcare at the hospital but she had to pay to get there if someone could not take her. Although her statement said that she had no "*effective access*" to healthcare in Mauritius, she agreed that she had said that she had been to hospital recently, but she said that she had no right to free transport and free medicine, but she goes to hospital when she has the money. She received treatment for dizziness and mental health, her eyes and stomach.

196. Mrs Jaffar said she had gone to Mauritius in 1966. She and her mother were told (it appears in 1967) by Rogers & Co that the islands had been sold by Mauritius, she did not say to whom, in return for independence. Their personal possessions also were left on Salomon. When they were told that they could not go back to Salomon they were staying with a neighbour and she had to leave school and abandon her education in order to find a job. Her mother had been unable to find work in Mauritius because she had become mad by that time; her witness statement said that her mother had been able to get a job after two years. They had had to rent a house made of corrugated iron with no running water or toilet facilities.

197. She said that her step-father whom she called Sinevessel, but is clearly Seeneevassen, stayed behind on Salomon until 1973, which drove her mother mad because he came with another woman. This was in a response to documents suggesting that her step-father (Seeneevassen) returned from Salomon in 1967 to live nearby and that another gentleman was actually living with them, in Cassis, (7/1247, 1260 and following which is a list of those displaced by December 1971 who received pension, outdoor relief or family allowance.) She denied that she had mentioned her step-father in her statement, although paragraph 11 refers to him. Various documents were put to her (relating to Ilois listed by the Mauritius Government as having been stranded when contracts were not renewed and for whom relief payments had stopped) which suggested that her step-father (Seeneevassen), his "*concubine*", as they put it, and four children

had arrived from Salomon by October 1968 but she denied that that was possible and said that it showed that the British and Mauritian Governments did something false, (5-521, 499, 469 and following). She was not the child referred to because she was already married by March 1968 and her daughter had been born then. This material supports the basic point that her family was stranded when she was about 14 (she was born in 1952), but not the detail of the circumstances as she variously described it. It is quite plain that some Ilois received some public assistance, which the witness statements do not address.

198. Marcel Moulinie, according to the unsigned 1977 statement, had been asked in 1968 by the Deputy Colonial Secretary to produce a five-year plan for all of the Chagos Islands within one week. He thought he could do it in a month and was extremely optimistic about the economic future of the Chagos Islands based on the quality of the coconuts and guano. He said he received no serious response to the plan from BIOT administrators. He recalled the period between 1967 and 1970 as a period of increasing labour requirements. He was unable to recruit the labour he required because a limit of 250 was put on at the end of 1967 or 1968. In fact, the workforce was depleting because some who left did not return and houses were lying unexpectedly empty. He had to reduce the labour on the outlying areas; John Todd had refused him further labour intakes in about February.
199. He agreed orally, however, that, in March 1968, the population of Chagos appeared to be 138 male adults, (15/396 and 5/400), so that the limit of 250 did not look as though it was close to being exceeded. Moulinie & Co's letter of 10<sup>th</sup> May 1968 to BIOT Administrator, (10-49), saying that the company was not going to recruit more, because there were enough already, accordingly appeared not to relate to the limit of 250 as opposed to the needs of the island plantations. He said on two or three occasions, when questioned about this, that everything was very uncertain and they did not really know what was going on in this period. The 250 limit on the number of labourers was for male labourers on Diego Garcia because the British were going to pick up the bill for expenditure under the draft management agreement as it operated, and so they were concerned about the number of labourers, but who was employed within those figures was left to the company. Mr Moulinie denied that any instructions had been given by him to Rogers & Co not to allow back people who had left the islands. His uncle had never told him so to instruct Rogers & Co and had never said that Mr Todd had told him to instruct Rogers & Co, nor was he aware of any instruction from Mr Todd to Rogers not to let people back. He was uncertain in his evidence about the evolution of the population and the reduction in Ilois families in the early 1970s. Over 1967 to 1968 there was a gradual reduction in the numbers of workers and it was difficult to get them back, probably because the islands were being evacuated. He thought requests for labour might have been refused but could point to no occasion when that happened. His perspective was clearly that of the plantation manager. He had heard in 1969 of people not being allowed back, but Rogers & Co had never told them that they had got instructions not to allow people back. He had never heard of the cases spoken of by the individual Chagossian witnesses of people never being allowed back. He did notice that people had left and never came back. Their notebook with the cash would be sent back to the Seychelles by the Head Office. When asked whether islanders could communicate with those who had left, he said they used the Met Office for communication, even those who could not read or write; there were BIOT stamps and a post office but he did not know how many islanders sent letters. He was unable to shed any light on the request for 100 additional workers in November 1968. He said it was because of the oil fuel that the Captain of the "*Mauritius*" refused to take 100 people.
200. On 1<sup>st</sup> November 1968, the FCO wrote to the BIOT Commissioner, (5/596), classifying the BIOT inhabitants for the purposes of the proposed legislation on immigration and citizenship, pointing out that it was the citizens of



the United Kingdom and Colonies or those who held dual citizenship of the United Kingdom and Colonies and Mauritius who really concerned the FCO and on which further information was required, particularly as to their numbers.

201. Meanwhile, the uncertainty as to the American position continued as the then Administration in Washington came to an end. The US position was that it hoped that no decision would be taken to redeploy workers from Diego Garcia to the other two islands in case one day the Americans wished to use those other islands for defence purposes and people then had to be moved on a second time, but on the other hand it was not necessary to clear those other islands at this stage.
202. The debate within the FCO about the legal status of the inhabitants of BIOT continued with a response to Mr Aust's note from Miss Hawson of the Nationality and Treaty Department of the FCO. Issue was taken in it with the definition of a "*Belonger*": a "*Belonger*" had to have an unrestricted right of entry to that territory. The concept of being a "*Belonger*" was more relevant to immigration than to passport purposes. Passports were not relevant to rights of entry into the UK and Colonies, (19/606(a)). Mr Aust riposted, (19/606C), on 7<sup>th</sup> November 1968 saying that he found it very hard to comment on Miss Hawson's minute "*which, quite frankly, I found muddled*". Her views were dissected at length. "*Belonger*" status was irrelevant to the law of immigration into the United Kingdom. He dealt with the issues which might arise under the Commonwealth Immigrants Acts 1962 to 1968 and the grounds upon which citizens of the UK and Colonies might be subject to immigration control. As if to end the debate, he said that his minute had been approved by the legal advisers to the Passport Office and to the Migration and Visa Department.
203. On 8<sup>th</sup> November 1968, the FCO prepared a chronological summary of events relating to the establishment of BIOT, which is an interesting summary of events between 1962 and 1968 and gives some insight into what were the international political concerns of the US and UK Governments, (5/608). In its introduction, it says that in creating the new territory of BIOT, the intention had been to make available for defence purposes "*islands with few or no permanent inhabitants, under direct British administration*". This would ensure maximum security of tenure and freedom from political pressures. Those pressures from hostile governments and governments concerned about US defence facilities in the Indian Ocean are set out in the subsequent history. A series of largely handwritten notes, dating between November 1968 and April 1971, contain internal minutes passing between members of the BIOT Administration, including the Commissioner, the Seychelles Attorney General and the BIOT Administrator, (19/368(b)). On 8<sup>th</sup> November 1968, the Attorney General for the Seychelles stated that "*I agree there is no need for an immigration law to solve the resettlement problem. Yet there is a need to have some immigration law on the statute book to control entry into BIOT*". On 17<sup>th</sup> December 1968, Mr Todd, recognising that the Ilois had rights as citizens of the UK and Colonies, stated: (19/368(c))

"This right, however, seems to be modified by their right to enter private property, which still remains the status of the BIOT islands except for Nelson. In these circumstances, it would seem better to continue to exercise immigration control through contracts than to risk difficulties which could arise over the issue of travel documents."

204. On 23<sup>rd</sup> November 1968, the BIOT Commissioner wrote to the FCO following his visit in November 1968 with the Administrator to the Chagos islands

and the continuing uncertainty as to the US long-term requirements for islands other than Diego Garcia. The Commissioner said that the islands were slowly running down for the lack of labour and lack of reinvestment. He maintained his previous preferences over the alternatives and said that it would be "*folly ..., to reinvest or to increase labour-force (other than by re-importation of approximately 100 Ilois now in Mauritius) until comparatively long-term defence requirements are known*". The present labour-force on Peros and Salomon was only half that needed for care and maintenance and a break-even operation, and only one third of that necessary for a profitable operation. The alternatives were to clear the whole Archipelago which would be a "*culpable waste of a fine asset, and wholly untimely by any standards of which we are aware*", or to clear Diego Garcia and fully redevelop the other islands which would mean trebling labour on those islands but with only a small increase over the Archipelago as a whole, a further alternative was to forget the defence facility and to exploit in full "*what could be a small goldmine*", \*(5/643)(DR). The BIOT Commissioner two days later pressed for an early decision in order "*to facilitate resettlement plans*". He sent a further dispatch on 28<sup>th</sup> November 1968, \*(5/646)(D). He identified two overlapping problems: how to make the best use of Chagos as an economic asset and how to fit the resettlement of the Ilois into the necessary overall plan for Chagos. Even the full development of Peros Banhos and Salomon alone would require an increase in labour force which would absorb not merely the Ilois on Diego Garcia but those in Mauritius. Because the present labour force was insufficient to maintain the islands, he estimated that a further 530 men would be required if the maximum use were to be made of all three islands, and some 310 on Salmon and Peros Banhos. He set out a tentative estimate of the investment costs required but concluded that the yield "*is so good as to demand further action*". He was convinced that the islands "*could be made a paying proposition*" and urged that Moulinie & Co be asked to give preliminary estimates for the cost of developing the islands to the point where the future policy could be decided upon as soon as the American intentions were clear. He said that if useful plans were to be made "*we cannot afford to wait for their decision on the use of the Chagos islands before beginning work on the detailed planning*". The FCO agreed to the Commissioner approaching Moulinie & Co. in that way but said that the working assumption had to be that the Americans wished Diego Garcia to be cleared. Indeed on 19<sup>th</sup> December 1968 following a discussion between the FCO and the UK Embassy in Washington that working assumption was confirmed. But it was recognised that the deteriorating condition of the plantations meant that planning meanwhile had to go ahead on investment, (5/651, 652).

205.

206. The year ended with a further despatch of 23<sup>rd</sup> December 1968 from the BIOT Commissioner to the FCO on BIOT citizenship and immigration control, \*(5/655)(D). He said that it seemed that everyone at present in BIOT "*with the exception of a few children born of Ilois stock since the creation of BIOT*" can claim a right to enter either Mauritius or Seychelles. A number might also be able to claim on citizenship grounds the right to enter BIOT. He continued:

"But the BIOT islands until 1967 were either privately owned or leased and no-one had a right to be on the islands other than by virtue of his employment by the owner or lessee. Although the islands have now been acquired by the Crown, the position has not fundamentally changed. The islands are in private ownership of the Crown, run as coconut plantations and there is no public land in the sense of land to which the public has an absolute right of access. The right to reside on the islands has, therefore, I assume, remained dependant on employment on the island and I am advised

that a refusal to employ a person would over-ride his right of entry based on citizenship."

206. This meant he said "*that no-one has an absolute right either to enter or remain in BIOT*". He continued:

"4. We have never envisaged difficulties with settlement except in the case of the Ilois and it was with the intention of ensuring their right of re-entry to Mauritius that we drafted the immigration legislation."

207. Although it had been intended that the Ilois should all be in possession of Mauritius travel documents "*it now seems that many of them could instead ask to be issued with a BIOT travel document*". This would further complicate the issue and accordingly he recommended that it would be better for the time being "*to continue to control entry to BIOT by means of the labour contracts, rather than introduce separate permits and require everyone to have a travel document*".

208. The Commissioner recognised that if the Chagos or indeed only Peros Banhos and Salomon were worked as plantations, the Ilois in Mauritius could be re-employed without difficulty, but that if the whole of Chagos were abandoned there would only be 2,000 acres of coconut plantation within BIOT on Farquhar and Des Roches plus the virtually uninhabitable island of Aldabra. The point has some importance.

"In these circumstances employment would not be available for the Ilois and a documentary right of re-entry would become valueless unless they were to be supported on these islands as permanent Government pensioners."

209. Again it was a question of a decision needing to be taken on the future of Chagos in order that the problem could be tackled, but till then nothing should be done to "*embarrass the position*" and the issue of BIOT travel documents would do just that. Accordingly he recommended against immigration control on the lines proposed so far as labour was concerned, although it might be necessary to have some means of controlling casual visitors. Accordingly the immigration legislation should have provisions enabling the plantation employees to be exempted. He pointed out that the manner of the creation of BIOT and the "*individual sociological pattern of the islands*", and the situation generally was likely to remain unique. The debate therefore continued; no line had been laid down, no final decision taken about the role of immigration legislation.

210. On 7<sup>th</sup> January 1969 the BIOT Administrator asked Mr Moulinie to prepare development plans for each of the main island groups ie Diego Garcia, Peros Banhos and Salomon in order that a decision could be made on what development was to be undertaken as soon as a decision on Diego Garcia was taken, (6/667). However, at the same time the Commissioner wrote to the FCO enclosing population tables accurate for employed persons but less accurate so far as children were concerned. The working population for Diego Garcia including 12 children and 87 women was 247, (6/672).

211. On 3<sup>rd</sup> February 1969 the US Embassy wrote to the Defence Department of the FCO informing it that the Diego Garcia project had been included in the budget request presented to Congress but that it would not be considered by Congress until March or April; many matters could not be answered until the hearings were completed, (6/676). The author of the letter said "*as indicated in my letter ... of November 22, we have no plans for the use of Peros Banhos and Salomon islands, with the proviso that the absence of current plans does not preclude consideration of using other islands in the Chagos Archipelago should this become desirable at some later time*". There was no objection to Moulinie being asked to draw up plans for expanded development on those two islands but that was subject to the understanding that consideration of the use of those islands had not been precluded. It was estimated that all migrant labourers would need to be removed from Diego Garcia on six months notice. The US agreed that it would be politically unwise to re-locate Diego workers on Mauritius where it was acknowledged that there were serious unemployment problems and stated that therefore the US agreed to the use of Peros Banhos and Salomon islands to re-locate them. He expressed concern about the proposal, of which nothing had come, to transport 50 Chagos born labourers on Mauritius to Diego Garcia.
212. The UK mission to the UN urged the FCO to speed up the arrangements under which all Ilois would be accepted as Mauritian or Seychellois for the purposes of presenting its case, should it prove necessary to do so, at the UN, \*(6/682)(P). The FCO responded to the US letter on 6<sup>th</sup> February 1969, (6/689). It referred to the two solutions to the problem posed by the US requirement that Diego Garcia be evacuated. The first solution would involve the transfer of the population to Peros Banhos and Salomon followed by the abandonment of the Diego Garcia coconut plantations and the development of those on Peros Banhos and Salomon to employ not only the Diego workers but the Ilois in Mauritius. But in order for Moulinie & Co, to be persuaded to continue to manage those plantations "*they would have to be sure of sufficient security of tenure to make the work and investment worthwhile*". This was estimated by the BIOT Commissioner to be about 20 years' tenure with some provisions for compensation if earlier repossession for defence purposes was required. The US were asked to agree that those two islands could be exploited economically for a period of 20 years. The alternative solution would be to clear the whole population of the Chagos and to re-locate in the Seychelles and Mauritius:

"In UN terms, this would be the ideal solution since we could argue that there are no '*inhabitants*' anywhere on BIOT: this is of cardinal importance since the only legitimate way in which BIOT could be raised ... would be in the context of Art 73 ... and our obligation to the inhabitants. On the other hand, we could have considerable difficulty in persuading the Mauritian Government to take the ex-Mauritian Ilois and we could also be criticized in humanitarian terms for uprooting people from the Chagos and depriving them of a livelihood there. We must bear in mind that these people are expert only in Copra production and that there is no outlet for their skills in Mauritius."

213. Mr Aust commented on the BIOT Commissioner's despatch dealing with the Immigration Ordinance of 23<sup>rd</sup> December 1968, \*(6/693)(ND); in general, he said it analysed the problem correctly. It also identified the problem as "*how to avoid making BIOT a 'non-self-governing territory' within the meaning of Article*

73 of the UN Charter". If it were not decided to remove all the inhabitants "certain legal measures will have to be taken so that we can present a reasonable argument based on the proposition that the inhabitants of BIOT are merely a floating population". He referred to three measures which were essential: first, to retain the system of yearly contracts and to avoid the creation of any permanent settlements so that the labour force and their families could *"truly be said to be ... migratory labour"*; second, that all inhabitants including contract labour should be brought under immigration control under a new Immigration Ordinance to be enacted as soon as possible; labourers should not be exempt; third, should any inhabitant of BIOT who is a UK citizen apply for a passport the BIOT Government should not issue it; it should be issued either by the Seychelles Government on its behalf or the High Commissioner in Mauritius on behalf of the Government of Seychelles.

214. He identified a longer term problem presented by children born in BIOT after 8<sup>th</sup> November 1965 but born before the date of Mauritius independence on 12<sup>th</sup> March 1968. Some of those and even some born after that date would be dual UK and Mauritius citizens. But most would be only UK citizens. After those children reached adulthood and ceased to be dependent on their fathers they would lose the right to enter Seychelles or Mauritius. *"Thus in about 14 years a new class of persons will emerge who will have no automatic right of entry to either Mauritius or Seychelles. They would be able to legitimately claim to be 'belongers' to BIOT in the sense that they have no unrestricted right of entry elsewhere (not even to the United Kingdom)."* He suggested three solutions: total evacuation now or in the near future, or amendment to Seychelles immigration law or assurances, about the movement of such persons from the Seychelles Government. The last two would not be enforceable once Seychelles had become independent.
215. The UK mission to the UN did not agree with the analysis of the problem set out in the 6<sup>th</sup> February 1969 memo from the FCO to the US Embassy, \*(6/695)(P). It thought that it would be possible to maintain that the territory had no settled population and that the small number of people living there were for the most part transients, and that argument could continue to be used even if the Ilois moved to Peros Banhos and Salomon. It pointed out that BIOT had been referred to in the Committee of 24 every year since 1966 and the Committee had declined to recognize the separate existence of the territory.
216. The position taken by the FCO on 14<sup>th</sup> February 1969 to the BIOT Commissioner was that Diego Garcia's evacuation would be required but the evacuation of Peros Banhos and Salomon would not be. The two alternatives being studied were the re-location of labour to Peros Banhos and Salomon or the evacuation of the whole of Chagos. Further information was required was required for a decision to be made: a report from Moulinie in relation to Peros Banhos and Salomon, and information from the High Commissioner in Mauritius for the latter, (6/697).
217. In order to make progress in considering the latter alternative, the FCO asked the High Commissioner about the likely reaction of the Mauritius Government to the removal of all Ilois to Mauritius and the likely resettlement costs there. It was presumed that the Mauritius Government would expect the UK Government to accept some responsibility for the Ilois already in Mauritius and sought information about whether they had been able to find employment, (6/698).
218. On 20<sup>th</sup> February 1969 Mr Moulinie sent to the BIOT Administrator what appeared to be some very skimpy calculations covering a five-year period which were then passed to the FCO, (6/699). On 20<sup>th</sup> February 1969 the UN political department of the FCO wrote to the Defence Policy Department of the FCO dealing with the comments on the letter of 6<sup>th</sup> February to the US Embassy. It said *"We in this Department are concerned that the picture being put forward of a possible return of the Ilois to Mauritius is one involving the dumping of*

*unemployables in the heavily over-populated island of Mauritius against the protest of an indignant Mauritius Government - not to mention the Ilois themselves*". It suggested that Agalega which was outside BIOT but within the control of Mr Moulinie be investigated as a place for resettlement on coconut plantations. Agalalega was under Mauritian jurisdiction.

219. On 21<sup>st</sup> February 1969 the FCO responded to the UK mission to the UN, \*(6/702)(ND). It agreed that there was a prospect that the ignorance and confused thinking prevailing in international circles on this island "*could enable us to dodge the real issues*" in the first instance when the Diego project was announced. But the lack of publicity and interest so far could not be taken as a lasting cause for complacency. Future hostility could be anticipated from Afro-Asian countries. It said:

"5. It is now extremely doubtful whether it is still open to us to use the formula ... that the inhabitants are essentially a migratory force."

This followed the discovery in 1968 that nearly half the BIOT population were at least second generation inhabitants, "*the so-called 'Ilois'*". There were 434 of them. He said that in 1966 "*we thought that there were many fewer second generation inhabitants than this and in any case we had hoped to dispose of the Ilois problem while Mauritius was still a Colony*". Percipiently, the author commented that neither in the longer nor the shorter term could the possibility be excluded:

"That this semi-permanent population will find themselves in the international limelight ... If attention were drawn to them, we should find it difficult to assert that BIOT is not a '*non-self-governing territory*' and that we had no obligations in respect of it under Chapter XI of the Charter. In particular, we should find it extremely difficult to deny that we had sufficiently honoured or are now honouring our Charter obligation '*to ensure ...*' their political, economic, social and educational advancement".

A contrast was drawn between the case presented in respect of Gibraltar and the residents of this dependency. There were distinctions which could be drawn by reference to their Mauritian citizenship, but nonetheless UK legislation had accorded them citizenship of the UK and Colonies as well and there would be some who were only citizens of the UK and Colonies. It was said "*our strongest card is the fact that the Ilois are still contract labourers with Mauritian citizenship, but until we can judge whether there is any prospect of returning them to a Mauritian island, it could be unwise to refer to them as essentially migratory*". This, however, represented preliminary thinking.

220. On 22<sup>nd</sup> February 1969, the potential development of Peros Banhos or Salomon for a twenty year period was rejected by the US, which stated that such a proposal would seriously derogate from the principles underlying the 1966 agreements which the US interpreted as authorising the transfer of local workers elsewhere, the curtailment or closure of economic activity including copra plantations, and making the UK Government responsible for relocation costs. The US, therefore, did not wish to enter into a twenty year self-denying commitment, (6/708). Their acquiescence to the resettlement of Chagos copra workers on Peros Banhos and Salomon was with a caveat that it should not prejudice the use of those islands ultimately for defence purposes. That remained the US position, even though such use and exclusion of workers from those islands was not at

present foreseen. Movement of workers, however, from Diego Garcia was seen as premature in advance of a Congressional decision on the proposal.

221. The other strand in the resettlement options was dealt with by the High Commissioner to Mauritius in a telegram to the FCO on 25<sup>th</sup> February 1969, (6/710). It said that the Mauritius Government would be unlikely to welcome the return of some 250 families "*except on generous compensation terms*" because of the already high unemployment rate of 20%. A calculation of the lowest resettlement costs which could be envisaged was presented: it covered low-cost housing, relief work payments and family allowance for three years, totalling per family 7,700 Rupees or £600 sterling. It cautioned that three years' payments might not be regarded as "*generous or indeed adequate in light of near impossibility of finding suitable employment*". There was no copra industry and there would be an increased pressure on educational and health facilities, social and community services. It was unlikely that many of those already in Mauritius from BIOT had found employment and the Mauritius Government would almost certainly expect them to receive the same treatment as those who might later be displaced.
222. The UK Mission to the UN responded to the letter of 21<sup>st</sup> February 1969 on 26<sup>th</sup> February 1969 (6/711). It noted that the Ilois were very much in the majority on Peros Banhos and Salomon, but made up only one third of the total population of 380 on Diego Garcia. This would still enable the Mission to maintain, at least in relation to Diego Garcia, that the small number of people were for the most part transients. However, it was recognised that the position based on the character of the population of the Chagos as a whole was much less tenable than had previously been thought, and "*that it would certainly be difficult to maintain the defensive position suggested in respect of Diego Garcia, if Peros Banhos and Salomon were also at issue*". The strongest card was said to be that the Ilois are resident in the islands by virtue of contract arrangements and are entitled to Mauritian citizenship.
223. Internal FCO minutes \*(6/712)(ND) referred to increasing interest in offering Ilois the opportunity to go to Agalega when their contracts expired in BIOT. It commented "*there is, of course, no raison d'être for the Ilois in BIOT without employment, since their housing & everything else is provided by their employer. In the past they have commuted between contracts to & from Mauritius*". There was not thought to be a human rights objection to the removal of migratory workers if they wished to move. But there was a risk over the question of nationality. An official advised "*We must be very careful not to let it appear that our object in moving the Ilois out of BIOT altogether is to prevent there being an 'indigenous population' who would be British citizens and not citizens of Mauritius*".
224. In March 1969, the PIOD of the FCO, which at this time had responsibility for BIOT, produced a draft working paper on the relocation of the plantation workers from Diego Garcia on to Peros Banhos and Salomon, (6/713). This also involved looking at the position of the Ilois families already living in Mauritius. The development plan prepared by Moulinie over a period of five years was described, together with its labour-force requirements, and the sum of £61,250 capital expenditure on housing and social services in addition to the investment required on the plantations of £126,000. It was recognised that, if the plantations were to be successfully developed, a long-term basis would be required, say fifteen years, in order to justify the substantial capital expenditure required over the first five years. Indeed, it was only after the first five years that there would be a return sufficient to begin to offset the investment. No commercial operator would be likely to risk the capital involved without certainty of tenure including a compensation clause for termination of the agreement. The alternative would be for HMG to provide the capital and run the plantations through a manager who would receive a fee. Taking account of the average price of copra, the Commissioner's view had been that the plantations on Peros Banhos and Salomon

could be run at a profit but could not be regarded as an enterprise capable of earning really substantial profits, or weather in a serious recession in the copra market. Although the adults from Diego Garcia could be accommodated, there were a number of growing children who would require employment and a yet longer-term problem of population increase, although the movement out of Chagos would offset that if contacts with Mauritius were maintained.

225. Mr Aust returned to the Immigration Ordinance in a note of 5<sup>th</sup> March 1969, \*(6/717)(ND), to Mr Jerrom. He said that immigration legislation would be needed, whether there was total evacuation of the whole of Chagos or permanent resettlement on Peros Banhos and Salomon, or temporary resettlement on Peros Banhos and Salomon. He described the provisions of the draft Ordinance which required anybody entering or remaining in the territory to be in possession of a pass, the issue of which would be at the entire discretion of the immigration officer, whose decision would be appealable only to the BIOT Commissioner. It would be unlawful for somebody who needed a pass to enter or remain without one. Provisions for removal for those whose presence was unlawful were included. Mr Aust commented that if there were to be permanent resettlement on Peros Banhos or Salomon, these provisions would obviously be too severe because a permanent resident should not be required to apply every four years for a pass to remain in the colony. If there were to be temporary settlement of the Ilois from Diego Garcia on Peros Banhos or Salomon, or if the Chagos as a whole were to be totally evacuated, Mr Aust advised that very rigorous controls would be needed. If the Chagos were to be totally evacuated "*there must be no permanent population*", and if the resettlement were temporary "*until a final decision is taken, we must continue to treat the inhabitants as a floating population*" otherwise total evacuation "*would be politically very difficult*". The power of removal, to which objection had previously been raised, was acceptable in view of the discretionary power which it gave to the Commissioner as to whether to make an Order removing somebody. It was to be assumed that the Commissioner would act properly and not deport a person who could not get entry elsewhere.

226. A draft submission for Ministers to make to the Prime Minister was circulated amongst officials for comment on 1<sup>st</sup> April 1969, \*(6/724)(P). It would deal with the arrangements for the future of the population of Diego Garcia and the other islands in the Chagos group within BIOT. A recommendation was made that the Foreign Secretary should send a minute to the Prime Minister seeking approval for the evacuation of the Chagos, which had been cleared at official level with other relevant departments. The background to the submission referred to the problem of the population as being "*highly complex and difficult*" and one which had been actively and comprehensively considered within the Foreign Office and with the Treasury and Ministry of Defence for many months. They had now reached an agreed view "*and the Treasury in particular have made it clear that they would be strongly opposed to any alternative solution which would entail open-ended, long-term financial responsibility for the population of the Chagos*". A note at the bottom of the draft submission, regretting its length, said that as islands had a habit of causing troubles "*it seems important that Ministers should have access to the full facts*".

227. It appears that "*Paper No 3 The problem of the people living in the Chagos Archipelago*" was attached to the draft submission, but it is not clear whether ultimately it was attached to the minute sent to the Prime Minister. The paper referred to it being understood, as a general proposition, "*that the cost of resettling elsewhere the people who could no longer make a living in the Chagos Archipelago because of the construction of defence facilities there would be met by the British Government*", (6/726). There had been no precise definition of who would be entitled to resettlement or what resettlement would cover. The Ilois were said to be those who can claim to have their main roots in Chagos. Mr Allen



relied strongly upon a comment in the paper that since the creation of BIOT and the purchase of the islands by the Crown in 1967:

"The relationship of the United Kingdom Government with the people in Chagos has been a dual one:-

(a) That between the government of a colony and the people living in it, either on a fairly temporary basis or those who could claim, as in the case of the Ilois, a substantial connexion with a colony (including eg 'Belonger' rights so far as entry is concerned);

(b) The relationship between a landowner and employees/tenants who make a livelihood on his land. It was said that in 1965, when BIOT was established 'our information' was that the population of the Chagos consisted almost entirely of contract labourers and their dependants from Mauritius or Seychelles, employed by the then lessees of the land and living in housing provided by their employers. It was thought that almost all of them were relatively short-term inhabitants on contracts, which they might or might not renew. It was, however, known that there were 'a small number' of Ilois (in one estimate not more than 200) who could be regarded as having their permanent homes in Chagos."

228. The intention had been that although BIOT was a colony, it was not to fall within the scope of Chapter XI of the UN Charter. The object of its creation was to obtain unrestricted use of the islands. It continued:

"7. The long-term expectation was that when defence needs arose, the inhabitants of the islands would be 'resettled' outside of BIOT, the cost being met by HMG. In the short-term, it was hoped to establish that the inhabitants were all either 'Belongers' to Mauritius or to Seychelles having unrestricted rights of entry to one or the other territory. This would have allowed us to issue them with only temporary residence permits to stay in BIOT. At the time it was envisaged that we should then have established a situation in which there were no individuals with claims on BIOT or without claims on either Mauritius or Seychelles."

229. A formula had been worked out for use at the UN in 1966 which referred to the essential character of the labour as a migratory labour-force.

230. The paper continued, however, that between 1966 and 1968 it had become clear that the number of people who could claim to be Ilois was greater than estimated and that although the number was still small they "*present a more awkward problem of status than had been foreseen*". They were included among those who automatically became Mauritian citizens on independence and it was said that after independence "*they no doubt continued to regard themselves as Mauritians and they are probably so regarded by the Government of Mauritius*". But a right to citizenship of the UK and Colonies could not be taken away, nor could the possibility be removed that some might claim to regard

themselves as people of Chagos. The total Ilois population of 128 on Diego Garcia and 434 on the total Chagos was set out. Paragraph 13 of the paper said:

"The Ilois, island born, clearly have a more substantial connexion with Chagos. Although as noted above they still regard themselves as Mauritians, they also look on themselves as Chagos islanders. They have some experience of movement between the atolls. Some are second generation, a few third. The men are contract labourers and they go to Mauritius, where many have family connexions, from time to time. These visits to Mauritius have an element of leave about them and for many years it has been normal for them to be re-engaged, although some have been refused on grounds of bad conduct. In summary, while being accepted as Mauritians they can be regarded as having their main roots in Chagos, although their continued presence in Chagos has always depended on their being employed there."

231. There were no accepted rules of international law regarded the responsibilities of States to permit the entry of their own citizens when those citizens are also citizens of another state. The argument that they should be permanently resettled in Mauritius despite their citizenship of the UK and Colonies might rebound if the Ilois regarded Chagos as their home. The paper said:

"Whilst it is legally possible for us to enact legislation which could permanently exclude them from BIOT, we could not of course administer such a legislation in such a way as to deprive them of any right of entry anywhere: for example, if Mauritius were to change its immigration legislation, which at the moment gives all Mauritius citizens (including dual citizens) an unrestricted right of entry to Mauritius. As we have done this in the case of our own citizens (Kenya Asians) it is theoretically possible that Mauritius might do the same."

232. The draft Immigration Ordinance would be necessary, it was said, were Chagos to be evacuated and during any interim period prior to a final decision being taken. The Commissioner would have a discretion to allow a person whose presence in BIOT was unlawful to stay, if that person could not lawfully enter any other country or his entry to a particular country would cause trouble. The problem of the children of those Ilois who were born in the Chagos part of BIOT after Mauritian independence on 12<sup>th</sup> March 1968, who would only be citizens of the UK and Colonies, was referred to as a problem for fourteen to fifteen years hence, and they could truly claim to be "*Belongers*" of BIOT unless the Ilois were removed outside BIOT.

233. The continued occupation of Peros Banhos and Salomon, although a partial solution to resettlement, would not solve the problem of national status and indeed would make the problem worse as time went on. The problem of resettlement would merely have been postponed if the atolls were to be evacuated later, and if not there would be continuing financial commitment and an increasing political commitment. On the other hand, evacuation of the whole of the Chagos and resettlement would be intended to remove the difficulties of

national status once and for all. It would require the co-operation of the Mauritian Government and the acquiescence of the people concerned. However, in that event, resettlement, while it would not deprive the dual citizens of their UK and Colonies citizenship, would put the UK Government on much stronger ground in refusing them entry to Chagos. The Ilois were described as *"simple islanders, not versed in the obscure problems of their national status touched on above ... . The Commissioner feels that there is a probability that they would prefer to stay in Chagos rather than to be resettled elsewhere; but no doubt much will depend on the arrangements which can be made for them, especially for housing and employment"*.

234. A fifth BIOT working paper of April 1969, on evacuation and resettlement, gave the total Ilois population of the Chagos as 434, of whom 128 were on Diego Garcia, (6/739). That figure included men, women and children. There were also 56 Mauritians and 317 Seychellois on the Chagos, of whom respectively 22 and 230 were on Diego Garcia. The existence of the 370 Ilois on Mauritius already, thought to be awaiting re-employment on Chagos, was referred to and it was assumed that any public statement on resettlement would lead some of them to apply to be treated on the same basis as the Ilois in the Chagos. The main object of evacuation and resettlement was seen to be the provision of a solution once and for all to the latent political problem of the continuing presence of the Ilois in Chagos. Although the whole of the Archipelago was being considered for evacuation, a different timescale could apply as between Diego Garcia and Peros Banhos and Salomon. The high unemployment rate in Mauritius itself and the difficulties and expense of finding suitable employment for any families returning from the Chagos meant that a more satisfactory solution might be to negotiate resettlement of the Mauritian citizens from Chagos on Agalega as the only coconut producing island within Mauritian territory. It was said that this had been the original intention when BIOT was established. The unemployment rate of 27.5% in the Seychelles was even worse than on Mauritius but there were hopes with the new airport of economic development. The Ilois were identified as presenting the main problem because they had traditionally worked and lived in Chagos and had no skills other than those of coconut plantation workers. The movement of this class therefore *"would involve not only uprooting them from their traditional homes and settling them elsewhere, but also providing them with a new livelihood, unless they can be resettled in an area where a copra industry exists"*. There was no such industry on Mauritius. An approach to the Mauritius Government was necessary and it was pointed out that that Government could be expected to negotiate for the best possible terms of resettlement in which humanitarian considerations, as well as the need to avoid adverse publicity would be factors. The continued use of Peros Banhos and Salomon after the evacuation of Diego Garcia, then envisaged for early 1970, could provide some valuable breathing space. There was also attached a paper on Agalega.

235. Lord Shepherd, \*(JR/3/256)(ND), agreeing with the submission to the Prime Minister, said that although the numbers involved in the evacuation was small, they presented a serious difficulty because of the severe unemployment problems in both the Seychelles and Mauritius and *"we must insist on these people being properly resettled and with reasonable prospects for their future"*.

236. On 21<sup>st</sup> April 1969, the Foreign Secretary sent a minute to the Prime Minister seeking his approval for the clearance of all the Chagos islands of their inhabitants, \*(6/745)(P). He asked his colleagues to agree that *"we should aim at the return of the inhabitants of the whole Chagos Archipelago to the Seychelles and Mauritius and should enter negotiations with the Mauritian Government to that end"*. The minute set out the background and referred to the need to consider immediately what should become of the contract labourers at present working on Diego Garcia and pointing out that that also called for a decision on the future of Peros Banhos and Salomon, as the only other inhabited atolls of the Chagos Archipelago. It was said:

"4. ... The problem of the future of these people exists independently of American plans, but the decision to proceed with a communication facility on Diego Garcia, which will necessitate evacuating that atoll, has brought it to a head.

5. There is no ideal solution. It has always been envisaged that the population should be resettled outside the BIOT as and when the islands become needed for defence purposes. Our aim must be to ensure the welfare of the people concerned, but at the same time we must seek to limit the financial burden falling on Her Majesty's Government, as well as follow a course which is defensible in the United Nations and which does not store us up greater trouble for the future. I agree with the conclusion reached in the paper that, on balance, the best plan will be to try to arrange for these people, all of whom are citizens of the United Kingdom and Colonies or of Mauritius or both, to return to the Seychelles or Mauritius. The people with whom we are concerned are working the Chagos under contract and own no property or other fixed assets there. However, some of them have established roots in Chagos and I should naturally have wished to consult at least these in advance of any decisions about their future, if this had been possible. Officials have examined closely the possibility of giving them some element of choice, but have advised that this would seem wholly impracticable. We are not able, at this stage, in advance of talks with Mauritius, to offer resettlement there as an option; and even if we could, these workers might express a preference to stay in Chagos. This ... would have severe drawbacks from our own point of view."

237. The minute pointed out that the UK Government had undertaken to meet the cost of resettlement of displaced labour, but further information was needed in order to make a realistic estimate for that cost. The particular problem was seen in persuading the Mauritian Government to accept the return of dual citizens there on reasonable terms. Negotiations to that end were proposed with the Mauritius Government. The Foreign Secretary continued:

"We should not seek agreement at any price, and it may later transpire that we are unable to make fair and satisfactory arrangements with the Mauritians for these people's welfare at a reasonable cost to ourselves. It would then still be open to us to fall back on less satisfactory solutions such as the resettlement of some of the population of Diego Garcia on Peros Banhos and Salomon and the development of these two atolls by Her Majesty's Government. This latter

alternative is, however, one which we should try to avoid, since it might later involve moving people a second time for defence reasons. It might also prove expensive in that continuing development and budgetary aid might be required."

238. Attached as Annex A to the minute from the Foreign Secretary to the Prime Minister was a paper which reflected much that was in the working papers to which reference has already been made, (JR/3/264). This referred to the small but growing number of workers and children who were establishing claims to belong to the Chagos which could cause considerable problems in the future, and some of whom might one day claim a right to remain in BIOT by virtue of their citizenship of the UK and Colonies. The plantations were run down because it had not been possible to develop them properly, pending decisions on defence use of the islands. When BIOT was created, it was not envisaged there would be any permanent inhabitants and the problem of the Ilois was, at present, not widely known. If, however, they remained within BIOT, whether resettled from one island to another, the risk of being forced to acknowledge UN Charter responsibilities arose and it would be helpful if any move could be presented as a change of employment for contract workers. The advantages of a short-term solution involving removal from Diego Garcia to Peros Banhos and Salomon were outweighed by the long-term disadvantages and there was an option of relocating them to other islands in the Archipelago. The population of the Archipelago was a maximum of 800 and the 434 Ilois were dual nationals. A relocation solution to another island within Chagos might not be in their long-term interests.
239. On 26<sup>th</sup> April, the Prime Minister signified his agreement to the proposal of the Foreign Secretary that the Government should aim at the return of the inhabitants of the whole Chagos Archipelago to the Seychelles and Mauritius and should enter negotiations with the Mauritian Government to that end, (6/752). The Chancellor of the Exchequer and the Secretary of State for Defence also agreed, (6/753, 754).
240. The problem of those Ilois who had returned to Mauritius in 1967 and 1968 and who had not been re-engaged by Moulinie & Co was raised again in May 1969. But the FCO minute of 7<sup>th</sup> May 1969 appears to accept that nothing should be done at that stage about it, and it does not suggest that the UK Government should do anything to help, (6/755). It refers to the Ilois being left in Mauritius because Moulinie would not re-engage them "*owing to doubts about the future of the plantations*". It was unlikely that the numbers had changed because there had been no sailings of the "*Mauritius*" from Mauritius to Chagos. However, the "*Nordvaer*" was due to leave for the Chagos from Seychelles in early June 1969 and Seychellois would eventually be leaving Diego Garcia on it. Moulinie would wish to replace those who left "*unless instructed otherwise*". The BIOT Commissioner sent a telegram to the FCO saying "*on grounds of administrative convenience, I should prefer to instruct Moulinie not to recruit replacements, giving as reason that the whole question of future commercial exploitation is under consideration ... Moulinie will begin recruitment later this month*", (6/760). The pros and cons of this course of action were considered, there being a conflict between the need to keep the plantations viable as a fallback for resettlement of Ilois from Diego Garcia, but uncertainty over the whole problem of resettlement from the other islands in the Chagos which could be made more difficult with increased recruitment. The advice from the FCO to the BIOT Commissioner was that although there was no ideal way of dealing with the situation "*further recruitment should be avoided on this occasion unless you consider it feasible to*

*limit further contract to six months*", (6/766). Mr Moulinie should be told that, pending a decision on the question of commercial development, it would be preferable not to contract further labour at this stage. It would be helpful, said the FCO, if information could be obtained about the number of persons and of what category whose contracts would expire in the coming twelve months.

241. Mr Todd suggested, towards the end of May, that the proposed immigration legislation be kept in cold storage, pending the commencement of the US defence works and that contract labourers be exempt from such immigration control and be dealt with through their employment contracts, (6/763).
242. On 2<sup>nd</sup> June 1969, the FCO authorised the Mauritius High Commission to approach the Prime Minister of Mauritius to give him advance notice on a confidential basis that, under the 1966 agreement, the UK Government had approved in principle a US facility on Diego Garcia subject to Congressional approval, in respect of which the secret hearings were about to start, (6/768). The Prime Minister should also be told that the UK Government would wish to enter into confidential discussions with it later in the summer about arrangements for resettlement and employment in Mauritius of the Mauritian citizens in Chagos and of those who were already in Mauritius but had been workers on the copra plantations. Some 30 Seychellois families were sent to Diego Garcia on the "*Nordvaer's*" next voyage, (6/770). Information was provided that all Ilois contracts would expire within the next six sailings, but that the great majority would probably stay on as had been the practice in the past. The present labour force was already below the minimum required and if six months passed without the replacement of labour, that would be equivalent to commercial abandonment and would probably lead to Moulinie not continuing his management, according to the dispatch from the BIOT Commissioner to the FCO.
243. Internally it was recognised that the resettlement discussions would also include those Mauritians "*who were Ilois already 'on the beach' in Mauritius*", (6/771). The FCO said to the BIOT Commissioner what was set out in the Foreign Secretary's minute to the Prime Minister to the effect that agreement was not to be sought on compensation at any price, (6/772). There were other, albeit less satisfactory, options. Advice was also sought on whether the Seychelles would seek assistance with any cost of resettlement or compensation. The present understanding was that there would be unlikely to be any political outcry. The Seychelles Governor replied to the effect that the effect of the Diego Garcia project would be to make 150 Seychellois labourers redundant in Chagos but that there were projects, including the airport, which would potentially provide them with employment opportunities, particularly if they returned on a phased basis. Their position was seen as being better than that of the Ilois because of their being more likely to be able to find work to which they were accustomed and they, in any event, had no possible claim to a right to stay in Chagos, (6/775).
244. The FCO Defence Policy Department, writing to the UK Embassy in Washington, described a meeting that had taken place in London with the US Embassy, \*(6/778)(ND). Agalega had been discussed and Ministers needed to be satisfied that Ilois returned to Mauritius "*would not merely languish there unemployed for the rest of their lives*". The problem was that they were only skilled in copra and as there was some copra industry on Agalega, there were advantages in their being re-employed there. He wished to emphasise the importance of a confidential advocacy to the Government of Mauritius of the secret Congressional hearings and American contacts in Washington and London were asked to be careful about divulging inadvertently that certain Mauritians, that is to say the Ilois, might have "*a special claim on us*". This was said to be of "*cardinal importance*".
245. The Claimants put some weight on the briefing of 24<sup>th</sup> June 1969, \*(6/787)(P), from the FCO to certain foreign missions on the Diego Garcia

defence proposal. A number of lines to take in response to leaks or to questions following a public announcement were set out. The briefing note said:

"We are anxious that no publicity should be given to the problem of these contract labourers. If asked about their future, you would merely say that there would be detailed talks between Her Majesty's Government and the United States Government about the administrative aspects of the Diego facility. ... all the people on Diego Garcia ... are Mauritian and Seychellois labourers working on contract on the copra plantation ... and that the future of the plantations will naturally be discussed at these talks."

246. The reason for this formula was so that it would apply equally to the Ilois "*since we are particularly anxious to avoid distinguishing between them and the purely migratory labourers*". It pointed out that neither the Ilois nor the Mauritian Government may have realised that they were entitled to dual citizenship. The use of Agalega to absorb some of the displaced labour continued to interest the BIOT Commissioner who, on 1<sup>st</sup> July 1969, told the FCO of the way in which Moulinie & Co had been impressed by progress on the island and were interested in further development, (6/787A). There was some potential for increased labour. The FCO briefed the Foreign Secretary for his meeting with the Prime Minister of Mauritius that the US would wish the contract labourers from Diego Garcia to be resettled elsewhere. The fact that some might have dual nationality was not to be admitted to the Prime Minister of Mauritius, \*(6/789) (D). The FCO was anxious, even after the meeting, that no distinction between mono-Mauritians and Ilois should be drawn in the eyes of the Mauritius Government, \*(6/804).
247. The BIOT Administrator presented up-to-date population figures for June 1969 in Chagos, (6/794). There were 129 Ilois on Diego Garcia out of a total population of 330. 189 were Seychellois and 12 Mauritians. Of the 129 Ilois, 27 were men, 30 women, and 57 children, ie 30 Ilois families. A similar breakdown was provided for Peros Banhos, where 140 of the total population of 164 were Ilois, and on Salomon 153 of the total population of 197 were Ilois. A table of resettlement of the population of Chagos indicated that the 129 Ilois from Diego Garcia were to be sent to Peros Banhos and Salomon in the first instance. There would be a gradual removal of population from those two island groups later to be resettled in Agalega and Mauritius. When the Foreign Secretary and the Prime Minister of Mauritius met on 4<sup>th</sup> July 1969 and the question of the resettlement of the Ilois was raised, the notes record Dr Ramgoolam saying that this point had been taken care of in 1965 under the Defence Agreement, (6/800).
248. The question of whether and when immigration legislation should be introduced into BIOT, which had been raised again between Mr Whitnall and Mr Aust in June, was dealt with on 8<sup>th</sup> July 1969 in a note from the FCO to the BIOT Administrator, \*(6/803)(ND), saying that it had been decided to postpone doing anything until the US proposals for the development of Diego Garcia were definite. It did, however, comment that it might be better to use the word "*permit*" rather than "*pass*" in the legislation because the latter had South African military connotations. If there were to be an exemption for Ilois, it would have to be on the basis that they were contract labourers as Mr Aust had previously advised and this had to be stated expressly in the Ordinance.
249. The Administrator of BIOT, together with Mr Marcel Moulinie, paid a further visit to the Chagos in the latter part of July 1969. They found that the plantation on Diego Garcia was gradually becoming more overgrown as the number of workers on the island was insufficient, (6/805). They were less

overgrown on the other islands. There had been a decrease in the population since 1967 of 155 and the main decrease had been in the number of Mauritians and Ilois because the communications with the island were now being confined to the Seychelles. But it had also been difficult to obtain Seychellois for the Chagos and their numbers had also declined. The report followed a similar pattern and its general conclusion was that the islands continued to be run satisfactorily on a care and maintenance basis and that the conditions of life on the islands remained acceptable, which was as much as could be expected under the current restrictions. The total population of Diego Garcia following this visit was put at 319, of which 93 were Ilois, comprising 27 men, 21 women and 45 children. There were 121 Ilois on Peros Banhos, comprising 22 men, 26 women, and 73 children. On Salomon there were 136 Ilois out of a total population of 182 (151 total on Peros Banhos) made up of 26 men, 28 women and 82 children.

250. There had been some discussion about the resettlement table prepared by Mr Todd when he enclosed the June population figures for Chagos. But it was said by Mr Whitnall of the PIOD of the FCO that he recalled Mr Todd mentioning "*that the labour-force is unlikely to be disturbed by change of location, providing there was no deterioration in their living standards*". (6/816).

251. In August, the BIOT Administrator agreed that the Immigration Ordinance could be put back into cold storage, (19/817(a)). The approach adopted by Mr Todd to the resettlement of the Ilois had occasioned debate because of the distinction which he seemed to draw between those who were Ilois and those who had only Mauritian nationality. The FCO pointed out to Mr Todd that it was anxious to maintain the position that no such distinction should be drawn, that the Mauritius Government had not drawn any distinction itself and accordingly it would be better if all Ilois and "*mono-Mauritians*" went from Diego Garcia to Peros Banhos and Salomon, \*(6/818)(P). The BIOT Administrator accepted that point. He also supplied a list of names of Ilois and Mauritians who had left Chagos between January and July 1968. There are some 90 names on the list and there were children as well, not separately named. The vast majority were Ilois, (6/820).

252. On 23<sup>rd</sup> August 1969, the BIOT Commissioner notified the FCO that Mr Moulinie was asking Rogers & Co to recruit 50 families from Mauritius to go to Agalega on a sailing due that week, but he had been successful in recruiting only 14 families, who were probably Ilois, (6/826, 827). The FCO replied, suggesting that if this were to take place it would be of some assistance if Ilois were recruited, (6/826(a)). It would be hoped, and the making of a distinction between Ilois and "*mono-Mauritians*" was not something which in other contexts they wished to make, that the numbers could be drawn from those who had recently returned from Chagos to Mauritius. There was, it was hoped, time to discuss that with Moulinie. Mr Todd wrote to the FCO on 28<sup>th</sup> August 1969 expressing his surprise that, in view of the previous anxiety of the Ilois in Mauritius to return to Chagos and their apparent destitution, the response had been so poor to Moulinie's recruiting effort, (6/827). He wondered whether there was a resistance amongst Chagos Ilois to going to Agalega, which, after all, was not a Chagos island. It was some 1,000 miles away. The FCO suggested that this failure of recruitment was probably due to the relatively short notice which the Ilois had and to the fact that they might to some extent have dispersed within Mauritius.

253. There is a handwritten note on the list of names, (5/470), supplied by the Mauritius Government to the United Kingdom Government of Ilois left behind in Mauritius in 1967 and 1968, which indicates those who appear to have been recruited to work on Agalega in August 1969. There are five families so marked.

254. In November 1969, an official in the FCO's Defence Policy Department, dealing with the proposed timetable for construction of the defence facility and the removal of the labourers from Diego Garcia, commented that it was highly unlikely that within six months they would have agreed satisfactory arrangements with the Mauritius Government for resettlement on either Mauritius or Agalega of



the contract labourers with Mauritian citizenship. If only six months' notice were given, it would be necessary to contemplate the fall-back position of temporary relocation of some contract labourers to Peros Banhos and Salomon, however undesirable in other contexts that might be. There would be less of a problem with Seychellois labour, which could be phased back into that labour market within twelve to eighteen months, (6/830).

255. On 21<sup>st</sup> November 1969, the BIOT Administrator produced his proposals for the removal of the population, (6/832). The "*Nordvaer*" would be leaving the Seychelles for the Chagos on 30<sup>th</sup> December and it was hoped that the project would by then no longer be secret. The voyage had to take place then in order to collect the copra for a profitable contract. He could see no difficulty in clearing Diego Garcia by June 1970, but not both Peros Banhos and Salomon as well. Negotiations with the Mauritius Government and with Moulinie, if Agalega were to be used, would take some time. A two-phased plan was necessary. The first phase dealing with Diego Garcia, the second phase with the other two islands. It was suggested that some Seychellois and mono-Mauritians could be removed from Peros Banhos and Salomon to make way for Diego Garcia Ilois in the first instance to go there. Accommodation would have to be improved for them. Seychellois and Mauritians were entitled to more than one month's notice and to payment for the unexpired portion of their contract. The plan was thus: that in April 1970, Ilois should be removed from Diego Garcia by the "*Nordvaer*" and Seychellois and Mauritians from Peros Banhos and Salomon; second, that mono-Mauritians and some Seychellois should be removed from Diego Garcia by a non-commercial voyage; and thirdly, that in June 1970, the remaining Seychellois should be removed from Diego Garcia and there would be an undated subsequent removal from Peros Banhos and Salomon. The BIOT Commissioner sought the permission of the FCO to take Moulinie into his confidence about the proposal because his co-operation would make resettlement much easier.

256. 1970 began with the refusal of the US Congress to approve the Diego Garcia facility and it was cut out of the Appropriations Bill. This would delay the Administration's timetable for the facility by at least seven months, and possibly more, and compelled the UK to take another look at the state of play on resettlement according to the Defence Policy Department's minute of 5<sup>th</sup> January 1970, (6/838). There was a choice between continuing to defer action until the outcome of the consideration by Congress of the 1971 US Budget, which would involve a probable delay of a year, or of taking steps now on resettlement in any event. The advantage of the former was that it reduced the leakage of information about the proposed US facility. The argument in favour of the latter was that the problem of the contract labourers in the Chagos existed independently of Diego Garcia plans. The Treasury was getting restive. The Mauritian Government might renew its pressure for compensation for those Ilois already in Mauritius which had been expected to be covered in the talks on resettlement which Dr Ramgoolam had expected to start in the summer of 1969 or thereabouts. Moreover, if the plan were begun now, it would be possible to avoid the two-stage resettlement plan. The key to the success of that plan would be the reaction of Mr Moulinie to the BIOT Commissioner's approach and his ability to keep the Government's intentions secret from the labourers. His co-operation was important, not merely because he managed Chagos but because he also leased Agalega from the Mauritius Government. The risk of a leak if he were informed, and provided the Americans agreed, had to be accepted "*in view of the stultifying inaction that must persist unless he is brought into our confidence*".

257. An impending visit by Dr Ramgoolam would be an opportunity to bring him up-to-date and it was recognised that the Mauritius Government had to be given an indication that the UK Government was prepared to assist with the resettlement of the Ilois who had been "*on the beach*" in Mauritius for up to two years now. The key to the resettlement problem was seen as Agalega. If most of

the Ilois could not be sent there, negotiations for resettling the remainder in Mauritius were thought likely to be difficult and protracted.

258. The new year was just over two weeks old when the draft Immigration Ordinance was brought out of cold storage for further discussion by Mr Aust, who had been asked to advise on whether it should be enacted and, if so, when. He set out the purpose of the Immigration Ordinance, \*(6/842)(P):

"(a) To provide legal power to deport people who will not leave voluntarily;  
(b) To prevent people entering;  
(c) To maintain the fiction that the inhabitants of Chagos are not a permanent or semi-permanent population."

259. He dealt with the power to deport in this way:

"3. The question has been asked whether the Government of BIOT needs this power. The Chagos Archipelago is, I understand, wholly Crown land, the private interests having been bought out when BIOT was established. ... it would therefore be possible for the Government to exercise its rights as landowners to turn people off the islands in the Archipelago. If people refused to go when asked, they would be trespassers and could be ejected with reasonable force. People who might refuse could be contract labourers, whose contracts had been terminated, or the pensioners who have stayed in Chagos. But forcible removal of such persons on the grounds that they were trespassers might be less attractive than forcible removal on the grounds that their presence was unlawful under the Immigration Ordinance; it also has a serious legal disadvantage in that the Government would have no power to say where they must go to. They could get on a boat and go to another island.

4. However, the Administrator of BIOT and the Attorney General of Seychelles should be asked for their opinions on which method they would prefer to be used. I do not think that the fact that a majority of those affected, the Ilois, are citizens of the United Kingdom (as well as citizens of Mauritius) affects the decision which method to use. If we are criticised for the deportation of citizens of the United Kingdom, it does not really matter whether the Government of BIOT is wearing its governmental or landowner hat. Either way, it will be 'the Government' which is pushing them out. The real test is which method is the most practical and convenient. It may be that both methods will have to be used ... . On balance, we would prefer to have an Immigration Ordinance in force in case it was needed. ...

#### 6. Maintaining the fiction.

As long as only part of BIOT is evacuated, the British Government will have to continue to argue that the local people are only a floating population. This may be easier in the case of the non-Chagos part of BIOT ... however, the longer that such a population remains, and perhaps increases, the greater the risk of our being accused of setting up a mini-colony, about which we would have to report to the United Nations under Article 73 of the Charter. Therefore, strict immigration legislation, giving such labourers and their families very restricted rights of residence would bolster our arguments that the territory has no indigenous or settled population."

260. He then turned to timing, which he regarded as a matter for local advice. It could create trouble if introduced now, unless it was made clear that contract labourers and their families would not be required to have a pass for the duration of their contracts. Pensioners could be assured they would be allowed to remain so long as defence requirements permitted. Mr Aust then turned to the evacuation of the whole of BIOT. His advice on the need for an Immigration Ordinance in relation to this had been specifically sought. He said this: the evacuation of the whole of BIOT was the most desirable solution to the BIOT problem from at least a legal, financial and UN point of view. An Immigration Ordinance would be necessary in those circumstances to stop people entering BIOT. *"Whether it would be needed in order to evacuate people from the non-Chagos part is more doubtful, as most are Seychellois and the numbers are much smaller"*, \*(6/844)(P).
261. On 22<sup>nd</sup> January, Mr Knight of the FCO's PIOD sent a memo, \*(6/846)(P), to Mr Lee dealing with the resettlement of the inhabitants of BIOT. He referred to an earlier note of Mr Sykes of 5<sup>th</sup> January urging that resettlement of the inhabitants of Chagos should be now considered rather than waiting for the Diego Garcia project to get underway, and to his discussions with Mr Aust. Mr Knight had previously had discussions with Mr Thomas of the Defence Policy Department which was clearly under the impression that the contracts with the labourers, plus the fact that the Crown owned all the land in BIOT, gave it sufficient powers to effect the resettlement of the inhabitants; but that did not appear to be the advice of Mr Aust, with whom he had subsequently discussed matters and who had felt that, on balance, an Immigration Ordinance was needed prior to any resettlement programme. Mr Aust had pointed out that one advantage of the Ordinance over the use of landowner rights was that the Commissioner would have power to direct a person to leave BIOT altogether, and indeed to send that person to the country to which he belonged, which would prevent a person island-hopping within BIOT.
262. On 27<sup>th</sup> January 1970, the FCO Defence Policy Department was asked for its views about the general problem of progress towards depopulating the territory. It was suggested that hitherto it had been the accepted view that the Archipelago should be depopulated whether the Americans went ahead with their plans or not, and because of the lack of certainty for many months, the view was expressed within the FCO that a start should be made now on depopulation, notwithstanding the difficulties which that would cause. Depopulation could take place over a longer time and the financial position on the plantations would worsen considerably the longer matters were left.
263. The BIOT Administrator thought it appropriate to distinguish between the Seychelles and Mauritian parts of BIOT, (6/852). The Chagos islands had an uncertain future, but considerable economic potential; if they were abandoned now, and the Diego Garcia project did not proceed, it would be probably too expensive later to resurrect them. The administrative advantages of relocating the population were seen by the Administrator as being the last consideration. It would be better to relocate the population over a period of two to three years. But no revocable decision should be made until Congress had reached a view later on in 1970. The BIOT Administrator thought that it would be unjustifiable economically and administratively to depopulate Farquhar and Desroche which were both profitable plantations and among the most productive of the islands of the Seychelles group, the abandonment of which would cause an uproar in the Seychelles. (It is to be noted that, the Immigration Ordinance notwithstanding, BIOT was not depopulated.)
264. The PIOD of the FCO disagreed, \*(6/855)(P). It was of the view that, in the circumstances, steps should be taken now to resettle contract labourers in the Chagos because of the risk that the longer the wait, the greater the danger of acquiescence, the continued existence of a settled population and of being held accountable to the UN for them, an ever-increasing financial commitment for

islands which could never be economically viable and in relation to which the Treasury had shown impatience, and lastly, the Americans could be understandably vexed with the UK's dilatoriness after all the time which it had had to make a start on depopulation. Mr Carter of the PIOD was not just in favour of the evacuation of the Chagos Archipelago but of the whole of BIOT. The whole objective behind the acquisition of BIOT was defence purposes and "*the sooner we clear the islands with that objective in view, the better.*" He was emphatic that, in order to prevent people entering and to clear the islands, the legal means of enforcement were necessary. To that end, he called on the advice of Mr Aust to the effect that an Immigration Ordinance was required to back up the Crown's rights as a landowner. The development potential of Agalega had to be established.

265. Mr Le Tocq of the East African Department commented on Mr Carter's minute, which had been sent to the FCO's Defence Policy Department, \*(6/856)(P). He was of the view that clearances should start without waiting for an Immigration Ordinance. He thought it unlikely that more than a very few Ilois would wish to remain in the islands if their contracts were terminated and they were deprived of their livelihoods. The presence of the Ilois in Mauritius and the need to deal with the Mauritius Government over them added urgency to his point. The US fears of leaks would be reduced if it was said that the islands were being cleared because the plantations were becoming uneconomic, \*(6/856)(P).
266. The FCO sent a telegram to the Seychelles on 18<sup>th</sup> February 1970, copied to many others. The memo identified the FCO's present thinking which was that a complete evacuation of the whole of Chagos was preferable to a two-stage operation to avoid undue attention being focussed on the Ilois and to avoid time for Ilois opposition to their resettlement on Mauritian territory to gain momentum. A US Congressional decision should not be awaited any longer and Moulinie, if it were safe to take him into Government confidence, should be asked to produce a development plan for Agalega to absorb as many as possible of the Chagos contract labourers. After receipt of that report, talks should begin with the Mauritius Government about resettlement of the Chagos contract labourers. Before those talks were concluded, it might be necessary to send an independent expert to Agalega to ensure that the new community would be established in decent conditions and a viable economy set up and maintained. Prior to resettlement, the BIOT Immigration Ordinance would be necessary. The resettlement of labourers from the former Seychelles islands of BIOT could not be deferred indefinitely. The Agalega plantations might be able to absorb them as well, (6/857).
267. The US agreed that Moulinie could be put in the picture to some extent by Mr Todd, who would put the proposal for closure of the plantations to him in the context of their declining viability and the Government's unwillingness to provide capital for their development. He should not refer to US intentions, but Mr Todd could confirm there was still a possibility that a facility might be established on Diego Garcia. It was necessary to put the approach to Moulinie straight away because of pressure from the Mauritius Government about those Ilois already there. The FCO told the Washington Embassy that even if there were no US proposal for Diego Garcia, \*(6/858)(R):

"We would still wish to close down the copra plantations on Chagos:

- (a) on economic grounds because they cannot be kept going as a profitable concern without the investment of new capital, and
- (b) because we do not want a mini-colony whose inhabitants

could, as time goes by, claim a right to remain in the BIOT by virtue of their citizenship of the UK and Colonies and who would have no right of entry to either Mauritius or the Seychelles when the latter achieves independence ..."

268. Failure to get things moving now could also delay the eventual US timetable for construction of their facility on Diego Garcia, particularly as after production by Paul Moulinie of his plan, an independent expert would be needed to vet it and construction of houses on Agalega could still take between nine and twelve months, and it was desired to avoid a two-stage resettlement process.
269. On 24<sup>th</sup> March 1970, the BIOT Administrator wrote to the FCO PIOD referring to a visit which one of the partners of Moulinie & Co had paid to him. He said that it seemed that Agalega had been struck by two cyclones and had had a bad season. Production had almost stopped. It would take two to three years to come back to full production. This was seen as having an adverse effect on resettlement plans because of the reduced need for labour and the reduced availability of money for investment. It was still, however, proposed to proceed with a request to Mr Moulinie to provide a development plan for Agalega, (6/860).
270. The United States agreed to Mr Moulinie being informed of the UK Government's intention to close the Chagos copra plantations and to him being asked to produce a development plan for Agalega to absorb as many as possible of the Chagos contract labourers and the Ilois already in Mauritius, (6/861). The declining viability of the plantations could be stressed and the fact of pressure from the Mauritius Government on resettlement help for those already in Mauritius could be alluded to. He was to be asked to stop recruiting Seychellois contract labourers and not to renew existing contracts with them.
271. Contingency press guidance, \*(6/874)(ND), was prepared by the FCO in case there was a leak about the Government's intentions to close the copra plantations in Chagos. It was to be said, if necessary, that they had been run down to the point at which it was uneconomic to continue their operation, that the people living on BIOT were contract labourers, engaged to work on the copra plantations, that the Government owned all the land and that the labourers owned no property or fixed assets and that except for some fishing, perhaps, and the meteorological station, the copra plantations were the sole means of livelihood for those resident on Chagos. They were all either from Mauritius or the Seychelles and possessed no land or houses on the island. The plantations were owned by the British Government and managed on their behalf. It was sent to the UK embassy in Washington.
272. In May 1970, the internal minutes in BIOT dealt with how Mr Paul Moulinie had reacted to being told by Mr Todd, the BIOT Administrator, that the operation of the plantations was not economically viable and the Chagos were to be closed down, (19/837(a)). Moulinie had agreed that there was no economic justification for continuing the operation unless capital could be made available, and that it would be best to close the plantations. Problems arose, however, when the question of Agalega was raised. The cyclones meant that the labour force now was sufficient to enable them to continue their planting programme and would be sufficient for the normal running of the plantation until some eight years hence when the newly planted areas were in production. The Commissioner therefore had to tell the FCO that the creation of extra jobs on Agalega would not happen as had been expected. It would not be popular to replace the Seychellois with Ilois because of problems which that would create in the Seychelles, and Moulinie

regarded the Seychellois as the better workers. There would be local opposition to any resettlement on Seychelles or ex-Seychelles BIOT islands. The question originally raised by Robert Newton in his report in 1964 that islanders might be given plots of land and settled on them, which had hitherto been thought of as too generous for land-less labourers, was mooted again as a starting point for negotiations on resettlement with the Mauritius Government. The only other alternative seemed to be, according to the Commissioner *"to send the Ilois back to Mauritius and to give them compensation in cash, either in a lump or in instalments. Either is unlikely to prove very satisfactory to the Ilois in the long run. They lack the knowledge, tradition and education to make satisfactory small-holders and any form of cash grant is likely to be soon spent"*. The upshot of the meeting was conveyed to the PIOD.

273. In his letter to FCO, Mr Todd described a lump sum and instalments as probably leading to the establishment of a class of permanent pensioners. As Mr Todd feared, the question of defence facilities had been buried so deep in the conversation that Moulinie & Co came back with an offer to lease the Chagos group from BIOT. This was considered by Moulinie & Co as likely to resolve for some time the problem of the Ilois on the islands. The plantations, according to Moulinie & Co accounts, had been run at a loss of Rs 80,000 in the year 1970-1971, (6/871).
274. This proposal from Moulinie required the Administrator of BIOT on the FCO's advice to have a further meeting with him, at which he laid special emphasis on the Government's firm intention to close the plantations and to permit no other economic activity. Moulinie provided Mr Todd with what he described as a long lecture on the economic opportunity which the UK Government was foregoing, (6/879). Moulinie also took what was described as a gloomy but realistic view of the future of the Ilois if they were returned to Mauritius. No labour was being recruited in July 1970 for the Chagos. He awaited the reaction on the islands to that development with interest. As the autumn wore on, Moulinie affirmed his willingness to provide resettlement for some Ilois on Agalega for some Ilois, if he received financial assistance. Detailed proposals and a five year plan were sought, but it was thought to be a good idea. There was a debate about a one off settlement versus a continuing subsidy. But it would not solve the whole problem.
275. Through the summer of 1970, the UK Mission to the UN was being advised to maintain the same line, if questions arose, which it had done so far as to the competence of the Committee of 24 to deal with Chagos. So far, the interest had been confined to the Seychelles context. The Mission had always tried *"to give the impression that there were no inhabitants as such in BIOT"*, though that was known not to be strictly true of Chagos, but any concession on that would mean Article 73 applied, \*(6/883)(ND). The people of BIOT, it was suggested to the UK Mission, were to be described as or implied to be *"transients"*, contract labourers from Mauritius or the Seychelles; the less said, the better, \*(6/928)(P). But this suggestion was rebuffed by the FCO as inapplicable to those who had been on Chagos for 3 generations but the wording, without *"transient"* still contrived that impression, \*(6/930)(P).
276. On 16<sup>th</sup> June 1970, the High Commissioner in Mauritius reported to the Foreign and Commonwealth Office on political developments in Mauritius. Unemployment and under-employment were stimulating what was described as *"much extra parliamentary pressure on Government. Indeed, this is virtually the only topic of public debate in the political or economic sphere. Government hypersensitive on subject and are desperately seeking labour-intensive palliatives"*. It pointed out that the resettlement of Mauritian contract labourers in Mauritius would inevitably be acutely embarrassing even with compensation. Its political line towards the presence of other powers in the Indian Ocean was changing as well, and special consideration would be needed to maintain its original generally favourable approach to the UK/US proposals, (6/885).

277. The FCO began to criticise the BIOT Administration for the poor performance of the plantations which had produced a net deficit in the three years to March 1971 of £62,300. Mr Todd explained that the deficit was due to capital expenditure occurring in 1968 when buildings and stores owned by Chagos Agalega Company Limited were purchased. The relationship between the Administrator and Moulinie & Co had to be put upon a legal and business-like basis according to the FCO, (10/94).
278. In July 1970, the Treasury took a further interest in the progress of resettlement proposals and it was concerned, in particular, with four simple questions: (6/886)
- a. when would the evacuation take place;
  - b. where would the inhabitants go;
  - c. how much would it cost; and
  - d. what would be the total cost of the operation and would it exceed the £10,000,000 authorised by the Ministers for the BIOT proposal.
279. Although the BIOT Administrator sought to prevent the recruitment of additional labour, it was accepted that it would be impracticable to stop all recruitment and therefore one year contracts should be provided so that staff could run the plantations at the minimum acceptable levels, (19/886(b)). Discussions between the FCO and the US about the difficulties of resettling the contract labourers examined the arguments for delaying the resettlement until after Congressional approval had been given to Diego Garcia. The problems with Agalega were identified, as well as the problems in Mauritius with the very high unemployment which it experienced. The question was raised as to whether discussions with the Mauritians should be deferred until after approval of the proposal by the US Congress, (6/887).
280. In the latter part of July 1970, Mr Todd, with a representative of Moulinie & Co, visited the Chagos islands, (6/910). Little had changed since his previous visit. The population on Diego Garcia was 324, of which 108 were Ilois, made up of 30 men, 25 women and 53 children. All but one of the rest were Seychellois. On Peros Banhos, 111 of the total population of 202 were Ilois, and again the vast majority of the rest were Seychellois. Of the Ilois, 25 were men, 25 women and 61 were children. On Salomon, 124 of the 154 population were Ilois, 21 men, 25 women and 78 children; again, the vast majority of the remainder were Seychellois. The number of Ilois were therefore reported as almost static. Two Ilois families left for leave in Mauritius and were to be re-employed on Agalega. The stock of rations on the islands was adequate and the shops were quite well stocked. A substantial increase in production was expected in 1971.
281. The UN Committee of 24 considered the detachment of the three islands from the Seychelles to make up BIOT in July 1970, (6/890). Various criticisms were made by the USSR, Sierre Leone and Ecuador. Tanzania expressed its hostility to the establishment of BIOT. But the criticisms were directed to the Seychelles part rather than to Mauritius. The UK representative said that there was no military activity on the three islands detached from the Seychelles, which was a point he made in response to what he regarded as a suggestion by the USSR that there were military activities of some kind which were impeding the independence of the Seychelles. But the USSR, with other countries, criticised the creation of BIOT for its detachment of islands from the Seychelles with the aim of establishing military bases in conjunction with the USA.
282. By the end of July, the FCO was writing to the High Commissioner in Mauritius explaining that the US "*wished to avoid publicity if that is still possible*", (6/905).

283. The High Commissioner in Mauritius advised the FCO in August to make a financial settlement for those people already in Mauritius who had already lost their jobs in BIOT; money might cover the cost of the provision of housing and social services by the Government of Mauritius, \*(6/908)(P). In November, \*(6/933)(PR), recognising severe unemployment in Mauritius, he said that "*we have been stalling now for far too long over the request for assistance in the resettlement of Mauritians who arrived from BIOT in March 1968*", untrained and destitute, and as the result of events in BIOT over which Mauritius had no control. This problem should be dealt with before the far graver problem arose, of the rehabilitation of a further 450 Ilois, a UK responsibility. The existing basis of compensation was inadequate; could they not stay in Chagos or go elsewhere?
284. In Parliament in November, Mr Dalyell renewed his interest in BIOT. Stimulated by an article in the Observer, lines to follow in answer to possible questions were prepared. The advice to Ministers in answering questions \*(6/936)(P) was that it was undesirable for it to become general knowledge that some inhabitants had lived in Diego Garcia for at least two generations and could be regarded as "*belongs*". The whole object was to avoid admitting that. It was proposed to say that it might have been the custom for the last generation or two that certain families had been contract workers, \*(6/938 and 9)(P). Discussions continued on the precise drafting and the average contract time. So far as I am aware, I have not seen any actual answer.
285. The US Congress approved an "*austere naval communications centre*" for Diego Garcia in December 1970, (6/943). The Governor of the Seychelles thought by December 1970 that temporary resettlement on Peros Banhos and Salomon was the "*only practicable solution*"; the Ilois should receive special treatment. Mr Todd should be able to give them some indications of the ultimate resettlement proposals; resettlement in Agalega would take at least a year, but the Ilois on east Diego Garcia could be moved to Peros Banhos and Salomon, \*(6/948)(P). This would meet the US proposal for evacuations by March and July 1971; construction was expected to start in March 1971 and to last for 3 years.
286. The FCO thought it appropriate to consider the timing of the enactment of the Immigration Ordinance with as little publicity as possible and so informed the BIOT Commissioner, \*(6/953)(ND).
287. In a further telegram of 11<sup>th</sup> January 1971, the BIOT Commissioner referred to the Immigration Ordinance and said that it would have to be published in the BIOT Gazette "*which has only very limited circulation both here and overseas*". The publicity would be minimal. He sought the approval of the FCO for the enactment of the Ordinance, (7/979).
288. There was a report in "*Le Mauricien*" of the expulsion without compensation of 300 Ilois from Diego Garcia. A Mauritian lawyer-politician, Guy Ollivry, was reported as saying that they had returned to Mauritius since independence and seemed still to have British nationality, (6/955). But the FCO legal adviser noted that Ilois had dual nationality; some young Ilois might lose their Mauritian nationality if they did not renounce UK nationality by the age of 22. He counselled the wisdom of keeping quiet if possible about that dual nationality, \*(6/956)(P).
289. On the preceding day, the High Commissioner in Mauritius had sent to the FCO a newspaper report in "*Le Mauricien*", the national newspaper in Mauritius, of 300 Ilois said to have been expelled from Diego Garcia without compensation and to be in some difficulty as a result. This, he said, was the first reaction to the news of the US base, (6/954). M Guy Ollivry, a lawyer and deputy for the Rodrigues constituency, had said that the Ilois had come back to Mauritius since independence "*and it would seem therefore that they still have British nationality*". (6/955) It was thought that more would be heard of the problem of these people, given, in particular, M Ollivry's interest in it.
290. By 23<sup>rd</sup> December 1970, the FCO was sending a telegram to the BIOT Commissioner dealing with how best to meet the US request for total evacuation



of Diego Garcia by July 1971. The FCO recognised the difficulties, but said "we must try our utmost to [meet this timing]". He recognised that some Ilois had reached the age of 21 since Mauritian independence and had not renounced their Mauritian nationality which meant that might have to be forfeit because they failed to renounce their UK nationality. This would be an additional embarrassment if the Mauritius Government "*tumbled to dual citizenship of Ilois*", \*(6/957)(P). There were no new thoughts as to resettlement. The same options as had already been discussed were repeated, but the only difference now was that the shortness of time would be the key factor. It was likely that resettlement in Peros Banhos would have to apply on a staged basis to at least some of the Diego Garcia Ilois. The Government of Mauritius had given no indication that it would not regard Mauritius as the natural home for the resettlement of Ilois, but it was worth considering a variety of options. These included the use of the outer islands of the Seychelles, staged resettlement on Peros Banhos and Salomon and the resettlement of some on Agalega. There was a need to have further information as to costs of termination of contracts, resettlement compensation and the implications of a staged resettlement on Peros Banhos for the displaced Seychellois labourers. The Commissioner said that there was no objection to a two-stage move. The Ilois could be relocated on Peros Banhos and Salomon.

291. A letter from Mr Todd to the FCO of 13<sup>th</sup> January 1971 confirmed that he had been told by Moulinie & Co that the normal contract had been for a two year period for Chagos rather than a specific named island, (7/983). He further explained what he called the "*migratory habits*" of the Ilois. This was that, according to Mr Moulinie, up to 1967 when direct links with Mauritius ceased and only a few families had gone to Mauritius via Seychelles and a few had taken new contracts, Ilois would do two to five years on the islands and then take advantage of their free passage to Mauritius staying there for a period which depended on how long their money and welcome from their families lasted, but normally returning after an absence of between three months and one year. Often Ilois women would go to Mauritius to give birth and be away for between three and six months.
292. An inter-departmental meeting took place on 15<sup>th</sup> January 1971 concerning resettlement arrangements in the light of the visit which had been paid by US officers to the Seychelles, (7/985). The upshot was a general expectation that Peros Banhos and Salomon could be gradually cleared by normal wastage as contracts expired, provided there was scope for gradual absorption on Agalega. Although this was thought to be perhaps over-optimistic, few snags were expected.
293. There was to be a Commonwealth Prime Minister's conference in January 1971 and a briefing paper dealing with BIOT was prepared for it, \*(6/960)(P). It continued to advise that reference to dual nationality should be avoided and that the position of the 100 families already in Mauritius should be dealt with by saying that action had been delayed pending the opening of general discussions on resettlement. The US intended to use only Service personnel and if it was asked whether Diego Garcia was inhabited, they should say that "*a small number of labourers from Seychelles and Mauritius work on the plantations*". Their contracts would be terminated and they would be returned".
294. In January 1971, in preparation for discussions between the Mauritius Government and the UK Government on resettlement compensation, the High Commissioner in Mauritius urged the FCO that compensation should be generous. He urged that the UK Government furnish aid and technical assistance to cover the cost of repatriation and rehabilitation (housing and resettlement), both of the Ilois in Chagos and of the Ilois in Mauritius under a scheme "*which is designed to benefit the Island's economy as a whole*" taking account of economic and sociological difficulties. A pilot project was suggested which would amount to a cost of £750 per family exclusive of housing. However, it was thought necessary that an outside expert in resettlement schemes should visit Mauritius and the

Ilois to enable him to be familiar with their skills and background and come up with a comprehensive scheme "*designed to reintegrate them economically and socially into the pattern of life here*". The High Commissioner also said that the Mauritius Government might feel that the UK had "*got away with the Ilois here and must not be allowed to get away with any more*". He said that if they were no longer wanted in a British possession and were to be cast out in "*this inhuman fashion*", the Mauritius Government attitude might be that they had to find some other British possession to take them. The Governor of the Seychelles did not think that there was a danger of extra compensation being claimed for the Seychelles but publicity for extra compensation for the Ilois could trigger such a claim and so publicity was best minimised until after resettlement. Differential treatment could be explained by the high unemployment in Mauritius, \*(7/980).

295. On 13<sup>th</sup> January 1971, \*(7/984)(ND), the High Commissioner in Mauritius wrote to the PIOD of the FCO pointing out that the resettlement of Ilois in Mauritius had not been discussed with the Prime Minister of Mauritius since 1965, notwithstanding anxious enquiries which they had received in relation to Ilois from BIOT arriving in Mauritius some years before. The High Commissioner said that when the Prime Minister of Mauritius was approached on the question of the resettlement of more Ilois, it would "*come to him as an unpleasant shock*". He had not expected a further 450 Ilois from Diego Garcia. The Commissioner said:

"Naturally, I shall not suggest to him that some of these have also UK nationality; this, as you say, would make for increased difficulties if the Mauritians realised that some were also of UK nationality. However, I suppose it is always possible that they may spot this point, in which case, presumably, we shall have to come clean".

296. By the end of January 1971, the FCO made a submission to Ministers on resettlement, \*(7-1004)(ND). The US were seeking evacuation of Diego Garcia by July, if possible, because of their security arrangements. The submission to Ministers dated 26<sup>th</sup> January 1971 by civil servants in the FCO AIOD said that the time had come to implement arrangements agreed in principle by the previous Administration by which the population of the Chagos Archipelago should be resettled, partly in Seychelles and partly, subject to negotiations with Mauritius Government, in Mauritius. The submission pointed out that it had been known since 1965 that if a defence facility were established, the contract copra workers would have to be resettled elsewhere. But it continued:

"It is desirable moreover, to arrange for the total evacuation from the Chagos Archipelago of the present population, who are essentially migrant workers. If BIOT is to fulfil the defence purposes for which it was created, there should be no permanent or even semi-permanent population, in respect of which we might in time incur, under Chapter XI of the UN Charter, a variety of obligations including the 'sacred trust ... to develop self-Government'."

297. The submission said that there were about 829 in the Chagos Archipelago, (7/1004), of whom 359 lived on Diego Garcia and the remainder on the two other inhabited island groups. Of this total, 386 were dual citizens of the UK and Colonies and of Mauritius but these, the Ilois, were unaware of their dual nationality, nor were the Mauritius Government aware of it. There were 35 citizens of Mauritius and 408 citizens of the UK and Colonies from Seychelles. The submission referred to the Mauritius Government spokesman's answer in the Legislative Assembly in December 1965, given with the approval of the Colonial Office that the British Government had undertaken to meet the full cost of the resettlement of Mauritians at present living in the Chagos Archipelago. It had

always been assumed that the resettlement would be in Mauritius and it was thought that that was the understanding of the Mauritius Government as well. However, because of the already high level of unemployment, it was to be expected that negotiations would be difficult. There were already about 100 families in Mauritius whose contracts to work in Diego Garcia had not been renewed and in respect of whom the Mauritius Government had been asking how the UK Government intended to fulfil its obligations. An answer to that had been delayed pending a decision about resettlement as a whole. Once again, the suggestion that some might be resettled in Agalega raised its head, but it was recognised that there would have to be some inhabitants moved temporarily to Peros Banhos and Salomon. This interim measure was seen to have no practical difficulties. There was a strong objection to Mauritians being settled in the Seychelles. It was pointed out that of the £10,000,000 originally allocated for the establishment of BIOT, all the money had virtually been spent on payments to Mauritius, the building of the Seychelles Airport and the purchase of the islands, and accordingly there was virtually nothing which could be used for resettlement purposes and that additional funds would be required for it. It was recognised that the evacuation and resettlement of several hundred people would attract unfavourable publicity from critics of the UK's Indian Ocean strategy. The submission had the concurrence of the relevant departments within the FCO, the Overseas Development Agency and the Ministry of Defence. The Treasury had concurred on understanding that any expenditure over £10,000,000 would be met from within existing provisions and *"subject also to the conditions that resettlement costs shall be kept as low as possible and shall be charged in the first instance to the unspent balance of the sum of £10,000,000"*.

298. The problem of who was to pay for what was to be of some significance. On 26<sup>th</sup> January 1971, the FCO Finance Department, concerned that it might be the FCO which had to find any extra money, was already pointing out in relation to the draft submission, that it had no more than a minimal sum of money available without facing very difficult problems, and expressed the view that the expenditure was defence or aid expenditure, (7/991). Mr Kershaw, one of the Ministers at the time, was concerned about criticism in Parliament arising from the removal of people, but is recorded as having the view that provided the arrangements for treating the inhabitants, and particularly the Mauritian Ilois, were *"demonstrably fair"*, it should not be too difficult to rebut criticism, (7/1001).
299. On 8<sup>th</sup> February 1971, \*(7/1008)(ND), the AIOD pointed out that there was no real prospect of employment in BIOT, that it was a non-starter to suppose that any Mauritian Ilois might be settled in Seychelles, that there were very few opportunities in Agalega and there would be difficulties in persuading the Seychellois and Mr Moulinie to employ Ilois there rather than Seychellois. He pointed out that all interested departments, FCO, MoD and ODA *"are on record with well-argued reasons why the costs [of resettlement] should not fall to their particular Vote. The Treasury have agreed to arbitrate, but have not yet given their ruling. There may be dust and heat before departmental liability is finally determined, but there is not, I think, any disposition to argue against HMG's having to pay up"*. (7/1010). The Secretary of State noted on this memorandum *"I smell trouble here, and we should make a definite plan now. I don't see why the Americans shouldn't allow some to stay. Could they not be useful?"* (7/1013, 016). Mr Kershaw had also concluded, according to a minute of 11<sup>th</sup> February 1971, \*(7/1017)(ND), that more definite plans were needed and that it was necessary to know exactly what was to be done for the inhabitants before a firm decision to move them could be taken. The Americans should be asked to examine employing some on Diego Garcia. So far as the people on Diego Garcia were concerned, the Secretary of State advised the BIOT Commissioner that when Mr Todd visited Diego Garcia with the Americans later in January, he should tell the contract workers that construction work was to begin in March on Diego

Garcia and it would therefore be necessary to stop work on the copra plantations. *"The British Government are considering what can be done to help the people concerned. A first step is likely to be a move from west to east side of Diego Garcia"*. It would be important at that stage to avoid any distinction being made between what was said to Seychellois and what was said to the Mauritians including the Ilois, (7/975). If necessary, and if he were asked questions about Mauritians going to Mauritius, he would have to say that he could not speak for the Government of Mauritius, but that all workers were to be assured that he will see that, insofar as it was in his power, the best possible arrangements were to be made for their future. That was to include Ilois.

300. The Secretary of State followed this up with a further telegram on 8<sup>th</sup> January 1971 seeking to know, as soon as possible, the proposed timetable for the movement of all the inhabitants off Diego Garcia to meet the July deadline, whether the contracts specified that the labourers worked anywhere in Chagos or on a particular atoll, and whether there would be adequate housing and other welfare facilities when the inhabitants moved within Diego Garcia and later to Peros Banhos and Salomon, (7/977). The use of civilian labour should be avoided as much as possible. The timetable was set; Seychellois would be moved in March or April 1971, and the balance in July. The majority of contracts specified Chagos, but some the particular atoll. The BIOT Commissioner also told the FCO that, so far as costs were concerned, a detailed estimate was not yet possible, but there seemed no danger of a claim for extra compensation for Seychellois, but if a more generous scheme for resettling the Ilois were publicised, it might spark off claims from them and negotiations with Mauritius should avoid such publicity at this stage, (7/980). It was hoped that publicity would be minimised until final resettlement. Once again, there was confirmation from the Americans that there would be no employment of Ilois as local labour.

301. Mr Watt, of the AIOD of the FCO, prepared a note of 12<sup>th</sup> February 1971, \*(7/1018)(ND), on resettlement in which he referred back to his earlier memos of 8<sup>th</sup> February 1971 and 26<sup>th</sup> January 1971. He traced the background to the resettlement proposals. He dealt with the arguments for and against the permanent resettlement of Peros Banhos and Salomon; the advantages of keeping labour on the islands which were unlikely to be wanted by the Americans against the problems that a permanent population would attract for UN purposes. He referred to the problems about consulting the Mauritius Government until after the US Congress had approved the proposals because of the Americans' desire to avoid publicity. He reiterated the view which he had expressed that the Seychelles Government should be asked if it were willing to take at least some Mauritian Ilois as a further service, which strengthened the relations between the Seychelles and the UK. But his final conclusion was that the best course would be to go ahead with negotiations with Mauritius *"and be prepared to pay the price"*, an approach to the Chief Minister of the Seychelles notwithstanding.

302. On 16<sup>th</sup> February 1971, Mr Aust of the FCO Legal Advisers Department, noted the potential implications for BIOT of the proposed new British Nationality and Immigration Legislation, \*(7/1020)(ND). BIOT, he said, is *"of course, in law, a colony, although we do not accept that it has any indigenous population ... Thus to create a citizenship for BIOT is politically quite out of the question"*. He said that there would be no objection to depriving dual nationals of their British nationality but that there would still be some who would have lost or might yet lose their citizenship of Mauritius: those who attained the age of 21 after Mauritius independence and did not renounce their UK citizenship within twelve months of becoming 21. A separate category of citizenship would be needed to cover such persons or they would become stateless. They would lose their Mauritian citizenship unless they had been absent from Mauritius during the twelve months after becoming 21, (this exception would appear to cover Ilois).

303. On 17<sup>th</sup> February 1971, Mr Todd, the BIOT Administrator, wrote to the FCO describing the visit which he paid to Chagos at the end of January. He went with a US reconnaissance party and Mr Paul Moulinie. He said: (7/1021)

"On 24<sup>th</sup> January, I told all the inhabitants that we intended to close the island in July but, that for some time, we would be continuing to run Peros Banhos and Salomon and that we would send as many people as possible from Diego Garcia to those two islands. This drew no comment from the Seychellois but a few of the Ilois asked whether they could return to Mauritius instead, and receive some compensation for leaving their 'own country'. I played this one into touch by saying that our intention was to cause as little disruption of their lives as possible and that due to the difficulties of communications with Mauritius, it would not be possible to arrange a return there until towards the middle of the year... ."

304. He estimated that in July on Diego Garcia there would be 36 Ilois families, made up of 36 men, 37 women and 64 children, together with 1 Mauritian and 45 Seychellois families. He said that the Ilois families should go to Peros Banhos and Salomon. It should be possible to absorb them with some reorganisation, without premature termination of the Seychellois contracts on those islands, (7/1021). He said:

"It would, I consider, be fair to pay each of the Ilois families who are moved to Peros Banhos Rs 500 to compensate them for the move which will involve them in some expense as they will have to leave some of the fittings which they own in their own houses."

305. This would add a further £1,350 to the cost of the move. He then dealt with the problem of those Ilois who would prefer to go to Mauritius or Agalega. Mr Moulinie had agreed to transfer those who wished to go to Agalega, but the Administrator said that it would be embarrassing if those who wished to go to Mauritius arrived there with at most "*their Rs 500 disturbance payments in their pockets*". The only solution would be to try to encourage them to go to Peros Banhos and Salomon, confining the offer of Rs 500 only to those who did so would help, but it would also be helpful to say that the move to Peros Banhos and Salomon was only temporary "*whilst we worked out a detailed scheme to provide adequately for their future*". Mr Moulinie was said to remain hesitant about plans for Agalega.

306. On 19<sup>th</sup> February 1971, Mr Watt prepared a further memo internally in the FCO, \*(7/1029)(ND). This confirmed that there would be no local labour employed on Diego Garcia, but that, for the foreseeable future, labourers moved to the other islands in Chagos, where facilities were adequate, would not be disturbed. A draft Parliamentary answer that the population was a small number of contract labourers from the Seychelles and Mauritius attracted the comment: "*is 400 a small number?*", but the Minister, Mr Kershaw, noted that it would do from a Parliamentary point of view. The Foreign Secretary said that he could see no reason why some should not stay. It appeared that there might be some signs that the Chief Minister of the Seychelles might be prepared to take some Ilois Mauritians, but a good deal more information and assessment would be necessary. He repeated his recommendation that the Mauritius Government should be approached in order to establish how far they would be prepared to help. Mr Moulinie should be encouraged to take 50 families on Agalega, a Mauritius island. Although it appeared from discussions with Sir James Mancham, the then Chief Minister of Seychelles, that there might be some possibility in certain circumstances of Mauritian Ilois being resettled in the Seychelles, there were considerable doubts as to whether Mr Rene and his party would agree to that without causing trouble. Ministers were anxious to resettle the Chagos

inhabitants without major upset with the Mauritius Government or at the UN, \*(7/1033)(ND).

307. On 26<sup>th</sup> February 1971, \*(7/1042)(ND), the FCO and the High Commission in Mauritius discussed who would be an appropriate person to advise on the resettlement programme in Mauritius for the Ilois, negotiations with the Mauritius Government and negotiations with Moulinie & Co over Agalega. For the latter, it was said that HMG had to make a concrete offer of assistance to Moulinie which had now been approved by Ministers. The discussions with the Mauritius Government were to cover the 100 families already *"on the beach"* in Mauritius and *"say 60"* Mauritian families from Chagos. The High Commissioner's views were noted; he placed great importance *"on offering immediately, in principle, both a free grant and technical assistance to help set up a proper viable economic scheme ... to benefit the Mauritius economy as a whole"*.

308. Mr Aust, meanwhile, was concerned with nationality and the undertakings offered in 1965 by the UK Government to the Mauritius Government. In a memo of 26<sup>th</sup> February 1971, \*(7/1036)(P), internally within the FCO, he said that he thought that undue emphasis had been placed on dual nationality and the line should be taken that that was irrelevant to the question of resettlement. He discussed the effect of the Mauritius Independence Act 1968 pointing out that it preserved dual citizenship of Mauritius and UK and Colonies for those inhabitants of Chagos who, or whose fathers or fathers' fathers, were born in Chagos. Persons born in Chagos before BIOT was created were regarded as having been born in Mauritius and therefore automatically entitled to Mauritian citizenship on independence, unless they were persons whose fathers had been born in Seychelles. The dual citizenship had not been removed because, said Mr Aust, it would have been contrary to the principles of our Nationality Law to deprive persons born in a colony of their UK citizenship. Mr Aust then turned to the term *"Ilois"*. He said the term had no relevance to nationality and had been used as a convenient, though thoroughly misleading term, to cover dual nationals when, in fact, *"the Ilois population is made up of citizens of the UK and Colonies, dual nationals and mono-Mauritian citizens, with origins in Seychelles or Mauritius"*. There was no advantage in using the term in negotiations and it could be to the disadvantage of the United Kingdom to do so because it indicated that the inhabitants of Chagos *"have a close, if not closer, connection with Chagos than with mainland Mauritius"*. He thought that fears of referring to dual nationals in Chagos, lest the Mauritius Government used such knowledge to their advantage at the UN or in negotiations, were exaggerated and that instead of concentrating on nationality or the meaning of *"Ilois"*, the Government should concentrate upon the undertakings given to Mauritius in 1965. He said that it was clear from the undertakings in 1965 that the resettlement of persons in Mauritius of Mauritian origin was contemplated. There was no suggestion that it would not apply to Mauritians who were also United Kingdom citizens because, in 1965, all the inhabitants of Chagos were UK citizens since there was no Mauritian citizenship until 1968. It was a necessary implication of the agreement to meet the full cost of resettlement that that placed an obligation on the Mauritius Government to permit resettlement in Mauritius. There would have been no need for such an undertaking if settlement elsewhere had been in contemplation. Mr Knight agreed with these comments, but added that if the question of nationality were raised by the Mauritius Government, the FCO line should be to: (7/1044)

"(i) Admit immediately to the existence of the dual nationals, and  
(ii) Maintain that nationality has no bearing on the negotiation."

309. He also pointed out that there was still no decision from the Treasury as to who would bear the costs of resettlement if it took the BIOT budget over £10,000,000. In a further note, \*(7/1046)(ND), Mr Knight said that it was not at present the UK Government's policy to advise the *"contract workers"* of their dual citizenship nor the Mauritius Government, but this policy *"of concealing this dual nationality"* might change in the coming months, but otherwise agreeing with the previous comments of Mr Aust on the effect of new nationality legislation.
310. On 12<sup>th</sup> March 1971, the FCO wrote to the High Commission in Mauritius saying that it had been accepted by Ministers that *"our best course is to resettle, as quickly as practicable, the entire population of the Chagos Archipelago"*, notwithstanding that the Americans had recently confirmed that it was only Diego Garcia that was likely to be required for the foreseeable future, (7/1048). It was not considered appropriate to *"clear out Diego Garcia"* alone because the other islands might be required one day, the possibility that they might be required discouraged new investment, and *"third, we do not wish to be accountable to the United Nations for any permanent inhabitants of BIOT"*. Thus, the move of Diego Garcians to Peros Banhos and Salomon was only a temporary measure, pending final resettlement. It was not thought that there would be any difficulty in re-absorbing Seychellois workers in the Seychelles, but resettlement of the remaining Mauritian/Ilois workers in Mauritius might cause difficulties there *"since these people have little aptitude for anything other than growing coconuts which doesn't happen in Mauritius; and may add to the already grave unemployment problem"*. Hence, Ministers were anxious that *"to the extent possible"* resettlement of Mauritian or Ilois families on other coconut plantations in the Indian Ocean area should take place. Agalega was the only place identified and that for 50 families. The advice to the Commissioner described how negotiations might be tackled: an acceptance of the commitment to meet the full cost of resettlement of the Mauritians living in Chagos in 1965, which included therefore the 100 or so families who returned to Mauritius after 1965; a repatriation and rehabilitation scheme based upon expert advice would be necessary, but possible methods were yet to be considered in detail and the Commissioner could not commit the Government to any particular scheme or to any particular amount of money because no realistic figure had been put to the Treasury. The Treasury was insisting that all costs be kept *"as low as possible"*. Mr Aust's views were to be used if dual nationality were raised, but it had to be assumed that the Mauritian authorities were aware of the dual nationality of some of those involved. Mr Watt of the FCO also sought to use an identified expert, then in the Seychelles, to examine the feasibility of the development of plantations in Agalega.
311. On 23<sup>rd</sup> March 1971, (7/1060), an FCO official wrote to the Treasury pointing out that Ministers had agreed to the proposals in the submission dated 26<sup>th</sup> January 1971 and that therefore arrangements were being put in hand to resettle as quickly as practicable the entire population of the Chagos Archipelago with Diego Garcia being cleared of its population by June. The High Commissioner was to approach the Mauritius Government but without authority to commit the UK Government to any expenditure, accepting the Treasury's conditions that total resettlement costs had to be kept as low as possible *"(but, consonant, of course, with equity and HMG's interests as defined by Ministers)"*. The cost of preparing houses on Peros Banhos and Salomon would be met from BIOT's annual account, £3,000 would be required in respect of Seychellois on Diego Garcia as compensation for premature termination, and £1,350 would be required for Mauritians being removed temporarily from Diego Garcia to the other islands. This was suggested *"both to avoid hardship to the individual families concerned, and because we consider there is a risk of endangering the success of the resettlement negotiations if a back-stage chorus of islanders were to come into*

*being protesting loudly to Mauritian politicians that HMG were treating them callously and unfairly". (Note from Mr Knight).*

312. On 25<sup>th</sup> March 1971, the Governor of Seychelles and the BIOT Commissioner wrote to the FCO (Mr Scott) pointing out a number of matters relating to resettlement, \*(7/1063)(P). First, he said that:

"It is important when dealing with the problem of the Ilois from Chagos to appreciate what type of people they are. They are extremely unsophisticated, illiterate, untrainable and unsuitable for any work other than the simplest labour tasks on a copra plantation. This is not altogether surprising as they have spent all their lives on remote islands."

313. The effect of that was that they would be limited to work on copra plantations on the Seychelles outer islands or similar agricultural work, but there was not yet any need to import low-grade labour. The Chief Minister of the Seychelles was extremely worried at the political implications of any Ilois coming to the Seychelles because he would be in real difficulties over completely unskilled foreign labour going there when there was no need for it; Ilois would be regarded as Mauritians who were particularly unpopular there. By now, it was clear that there was no prospect of any Mauritian Ilois being settled on the Seychelles. The alternative of Farquhar island, also within BIOT, was raised as a possible place for 100 extra men. Agalega was also referred to, but there would be problems in the Seychelles if the Seychellois working there were displaced in large numbers at any one time. It might be better, he thought, to allow the Ilois to remain on the plantations on Peros Banhos and the Salomon islands, even though the copra plantations on those two islands would not be, by themselves, viable. Around this time there were thought to be 103 Mauritian families in Chagos who would need to be resettled, whether in Agalega or Mauritius.

314. On 29<sup>th</sup> March 1971, the High Commissioner and the Prime Minister of Mauritius met to discuss resettlement. In a telegram, (7/1057), the High Commissioner said that the Prime Minister of Mauritius had accepted the plans for rehabilitation for workers of Mauritian origin in Agalega and Mauritius, but wanted the possibility of local employment for Ilois on Diego Garcia to be pursued with the Americans, recognised the possibility of resettlement in Agalega provided that the families themselves were happy to live there, considered that a British expert should examine seriously the possibility of coconut plantations in Mauritius because that would be a new development in the economy, and said "*that we must treat these displaced persons with the greatest of consideration and that he counted on HMG to do their best to cushion the impact of this inevitably unpopular move*".

315. By the end of March, however, one issue appeared to have been settled by the Treasury ruling that the ODA budget should be the source of funds to meet the cost of resettlement in excess of the £10,000,000 originally provided for BIOT from defence votes. The ODA, however, notwithstanding that ruling wished to continue to debate the point. Mr Watt complained about this, saying "*but we have all along been concerned to resettle these people humanely and, if at all possible, usefully*", (7/1072). The possibility of coconut plantations being created on Mauritius was now to be examined and so the ODA was the obvious source of resettlement funds. On 2<sup>nd</sup> April 1971, Mr Watt prepared a note for the discussions with the Prime Minister of Mauritius when he visited the UK at the end of April, (7/1074). He said that he had asked the BIOT Commissioner to look at the possibility of the coconut expert going to Mauritius to look at a plantation scheme "*though at this stage, we cannot be committed to it or indeed to employ Mr Windsor. It may be that the scheme is agriculturally or economically unsound, but we shall have to keep open minds on this ...*". He pointed out that even if the



ODA were to lose its Ministerial appeal against the Treasury ruling, it would continue to be reluctant to do more than the minimum and the Treasury would be reluctant to see more money spent.

316. Once again, the FCO proposed to approach the Americans to see if there any prospects of their employing local labour but without much hope. Indeed, it transpired shortly that the Americans themselves had told the Prime Minister of Mauritius that there was no prospect of their doing so. The FCO were clear that this avenue was closed and that their several approaches to the Americans had yielded no change of heart and that had to be explained to the Prime Minister.
317. On Diego Garcia meanwhile, construction work had commenced shortly after the landing of US construction battalions. A report from a RN Captain visiting the island noted the rapid build-up of men and machines and the prodigious progress which they were making. He said of the plantation manager that he was sad that he and his workers had received no offers of compensation and reported his comments that the older islanders were also apparently sad at going and those born on Diego Garcia were apprehensive.
318. By mid-April, the FCO was pressing the ODA for the offer to the Mauritius Government of an expert in coconut plantations, unless this was a waste of time, and of a resettlement expert. However, there was no real prospect of any expert visiting Agalega and reporting on the development proposals of Mr. Moulinie before even mid-May.
319. On 16<sup>th</sup> April 1971, the BIOT Immigration Ordinance was enacted. It was published in the BIOT Gazette three days later.
320. The FCO responded to the BIOT Commissioner's note of 25<sup>th</sup> March pointing out that even though the Seychelles was recognised to afford no solution, Ministerial instructions had been to explore every option and to keep open as many options as possible including a gradual replacement of Seychellois on Agalega with Ilois, \*(7/1082)(P). One option which was not attractive was resettlement on other BIOT islands, because of the inadvisability of having a permanent population in which the UN could take an interest. But this did not mean that the workers should be hurried out before "*satisfactory arrangements*" had been made to resettle them.
321. The Prime Minister of Mauritius had a further meeting with the High Commissioner in April but, apart from expressing concern over the need for more British defence support in Mauritius, seemed to have no great concern about the repatriation of Ilois to Mauritius, although he had been emphasising his desire to slow that down so as to reduce the impact on the Mauritius economy as much as possible. The High Commissioner advised the FCO to "*play this affair slowly*" with a view to avoiding any further repatriations. But there had been no response to the UK Government's request for discussions about resettlement schemes, (7/1088).
322. On 27<sup>th</sup> April 1971, Mr Watt, to whom the Mauritius High Commissioner had reported on his meeting with the Prime Minister, received a letter from the ODA in which the discouraging views of its agricultural adviser on possible coconut plantations in Mauritius were reported. This had been the idea of the Mauritius Prime Minister. A particular problem was the long period of time before any new plantations would yield any return. However, it was prepared in principle to finance a study, (7/1090).
323. On 30<sup>th</sup> April 1971, the Treasury was asked to agree to the payment of Rs500 to each of the 37 Ilois families who would leave Diego Garcia for Peros Banhos and Salomon. This would total £1350. Their chickens could not be transferred because of disease, their vegetables, which were recognised to form part of their basic diet, would have to be left and replanted, and certain fixtures and fittings in the houses would have to be left behind and replaced. The Treasury agreed a week or so later.
324. At the beginning of May, the Secretary of State met the Prime Minister of Mauritius. He was briefed on what to say by FCO officials. The Brief,

\*(7/1093)(P), refers to the 55 families ,or some 170 people, whose contracts had been terminated in 1967 and who had returned to Mauritius where they seemed *"to be loafing at cost to Mauritius social services"* There were 103 families or just under 400 people still working in BIOT to be resettled, if possible elsewhere than Mauritius. Agalega was the best place and an expert in copra had produced an encouraging report; it appeared that he had yet to go there. A pig-breeding scheme on Mauritius was a possibility now that coconut plantations did not offer much hope. Officials of both governments should work together to pursue the various ideas with experts, *"with the aim of devising a comprehensive plan of resettlement acceptable to both Governments."* The pig-breeding scheme appears to have been the idea of a Mauritius Minister, Mr Ringadoo.

325. Mr Ringadoo told a High Commission official that the Ministry of Labour had tried unsuccessfully to interest the Ilois on Mauritius in tea and fibre production; they were a continuing liability on social services and outdoor relief. Other ideas for a resettlement scheme were canvassed with him, (7/1097).
326. Meanwhile Mr Moulinie was continuing to make optimistic noises about the prospects of production on Agalega and with costs and compensation covered, he could provide work for 50 families in the short term and 200 families in the long term. This was something which it was thought he should discuss with Mr Ringadoo. An early indication of the views of Mr Windsor, the copra expert who had by now visited Agalega, was favourable. The attitude of the Prime Minister of Mauritius, in discussion with an FCO Under-Secretary, was that resettlement in Agalega was fine provided that the workers wanted to go there, for there could be no question of forcing them to go there. The difficulty of such plantations in Mauritius was pointed out.
327. Mr Windsor concluded in his Report that at least another 100 Ilois families could be absorbed on Agalega if there were increased mechanisation, new housing and improved medical and educational facilities. The BIOT Commissioner thought that the next step should be a development plan based on a more detailed report from Mr Windsor, followed by negotiations over what financial assistance the UK Government should give. Internal FCO minutes assessed the costs of resettling 160 families, including 55 who were *"on the beach"* in Mauritius, would be of the order of £210,000 plus various other items. This was seen by at least some in the FCO as the way to proceed, persuading Mr Moulinie to accept 150 or so Ilois families, but if they were unwilling to move, local arrangements would have to be made for them.
328. On 4<sup>th</sup> June 1971, the US Commanders on Diego Garcia and the Seychelles asked Mr Todd for *"dates for soonest removal"* of the copra workers as within the month, construction would have displaced several more families and greatly limited copra production, (19/1127(a)). But as the Commissioner pointed out, the timing of the sailings of the *"Nordvaer"* and the Moulinie organisation did not permit a strict military timetable to be met.
329. By June, Mr Moulinie seemed to be getting cold feet about the possible development of Agalega because he feared political instability in Mauritius and possible nationalisation of the plantations, although the FCO were trying to persuade the ODA to back the scheme with development aid, and it appeared to have support from the Prime Minister of Mauritius. The FCO pressed the BIOT Commissioner to pursue Mr Moulinie over this although emphasising to him that the scheme had to be as economical as possible and, as he was expecting to profit ultimately from it, he would have to bear some of the costs himself. The Mauritian Minister of Labour was thought to be in favour of dealing in that way with those still on Chagos as well as with those variously described in the FCO material as *"beachcombing"* or *"on the beach"* in Mauritius. He was reported as thinking that the latter would be anxious to go to Agalega, \*(7/1134)(ND).
330. In mid-June and early July, the FCO, at the suggestion of the Mauritian Minister of Labour, also asked MoD if it could give some casual work on a naval

base on Mauritius to those Ilois already in Mauritius but nothing came of it because the Royal Navy did not employ the civilian labourers who worked there.

331. Although a draft brief of 13<sup>th</sup> July, from FCO to MoD for a visit to Washington, expressed the hope that by then all the contract labourers had been removed from Diego Garcia, "*as the first stage in our scheme to cease all economic activity in the Chagos Archipelago*", matters had not proceeded so smoothly, (7/1138).

### **The evacuation of Diego Garcia**

332. The "*Nordvaer*", which was to carry out the evacuation of Diego Garcia, broke down en route and needed temporary repair from the Americans there. There appear to have been just over 100 Ilois, some 36 or 37 families on Diego Garcia at this time, and some 200 or so Seychellois. On about 25<sup>th</sup> and 26<sup>th</sup> July, passengers were loaded for Peros Banhos and Salomon, but after they had been discharged there, the ship had to return to Mahe for repair without completing the evacuation of Diego Garcia. There was some anxiety among the remaining "*natives*", according to a telegram from the Island Commander to the BIOT Administrator, about the limited food supply on the island. The "*Nordvaer*" had also arrived with a veterinary team and crates in order to catch and transfer to the Seychelles five wild horses from among those on the island, at the request of the Department of Agriculture in Mahe. The team had been warned that shipboard accommodation for them would be rugged. Mr Marcel Moulinie on Diego Garcia expostulated in a telegram to the BIOT Administrator: "*With all the deck passengers I have for Mahe how on earth can we carry horses?*" Although, as he said, the removal of the horses would have to await the arrival of a ship bound for Mahe, the passengers on that eventual voyage were to compare unfavourably their accommodation with that provided to the horses and "*rugged*" would not have done it justice.

333. On 24<sup>th</sup> August, Moulinie & Co agreed to send the "*Isle of Farquhar*" to Diego Garcia to complete the evacuation of the people and a later trip of the "*Nordvaer*", when repaired, would remove the remaining copra, supplies and equipment. The food situation was described in a telegram from the US Island Commander to the BIOT Administrator of 28<sup>th</sup> August, in response to a request for information and, if necessary, help, (19/1162(a)). Food support by way of flour and milk had been made and would continue, there was for the while sufficient rice and salt, cooking was not an insuperable problem but there was a shortage of fresh fruit and vegetables.

334. The various shipping problems meant that evacuation was not now expected to be complete until the end of September. Mr Moulinie's position in relation to taking families to Agalega vacillated; - he thought that taking 25 families would be possible but he then became concerned lest that became a long term commitment of his without the backing of a firm development plan approved by the UK Government. He wanted firm proposals to be put forward by the UK for his board to consider rather than for him as a share holder to have to put them forward. The BIOT Administrator told him that he would begin work on a scheme with their co-operation for the expansion of copra production to absorb 150 families with a UK financial contribution.

335. On 30<sup>th</sup> September 1971, the "*Nordvaer*" arrived in Mahe with the last of those to be evacuated from Diego Garcia. The Seychelles United People's Party publication, "*The People*", (7/1199), hostile to the then local administration, described the background under the heading "*BIOT throws out Islands Natives*". It referred to the length of time for which some of those had lived or had families living on the Chagos. It anticipated a UK/US defence requirement for the other Chagos islands. It gave the 1968 population figures for both the Chagos and for the western islands of BIOT which were formerly part of the Seychelles, Aldabra (42), Farquhar (50), and Desroches (120). It pointed out that several of them felt

deceived and tricked because in 1968, Mr Moulinie in the presence of Mr Todd and various UK and US personnel, had promised them that when they left the islands for good they would receive some compensation by way of disturbance pay, but they had received nothing of what they had anticipated they would receive in Mahe and Mr Moulinie had denied making any such promise. The Ilois were deposited on the jetty and had to be put up in the prison with prison food. The Seychellois were simply left to their own devices and many slept homeless for a while. The majority of the Ilois left for Mauritius on the "*Mauritius*" on 8<sup>th</sup> October arriving on 14<sup>th</sup> November. But a number had been left behind, 4 adults and 7 children. They were to receive medical attention before the adults departed for Agalega. But the adults who left on the "*Mauritius*" had rejected the offer of employment on Agalega because they felt so bad about having been deceived by Mr Moulinie over compensation. This was to be taken up with the BIOT Commissioner. The article concludes by referring to the UN's condemnation of the base and of the breach of the territorial integrity of the Seychelles involved in the creation of BIOT. The SPUP sent a copy of this article to the UN Committee of 24 in March 1972; it received some press publicity in the Seychelles.

336. Michel Vencatessen was among those who landed in Mahe and left for Mauritius later on 8<sup>th</sup> October. He was issued with an identity document in the Seychelles on 5<sup>th</sup> October 1971 in a form for those who were unable to obtain a passport. It was issued to him for the purposes of his journey to Port Louis, Mauritius. It describes him as "*British Subject Citizen of UK & Colonies*". (7/1170).
337. There was indeed an inquiry about compensation made to the BIOT Commissioner on 5<sup>th</sup> October 1971 by a Seychellois lawyer on behalf of an Ilois family; he believed that compensation would be paid to those who went to Mauritius. He described the family as having been evicted from their homeland. The Commissioner's manuscript note asks how to reply - "*we must be very careful what we say*", \*(19/1170a). Three other families also wrote in early October in a similar vein stressing that they were all born on the Chagos, had their roots there, had nothing on the Seychelles and were in desperate straits. One of them is a Claimant in these proceedings.
338. On 2<sup>nd</sup> November the Seychellois lawyer wrote again, pressing for a reply and saying that he was now acting for the parents of 35 children. Eventually, on 11<sup>th</sup> November the BIOT Administrator replied saying that the Seychellois were contract workers who since their return had been paid what was due to them under their two year contracts, (19/1213(a)). A similar answer was given to the SPUP in December though he left open the possibility of considering individual cases which might be referred to him, (19/1243(a)).
339. The SPUP, which was to become the ruling party in a single party state following the "*Liberation Day*" coup, also wrote enquiring as to the availability of compensation. There were rumours that it was in contact with the "*Mouvement Militant Mauricien*" led by Mr Paul Berenger, which the Seychelles Governor passed on to the FCO. At the same time, he said that the prison accommodation had been previously unused, that Mr Moulinie had paid for the food, he was dismissive of discomforts on the voyage and thought that the Ilois had failed to act on promises made to them by Mr Moulinie as to future work on Agalega.
340. Mr Moulinie asked the BIOT Administrator what he should say to those who were to embark for Mauritius from Mahe about compensation: should he say that they were to receive nothing, or should he negotiate something and if so should a single woman labourer get anything?
341. Through October, the inconclusive discussions between the BIOT Administrator and Mr Moulinie continued. From the perspective of Mr Todd writing to the FCO, Mr Moulinie was going round in circles without any real advance in weeks on the production of a development plan by anybody or any firm commitment to anything from anybody, (7/1171). But what would not be part of

any such plan was any indefinite commitment to subsidise any losses which might be made; at some point he would have to take the risk.

342. At the same time, Mr Todd was expressing concern to the FCO that if more workers left Peros Banhos and Salomon for Agalega to replace the diminishing numbers of Seychellois workers there, the plantations on those two islands would become unviable. There had also been 8 Ilois and Mauritians from Diego Garcia who wanted to return to Mauritius as their contracts had expired and they could not be prevented from doing so.

343. By 20<sup>th</sup> October 1971, the press and politicians in Mauritius were raising the problems of the distressed Ilois arriving in Mauritius. This was reported on by the High Commission to the FCO and to the Governor of the Seychelles. "*Le Militant*", the newspaper of the MMM, reported a conversation between Mr Berenger and a Mauritian lawyer, Guy Ollivry and journalists deploring the treatment of Mauritians "*torn from their country of origin*". The SPUP from the Seychelles had warned him of what was happening to these people in the Seychelles. They had no compensation despite the Rs500 which had been promised by Mr Moulinie, or resettlement benefit; there were 300 families in utter distress and there were several Ilois in distress in Seychelles. He would campaign for compensation for them and against the nuclearisation of the Indian Ocean. It was up to the British to assist these latest victims of imperialism. The High Commissioner commented that Mr Berenger was now in a far stronger position to make trouble.

344. The Governor of the Seychelles told the FCO, \*(7/1181)(R), in response to the SPUP article, that those who had come to Mahe on the "*Nordvaer*" on 30<sup>th</sup> September were 8 employees and their families whose contracts had expired and who could not be prevented from returning to Mauritius where arrangements were in hand for them to receive their contractual entitlements. No one would be compulsorily repatriated to Mauritius but instead would be offered employment on Peros Banhos, Salomon or Agalega. They had been accommodated in a modern unused prison building completely separate from the main prison, because no other accommodation was available. They were told by Mr Moulinie that he would give them first consideration for jobs on Agalega if they applied after leave in Mauritius. In this telegram, it was not said that they ought to have made such applications before leaving Mahe.

345. The Secretary of State said that it should be emphasised that the great majority of Ilois had not gone to Mauritius but to other Chagos islands and that only 8 families had gone to Mauritius and that that was at their own request, (7/1185). Rs 500 disturbance was being paid to those who had gone to the other Chagos islands. This was the line which the High Commissioner said he would advise the Prime Minister of Mauritius to take in response to an anticipated Parliamentary Question, (7/1186). In this telegram to the FCO, repeated to the Governor of the Seychelles, dated 22<sup>nd</sup> October, the High Commissioner records the Prime Minister of Mauritius telling him of his understanding that many of those in Seychelles awaiting onward shipment to Mauritius were UK citizens. The concern was that with pressure from Mr Berenger, and high local unemployment, it would be "*embarrassing*" if UK citizens were shipped to Mauritius and it would be very much better if the Seychelles could be persuaded to accept them. He continued "*I cannot understand how these people have suddenly been evacuated from Chagos without any prior notification to Mauritius Government if it is seriously intended to ship them here*". He thought that something might have gone grievously wrong with the original scheme, (7/1186).

346. The Prime Minister did as advised and answered the Parliamentary Question along the lines suggested, adding that he had constantly been assured by the UK Government of its readiness to co-operate in resettling all Mauritians evacuated from Chagos. Resettlement plans taking account of their wishes and interests were being designed which would also cover those already in Mauritius.

347. On 28<sup>th</sup> October 1971, Mr Berenger and Mr Ollivry had a meeting with the High Commissioner who, reporting to the FCO, said that their real concern was for the Mauritians who had been destitute since their arrival in 1968 and subsequently, living in conditions of extreme poverty most of whom were now having to fend for themselves without social security. They had described the Mauritian authorities as apathetic but, in his telegram, he commented that that was largely due to their reliance on the UK Government meeting a commitment the extent of which had not been specified. Although he had told his visitors that the matter was being examined urgently, he urged that some form of interim assistance be given without delay pending a firm decision about their future. Mr Ollivry had been told by the Prime Minister of Mauritius that they were probably UK Citizens but the High Commissioner said that that question should not be allowed to cloud the issue of resettlement. He urged that resettlement in Agalega be pursued with some concrete offer of help.

348. The Secretary of State was unhappy about this meeting and did not want further such contact lest it enable those politicians to make claims, however falsely, that they had been more effective in looking after the interests of the Ilois than the Mauritian Government. He hoped that a resettlement plan based on Agalega would soon be at hand. The High Commissioner re-iterated the need for a clear statement as to how the UK Government saw its obligations in order to advance any meaningful resettlement scheme. He said that the Mauritius Government had suggested £300,000 as a conservative estimate covering disturbance, resettlement and reimbursement of public assistance payments. He said that the present estimate by the Mauritians was that there were 250 families or about 1,000 people who had arrived in Mauritius from Chagos since 1965 to whom the resettlement obligation applied. He was given permission to provide to the Government, but not to other politicians, the FCO advice from Mr Watt dated 12<sup>th</sup> March and sent to the BIOT Commissioner which dealt with citizenship, because he had been asked to be more explicit about this as it was seen as an important point in Mauritius, (7/1036).

349. On 29<sup>th</sup> October 1971, a meeting was held between the High Commissioner and Mauritian civil servants about resettlement, following up meetings in May. The Prime Minister's Permanent Secretary referred to 474 families whose heads had registered with the Employment Service since their arrival in Mauritius. A co-operative pig breeding scheme was discussed and thought to be appropriate. It was thought by a senior Mauritius civil servant that those living and working on Chagos had acquired British nationality. The High Commissioner would investigate employment potential in Agalega and other neighbouring islands, and severance pay; the Mauritians would examine the length of service of those displaced since 1965, the sums paid to them by way of outdoor relief, the use of Crown land for resettlement. The inhabitants would be asked whether they wished to go to Agalega or Mauritius. The High Commissioner was not content with the notes of the meeting on severance pay because Mauritian law might be inappropriate.

350. The population figures then being discussed showed the decline in Chagos since 1964 when there were 638. In 1968, there were 434 and by 1970 that had reduced to 343 of whom just under half were adults. In January 1971, the FCO told the Deputy High Commissioner that there were 103 families on the Chagos, \*(7/1212)(D). These were described as "*Mauritian contract workers*".

351. The advice given to the High Commissioner as to the significance of the nationality issue related to the way in which he might contest any argument from the Mauritius Government about its responsibility for resettlement or for better terms rather any denial of dual nationality. After all until 1968, Mauritians and Ilois were Citizens of the UK and Colonies and they had a close connection with Mauritius; the issue should be seen as a technicality in this context, \*(7/1213)(P). The Mauritius Government was known to be assuming that the

resettlement agreement with the UK covered those who had returned to Mauritius since 1965, \*(7/1207)(ND).

352. On 31<sup>st</sup> October, the "*Isle of Farquhar*" arrived in Mahe having completed the evacuation of Diego Garcia; it brought only one Ilois woman and child in addition to a few Seychellois. When reporting this to the FCO, the Governor of the Seychelles said that there was an advantage in resettling Ilois on Agalega rather than paying a lump sum because they would all take the lump sum and ex-employees from the Seychelles would want the same. The idea of a lump sum had been mooted as a solution to the problem of the Mauritians "*on the beach*". Others too within the FCO thought it important that they "*be put to work*".
353. I turn to the oral evidence given about these events. The first time Mrs Talate said she was told she would have to leave Diego Garcia was six months before they left. They were all called to the Administration Office for a meeting at which Paul Moulinie came with an Englishman (Mr Todd). There had been no Americans there. He told them what the Englishman was saying: the Mauritians had sold Diego Garcia and they would have to leave, including her husband who had been born on the Seychelles. They had to leave because Paul Moulinie said there would be no food. However, before their meeting there had been no food, soap, milk, medicine, nurses or teachers and everybody had left and that was why she left. They had to go to Peros Banhos and Salomon and those who wanted to could go to Mauritius, but they had to go to Mauritius if they did not go to Peros Banhos or Salomon. They could not stay in Diego Garcia and they had no right to stay. Paul Moulinie said the British Government had given the Mauritius Government money not to remove people straight away and to give them time to build houses.
354. She said they thought they were only going to have fish balls, that the dogs were going to be poisoned and that they were going to give all the islanders poisoned fish balls. She said that the Administrator and the people in charge had said that. She said then that nobody had said that but she could see it because they had killed her dog.
355. She said that at the meeting Marie Louina had a shock and just fell, and that she did not see her on the islands again. In her witness statement she said that she died of what must have been a heart attack, upon hearing that they had to leave, and died on the spot. They rushed to her, but it was too late. She gave no such evidence in chief or in cross-examination, nor did anyone else nor was there any reference to it in any contemporaneous documents.
356. She said that before they left there was a jet plane, but she was not sure about whether there were helicopters. Later, she said she was not sure about whether there were jets. She said orally she remembered fighter jets only because her parents used to tell her about them, since she was a child and scared. She said they saw planes and children went out to see them, but they were scared because there was no food. She then said that nobody said anything about jets, they just hid everything. She thought planes were dangerous. She thought there was danger because there was no food, everyone had gone and there were no drugs for when she was hurt. In her witness statement, it was written that she remembered the British sending a helicopter, an aeroplane to fly very low to scare them. It was quite plain at this stage in her evidence that she was very confused and that she had no idea that it said in her statement that there had been any risk or threat of their being killed or bombed.
357. Later she said that the dogs were given poison and taken to the calorifer, a sort of oven which was part of the copra production, where they were killed, and she said that they were going to kill the islanders in the same way. She said that there were many English and United States people living there, but that she did not speak to any of them because she did not speak English. She said there were British officers there but she did not know if they were soldiers. There were American and English living at Norwa, on Diego Garcia, but she did not know who was who. There were big boats there and she went to see the films played by the

English, although she could not speak it. Her witness statement draws no distinction between those English speakers to whom she said she spoke and what she may have understood from others. Her witness statement, but not her oral evidence, said that the British officers had decided that those who lived on Diego Garcia would move to Peros Banhos and Salomon and they were threatened by the British officers and told that they had no choice but to leave.

358. She was forced to go to Peros Banhos on the "*Nordvaer*" boarding in the afternoon, but leaving at night in case anybody wanted to escape. She said how painful it was to leave, seeing some of the dogs had escaped, including her own, following the boat as it left Diego Garcia. But it is clear that by "*forced*" she meant that she had no choice rather than was physically compelled to board. This suggestion of threat, as with other allegations, was not maintained or justified by the evidence which she gave.

359. Mr Canter, a former RN Lieutenant Commander, gave unchallenged evidence that he arrived in Diego Garcia in November 1971 after all the plantation workers had left; there were no RN Officers on his arrival and he was the first RN Officer to be stationed there permanently. The only people were US construction battalions, a small US Naval Communications Unit and a few civilians. There was a temporary airstrip used only by C130 Hercules transport aircraft, but no helicopters. C130s would take off flying low on full throttle over the main settlement at Pointe de l'Est.

360. When Mrs Talate went to Peros Banhos, she lived in Peros Town in a house that was unfurnished because she had had to leave behind the things which she owned on Diego Garcia. When she went to Peros Banhos she thought she was going there forever because Peros Banhos had not been sold.

361. Jeanette Alexis said that her father had come home one day and told her mother that the island was closing down because the Americans were moving in to build a base. She realised, as time went by, that it was a military base and she saw military planes. She said they were scared because there had not been many planes on the island and they were noisy and she and her sisters used to hide from them. She felt that they had been invaded by foreigners. There were no British Officers living there. As the "*Isle of Farquhar*" sailed with them from Diego Garcia they could remember seeing their dogs running up and down on the quayside barking, although other people's dogs had been caught and burnt in the calorifer.

362. Her mother, Mrs Mein, said the islands were literally closed. The first thing she heard was that the English were giving the island to the Americans. Mr Todd and Marcel Moulinie came to a meeting to which everyone was invited. Marcel Moulinie translated when the meeting was over, giving an explanation of what had happened, then Paul Moulinie gave an explanation. She had cried with her husband because they were very sorry and did not want to leave, but there was no possibility of staying on Diego Garcia. There were English and Americans doing work in various parts of Diego Garcia and they destroyed everything there: they had been unable to go there but they were taken there before they left. She said that no proper arrangements had been made for them to leave; the Americans said "*Do you want your fate to be the same as the dogs who are left behind, who were killed?*" She agreed, however, that she could not speak English. Marcel Moulinie said nothing much but he repeated the story about the dogs, but, she said, he was speaking in English. She freed her animals before she left. They could not take their possessions and everything including her furniture remained in the house. She took just three mattresses to Peros Banhos and her ten children. Paul Moulinie had promised them compensation; Mr Todd had made promises of compensation with cash and land and that he would follow on after them, but they got nothing. She said she never spoke to the English or Americans but her husband spoke a little English.

363. Mrs Piron's evidence was much the same; she chose the Seychelles because the other islands were not for her, a Diego Garcian.



364. Marcel Moulinie said that at first they had understood that the whole of Chagos would close. Later, the British Government said that Diego Garcia would close but they did not know about Peros Banhos or Salomon.
365. He pleaded with people to go to Peros Banhos and Salomon when Diego Garcia closed. Mr Todd and his uncle had been to Salomon and Peros Banhos to see if appropriate accommodation was available and that he had been told that Rs 500 was to be paid to those who went to Peros Banhos. They would have had to be closed in the absence of a capital injection in the islands. He had known that when the islands closed most of the islanders would go to Mauritius.
366. No physical force had been used on the evacuations but he said that the islanders had been told that there was no more food and that there would be nothing left on the island. He said the islanders had not wanted to leave the islands because it was their island, rather than because of conditions on the boat. He thought that about 25 families had gone to Peros Banhos and Salomon, or even 30. He said Salomon islanders were very reluctant to go to Peros Banhos and vice versa and the same for interchange with Diego Garcia. For some of the younger ones it was an excitement, but they were not able to take all that they possessed. The employees had an option as to where they went. They were told that at a meeting and that the only way of getting on or remaining on the island was being employed by the company. He would not have said to Jeanette Alexis that threats of force had been used to make people leave the islands, he made no personal promise of compensation, but he would have said that if they had to move there would have been some compensation.
367. The Americans arrived in two groups at the end of 1969 and November 1970, by which stage Diego Garcia had effectively been divided into two parts; from the arrival of the Americans in 1969 a number of ships came to take the Ilois away, according to his Bancourt Judicial Review statement. This involved a number of trips by the "*Mauritius*", the "*Nordvaer*" and the "*Isle of Farquar*". He had not encouraged the Ilois to leave but thought that many had become frightened by the Americans and felt they had no option but to go. The island population began to dwindle between 1968 and 1970.
368. The 1977 statement said that Michel Vencatessen was a bit shaken at news of the evacuation and talked about his forefathers, but accepted that if he were told he had to go by the company he would have to go. He was instructed to tell them that they had to leave and did so. No-one argued that he had no right to move them.
369. He got authority for what he said from his uncle. "*You do not just kick the whole population off without compensation*". This was early in 1966, when the Ilois could come and see him individually. They discussed compensation among themselves but he did not know what they were going to get.
370. In his Judicial Review statement, Marcel Moulinie said that the declining population by 1970 led to over 800 dogs on the east side of Diego Garcia where the coconuts were; the Governor ordered these strays to be destroyed which he tried to manage by using first of all US sharpshooters and then poisoning, finally gassing them in the calorifer. He hated doing this but he could understand that if these actions caused the Ilois to fear some form of violence. He had never said that any Ilois would be put in the calorifer.

### **The evacuation of Peros Banhos**

371. Reverting to the documents, on 12<sup>th</sup> November, the anxieties which had previously been expressed by Mr Moulinie about the long term obligations to Ilois with which he might be landed on Agalega had hardened and he no longer wished to proceed jointly with the UK Government. The future of the copra was uncertain. He would prefer to recruit in the normal way, the Governor of the Seychelles told the FCO, (7/1220). He had also expressed doubt about continuing

to run Peros Banhos and Salomon as the labour force was inadequate and "*on economic grounds early closing is desirable*". The Governor saw an increase in the labour force there as the answer but recognised that Agalega was no longer an option for resettlement except for a gradual absorption. The Ilois could not be settled there as copra small holders. Compensation could be paid. This telegram led the FCO to comment that it had put a ceiling on resettlement costs of £750,000 in case of this sort of eventuality.

372. The FCO still wished to pursue an arrangement with Mr Moulinie and asked the Commissioner of BIOT to find out why he had changed his mind but it recognised that he was unlikely to change it again. He was to be asked about the numbers which he might take on a commercial basis, encouraged perhaps by a loan from the UK Government. It scotched the idea that resettlement on Peros Banhos and Salomon was a practicable answer by reference to earlier correspondence. Mr Moulinie confirmed his concerns adding that such labourers would feel themselves to be in a special position, but he remained willing to take Ilois from Chagos provided they returned to Mauritius first for recruitment in the normal way. He told the BIOT Commissioner on 25<sup>th</sup> November that he had tried to recruit 25 couples from Mauritius but had only obtained 18 people. He told Mr Todd in a letter of 30<sup>th</sup> November that the present management agreement was unworkable and that most people on the islands were just waiting to leave.

373. The figure of 1,000 people to whom the resettlement obligation applied caused some alarm as it was larger than expected. The FCO said, \*(7/1225)(P), that in 1964 there had been 658 Ilois in Chagos, of whom 55 with their families had arrived on Mauritius in 1967, and a further 140 individuals including children had arrived in 1968. There were now 332 persons on Peros Banhos and Salomon, Diego Garcia having been completely evacuated. The difficulty of knowing which way the Mauritius Government wished to deal with resettlement was also thought to impede any immediate action: did it want a scheme which might create internal problems by placing Ilois in a distinctly better position than other Mauritians, or would it rather receive money by way of reimbursement of public assistance whereby the Ilois would effect their own resettlement? It recognised the danger of appearing to go round in circles.

374. The High Commissioner reported to the FCO on 17<sup>th</sup> November that the Prime Minister of Mauritius had suggested a lump sum payment to those "*on the beach*" so as to be "*shot of the problem*" as he was said to have put it. But this was not a resettlement scheme and would simply attract more Ilois to return aggravating the unemployment problem, as the High Commissioner saw it. The Prime Minister thought that this form of payment had been agreed but there was some uncertainty as to the basis upon which that might be the case. The FCO was to investigate this, the total cost and the true position of the Mauritius Government towards such payments as discharging the UK's obligations to Mauritius according to a telegram of 2<sup>nd</sup> December from the Secretary of State to the High Commissioner, (7/1242).

375. The difficulties of knowing how many Ilois there were pre-BIOT and at various later dates was referred to in a note by the BIOT Administrator for the FCO. The High Commissioner waited for a definitive list of Ilois who had returned to Mauritius from the Mauritius Government. But he was now of the view that a lump sum payment was the tidiest means of dealing with the problem because of the difficulties in the way of a resettlement scheme. However, the Governor of the Seychelles pointed out that a lump sum scheme would have repercussions there and would not compensate the Ilois for the jobs which they would be losing. That could only be done by resettlement on Agalega. He thought that political pressure could enhance their demands considerably and that they were "*completely unsophisticated but capable of taking opportunity to drive a hard bargain and liable to respond to irresponsible leadership*", (7/1234). Differentiating compensation based on age would lead to interminable wrangling and would not normally be expected by the Ilois. He estimated that allowing for

free rations and accommodation, wages for two people would be about Rs 2,000 pa although the FCO thought that the correct figure was Rs 1,400 for labourers, apparently excluding any allowance for free housing. The Governor of Seychelles persisted in his concerns about a lump sum payment to the Ilois; it would cost about £25,000 to provide two years' wages and benefits to all those now on Chagos.

376. On 10<sup>th</sup> December 1971, the Office of the Prime Minister of Mauritius wrote to the High Commissioner saying that the total number of persons who had come to Mauritius from Chagos since 1965 was 1,151, made up of 97 couples, 241 singles and 716 children upon whom some Rs 2,140,000 had been spent on public assistance. The High Commissioner forwarded to the FCO from the Mauritius Government a list of those who, following their arrival from Chagos after 1965, had registered with the Mauritius (Ministry of Labour); it showed the names of those who had also received public assistance. They had come from all three Chagos island groups. Some are Claimants. (It is by no means clear how many were Ilois rather than Mauritian contract workers, perhaps of longstanding in the Chagos.)
377. The FCO appeared as at mid-December to have accepted that pig-breeding would not provide an acceptable resettlement scheme, and pursued a lump sum payment scheme instead but it had decided that there was to be no liability to the Seychellois. The Governor of the Seychelles repeated his dissent; any such payment would be seen as a redundancy payment rather than as a resettlement payment and so would be said by the SPUP to be applicable also in the Seychelles.
378. 1972 revealed the first signs of stirrings within the Ilois on Mauritius. Mr Christian Ramdass of Roche Bois, Port Louis sent a typed letter in English, dated 17<sup>th</sup> January 1972 to the US Ambassador to Mauritius purporting to be on behalf of all the inhabitants of Diego Garcia. He complained that they had been forcibly asked to settle in Mauritius, "*thus leaving behind all our properties and wealths acquired through years of hard labours*", (8/1283). It expressed astonishment that compensation had been proposed in the form of pig rearing and asked instead for cash. Others had taken their jobs when they had recovered from the illnesses which had brought them to Mauritius in the first place. They had been deprived of their rights and asked for justice and fair play. He sought compensation for those who had left Chagos before 1965.
379. On 1<sup>st</sup> February 1972, the High Commission reported to the FCO that the Prime Minister of Mauritius had received a request from Mr Moulinie for transport for 130 adults and 240 children from Peros Banhos and Salomon to Mauritius. The FCO recognised that it had little choice but to concur if the Mauritius Government did, but thought that this would cause great embarrassment as no compensation had yet been agreed for those already there. The Seychelles Governor reported to the FCO that Mr Moulinie would like to see the islands closed as they were no longer profitable to him on the present basis; the Governor would, however, discourage their staggered departure on the "*Nordvaer*"; those islands would not be evacuated until the compensation issue had been settled. The Mauritius Prime Minister agreed this approach.
380. The resettlement proposals received a rebuff at the hands of the Mauritius Ministerial Committee on Resettlement. Its report of 17<sup>th</sup> February rejected the payment of Rs 3,000 for a single adult and Rs 4,000 for a couple as inadequate. It had examined the issues and concluded that the 300 families should be adequately rehoused on two housing estates at 8 houses to the acre with space for a vegetable garden and communal amenities. 250 heads of households were unemployed (86) or only in casual employment, which included dock labour, (134), apart from those who were too old to work. Only 43 were in permanent jobs but these included very poorly paid domestic service. A pig-breeding scheme was recommended. Rabbits could be bred around the houses. It was assumed that 130 more families remained to be resettled from Chagos. The total estimate

for the resettlement was Rs 8,560,000 or about £642,000. For the purposes of this report, 286 people were interviewed covering 986 individuals altogether, with 44 households which could not be traced.

381. On 18<sup>th</sup> February 1972, the Mauritius Cabinet approved a scheme which the High Commissioner urged the FCO to accept. Two housing estates comprising 330 houses would be built, a pig-breeding co-operative would be established nearby with grants and loans, and a further grant would be made for vegetable growing and rabbit breeding on individual plots of land. There was confidence, following the Government survey in which these possibilities had been canvassed, that most of the 296 families would wish to participate and that those who did not would receive a cash grant instead. It was assumed that the 13%, as it was put, on Peros Banhos and Salomon would participate. If all 460 heads of families and unmarried men participated, the total cost including reimbursement of social security payments would amount to Rs 8,558,000 or £642,000. The Prime Minister of Mauritius urged acceptance of these proposals.
382. The ODA was unconvinced. It told the FCO that some of the costs were reasonable but it doubted whether all the Ilois would wish to be or could become pig-breeders, that the resettlement would only add to the over-population and unemployment on Mauritius and that if this were a potential aid project, it could not be supported in any circumstances. The FCO was more favourably inclined, even were a third housing estate necessary for those Ilois yet to come: it was still not an expensive scheme, would not have been jibbed at but for the over-expenditure on the Seychelles airport, and with the economic problems facing Mauritius, the Ilois had to be treated reasonably well so as to avoid the Mauritius Government turning round and telling the UK to look after its own people. The FCO thought that it had a weak hand and wanted to avoid cheese-paring. Shortly after, there was a suggestion from the Acting Prime Minister that the Ilois should go to England and that it was only due to some last minute and skilful drafting that they had become Mauritian citizens. The High Commissioner did his best to "*enlighten him*". By the end of February, the ODA was raising further questions about the reality of the costs and return on the pig-breeding scheme although the High Commissioner remained of the view that the scheme was as realistic and viable as any likely to be produced by the Mauritians, for all its difficulties; at least it would not be seen as providing competition for jobs which would otherwise go to Mauritians in the way in which industrial training would. The Governor of the Seychelles thought that it would be acceptable to the Ilois still on Chagos once they realised that there was no lump sum available.
383. An FCO Brief on Ilois resettlement, \*(8/1308)(ND), dated 1<sup>st</sup> March 1968 recapitulated the history: there had been no permanent population, as a matter of policy the plantations had been allowed to run down since 1965, the number of workers dropped steadily and workers had returned to Mauritius, the US had accepted that handling the Ilois was to govern subsequent planning. The subject was not one to raise.
384. The FCO response to the concerns of the ODA was that time was pressing, the scheme fulfilled the essential requirements of the kind of resettlement scheme which it had in mind and that it should not be judged as a normal development project. Such a resettlement scheme, acceptable to the Mauritius Government had been sought for a long time: it offered reasonable prospects of success in extremely difficult conditions, "*so that we can get ourselves off the hook on which we impaled ourselves, without too much thought, a good many years ago*", \*(8/1317)(ND). Through March, the ODA criticised the agricultural aspects of the scheme from a practical point of view; its failure was certain, \*(8/1319)(ND). Pig-breeding was too complex for the Ilois and the economics of production and marketing were unfavourable.
385. However, by 8<sup>th</sup> March 1972 the FCO was warning that the remaining plantations would be closed as soon as the Mauritius Government confirmed its willingness to receive the remaining Ilois, said by the BIOT Commissioner to

number 65 men, 70 women and 197 children. He also advised that there had been only limited mixing on the islands between the Ilois and the Seychellois, who rarely spent more than two contractual periods there. He advised in April that 100 Seychellois had been returned to the Seychelles when Diego Garcia had been closed, and that 95 Mauritians (18 men, 18 women and 49 children) had gone to the other Chagos islands with a further 25 (7 men, 6 women and 12 children) choosing to return to Mauritius as their contracts had expired.

386. Notwithstanding the points raised by the ODA, the FCO pressed the Treasury to approve the resettlement package on 19th April 1972, (8/1330). It saw the obligation to Mauritius as being to meet the costs of a scheme rather than to evaluate or even devise a scheme. It accepted the force of the ODA points but said that it was not for it to become involved in the preparation or execution of the Mauritius Government scheme; it simply had to be sure that the obligation could not be discharged more cheaply. This scheme was almost certainly under-costed and if it were examined more closely, there would almost certainly be a substantial increase in cost. It did have the advantage that the scheme was devised and supported by the Mauritius Government and its adoption would enable an increasingly urgent problem to be disposed of quickly. (This emphasis may have reflected the need to fashion argument in such a way as to appeal to the recipient, and it succeeded.)

387. On 23<sup>rd</sup> June 1972, at a meeting in London between the Prime Minister of Mauritius and an FCO Minister, the UK Government offered £650,000 in full and final discharge of the obligation which it had undertaken at the Lancaster House meeting in September 1965 to meet the cost of resettlement. On 4<sup>th</sup> September, the Prime Minister wrote to the High Commissioner accepting that sum on that basis: it discharged the UK Government's obligation to meet the cost of resettlement of those displaced from the Chagos Archipelago since 8<sup>th</sup> November 1965, including those still there. The UK Government could make a public statement to that effect. He noted that this did not affect the verbal agreement giving to Mauritius "*sovereign rights relating to minerals, fishing, prospecting and other arrangements*". He asked for payment at earliest convenience. It appears to have been paid in the spring of 1973. When acknowledging receipt, the Prime Minister emphasised the rights which Mauritius retained over Chagos and which he said had been agreed in 1965; this included the return of the islands to Mauritius without compensation, if the need for their use by Great Britain disappeared. The Governor of the Seychelles wanted no such public statement because SPUP could be expected to make a similar demand on behalf of Seychellois. However, on 7<sup>th</sup> November 1972, the Prime Minister made an announcement in the Legislative Assembly stating the sum to be paid by the UK Government and its broad purposes, including housing and land sufficient to enable the Ilois to earn a livelihood. He said that the nationality of those displaced was still being studied.

388. Returning to the events on the islands in May 1972, rations were due to be taken to Peros Banhos and Salomon at the end of May. The BIOT Administrator, having discussed matters with Mr Paul Moulinie, suggested to the FCO that labour should be concentrated on Peros Banhos because this would be the most economic way in which to use the available labour force which was too small to run the two islands efficiently. He advised that, on economic grounds, "*we should close Chagos as soon as possible*", (8/1332(a)). The island manager and Deputy BIOT Administrator Mr Prosper, told Mr Todd in June, \*(19/1288a), that 90% of the labour force wanted those islands evacuated as soon as possible and that should be done, or the labour force increased.

389. On 17<sup>th</sup> June 1972, Mr Todd told the FCO that the "*Nordvaer*" had just arrived in Mahe from Chagos, carrying 53 Ilois (30 adults and 23 children) from Peros Banhos and Salomon who wished to go on leave to Mauritius and to return later to Chagos. He said that they had been told that "*we cannot guarantee return passages*", (8/1333). They would sail for Mauritius from Mahe in July.

What he described as "*this latest exodus*" had reduced the labour force to 50 men, 50 women with 174 children. Nonetheless, those on Salomon had refused to move to Peros Banhos and the issue had not been pressed by the island manager. Mr Todd recognised that people could only be moved between islands with their willing co-operation. The Captain of the "*Nordvaer*" had told him that there was an air of general apathy on the islands and a general acceptance that the islands would close one day; it appeared increasingly difficult to get the workers to work. "*I am afraid that it all boils down to the old cry of the sooner we evacuate the islands the better.*"

390. On 3<sup>rd</sup> July 1972, the BIOT Administrator had to write to the FCO commenting on the trading losses shown in the plantation accounts. He thought that a fair estimate of the total cost for copra from Chagos delivered in Mahe would be £60 per ton which compared with a local cost of £35. A high production was necessary to overcome the freight cost in order to make a profit "*and circumstances have made this impossible*". Additionally, Mr Moulinie's costs were higher than £60 partly because of his inefficiency but also because "*We have been running the islands on a care and maintenance basis and have kept the labour force below an economic level due to the uncertainty on the islands' future*". (8/1337). He thought that they had done as well as could be expected out of the islands and deserved credit for keeping them going until the resettlement problems had been solved. His Commissioner thought that the islands would be evacuated by the end of the year. Mr Moulinie wrote to Mr Todd to say that compensation for displacement of Rs 500 per head had been paid to those on an attached list.
391. On 24<sup>th</sup> October 1972, the UK and US Governments exchanged Notes which contained the UK approval for the specific facility on Diego Garcia. One of its terms was that access to Diego Garcia, service and scientific personnel apart, should not be granted to any other person without prior governmental consultation.
392. The Office of the Prime Minister of Mauritius raised a question in November, shortly before the announcement of the resettlement agreement in the Legislative Assembly, seeking an answer to a forthcoming Question about nationality; it concerned the status of children born in Chagos of parents who had Mauritian citizenship. The High Commissioner told them and the FCO that they were Mauritian citizens by descent and citizens of the UK and Colonies by birth but would have to be dealt with as Mauritians for resettlement because their parents would be so dealt with, (8/1342).
393. On 6<sup>th</sup> November 1972, the BIOT Commissioner signalled to the FCO, \*(8/1343)(ND), that the "*Nordvaer*" would arrive in Mahe the next day with 120 Ilois on board, 73 adults and 55 children. These were said to be contract expired workers who had exercised their right to leave Chagos, of whom 30 couples were expected to accept offers of work on Agalega. It arrived in Mauritius on 14<sup>th</sup> November. On 12<sup>th</sup> December 1972, the BIOT Commissioner told the FCO that Salomon had now been closed and that the labour force left on Peros Banhos was too small to run it. It would be advantageous to clear it when the "*Nordvaer*" made its voyage there in March with rations but some might chose to go back to Mauritius anyway as had happened previously. "*Moulinie & Co are also anxious to close the island as the fee they receive on the basis of copra very small.*" (8/1345). There was no objection from the High Commissioner to the arrival in Mauritius in March 1973 of 32 adults and 119 children, and the Secretary of State, who had discussed the matter with the BIOT Administrator on leave in London, agreed to the acceleration of the rundown of the Chagos plantations and to notifying the Mauritius Government of the arrival in April 1973 of the remaining Ilois.
394. However, in February 1973 came warning that Ilois who had returned to Mauritius more recently were finding life difficult; the resettlement scheme had not been put into operation. The High Commissioner asked if some could be

diverted to Agalega; they should be warned that life in Mauritius would "*not be a bed of roses*". (8/1348). Mr Moulinie sought guidance as to what he should do and the BIOT Administrator told him that the FCO had given permission for Peros Banhos to be closed down; the means were up to him and some money for compensation payments was transferred to him.

395. The arrangements for the final evacuation were discussed between the FCO, BIOT and Mr Moulinie. The Ilois for Mauritius were to be taken on the first trip of the "*Nordvaer*" from Chagos arriving in Mauritius on 28<sup>th</sup> April and a second voyage would then remove those returning to the Seychelles. The Mauritian authorities were to be forewarned. Mr Moulinie thought there would be no difficulty with the inhabitants over this. He was still prepared to offer work to the majority of them on Agalega but they would still have to be recruited in Mauritius in the normal way.
396. The "*Nordvaer*" left Peros Banhos on about 27<sup>th</sup> April 1973 carrying 133 persons for Mauritius: 26 men, 27 women and 80 children according to the passenger list. It arrived a couple of days later and the High Commissioner informed the FCO that the 150 Ilois had at first refused to disembark saying that they had nowhere to go to, no money and no employment. But then homes were found for the 30 families and a small amount of money was provided by the Mauritian authorities. Mr Moulinie had told the BIOT Administrator that he had offered employment to all those on board on Agalega but that no one had wanted to go there. He would not commit himself to the next recruitment. On 26<sup>th</sup> May, the "*Nordvaer*" left Peros Banhos again, this time bound for the Seychelles with 8 men, 9 women and 30 children. The last Ilois were thus removed from the Chagos and the islands were closed. Mr Moulinie provided the BIOT Administrator with a list of the costs incurred forwarded to the FCO for inclusion in the next accounts.
397. Mrs Talate, who had gone from Diego Garcia to Peros Banhos described events. Salomon was the next island to close and no boat brought any food to Peros Banhos. When she left Peros Banhos, the plantations were still open but all closing. There was no food and no-one had the courage to work. The ship from Diego Garcia to Peros Banhos brought nothing. "*They told us to go, and said that if we didn't go the white people would leave and there would be no food and so what would we do.*" When asked whether any English person had told her to leave, she said that she did not see any English people there but the English had told Paul Moulinie that they had to go. Mr Prosper had told them they had to go a few months before they left.
398. She left Peros Banhos on the "*Nordvaer*". They were told they had to go. 150 people left on the boat from Peros Banhos and they were treated on the journey just like people she had seen in a film about slaves. They had no food and conditions were vile.
399. She had heard that someone had jumped into the sea. In her witness statement, she said that she remembered in particular Christian Simon, a 28 year old, committing suicide in that way; he disappeared in front of their eyes. But in evidence in chief she only said that she had heard that someone had jumped into the sea, and they told her his name. Later she said that she did remember Christian Simon who had jumped into the water and had not been found. There is no evidence of such a person on the passenger list.
400. She remembered going to the Seychelles en route, but being kept on the boat rather than going to the prison; others had gone to the prison for accommodation. In her witness statement, she referred to there being horses on the voyage she was on, but in her oral evidence she denied that there had been horses on it.
401. Jeanette Alexis' father, Mr Mein, was in charge of Peros Banhos. There had been sufficient food when they got there and they stayed there for six months when her father said that Marcel Moulinie told them that they had to leave, because that island too was closing down and it was not safe for them to stay

because they were too close to the base on Diego Garcia, and that they had heard that it might be bombed. This was a general fear amongst the population. Her mother said that she was told that the Americans did not want anyone in their area. They left Peros Banhos because they had to. The labourers had left bit by bit.

402. She described the terrible voyage when they left Peros Banhos on the "*Nordvaer*" with the horses. Because of her father's position, they had a less uncomfortable, but nonetheless cramped, journey. Her mother said she lost a baby on arrival in the Seychelles.
403. Mrs David said that she had to go to Peros Banhos in May 1969 for the birth of her third child and whilst she was there people arrived from Diego Garcia and told her that the island had been sold and that those who wanted to go to Mauritius could do so and those who wanted to work more in Chagos could go to Peros Banhos or Salomon. She appears from her witness statement to have remained on Peros Banhos from May 1969 until 1971. She described how Mr Prosper, the Deputy Administrator on Peros Banhos, had called a meeting at which he passed on what Mr D'Offay had told him which was that Peros Banhos would be closed and that the American base on Diego Garcia meant that there might be bombs and explosions and that it would not be safe. He said that they had a week to get ready to leave, but they had no time to prepare their possessions. If they were left behind, they would be abandoned there. Her clothes, her animals, pots and pans were left behind. Mr Prosper told them that when they got to Mauritius they would have a similar house, animals and compensation. They had travelled directly to Mauritius on the "*Nordvaer*"; in her witness statement, she refers to travelling via the Seychelles.
404. However, she had sworn a statement in the Bancoult Judicial Review, (12/46/4a), in which she said she had moved to Peros Banhos from Diego Garcia when she was seven. It appears that she was saying that a mistake had been made, but it was not clear which was the correct statement. She said that the move had not been an immediate one, but they had gone to Salomon first and then to Peros Banhos. Her most recent statement states that they were removed by the British officers from Salomon. But she said in oral evidence that they were removed from Peros Banhos. She agreed that she left Salomon not because British officers asked her to go, but because there were no medical facilities there. She also agreed she was not asked to leave Peros Banhos by British officers, but it was Mr Prosper who told them that the boat would come and take them away. When asked to explain the reference to British officers in her most recent statement, which she said had been translated to her in Creole and thumbled by her because it was true, she said that it was only now that she knew exactly what she signed.
405. She had been in Peros Banhos for may be a year or a year and a half before the meeting at which Mr Prosper spoke. She said at that meeting they were told that both Peros Banhos and Salomon were being sold, although previously she had said that the people had arrived from Salomon very shortly after she had arrived on Peros Banhos. She said they had no food, milk or drink, but only some rice and water and this state of affairs had lasted for quite a long time before they left Peros Banhos. She said that her husband had gone to Mauritius before she arrived because he was ill. She agreed that he had been in Mauritius for about two years before she arrived there, and that it had been an error on her part just a bit earlier to say that he left Peros Banhos with her. She said "*I am just a bit forgetful. It's so long ago*".

### **Resettlement in Mauritius and the Seychelles**

406. Although in April 1973, a Mauritian lawyer who described himself as acting for 280 Ilois (including some of the Claimants and witnesses) had written to the Mauritius Government seeking payment on an individual basis of the sums



available for resettlement, the first significant public complaint about their circumstances arose over a year later when in October 1974, two representatives of the Ilois called at the High Commission and left a petition which was also sent to politicians, newspapers and two ambassadors. Mr Saminaden, Mr Fleury (also known as Michel Vencatessen) and Mr Christian Ramdass organised it. It was typed in English. It described their origins on the Chagos islands, how a "*Military Chief*" told them that there would be large compensation, how on Mauritius it was only the animals which were given anything and all their pleading and pressure on the Mauritius Government had produced nothing, (8/1365). They were not against the purchase of the islands nor the base but they wanted to explain to the UK Government how they had no food, jobs or care. Forty had died through sorrow, poverty, lack of food and care. They asked the UK Government to ask the Mauritian Government to give them each a separate piece of land and house which their children could inherit tax free, and a job which they knew how to do. If they did not receive these, it would be preferable for them to be sent back to their islands. They also asked for permission to visit the cemetery on Diego Garcia where their ancestors were buried, so as to tend their graves and the church.

407. The High Commission sought the advice of the FCO, \*(8/1372)(D), saying that the Prime Minister of Mauritius had said that arrangements had been made with the UK and that resettling the Ilois was a Mauritian responsibility. There was a fear that opposition politicians, including Mr Duval, might pursue their line about the UK nationality of the Ilois. The FCO advised that they be listened to sympathetically but be told that "*we are unable to intervene between a government and its people and, perhaps, drawing their attention to the statements made by the Prime Minister of Mauritius ...*". (8/137). There was a possibility that a very few might be allowed to visit the graves and church on Diego Garcia. The High Commissioner replied on 11<sup>th</sup> November. He said that a copy of the petition had been sent to the UK Prime Minister. He was sorry to hear of their present difficulties and hoped that matters would improve. But he "*cannot intervene between yourselves as Mauritians and the Government of Mauritius, who assumed responsibility for your resettlement under the arrangements outlined*" in various statements, \*(8/1374)(ND). The request to visit the islands was being considered. A copy of the statement of 7<sup>th</sup> November 1972 was enclosed.
408. Before turning to the Vencatessen litigation, I set out en bloc the way in which the £650,000 resettlement fund was eventually spent.
409. On 13<sup>th</sup> October 1975, Mr Ennals, an FCO Minister, told Mr Dalyell MP in written answers, that he had received no communication from Mr Duval, who was described as legal adviser to the Diego Garcian community, that the Mauritian Government accepted that their standard of living was below the average in Mauritius; he said that out of 421 families, 243 heads of family were in more or less fixed employment, 57 received Mauritian old-age pensions and 74 were on public assistance, (8/1383). Urgent consideration was being given to the sending of advisers to Mauritius to help formulate a practical resettlement plan. On 16<sup>th</sup> October the written exchanges continued. They covered the housing of Ilois in the Mahe prison in October 1971, the absence of investigation into the denial of return passages to Ilois after 1968; the Vencatessen litigation prevented other questions being answered but the Minister did say that at all times in 1971 the "*Nordvaer*" was operated on the instructions of the BIOT Administrator.
410. In late January and early February 1976, Mr Prosser, an Adviser on Social Development from the Ministry of Overseas Development, visited Mauritius and reported to the Mauritius Government in May 1976 on resettlement proposals, (8/1387). The Report was concerned with 426 households previously resident in the Chagos. This was a figure based on two "*reasonably complete*" surveys of Ilois, one by the Department of Public Assistance and another by the National Council of Social Service. Mr Prosser had discussions with the relevant

Departments, two meetings with Ilois, although as the Claimants pointed out, these lasted no more than half a day each, and he had visited the areas where they lived. His Report recognised that there had been very little interest in the pig-breeding scheme and that there were real practical difficulties in converting copra workers into efficient small-holder producers. It continued: "*The Mauritius Government have already taken a by no means inconsiderable interest in the welfare of the Ilois. In fact, the whole range of social services has been available from the outset to the families concerned. Those eligible for old age pensions have been granted their rights as full citizens of Mauritius, and those in need of public assistance and family allowances have been visited by ... the Department ... who have assessed need and made appropriate payments. In addition, the Mauritius National Council of Social Service has developed a considerable programme of work with the Ilois.*" It referred to rabbit breeding, home economics classes to assist with the adjustment to life in an urban environment and special educational classes to help integrate teenagers into school and to the employment of a full time social worker to work with the Ilois.

411. The most intractable problem for the Ilois had been housing, of which there was a grave shortage at the bottom end of the scale, compounded by the effects of cyclone Gervais, which had destroyed so many houses. The Report said that, notwithstanding the severe constraints on housing, "*a commendable attempt has been made to share with the Ilois what housing is available*". (The Ilois pointed out that there were no cyclones passing over the Chagos.)
412. He took the view that the Ilois had gradually merged with Mauritius society and that there was a consensus among all groups that what was required was an agency which would focus on their complete integration; he says that they did not wish to be moved to another island, but rather wished to be established as residents of Mauritius, with no more than 30 or 40 families wishing to return to Diego Garcia if they could. He started from the basis that the majority were reasonably well settled with 243 in paid employment. He recommended the establishment of a Resettlement Committee upon which the Ilois should be represented because "*they are now suspicious of decisions taken for their welfare without their knowledge, and the success of a scheme for integrating the Ilois depends upon their whole-hearted cooperation and assent*". This Committee should first look at funding the training of the unemployed Ilois with the £650,000 from the UK Government, welfare problems should be addressed by the appointment of a full-time welfare worker, and a capital allocation should be provided to each family. There were some urgent welfare cases: 78 people were in receipt of old age pension, but there were others who were unable to work and for whom the extended family system did not provide adequate support and who should be taken care of immediately. For the others, the first call on their individual allocation should be the provision of adequate housing with some furnishing. All this taken together would exhaust the £650,000 but would achieve "*reasonable satisfaction*" for the Ilois and could be quickly implemented. He hoped that the problems of the Ilois could be resolved as quickly as possible. The problems were largely financial. "*The fact is that the Ilois are living in deplorable conditions which could be immediately alleviated if action is taken along the lines I have suggested.*" It was an unfortunate fact that, since the sum of £650,000 had been agreed, the cost of housing in Mauritius had risen by more than 500%. Nonetheless, this appears to have been allowed for in his calculations of what could be done.
413. The Foreword to the Report, written by the Prime Minister's Office in Port Louis in September 1976 when it was published, said that not long after the scheme involving pig-breeding had been devised, it had become clear that the Ilois did not want it and preferred a scheme in which they each received money from the UK Government regardless of their need for proper housing or for a planned means of future livelihood. The problems which they faced had been compounded by a cyclone in 1975. The Report had recommended the

construction for each family of a house which was a little below the standard which was allowed by Building Regulations in Mauritius; this proposal had been rejected by the Mauritius Government which undertook to allocate funds to ensure that the houses, which it accepted should be built, were not below standard. It hoped that resettlement would become a non-partisan issue in the long term interests of the Ilois, and hoped that the Report, which in other respects the Government welcomed, would form the basis of their resettlement.

414. In February 1976, there was a further Exchange of Notes between the UK and US Governments permitting additional developments on Diego Garcia, and repeating the same provisions as to who could go to the islands, (8/1384(a)).

415. On 29<sup>th</sup> June 1976, the Seychelles gained independence and shortly beforehand the islands of Aldabra, Farquhar and Desroches were detached from BIOT and returned to the Seychelles. The BIOT Commissioner ceased to be the Governor of the Seychelles and became the person who for the time being was head of whichever FCO department was responsible for BIOT.

416. On 12<sup>th</sup> September 1977, (16/132), a Resettlement Committee, composed along the lines recommended in the Prosser Report, met in the Office of the Secretary to the Mauritius Cabinet. This was not the first meeting of this Committee. The Cabinet Secretary chaired it. There were several senior officials present together with Mr Ramdass, Mr Piron and Mr Saminaden as the representatives of the Ilois. Mr Bernard Sheridan is also recorded as "*In Attendance*" in the Minutes; he had been specifically told of the meeting by the Mauritius Government, (8/1406). The Minutes record that the Chairman said that the Government was aware of "*a test case*" in the UK and felt that the opportunity should be taken to introduce to the Ilois the lawyer who was representing the person who was bringing the case. The Chairman stated that its outcome would affect all Ilois because it could be assumed that the consequences of success would be that the same treatment would be meted out to all those in similar circumstances. Hence the benefit for all the Ilois if the lawyer met their representatives to obtain their help in preparing the case. However, Mr Ramdass with the support of the other two Ilois, expressed concern that the delays in such a case would delay a solution to their urgent problems. The Government reassured them that the work of the Committee would not be delayed pending the outcome of that case. But as Mr Sheridan was not appearing for any official body, no mention was to be made to the press of his attendance. Nonetheless the Ilois pressed for an urgent decision in view of their plight and the difficulties which they faced when reporting back on progress to those whom they represented. Mr Sheridan had no recollection of this meeting but it obviously happened.

417. The Committee met again on 17<sup>th</sup> December 1977; there was an additional Ilois representative, Mrs Vythilingum, (8/1409,20-103). The Chairman opened by referring to the apparent wish of the Ilois that the resettlement money provided by the UK Government be distributed to them as a cash payment. The question arose as to how that sum was to be apportioned; the Ilois representatives are minuted as saying that they were all agreeable to the 595 families surveyed in January 1977 sharing in the money even though the Prosser Report mentioned only 426 families who had been transferred between 1965 and 1973. The others had returned to Mauritius before 1965. The mechanics of its distribution were discussed.

418. On 9<sup>th</sup> January 1978, the High Commissioner reported to the FCO on a discussion which he had had with the Chairman of the Committee at which the strong sense of solidarity among the Ilois was identified as the reason for the inclusion of those returning before 1965 among the recipients of resettlement cash, even at the inevitable price of a lesser sum for the 426 families. Allocations would be weighted according to family size. He reported that when the Ilois collected their share from the Post Office, they would sign declarations accepting that they had no further claim. "*There was a good hope therefore that this would*

*be the end of the matter.*" (8/1452). Deductions would be made for rent but social welfare services would continue, and a welfare officer would be paid for by the Mauritius Government. A letter was sent on 9<sup>th</sup> February 1978 by the Mauritius Government to the FCO setting out the proposed distribution. Sheridans were informed by the Committee Chairman. The sum of £650,000 which had been received on 28<sup>th</sup> October 1972 had been augmented by just over 25% over the subsequent five years by interest payments. No objection was raised to the inclusion of the extra families but the High Commissioner responded that although the FCO welcomed the disbursement, it recalled that the funds had only been provided for the benefit of those displaced since 8<sup>th</sup> November 1965.

419. An anxious letter from the High Commission to the FCO, of 17<sup>th</sup> February 1978, referred to the political in-fighting engendered by the resettlement, with the MMM of Mr Berenger claiming credit in its newspaper "*Le Militant*" for having taken up the Ilois cause, complaining about delays and the erosion of its value caused by inflation, while the Parti Mauricien Social Democrate of Gaeten Duval claimed in "*Le Populaire*" that he had been instrumental in the bringing of the Vencatessen action, that he had met with a group of Ilois to keep them abreast of its progress and that he thought that it had good prospects but should not hold up the distribution of the resettlement funds. This point scoring by the two parties could raise Ilois expectations and lead to more direct political pressure for a better deal for them.

420. The resettlement fund had been agreed only between the UK and Mauritius Governments and was only to be distributed to Ilois on Mauritius. However, on 15<sup>th</sup> March 1978, Mr Raymond Mein who had settled in the Seychelles after leaving Diego Garcia, sought compensation for his family. This was at around the time that the payments in Mauritius were actually being made to Ilois, (8/1473). Neither Mrs Mein nor her daughter, Jeanette Alexis, knew of this. The FCO replied that the only individual compensation had been for premature termination of contract and in certain cases Rs 500 for loss of personal effects. The resettlement agreement was with the Government and not with individuals, even though that was the manner in which the Mauritius Government had decided to distribute the money. It had been paid to the Government in recognition of the particularly acute economic difficulties which an independent Mauritius faced; the Seychelles had still been a colony when the plantations had been closed, had still received sizeable grant aid and substantial compensation for the detachment of its islands (which had not been evacuated) and did not face such severe economic problems. The FCO added for the benefit of its representative on the Seychelles that the recent offer to settle the Vencatessen case for £500,000 to include all eligible islanders on Mauritius, had been made in that same spirit rather than to compensate for the loss of contested individual rights. It was feared that those now in the Seychelles, having left the Chagos, might start litigation taking their cue from the Vencatessen case.

421. The distribution of the cash, according to the High Commission in April 1978, led to additional Ilois seeking compensation from it; others wanted Crown land upon which to build a house; others had spent their money quickly. The MMM and PMSD "*were stirring the pot*". 1,081 adults and 1,284 children had received compensation. In April 1979, as the Vencatessen case made it important to know who were post 1965 Ilois in Mauritius and who had received what money, the High Commission reported to the FCO that the Prosser list of the 426 families who had arrived between 8<sup>th</sup> November 1965 and 1973 had been lost, that not all of them had registered in the 1977 survey and so had not all received a share of the £650,000 but that some of the extra 200 claimants probably included unregistered families from among the 426. There were not thought to be any post 1965 arrivals omitted from the list of 426. The figure used by Sheridans, which was some 200 higher, was not thought to be sound. Some lists with names were made available.

422. The Press took an interest in Diego Garcia and in the displacement of the inhabitants in particular, an interest which may have been further stimulated by hearings which were being held by a sub-committee of the US House of Representatives into the establishment of the military facilities on Diego Garcia and which dealt with the nature of its population and what had become of them. In September 1975, the Guardian suggested to the MoD that there had been deliberate misrepresentation about the inhabitants of Chagos. It referred to the treatment meted out to the islanders, to the violation done to their human rights by uprooting them from their native land. An Insight article in the Sunday Times in September 1975, under the headline "*The Islanders that Britain sold*" described the background to the departure of the islanders and drew attention to their poverty and ill-treatment, to the absence of compensation and to the fact that one of them was suing the Government. It referred to "*1,000 British citizens*". (8/1376).
423. The Chagossians gave evidence about this. Mrs Talate gave the principal evidence about conditions in Mauritius. For the purpose of these proceedings, there was little challenge to the general description of conditions, which can be therefore accepted and it is supported by much contemporaneous material. But it was tested to a limited extent for its reliability. Failing memories, contradictions, exaggerations and omissions of relevant parts of the picture eg as to social security benefits, accommodation and medical treatment for what ailments were commonplace. It is again apparent that reliance cannot be placed on written witness statements, now or past, as being what the witnesses can say or meant to say.
424. When Mrs Talate arrived in Mauritius, she said that some officers had come onto the boat and said that there was some cheap housing in the city which she went to see, but it had no door, windows, light or water, and that cows and goats were living in the house. She only had with her the Rs 8,000 which she had earned. She went to see her brother who had arrived before her in Mauritius in 1965 but had not been able to return. She had been forced to live with him, his wife and ten children, in four rooms with her six children.
425. She had been taken to hospital when she arrived in Mauritius and her children were ill; two died shortly after. One was less than a year old, another was eight. They had no food or drinks or milk and had to feed their children on citron tea. There were no jobs related to coconuts or copra in Mauritius.
426. After two or three months with her brother, she rented a house with three rooms, corrugated iron and a concrete floor, smaller than the one she had had in Diego Garcia, which cost Rs 300 per month and in addition she had to pay for light and water. She had no choice but to take it. She had left her belongings behind.
427. She knew nothing of debt or drugs in Diego Garcia. In Diego Garcia they had had plenty of rice, which was part of the rations, which they could cook while they went fishing. They were devastated by cyclones in Mauritius which destroyed their houses, took all their furniture and everything which they had bought. She experienced just poverty and misery. All the promises that had been made to them were lies. Paul Moulinie had promised them a house to leave the islands, the English Government had given the Mauritius Government money and time to build houses for them, their children would be educated, they would receive animals such as chickens and rabbits if they wanted to, but when they arrived in Mauritius there was nothing.
428. In order to get money to pay the rent, she had gone to work as a domestic servant, washing and ironing and doing the degrading jobs which Mauritians would not do. They had been discriminated against and ignored by the Mauritians. Those who knew them would not mix with them. They were looked down on and felt no self-respect. All they had to feed the children on was bread or water. She had got into debt just to pay for something to eat. She had repaid

the interest but the capital which she owed remained the same. Sometimes people asked for charity or drank river water in order to live.

429. She had moved from place to place in Mauritius but they were not nice places. Sewerage was no more than a hole in the ground which was flooded when it rained and there was all kind of rubbish and the conditions were unsanitary and bad for the children's health. Dirt came into their houses when it rained and children played in the dirt, picking up infections. People laughed at the poor conditions and poverty of the Ilois. They had no uniform to go to school in or exercise books and arrived dirty and came home dirty.
430. She had bought her own home and lived there with her six children, who were all grown up and married, and fifteen of their children. She found it difficult to talk about the numbers of people who had lived in her house and with whom she had bought it, and when they had left. It appeared that two had had to be taken into some sort of care. She was more precise later about the house. Her mother had died recently. She was not sure about the number of grandchildren in the end and how many were living in the five-roomed house.
431. She was asked about her health and said that she did not understand the word "*depression*", although in her witness statement she said that she had suffered from severe depression for a long time. She referred to the living conditions of other families as being the same as those which she had experienced, without light or water which was fit to drink and with houses that had leaky roofs. Their conditions were bad whether they suffered from cyclones or not.
432. Jeanette Alexis said that when they arrived on the Seychelles, they were put in quarantine and that they had lived, after a year, in an abandoned cow shed for many years, having lived for a year with an aunt. Her aunt had thrown them out when they ran out of money. Her father had difficulty getting a job. She remembered that they had to go onto other people's property to get mangos to boil and had no electricity or toilet or treated water. She could not go to school at the beginning because they were thought to be foreigners, but eventually all but two were allowed to go to school for a while. She said that on the Seychelles they had been called names and life had been made difficult for them. All the Chagossians in the Seychelles had faced a lot of difficulties in accommodation, food and clothing, and that most of them had lived in poverty and did not have the same privileges as Seychellois and were not considered as Seychellois, but rather as foreigners.
433. She said that her father was a Seychelles citizen and it was only after she got a job that she was told she was working illegally and had to renounce her Mauritian citizenship when she was nineteen. She was made to pay for Seychelles citizenship. She said those years of her life had been a terrible experience. Gradually, in the early 1980s the cow shed, in which she still lived, had been improved. Her father had been to see Marcel Moulinie about the compensation which had been promised but he was not very supportive, and she had found the same in 1997. He had said that he had to do as asked as manager of the islands for the British, which was to clear the islands. This he had done by bringing in a ship and asking people to leave. He had admitted to her that at some point, people who had left were not allowed back. She was not really sure how much the UK Government had been involved.
434. Her mother said that when they arrived in the Seychelles her children were very poor and had nothing to eat so her husband had had to work as a carpenter. Her present house has just three rooms. She owns it. It is concrete with a corrugated iron roof; her husband had bought it from the uncle. It had taken her husband six to seven months to find a job on the Seychelles. They had stayed for a few months with her brother-in-law in a cattle area. She could not remember her husband working for Public Works in the Seychelles as the statement said which he was said to have given to the Seychelles Attorney General in August 1975, (19/1383). She and her daughter both said that he had

not gone to Agalega for a year. She said that he had worked as a carpenter when he had no job. He had not told her that he had been to see anyone about compensation or had sat on a committee about compensation. (That is surprising and probably reflects her failing memory; she had diabetes.)

435. Mrs Piron said that in the Seychelles there was no money for her to live on and nowhere to live. She stayed at her mother-in-law's for a time; they lived in a ditch in the open air without food with her children and husband. She lived in this trench on the Seychelles until an old lady let her stay somewhere else. She could not remember how long she had stayed there for. She agreed that her older child born on the Seychelles was born in 1973 after she had left the ditch, so she had lived there for three to four months. She said that she had no work but he went fishing, selling his fish to get money, but there were days when he got no fish. He was a fisherman with his uncle. Her possessions had been left behind in Diego Garcia including her furniture and kitchen utensils and she had only brought out two mattresses, two cooking pots and her clothes. She had never tried to make any kind of claim for compensation before. She had been to hospital and had many illnesses. She was sad and had received blood twice. After two years, her children were old enough to go to school.

436. Mrs David said that she arrived on Mauritius with about Rs 7 or 8,000 saved from her work, kept in the employer's notebook and from which she got a cheque that they could change in an office; in her witness statement, she said that they arrived with no money. She said that when they arrived, they left the boat after four days, the Government gave them a house to go to at Baie du Tombeau, but it was not a good house because animals had been sleeping there but it was a proper house, though it lacked doors and windows, water and light. It appeared in re-examination that her husband had lived with his godmother in Mauritius. She told me that when she first arrived in Mauritius she was taken to the Dockers Flats area because they had nowhere to go. The Mauritius Government had provided them with a lorry to take their mattresses and things there. She received no social security.

437. She then agreed in further cross-examination that although she had previously said that the Government had never given her money and she had asked for a pension and had never got any, she had in fact received a monthly payment from the Government for maybe a year or a year and a half before the payment of Rs 10,000 was made. She said that the money she got (Rs 184 per month) was less than Mauritians got. She said that she had moved from Dockers Flats to the house which she rented in Cassis, referred to in the record of social security payments.

438. They then moved to a house in Cassis for which she had to pay Rs 400; it had corrugated iron walls and roof and an earth floor. They got into debt. She remembered receiving Rs 7,000 and then Rs 10,000 and the means to buy some land. She got enough land for three houses, which is where she now lives. Hers is a corrugated iron house and it was no good in a cyclone. Her husband eventually got a job with a lorry and she got poor quality work.

## **The Vencatessen Litigation**

438. One of the most important, if not the most important, driving forces of events was the Vencatessen litigation.

439. The documents before the Court show that on 22<sup>nd</sup> October 1974, there was a conference between Bernard Sheridan, the London solicitor, and Louis Blom-Cooper QC about Diego Garcia. A note of a conference between the two in early 1975 recorded that the "*claim appeared to be good*", (16/25). There was also a conference with Gerald Levy in early 1975. This was the first fruit of an approach by the informal Committee organised by Christian Ramdass, who had already been pressing for compensation for the Ilois.

440. Mr Ramdass had contacted Gaetan Duval, an important lawyer politician whom he described as sorting out problems relating to Diego Garcia, who had put him in touch with Donald Chesworth, an English adviser to the Mauritius Government. It was Mr Chesworth who suggested Sheridans. That account of how an illiterate, non-English speaking Ilois had been put in contact with a well-reputed firm of English solicitors with relevant expertise was consistent with what Mr Sheridan said. Eddy Ramdass, his son, did write some English but Mr Ramdass had a number of helpers in that respect. Mr Ramdass said, though not Mr Sheridan, that Michel Vencatessen had been chosen by Mr Sheridan to bring the proceedings as the oldest person.
441. On 17<sup>th</sup> February 1975, the Writ was issued in the High Court in London. Mr Vencatessen sued the Attorney General on behalf of the Secretaries of State for Foreign Affairs and Defence. He claimed compensatory, aggravated and exemplary damages for intimidation, deprivation of liberty and assault arising out of his enforced departure from Diego Garcia and transportation to Mauritius. It was later amended to include allegations that there was a conspiracy between 1965 and 1971 to enforce compulsorily his departure from Diego Garcia and to prevent his return there, to terminate his contract of employment and to deprive him of his rights as a UK Citizen.
442. The Statement of Claim asserted the rights of the Plaintiff as a UK Citizen and asserted the unlawfulness of the Defendants' behaviour, not only in the fact and manner of his removal from Diego Garcia, but in their refusal to allow him to return. Unlawful force had been used to compel his departure from the islands. He had been deprived of his rights as a UK Citizen, and of his rights to live on Diego Garcia or on BIOT, of his opportunity of obtaining employment, growing vegetables and rearing animals, and enjoying the amenities of life on Diego Garcia.
443. Although the litigation was brought in the name of Michel Vencatessen, Sheridans corresponded principally with Mr Ramdass or with Mr Duval. On 4<sup>th</sup> March, Mr Ramdass wrote seeking Sheridan's advice as to how he should respond to the inquiry by the Mauritius Government about whether the Diego Garcians wanted compensation in cash or land and houses. Sheridans replied on 15<sup>th</sup> March, (16/29), that they had instructions to press a claim in the English Courts for compensation on behalf of Michel Vencatessen "*and thereafter for all those Diego Garcian Islanders and others who were removed from their homes ... you may be assured that now the case has started all the Islanders' interests will be taken into account ...*". Mr Duval would be kept informed of progress.
444. On 20<sup>th</sup> June 1975, Sheridans applied for Legal Aid. The accompanying letter made specific reference to the dual nationality provisions of the Mauritius Constitution. The further forms for signature by Mr Vencatessen were sent by Sheridans to Gaetan Duval in Mauritius for him to arrange for their signature. On other occasions too, he acted as the point of contact between the Plaintiff and Sheridans.
445. On 8<sup>th</sup> July 1975, they wrote to the Law Society pointing out that some 400 other families were affected in a similar fashion to this Plaintiff, but that there were some voluntary removals for whom no complaint could be made. Those affected, however, could either participate later in these proceedings or join in a global settlement. Mr Blom-Cooper QC was also identified as one of those advising the Plaintiff; he may have been doing so since October 1974. He was sent information when he was in Mauritius as to the outcome of an interlocutory hearing in July 1975, which Sheridans anticipated he would discuss with Mr Duval. Sheridans sent him the Defence and hoped that he would be able to do some research whilst in Mauritius.
446. With the benefit of legal aid for a full opinion, Mr Levy produced an opinion on 11<sup>th</sup> November 1975, (16/1). He said that "*prospects of success ... are sufficiently high to justify proceeding further, particularly in view of the importance of the action to Mr Vencatessen and others in his position*". He



considered whether it would be tortious to expel someone from the place where he was born or whether that would inevitably be covered by an action in trespass to the person; he examined the question of whether the Crown could lawfully rely on its rights as owner of the land to remove the inhabitants, which he said was a difficult issue, and advised that the BIOT Immigration Ordinance was arguably ultra vires; he also doubted whether the Crown could rely upon the Ordinance because the procedures which the Ordinance envisaged had not been put in train. This opinion was sent to Mr Duval. Legal aid was continued to cover discovery.

447. In June, Sheridans wrote to Mr Ramdass saying that they wished to advise in person when next in Mauritius but pointed out that the interests of the Ilois, suffering from cyclone damage were "*protected to a large degree by the proceedings ... issued ... on behalf of Mr Vencatessen*". Information would eventually be required "*from each of you who qualifies to complain against the Government for the loss of your land*", (16/37).

448. The Defence, served on 19<sup>th</sup> August 1975, was drafted by Treasury Counsel. It pleaded the acquisition of the islands in 1967, and that Moulinie & Co had managed the islands in accordance with the terms of an unexecuted agreement. It specifically pleaded that, if Michel Vencatessen had been born in 1922 on Diego Garcia as he claimed, he would have become a British Subject by birth and later a citizen of the UK and Colonies by virtue of the British Nationality Act 1948. On the independence of Mauritius in 1968, he would also have become a Mauritian citizen. This pleading is of significance for the claim in these proceedings that the UK Government sought to deceive the Ilois as to their citizenship. It contended that the work on the plantation ceased and that the workers were transferred at their choice either to other Chagos islands or to Mauritius and that those transfers took place with the consent of the employees. In response to a Request for Further and Better Particulars, it was specifically pleaded that this Plaintiff agreed to leave at a meeting with the Moulins shortly before departure. Residence on Diego Garcia was as an employee and with the leave of his employers; without such leave, he had no right to enter or remain on the island. No acts of force had been used, if at all, by or on behalf of any servant of the Crown. The BIOT Immigration Ordinance 1971 was pleaded, not as the basis for the removal of the Ilois, but as the basis upon which the refusal of their return was lawful: they had no right to enter, they had no permit and indeed had never sought one, or if they had and it had been refused, they had never appealed against such a refusal.

449. The pleadings were amended in 1976. The purpose of the Re-Amended Statement of Claim was to allege that, in effect it was the UK Government which was behind the enforced departure of the Ilois and that it was the Government which caused their removal, the prohibition on their return, the deprivation of the right to live on Diego Garcia or on BIOT, their wrongful loss of employment and the deprivation of their rights as UK citizens to return. A Declaration was sought that Michel Vencatessen was entitled to return to live on Diego Garcia. In July 1976, the Plaintiff alleged that it was a term of the UK/US Agreements that the Ilois be removed by the UK Government.

450. The Reply of October 1976 asserted that the Crown was not entitled to rely upon the rights of the managers of the plantations or their lessees so as to remove a subject from the realm where he would otherwise be entitled to live. It was unlawful to expel the Plaintiff from the whole of BIOT or Diego Garcia. He never consented to leave and if he did, that consent was procured by the false representation that the Secretaries of State would pay compensation. The BIOT Immigration Ordinance could not be relied upon by the Defendant: it was ultra vires the BIOT Order 1965 because its purpose was to remove the whole or the larger part of the population of BIOT and accordingly was not made for the peace, order or good government of BIOT. This was the issue upon which the Bancoult case was fought and won by Mr Bancoult in 2000, but that precise issue had been raised in the Vencatessen litigation nearly 25 years earlier.

451. It was alleged by the Plaintiff that it had been an Officer of the Royal Navy who had been responsible in October 1971 for the enforced departure of the Ilois, something which the Defendant denied and of which it sought Particulars. Later the Plaintiff alleged that the person was the officer in charge of the "*Nordvaer*", who was said, in Further and Better Particulars of December 1976, to have told a meeting of the islanders that they could not stay but that they would receive compensation in Mauritius. This meant that the Plaintiff would be forced to leave or left to starve on Diego Garcia; his wishes were not sought or taken into account; Mauritius was the only "*final*" destination offered.

452. One of the important features of the Vencatessen litigation for the purposes of the present case is the extent to which, as long ago as 1976, issues had been identified which are very similar to those which underlie this action. There are differences; the property claim had not been formulated and there was no reliance placed upon the Mauritius Constitution. The causes of action are not pleaded as misfeasance, negligence, exile or deceit; but the Immigration Ordinance is said to be unlawful on the grounds relied on 25 years later; the issue is raised as to whether it was lawful for the Crown to rely upon its property rights to remove the population of BIOT and that it was in any event unlawful for it to do so without consulting the population, offering them a choice as to whether to stay or go and if the latter, where to go. The essential unlawfulness of compulsorily removing a whole population or the greater part of it from the BIOT was at the centre of the Vencatessen litigation.

453. The Defendant began to gather evidence for its case from witnesses in the Seychelles through the Seychelles Attorney General. In August 1975, he interviewed Paul and Marcel Moulinie and Raymond Mein, who was the Assistant Manager for Moulinie & Co on Diego Garcia. He recorded Paul Moulinie as saying that the company and the BIOT Administration had arranged for the transfer of employees to Peros Banhos and Salomon and that the company had carried out the transfer. They could choose to go instead to Mauritius. They could take their personal belongings to those islands. They received a sum by way of resettlement which the BIOT Administration reimbursed. They left willingly. No naval vessels or personnel were involved; the transfer took place without incident or the use of force or coercion as he understood it from Marcel who had been in charge. The same applied when they were transferred from Peros Banhos and Salomon. Paul had said that he dealt with the refusal to disembark on arrival in Mauritius by saying, I infer from the missing words in the note, that the Mauritius Government would pay some further sums to them, (8/1421). Marcel was interviewed with Mr Mein, (19/1383d). They confirmed that no military personnel had been involved in the transfers. They both said that the fifty or so families on Diego Garcia were given the choice of going either to Mauritius or to Peros Banhos or Salomon. Only twelve took the latter course and the majority chose Mauritius in order to be first in line for any jobs there. Michel Vencatessen, who had been the senior overseer on Diego Garcia, as with the rest of the families, had been reluctant to leave Diego Garcia and the older people had been particularly reluctant to go but the younger people had seen it as more of an opportunity. Nonetheless, the promise of compensation and the fact that they were allowed to take all their possessions helped them to make up their minds to go. He said, according to the Attorney General in a note made when he sought further details in March 1976, (19/1384b), that the company treated the islands as an estate and no-one could enter or stay without their permission and none did except as employees.

454. Mr Marcel Moulinie told the Court that he had no recollection of the interview or discussion or even of being contacted by anybody in connection with the Vencatessen case (though it is not conceivable that these were simply fabricated conversations). He confirmed though the accuracy of what was said about compensation and the evacuation. He disagreed that Mr Mein had gone to Agalega for a year, as did Mrs Mein. Although it was a commercial estate, Diego Garcia was also the islanders' permanent home, for those who had been there for

generations, and was not just a question of their having contractual rights as employees. A bad employee would be locked up for a few days, only one had been sent back.

455. Later, when asked by the Attorney General, whether the consent of the employees to the transfer from Peros Banhos and Salomon had been given orally or in writing, Paul Moulinie replied in April 1976, (19/1384g), that there had been no question of consent because as the islands were being evacuated, it was not possible for anyone to stay. He also said that he had at last found a reference showing that Mr Vencatessen needed no contract in order to stay on Diego Garcia because he was domiciled there. The Attorney General wrote to the BIOT Administrator in April 1976 (19/1384m) saying that Mr Paul Moulinie had told him that Mr Vencatessen had no contract because he had been born on the island *"and was employed in the normal course of events"*.

456. Mr Mein, according to the interview, said that he had gone from the Seychelles to Diego Garcia when he was twenty and had lived there for twenty five years. He had assisted in the evacuation of Diego Garcia and had then gone to Peros Banhos for a few months. He had gone reluctantly because of his ties with Diego Garcia. After a short spell on Peros Banhos, he had gone to Agalega for a year, (8/1442). Mrs Mein, who gave evidence to me, said that he had not been to Agalega at all. He had had a year's salary in lieu of leave when he finally left the company and on the Seychelles, he had had employment in Public Works. He also said that he was not pressing for the Rs 500 which he and all the others who left Diego Garcia had been promised, and which none of them had received. He was on good terms with the company, unlike Mr Prosper, who had been in charge of records on the islands for the company, who also lived in Mahe but was bitter at what had happened.

457. In August 1976, the Seychelles Attorney General conducted a further interview with Paul Moulinie. He dealt with the contractual position of Michel Vencatessen who on certain documents was referred to as *"pas engage"*. This meant, he said, that they were Ilois and *"were never engaged on a contractual basis, being already on ... Diego Garcia"*, (8/1400). But Mr Paul Moulinie did not mean by those documents or by saying that Mr Vencatessen was domiciled there, that he was entitled to live there or even thought that he was. It meant that he regarded the island as his home. Mr Moulinie still thought that the workers looked upon themselves as working on an estate, rather than as having any permanent right of abode. They were given houses rent free which the company repaired and, if they left, re-allocated to another worker. Workers from the island differed only from those recruited from off the island in that they had no contract. They were never given the impression that they would continue to be employed on the island. The children of workers took up employment with the company when they were about twelve unless they were thought bright enough to go to school in Mauritius. Many had done so and some of them had returned to the island if trouble had arisen in Mauritius. The question of a prescriptive right of residence had never arisen. Whenever a worker had had to put off the island, he had just done as told and went. The plantations were run on paternalistic lines, with the company providing free medical care, food in the store, the religious services and the school. Some people had been living on the island for many years, possibly from families who had been there for a hundred years.

458. Passages in the Prosser Report were seen as helpful to the argument that the evacuation was the result of deliberate policy rather than being the natural order of events leading to a voluntarily departure. Mr Duval was kept informed as to the progress of the case. By October 1976, pleadings were closed, discovery had yet to take place and it was soon hoped to set the case down for trial in view

of the urgency attaching to it because of the plight of the Ilois. Mr Sheridan and Mr Levy discussed in conference the existence of "*another 425 potential Claimants*" as a further reason for not pursuing any interlocutory appeals to the Court of Appeal; (16/103). Boreham J had refused leave to amend the Statement of Claim so as to add an allegation of conspiracy against various Ministers and they obtained legal aid to pursue it although they never did so. Sir John Foster QC appears to have become involved at this time for the Plaintiff.

459. Mr Robin Cook MP also contacted Sheridans to express his close interest in the wellbeing of the islanders; they told him of the constitutional implications of the case and of the international dimensions. He was to be re-acquainted with it as the defendant in the Bancoult Judicial Review.
460. Sheridans asked for the Summons for Directions to be placed in Counsel's list in November 1976 because they contended that the case concerned not just the Plaintiff but also the rights of some 400 other families in Mauritius. In January 1977 it was ordered to be set down for a 15 day trial within 35-42 days, which prompted Sheridans to contact the Treasury Solicitor to see if there was any point in the two sides talking. Mr Munrow recorded Mr Sheridan as saying that he had the ear of a number of people in Mauritius, and that there were people other than Mr Vencatessen who were interested parties in the case. Mr Munrow said that they had always appreciated that it was a "*representative action*", (8/1405). Strictly, it was not, but that is loose language for the general importance for all the Ilois which at least both sets of lawyers appreciated it had.
461. Indeed, the general importance of the case was such that Mr Sheridan had meetings in July 1977 in London with the Prime Minister of Mauritius who suggested a meeting with the Secretary to his Cabinet, Mr Burrenchobay who chaired the Resettlement Committee.
462. In August 1977, Sheridans wrote to Mr Duval saying that the action would soon be set down for trial but that there was the possibility of a settlement which would be in the interests of the "*clients*" and the three governments. Mr Sheridan was to come to Mauritius, and with the assistance of Mr Burrenchobay, would have facilities to pursue necessary researches but it was best if the trip were not publicised and played "*in low key*", (16/128). He sent a copy of that letter to Mr Burrenchobay because, as he explained, he had received his instructions originally from Mr Duval and would be professionally bound to meet him. It was on this visit that Mr Sheridan attended a meeting of the Resettlement Committee on 12<sup>th</sup> September; although he could not remember actually doing so, he agreed that he must have done. He obviously met with at least some representatives of the Ilois. He also contemplated proceedings in the BIOT Courts. He also asked for the help of the Mauritius Government in compiling a list of the house holds who had come from the Chagos to Mauritius and when, together with their addresses. He received this information from the Prime Minister's Office in early November. He was also sent the questionnaire upon which that list was based.
463. By the Autumn of 1977, there had been some discovery of documents by the Defendants. But it was already plain that there was going to be a very considerable area of dispute over which documents were subject to public interest immunity or not. Privilege was claimed for some 600 listed documents. A Summons for Discovery had been taken out but it was adjourned to the judge by consent on 8<sup>th</sup> December 1977. Sheridans sought a date earlier than the Court envisaged because of the urgency of the position of the "*400 people now living in ... conditions of abject poverty ...*", (16/145). On December 1977 and again in January and February 1978, some further documents were released to Sheridans, some of which were expurgated.
464. Another important feature of the litigation was the extent of privilege claimed for documents which are now before the Court. The Defendant's Discovery Schedule of August 1977, listed documents which they were not prepared to disclose because their disclosure would be harmful to the public interest. These included the high level consideration of defence policy including

the resettlement of workers, and discussions with foreign governments or the UN. Some documents were disclosed after negotiation and others were disclosed in a redacted form. The differences have been identified for me by reference to the extensive chronology with which I have been provided. A Summons was issued for hearing before a Master in December 1977 at which the issue would be resolved; the Master would have been asked to examine the documents himself in order to assess their privileged status. The extent to which those documents were truly privileged was never tested in the litigation before a Master or a Judge. It was said before me by Mr Cyril Glasser of Sheridans that this was because the Treasury Solicitor had made an offer of settlement shortly before the hearing, which offer had been timed to deprive his client of the opportunity of pursuing the application without a further consideration of the prospects of success, and thus to postpone the point at which disclosure might be ordered of embarrassing documents.

465. Whether that was so or not cannot now be resolved, and I do not consider it wise to speculate as to one solicitor's motivation based upon his opponent's appraisal of the tactical manoeuvrings of litigation. The point of relevance is that these Claimants have access to a far wider range of documents than did Mr Vencatessen but he did not pursue any application for discovery as he could have done, rather than settle on the terms upon which he did. That aspect of the conduct of his litigation was a matter for the advice of his lawyers, weighing the prospects of success and the timing of any victory against the risk of losing or waiting with nothing for perhaps a number of years.

466. However after the summons for the discovery hearing was adjourned by consent, there were no formal Court proceedings until the formal Order staying all further proceedings after the settlement in 1982 as part of a wider negotiation of Ilois claims, the significance of which was a matter central to the proceedings before me.

467. On 23<sup>rd</sup> February 1978, the Treasury Solicitor wrote an open letter to Sheridans offering to pay £500,000 to the Ilois families who left BIOT after its creation in 1965 and who went to Mauritius. It was said that the sum was offered in the same spirit as motivated the £650,000 offer to the Mauritius Government and had not been calculated by reference to any heads of damage. It was envisaged that the sum would be shared equally among the families according to a mechanism of their choosing. *"The UK Government would not, however, be prepared to pay out this money and yet still remain open to legal proceedings of the kind brought by your client. It will therefore be a necessary condition of any payment that the Crown shall receive receipts and discharges adequate to protect it against the possibility of any future actions against either the UK or BIOT Governments ..."* (8/1467). Court approvals would be necessary for any infants. The Treasury Solicitor recognised that Sheridans might wish to complete the process of discovery before advising their client *"and those other members of the Ilois community for whom you act ..."* If, however, after the consideration of any further documents which might be ordered to be disclosed, the action was continued, the offer would be withdrawn. It was thought that Sheridans might be able to obtain instructions for other families in addition to Mr Vencatessen, and for those whom Sheridans did not act, the Crown would have to tell them of the offer. A list of those for whom Sheridans acted was asked for. The Government of Mauritius was informed.

468. This offer was made shortly before the actual distribution of the £650,000 to the Ilois, which was due to take place in stages over three weeks in March 1978. *"Le Militant"*, the MMM paper criticised the payments as scandalously inadequate. It had previously reported on the demonstrations of the Ilois. No doubt, it had an interest in using their plight as a means of criticising the compensation terms agreed at the time of the creation of BIOT and hence the

then Government. Mr Ramdass wrote or had written for him two letters in English to Sheridans, first complaining about the delay in the distribution of this sum and then saying that the distribution dates had been fixed. He referred to what had been on the radio, TV and in some newspapers.

469. Sheridans replied to the offer letter on 20<sup>th</sup> March 1978. It said that although they acted for Mr Vencatessen alone, they also represented a committee "*purporting to represent the Ilois community, to whom we shall arrange for the communication of your offer*", (8/1474). It raised difficulties over ascertaining the precise scope of potential claims, and the possible inclusion of those who left earlier than 1965. It was not thought reasonable to have to consider the offer and to take proper instructions on it without visiting Mauritius, for which purpose Sheridans sought the financial help of the Defendants, and an adjournment of the Summons for Discovery which was becoming imminent. It was adjourned sine die by consent. It was thought that a week would suffice for the purpose of communicating with the community, seeking their views and advising them on the offer. A request was made for legal aid to cover the visit on the basis that Sheridans had received instructions from "*a representative group of Ilois*", that it needed to take instructions direct from the community which would "*engage in long and earnest debate*" in which the presence of the lawyer would be of help. Legal aid was refused because there was only the one formal client and the community in general were not the legally aided client. But in May, the Treasury Solicitor offered to pay up to £5,000 towards the costs of two lawyers from Sheridans going to Mauritius because of the proposals which needed to be put to the Ilois generally. Assistance was also sought from the Mauritius High Commission by Sheridans. Both Mr Sheridan and Mr Glasser, the Sheridans Head of Litigation, went to Mauritius in June 1978. Mr Glasser said that they had discussed the offer of £1/2m with Ilois representatives. They had gone to meet Ilois community representatives and to see where the Ilois lived. There was critical publicity of the offer in Mauritius. One problem had been that the Mauritius Government was unhappy with money being distributed to individual Ilois, which could be divisive if they became better off than Mauritians. But it was aware of the case and of its importance. Mr Sheridan agreed in Court that the Vencatessen case would be a precedent for other Ilois and he had viewed it in that way when it was in progress, as had the Treasury Solicitor. The offer of £1/2m and the subsequent offers were clearly directed to the Ilois community as a whole. Mr Sheridan said that, although when the first offer of £1/2m was made he did not know whom the Ramdass Committee represented or how representative it was and could not now remember who the committee members were, he did know that this visit had made him more sure of the committee and it seemed that he must have been convinced that they were spokesmen for the community.

470. In July, an article appeared in "*L'Express*", a Mauritian newspaper in French, referring to the possibility of a second round of compensation for the displaced Ilois, (19A/F/17). Mr Duval was off to London to meet his British lawyer, Mr Sheridan with a Mr Naiken who had been elected president of the "*Ilois Group*" at a meeting of some 400 Ilois. Its aim was to bring pressure to bear on the UK Government whilst what it called Mr Vencatessen's "*test case*" was before the Privy Council. Mr Sheridan remembered meeting Mr Duval in 1978 but not Mr Naiken.

471. Mr Glasser of Sheridans wrote to the Treasury Solicitor on 6<sup>th</sup> July 1978, saying that he had been instructed through a committee "*representing the various communities of Ilois to negotiate*" with the Government on the offer made "*on behalf of all the Ilois in Mauritius*", (8/1489). A similar letter was written to the Law Society on 26<sup>th</sup> July, in which Mr Glasser also said that Mr Vencatessen wanted his case "*dealt with in conjunction with negotiations in relation to his fellow islanders*", (16/467). Mr Ramdass pressed for information as to what had happened since Sheridans return to England, describing what had been done with

the compensation paid out in March. In Mauritius, the Ilois maintained political pressure by hunger strikes among the women; one of whom, Mrs Talate, was admitted to hospital. The press reported these events. The pressure had at least the effect of causing the Prime Minister of Mauritius to ask Sheridans in November how negotiations were faring, because of the pressure it was under from the Ilois.

472. On 27<sup>th</sup> September 1978, Sheridans made their substantive reply to the offer of £500,000. The letter recapitulated the background to the UK's legal and moral responsibility for the plight of the Ilois, the inadequate thought given to the resettlement scheme and to the inadequacy of the cash paid out in lieu to provide for their needs. The major problem was housing; their conditions were deplorable and exacerbated by unemployment, the numbers of children and elderly, and the cost of providing land and buildings. What there was had been devastated by a hurricane. The letter emphasised that the Ilois *"who lived together in a number of communities"* wanted negotiations to be carried out *"on behalf of all the Ilois in Mauritius and not merely those that had come since their removal from the island by the British Government"*. A further survey of numbers was being carried out on behalf of the Ilois, (8/1490).
473. Following a *"without prejudice"* meeting on 9<sup>th</sup> January 1979, at which it was agreed that a settlement was in everyone's interest, a further offer was made on 9<sup>th</sup> May 1979. The offer was increased to £1.25m subject to the same conditions as the earlier offer. It was made only for those who had left BIOT since its creation, and not accepting responsibility for those who had left earlier. It was hoped that Sheridans would obtain instructions from all those to whom the offer was addressed, act for them and obtain the quittances for giving effect to the settlement. Shortly before receiving that letter, Sheridans had sent telexes to Francoise Botte, a social worker who was assisting them and to Mr Ramdass saying that a new offer which was believed to be *"very"* or *"more"* favourable was imminent and asking her to advise the Ilois community of what was expected.
474. Sheridans sought financial assistance from the Treasury Solicitor to return to Mauritius, which was agreed to, for a visit in July. Meantime, discussions focussed on the identification of those for whom Sheridans acted. Sheridans wrote to Miss Botte seeking her help in compiling a definitive list of those who left the islands after the creation of BIOT, even though the Ilois themselves might decide to distribute the money more widely. The lists already obtained from the Mauritius Government had omissions. The UK Government merely wanted a receipt from those to whom money was paid. She was asked to circulate this information to the whole Ilois community. She replied saying that she had done as asked but that the Ilois were all of the view that those who had worked on the islands, even if they had been born in Mauritius should be included in the payments. The Mauritius Government should be asked to help with additional registrations. On 13<sup>th</sup> June, an enlarged list of those from Diego Garcia was sent by Sheridans to the Treasury Solicitor, which it was recognised went well beyond those who might be the agreed list (as it included the whole Ilois community), but was seen as a basis for comparison between the various lists then in circulation. He sought the help of the Mauritius High Commission which was kept informed of his travel plans.
475. In June, Sheridans also received a hand written letter from Mr Vencatessen; it is full of gratitude to Mr Sheridan for what he is doing for *"us"* and *"our cases"*. Mr Sheridan was also in touch with the then, Anglican Archbishop in Mauritius, Trevor Huddleston, and an English support group for the exiled Diego Garcians.
476. On 28<sup>th</sup> June 1979, the Treasury Solicitor replied with incomplete details of three lists, one of which matched one sent by Sheridans. The letter emphasised the need for there to be agreement as to the precise steps to be taken to satisfy the Crown that it would not be at risk of future actions if this offer proved acceptable, dealing with the problem of identifying those who fell into the group

to be compensated and dealing with those who might not come forward to participate, in respect of neither of which could there be guarantees.

477. A further letter was written by the Treasury Solicitor on 11<sup>th</sup> July 1979. It emphasised the need for a resolution to the questions of to whom the offer was directed, how quittances were to be obtained and how any necessary court approvals for those under a disability were to be obtained. Detailed suggestions were made on a number of these points. The possibility of sharing in an improved offer should be advertised before Mr Sheridan's visit. Mr Sheridan wrote to the Mauritius Deputy High Commissioner seeking some financial assistance for the visit and in communicating his arrival and the terms of the offer to the Ilois. The UK High Commission warned the FCO of the risk of a flood of ineligible claimants unless the advertisement was very carefully worded.

478. Discussions between the parties included the form of the quittance which recipients of compensation were to sign. A first draft was sent to Sheridans in September, which was examined by Mr Blom-Cooper and amended in a number of ways in the course of discussions. A form was agreed in October, and a thousand copies were provided, and later a French translation, as Mr Glasser thought that none of the Ilois spoke English and the Treasury Solicitor wanted to ensure that the Ilois understood what they were signing. The problem of illiteracy was left unresolved. Mr Blom-Cooper drafted a trust deed to hold the settlement monies for the Ilois. He advised at the beginning of October that: (16/515).

"Having regard to the difficulties, both procedural and substantive, that stand in the way of a successful conclusion to the litigation and to the already protracted nature of the litigation I am firmly of the view that the offer of £1,250,000 ought to be accepted in full and final settlement of all the claims by Ilois displaced from their homeland in Diego Garcia by the British and American authorities."

479. Mr Sheridan arrived in Mauritius on 27<sup>th</sup> October 1979 with his wife. They stayed until 9<sup>th</sup> November. He could not remember, but agreed that he had to accept from the later correspondence, that he had met the committee instructing him before holding more general meetings, that he had asked them to discuss matters among themselves and that they had not demurred from the terms, because if they had done so he would not have proceeded as he then did. He had relied on Miss Botte and Mr Ramdass to spread word of the offer already. They then arranged meetings and helped him obtain the signatures for the quittances. He had no recollection of meeting Mr David QC, although there was a letter written to him shortly after Mr Sheridan had arrived in Mauritius because he was a leading QC in Mauritius and likely to be a trustee of any money. Everyone was taking an interest in the Ilois and there was some debate in Mauritius, he remembered, on the terms of the offer.

480. He explained as he saw it the role of the quittances. He did not regard the signing of the quittances as more than a preliminary step on the way to a settlement and that the quittances would be conditional on a later deed. Although there had been discussions about the form of the quittance before he left England, other considerations remained to be resolved such as who was to qualify and how any sum was to be distributed. He did recognise, however, that a good deal of negotiating work had to be done on the quittances before he went to Mauritius and the form referred to the appointment of "*Bernard Sheridan as our Attorney*", as "*our Solicitor to act on our behalf*". The form of quittance expressed acceptance of the money in full and final settlement of all claims arising out of the creation of BIOT, the closure of the plantations, the departure or removal of the inhabitants and workers, their transfer and resettlement in Mauritius and "*their prohibition from ever returning to the Islands*" of BIOT. Clause 3 included: "... we



*further abandon all our claims and rights (if any) of whatsoever nature to return to" BIOT. This was where the chief problem lay, (16/537).*

481. His wife, who was not a lawyer and did not work for Sheridans, had gone to Mauritius with him for a holiday and was pressed into service when he saw the volume of work which he had to do. People outside were pushing to come in to the hall where he worked, so he assumed that they were aware of what was happening. They were eager to sign. Large numbers of people had heard of the offer and wanted to come in so they made use of small rooms. He had seen people in small groups of 12 to 15 and told them of the terms of the Government's offer. He had done his best to explain the contents and effect of the quittance, and what he said, namely that the Ilois would be giving up through the quittances any rights to seek compensation or to return to BIOT, was translated into Creole, although he could not assess how accurately. He agreed that it was part of his task to explain the quittances and to ensure that those who signed them understood them. He had not been able to give legal advice or in the time available to explain what the rights to compensation or the right to return to BIOT actually were. He did not elaborate on those claims although their nature would have been explained, and he did not advise on the merits of the offer. It would not have been practical to take statements or instruction from each family. He spent over an hour talking to each group because there had to be an address followed by a translation. They would confirm their willingness to accept the offer by signing or putting a thumbprint on the quittance. At the start of each document were the parts which his wife and he had asked each individual to complete, explaining what their circumstances were in order to see whether they qualified for the offer. They were dealt with individually in relation to that part of the document which contained individual questions relating to their qualification for the offer. He had worked at this for seven to eight long consecutive days.
482. He was satisfied that acceptance of every signature was properly and voluntarily given as a result of the steps which he had taken. They had been told that if they wanted the money they would have to sign and they were not compelled to sign. He thought that they were motivated by the offer of compensation and in all probability, in view of their wretched living conditions, the question of getting advice did not enter their heads. However, he agreed that the Ilois were quite capable of making their views known, campaigning about it and indeed had rejected an earlier offer of £1/2m. Most Ilois wanted to deal with their immediate distress by the payment of money.
483. However, at least some Ilois had taken strong action against his presence and the terms of the offer had become known very quickly, and he had done his best to explain the contents and effect of the document. His meetings had not all been at one venue because of hostility of some in the community, street demonstrations and threats of disruption.
484. The Vicar General warned Mr Sheridan of the fast spreading view in Mauritius that signing the quittances would jeopardise the chances of the Ilois returning to the islands; he also thought that the Ilois had been given too little time at the meetings in which to consider their position before being talked into signing the forms. He left earlier than planned because of the demonstrations.
485. Mr Glasser remembered how very upset Mr Sheridan had been when he returned from Mauritius in 1979 about the way things had gone. He had seen the MMM as behind the disturbances at meetings and he had been worried about his wife's safety at one meeting. The correspondence then reflected a calmer tone than his conversations had done upon his return. The MMM were complaining about the renunciation clause which was politically controversial and had caused the problems.
486. Mr Sheridan said that in retrospect more time and consideration had been needed and although he was satisfied at the time that he had received instructions from a representative group of Ilois, he was not in the end sure how representative those purportedly representative committees really had been.

487. Mr Ramdass' evidence about what had happened in 1979 and subsequently was confused. He could not remember the Resettlement Board set up in 1970 nor being a member of it. He said that Mr Sheridan had spoken to his group about the 1979 offer and explained that there was a requirement for claims to be renounced. Accordingly, they had told him that they could not take that decision on their own and so arranged a hall and invited people to come where Mr Sheridan explained the position. Mr Ramdass said that those who heard of the proposal were very annoyed about it and no one agreed with it. This was scarcely consistent with Mr Sheridan's evidence that 1,200 quittances had been signed, in his view voluntarily, and that there had been no demur from Mr Ramdass' committee when he spoke to them about it in advance. At another point in his evidence he said that he was unable to remember Mr Sheridan coming with a second offer or that a new committee had been established before that by Mrs Alexis. He said that he did not know whether the offer of £1.25m was for Vencatessen alone or for all the Ilois. His group had not agreed with the renunciation of rights but he also said he did not know what conditions had been attached or whether it had been a condition of the offer that the Ilois could no longer sue. He simply repeated that the Ilois did not agree with renunciation of rights. He denied that there had been any discussion with him or any explanation about what was being renounced.
488. Questions were frequently unable to keep Mr Ramdass on track and time and again he did not know things which he might have been expected to know in the light of what else he remembered. Notwithstanding the fact that he was elderly and in poor health, he was plainly selective in what he remembered and in what he said he knew. He was frequently evasive. He agreed that Mr Sheridan had told the committee that his offer had a renunciation of rights attached but he said that Mr Sheridan had always been speaking in English. When pressed, he accepted that there had been a translation but he then said that he did not know that for the offer to be accepted all the Ilois had to accept it. He denied helping Sheridans to get the renunciations signed or to arrange for the Ilois to come and meet him and he said that it was just a small number of people who came who disagreed with the proposal. He said in response to the existence of 1,200 signatures that people did not understand what renouncing rights meant. His committee had not been in favour of accepting the offer. Eventually he said that people were happy to receive money but not to give up rights in relation to their land in Diego Garcia.
489. Mrs Alexis described how in 1979 when Bernard Sheridan had come to Mauritius, the word had spread through the Ilois community about the proposed renunciation of their rights as Chagossians (plainly word of mouth was effective in that instance). This had led to what she described as "*intervention*" by a number of Chagossians which had caused Mr Sheridan to leave Mauritius "*in a hurry*". She said that she had realised that many who had signed those forms had not realised their implications. In cross-examination, however, she denied that there had been a meeting in Beau Bassin in July 1979 to set up the Committee Ilois, then she said that she did not remember the meeting but accepted that there had been a big meeting where there could have been 1,400 Ilois. She could not remember that it had elected a committee of 28 people or becoming a member of that committee – "*it was all so long ago*".
490. She said that she did not think that Mr Sheridan had brought an offer of compensation in 1979 and Mr Michel with whom she was working had not told her about the offer. She next said that although she had not gone to any meeting held by Mr Sheridan, her group had led a campaign to make the Ilois aware of the consequences of accepting this offer; Bernard Sheridan had prepared to put a noose around their necks. His offer had conditions attached which involved renouncing rights; they had all put their heads together and said that that would be impossible. It was her constant position that she did not know that Mr Sheridan had brought an offer of money. There was confusion as to why,

therefore, her group had got so upset about the quittances and also about what she had said about that in court.

491. After a short break she said that she did not know even now whether Mr Sheridan's offer from the Government meant that they would have to give up the right to return if they wanted the money, then that she did not know what Mr Sheridan was asking them to renounce because she had not been at the meeting. She was again asked what had annoyed her in 1979 leading to her intervention, to which she said that that was because they had renounced their rights and could not ask the English for more money but she had only heard that from other people and nor Mr Sheridan. It may be right that she only heard indirectly about the offer but she was clearly dodging the questions in case her knowledge of that offer and its terms prevented her claims to ignorance of subsequent developments being believed.

492. Mr Saminaden said that he knew when Mr Sheridan came to Mauritius in 1979, he was bringing a new offer though he could not remember whether Mr Ramdass had told him about that or that there had been a meeting of the Ilois to say that Mr Sheridan was coming. He had not heard what Mr Sheridan had to say but he had heard people saying that they had snatched the papers back from Mr Sheridan because they had had to renounce their rights to return to Diego Garcia and did not like that. He remembered nothing about it being said that there was an obligation to bring no more cases. He remembered writing with others to Mr Sheridan saying that he should not use the forms which had been signed. He thought that the letter merely told Mr Sheridan to stop work. He could not read or write in Creole and it was Mr Mundil who used to write letters for them in 1979.

493. The impact of the condition on the return of the islanders to the Chagos was highlighted by the press. "*Le Mauricien*" questioned why such a condition was necessary and why Mr Sheridan had not been in contact with a particular Ilois support group elected in July at a big meeting in Beau Bassin. It suggested that he was there as the guest of the Government of Mauritius. Certain politicians in Mauritius were concerned that if the Ilois renounced their right to return to Diego Garcia, Mauritius would have a weakened argument for the return of the islands. To that extent, their national interests and those of the Ilois were in harmony. The MMM, the opposition party in which Mr Berenger was a leading light, claimed some influence in persuading the Ilois to reject the abandonment of their rights as proposed by Mr Sheridan - as it was seen by some. Questions were asked in the Mauritius Parliament about the Government's attitude towards this particular condition - it saw it as a matter for the Ilois. It was questioned too about the assistance which it had provided to Mr Sheridan. The Guardian reported on his visit; he told it that the committee which he had spoken to on his arrival had accepted the terms without demur, that the response from the Ilois had initially been so overwhelmingly favourable that he had had to prevent some coming in, so as to have some order to the meetings. But he recognised that their poverty would make them willing to sign almost anything in order to receive some money.

494. When Mr Sheridan returned to England, he received on 13<sup>th</sup> November 1979 a telex from some Ilois saying that they were revoking their acceptances. The High Commission in Mauritius warned the FCO that there were two Ilois Committees with the MMM in the lead, opposed to the settlement terms, especially to the requirement to give up the right to return to the Chagos. Mr Sheridan described the events of his trip to the Treasury Solicitor in a letter of 19<sup>th</sup> November 1979. He said that until he had received the political objections from the MMM, he "*had managed to see the greater part of the Ilois community and am satisfied that the acceptances that I have received in respect of every signature was properly and voluntarily given as a result of steps which I took ... It is abundantly clear to me that the overwhelming majority of people wish to accept the offer*", (8/1541). He was not sure how far these political objections went but he did think that what people really wanted was a financial settlement and an end to this long drawn out matter.

495. On 25<sup>th</sup> November 1979, three committees sent a joint type written letter in English to Mr Sheridan, (20/99). The first committee was that elected on 8<sup>th</sup> July at Beau-Bassin and their signatories were Charlesia Alexis, Elie Michel and Marie Lisette Talate. The second was the "*Older Committee Which Has Been Liaising with You from Mauritius*" whose signatories were the four Ilois representatives on the Resettlement Committee: Mr Ramdass, Mr Piron and Mr Saminaden together with Mrs Vythilingum. The third committee was the Ilois Support Committee of Mr Mundil. They had also met with Mr Elie Michel of the Organisation Fraternelle. The first two described themselves as having been at the forefront of the Ilois' struggle. They had had discussions with the representative of an Ilois support group based in England, who had also corresponded with Sheridans. They had started the process of discussions within the Ilois community and whatever legal document he now received from the Ilois would be the product of those discussions. They explained why events had taken the turn which they had.

496. Although the conditions were read out and explained, the people focussed on the money and regarded the forms as a mere formality which had to be got over with in order to get the money. They had had only a short time in which to consider matters and had had no time to consult others wiser, more literate than themselves or to take alternative legal advice. Nonetheless they appreciated the efforts which he had made over the years for them. They regretted that he had not discussed the offer "and the conditions attached to it" with the committee with which he had been liaising or provided a copy or one in French, so that they could have reached an informed view on the whole offer before assisting him obtain the signatures. However, they did not wish to reject the whole offer: "We would like to state categorically that we accept the compensation of Rs 20 million". But this could not be regarded as final so long as their basic problems of housing, jobs and general well-being remained unresolved. Rs 20 million was insufficient to cover also those who had worked for a long time on the Chagos and those who were still working on Agalega. They were unhappy with the idea of a trust fund and the composition proposed by Sheridans. They were emphatic that they would not accept the abandonment of the right to return to Chagos and although they recognised the practical problems of returning to Diego Garcia in the near future, there were no such reasons why they could not return to Peros Banhos and Salomon. They were not prepared to undermine the position of all those who wished to see the Chagos returned to the sovereignty of Mauritius. Why, they asked, should the compensation to which the Ilois were entitled have such tough conditions attached?

497. Bernard Sheridan said that this joint letter of 25<sup>th</sup> November 1979 seemed a well-considered letter, but as to the complaint that they had not had the opportunity to seek alternative legal advice, he said that they could have got advice in Mauritius where there were many lawyers who took an interest. He was conscious that not everyone who interfered were Ilois and that there were political interests with axes to grind: to criticise the Government of the day over the detachment of Diego Garcia and to avoid any settlement between the Ilois and the UK Government affecting any Mauritius claims to sovereignty. He had thought in 1979 or 1980 that they were a community who would meet and discuss matters amongst themselves. They received support from many politicians and lawyers and the Mauritius Government was not unsympathetic to their claims.

498. Mr Sheridan wrote to Mr Vencatessen referring to his hope that a settlement could have been achieved to the benefit of all the Ilois, the vast majority of whom had been prepared to accept the offer until politics intervened. He wanted to know if an individual settlement should be pursued. Mr Sheridan also wrote to Mr Ramdass, although not in reply to the joint letter. He affirmed his satisfaction that the majority wished to settle. But it needed to be clear to everybody that there had been no pressure at all on anyone to sign. He did not

think that the giving up of rights to return would affect the sovereign rights of Mauritius over the Chagos but he was concerned for individuals and not the Government. Eventually rights to compensation would be time-barred although a right to return could, in theory, endure for ever. But their arguments would be met by the Immigration Ordinance, and although it had been challenged in the proceedings, it was not the strongest part of the case.

499. Sheridan's reply to the joint letter was dated 31<sup>st</sup> December 1979, (20/117). Mr Sheridan agreed in evidence that in correspondence in 1979 he had described the Ilois as his clients and had a file for them, separate from the Vencatessen file.

500. It was up to the client to give instructions; nothing had been forced on anyone nor would it be. It had been difficult to see and advise over 1,000 people and was not made easier by the hostility encountered and related problems over the use of the hall. No decisions would be communicated to the UK Government until everyone had had the opportunity to consider the document and to make their views known. He affirmed that he had discussed the offer with the committee which he advised and they had not asked for more time. It was not at all clear that they had any right to return to the island and there was certainly no power to compel the UK Government to send ships to provision the island. Compensation might only be available for those born on the islands and who were forced to leave. *"... the chances of success ... are probably not high and even if the case was won, it would probably apply to only a small number of Ilois, the rest getting nothing."* There would be no compensation paid out by the UK Government without a condition that there were to be no further claims and no right to return to the islands. The amount on offer had to be judged against the rejection by the UK of responsibility for the large proportion of Ilois who, they say, were never permanent residents or who left before the creation of BIOT; their case would be very difficult. He dealt in detail with the many points raised by the joint letter before turning to the imposition of the tough conditions. The UK Government had only ever accepted responsibility, if it had done so at all, for a small proportion of the Ilois *"and there are severe difficulties in proving the case of even these ... Even if you were to succeed, the amount of compensation would be divided amongst this small number and may be a very low figure indeed. Even then, the Courts might not grant a right of return to the Islands."* The Ilois had to decide whether they were going to accept the conditions imposed by the UK Government or whether they would favour a political campaign. He was very conscious of their poverty, and of the passage of time with nothing being done to alleviate their conditions. But it was for the Ilois to decide what to do.

501. On 18<sup>th</sup> February 1980, three representatives of the three Committees instructing Sheridans signed a typed letter in English telling Sheridans to expect a petition signed by a majority of the Ilois in response to that letter. These three were now the Joint Ilois Committee; a general meeting of the Ilois had insisted on unity and he was to correspond with that body. On 2<sup>nd</sup> March 1980, the same three, namely Mr Ramdass for the Older Committee, Mr Michel for the July Committee and Mr Kishore Mundil for the Ilois Support Committee, signed a detailed, typewritten letter in English containing instructions on various matters and enclosing a petition to be sent to the UK Government, said to have been signed by the majority of Ilois, (16/179). The petition said that it came from the former inhabitants of the Chagos. It was typed and in English. It said: *"We, members of the Ilois Community, solemnly declare that we are prepared to renounce our rights to return to Diego Garcia, and accept an offer of compensation in full and final settlement, provided that it is paid to us in accordance with the following proposals"*, which were then set out. They sought compensation to enable the purchase of land for house building and to start a trade or business. They appointed Mr Sheridan to be *"our legal adviser"* and proposed that further negotiations be carried out by him together with two Ilois representatives plus an interpreter. They urged the dire conditions in which they

lived. *"We shall not give up our rights to be repatriated unless the above proposals are agreed to and implemented."* The names of the supporting Ilois from the various districts in which they lived are set out and against those names, at least on the face of it, are the thumb prints, or in a few cases the signatures, of the petitioners. Some of them gave evidence before me.

502. Sheridans asked them for clarification of a number of matters: as to why a minority had not signed and whether the signatures were those of the heads of households or Ilois eligible for compensation.

503. In March 1980, the JIC wrote to the President of the USA asking for compensation and pointing out that, if they were paid the compensation which they were seeking, they were now prepared to give up their rights to return to Diego Garcia which thus far they had retained. They sent a copy of the petition, saying that it contained some 800 signatures.

504. On 3<sup>rd</sup> April 1980, (8/1546), the JIC replied to Sheridans' questions. The letter referred to the difficulties in working out how many Ilois there were to be compensated, partly because this included those who had worked on the Chagos for a long time. The 800 signatures constituted a majority of the Ilois because it was more than half of 1,200, which was the number of quittances which Mr Sheridan had obtained. But they recognised that there must be considerably more Ilois than that. It was signed by those over 18. The reason why others had not signed it was that it had been collected in rather a hurry; going from door to door was a long drawn out job and they did not manage to get around to everyone, particularly those who lived in more isolated parts of Mauritius, and the weather had been terrible.

505. Mr Sheridan had no recollection of a petition being sent to him, nor of being appointed by the JIC as their legal adviser to negotiate although he recognised what the correspondence said. He agreed that the documents seemed to suggest that the petition came from his clients and that by April 1980, he was of the view that the committees represented the large majority or possibly all of the Ilois.

506. Mr Ramdass could not recall the letters sent by the three committees in November 1979 to Sheridans even though in his written statement of 22<sup>nd</sup> November 2002, made some two weeks before he gave evidence, he had specifically dealt with that letter. He said that he had no memory of that statement. He said that he could not remember Sheridans replying to the letter, saying that the UK Government would only pay money if it was accepted in full and final settlement. He had not known that that was their position or that Sheridans had said that that was one of the conditions laid down by the UK Government.

507. He said that it was only here in court that he had found out that Mr Mundil was sending letters without telling him what was in them. He believed that Mr Mundil had betrayed them because he was interested in claiming sovereignty rather than in the interests of the Ilois. But he could not remember how he had learned that letters had been sent without his knowing and could not remember who had told him; they had begun to avoid Mr Mundil when he started writing letters without consulting him. I concluded that he must therefore have found out what Mr Mundil was doing, if indeed Mr Mundil was doing that, some time before he came to court. When I asked what letters he had regretted signing, he said that it was some letters sent with his name on but that he had not known what they had said. He was unable to remember a single thing in a single letter which he had signed which he felt that he ought not to have signed. He agreed that his son, Eddy, who understands English, would have signed letters if he had been around but otherwise Mr Mundil would have got Mr Ramdass to sign; but Eddy would have been able to look at the replies which were addressed to Mr Ramdass and could have advised him not to sign the letters.

508. He said that he did not know what was in the letter which accompanied the petition sent to Sheridans in 1980 because Mr Mundil had prepared it and

they had signed it without knowing its contents. He then denied knowing what a petition was: he said of its contents that nobody would have been in favour of signing a document appointing Sheridans as an adviser, putting forward proposals for compensation in full and final settlement, or saying that they would be prepared to renounce the right to return. Repeatedly he said that nobody would have been in favour of renouncing rights. He said that he did not remember whether the committee had organised the petition but deliberately kept those who signed it in the dark about what it contained.

509. Mrs Alexis said that after Mr Sheridan had left in 1979, she and a number of representatives had met to discuss what to do about the quittances. At Mr Ramdass' house, she with Mrs Talate, Mr Michel and others had made Mr Mundil write a letter to Mr Sheridan saying they wanted him to stop working for them. Mrs Alexis said that she had first heard of Mr Ramdass' committee when she started working on the street for the Chagossians. But then she said she had only heard of it after Mr Sheridan had left in 1979 rather than in 1978 and could not explain why Mr Sheridan had her name on a list of those representing Ilois in 1978. When she had told the Ilois who had signed the forms what was on them (which means that she must have found out), they were very angry because they had never imagined that Mr Sheridan would make them do that. Mr Mundil had translated Mr Sheridan's reply but said that he had not told them that it said that the British Government wanted two things in return for compensation, one of which was a renunciation of the right to return to the islands. Mr Mundil had only said that Mr Sheridan would not be working for them anymore. She could neither read nor write nor speak English or French.
510. It is difficult to convey, without going through all the questions and answers, how reluctant Mrs Alexis was to answer even simple questions if she could see that there was some element of difficulty for her case which an answer would create, but it happened time and time again.
511. She remembered a meeting of the Ilois at which the Ilois had insisted that all three committees act together under the umbrella of the JIC, that is, the CIOF, Mr Ramdass' committee and Mr Mundil's. Mr Mundil did not represent many Ilois; most of the Ilois were working with her, Mr Michel and Mrs Naik. She was constantly demonstrating with the CIOF and others against the British and Mauritius Governments. She knew Mr Berenger and with the CIOF went to see him sometimes; he had put them in touch with Mr Elie Michel in 1978, whose brother, Sylvio, unlike Elie himself, could read and write in English and do letters if they had to be done. She did not remember the three committees organising a petition; her group had never organised petitions.
512. She said she had prepared proposals orally in her group to put to the British Government after Mr Sheridan had gone back to England, but she had never told the Ilois to sign a petition. She said that she did not know whether the petition had been sent to Mr Sheridan because she did not know him. If Mr Michel, Mr Mundil and Mr Ramdass had sent that petition to Mr Sheridan, they were wanting only to crush the Ilois and the Ilois knew nothing of it. Those people alone had organised the petition looking for a list and taking thumbprints. A lot of the names were false. She denied that she had signed it. She complained about the Mauritians tricking the Ilois.
513. Forensic evidence showed that it was her thumbprint but also that at least some other thumbprints had been placed on the petition more than once. On being told about that she then agreed that she had signed the petition but had done so without knowing what it was. She remembered signing a petition asking for compensation but it had said nothing about renouncing rights; her group had organised a petition and details of it were reported in the newspaper. She plainly became confused in later questions about what the petition she was referring to might have asked for. She remembered a petition about animals and land. She was either unable to focus on the question because her memory was bad or she knew well enough the general thrust of what was being sought by the Ilois in

1980 but did not now want to acknowledge it. There is evidence that she had denounced the petition in 1980 because its signatories were unaware of its purport, which would mean that she at least had been aware of it. She reiterated that they had not been in agreement with a sum being accepted as final with no more to be paid or giving up the right to return to Diego Garcia.

514. Mr Saminaden said that they had not organised a petition but when it was pointed out to him that he had signed it, he said that he remembered it but there had been no letter with it saying that they would in certain circumstances renounce their rights to return and accept an offer of compensation. The petition he signed related to animals, housing and land. He gave evidence after Mrs Alexis. He said that if Mr Ramdass and Mr Michel had prepared the petition saying that rights to return would be renounced, they had tricked the Ilois. He was the representative of the JIC in Dockers Flats but did not know who had passed the petition around. He had heard nothing about a demand for £8m compensation as a final sum in 1981. Even if £8m had been paid he thought there would have been no agreement because the Americans ought to be paying an annual rent.
515. On 22<sup>nd</sup> April 1980, Sheridans wrote to the Treasury Solicitor referring to the recent correspondence with the JIC. They now felt that they had instructions on behalf of the great majority of Ilois, as they had also told the JIC. The instructions which they were now getting were much more detailed, well written and comprehensive than hitherto. They asked if the UK Government would be prepared to pay the costs of the Ilois members of the negotiating team plus interpreter to come to London for the final negotiations because Mr Sheridan pointed out that the Ilois were very clear that they wanted to be present at any negotiations he conducted. The petition was not then sent to the Treasury Solicitor as Sheridans were awaiting clarification of its make-up. The Treasury Solicitor was prepared to contemplate this but only if it were clear that the Ilois were ready to agree to abandon any right to return, and all further claims and if the lists of those eligible were clearer.
516. The position of the Ilois as set out in the petition was given press publicity in Mauritius. "*L'Express*" reported it at the end of May 1980, setting out those parts of the petition in which the Ilois declared their willingness to abandon their right to return in exchange for compensation of Rs 50,000 or £3,000 per head, (19A/F/31). The article in French referred to the JIC and named its representatives. Mr Sheridan was described as the legal adviser. A few days later, it also reported on a mass meeting of about 450 Ilois, following internal divisions among the Ilois. Mr Michel of the Organisation Fraternelle, who was linked to the July Committee, was concerned about negotiations being left to Mr Sheridan alone. It withdrew from the JIC as it appears did the July Committee, or at least its leaders did. "*L'Express*" reported in July on a new committee, the Comité Ilois Fraternelle with Mrs Alexis, Mrs Naick and Mrs Talate, (19A/F/35). They held a press conference. Mr Michel announced that their lawyer was going to bring 6 test cases on behalf of those who had missed out on part of the £650,000 when it was distributed. Mrs Alexis, according to the report, denounced the petition; people who could not read had signed it without knowing what they were signing; the Ilois would never renounce their rights to return to Diego Garcia. She would show that her committee represented the majority and to that end she had obtained a petition containing 1,133 signatures out of the 1,300 Ilois in the country.
517. On 22<sup>nd</sup> July 1980, the reduced JIC wrote to Sheridans saying that they would only renounce their rights to Diego Garcia if the compensation enabled them to lead a simple but decent life in Mauritius, as they had done in their islands.
518. Sheridans consulted Professor Griffiths who doubted that anyone could bargain away citizenship as such but that they could perhaps bargain away incidents of it such as the right to enter a country but even that was doubtful. It might depend on dual nationality, (16/258).



519. In August 1980, according to her passport, Mrs Alexis visited the Seychelles for 18 days. Mrs Alexis remembered going to the Seychelles in August 1980 for 13 days with Mr Michel on behalf of their Committee. There she saw her husband's sister, Therese Alexis and her daughter, Jeanette. She stayed with them in their house. She said that the Ilois in Seychelles included some who were living quite well and had work and some living in poverty who had no work. She remembered meeting a Comite Fraternelle des Ilois de Seychelles. They arranged a meeting with the Seychelles Ilois through a Government Minister to seek to work together with them. Then she said that they just met all the Chagossians who at that time had formed no grouping. She had explained to them that her committee was demanding compensation from the British Government and that the committee thought that the Government was responsible for the removal of the Ilois from Chagos. They told them that they thought they had a right to return to the islands and were adamant that they had a right to return. She said that Seychelles Ilois did not think they would be able to return but the Seychelles committee did not say that they would renounce their rights. Mr Mein and Jeanette Alexis came to the meeting. She could not remember the Seychelles committee sending a message of support when she was later arrested during a demonstration in Mauritius.
520. It was not until August that Sheridans forwarded the petition to the Treasury Solicitor. Mr Glasser pointed out that the requirement for the Ilois to abandon the right to return was one major stumbling to the negotiations which he hoped to resume based on the petition; he intended to continue with the Vencatessen action.
521. Political activity by the Ilois in September 1980 included a hunger strike by 9 Ilois women, among them Mrs Alexis, which received publicity in the "*Nouveau Militant*", and featured the role of Elie Michel and the Comite Ilois- Organisation Fraternelle, its hostility to the renunciation of the right to return and how it had left the Ilois Support Committee when it had learned of the proposal seemingly brought by Sheridans to that effect. "*Le Weekend*" reported on endeavours to maintain a united front among the Ilois groups for the purposes of negotiations with the UK Government. A third reported that Mr Michel had plans to contact 198 Ilois who lived in the Seychelles. On 6<sup>th</sup> October, he reported to a meeting of some 400 Ilois on the favourable conditions which those Ilois there enjoyed. However, in March 1981, the CIOF and FNSI asked the Mauritius Government to see if there were any Ilois in the Seychelles who were in a position similar to the Mauritius Ilois. Hunger strikes and demonstrations became a feature of Ilois political pressure for a number of years; they were regularly reported in the Mauritius press.
522. That meeting had been called by the OF and the MMM; it passed many resolutions about compensation for the Ilois and Mr Michel reported to "*L'Express*" that Mrs Charlesia Alexis, Mrs Naick and he had been chosen later to represent the CIOF on a new mixed committee dealing with Ilois matters. Mr Sheridan was hopeful, and so told the Treasury Solicitor, that there was a new committee which appeared representative of the various groups. This appears, in his mind, to be the Ad Hoc Committee set up by the Mauritius Government to examine newly registered cases seeking compensation from the £650,000 fund, the terms of reference of which they wanted enlarged to cover any additional compensation paid by the UK Government.
523. On 3<sup>rd</sup> October 1980, the Special Report of the Public Accounts Committee of the Mauritius Legislative Assembly was published. It was critical of the way in which the £650,000 had been distributed and of the delay in its distribution. It pointed out that of the 557 families registered in 1977, more than 300 had said that they would prefer a house to cash compensation. It referred to the difficulty in establishing the relevant numbers of Ilois: one survey carried out by Public Assistance Officers every time a group landed supported a figure of 426 families arriving since 1965, the same figure as arrived at by Mr Prosser; the second

survey, under the aegis of the Resettlement Committee in January 1977, after a press, radio and TV campaign asking displaced persons to register, arrived at 557 families. This comprised 1,068 adults and 1,255 children. The numbers who actually received compensation were slightly different, perhaps due in part to the passage of time between the survey and payment in March 1968. The 557 families included 150 people who had arrived before 1965, and from the survey this would have been at least 113 families.

524. On 13<sup>th</sup> November 1980, Sheridans sent to the Treasury Solicitor a redraft of the deed which would govern the anticipated settlement of the Ilois' claims. They had removed references to the islanders promising never to return to the island, but thought that they would probably concede that they had no intention of returning while it was in defence use. Sheridans sent a letter to the JIC saying that those references had been removed and seeking instructions on the deed which related to the offer of £1.25m. On 16<sup>th</sup> January 1981, the Treasury Solicitor replied saying that the removal of the clause about return did not give rise to any problem.

525. In November 1980, a further Ilois committee came into being, the Front National de Soutien aux Ilois des Chagos. According to the press, this Front included the MMM, PSM, the JIC and nine others. Its aim was to obtain more compensation without foregoing any rights to return or affecting Mauritius' claims to the Chagos; it intended to mobilise national and international opinion. It was to examine the work of the new Government established Ad Hoc Committee dealing with resettlement as well as seeking a second round of compensation. In December 1980, Mr Ramdass wrote to Mr Sheridan saying that he did not know why the CIOF had split from the JIC and gone its own way.

526. On 26<sup>th</sup> November 1980, the Mauritius Ministry of External Affairs wrote to the High Commissioner referring in confidence to the unexpectedly large number of Ilois who appeared entitled to have claimed a share of the £650,000 but who for one reason and another, had failed to register their claim, eg they were away on fishing vessels or were wary of identifying themselves as Ilois. They numbered 582 adults and 727 children. The UK Government rejected any further payment on that basis because it had been for the Mauritius Government to decide how to organise the distribution of the sum which had been agreed.

527. The next day, the press reported on the new UK offer of £1.25m or Rs 20m, sent by Mr Sheridan who was described as the UK Government's delegate. It noted that the condition requiring the Ilois to renounce a return to the Chagos had been removed. When Mr Ramdass wrote to Mr Sheridan on 15<sup>th</sup> December, he said that the JIC were split on renouncing rights to return and that the FNSI would need to be consulted on the terms of the deed.

528. On 10<sup>th</sup> January 1981, Mr Mundil of the ISC wrote to Sheridans setting out the varying positions which various Ilois groups had taken at times to the renunciation of the right to return, but saying that the JIC and the ISC and many other Ilois had now decided that however favourable the conditions might otherwise be, there would be no renunciation of that right; the position set out in the March 1980 petition which it had sent was denounced. Mr Blom-Cooper was asked to give further advice which he did at the end of March 1981. An attendance note records his view that the case should proceed and that there were two substantive claims: status as an islander and a claim for inducing a breach of contract, with damages which could exceed £10,000.

### **The 1981 negotiations**

529. At about this time the Ad Hoc Committee, through its secretary Mr Bacha, had commissioned a further report along the lines of the Prosser report into the living conditions of the Ilois and the extent of their needs. It appears that the references to a new and representative committee by Sheridans were based on a misunderstanding as to the nature of the Ad Hoc Committee. The committee(s) instructing them remained therefore to some extent unclear.

530. However, another committee in England took an interest in Diego Garcia; in March 1981 a further hunger strike was undertaken by Ilois women. On 20<sup>th</sup> March 1981, (9/1638), the various Ilois groups sent a memorandum to the UK Government. It was signed on behalf of the CIOF and the FNSI. It sought £8m in compensation based on land, housing and a business allowance for each family; this would be a "*final*" compensation. This was to be distributed to the 900 families which the Ad Hoc Committee report had identified. There should be no link between the compensation and their right one day to return to their native land. The JIC wrote to Sheridans saying that they had sent the revised draft trust deed to the "*mixed committee*", that the hunger strike was also to put pressure on the UK Government to pay "*proper final compensation*" and had the support of all the Ilois. The JIC instructed Sheridans on 27<sup>th</sup> March to press for £8m in compensation.

531. The High Commissioner reported to the FCO that the Mauritius Government had sought its help at the end of March, as the hunger strike continued, over whether Rs 3m could be paid to the new claimants. But the UK Government would not entertain this, notwithstanding the growing possibility of international press interest in the Ilois. Although he reported that Mr Duval (PMSD) thought that the Ilois were being manipulated by the MMM, he also said that the influence of the JIC was rather less among the Ilois as a whole than that of the CIOF and that Sheridan's role as an intermediary with the Ilois as a whole

was minimal. He had a meeting with Mrs Charlesia Alexis, one of the leaders of the hunger strikers and other Ilois from the FNSI, on 2<sup>nd</sup> April 1981 which he reported to the FCO. Mr Mundil said that Sheridans had not been dispensed with but were no longer the primary vehicle for the advancement of the Ilois claims.

532. It appears, (16/242 and 307), that in early April 1981, the CIOF and FNSI met the Prime Minister of Mauritius and agreed that Rs 3m would be paid to the new claimants, but would be deducted from any further compensation paid by the UK Government; a joint Government and Ilois delegation would press for £8m from the UK Government and deal with other issues including their nationality. Generous assistance would be given to destitute Ilois after their cases had been studied by a group comprising three Ilois and three Government officials. The press reported on the proposal to send a delegation to London and set out its composition.

533. The Mauritius Government asked if the UK Government would receive the delegation seeking £8m. It was to include two Government Ministers, Mr Berenger and two other MLAs and four representatives of the Ilois, three from the Ad Hoc Committee namely Mrs Alexis, Mrs Naik and Mr Michel and one from the FNSI who was later identified as Mr Mundil. Sheridans were instructed in a letter, which arrived through the diplomatic bag, to seek £8m. They advised that there was no objection to direct negotiations so long as they were coordinated with the Sheridans' efforts in the litigation. Mr Blom-Cooper's advice recommended a further limited application for discovery.

534. On 22<sup>nd</sup> April 1981, the Ad Hoc Committee report was published. It describes the attachment of the Ilois to the Chagos and the way in which they had, as islanders, enjoyed their trips to Mauritius but living on Mauritius was very trying for them. Some had reasonable accommodation but others had living conditions which were very poor indeed. The report confirmed that housing was the highest priority; they badly needed money. However merely sharing money would not provide a solution and some had just spent the first compensation "*blindly*", (9/1656). 144 were receiving old age pensions and 62 Social Aid. Some three fifths of the men were in employment and about one quarter of the women. Just over three quarters of them wished to return to the Chagos. The report was sent to the UK Government.

535. On 23<sup>rd</sup> April 1981, the delegation which was proposing to come to London met a UK Foreign Office Minister in Mauritius. They ran through the issues which were to be raised in London. Mrs Chalker promised a reply for Mr Berenger on the question of the nationality of those born on the Chagos after the creation of BIOT. The reply sent to Mr Bacha, then Secretary for Defence, was that those born before Mauritian Independence were both Mauritian citizens and citizens of the UK and Colonies, and those born after that date were citizens of the latter, (9/1688). The internal correspondence before it was sent shows the FCO pointing

out that the issue of citizenship was not helpful to them. It also describes the role of the master/citizenship principle when a dual national is in one of the countries of which he is a national, (9/1684). He cannot be given protection by the authorities of the other country of which he is a national. The reply received press publicity in "*L'Express*" on 1<sup>st</sup> June 1981. The point was repeated in June after a further request by the Mauritius Government on behalf of delegation members.

536. The High Commissioner's own notes referred to one delegation member saying that there should be no link between the Vencatessen case and the payment of just compensation, and to the debate over whether those to be compensated could include those who had left before 1965 or those who were born on Mauritius after the passage of a certain number of years had elapsed following their parents' departure, and to the need for the delegation to be able to speak for all Ilois.

537. There had also been some rumours that some Seychellois Ilois wanted to join the delegation, but Mr Berenger said that he had been wrong in supposing that there were many Ilois on the Seychelles, (9/1680). He had gone there for a week to ascertain the position according to a report made by the High Commissioner to the FCO, (19A/A/26), and the issue of Ilois there was really a "*hare*" run by his political rival, Mr Michel from the CIOF. The FCO, in a widely distributed but nonetheless internal Government memo of May, (9/1685), had also said that the Ilois on the Seychelles were believed to be fully integrated and that Mr Rene, the Seychelles President, did not want them involved.

538. The relationship between the delegation and the Vencatessen case gave rise to difficulties in a foretaste of problems to come. On 21<sup>st</sup> May 1981, Mr Vencatessen sent a letter typed in English but witnessed by his son Simon, saying that his nephew Christian Ramdass had been appointed as his agent for bringing the case to an end in the favourable climate created by the delegation's endeavours, but that he was not prepared to release the pleadings to the Prime Minister of Mauritius as the latter had requested, because his role and the importance of his case was not appreciated by that Government or by others who were now taking an interest. The JIC asked if Mr Ramdass could come to London at the same time as the delegation so as to bring the case to a conclusion at the same time as the negotiations; Mr Mundil who was already part of the delegation could translate but Mr Ramdass' expenses would have to be paid by the UK Government. Meanwhile the proceedings were put on hold pending the outcome of the talks.

539. Mr Purryag, the leader of the delegation and the then Minister for Social Security, was reported by the High Commissioner to the FCO to have been insistent that the problems were the responsibility of the UK and that the delegation would be claiming on behalf of 900 families, even though this included

those who had left before 1965, those who were married to a Mauritian and those who were the offspring of such a relationship.

540. Before the delegation left Mauritius, there was a mass meeting of Ilois in Roche-Bois to give the Ilois members their instructions, according to an article in "L'Express" of 11<sup>th</sup> June 1981. It reported that more than 1,000 attended following a call issued by the delegation members over radio and TV. It also was asked to and did approve the participation of Mr Ramdass in the delegation because he was one of those who had brought official proceedings against the UK Government through Mr Sheridan. He did join the delegation and the Mauritius Government paid his expenses on that basis. "Weekend" described the delegation as seeking "*compensation finale*". Sheridans said that they needed to meet in order to coordinate the case and the negotiations which they did after the first day's session. Mr Mundil explained that they were part of the JIC which only represented a minority of the Ilois and Mr Ramdass was only there for Mr Vencatessen. Mrs Alexis remembered a meeting of the Ilois, to tell her what to do. She remembered that Mr Mundil explained to the meeting that Mr Ramdass had to go to London because he represented Mr Vencatessen who had brought the case in England. This accords with what Mr Ramdass said.

541. The various papers prepared by the delegates set out their cases. The Mauritius Government was critical of the UK's displacement of the islanders and of the limited compensation paid for those who were living in such very poor conditions. It referred to the various surveys which had been carried out since 1974 when 476 families were shown as displaced, to the new registration exercise and to the Sylva report which related to 942 families. It annexed reports from the FNSI and from the CIOF which detailed the various sufferings of the Ilois, including the mental and physical illnesses which named individuals had suffered from, the suicides, and the prostitution into which women had been forced through poverty. They had to leave their homes and furniture behind, their animals, church and graves, all that made them a community. The force which was said to have been used in their removal was the curtailment of supplies and the running down of the plantations with the effect that people who had left the islands for a specific reason were not allowed to return. The FNSI annex refers to the Vencatessen "*test case*".

542. Sheridans' notes record that Mr Mundil spoke to them again on 30<sup>th</sup> June 1981 saying that the offer made by the UK might be withdrawn but that the withdrawal of the Vencatessen case had been made a condition of the offer. During the period of the talks, Mr Michel and Mr Berenger attended a meeting of a London Solidarity Group according to a note of which, the latter rejected the lawfulness of BIOT and said that the case would be fought in Court, (9/1725).

543. The minutes of the Sessions, marked "*Restricted*", (9/1711-1724), refer to Mrs Alexis and Mr Michel speaking. Mr Purryag asked about the £1.25m offer

and to whom it was made. The UK said that while it was made in the context of a private action, it was made to the Ilois community. A Ministerial member of the UK delegation, Mr Luce, said that the offer terms were intended to remove any possibility of further litigation against the UK in this matter. A further £300,000 in aid was proffered but was seen as wholly inadequate by the Mauritian delegation. Mr Berenger and Mr Michel were forceful in their rejection of it. There were difficulties over the number of Ilois, and over the term of the draft quittance discussed at the sessions which referred to the suspension of the right to return until the islands were "ceded" to Mauritius, because that suggested that they were not now part of Mauritius. There was a dispute over whether families with just one displaced Ilois member should qualify and over how reliable the 426 and 942 assessments of Ilois households were. Nothing further was agreed and the four days of talks ended on 2<sup>nd</sup> July 1981 with no more than an agreement than that they should be regarded as adjourned.

544. The absence of progress led to Ilois demonstrations in Mauritius. "L'Express" reported that the right to return would have had to be given up and the Vencatessen case withdrawn. "Le Mauricien" commented on "Perfide Albion" and its imperial attitude to those who dared to talk of their rights and their British citizenship. Mr Purryag saw the High Commissioner on 23<sup>rd</sup> July to complain at the absence of progress and at the UK's stance, although acknowledging that the £8m bid had been high. The latter told the FCO of the increasing interest and protest locally and of reports that Mr Michel had instructed UK lawyers.

545. On 10<sup>th</sup> July 1981, the Ilois members of the delegation sent a typed Memorandum in English to the UK Government. It recalled the UK's responsibility for their plight, the inadequacy of the settlement sum, the illegality of the UK's actions in creating BIOT and in exiling them, of the breaches of their human rights, the death and mental disability which those actions had caused and demanded compensation and a proper programme of resettlement until such time as BIOT was dismantled and the sovereignty of Mauritius re-established over Chagos. It finished by saying that only duly accredited representatives of the Ilois could commit them to any agreement, (9/1740).

546. Sheridans advised, on 13<sup>th</sup> July, (16/278), that the case proceed to the next stage of discovery but that the chances of the case succeeding were not high. It was agreed that matters should be adjourned pending the outcome of negotiations.

547. Mr Sheridan did not recall the delegation in 1981 but accepted that it was perfectly possible that, as the documents suggested, Mr Glasser had seen Mr Ramdass and Mr Mundil both before and after the negotiations and that he might have done so as well. He accepted that even after 1980 the correspondence to and from Sheridans suggested that his firm was involved in advising the JIC in connection with the 1981 negotiations and the 1982 negotiations' outcome but he

himself had no recollection of any such advice before or after the withdrawal of the Vencatessen action. He had had little contact with the matter after April 1981. Bindmans, instructed by the CIOF, became the legal advisers to the Ilois more generally.

548. Mr Ramdass agreed that he had been to London in 1981 as an observer, to represent Mr Vencatessen's interests but when it was suggested that that was because the British needed to know the terms upon which the Vencatessen litigation would be withdrawn, he simply said that he did not know about it. He was not sure whether the Vencatessen case had been a way of putting pressure on the British Government. He denied that they had ever sought publicity for their cause. He complained that Mr Mundil had spoken in their name, without telling them, but also denied that Mr Mundil had gone as their interpreter. Mr Mundil had not explained what had been said, but Mr Ramdass had not asked him either, although Mr Mundil and Mr Michel had been there to help.

549. Whether or not in these respects this evidence was the result of dishonesty or forgetfulness, I am quite satisfied that in 1981 he knew of the role of the litigation in the settlement negotiations and of his role as the representative of Mr Vencatessen's interests. I reject as incredible the idea that in 1979 and 1980, he had no idea what were the basic requirements for a settlement, as relayed to his group by Mr Sheridan. Likewise, I regard as incredible his contention that he had no idea what was in the letters or petition which were organised by the JIC. Mrs Alexis had denounced the petition saying that people had not understood what was in it. There is nothing to suggest that Mr Ramdass was surprised at what had been done in his name in 1980. It was all of a piece with what had happened in 1979. It is difficult to see how he could only have found out about the contents of the letters in court, in the light of his witness statement or in the light of his answer that he had begun to distance himself from Mr Mundil because Mr Mundil had betrayed them. He could not remember the manner in which he was saying he had been betrayed. Mr Ramdass said also in his evidence that he could no longer understand all the letters that were written relating to his group and over his name, in which negotiations leading to a final settlement had been discussed, because he was now too old. That may be the explanation but it does not add to the reliability of his evidence.

550. Mrs Alexis said that in 1981 in London the negotiations were carried on in English and the Ilois representatives just sat there looking like dolls. She also said that hunger strikes and demonstrations were responsible for getting the Mauritius Government to send the delegation. No one told her what was happening. There was no discussion that she was aware of about the renunciation of rights in London. She said that she and her group had never been willing to renounce their rights. She said, however, that they did not know what was happening at the negotiations because Mr Bacha did not tell them. The negotiations broke down because the English would not give what they were asking so they continued with their noise, disorder and hunger strikes in Mauritius. She remembered that in 1981 the British Government had wanted some conditions attached to the compensation of the same kind that Mr Sheridan had mentioned.

551. Mrs Alexis denied saying anything at the 1981 negotiations but in the minutes of the negotiations, (9-1711), were references to things that she said including coming to Mauritius for treatment for a child. She could not remember



saying that. She said it was a lie for the meetings to record her, Mr Mundil and Mr Michel saying things. She said it was possible that Mr Mundil said things but thought that Mr Michel had said nothing. The whole sequence of questions and answers showed a pattern of deliberate evasion so as to protect her contention that she knew nothing about the substance of the negotiations. She said that it would have been difficult for Mr Michel to reject the offer because he could not speak English. Mr Mundil did not translate. She then agreed in cross-examination that in the sessions she and Mr Michel had spoken and that Mr Bacha had translated for them.

552. It is not entirely clear when Bindmans became involved; they were paid some money in April 1981 by the Mauritius Government for the preparation of papers relating to the payment of money to the Ilois community. Mr Grosz said that Mr Michel, when in London, had come via the Brixton Law Centre, who had suggested the solicitors who had dealt with the Ocean Island case but who could not take him on; the Law Centre had put him in touch with Mr MacDonald QC who had suggested Bindmans. Mr Grosz confirmed that the documents revealed the course of events as he had understood them. He had spoken briefly to Sheridans who had confirmed that the case was not strong. Bindmans were instructed by Mr Michel on behalf of the CIOF by July 1981. On 14<sup>th</sup> July 1981, they sent instructions to Mr John MacDonald QC to advise in consultation. Questions were asked about where the money to pay for lawyers was coming from. The CIOF representative said that it represented all the 6,000 Ilois on Mauritius except Mr Vencatessen and that the Organisation Fraternelle, to which the Comite Ilois was attached, had 15,000 members with some means and they contributed a little each month to help their fellow blacks. The Ilois had political help from both Government and opposition parties. Mr MacDonald did advise that the Ilois were citizens of the UK and Colonies. They should seek documents from the UK Government. On 30<sup>th</sup> July, "*L'Express*" reported that the CIOF had decided to bring a second case in the UK Courts; this had been announced at a demonstration organised by the FNSI and attended by its leaders and some 200 Ilois.

553. Mr Grosz of Bindmans sought details of whom he was representing; he wanted a signed list. The Treasury Solicitor's attendance note for 11<sup>th</sup> August 1981 records a conversation with Mr Grosz in which the latter stated that he was instructed by an Ilois group and that he would be going to Mauritius to investigate the position. He wrote to Mr Michel commenting on the inaccuracy of press reports about the bringing of a second action, saying that this should be corrected, that his provisional view was that no action could be brought and seeking information. By the end of August, Mr Vencatessen pressed for his action to proceed in accordance with a letter of instructions from the JIC. This sought £8m in compensation and no renunciation of the right to return. This would bring pressure to bear on the UK; legal and political pressure would go together. They raised the possibility of proceedings against the USA.

554. On 24<sup>th</sup> September 1981, the CIOF wrote to the High Commissioner pleading their cause and threatening that something ugly would happen. He

agreed to meet them. Nothing of substance emerged. The press reported on threats to emulate the hunger strikes in Northern Ireland and claims that the occupation of the Chagos by the USA was illegal. However, Mrs Alexis, according to the press, was acquitted with the help of her lawyer, Mr Bhayat, of charges arising out of an earlier demonstration.

555. On 26<sup>th</sup> October 1981, Mr MacDonald provided his Opinion to Bindmans, (15/112). He reviewed the facts as he then saw them; he advised that statistics be collected to show that the contract worker theory was a "*convenient myth*"; he advised that the Immigration Ordinance was not merely an example of the UK Government's unattractive behaviour but was also "*completely contrary to the traditions of English law*". There was the possibility of a breach of contract claim against Chagos Agalega Company Limited but there was not likely to be any such claim in respect of the distribution of the £650,00; he drew attention to the limitation period. He thought that if the Ilois could be shown to have had land rights, there might be a trust based action and that a claim based on possible land rights, the nature of which was then unclear, provided the most promising line of investigation. He also advised that there would be a serious defect in the law if the Ilois could be expelled without legal redress and that a Court would be sympathetic to a claim alleging intimidation, wrongful imprisonment and assault. It would be difficult to argue that the creation of BIOT itself was unlawful but that if there had been any deception about the nature of the interest which the USA had, that might found an action by the Mauritius Government, the proceeds of which might be held in trust for the Ilois. He concluded that it was political pressure which gave the Ilois the most hope for although it would be easy to show that the Government had behaved badly, he could not say that it would be possible to frame an action which would be taken seriously in the Courts, which ought to be the High Court rather than BIOT Courts for maximum potential political impact.

556. On 16<sup>th</sup> November 1981, Mr Michel, Mrs Alexis and Mrs Naick wrote a typed letter in English to the High Commissioner asking if the £1.25m offer could be paid as an instalment of compensation and offering to accept £8m as "*full and final compensation from your government*", (19A/A/56). But they would not renounce their rights to their homeland. They handed it in together to him. He pointed out to them, (19A/A57), that this was going nowhere: the settlement had to be with all the Ilois and the Government of Mauritius and include the withdrawal of legal cases. He also said that he did not think that the Government would insist on the abandonment of claims to return for all time in individual quittances. He wrote to the FCO suggesting that the discreet help of the Mauritius Government be sought in achieving a settlement. The same Ilois wrote subsequently asking if he would confirm in writing that something more might be negotiated as "*final compensation*" even if £8m was not acceptable. He offered no more money but said that they were willing to consider any fresh proposals; any settlement would have to be supported by the Ilois community as a whole and by the Mauritius Government and they would not wish to see the condition concerning return to Chagos becoming an obstacle to agreement.

557. Mr Ramdass said to me that he was still not in favour of £8m as final compensation because he was against ever saying that and had not known that the British would only pay compensation if it was a final amount.

558. Mrs Alexis remembered that in 1981 her committee and the Front National had together demanded £8m from the British Government and that that should not be linked to an abandonment of a right to return. But she next said that they would never have asked for £8m as final compensation in money terms because they did not know how the cost of living would go and that they would never have said '*final*'. She did not know that those words were in the document. Compensation could not be final unless it would enable them to live well in Mauritius. They had decided to ask for £4m per person but the bigshots from the Mauritius Government prevented them from doing that, saying that it was too much. They had no rights to propose anything and things were always decided on their behalf. She eventually agreed that the CIOF and FNSI had in fact presented £8m as a demand for final compensation to the High Commission and the Mauritius Government in March 1981, and that there had been a lot of support from people to persuade the Mauritius Government to send a delegation to negotiate compensation and the demand for £8m. She agreed that the bigshots were in fact helping her to make that demand.

559. She had regarded herself as representing the Ilois community, acknowledged that if she could not go to negotiate on behalf of the Ilois there would have been no point in her going there, and that she had told Mrs Chalker, then a British Minister, in Mauritius that she did represent the Ilois. She also remembered that Mrs Chalker had been asked for information about British citizenship and that the answer was that those people who had been born on the islands before 1968 retained their British citizenship. The answer was published in the Mauritius press, (19A/F/65).

560. Mrs Alexis remembered discussions between the five Ilois delegates in Mauritius asking the British Government to change its position, but not whether a letter was written following that. She remembered after they returned there was a demonstration in Port Louis and speakers at a rally, who included Mr Berenger, Mr Mundil, Mr Michel and herself. She did not remember anyone saying that their group had decided to lodge another case in the English court, (19A/F/70). Mrs Talate had not told her that she had signed a document giving instructions to English lawyers and Mr Michel did not tell her that he had seen English lawyers. She thought that sometimes they wanted to keep things secret from the Ilois (even though it appeared that those matters were announced at a public meeting and were done by her group). When she was shown a photograph of herself in a newspaper with three others announcing that the CIOF had retained the services of English lawyers, she said she had heard about it but did not know the lawyers themselves. She then said that she did not see him giving any help and knew nothing about the group retaining an English lawyer. She said that consulting a lawyer was not one of the things they had thought they could do to help to bring about a change in the British Government's position.

561. She was referred to a letter, (19A/A/56), to the British High Commission in 1981 saying that after a special general assembly of the CIOF, the Committee supported the Ilois claim for £8m as full and final compensation but without renouncing the rights to the homeland, and seeking £1.25m as part payment while discussions continued. She said that no one had asked for the Ilois'

permission to use the word "*final*" in that letter. She had gone to meet the High Commissioner and had left that letter with him without knowing what was in it rather than going, as the document, (19A/A/57), suggested, with Mr Michel, Miss Navarre and Mrs Naick. She could not remember the High Commissioner saying that £8m was not realistic and the solution had to be final, nor remember well a subsequent letter saying that they wanted to discuss an improved offer from the British Government, nor a letter sent to Mr Michel suggesting that the British Government would consider new proposals and perhaps modify the conditions.

562. On 5<sup>th</sup> December 1981, the same three wrote to the High Commissioner suggesting payment of £6m as "*further and final compensation*" without prejudice to the £8m claim which they regarded as wholly justified, (9/1748). The £6m was based on those displaced between 1965 and 1973 but it relied on the 1321 adults and 1708 children identified in the Sylva report. They wanted to resume discussions with the UK Government as soon as possible with a delegation similar to the one which had been involved in the summer. A meeting of Ilois had been held at which this figure of £6m had been unanimously agreed, they said. It appears that 500 Ilois attended this meeting. When this letter was handed to the High Commissioner, he told them that these figures were completely unrealistic; his note to the FCO refers to the figure of £3.1m suggested by the Mauritius Minister for Information, which had been publicised on TV and which appeared to have the support of all the Ilois except for Mr Michel and his group. On 10<sup>th</sup> December 1981, he told the FCO more of the various intrigues among the Ilois, the anti-Michel faction who wanted £3.1m distributed among a smaller number of families and the dominance at an Ilois meeting of Mr Berenger. Both the group prepared to settle for £3.1m and the CIOF met the High Commissioner but he told them that there had to be a common position among the Ilois. The papers include an undated petition signed by the group of 426 and of 516 (942) led by Mrs Velloo and Mr Raphael Piron which would share the £3.1m made up of twice £1.25m and twice £300,000. She thought that the payment of compensation to those who left the Chagos after 1965 had been delayed by the overall politicisation of the Ilois around Mrs Alexis, according to a note of a meeting which she had with the High Commissioner in February 1982, (9/1762). Some of the political arguments raised at various times went beyond sovereignty and the creation of BIOT, to the associated militarisation of the Indian Ocean as it was seen.

563. Mrs Alexis said that she could not remember a meeting in December 1981 in Roche Bois at which it was suggested that £6m should be paid rather than £8m to those displaced between 1965 and 1973. She rejected the idea that she would sign a letter accepting any settlement as final and indeed said that they would never have asked for £6m. When asked who the people were who got her to put her mark to letters she did not agree with, she said that the person writing the letter might just be saying what he wanted to say. She thought those people might have been Sylvio Michel and Mr Mundil. Those were the two who were in the habit of writing their letters.

564. On 12<sup>th</sup> December 1981, Mr Ramdass and Mr Michel Vencatessen, in a letter witnessed by Simon Vencatessen, asked Sheridans to meet Mr Mundil, their "*friend and collaborator*" who would be visiting London shortly and had their authority to discuss the case for the JIC and Mr Vencatessen, (16/290). Mr

Vencatessen recognised his signature but could not remember the letter; he might have been a member of the JIC at some point.

565. After payment of the necessary fees, the opinion of Mr MacDonald was released to the CIOF which sent a letter to the Prime Minister of Mauritius telling him of it and seeking assistance in paying for it, and saying that a further action might be brought. Some press publicity was given to the opinion. The "*Weekend*" identified the lawyers involved and that they were working on a possible case in the British Courts on behalf of the CIOF, supported by the MMM.

566. In January 1982, Sheridans wrote to the JIC to say that they were now pressing forward with the litigation which might have an effect on the Ilois as a whole. Discovery was to be pursued. There was a clear link between the case and the negotiations with the Government. A Notice of Intention to Continue was served.

567. On 15<sup>th</sup> January 1982, the FCO wrote to the High Commissioner in the Seychelles asking about the attitude of the Ilois in the Seychelles, if indeed there were any and strictly speaking there were not, towards the dispute in Mauritius.

### **The 1982 Agreement**

568. The UK Government began to make arrangements for another round of negotiations, and on 20<sup>th</sup> January 1982, the FCO sent a brief to Sir Leonard Allinson who would lead the UK team. A settlement of between £3 and £5m was commended. They could advance from the £1m disbursed in 1978 (£650,000 plus accrued interest) to £4m with a further £3m; anything less would not be acceptable to the Mauritius Government; if necessary it could go to an additional £4m but the last million was only to be offered if really pressed. It should be maintained that only 400 families were eligible but that the Mauritius Government and the Ilois could decide how to distribute it. FCO research produced a paper showing that the total population of the Chagos of all nationalities up to 1964 did not exceed 1000 or so, and the figure of 2867 relied on by the Ilois was grossly excessive. The Prosser figure of 1150 Ilois or 426 families was too high (although those figures do not include any Ilois who were outside the Chagos at any one time but were intending to return). There was a briefing on the fracturing and fractiousness of the Ilois groups, (19A/B/16). Nearer the time of the talks, more extensive briefing papers were prepared, one theme of which was the need to ensure that there would be no further litigation if an agreement were reached and another was the use of the figure of households (426) which emerged from the Prosser report, as the least unreliable of the many figures which had emerged. This would affect the calculation of compensation but not necessarily the way in

which any sum was in fact distributed. The sum of £2.5m, based on 426 households, would involve the complete acceptance of Mauritius Government figures for housing and land costs and almost complete acceptance of Ilois figures for family businesses and collective needs. This offer would replace the £1.25m plus £300,000 and would bring the total compensation including the £650,000 to £3m+.

569. On 11<sup>th</sup> February 1982, the High Commissioner was presented with a list of the 75 Ilois families receiving Social Aid. Shortly after, he also reported that Mr Michel had presented a petition of 1,100 signatures to the Prime Minister of Mauritius calling for the Government to pay for Bindmans to fly to Mauritius to advise on the settlement of the Ilois claims, which it did. Their role was to represent the Ilois through the CIOF, according to Mr Grosz, although, in re-examination, he said he regarded himself as advising only the CIOF. I do not think that in 1982 he drew that distinction. He thought the CIOF and he represented the Ilois, in my view. It makes no sense for the delegates to be representative of an unknown, let alone insignificant, number of Ilois. The CIOF had made the running; if they were satisfied, who could be dissatisfied apart from those who would have settled earlier, for less? He had been told by Mr Michel that the CIOF represented the overwhelming majority of Ilois but he himself had seen no proof of that beyond its representation on the delegation. He did not have such reservations as he expressed in re-examination at the time, in my view. He had no specific instructions but his impression from Elie and Sylvio Michel was that if the money were sufficient, the Ilois would renounce damages claims and put the right to return into cold storage for an indefinite period. The UK Government wanted to wash its hands of the business of the Ilois.

570. Formal talks were due to begin in Mauritius on 22<sup>nd</sup> March 1982. The arrival date of the UK delegation was announced and the terms which would be sought by the Mauritius delegation were publicised: £8m plus reimbursement of the Rs3.5m disbursed on the new claimants. A Government press communiqué announced the composition of both delegations. Sir Leonard Allinson, Assistant Under-Secretary at the FCO would lead the four-man UK Delegation which included one legal adviser. The Mauritius delegation would include Mr Purryag, the Minister of Social Security, the Attorney General, other officials, Mr Berenger, Mr Bacha of the Ad Hoc Committee and, as Ilois representatives as they were described, Mr Michel, Mrs Alexis, Mrs Naik, Mr Mundil and Mr Ramdass. The communiqué also stated that two British legal advisers to the CIOF would be in Mauritius during the talks. "*L'Express*" gave publicity to the schedule for the talks and referred to the arrival of the British lawyers who were preparing a case against the UK Government and would meet various Ilois representatives.

571. Mr Grosz remembered a large group of Ilois awaiting their arrival at the airport on 19<sup>th</sup> March. He had been to a public meeting of the Ilois conducted in Creole.

572. The talks opened on 22<sup>nd</sup> March 1982. In his opening statement, Sir Leonard Allinson made the points as he had been briefed to do. The UK Government accepted no legal responsibility for the Ilois who left BIOT after its creation. The offer was made ex gratia and in a spirit of goodwill and no attempt had been made to evaluate the different heads of claim. It was made to enable them to settle with land, a house and money to start a business together with community facilities. The Government considered that 426 was the best figure to take for households who left BIOT as a direct result of its creation and those who left before November 1965 did not do so as a result of the UK Government's acts. The number of those temporarily away would not significantly alter that figure. Accordingly, the offer of £2.5m or £5,800 per family was put on the table. He also said that the Government was prepared to forego the requirement for individual Ilois to sign quittances provided that the terms of the agreement were incorporated into an inter-governmental agreement which would provide for the establishment of a Trust Fund; this would be the best way of ensuring that the money was used for the proper purposes. This agreement would provide for all claims against the UK Government to be renounced or withdrawn. A slightly different version from the Brief, (19A/B/62), which probably reflects what was actually said, refers to the need for the Vencatessen case also to be withdrawn. An agreement was tabled. The two London lawyers sat with the Mauritian delegation. The negotiations were conducted in English; there was no official translation.

573. During the negotiations, the High Commissioner kept the FCO informed as to how matters developed. He referred to a meeting which Sir Leonard Allinson had had with the Prime Minister of Mauritius, Sir Seewoosagar Ramgoolam, before the first session on 22<sup>nd</sup> March 1982, at which the latter had offered to add £1m to the UK offer, provided that the UK matched it with an additional £1m, an offer which he repeated in a private meeting the next evening. Lord Carrington had previously written to him asking for his support for Sir Leonard. It was then pointed out by the Mauritius Government Ministers present that they did not accept the figure of 426 as appropriate but the Sir Leonard said that £6m was out of the question. The offer of £3m was leaked to the press, notwithstanding pleas at the session for it to be confidential. Mr Allen was critical of these private meetings of which the Ilois were unaware. I see nothing objectionable in them. The negotiations were not exclusively direct negotiations between the Ilois and the UK Government.

574. It appears from these telegrams that the next day's negotiations focussed not on the households but on the global sum; the Mauritius Government offered £1m by way of land to which the UK delegation responded by increasing its offer by £1m so as to make £5m (£4m from the United Kingdom) in total in addition to the £650,000. A post negotiation report, (19A/B/84), said that Mr Mundil's efforts to press for more had been foiled. The UK delegation stance was that it was for the Ilois to decide how the money was to be distributed. The delegation's lawyer met with Mr Grosz and Mr MacDonald in the afternoon to go through the trust fund arrangements. He is reported to have told them of the need for the Vencatessen case to be withdrawn and for an indemnity to be provided against other claims. Mr Grosz said that Mr MacDonald had said that the Ilois would need to give practical assurances that they were not going to bring claims about the right to travel to Diego Garcia. He confirmed that the need for all claims,

including Vencatessen's, to be withdrawn was a key point which would have been explained and translated to the Ilois delegates or to the whole Mauritian delegation. He said in re-examination that he could not form a view as to how much they understood. However, he never gave any indication that he had remotely formed the view in 1982 that they had failed to understand what was being said. In private, Mr Purryag explained the difficulties which a renunciation of rights to return and a Government indemnity would pose for the Mauritius Government, which was then facing a general election. Mr Grosz said that he had noted Mr MacDonald advised the delegation that the withdrawal of claims would be difficult to enforce and, as an inter-governmental agreement, it could not bind the Ilois.

575. The lawyers met again on 24<sup>th</sup> March and solutions were debated. The Mauritius Government was also concerned about a clause in the draft agreement which could be interpreted as giving up its claims to sovereignty. The details of the discussions on the agreement, as set out in those telegrams, show that the concern about the indemnity from the Government was proposed by the Ilois (or at least their lawyers) and by the Mauritians to be met by individual renunciations, (19A/B67 and 73). This would protect the Mauritius Government in relation to its indemnity. This was thought to be as satisfactory as it could be, if coupled with the retention of £0.25m in the trust fund until the end of 1985 to be used as a source of funds for an indemnity against other claims being brought, for example by those who refused to sign a renunciation. The end of 1985 was thought to represent a point after which the limitation period would provide protection. In practice, the best protection was that the Ilois were apparently ready to initial the agreement with its provisions for individual renunciations, which the Mauritius Government envisaged would be signed at the first distribution of funds and which it was willing to undertake to procure, motivated by their acceptance of the obligation to indemnify the UK against further claims. It was recognised, at least internally by the UK delegation, that there was no hope of getting the Ilois to abandon claims to return to BIOT. Mr Grosz recollected a lawyers' meeting at which the terms of the Agreement, including individual renunciations, were discussed. But he did not think Article 4 was actually in the Agreement before he left, although it was certainly in at some point on 24<sup>th</sup> March, and he later agreed that subsequent events suggested he was familiar with the provision. All drafts had, however, referred to full and final settlement of all Ilois claims and Mr Grosz said that that had been understood. There was, he said, no point in an agreement with the British if the Ilois were unhappy with it.

576. Bindmans' attendance notes for the negotiations records a meeting, but not its content, with Ilois: Simon Vencatessen, Christian Ramdass, Eddy Ramdass, Kishore Mundil and one other. There is a note of a discussion with Elie Michel and Paul Berenger about individual signed abandonments of claims, which Mr Grosz thought had taken place. They also refer to a meeting at which Mr MacDonald advised what appears to be the Mauritius delegation, that although it could ask for more than the £4m on offer, that sum was a fair settlement and that he did not think that any more would be forthcoming and that it should be accepted. Mr Berenger said that such acceptance would require a general meeting of the Ilois. Mr Grosz confirmed this.



577. Mr Grosz and Mr MacDonald left for London during the afternoon of 24<sup>th</sup> March 1982. Their departure was regretted by the UK delegation because it was felt that their contribution had been helpful and constructive, conscious of the weaknesses of some of the Ilois claims. The post negotiation report said that Mr MacDonald had been helpful in advising his clients of the desirability of reaching an agreement.

578. A further problem blew up with an attempt by Mr Berenger and Mr Mundil to insert a provision into the agreement which would have had the effect of keeping open claims arising out of the very creation of BIOT. This was regarded as totally unacceptable by the UK delegation and simply as a political ploy. The Mauritius delegation received advice from both its Law Officers and from the three lawyers advising the Ilois. The telegrams and the post negotiation report both state that the UK delegation wanted its position made clear to the Ilois in Creole so that there was no misunderstanding that this would be a sticking point for the UK and if it were persisted in would lead to the end of the negotiations; it was a political gambit irrelevant to their need for compensation. After several hours, a solution was reached by which Ilois claims arising out of the creation of BIOT would be precluded but not those which Mauritius might have.

579. This, it was said by Mr Allen, was the only occasion when the UK delegation set out to make clear what was happening to the Ilois in the language which they understood. Mr Grosz said that he believed but could not be certain, that at meetings of the Mauritius delegation and of its Ilois part at which he and Mr MacDonald spoke, what they said was explained in Creole and vice versa. The language of those meetings was Creole. His recollection of the Ilois delegates was hazy, but he could not remember any points of disagreement between the Ilois and CIOF. He did not meet the 34 individuals named as the CIOF Committee on the list sent to him. There is a letter of thanks from Sir Leonard Allinson to Mr Purryag dated 29<sup>th</sup> March 1982, (19B/1), in which the usual courtesies are expressed and specific thanks are given for the service of Mr Bacha in interpreting for "*us and the Ilois*".

580. There was an initialling ceremony on 27th March 1982; the members of both delegations initialled the last page of the agreement. Mr Vencatessen himself attended, and Mr Purryag handed to Sir Leonard Allinson a letter saying that instructions would soon be given for the case to be withdrawn. Speeches were made; Mr Purryag said that it was "*a satisfactory and final solution*", (9/1787). He congratulated his Government on its paying for Mr Grosz and Mr MacDonald to come as the Ilois' legal advisers. A joint press communiqué was issued referring to the £4m UK contribution and to the £1m Mauritius addition. The £4m was "*in full and final settlement*" of all Ilois claims. It was so announced in the House of Commons, on 1<sup>st</sup> April 1982. The Mauritian press reported the agreement widely. "*L'Express*" specifically referred to the need for the Government to obtain from each member of the Ilois community "*un acte signe de renonciation a loger*

*d'autres plaintes*" which it had then to hold for the UK Government, (19A/F/81). Other lawyers were referred to as having been there to help the Ilois including Maitres Ollivry and Bhayat; the High Commissioner told the FCO that they had been unhelpful in the wings. On 27<sup>th</sup> March 1982, Mr Purryag and Mr Bacha visited Roches Noires and were greeted rapturously by the Ilois on account of the settlement so they told the High Commissioner; they had played down the role of Mr Berenger to their satisfaction. Mr Berenger told the High Commissioner that the elimination of this dispute boded well for future relations between the UK and the MMM/PSM Government which he saw in power after the elections. (He became the Finance Minister).

The agreement as initialled needs to be set out in full:

"AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF MAURITIUS

The Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as the Government of the United Kingdom) and the Government of Mauritius,

Desiring to settle certain problems which have arisen concerning the Ilois who went to Mauritius on their departure or removal from the Chagos Archipelago after November 1965 (hereinafter referred to as "*the Ilois*");

Wishing to assist with the resettlement of the Ilois in Mauritius as viable members of the community;

Noting that the Government of Mauritius has undertaken to the Ilois to vest absolutely in the Board of Trustees established under Article 7 of this Agreement, and within one year from the date of entry into force of this Agreement, land to the value of £1 million as at 31 March 1982, for the benefit of the Ilois and the Ilois community in Mauritius;

Have agreed as follows:

- i.
- ii. Article 1

The Government of the United Kingdom shall ex gratia with no admission of liability pay to the Government of Mauritius for and on behalf of the Ilois and the Ilois community in Mauritius in accordance with Article 7 of this Agreement the sum of £4 million which, taken together with the payment of £650,000 already made to the Government of Mauritius, shall be in full and final settlement of all claims whatsoever of the kind referred to in Article 2 of this Agreement against the Government of the United Kingdom by or on behalf of the Ilois.

- iii. Article 2

The claims referred to in Article 1 of this Agreement are solely claims by or on behalf of the Ilois arising out of:-

(a) all acts, matters and things done by or pursuant to the British Indian Ocean Territory Order 1965, including the closure of the plantations in the Chagos Archipelago, the departure or removal of those living or working there, the termination of their contracts, their transfer to and resettlement in Mauritius and their preclusion from returning to the Chagos Archipelago (hereinafter referred to as '*the events*'); and

(b) any incidents, facts or situation, whether past, present or future, occurring in the course of the events or arising out of the consequences of the events.

a. Article 3

The reference in Article 1 of this Agreement to claims against the Government of the United Kingdom includes claims against the Crown in right of the United Kingdom and the Crown in right of any British possession, together with claims against the servants, agents and contractors of the Government of the United Kingdom.

**Article 4**

The Government of Mauritius shall use its best endeavours to procure from each member of the Ilois community in Mauritius a signed renunciation of the claims referred to in Article 2 of this Agreement, and shall hold such renunciations of claims at the disposal of the Government of the United Kingdom.

**Article 5**

(1) Should any claim against the Government of the United Kingdom (or other defendant referred to in Article 3 of this Agreement) be advanced or maintained by or on behalf of any of the Ilois notwithstanding the provisions of Article 1 of this Agreement, the Government of the United Kingdom (or other defendant as aforesaid) shall be indemnified out of the Trust Fund established pursuant to Article 6 of this Agreement against all loss, costs, damages or expenses which the Government of the United Kingdom (or other defendant as aforesaid) may reasonably incur or be called upon to pay as a result of any such claim. For this purpose the Board of Trustees shall retain the sum of £250,000 in the Trust Fund until 31 December 1985 or until any claim presented before that date is concluded, whichever is the later. If any claim of the kind referred to in this Article is advanced, whether before or after 31 December 1985, and the Trust Fund does not have adequate funds to meet the indemnity provided in this Article, the Government of Mauritius shall, if the claim is successful, indemnify the Government of the United Kingdom as aforesaid.

(2) Notwithstanding the provisions of paragraph (1) of this Article the Government of the United Kingdom may authorise the Board of

Trustees to release all or part of the retained sum of £250,00 before the date specified if the Government of the United Kingdom is satisfied with the adequacy of the renunciations of claims pursuant to Article 4 of this Agreement.

#### **Article 6**

The sum to be paid to the Government of Mauritius in accordance with the provisions of Article 1 of this Agreement shall immediately upon payment be paid by the Government of Mauritius into a Trust Fund to be established by Act of Parliament as soon as possible by the Government of Mauritius.

#### **Article 7**

(1) The Trust Fund referred to in Article 6 of this Agreement shall have the object of ensuring that the payments of capital (namely £4 million), and any income arising from the investment thereof, shall be disbursed expeditiously and solely in promoting the social and economic welfare of the Ilois and the Ilois community in Mauritius, and the Government of Mauritius shall ensure that such capital and income are devoted solely to that purpose.

(2) Full powers of administration and management of the Trust Fund shall be vested in a Board of Trustees, which shall be composed of representatives of the Government of Mauritius and of the Ilois in equal numbers and an independent chairman, the first members of the Board of Trustees to be named in the Act of Parliament. The Board of Trustees shall as soon as possible after the end of each year prepare and submit to the Government of Mauritius an annual report on the operation of the Fund, a copy of which shall immediately be passed by that Government to the Government of the United Kingdom.

#### **Article 8**

This Agreement shall enter into force on the twenty eighth day after the date on which the two Governments have informed each other that the necessary internal procedures, including the enactment of the Act of Parliament and the establishment of the Board of Trustees pursuant to Articles 6 and 7 of this Agreement, have been completed.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

581. The FCO legal adviser at the talks sent a copy of the agreement to Bindmans on 1<sup>st</sup> April 1982 who passed a copy on to Mr MacDonald, pointing out changes made to the draft which they had seen before departure, after the long debate which they had missed. Mr Grosz agreed that he had not reacted to Articles 4 and 5 as if they were surprising or new. There was no suggestion of anything untoward in those changes. He was thanked for his work.

582. One UK adviser was concerned that the size of the offer would provoke claims from the hitherto quiescent Ilois on the Seychelles but it was thought that in 1981 Mr Berenger had failed to interest President Rene in his campaign and that nothing had since changed.
583. Although the attitude of the Mauritius High Commissioner, as expressed to the FCO, was that the agreement would go a long way to alleviating the plight of the Ilois, the FCO was warned by the UK High Commissioner that the FNSI under Mr Mundil had sought advice from a radical lawyer about the sovereignty implications of the agreement and, with the likes of Mr Bhayat, was now against the signing of the agreement or at least delaying its signature. On 6<sup>th</sup> April 1982, Bindmans sent a letter to Mr Sylvio Michel saying he had heard of such concerns. He had taken the advice of Mr MacDonald, with which he agreed, and thought that nothing in the agreement, as initialled, precluded any international claim which Mauritius might wish to bring against the UK over the sovereignty of the Chagos. He set out their reasoning in some detail. The CIOF appear to have accepted this advice and pressed for the signing of the agreement and this was reported in the press. Mr Grosz agreed that neither he nor Mr MacDonald had suggested that Articles 4 or 5 contained anything untoward. He would have commented on anything new and important. He agreed that this suggested that he had in fact been familiar with the text before he left Mauritius.
584. Sheridans sought payment from the UK Government of their costs in advising the Ilois generally; they too were envisaging an end to the litigation, in April 1982. In May, Bindmans told them that the Ilois were pleased with the outcome but that although he had met Mr Ramdass and Mr Mundil, the former had been unable to get any more for Mr Vencatessen.
585. However, on 21<sup>st</sup> May 1982, the JIC wrote to Sheridans raising the point that there were doubts in Mauritius about the sovereignty issue and that the proceedings were not to be withdrawn until the Mauritian delegation was satisfied and ready to sign the agreement, a copy of which was enclosed. This stance was communicated to the Treasury Solicitor whose reply appeared to suggest that the deal had been done. The litigation was nonetheless put into abeyance. Sheridans advised the JIC in a letter dated 2<sup>nd</sup> June 1982 on the terms of the agreement, identifying the provisions of clause 2(a) precluding a return to Chagos and commenting that they must have taken a view on that point; they said it was preferable, as now provided for in clause 4 that it should be the Mauritius Government which would be responsible for procuring the renunciations, and that was one of the major issues which needed to be considered. Sheridans sent a copy of the agreement to Mr Blom-Cooper.
586. The CIOF, including Mrs Alexis, met the new MMM/PSM Government in June 1982 to discuss foreign expert views on the sovereignty issue. They held a press conference at which they are reported as saying that while they did not doubt the advice of Mr Grosz and Mr MacDonald, the agreement concerned only compensation and not sovereignty and they wanted steps taken to implement it.
587. On 7<sup>th</sup> July 1982, the agreement was actually signed on behalf of the two Governments. Speeches were made. The new Mauritius Government welcomed *"the end of the saga of the Ilois community"*, (9/1819). The role of Mr Berenger, of the Michel brothers and of the Ilois representatives was praised. They had all agreed to this sum despite the great sufferings of the Ilois in a spirit of compromise. The new opposition and even the UK High Commissioner were praised for their part. The agreement had only been concerned with compensation and not with sovereignty and had no bearing on it. The agreement was embodied in an Exchange of Notes, (Cmnd.8785), with a minor change to Article 8.
588. Mr Ramdass and others gave evidence about what they knew of the negotiations in 1982. He again complained that Mr Mundil had spoken in their name without telling them, and that Mr Mundil, who could speak Creole and English, did not explain to them what was happening in the 1981 or 1982

negotiations; but he agreed that he did not ask Mr Mundil what had been said during the negotiations, although Mr Mundil and Mr Michel had been there to help.

589. He said there had just been discussions in groups in 1982 and they were just sitting down watching. Mr Michel was there and Mr Ramdass did not know how he might have understood what was happening. There were several English people there. There might have been some English lawyers to advise Michel and Mrs Naick but he could not remember; that group had told him they had English lawyers but they had not advised him, that he could remember. Proceedings had been summarised once, at the end. There were no English lawyers present when the Ilois groups asked for things to be translated. At the meetings around the 1982 Agreement, they were just in a corner not together. He could not remember trying to get more money with Eddy and Mr Mundil for Mr Vencatessen.

590. Mr Ramdass had understood that the Government would keep back money for five years under the 1982 Agreement and use that to defend any cases that were brought against them. There would be no renunciation of rights and this formula enabled the problem of renunciations to be resolved. No one had been given a copy of the agreement. He did not know how his son had then managed to send a copy of the agreement to Sheridans to seek their advice. By this time he did not understand what agreement was being talked about. He could not remember his son saying that he had received a reply from Sheridans giving advice on the agreement. All this was too long ago he said; his memory was very short, there had been too many letters and too many events. He was asked about the initialling of the agreement which at first he appeared to understand, but yet when a query arose about a translation and the questions were restarted, it was impossible to bring him back to the 1982 Agreement. He simply could not remember anything about it. Finally, he remembered there might have been some ceremony at which something was signed but he could not remember. He did not know what was in it.

591. Mrs Alexis agreed that she had known before the 1982 negotiations started that the British Government would not insist on the renunciation of the right to return to Chagos and what the British Government wanted was a renunciation of any more claims for compensation. A doubt about the translation was then raised and not for the first time the effect of the doubt being raised, which was perfectly proper in itself, led to a change in the answer. She said then that she had not known at the 1982 negotiations that the British Government wanted them to give up the right to make further claims for compensation.

592. She denied there was a meeting in December 1981 attended by 500 Ilois at which it was decided who the 1982 delegation should include and that the demand should be for £6m. Mrs Alexis' evidence became very vague about the run-up to the 1982 negotiations. She did not remember that they had tried to get the Mauritius Government to fund English lawyers, nor that they had asked for the Mauritius Government to pay for them. A letter saying that she had met with the Mauritius Prime Minister and Mr Berenger in September 1981, when the Prime Minister said he would meet the English lawyers if they came, was simply not true and they had been tricked by the Mauritius Government and all those who disagreed with them.

593. She was referred to a newspaper in which it was said that her group had handed a petition to the Mauritius Prime Minister signed by 1,000 Ilois calling for an immediate visit to Mauritius by Mr MacDonald and Mr Grosz. She said she had no knowledge of that, (19A/B/15 para 3). She was shown a photograph of herself standing next to Mr MacDonald published in the newspaper, (19B/93). She said she had forgotten, so many English people came to Mauritius.

594. Mrs Alexis said that in the 1982 negotiations she did not understand what was going on because the meetings were conducted in English. They again sat around like dolls not knowing what was being talked about. However, she said they refused to accept that some form of release should be given. She said the

solution was that a sum of money would be kept to compensate the British Government in case Chagossians initiated claims against the British Government within the first five years after the compensation was paid. Things were only explained in Creole after the negotiations were finished. Only Mr Bacha explained in Creole what had happened; Mr Mundil explained nothing because he had come only for his own personal interests; Mr Michel explained nothing. She only could remember that Mr Bacha had told her they would get £4m and the Mauritian Government would give £1m for land. He also explained that if anyone brought a case in five years against the British Government, money had been held back against that. The agreement was never summarised or translated to her and she said that if Article 4 had been explained there would have been big trouble. Mr Bacha never said that the British Government would pay only £4m and that there would be no more than that. She did not know whether Mr Bacha might have hidden things from her. She was unaware that there was any requirement in the Agreement that the Chagossians renounce their rights to get money from the ITFB. She said that she did not know that the Vencatessen case was being discussed at the time of the 1982 Agreement or at that time that it would have to be withdrawn; it was only afterwards that that was mentioned. She could not remember putting her thumbprint to the Agreement.

595. Although she was President of the CIOF which had instructed Bindmans, she said that she could not remember that there were two English lawyers at the negotiations or that Mr Michel had made contact with English lawyers; there were just a lot of English there. She said that they did try to find out what they were talking about, but only after all the negotiations were over and they had dispersed did they find out what it was about *"because then we had the responsibility for informing the Ilois over whose heads they had been talking"*. This was not a credible picture of Mrs Alexis, a very active and determined woman and President of a well-organised group.

596. In cross-examination, Mrs Alexis explained a little more about what happened in 1982. She said that in the 1982 negotiations there were meetings between the two delegations and among the Mauritius delegates themselves to decide what to say. Her committee had meetings all the time to decide what to do but not during the negotiations. They had had no meetings with Mr Berenger during the negotiations. She could not remember Mr MacDonald and Mr Grosz being there when they had discussions as a group of Ilois or delegates. She said that all the Mauritius delegates spoke Creole but there were times when they spoke in English. She was then very evasive about why she made no efforts to find out what was being said in English of those who could speak English. She asked rhetorically of whom she could have asked. She said that Mr Mundil was not part of it at that time, in the sense he was not part of the committee and she did not work with him. She asked Mr Bacha during the negotiations but they were just sitting like dolls and were only told things after the negotiations were over. They just told them things were in order so that they could be finished with the Ilois more quickly. She said she had asked Mr Bacha what was being said before the end of negotiations but it is possible that he did not tell them what was being said. She was shown a photograph which she accepted appeared to show her sitting next to Mr Mundil at one of the sessions of negotiations.

597. It is perfectly clear to me that she was in a position to enquire readily what was going on during negotiations and it is quite incredible to suppose that she did not ask Mr Mundil what was happening and get an explanation. She was President of the CIOF and no shrinking violet. She agreed that the Ilois wanted their representatives to have full authority. She explained that she could not remember an opening statement by the British nor what their first offer was and explained that she had not asked because she said they did not have the right, although they were members of the delegation, to ask because they were too insignificant. She had no idea what was being offered until the negotiations ended. I find that impossible to believe.

598. She remembered that Mr Purryag, a Mauritian Minister, was head of the delegation but she said that they had not gone to see him after the opening session. She said she did not know that the British had made it clear that there would only be £4m from them.
599. She did not remember that during the negotiations there was a meeting in Roche Bois addressed by Mr Berenger, Mr Michel and Mr Mundil. She said she might have been ill and did not go. She was pressed about a newspaper report of 25<sup>th</sup> March 1982 referring to a meeting the previous day and whether she remembered a meeting during the negotiations to tell the Ilois what was happening, to which she said she did not believe there was a meeting because during the negotiations the Ilois were dying of hunger. (The newspaper report referred to Mr Berenger telling a mass meeting of Ilois that the British and Mauritius delegations were in full agreement over the amount of compensation, the non-renunciation of the right to return but that the provision preventing a future Mauritius Government (he hoped to be in the new one after imminent elections) from raising the issue of the creation of BIOT was unacceptable; paragraph 578 describes how that was resolved).
600. There is no doubt that she was not answering the question, not because she did not understand it, but because she understood it only too well. The implications of answering the question truthfully were that the Ilois knew very well what the gist of the negotiations were about.
601. She did not remember a stage in the negotiations towards the end when the British delegation arranged for the Ilois to be told specifically in Creole about a dispute which was risking the successful conclusion of negotiations and the payment of money by the English. But later she recollected that there was a disagreement about sovereignty between the two Governments and the British Government had said that if the Mauritius Government could not agree on sovereignty there was a real risk that there would be no agreement on compensation it appeared. She then said that the British Government had not arranged for that to be said in Creole. In re-examination, she said that it had been translated into Creole, but not why it had been nor that the Mauritius Government's attitude put the Agreement at risk.
602. She said that the Mauritius Government was concerned about sovereignty and for that reason the Mauritius Government had not told them what was going on, because the Ilois said that the Ilois had sovereignty over Chagos. She could remember no discussion between the Ilois and the Mauritius Government along the lines that the acceptance of the money would not weaken the sovereignty claims. (It is plain that such a line was taken).
603. She thought that at the end of the negotiations the Mauritius Government had got money for the Ilois to end their poverty. The Ilois knew that money was coming to a fund but they knew nothing about renouncing their rights. She did not know what the terms of the Agreement were in the paper or if they were secret. She knew that there was a condition in the Agreement requiring money to be put into a fund because Mr Bacha told her, but they did not ask him any questions because they had no right to do so. This was in answer to the question about what steps she had taken to find out what the Agreement contained so she could tell the Ilois. The Ilois had no right to do anything and Mr Michel, who could not read or write, was not in a position to ask Mr Bacha either. She did not remember a communiqué issued by the delegations and she did not know that anything ever had been said about full and final settlement. She would never accept a final settlement. She said the money was being paid, not as final compensation or to get them to renounce their rights, but because they needed money and so the English were paying for the suffering they had caused.
604. The British Government never said they would not pay more than £4m, but the reason they did not pay £6m or £8m was that they did not understand the needs of the Ilois. She was asked why if the British Government were happy to pay more, they wanted money retained in the fund to deal with claims against



the British Government. Once again, the answer to the questions trailed off into nothingness. She said that it was the Governments who decided to keep the money in the fund; that they had kept some aside in case anyone should bring a case against them and then that it had to be kept for five years and that it could not have been released early if the Ilois had signed renunciation forms.

605. She denied that the CIOF had sought legal advice about the 1982 Agreement. It was plain from the documents that it had. She did not remember a press conference held by her Committee saying they wanted to press the Mauritius Government to ratify the Agreement, (19A/F/87). When pressed again about her Committee obtaining legal advice from Bindmans she repeated her answer that she knew no law and was just saying the Ilois were dying. She only remembered putting pressure on the Government to unblock the money.

606. Mr Saminaden said that he did not know the result of the 1982 negotiations other than that he had heard that £4m and £1m was to be paid for all the Ilois and that Vencatessen had to withdraw his case, and did not think that it was a condition that the Chagossians would never ask for any more money or that they could be required to abandon the islands. Even £8m could not be final, and he was not aware that the CIOF were looking for £6m, or any final settlement. He accepted that Vencatessen would not be paid twice over and would only get money from the ITFB and that was all the other Ilois were going to get. He knew the English in 1982 had wanted the Agreement to be final but he said it was not part of the Ilois' intention. He appeared to think that if there had been another case that would have yielded another large sum of money in order for that to be withdrawn. I asked him why if he thought that was so, there were not more cases, but he said they did not have other people to take the action. They needed someone to encourage them and it was only now that they had the right kind of support. He realised that Vencatessen himself could not bring another case but it had to be somebody else who brought it. The case was final for Mr Vencatessen but he was either evasive or simply unable to understand the point as to why it should not have been final for anybody else who might want to bring a case. He did not speak to the delegates about the terms of the 1982 Agreement but he heard it from others who had read it in the newspapers.

607. Mrs Kattick described herself as having been a simple member of the CIOF; her sister, Mrs Naick had been on the Committee. Her sister had not told her about the visit to England in 1981, because they did not have enough contact even though they both lived in Roche Bois. It was possible, she said, that her sister had been a prominent member of the CIOF but she did not read the papers often. She could not read in French. She then said that she was aware that they had gone in 1981 to negotiate with the UK Government and that Mrs Naick was in the 1982 delegation. They had never talked about the Agreement, but she remembered that there had been an agreement with the British Government giving £4m and the Mauritius Government £1m of land for which the ITFB was responsible. She was asked whether the payment was intended to represent settlement of the Ilois claims for compensation. By this time she was aware of the dangerous path the questions were going down and started laughing at the questions. She said that because the money was not enough she did not think that it was final. She was asked again, not having answered clearly, whether the £4m had been intended to be final. "*Final?*" she said. The question was repeated followed by silence. Now she said she understood that the question was whether the agreement was final. There was an agreement as to the amount of compensation to be paid: that was the £4m. She remembered there was a claim for £8m in 1981 and after negotiations broke down the Ilois made a further demand asking for compensation. But she could not remember any of those negotiations, although she was still a supporter at that time of the CIOF, which was represented on the 1981 negotiations. She then said she did not know that there had been any delegation to Mauritius from Britain to negotiate claims in 1982. I gained the impression that she understood the questions before they

were translated on a number of occasions and anticipated the problems that were coming up. She then said that she knew there was an agreement in Mauritius between the two Governments because the British Government delegation had come to Mauritius to reach an agreement. She said that she could not remember if it was intended to be a final settlement. She agreed that £250,000 was kept in reserve to meet a claim against the British Government, that the money could be released if no claims were brought, and released early if all the Ilois promised not to sue the British and that the Mauritius Government had to do its best to get the Ilois to sign the forms not to sue the British Government. Her evidence on this changed later – she said she did not know that. She was unaware of any meeting in April to tell the Ilois about the Agreement but agreed there were many meetings and that it probably had been explained. She said she only discovered the terms when she was on the ITFB in 1983.

608. Mr Bancoult was asked about the 1982 Agreement. I considered that Mr Bancoult was very reluctant to give straight answers to obvious questions about what the Chagossians thought was going on and about what interest they took in the progress of the Agreement and its purport. He said that the Ilois had wanted to be paid compensation without conditions. They had not just agreed because they were poor. He said that nobody had agreed to renounce their rights but they would have wanted to know if there were conditions attached to the payment of the money. He was unaware that there had been a debate associated with the negotiations about whether the Agreement in effect required the Mauritius Government to give up sovereignty over the Chagos Islands. He did not know that the money to be paid was in full and final settlement of claims or that the aim of the UK Government was that the Ilois would not be able to claim any more from it. He did not know of the terms of the Agreement, and sometimes he did not have enough money to buy a paper, so he was not aware of the communiqué in which both Governments said that £4m was in full and final settlement; the term "*full and final*" was bandied about all the time. It had not been said that the 1982 Agreement required them to renounce their rights and there was a protest when Mr Berenger said they had to renounce their rights; all that was said was that part of the money would be kept back until 1985 if anyone decided to sue the British Government or the ITFB. The Ilois had agreed to nothing in the 1982 Agreement, and the payment did not discharge any obligations owed to the Ilois. They were free at any time after 1985 to bring proceedings for more money, he thought, and the people on the delegation never told the Ilois that they would not be able to sue the British Government again. He thought that the Government required the withdrawal of the claim before it paid £4m because there were people outside the scope of the Agreement who wanted compensation. But he could not answer why he thought the British Government might pay £4m and still leave themselves open to being sued by Mr Vencatessen.

609. Mr Bancoult said that Mrs Alexis did not understand what was happening, and had only said that if the Vencatessen case was withdrawn, that would allow compensation to be paid; she never said that there were any conditions. He had not been told that the Mauritius Government had agreed to use its best endeavours to get renunciations from the Ilois. Each time there was a mention of renunciations there was a demonstration. Renunciations had not been agreed even in 1982 and that is why it had been decided that they should keep part of the money back in case there were people who sued the British Government.

610. Mrs David remembered that there were negotiations between the British and Mauritius Governments, that they reached an agreement and that money was paid as a result. She remembered that there were meetings of the Ilois about that. She agreed that once those two Governments had reached an agreement, she could expect money in Mauritius but nothing more from the British. But she asked for the question to be repeated and for water saying she had a headache. The sequence of questions was started again and this time she said that she did not remember negotiations between the two Governments or that there had been

any agreement. After a break, she said again that she did not remember negotiations between the two Governments, although she did remember several hunger strikes by women. She thought they were on strike against the Mauritius Government. She did not know where the ITFB got its money from. She remembered signing the August 1980 petition seeking compensation, that a lot of others signed it but there was no discussion about it. They had never discussed asking the British Government for money, because they would never renounce the right to return. She said that she knew Mr Ramdass by name and face but had never supported his committee. She also remembered Elie Michel who ran the CIOF and Mr Mundil, but she had not participated in his activities or the Front Nationale de Soutien des Ilois, nor the CIOF. She supported the Chagos Refugee Group because Olivier Bancoult was in it. She had not talked to Michel Vencatessen about his case but she heard about it. She never asked him about it because they did not meet much and would only pass the time of day. She had heard that Michel was claiming a right to come to England and seeking money as compensation for having to leave the islands. She talked to her uncle, Rosamund Saminaden, but he did not tell her that he had met an English solicitor. She could not remember Mr Sheridan but she knew he was helping the Ilois.

611. Mrs Elyse could not remember any agreement between the two Governments, or that the money which she knew the UK Government had paid was all it intended to pay.
612. Mrs Jaffar had not been aware, she said, of any negotiations: the Ilois did not meet to discuss things because they were scattered through Port Louis. She thought the ITFB money came from Mauritius, as did Mr Laval.
613. Mrs Talate remembered that a delegation of ten people had been to see the Mauritius Government and that there had been protests by the Chagossians in Mauritius about returning to Diego Garcia. She remembered getting Rs 7,000, given by the British to the Mauritian Government to give to the Chagossians. She had got the money from the Post Office, but she already had Rs 15,000 debt at the time.
614. She denied knowing who Mr Sheridan was or knowing anything about a lawyer or knowing what the August 1980 petition was. She simply said that she would never and had never renounced her rights. Before she signed anything, somebody would have to explain things to her because she could not read. No-one explained anything to her. She did remember attending Ilois community meetings because she was a member of a Creole defence organisation. Some of those meetings were attended by very many Ilois. They discussed compensation to get money to feed themselves, but they never put signatures to any papers before getting money. In cross-examination, she said that she did not know in Mauritius of groups supporting the Ilois. She knew Ramdass but did not mix with him. She knew there were several groups but she did not support them. She supported the Organisation Fraternelle Cite de Roche Bois, and eventually she agreed that she knew the Chagos Refugee Group; but said that she had not been the Treasurer, saying that she cannot read and cannot understand anything. But she agreed that she had been closely associated with it, and had been one of the leaders of the group at the very beginning. I found her reticence on this unsatisfactory; she knew much more than she said and was aware of the problems which that would create.

### **The implementation of the 1982 Agreement**

615. As a necessary part of implementing the agreement, the Mauritius Legislative Assembly passed the Ilois Trust Fund Act 1982. The objects of the Fund, as set out in section 4, were to receive the £4m paid under the agreement, to use it for *"the social and economic welfare of the Ilois and the Ilois community in Mauritius"*; to acquire land for the same purpose and to indemnify the UK Government under the terms of the Agreement, (9/1850). There is no definition

of "Ilois". Section 5 provided for the establishment of the Board: an independent chairman, 5 Government representatives and 5 Ilois to be appointed in a prescribed manner. The first Ilois members were identified in the schedule to the Act. They were Mr Mundil, Mr Michel, Mrs Alexis, Mrs Naick, and Mr Ramdass. The Chairman was Father Patient and Mr Bacha was one of the Government representatives. As a precaution, section 12 stated that nothing in the Act affected Mauritius' sovereignty over the Chagos.

616. The ITFB first met on 11<sup>th</sup> August 1982. It was decided, according to the minutes, that the discussions would be in Creole and that the minutes would be in both Creole and English. Mr Ramdass raised the question of expenses for Mr Vencatessen and was told by Mr Bacha that Mr Vencatessen had given his word that the case would be withdrawn and he should withdraw it unconditionally. If he did not do so, no money would come in for the Fund. The bringing of any other action would amount to a breach of promise. Those who wanted work in Agalega should be identified. But Sheridans told Mr Mundil that they still had no instructions from Mr Vencatessen on 25<sup>th</sup> August. The delays in the withdrawal of the case led to concern among the Ilois as to when they were going to receive the monies. The High Commissioner reported that the delay was due to Mr Vencatessen seeking payment of expenses.
617. On 31<sup>st</sup> August the ITFB met for a second time. According to the Minutes, Mr Vencatessen had been asked to submit details of his expenses but not for the ITFB to pay. He wanted Rs 15,000 and a public meeting on 5<sup>th</sup> September so that he could tell the public of all that he had done for the Ilois cause. Mrs Naick said that voluntary subscriptions had been raised for the case. Mr Bacha spoke of the anxiety of the Ilois at the delay. Mrs Alexis said that she too had incurred expenses. Mr Michel said that he was not prepared to be responsible for what might happen if the case were not withdrawn.
618. Mr Simon Vencatessen gave evidence to me that the first time he became aware of his father's case was after the 1982 negotiations, when Mr Berenger addressed a meeting of 500 Ilois in Cite Rochebois saying that the Ilois had won £4m but only on condition that his father withdrew his case. From that moment there was intense pressure brought to bear on his father. His house was surrounded, people threatened to beat his father up, he could not go out and had a police escort for 17 days. Up till that moment his father had not known that he would have to withdraw his case in order for the £4m to be paid. Later Mr Vencatessen said that it was thanks to his father that all the negotiations had started and that he had wanted money for his case and the thanks of the Ilois. With those, he would have been happy to withdraw. But Mr Vencatessen said that the Ilois did not want to wait while his father got his money, which they thought was holding matters up.
619. On 3<sup>rd</sup> September 1982, Mr Vencatessen wrote to Sheridans, in a letter witnessed by his son Joseph, giving instructions for the withdrawal of his case. On 5<sup>th</sup> September, Mr Mundil and Mr E Ramdass for the JC wrote to Sheridans explaining what lay behind this. There had been a demonstration on 3<sup>rd</sup> September by "*some impatient Ilois*" and the acting Prime Minister had called an urgent meeting to which Michel and Joseph Vencatessen had been summoned along with some of the demonstrators, some members of the ITFB and two Ministers, (16/356). There, the Government had promised to pay him Rs 15,000 if he withdrew the case immediately. This he agreed to do. The Government had then taken it upon itself to cancel the meeting called for the 5<sup>th</sup> at which the work of the JIC was to have been explained to the Ilois and at which the withdrawal of the case was to have been announced publicly. But a letter of 6<sup>th</sup> September 1982 from Eddy Ramdass to Sheridans alleged that Mr Vencatessen had been forced to sign that letter under pressure at the meeting from people who included members of the "*National Intelligence Unit*". Simon Vencatessen in his evidence said that he wrote the letter of 3<sup>rd</sup> September 1982 to Sheridans asking them to withdraw the action following his father being taken "*by big strong people*" in a

car to the Prime Minister's office. His father told him about that. They had made him sign the letter. What was said in the letter of 5<sup>th</sup> September was true so far as he knew and so the next day they wrote to Sheridans and told him not to withdraw any action, but he said that the request seemingly signed by Simon Vencatessen made by Michel for the withdrawal of his case in the letter of 5<sup>th</sup> September 1982 was not something which he had signed. He said that his brother Joseph was a drunkard and was given rum to get him to sign the piece of paper withdrawing the case.

620. On 22<sup>nd</sup> September 1982, a letter in the names of Christian and Eddy Ramdass, Simon and Michel Vencatessen was sent to Sheridans saying that all had been a misunderstanding and that the instructions to withdraw remained good. At the same time, Sheridans asked a Mauritius QC, Marc David, to see Mr Vencatessen and check whether his consent was genuine and free. Mr David met Mr Vencatessen on 27<sup>th</sup> September 1982 with his son Simon and the two Ramdass' in the presence of Mr Bacha, at Mr David's home. Mr David wrote to Sheridans to say that he was satisfied that Mr Vencatessen freely and unreservedly wished the action to be withdrawn and was fully aware of the nature and implications of what he was doing.
621. Simon Vencatessen said that he knew nothing about the letter of 22<sup>nd</sup> September 1982 (very much later he agreed that its contents were correct). He remembered going to the meeting at Mark David's house because Mr Sheridan had proposed that they contact him as an apolitical lawyer. He went there with his father and Christian Ramdass. He said that there were maybe 10 to 15 cars behind them, and outside there were lots of people who said that they would not come out alive unless they signed to withdraw the action. Mrs Naick was outside and could be seen through the window, and Mrs Alexis was in one of the cars. They insulted those inside, but Mr David did not see them because of the way Mr David opened the door, or hear them because they knew he was important and kept quiet. Mr Bacha, who was the Secretary of Defence, was there to make sure that they signed the document and they were unable to discuss anything with Mr David. Only Mr Bacha and Mr David did any talking. No one was happy that Mr Bacha was there. Mr Bacha was a very authoritarian person and when he told you what to do, you had to do it. This account was not in his witness statement. Mr Howell suggested this was incredible; why had he not written to Sheridans as soon as the £4m had been paid over? He was an uncomfortable witness, possibly giving evidence in some fear.
622. Mr Ramdass said that Mr Bacha had done the talking in English with no Creole translation; he thought the discussion was about ending the case and ending the pressure on Mr Vencatessen. He knew that Mr Vencatessen had to do that if the money were to be paid, but said that Mr Vencatessen was not happy to withdraw it. There had been 15 cars outside putting pressure on them and people looking through the windows to put pressure on. One was a female Ilois but he did not know her name, (which is odd if it were Mrs Naick). He did not know of Rs 15,000 being paid to Michel Vencatessen.
623. Mrs Alexis, in chief, remembered that Chagossians had demonstrations about the Vencatessen case saying to him that he had to withdraw his case so that they could get their money. She knew of his case because she had heard through other people that he had a case in court. There had been a third hunger strike because of the delay in payment caused by his case. She went to see Mr Bacha who said it was necessary for the case to be withdrawn in order for the Chagossians to get their money; she had pestered him, so Mr Bacha had sent the police to bring Mr Vencatessen to the Government offices from his home. She said that he was forced to withdraw his case but if he had not withdrawn it, the Ilois would have attacked his house and smashed it down. Then she said that she did not know whether the money could be paid to the Ilois before the case had been withdrawn. No one told her that it had to be withdrawn at the time of the Agreement. It was the English, she knew, who required the case to be withdrawn

because Mr Bacha said so and that the English would not give the money otherwise. She remembered that Mr Vencatessen was very upset at having to withdraw his case. She had wanted him to withdraw the case so they could get the money.

624. In cross-examination she denied knowing that he had to withdraw his case; she had never gone to Mr David's house. She could not follow, at least according to her answers, the concept that if Mr Vencatessen had had to withdraw his case as part of the Agreement, the British Government would not want other people to bring cases against them. When asked why she thought the Mauritius Government was insisting that the case be withdrawn, she said that that was so that they could get a bit of the money for themselves because they were always torturing the Chagossians, then, so that all the money would go into the hands of the Mauritius Government, which could have then said untruthfully that it had gone to the ITFB.
625. After the letter of 22<sup>nd</sup> September, Mr Vencatessen's supporters in turn pressed Sheridans to withdraw the action, saying that the Ilois community was impatient to hear that it had been withdrawn. The Mauritius Government, with a view to cooling the situation, according to a telegram from the High Commissioner to the FCO on 27th September 1982, had taken five minutes of the main evening news to broadcast in Creole to the Ilois explaining the situation over the Vencatessen case and what had been happening over the last month to it. It had emphasised its desire to speed things up.
626. On 7<sup>th</sup> October 1982, an attendance note of Sheridans on the Mauritius High Commissioner speaks of a hostile crowd outside Government House in Mauritius refusing to disperse until Sheridans had withdrawn the case. There had been an ongoing demonstration there for some days, addressed on one occasion by Mr Berenger. On 8<sup>th</sup> October 1982, the High Commissioner sent a letter to the FCO enclosing a handwritten letter which he had received from Mrs Alexis which complained at the slowness of Sheridans in dealing with the letters which Mr Vencatessen and Mr David had sent instructing them to withdraw the action. The prolonging of what the letter described as the test case was prolonging their suffering.
627. On that same day, the Order staying proceedings had been drawn up and the litigation ended. The Treasury Solicitor agreed to pay the costs of Sheridans acting for the Ilois in general.
628. On 28<sup>th</sup> October 1982, the £4m was paid over at a ceremony at which, on the Ilois side, Mrs Alexis, Mrs Naick, Mr Ramdass and Mr Mundil were present. The Mauritius Foreign Minister said that it was a happy conclusion and that the long sufferings of the Ilois were at an end. The UK Government was thanked and so were the Ilois representatives. The Indian Government also added Rs 1m to the Fund.
629. The ITFB decided on 11<sup>th</sup> October 1982 that it would communicate with the Ilois about the distribution of the monies by press communiqué and TV advertisement for December. There were heated debates as to who were Ilois, how they were to be identified when collecting compensation and as to how the money was to be disbursed. Mr Duval wrote saying that he had been retained to protect the rights of certain people and criticised the settlement in the Assembly. It was eventually agreed in the ITFB that there would be a first payment in December to each individual Ilois of Rs 10,000 in cash. There would be a list of Ilois posted and objections could be raised to names on the list and to those omitted from it. They would attend with a birth certificate and would be identified by an Ilois. Payment of the next, larger sum, which was calculated on the basis of 1453 adults and 122 minors, would be made for the purchase of housing on production of title deeds. Adults would receive an additional Rs 36,986 and children one half of that. The proposed system of payment was publicised. A large queue formed at the central Post Office where the money was distributed.

630. The payment of Rs 10,000 (then worth £556 at the prevailing exchange rate), was largely complete in December, but there were still 200 or so who had yet to receive it in January. A High Commissioner's memo to the FCO said that 1419 adults and 160 minors had registered for compensation in 1982 of whom 1288 and 83 respectively had received the first tranche. There were elections for the Ilois members of the ITFB in late December 1982; Mrs Alexis and Mrs Naick were not elected and instead two sons of Mr Vencatessen, Simon Vencatessen and Francois Louis were elected along with Christian Ramdass, Elie Michel and Mrs Kattick.
631. At this time the High Commissioner reminded Mr Abdullatiff, who was the Secretary/Treasurer of the ITFB as well as being the Permanent Secretary at the Ministry of Social Security, of the Mauritius Government's obligation to obtain signed renunciation forms, none of which had been obtained so far. The issue was taken up with the Mauritius Foreign Minister. The FCO urged that the pressure be maintained on the Mauritius Government on this point. The Mauritius Government sought advice as to whether the task of procuring them fell to the ITFB or to the Government, which it received in February 1983 to the effect that the ITFB could not be responsible for the renunciation forms.
632. The Ilois who had been Citizens of the UK and Colonies became British Dependant Territories citizens on 1<sup>st</sup> January 1983 after the coming into force of the British Nationality Act 1981. Their dual citizenship remained. They had had no right of abode in the UK previously either.
633. The Ilois representatives on the ITFB were minuted on 25th January 1983 as being in favour of Identity Cards so as to reduce the risk of impersonation but at the next meeting but one, on 24<sup>th</sup> February, two Ilois representatives reported opposition to such cards from among the Ilois. There had also been a decision in January to seek the advice of the Solicitor General as to the eligibility of Ilois who were in the Seychelles or who had emigrated from Mauritius after their departure from the Chagos. There were discussions at the meeting on 3rd February about how the money for the purchase of land or a house should be dealt with.
634. The fate of the Ilois continued to be raised in the UK Parliament. An FCO Research Paper of February 1983, prepared for a Question from Mr Onslow discussed the circumstances of their departure. This is relevant in relation to any allegations relating to the state of knowledge of Ministers in 1983 and later. The researcher said that she thought that there were probably few, if any, who left BIOT entirely voluntarily and without expectation of return "*until the life of the islands was clearly at an end*", (19A/C/7). It appeared that direct physical coercion was not used to remove them. There were those who were stranded and not re-employed who left between 1965 and 1971; there were those who left Diego Garcia without reportedly any physical force being used but to whom it must have been apparent that there would be no further food as all the company's supplies were being removed on the last boat; and there were those 332 Ilois on Peros Banhos and Salomon who left "*voluntarily*" when their contracts ran out in the knowledge that the islands would be closed in the near future, and the 150 who were removed by boat from Peros Banhos in April 1973, most of whom would probably have been resigned to leaving. Substantial background papers were produced for the briefing of Ministers appearing before the Select Committee on Foreign Affairs.
635. On 3<sup>rd</sup> March 1983, after the ITFB meeting, three Ilois ITFB members, Simon Vencatessen, Francois Louis and Mr Ramdass wrote to the Chairman and to the Prime Minister of Mauritius and to the High Commissioner, saying that they were suspending participation in the Board until it did some real planning for the resettlement programme with reference to the sites for housing and identifying the eligible families. They were strongly of the view that ID cards were essential to avoid fraud. They appear to have missed a couple of meetings.
636. Mr Abdullatiff had become aware of the advice that it was not for the ITFB to collect renunciation forms from the Ilois, and in the light of a Government

decision that they should be collected by the Ministry of Employment and Social Security, asked for a letter of renunciation to be drafted. At the ITFB meeting of 1<sup>st</sup> April 1983, Mr Bacha referred to Article 4 of the Agreement and the need for renunciation forms. Mr Abdullatiff said that this was not a matter for the ITFB to deal with and Mr Bacha said that he thought it was a matter for the Employment Ministry.

637. The Select Committee of the Mauritius Legislative Assembly into the Excision of the Chagos reported in June 1983. It had been set up after the elections of June 1982 and was chaired by the new Foreign Minister. It rejected parts of the evidence given by the previous Prime Minister of Mauritius and of Mr Duval of the PMSD, which had been in government. It accused the UK Government of flouting the UN Charter and of blackmailing the Mauritius Government into accepting the excision of the Chagos as a necessary step on the road to independence.
638. By June 1983, there was evidence of restlessness among the Ilois and dissatisfaction at the absence of progress towards any development of the land for housing which the Government had put into the settlement. However, Mr Abdullatiff told the High Commissioner on 6<sup>th</sup> June 1983, (19A/C/65A), that land payments had been made. House owners received Rs36000 per adult and minors had received Rs 23,000, 50% of which had gone to their parents. Other categories had been paid in cash, notably the elderly. No renunciation forms had been obtained. But it appeared that the ITFB was generally restricting payment to some 1,420 people, including some 200 children.
639. At a meeting of the ITFB on 10<sup>th</sup> June 1983, there was a discussion about a claim from a Noelline Paul from the Seychelles, which would have to await an Affidavit from the Seychelles Government. "*Le Militant*" reported on 30<sup>th</sup> June 1983 that Mrs Alexis was supporting the right of Ilois on the Seychelles to participate in the compensation. The particular case concerned an Ilois who had gone to the Seychelles in 1971 for an operation and had not had the money to go to Mauritius when her parents had left the islands in 1973. Mrs Alexis also took up other cases and requested press releases of what went on at meetings of the ITFB. She planned a demonstration outside the Board's meeting on 30<sup>th</sup> June 1983 to which Simon Vencatessen and Francois Louis sent their letters of resignation. The issue of ID cards and impersonation continued to vex the ITFB. The two held a press conference at which they explained their concern at the use of the names of dead persons to claim compensation, the need for ID cards and the opposition which that had met from some other Ilois on the ITFB.
640. Another Ilois group was started in about mid 1983 – the Chagos Refugee Group. Mrs Alexis was its first President (though her witness statement had not said so). Mr Bancoult and Mrs Talate were involved in setting it up. Mr Bancoult said that it was necessary because Mauritian politicians and intellectuals had betrayed them. His evidence about that was unsatisfactory. The CRG would be Chagossians helping themselves, he said. There had been some claims that the Ilois could regard themselves as refugees, although the aim of the compensation as seen by both Governments had been to enable them to integrate into Mauritius. It petitioned the ITFB on various issues. It wanted to examine the lists of Ilois eligible for compensation to see if there were ineligible or even dead people included. The CRG expressed disagreement with those on the list and the ITFB responded in August by saying that 1,260 Ilois had registered in 1982 plus 96 who were latecomers, or away abroad or working on boats, but that the CRG could send the names of those who should not be there for investigation. The CRG had also sought the early payment of the final instalment of compensation.
641. Allegations continued to be made in the summer of fraudulent claims; one individual accused Mrs Alexis of making a fraudulent claim. Mrs Alexis was later convicted of making a fraudulent claim on behalf of two deceased children and served a short custodial sentence. In July 1983, ID cards were issued to the Ilois



- and the ITFB asked if Mr C Ramdass could be given time off work to assist in the process by identifying them. 1,303 were issued.
642. In July 1983 Mr Lucine Permal sent a list, containing the names of some 80 workers, to the ITFB at the request of Mr Bacha. He said that he was their representative and that they were entitled to compensation.
643. By the middle of August arrangements were being made for the final instalment of compensation to be paid. (Final is the way it is described by a number of people in the documents, but there was still some money to be retained by the ITFB to support the indemnity.) There had already been a small further payment from the Rs1m donated by the Indian Government. The enduring pre-occupation of the UK Government with renunciation forms was to be met before this last payment and the Mauritius Government had prepared the forms. On 26<sup>th</sup> August 1983, the Secretary to the ITFB told the High Commissioner that the Minister of Social Security would arrange for their collection when the final payment was made, which had been set for 29<sup>th</sup> August to 13<sup>th</sup> September 1983. The police had been notified and asked to attend at Astor Court, the Ministry Offices where this payment was to be made. The letter from the ITFB to the police refers to the fact that renunciation forms will be signed.
644. There was however, according to the documents, a problem which arose at the start of the payment process, which was postponed on 29<sup>th</sup> August until further notice, (22A/162). On 1<sup>st</sup> September, the High Commissioner wrote to the FCO, (19A/C/72), saying that the Secretary to the ITFB, Mr Abdullatiff had told him that the Ilois had refused to accept the money and to sign the renunciations. There was an emergency meeting of the ITFB on 30<sup>th</sup> August at which it had been decided to increase the amount paid by adding in the notarial and survey fees for the land which they might receive after the implementation of the two housing projects, which the ITFB had been holding back. There had been a meeting with Mr Berenger, now Leader of the Opposition and the two MLAs who represented the constituencies with the greatest concentration of Ilois. He said that Mr Berenger had been *"very firm with the Ilois and said that there could be no question of them not signing the renunciations"*. It appears from an article in *"Le Militant"* on 1<sup>st</sup> September that Mrs Alexis was present. On that basis, the arrangements were reinstated for the following week with a payment of Rs 8,687 per adult and Rs 4,340 per minor.
645. A press communiqué was issued on 1<sup>st</sup> September by the ITFB setting out the arrangements for this distribution. It was in Creole and the ITFB asked for them to be broadcast on radio. The Ilois were to come to the Ministerial Offices between 5<sup>th</sup> and 20<sup>th</sup> September, with specific days being allotted according to the initial letter of their surnames. *"Le Militant"* reported the proposed increase, saying that the hold-up had been because of confusion over the amount of the pay out. It also said that there was to be a general meeting of Ilois called for 4<sup>th</sup> September so that the four who had met with the ITFB could explain the last payment.
646. The process of payment and of signing the renunciation forms seemed to pass off without any real difficulty. On 4<sup>th</sup> October 1983, the High Commissioner wrote to the FCO saying that only 12 people had refused to sign them, among whom were Simon Vencatessen and Francois Louis, for reasons which were unknown, but not sufficient to prevent their wives signing them for their share.
647. There were two forms, identical except for the fact that one related to claims against the UK and the other referred instead to the Government of Mauritius. (Mr Westmacott, Director of the Americas Command of the FCO service 1997, said in paragraph 79 of his Affidavit in the Bankrupt judicial review (12/201) that waivers had only in fact been obtained in respect of claims against the Mauritius Government. That clearly is wrong. He also makes it clear that his understanding was that waivers were to be obtained in respect of claims against the UK, including those which asserted a right to live in BIOT.) The UK form was as follows:-

a. "FORM A

ii. GOVERNMENT OF MAURITIUS

Ministry for Employment and  
Social Security and National  
Solidarity

I, .....,  
of age, an Ilois, Residing at .....

In consideration of the compensation paid to me by the Ilois Trust Fund and of my resettlement in Mauritius, do by these presents declare that I renounce to all claims, present or future, that I may have against the Government of the United Kingdom, the Crown in right of the United Kingdom, the Crown in right of any British possession, their servants, agents or contractors, in respect of anyone or more of the following –  
(a) all acts, matters and things done by or pursuant to the British Indian Ocean Territory Order 1965, including the closure of the plantations in the Chagos Archipelago, my departure or removal from there, loss of employment by reason of the termination of contract or otherwise, my transfer and settlement in Mauritius and my preclusion from returning to the Chagos Archipelago;

(b) any incidents, facts or situation, whether past, present or future, occurring in the course of anyone or more of the events hereinbefore referred to or arising out of the consequences of such events.

Made and subscribed on the .....1983,

Signature/Right thumbprint of Ilois .....

We certify that the above is the right thumbprint of

.....

.....  
(Provision is made for the signature of two witnesses and name and address of the two witnesses)

Note: Where the subscriber is unable to sign, he/she should affix his/her right thumbprint in the presence of two witnesses who can sign."

648. A Westminster MP on behalf of a constituent wrote to the FCO to see if any more compensation would be paid by the UK. The Ministerial reply of 21<sup>st</sup> September 1983 was that the £4m was a full and final settlement.
649. A number of witnesses gave evidence about this process and what happened on the ITFB from when it was first set up, to this distribution. Mr Ramdass and Mrs Alexis were among those initially appointed to the ITFB when it was first set up.
650. Mr Ramdass said that discussions at the ITFB started in English and were then changed to Creole, but secret things were in English and not translated; later, he said that Mr Bacha translated important matters briefly. Father Patient could speak Creole; it is the language of Mauritius. He could not remember that documents were requested at the first meeting of the ITFB; they were all so silly they did not think to ask for them. He could not remember the ins and outs of the Ilois being elected to the ITFB over time. He said of the 1982 Agreement that the English had said that they would pay no more than £4m in English, so that he would not understand what they were saying. When pressed as to whether the

English had said that no more money would be paid, he said he did not remember. It was a long time ago, however, that he realised that there had been one condition to the Agreement, there would be no more money. In re-examination, he said that Father Patient had just translated the preamble as Mr Allen quoted the agreement to him to see how much had been known. Nor had the Mauritius Government explained it to the Ilois.

651. Although he said he had been a witness to forms being signed in 1983, in his witness statement he said he was shocked to discover when he signed his statement of 22<sup>nd</sup> November 2002 that the form he had signed was a renunciation form. They had not been told about what the renunciation forms contained, although he had said that he knew when he was on the ITFB that the English had said there would be no money. When I endeavoured to follow up what that meant, he said that he did not know that that had been the position; they had never been told it. But his committee came to an end because the work was finished, the British Government had paid and there was nothing more to do.
652. He agreed that the English had always said that Vencatessen's case had to be withdrawn before the Ilois got money and that was something that most of the Ilois knew was required. Always, he agreed, the English had insisted on the withdrawal of their case. He did not remember the suspension of payments or an emergency meeting of the ITFB. He heard nothing about Mr Berenger saying to Mrs Alexis that there could be no question of the Ilois not signing the renunciation forms after the issue had been raised in the ITFB. There had been no mention about renunciation of rights when the distribution of the Rs 8,000 was announced on the radio. He said they always had to sign to say that they had received the money. There had always been a witness to the receipt of ITFB money. Identity cards were required because they thought they had noticed fraud, and they were required to be shown when the Rs 36,000 for land was paid over. Nonetheless, he said that Mrs Kattick and he were witnesses for the people whom they knew when they came to collect their money. People did not read the paper; they were called to put their thumbprint on it. No one translated them. No one had told him what the documents were. It was not significant to him that there were two forms to sign. People would have reacted very unfavourably to any suggestion that they should give up their rights for Rs 8,000. He thought the ITFB had betrayed them. As soon as anybody had been aware that the forms involved renunciation, he said that they would not have signed such a thing, but he did not remember what happened when Francois Louis came to collect his Rs 8,000 or that Simon Vencatessen had not agreed to sign his form. He said that he had withdrawn from the ITFB because there was fraud on it, in the form of adding names of people who had died to the lists of Ilois to get money. He did not raise these matters with the Board because the people doing this were very violent and it was people on the ITFB itself who added the names of the dead people. He then said that he could not say who the violent people were because it was delicate and there were some he did not know. They did not include Mr Simon Vencatessen, Francois Louis or most of the other names put to him who were Mauritians or non-Ilois. He was prepared to say that it could have been Mrs Kattick or Mrs Alexis because he knew that she had been jailed for such a fraud, and Mrs Naick. He was clearly in some anxiety as he spoke of these things.
653. He found out that Francois Louis and Simon Vencatessen had refused to sign the forms but not at the time. He said that they lived some way apart in Port Louis even though they had worked together on the ITFB. He did not remember that they had been elected together and this notwithstanding that they were closely related and had cooperated over the Vencatessen litigation. It was only some time after that he realised what had happened. He did not meet Francois Louis and discuss the press conference at which Francois Louis had described the dangers created by signing these forms. He said that Simon Vencatessen's case was a case simply for Simon Vencatessen. He had never discussed what the case was about then or later. They had not told him about it. When asked why

Francois Louis would not have told other people about what the document contained, even though he was quite happy to go to press conferences, Mr Ramdass said that it would have been Francois Louis' own opinion as to whether the document should be signed.

654. Mrs Alexis said that, as a representative on the ITFB, she had taken part in the discussions drawing up the list of those who were to be qualified to receive compensation, the establishment of housing, the withdrawal of the Vencatessen action and other administrative matters. She said that during no meeting in 1982 was there any mention of rights having to be given up in return for compensation.

655. She had been a member of the ITFB at the outset and said that discussions were to be in Creole. She was asked whether the Board had called for the agreement between the Governments at the outset and she said that it had not because they knew the agreement very well. When she failed in her bid to be elected to the ITFB in December 1982, she did not stop agitating and the CRG was formed and she became its first President; it was formed in 1980 rather than in 1983. She agreed that in July 1983 a petition had been submitted by the CRG to the ITFB including demands about ID cards. She remembered organising a sit-down in front of Government House. In July and August 1983 she was not sitting at home but was active on behalf of the Ilois. She had said, untruthfully, in chief that after she had failed to be re-elected in December 1982, she had just sat at home, fed up having done the work. She did not remember any postponement of the payment of Rs 8,000. She was unable to remember specific meetings because there were so many meetings which she attended. She remembered there was a problem about the amount of money to be paid but not that Mr Berenger had said there could be no question of the Ilois signing the renunciations; she could not remember such a meeting addressed by Mr Berenger before she signed the form.

656. She described the various processes whereby they had obtained the money in relation to the Rs 8,000 in 1983; there had been nothing said about renunciations or about final payment in the announcement. If there had been they would not have accepted the money. She had no idea of what the form she put her thumbprint to had said; no-one explained the form. She said she could not remember Simon Vencatessen and Francois Louis resigning from the ITFB and had not known that they had not taken the Rs 8,000. Neither had spoken to her about that, though she had spoken to them.

657. She prevaricated over whether she could remember being successful in the December 1983 ITFB elections (which she was). In a sequence of questions, she was clearly evading questions by saying she did not understand and she did not remember, she did not know. Frequently her answers bore no relation to the question.

658. Mr Saminaden agreed that the renunciation form had not been a receipt because it had no figures on it, but no-one had said what it was, merely that it had to be signed to get the money. The forms had not been explained; he had heard that it was a condition of compensation that the Vencatessen case be withdrawn but never that rights had to be renounced.

659. Mrs Kattick, a CIOF supporter and organiser, was elected to the ITFB in December 1982. She beat both her sister, Mrs Naick, and Mrs Alexis. She initially denied remembering Mr Michel explaining that it would be necessary for them to renounce any right of return before the forms were signed and she recalled no explanation of any of the terms or conditions attached to the distribution. She attended the distribution on a number of occasions as an observer for the ITFB and later to sign certain forms. She thought the purpose of that was to identify the person who signed. She was unable to, and gave no explanation of what was in the documents. Sometimes the person getting the money had already left and she would sign the forms for the Rs 8,000 after they had left. She said that the discussions at the ITFB were in English. She was not present that she could remember when Francois Louis or Simon Vencatessen came to get their money in

September 1983 and she did not know until this case that either of them had refused to sign the forms.

660. She elaborated somewhat in cross-examination, but the only consistent pattern to her answers was their evasiveness and contradiction.

661. She said that she did not know why in addition to ID cards, the Board required two Ilois representatives to sign the renunciation forms as witnesses; she was only there every other day, and was often given forms which had Mr Ramdass' signature already on it which she trusted. She would have objected to signing or getting Ilois to sign a form in English. The process took about a fortnight. There might have been a delay for a week after the first day and she remembered a dispute over notarial and survey fees.

662. She agreed that when she signed a receipt it said how much she had been paid but the forms did not do so. She knew that figures were the same in English and in Creole, but she debated before agreeing it saying that she did not know whether there was a figure in it or not, but she then agreed that there were no figures in it. She said it was only now that she had become aware that these forms had no figures in them. This was one of many examples of this witness trying to duck away from the issues because she was very well aware where the questions were going and what they signified. If she felt she could throw the questioner off the scent by her prevarications and picking up on small points in the questions, she did. She was quite an intelligent woman and knew what the issues were.

663. She thought that it was not correct that they had signed something they did not understand, but it did not occur to her, she said, that she should find out what it was she was signing. It was only now, rather than when Mr Michel spoke of the forms at the Board meeting, that she realised what she had signed. This was rather a different answer from the one she had given but a moment or two before. She said the discussions in 1983 in the ITFB about the forms were very clear, but she said that she did not know that what she had signed was a renunciation form, until a few days later in 1983. She said she could not remember agreeing earlier (as she had) that the Mauritius Government had agreed to do its best to get the Ilois to promise not to sue the British. She said renunciation forms would have been a surprise to the Ilois.

664. She could not remember advice being sought about whether the Trust Fund should collect renunciation forms, nor that it was suggested that the Ministry should do that or that in the end the Trust Fund did it. It was possible that there was a delay. She had not heard Mr Berenger say that the renunciation forms had to be signed. She had had no dealings with him and thought him possibly hostile to the Ilois. She knew that there were a number of Ilois who had not signed the renunciation forms because it was discussed in the Board. She knew those were the forms that she had been witnessing, after she had signed them, when Mr Michel talked about them in the ITFB.

665. She was aware of Mr Michel's view that the £250,000 would be unblocked when enough forms had been signed by the Ilois promising not to sue the British Government. Mr Michel had said there was a form to be signed but he did not say that it was to give away their rights; she did not remember what he had said about it. She said she did not say anything back to Mr Michel about that view but she was not very happy because he had said that they should sign the renunciation forms. Later, surprisingly, she said she could not remember what he said. She also said she knew that if the Ilois promised not to sue, the £250,000 would be released early. But she did not remember the Ilois being asked to promise not to sue. She thought the money could be released before the end of 1985 if the Board agreed, but she said that she did not know why the Board had not agreed and then said possibly it could have been in part because not all the forms had been signed.

666. Mrs Kattick said she was not aware that Francois Louis and Simon Vencatessen had not signed the forms, though she knew that some people had

not signed them. She said there was a discussion about whether Ilois should or should not sign the forms but, somewhat surprisingly, she could not remember what the arguments were. She said that Mr Louis should have told her and the Ilois about the dangers of the forms but she could not remember him saying anything at the time. She was unaware of an organisation being set up by Mr Mundil and Mr Louis.

667. She was asked what she thought was going to happen about renunciation forms as a result of the ITFB discussions, to which she simply replied that as an Ilois she could not renounce her rights and then said that she did not know there had been discussions about the forms at the Board meeting and was unaware, albeit as an elected representative, that the Ilois signed something, the contents of which they were unaware. Her evidence here was simply evasion piled upon evasion.

668. She was asked why when she had heard Mr Michel talking about the forms which she thought they ought not to have signed, she did not tell the Ilois what they had done. She said that was because they had already signed them. She was asked why she did not tell them what they had done and she said she did not give them an explanation. She was asked why again and said simply because she did not say anything. She said she discussed it with Mr Michel and Mr Ramdass who had said that as the Ilois needed the money they had to sign it. Mr Michel did not say much about it. She denied that she had spoken to anybody outside the ITFB meeting about it, although she was angry over what had happened about the signing of forms which nobody knew about. Mr Michel did not give an opinion, but Mr Ramdass was angry. She did not remember the CIOF meeting to discuss this or protest to the Mauritius Government or telling her sister about it, because they did not have good relations. She did not speak to Mrs Alexis about it either. She said later that the Ilois community would have refused to sign the renunciation forms if they had known what they said. There would have been hostility and it would have become known quickly that that was what was being asked. She thought there would have been an objection also if they had thought they were just renouncing the right to ask for more money.

669. Olivier Bancoult said that nobody knew what the form was. If he had known what it was he would not have signed it; he thought it was a receipt. He would not have renounced his rights for Rs 8,000. He said that on the earlier occasions when money was received, he had had to sign for it. An official had just put his hand over the writing and said, "*Sign here*". No-one had translated the document for them. He agreed that he had witnessed the signatures of others in 1984 and 1985, signing as a representative of the people along with Mrs Lafade. People signed, however, without knowing what was in it and he was not given one to read. The first time he had become aware that he had signed a renunciation and not a receipt, was when he saw it in court when Mrs Talate produced it. His witness statement says that they were mentioned at the ITB in 1984 but when he asked to look at one, there was no reply and he felt too junior to pursue it. Mr Bacha had mentioned renunciations at the ITFB which was when he first learnt of them but he gave no explanation. Mrs Alexis saw Mr Berenger about this and he told her there were no problems with it but she never had the chance to see the form and take legal advice about it. This happened after 1984.

670. Olivier Bancoult said that in 1983 he was a member of the CRG but was not active, some decisions were taken when he was not there. He was its Secretary in its early days, kept its minutes in Creole and copies of letters. None had been produced because no-one had asked and some got lost in cyclones and bad weather. He did not remember the headed notepaper, but did not reply to the question of whether he was a founder member of it or not. He had never heard of ITFB payments being suspended briefly before they were completed in relation to the Rs 8,000. He had not heard of an emergency meeting of the ITFB. He then said that he had not heard of a meeting between Mr Abdullatiff and Mr Berenger, to which Mrs Alexis had been, where Mr Berenger had made it clear the

renunciations had to be signed. He said that she had gone to that meeting as President of the CRG without telling them.

671. Mrs Elyse was confused about various documents to which she put her thumbprint. She thought she had put her thumbprint to a demand for compensation. She said that she would never renounce her rights and always had to put her thumb on documents to get money but did not know what was in them and did not ask. She too said that now was the first time she learnt what was in the form which she remembered thumbing for the money. Her son, Olivier Bancoult, had not told her. Although he could read and write, she did not know if he could do that in English. Although his statement said that he had got examination certificates in English, she did not know that he could write English, he had not told her that he could and he would have done had he been able to. Some Ilois were well educated, and a Seychelles Government Minister was a Chagossian Claimant. She knew of the Chagos Refugee Group and supported it. She said that her son told her what they were doing. Later, she said they rarely spoke as they lived in different parts of Port Louis. She had heard about the £250,000 in the ITFB but not about the British Government not releasing it. She had never talked to Mr Ramdass about the ITFB money. They discussed the payment of money by the ITFB with family and outside the family with all their friends. But there had never been any discussion about if they took the money there would not be any more. Only after he left school did Olivier Bancoult take part in these discussions. After they got the money, there were more demonstrations asking for money by her and friends in order to get money to return to their country.
672. Mrs Talate remembered getting money in 1983; she got Rs 10,000 at the Post Office, and then Rs 36,000 *"only if you had a contract for the purchase of a house"* and then a further Rs 10,000 in December. The Rs 36,000 was not enough, even with all her family contributing their share, to buy a house. She, her mother, her three children and another person clubbed together, but her son still had to borrow Rs 10,000 to buy the house. After that, she got Rs 8,000 and then a further Rs 3,600.
673. There were five representatives to witness her putting her thumbprint on a document. One was Josephine and another Christian. They did not say anything to her, or explain anything, such as why this time there was more than one form. She did not ask them, because they could not read or understand English. The British Government sent nobody to explain anything to her before she signed the paper. Nobody translated into Creole what was on the document or said anything. She had to sign to get the money. When she went to sign and get the money, she waited for some time in the queue with her birth certificate and identity card. She would not have renounced her rights for Rs 8,000 because they would not solve her problem.
674. She agreed that she had had to sign for her children and had gone back to get the money on more than one day. She said that they had asked a civil servant to explain the forms. But they had no rights in Mauritius. They were just treated like dogs. She just signed. She did not see Ramdass and Kattick sign her form, although she knew them well. The lady was outside and she was by the door. Ramdass was inside, standing by the table where the money was being paid. But they could not read, they were just signing for her to get the money.
675. Mrs David said she did not know what she was doing when she put her thumb print to the renunciation form, because she could not read or write. She did not ask for an explanation from Mr Ramdass or Mrs Kattick because Mr Ramdass did not know how to read, nor had she had the chance to speak to them. She was just told to sign two or three papers; she did not know exactly what for. The first time that she had learned that there was a form in existence, requiring claims against the British to be renounced, was in court. She said that she was unaware that her brother Simon had brought a court case in Mauritius so that he could get the money without being required to sign such a form. She said

she never thought about whether she was renouncing her rights, because she could not renounce her rights as she was still living in poverty.

676. She never thought that there would be no more money. She thought the Mauritius Government was just giving them money and that in one or two year's time they could return to the islands. She gave no very satisfactory answer as to why the Mauritius Government might have provided them with land if they were to return in a year or two, but she said that she thought that it was because her roots were still there. She could never forget it and she was still extremely impoverished and suffering. She said that she could not remember whether the Government of Mauritius paid this money as a result of negotiations with the Ilois community or that she could ask for more because she was an Ilois.
677. In July 1983, Simon Vencatessen had resigned from the ITFB, to which he had been elected in December 1982, because they were asking for an ID card in order to prevent fraud and other people on the ITFB were not working. He also disagreed with the others over the distribution of land. He was already in 1983 of the view that they had been victims of Mauritian intellectuals. He heard no mention while he was a member of the ITFB of any discussions about renunciation forms or the preparation of renunciation forms, but he later said that he had heard renunciation forms mentioned at the ITFB. This had made him angry and he had said that they would not sign away their rights and that this was not something the ITFB should be doing. Legal advice had supported him in saying that the ITFB was not responsible for implementing Article 4 of the 1982 Agreement. He resigned before the forms were signed when the Rs 8,000 were paid.
678. Francois Louis, his half-brother, had gone to get his Rs 8,000 ahead of Simon Vencatessen and had not signed the renunciation form because he understood English well, read it and was not in agreement with it. Two or three days later, he explained to Simon Vencatessen what was in the form and so Simon Vencatessen did not sign it. He saw no reason to sign for Rs 8,000 when he had not had to sign such a form for Rs 46,000. He blamed Mr Mundil for making people sign the form. He went to see a lawyer. After the Ministry had refused to pay him any of the Rs 8,000 without him signing the form, he began a court case to contend that he did not have to sign the renunciation form; he offered to sign a different form but that was rejected. Did he fear an adverse reaction from the Ilois, if this were publicised because it would hold up the distribution of further sums? But why not say what it was they were signing? After much prevarication, he said that he did not tell any other Ilois about the forms or his case because, having resigned from the ITFB, all his contacts were cut and he took no further part in Ilois affairs (and most had signed anyway, since "V" was quite late). He said that Francois Louis had also told no Ilois about the renunciations, saying that it was because he too was a victim.
679. He was unable to answer whether it would have been a great shock to the Ilois to learn that they had signed a renunciation form rather than a receipt because he was not there as a representative and could not answer for them. But he then said that anyone would be shocked to learn that it was a renunciation form and not a receipt. When he was asked why at the press conference in November 1983, his brother and Mr Mundil had not said how shocking it was to discover that the Ilois had signed renunciation forms and not receipts, he said that he had only seen it now; he did not read newspapers. His brother had had letters about this in his possession. He had cut himself off from these things, devoting his time to his family. Later in answer to my questions, he said that part of the case, which he brought in the Mauritius court, involved it being asserted that the document was a renunciation form. He said that the Ilois were shocked that the form was a renunciation form. He said in answer to a question about how they came to know that it was a renunciation form in order to be shocked by the discovery, only that they revolted against it.



680. He said Francois Louis and his wife had had a very heated discussion about it when she had gone to get the money. He said that three to four years as well after that, when he was pursuing his case as part of which it was necessary for him to say that the document to be signed was a renunciation form, people were shocked to discover it was a renunciation form, which they showed by swearing. He did not remember whether they had had demonstrations. His understanding of events had long past the point at which he could be regarded as a reliable witness.

681. Mr Vencatessen said that his father should have had at least Rs 500,000 because his case had inspired the £4m payment. He said, however, that the Ilois did not understand that it was his father's case that had brought the £4m. They thought that it was a mixture of politics and the case. He could not say why no other Ilois had started legal proceedings, like his father, after the conclusion of the 1982 agreement. He said that if someone had started litigation before payment of the £4m, the Ilois would have been angry because the British Government would not have paid the £4m. But he did not know whether they thought that a case could be brought as soon as the £4m had been paid. Nor did he know why after the money had been paid, no Ilois had brought a case seeking compensation in the same way in which his father had done.

682. Mrs Jaffar first said that she had first heard of Michel Vencatessen four years ago, but later she said that she had just heard his name since she had come to court right here, and now in this country, although she had referred to him in her statement. She denied the truth of what was set out in her statement about her knowing Michel Vencatessen and being aware of the fact that he had taken legal action as a result of which compensation had been paid in 1984 and had led to her buying a small piece of land where she still lived with 13 others, her children and grandchildren. She said she never said that because she did not know Mr Vencatessen, not having been born on Diego Garcia. Then she said it was only roughly four years ago that they were aware that they had a case and that the case had been brought in London. Bringing a case in London had not occurred to her until Olivier Bancoult's case. I believe that her statement is the true position and that she lied about her knowledge.

683. She expressed her concern that Mr Mundil, as a Mauritian, did not like them as Ilois and that Mr Michel used Mr Ramdass as a Diego Garcian who did not speak English. She did not go to any meetings. The committees formed by Mr Michel and Mr Mundil were formed to take advantage of the Chagos people. She had no confidence in any of them. She knew nothing of any document appointing Mr Sheridan to be her legal adviser, nor of the August 1980 petition. She participated in the Committee of Creole but she did not want to work with Elie Michel. It was the Ilois not the Creole who were suffering.

684. She had been unaware of any claim for compensation before she met Mr Mardemootoo, which I do not believe. She read *"l'Express"* but not *"le Mauricien"* because it did not take the side of the Chagossians. She only read things in the newspaper which were in her interest, and she could not afford to buy a newspaper, at least every day. She would have known quite a lot in those circumstances. She had never heard that the CIOF had obtained legal advice, because her mother was suffering from madness and she had no time to deal with those matters. She heard that there had been an offer of compensation of £250,000 which she thought came from the Mauritius Government because they had sold her people for independence. At times she said that they had to hide their identities from the Mauritians. They had confidence in no-one. She was not aware of negotiations between the British and Mauritius Governments. The Ilois did not meet to discuss things because they were separated in the various parts of Port Louis, even though there were Ilois representatives on the Mauritius delegation. I do not believe this is true or what she thought.

685. It was only four years ago that she came to the Chagos Refugee Group, but they had not talked about what had been signed in 1983. She was, however,

a committee member, assisting in identifying Chagossians. She knew that there were Ilois on the ITFB including Mr Bancoult and she had heard that her sister (not a true sister), Mrs Talate, was a member of the board but did not know when she became a member. She knew Mrs Lefade, but she had not been part of the Chagos Refugee Group when Mrs Lefade might have been its President. She did not have the time to talk to her.

686. Although her statement had said that on many occasions they would be arrested by the Mauritius police and jailed because of their protests in the early 1970s, she said that she had never had any kind of problem with the Mauritius police. She said she had taken no part in demonstrations because her mother was mad. This was only something that she had heard about from the radio and it had also been in the newspapers.

687. She denied signing the petition of August 1980 and, as with many other witnesses, she instantly turned to make comment as if those questions related to the renunciation forms, making no distinction between the two. The first time that she had heard of what was in that form was when her sister (Mrs Talate) had given evidence here and she cried a lot because the English had raped their confidence because they had not shown them the paper. She would never sign a paper renouncing her island. She said it was because they were a poor black people that they had been dealt with in that way. Rs 8,000 was not the value of a people. She signed it in front of a grille and the signatures on it were not there when they signed. They had had no right to ask what they were signing. She had known nothing of Ilois meetings before she went to collect the money. There was a queue of people to sign to get the money, who went in one by one and were told to sign by Government officials and then they would get their money. She just signed to get the money. There was no opportunity or the right to discuss things with other Chagossians.

688. She could write a little and read a little and could understand some, but not read any English. She could understand a little French. Her statement had been read back in Creole and she agreed with it after it had been written down and signed it to show that she agreed with it.

689. She had said orally that no lawyers took any notice of them. They had all just tricked them. When asked who, she said that in fact she had never met such people, she just meant that if they had met such people they would have tricked them. It was only in Olivier Bancoult and Mr Mardemootoo in whom she had confidence. She knew about Olivier Bancoult's case because she worked with him, but until they met Mr Mardemootoo four years ago, they did not know how to bring a case. Her evidence was wholly unreliable.

690. The ITFB met on 23<sup>rd</sup> September 1983, shortly after the payment process had concluded. Its Minutes show that the Crown Law Office advised that Mrs Paul, who had gone to the Seychelles, was ineligible for compensation but that she had already been paid as the ITFB had decided. It had also advised that only those who came after November 1965 were eligible under the Agreement but that the ITFB had adopted as its sole criterion for eligibility, whether someone had been born on the Chagos. Mr Ramdass is minuted as asking that legal advice be sought on certain issues. It was reported that 1,161 adults and 128 minors had received compensation. Mr Michel (a Creole speaker) enquired whether the £250,000 which was being withheld pending the signing of the renunciation forms could now be released, but the answer was that it could not be released yet because not all Ilois had signed them. It was up to the UK Government as to whether it retained that money until 1985. Mr Ramdass said that he could remember no such discussion, or mention of renunciation forms, (22A/164). The Government, he said, was responsible for the minutes.

691. On 27<sup>th</sup> October 1983, the High Commissioner wrote to the FCO about the renunciations. He reported that Mrs Alexis and a number of other Ilois "*were giving the non-signatories hell*"; (19A/C/77) their refusal to sign was impeding the release of the £250,000. Mrs Alexis could not remember that; she said she

could not make people sign or prevent them; I was less than convinced by her reticence. The CRG, now with Mrs Alexis as President, asked him for his help in getting the promised housing and land for the 200 families which she said were without accommodation. He reported that whilst he had made the right sympathetic noises, he had stressed that the UK now had no locus in the compensation process. He described Mrs Lefade, the CRG Secretary as an impressive and sharp personality. The FCO asked him to find out what was actually happening on the housing front.

692. The UK Mission to the UN wrote to the President of the General Assembly on 17<sup>th</sup> November 1983 responding to the recent claim at the UN by the Prime Minister of Mauritius that his country had a legitimate claim over Chagos. He said that the Chagos had never been part of Mauritius as an independent state and that before its independence the islands had been administered from Mauritius for convenience and had been legally distinct. But they would be ceded to Mauritius when no longer required for defence purposes. The Mauritius Mission repeated its claim relying on the claim that the detachment had been in breach of the UN Charter. These exchanges were circulated to the General Assembly.

693. An FCO Research Report of December 1983, (19B/58), describes the way in which the BIOT issues had been debated at the UN. The controversy in 1965 had been about the fact of the creation of BIOT and the associated detachments, although the UK told the Committee of 24 that the population consisted of labourers and their dependants from Mauritius and the Seychelles. Great care would be taken with the welfare of the few local inhabitants which would be discussed with those governments. The attachment of these islands, uninhabited when acquired, to Mauritius and the Seychelles had been a matter of administrative convenience. In 1966, the controversy had the same focus, although the UK representative is said to have spoken of "*almost all*" the workers being migrants and "*virtually no permanent inhabitants*". The debates in 1967, 1968, 1969, 1970 all focussed on the creation of BIOT. In 1971 for the first time, and more obviously in 1972, the question of the interests of the BIOT inhabitants was raised but in the context of the compatibility of their rights with the establishment of military bases. The Committee of 24 in 1972 condemned the evacuation of people of Seychellois origin from the Chagos to make way for a UK/US base, but the BIOT inhabitants were not mentioned in the omnibus resolution adopted by the General Assembly. The same pattern followed in 1973, with the further evacuations being condemned by the Committee of 24. Nothing of further significance was discussed. The return of Aldabra, Desroches and Farquhar to the Seychelles on independence was noted.

694. On 28<sup>th</sup> November 1983, "*Le Mauricien*" reported that Mr Mundil had dissolved the FNSI and had established a new committee with a wider reach. The article said that he thought that the compensation had only just been sufficient to pay off debts and for re-housing. He referred to the document which the Ilois had to sign before they could get the remaining compensation and said that it had serious implications for "*nos droits*", that is those of the Mauritians, for he was not himself an Ilois, over Chagos, (19A/C/83). They were also to fight for compensation for the Ilois from the USA.

695. On 24<sup>th</sup> January 1984, the five newly elected Ilois members of the ITFB sent a letter to the President of the USA. The five were Mrs Alexis, Mrs Talate, Olivier Bancoult, Mr Siatous and Mrs Lefade. They asked the US Government for £4m because they had originally needed £8m and the UK Government had only paid £4m which with the £650,000 "*would be in full and final settlement of all claims against the Government of the United Kingdom by or on behalf of the Ilois*", (19A/D/2). This too received press publicity in the context of the way in which the compensation paid by the UK Government was proving inadequate.

696. At the ITFB meeting of 26<sup>th</sup> January 1984, Mrs Alexis asked, according to the minutes, if the remaining funds could be unblocked. Mr Bacha said, according to the minutes, that the UK Government wanted the maximum number of

"*formes de renunciation*" which the Mauritius Government could collect, (22A/186). It was important to show which Ilois had signed, which Ilois were not Mauritian and which Ilois did not want to sign. In that way, it could be shown that the great majority of Ilois had signed and that would show their good faith in this respect. Mrs Lefade said that the release of the money would be a great help to the Ilois. The ITFB's administrative officer said that as soon as the forms were in alphabetical order, he would write to the Foreign Ministry along those lines and write to the English to ask for authority to unblock the funds.

697. At the next meeting, Mrs Alexis asked if there could be a press communiqué after each meeting of the ITFB so that the Ilois could be kept up to date. It was agreed at the meeting after that, that there should be a short and clear resume of the decisions.

698. Mr Permal brought a test case, as "*L'Express*" described it, against the ITFB, which was heard in the Mauritius Supreme Court in March 1984, to try and establish that the workers whom he represented were also entitled to compensation. Mrs Alexis said she was aware of the case. There appears to have been a dispute as to whether he had or had not been expelled or whether he had left Peros Banhos in 1968 but was Ilois nonetheless. He was represented by lawyers. He wanted Rs 100,000. He succeeded at first instance, the judge found that he had been expelled and awarded him Rs 74,000. He rejected an argument that no action could lie against the ITFB at the suit of an individual Claimant for failing to provide a grant similar to those which it had made to other Ilois. The ITFB appealed but the Court of Appeal dismissed its appeal on 26<sup>th</sup> April 1985, (19A/E/3). It agreed with the first instance judge who said that:

"What the Agreement did provide for, however, was payment in anticipation and in full settlement of all claims that might be made by those people against the United Kingdom Authorities. The payment was designed to be administered by Mauritius through the Trust Fund which the Government of Mauritius undertook to set up and, if any claims were made by those people against the British Authorities, the Trust Fund, and failing it, the Government of Mauritius would indemnify the United Kingdom Government. The undoubted purpose of the Agreement, as is abundantly clear from its terms, was to provide the means of an amicable settlement of claims by those people and thus conferred on those people a remedy obtainable in Mauritius as an alternative to their right of action against the United Kingdom Authorities which itself would have been cognisable by the Courts of the BIOT or else by the Courts of the United Kingdom.

I conclude, therefore, that the scope and purpose of the Act in all the circumstances was to benefit members of the Ilois Community both individually and as collectivity and that any individual Ilois does have a cause of action under the Act in Mauritius so as to avail himself of the remedy there provided as a statutory alternative to any other cause of action in the UK or the BIOT against the United Kingdom Authorities that he might also possess."

The Court of Appeal continued:

"We may now come back to the grounds of appeal left for our consideration and appreciate how misconceived and fallacious they are. It is certainly not the Agreement alone which created the right of action. It was the Agreement with all the events that preceded it and which followed it in the passing of the Act with a view to honouring such agreement and culminating in the payment by the Board of compensation in cash grants to a great number of people who could have a claim for having been displaced, as the appellant had been, from the Chagos Archipelago after November 1965, and referred to as 'the Ilois' in the second paragraph of the preamble to the agreement which reads –

'Desiring to settle certain problems which have arisen concerning the Ilois who went to Mauritius on their departure or removal from the Chagos Archipelago after November 1965 (hereinafter referred to as 'the Ilois'). We find no substance in the grounds of appeal'."

699. The litigation had the effect of causing the Government to amend the ITFB Act on 17<sup>th</sup> May 1984. It was designed to limit the number of Claimants, and defined "Ilois". An "Ilois" was "*a person who has been identified as such by the Board and has been issued an identity card on or before the 14 May 1984*", (19A/D/23). Amendments were made to the powers to deal with property and the Board was declared not to be liable to any person outside the scope of that definition of "Ilois" and no action could be brought by them in respect of the distribution of cash or the allocation of land.
700. The ITFB discussed this litigation as well as the cases of 124 workers which had been presented on a number of occasions. Mrs Alexis and the Ilois representatives were present.
701. On 16<sup>th</sup> May 1984, the five Ilois representatives on the ITFB, including Mrs Alexis and Mr Bancoult, wrote to the High Commissioner asking for the release of the £250,000 "*given that no claim against the [UK Government] has been entered ...*" (19A/D/9). They again pressed the USA for compensation, explaining why the UK sum was inadequate and the poverty which they still faced; it had been too little, too late. The Prime Minister of Mauritius described this claim as ridiculous in an interview in "*African Affairs*". What had been done to the Ilois was appalling and inhuman but the matter was now closed; anyone raising it again would be doing so in bad faith after the agreement. (He may have had Mr Berenger in mind, as his party was no longer part of the Government, and no doubt this magazine was not everyday reading material, but the Ilois representatives became aware that those were his views).
702. The next day, as the High Commissioner reported to the FCO, an Ilois delegation including Mrs Alexis, came to see him asking about the release of the £250,000. He recorded that he told them that as some "*revocations*" were still outstanding, there was no immediate hope of that.
703. On 28<sup>th</sup> June 1984, the Mauritius Government sent to the High Commissioner 1332 renunciation forms saying that there were only 10 outstanding and explaining that only 2 people had refused to sign, 2 were disputed, 5 people were abroad and 1 was dead. Thus all the 1,342 to whom ID cards had been issued were accounted for. (A later Annual Report for the ITFB refers to 1,344). They were sent to the FCO in September 1984. The FCO wrote back saying that they would keep them in London in case someone else brought proceedings against the UK Government.
704. The FCO was asked at Ministerial level to review the position with the Ilois. The review in July 1984 recommending holding to the line that there had been a full and final settlement of their claims. The Minister agreed, being of the view that although they had been treated badly and deprived of democratic rights, the £4m compensation was fair.
705. The release of the £250,000 was discussed at the ITFB meeting on 5<sup>th</sup> September 1984. Mrs Lefade asked what the position was. Mr Kewal, a civil servant, explained that the UK still wanted all the "*renunciation forms*". She asked why it had been said previously that the sum could be unblocked if there were one or two forms not signed but now it appeared that all of them had to be signed. Mr Bacha said that the Law Officers had advised that the spirit required that but that as only a few were outstanding, a small sum could be asked for. Mr Bancoult asked that that be done. Mrs Alexis asked the ITFB, which had done nothing for the Ilois, to ask the Mauritius Government to support the Ilois request for compensation from the USA.
706. On 15<sup>th</sup> September 1984, (19A/D/45), a letter from the 5 Ilois on the ITFB, and signed by Mr Bancoult asked the High Commissioner for the release of the

£250,000. "We had to let you know that most of the Ilois had already signed the renunciation form ... . We know that there are about ten Ilois who had not yet got the renunciation form signed ...". 'Le Mauricien' reported on the letter, referring to "renonciation form" and its purpose as being to prevent new claims; most Ilois had signed one. "Le Nouveau Militant" reported on a delegation led by Mrs Alexis to the Mauritius Government seeking its help in procuring the release of the money. It made the same point about the majority having signed "*les formulaires de renonciation des iles*."

707. On 12<sup>th</sup> November 1984, four of the five Ilois on the ITFB, including Mrs Alexis and Mr Bancoult, with Mr Berenger and others met the Employment Minister. He was unwilling to release the money as there were still many cases pending before the Courts. Mr Berenger said that he was aware of the interview in the "Africa" review but contested the view that the 1982 agreement impeded claims against the USA and so asked if the Government would help in that claim. There was a discussion about legal advisers to the Ilois but the context of that is unclear. Notes were made in English and in Creole. This Ad Hoc Committee met again on 3<sup>rd</sup> December. Mr Berenger said that the money could not be released because of the inadequacy of the renunciation forms. One of the senior civil servants said that a few Ilois had intimated that they would be prepared to sign a different form of renunciation form.
708. Throughout the minutes of the ITFB and of this Ad Hoc Committee are references to the many and varied interventions of the Ilois, notably of Mrs Lefade and of Mrs Alexis.
709. At a meeting of the Ad Hoc Committee on 6<sup>th</sup> May 1985, the Minister told Mr Berenger that advice would be sought as to whether the £250,000 would be released at the end of the year, if there were no more cases pending before the courts.
710. The CRG through Mr Bancoult wrote to the High Commissioner on 17<sup>th</sup> May complaining that the £4m had proved to be inadequate for the proper resettlement of the Ilois. The housing programme had absorbed much of the money, it had come late and the Ilois were in debt as a result of buying land or houses. They were destitute, unskilled and unemployed. They wanted part of what they thought was the rent paid to the UK by the USA for the use of the Chagos. In a letter written about a month later, he complained at the political affiliation of the ITFB chairman and said that all the problems of the Ilois were the same as before.
711. In June, the High Commissioner told the FCO that a further 7 renunciation forms had been received and that 2 more were expected, leaving only Simon Vencatessen and Francois Louis who were refusing to sign. One of the registered Ilois of the 1,344 had died.
712. By July 1985, the CRG was threatening legal action against the UK Government in the "*International Court of Human Rights*" on the grounds that they were British subjects who were denied the right to reside both in the UK and on Diego Garcia. A delegation led by Serge Perrault told the High Commissioner so, according to his note, when complaining about the ITFB and warned of a demonstration outside the High Commission and its possible occupation. An article in "*Le Mauricien*" referred to his seeking the same social security as would be paid in the UK; he had told the French Communist Party of the situation. They returned to the High Commission in August, with Mr Perrault as their spokesman. Similar demands were repeated.
713. At a meeting of the Ad Hoc Committee on 13<sup>th</sup> September 1985, Mr Berenger said that he had only just discovered that the Ilois had been asked to sign a renunciation form in favour of Mauritius as well as one in respect of the UK. The Government had been wrong to ask for that.
714. It is relevant to note, in view of the evidence of Mrs Alexis as to what she was able to understand of the ITFB meetings, that in the minutes of the meeting on 10<sup>th</sup> October 1985, she is recorded as having seconded the adoption of one set

of minutes and an amendment to another set. This is not the only occasion when an Ilois proposed the adoption of the minutes.

715. Sheridans informed the Treasury Solicitor that they were doing as asked and destroying the documents of which discovery had been given.
716. In October 1985, according to an article in "*Le Mauricien*", the CRG alleged that the UK Government had breached the agreement by failing to release the balance of the money because the Ilois had signed the required renunciation forms giving up all claims on the territory of the Chagos, as it was put. They had been forced to sign them without knowing what they really meant. The sum would not be paid out if there were any cases against the UK Government. "*Le Nouveau Militant*" reported the complaints of the CRG that the Ilois had signed "*un formulaire de renonciation*" without being put in the picture as to its contents. Mr Bancoult and Mrs Alexis were among those who reportedly denounced this as a breach of their human rights. They wanted to involve Greenpeace in the provision of a boat to go to the Chagos.
717. However, at a meeting of the ITFB on 24<sup>th</sup> October 1985, at which the Board's two lawyers were present, they pointed out that even if the UK Government were to release the funds at the end of the year, there were still outstanding Permal-related cases, from those whose entitlement as workers had been accepted until the change in the Act, and the ITFB would still have to retain the money itself against such claims as it might have to meet. This remained the position at the meeting of 15th November 1985; there were 155 cases outstanding. The Ilois asked to see a copy of the written advices about this which had been received by the ITFB.
718. The CRG wrote to the High Commissioner at the end of October 1985, rehearsing the grievances of the Ilois about their forcible exile from their native land, referring to the 1982 agreement and the renunciation forms and accusing the UK Government of being in breach of its obligations now to release the £250,000. They were loyal to the Crown but hostile to the Governments. Another note from the CRG referred to their rights as British citizens, explaining how that had come about, and asserting that the agreement had been reached under the duress of their great poverty.
719. Mrs Alexis was re-elected to the ITFB at the end of 1983. She denied that she had given the interview to the "*Nouvel Militant*" in December 1983, (19A/F/109), referring to the Mauritius lawyer, Mr Vallat. It was an interview with her as candidate. It was all lies, she said. She was asked about the minute of the January 1984 meeting of the ITFB, (22A/188), at which renunciation forms were discussed. She said that after she had heard the word mentioned at the Board, she took a delegation to meet Mr Berenger to tell him that she had heard talk of renunciation at that meeting. That was when she first learnt of them. Mr Berenger had said that it did not matter. She did not know at the time of the agreement that the Mauritius Government had to try to get the Ilois to sign such forms and no Ilois representative had suggested that such forms should be signed. She remembered that there had been a conversation in the ITFB about unblocking the £250,000 even if there were only a small number of Ilois who had not signed the renunciation forms. She said that her head would sometimes spin at the Trust Fund meetings. She did not always keep a close eye on what was being discussed. She then said she did not understand that there was a discussion about when the £250,000 could be unblocked; she could see where this was leading.
720. She denied later that on the ITFB there was talk about renunciations in the context of unblocking the fund money and said that if she had known about the renunciation in connection with the money, she would have broken up the Board. That is plainly wrong. She was either lying or hopelessly unreliable. She agreed she knew that a sum had to be kept in reserve but said that she did not know that it could be released early if all the Ilois signed such forms. There was a difficult passage of questions in which she first said that she had not known, then

answered several times that she had never known and did not know that the £250,000 could be released early if all the Ilois signed renunciation forms but she then said that she knew that in 1984. She said that the CIOF had not had lawyers to help it. She denied knowing that minutes were kept of the ITFB meetings and approved at the next meeting, or that they were kept in Creole and English. She could not remember proposing a change to the minutes or seconding their adoption as is shown in minutes of the ITFB on occasions. She said she agreed things were put down on paper but she did not know what it was. She could not remember the President of the ITFB reading out the minutes at the start of the meeting. She then agreed that sometimes her group would look carefully at the minutes including Olivier Bancoult but sometimes there were English words he got stuck on. Sometimes the minutes of the previous meeting were read at the start of the next meeting, she eventually agreed. She had said that she had sat like a doll saying nothing.

721. She was referred to another meeting at the end of 1984, (22a/260). Mr Berenger was concerned about the inadequacy of the renunciation forms. She said that she had never heard Mr Berenger say that the money could not be released because there were not enough forms signed and he would never have said that in front of the Ilois. It was difficult to make sure that Mrs Alexis had understood the question. She then said after repetition that she did not remember any discussion about the release of money being prevented because a handful of Ilois had not signed renunciation forms or a discussion about a different form. She then said she remembered raising the question of whether the £250,000 plus interest should be kept separately. The minutes show that this happened at the same meeting as the renunciation forms were discussed, but she said that she did not remember renunciation forms being discussed. She could not remember asking that money should be advanced from the £250,000.

722. Mrs Alexis also denied remembering a concern about the £250,000, and then persisted in saying that she had never heard about the renunciation forms at the Board; if she had known about it she would have turned the table upside down. But then she said she had heard them talking about renunciation in 1984 and Mr Berenger had told her not to worry about it. She had not been told what they were renouncing and she had not asked him what was in the form and had only found out in court. There would have been a big war in Mauritius, she said, if the Chagossians had been known to have renounced their rights. All the Ilois leaders would have done the same. She would have expected Ilois leaders, Mr Michel and Mr Ramdass to tell the Ilois about it. No-one told her of any problems with the forms. But none of them knew what they were signing. They just did what they were told. They were just asking for money to relieve their suffering and the Mauritians were saying that the money could not be unblocked because they had not finished *"tying the rope for the Ilois"*.

723. She was asked specifically about the minutes recording a debate about whether the money could be unblocked when there were only a few other people who had not signed renunciation forms. But she said that she understood nothing. She said that the Governments were trying to make life difficult for them over the £250,000 and that the money was held back in case somebody brought a case against the British Government in the next five years. I asked whether she thought there was a connection between unblocking the money and the money that was being kept back and she said "No". The money was simply to be used if anybody sued the English and that was the money which the Ilois were trying to unblock before the five years were up. She said there was a fear that people from outside Mauritius, such as the Seychelles or France or England, would make a claim because there were claims from there, because she imagined families had written to them. I asked her whether what the British Government wanted, in order to unblock the money early, was an assurance that there would be no further claims. She said that so long as they lived they had to claim their rights. It was too small a sum to be compensation. She did not know what would make



the British Government unblock it before the five years were up, nor what the Ilois had to do to persuade them to release it early. She was asked what arguments she had used, but no sensible answer emerged other than that they would be completely unmoveable. She said that she did not know whether she had been keen to get the money released early. Nobody had known that it was in full and final settlement. She could not remember asking the Americans for £4m on top of the £4m given by the British Government. She said nobody had ever thought of asking the Americans or writing to the President or the American Embassy. She then appeared to remember later that they had made a request for £4m to the Americans because they were desperate. She agreed that whilst she was on the ITFB they had never made another demand for £4m from the British Government.

724. She did not know that Simon Vencatessen had brought a case in Mauritius against the ITFB, about not signing the forms. These were his personal affairs, though she was a member of the Board at the time. She agreed that he and his brother were popular with the Ilois but she did not know whether the Ilois would listen to them or not.
725. Mr Ramdass could not think of a reason why Simon Vencatessen and Francois Louis would not say to the Ilois that they had been tricked into signing forms that renounced their rights. They were trustworthy people, although there had been some disagreement between the Ilois.
726. Mr Saminaden knew the people who had been elected to the ITFB but he did not have much to do with them. It was only when he heard from other people that Vencatessen and Louis had resigned that he found out about it. He had never heard the reason. He did not see Simon Vencatessen very often although they were related, and lived about four to five miles away. He did not know that they had refused to sign forms and until this case began he had not heard of Simon Vencatessen's case. He had not heard why they were concerned about the danger of signing the forms. He agreed that the word "*renunciation*" in the Chagossian context caused immediate anxiety as to what was happening and they were always on the look-out for such a problem. He thought that if Mr Michel and Mr Ramdass knew that they had signed renunciation forms they would have objected very strongly.
727. Olivier Bancoult had heard that Simon Vencatessen had brought a case against the ITFB because he had not signed the form. The case had been dealt with by lawyers and he had only found out what it was about today in court. It had been a personal decision of Mr Vencatessen's and if he had told the community what he was doing, there would have been a reaction. He said that he had not known what the case was about; it was simply a legal matter. He was not aware of the judgment of the court that the ITFB could require someone to sign a form. He was only aware that Simon Vencatessen had lost his case.
728. Mr Bancoult had heard that Francois Louis and Simon Vencatessen had not signed the forms, but not of the press conference which Mr Louis had held. He agreed that when he was elected to the ITFB in December 1983, the immediate concern of the members of the Group had been to unblock the £250,000 which had been blocked because of cases brought against the ITFB. He said that it was after the reference to renunciation forms that the ITFB meeting of 26<sup>th</sup> January 1984, (22A/118), that they had asked about these forms which till then they had never seen. He explained the fact that there was no reference to Ilois asking what these forms were and who had signed them by saying that, at the meetings, what the Ilois said most of the time had not been recorded in the Minutes, whereas what the Government members had said was written down. This was the point at which Mrs Alexis had been to see Mr Berenger. He said that they asked Mr Bacha to explain the position all the time to the five Ilois representatives and they asked the Secretary to the ITFB to produce the forms, but they never did. They had also asked Father Patient, the Chairman, but he was Mr Bacha's puppet.

729. He said in response to being shown the letter of 24<sup>th</sup> January 1984 to the US Ambassador from the CRG which he signed, (19A/D/1), referring to the agreement with the UK Government as "*full and final*" that he was never fully aware of this full and final settlement. When he was pressed as to why they were going to the US Government rather than to the British Government, he said that they were in a very difficult situation and were looking for other ways out of the problem. They asked a lot of people for money, like beggars. But he had never heard that the British Government would not pay any more and had been looking for an assurance that they would not be sued. I asked whether the CRG had agreed to turn to the US as the next best source of money, given that the British would not pay more. He said that there were so many people wanting to help them and so many letters written. However, the letter said that they had originally wanted £8m but the British Government had only given them £4m, and so they were turning to the US for the other £4m, and that letter had not been written by Mr Perrault, Mr Mundil or Mr Michel, but by the five ITFB members. He said that all the contents of the letter could have been written for them by someone else and that they just signed. He said, "*In the end they betrayed us by telling us things that weren't true*". It was plain beyond peradventure that Mr Bancoult was simply being evasive and was well aware of the significance of the awareness demonstrated 20 years ago that they could not sue the UK Government.
730. He agreed that the letter of 16<sup>th</sup> May 1984, (19A/D/9), had been signed by him quoting Article 5. He said that they were looking for ways to get the community out of its problems without renouncing its rights. Although he had referred to Article 5, he said that they had never had a copy of the agreement, never saw it, and could not remember who wrote it. He said they did not get replies to most of their letters. He could not remember the letter being taken to the British High Commissioner on 17<sup>th</sup> May 1984, (19A/D/22). He did not remember going to the High Commission; it was too long ago. He pointed out that that letter concerned revocation. Mrs Alexis had never said she was going about renunciation.
731. Mr Bancoult said that they never had a report of the ITFB meetings in Creole; it was only ever provided in English. He said they asked questions but did not always get replies. He later agreed that the Minutes were sometimes in English and sometimes in Creole. He was referred to the Minutes of the ITFB, (19A/D/41, 22.8.84). He said he had never seen Article 4 and so could not have asked about it. He was referred to the Minutes of 5<sup>th</sup> September 1984 of the ITFB, (22A/232), which referred to Mrs Lefade asking for a copy of the ITFB Act and whether the Secretary had got a reply about the unblocking of the £250,000, in the light of the fact that only a few Ilois had not signed the forms. He said that he was unaware that Mrs Lefade had mentioned those forms. He said that things were not reported in the Minutes as the Ilois had said them because the Minutes were controlled by Mr Bacha. He said that the Mauritian Prime Minister, as with other politicians, changed his mind all the time. He was unaware that Mr Jugnauth had said that they would be acting in bad faith if they raised the claim again. He was referred to the Minutes of a meeting of 12<sup>th</sup> November 1984 which he, Mr Berenger, Mrs Alexis, Mrs Lefade and a number of others had attended with the Minister, (22A/248). He had not heard Mr Berenger say that there was an agreement with the British Government that no further claim would be made by the Ilois community. He said that Mr Berenger had never said that in his presence.
732. Mr Bancoult was referred to a meeting in December 1984, minuted in Creole, in which there were references to a possible signing of a different renunciation form. He said that there were so many words he did not understand, he could not explain what it was. He said that over the years he had asked again and again to see a renunciation form but had never been shown one, but if he had known that he had signed one he would never have sued the British

Government again. He had not seen the form until he came to court and saw Mrs Talate give evidence. All he believed was that the £250,000 had been kept back in case the British Government were sued or there was a case against the ITFB. Although he knew a little English, he did not know everything and did not know what he had signed. He was not suspicious about all the references to renunciations because they had trusted a lot of people who, he said, betrayed them. Mr Berenger had told Mrs Alexis that there was no problem. None of the other initial members of the CRG, Mrs Alexis, Mrs Lefade or Mrs Talate could read English. Sometimes he wrote letters in English, sometimes they went to those who had betrayed them because they had a bit more education and were able to help them. He did not know who typed the letters that were typed and said that he needed to see them in order to be able to tell who had done so.

733. Olivier Bancoult said that he was unaware of the letter sent on 31<sup>st</sup> October 1985 by the CRG complaining about the refusal to release money, (19A/E/18). Although this letter referred to the Group's contentment with the 1982 agreement, to Article 4 of the 1982 Agreement and the renunciations, but sought the unblocking of the money, he had not been aware of it and did not approve it. All he knew was that the Governments had decided to keep £250,000 back until December 1985 in case the Ilois did not sign or in case someone sued the British Government or the ITFB. At no time had he known or heard that the renunciation forms were amongst the conditions. The retention had been because workers from the Chagos, but who had not been born there, were delaying the payment out of monies. The letter must have been written by Mr Perrault. He knew nothing about Article 4 or the renunciation forms. Mrs Lefade had never told him or discussed that she was trying to get the £250,000 released earlier because enough renunciation forms had been signed. The letter would not have been written by Mrs Lefade (who signed it), as they had no office. Everything was done from Mr Perrault's office.

734. Mr Bancoult said that after 1985 they could have started again. They had not done so because they always thought that when they approached the British Government and explained their problems, the Government would understand and would have *"some love for them"*, but every time the Government simply took advantage of them. He said that they had no adviser to tell them in 1986 that they were free to argue the same things again that Mr Vencatessen had argued. They had no contact with Bernard Sheridan at that time.

735. For all Mr Bancoult's intelligence, ability and commitment to the Chagossian cause, he was an evasive and not always honest witness. I formed the strong impression that he was well aware of the problems created by the 1982 agreement, the renunciation form, the lack of subsequent action by the Chagossians against the British Government and the level of public knowledge of what had happened. He could read English and it is not credible that he was unaware of the content of all of the letters which were sent from the CRG or on which his name appeared. It is not credible, having concluded that they were being betrayed in 1983, that he was not subsequently on his guard against politicians or non-Ilois.

736. Mrs Talate had been elected to the ITFB in December 1983, but said there was no money when she was elected, though they had heard that the money had come from England to the ITFB. Later, she agreed that there was still money for the ITFB to distribute when she joined and that there were disputes about it. When she had been in the ITFB there had been a dispute about £250,000 because the British Government would not agree to release it because the renunciation forms were not signed, although she said it was never explained that they had to be signed. When she was asked *"So, when you were on the ITFB you knew that the renunciations had to be signed?"*, she said *"I didn't know that because when I joined the ITFB the Rs 8,000 had already been done"*. She was clearly having difficulty over what she knew at the time when the renunciation forms were signed and what she subsequently knew when she was on the ITFB.

The ITFB meetings were in Creole, she said, after Mr Bancoult told them to speak Creole. I asked on a number of occasions why she thought that the English Government would not release the money, but her answers always related to what she had been told or understood at the time when the renunciation forms were signed. I found it impossible to get any closer to her understanding of the position in 1984 and 1985. This was when she was on the ITFB and that issue was being discussed.

737. It is appropriate here to pick up the oral evidence about citizenship. Mrs Alexis' son, Mr Cherry, who had been born in the Chagos applied for a British passport and obtained one. Both events were publicised in "*L'Express*" in February 1985. She was photographed with him and the passport for a British Overseas Citizen. This does not appear to have been an altogether welcome development for the UK Government which had been keen to emphasise the Mauritian citizenship of the Ilois. Mr Duval reminded the press that he and the PSMD had always supported the Ilois and had thought that they had British nationality. There were reports that a lawyer, Serge Perrault who was the CRG's adviser, was going to London to discuss this with Sheridans. Others applied for a like passport. Their endeavours were publicised again in August. The Ilois continued to send delegations to the High Commissioner to enlist his support for more effective action by the Mauritian authorities in providing housing. Mr Bacha told him that the Ilois were to blame for they had not made up their minds about how many wanted houses, according to his report to the FCO in March 1985.
738. Mr Bancoult gave evidence about the allegation that the Defendants deliberately concealed from the Claimants the fact that they were citizens of the United Kingdom and Colonies. To my mind, it became clear as the cross-examination proceeded that Mr Bancoult, and indeed other Ilois of whom he was speaking in the generality, were well aware that they were British citizens but were really complaining that as citizens of BIOT they lacked the same rights as other British citizens would have and, in particular, the right of abode in the United Kingdom.
739. He said that the Chagossians had always believed that they were BIOT citizens and not full British citizens, because BIOT passports were different and did not give them the same rights. They were very happy to remain subjects of the Queen when Mauritius became independent, but they did not have the same treatment as an English person, because they could not stay in England or work or get benefits. They had got the lowest grade of British passport and had been turned away in Reunion because it was said not to be a proper passport.
740. He could not remember, notwithstanding the photograph of him at the press conference, that in 1985 Mrs Alexis' son, Mr Cherry, had applied for a British passport in what was described as a test case, but he said that they had wished to remain British subjects. He then acknowledged that after Mr Cherry had got his passport, the CRG based a campaign on the claim that the Ilois were British citizens; but his complaint was that they did not get the same treatment as British subjects in terms of residence, social security and education and that they had all thought that a British passport meant that they could come and go just as if they were British.
741. Mrs Talate said that she first realised she was a British citizen when she met Mr Mardemootoo. She recognised the photograph of Mrs Alexis and her son in 1985 holding his British passport, but she said that she only remembered a little bit and could not remember the question of passports. She later said that she remembered Mr Cherry obtaining a passport and that he was the first person on the test case, but that there was no discussion about him coming to England, other than that he could come if he had enough money.
742. Mr Bancoult was asked about a letter from the CRG dated 7<sup>th</sup> October 1985, (19/1877kk), which he signed but could not remember. It refers to "*British citizens of BIOT*" or "*category C*". He signed it without being able to be sure what it said because at that stage they had hope in the intellectuals and politicians who

- had then betrayed them. Although the CRG had been set up, because Mauritians, he asserted, had betrayed them, and it was an Ilois group with a Mauritian adviser on it, most Mauritians who advised them had betrayed them, he insisted.
743. He did not remember seeing the High Commissioner in Mauritius on 16<sup>th</sup> May 1985 with CRG colleagues seeking to argue that they were virtually all British citizens. He said that he had never gone to the High Commissioner to raise the question of British citizenship and that he had gone only to deal with social assistance. He suggested that the Mauritian adviser, Mr Perrault, could have used his name. He was asked about a CRG letter in late November 1985 to the UN Secretary General, (19A/E/27), which referred to the successful campaign to be recognised as British citizens, the 1982 agreement being reached under duress and the violation by the United Kingdom of their human rights. He said that the signature was not his. He said that it was only from the time at which they started a case here, that they had launched a campaign for equal rights with other citizens. It was, however, perfectly clear from the other answers which he had given, that that was the complaint which had been made since at least 1985. It had not been a complaint that they had not been British citizens. It was quite apparent that he was using that answer to avoid answering the questions, which he knew were coming, about what the Group knew about British citizenship. It had been pointed out to him that the Particulars of Claim said that it had been deliberately concealed from the Claimants that they were citizens of the United Kingdom and Colonies. He eventually agreed that they had been after the same advantages as other British citizens. He said Mr Perrault himself did try to obtain those advantages for them but then added it was something that he did on his own account. This made no sense at all, and was merely an endeavour to persist in the allegation that no-one had ever assisted them when it was perfectly clear that they had received assistance in this area and legal advice.
744. His mother did not know that she was British before she got a passport in 2001, although she was proud that the Queen was her Queen. Although she had said that she always thought she was British, she then said that she had only realised that last year when she got her passport, but she agreed with what her son had said in his statement that when Mauritius became independent they were happy to stay subjects of the Queen.

### **The further claims of the Chagossians**

745. The inadequacy of the compensation in the eyes of the Ilois led Mr Berenger to seek the assistance of UK opposition leaders in his fight for more compensation. The Ilois met a visiting MP to press for more money. Towards the end of November 1985, the Ilois met the Prime Minister of Mauritius and, according to a note from the High Commissioner to the FCO who appears to have been present, he told them that the £4m was in full and final settlement and that they had to forget the past and concentrate on integrating into Mauritius society. "*Le Nouveau Militant*" reported that the money would be distributed provided that there were no claims against the UK in the courts, the £4m was final although inadequate. It was about this time that the CIOF produced the "*Common Declaration of the Ilois People*", (B/387A), thumbbed or signed by 812 individuals asserting their rights as citizens of BIOT to reside on the islands of Chagos.
746. In February 1986, the CRG sought the advice of Mr Allen, an American lawyer, who visited Mauritius. He advised in April 1986 that the Ilois should set up some representative structure, that there was a "*compensable*" claim against the UK by the Ilois and possibly by Mauritius and lobbying could be undertaken in a number of quarters; however, \$150,000 would be needed initially, (A215). Lawyers in Mauritius should be retained. The ITFB decided to pay for his expenses. Mr Bancoult remembered that.

747. The case of fraud against Mrs Alexis was discussed at a meeting of the ITFB in March 1986 at which she was present. There was later some discussion about whether the case could be dropped if she repaid the ITFB.

748. At the ITFB meeting of 15<sup>th</sup> December 1986, the minutes record that it still retained Rs 7.6m. It calculated that it needed to keep back Rs 2.6m to meet outstanding claims including by now the 238 workers, unregistered Claimants, unclaimed money due, and so on. Rs 5m was thus available for distribution. This was about £250,000. It would go to the 1,281 adults, 63 minors and 75 successors. This would mean Rs 3,600 per adult and half per minor. The financial work of the ITFB was by now very largely done. In May 1987, the ITFB decided that it would no longer publicise all its decisions but only the major ones. In May 1989, it was minuted that almost all the Ilois going there had signed the notarised contracts in connection with the accommodation being built at the two sites chosen.

749. On 28<sup>th</sup> June 1989, the Supreme Court in Mauritius gave judgment in the action brought by Simon Vencatessen against the ITFB. He had contended that it was unlawful for the ITFB to make it a condition of payment of its funds to an Ilois that he should have to sign a renunciation form, as he had refused to do. He lost. The Court held, adopting the reasoning in *Permal*:

"It is therefore beyond any possible doubt that the Trust Fund which will ultimately have to indemnify the United Kingdom Government against any loss, costs etc as a result of a claim made against it by an Ilois, is perfectly entitled, by virtue of section 6 of the Act, to insist that any person applying for '*a payment in anticipation and in full settlement of a claim*' he may have against the United Kingdom Government should sign a renunciation of any further claim.

In the course of his able arguments counsel for the appellant submitted that the Board could not insist on the appellant having to sign a renunciation of a possible claim for a violation by the United Kingdom Government of the appellant's right to return to his place of his birth. The short answer is that the appellant is in no way compelled to claim and/or accept from the fund '*any payment in anticipation*' for any claim he may have against the U.K. Government."

750. On 31<sup>st</sup> July 1989, it was minuted at the ITFB meeting that the Ilois had recently had legal advice from the Board's legal adviser that there could be no case against the USA but that they could press the UK for more compensation on humanitarian grounds. The Mauritius Government refused Mr Michel's request of September 1989 for a further delegation to be funded to go to London; agreement had already been reached. However, the ITFB minutes for 29<sup>th</sup> September 1989, said that Mr Michel, who was on the Board as an Ilois representative after wholesale changes in their representation, was in touch with Mr Grosz with a view to re-opening the case for compensation. The Chairman refused the assistance of the ITFB in this. At the meeting on 24<sup>th</sup> October 1989, he said that they should concentrate on obtaining compensation on a humanitarian basis, and that the Ilois leaders all knew perfectly well that the £4m had been paid as a final sum. Only Rs 1.2m remained for disbursement and the ITFB would soon be wound up.

751. The CIOF sought legal advice from Bindmans again in March 1990; Mr Michel wanted to bring an action against the Mauritius Government because of the way in which it had signed the 1982 agreement without removing the provisions for the Ilois to renounce the right to return to Chagos. In particular, he wrote that the Ilois had signed the forms believing that they were only to be

effective for five years. On 29<sup>th</sup> March 1990, six Ilois representatives sent a letter to the Mauritius Government asking for its financial assistance in obtaining the services of Mr MacDonald to come to Mauritius to advise the Ilois on possible legal proceedings which they wished to bring. No Defendant was specified. The six signatories included Mr Michel, Mr Bancoult, Mr Permal and Mr Mundil. The groups represented included the CRG and the CIOF, a range of political parties and other support groups. This was refused because the ITFB already had the benefit of legal advice and the sovereignty position was said to be well known. Mr Bancoult said he had never heard of Mr MacDonald and was unaware of signing that letter. Nobody had asked him about the CIOF seeking more advice from Bindmans.

752. In order to obtain advice, the CIOF had to send £2,000 to Bindmans in May 1990. In its letter of 18<sup>th</sup> May 1990, the CIOF said that the Ilois had been made to sign documents, of which copies were attached, renouncing claims against the UK Government as required by the 1982 agreement, but what they had signed "*unknowingly*" were the documents, of which copies were also enclosed, which related to the Mauritius Government. Mr Grosz consulted Mr MacDonald about whether the Mauritius Government had been entitled to require releases of claims against it, and whether there was any effective restriction of the definition to those who were born or ordinarily resident in the Chagos at the time of their forcible removal; the question of the limitation period in Mauritius for claims for breach of trust was raised. He thought that there might be a case against the Mauritius Government but required sight of a number of documents. Mr Grosz met Mr Michel, whose concern appeared to be that the Mauritius Government, which was mainly Indian, would ignore the interests of Creoles when the islands were re-inhabited and were not permitting Ilois to undertake work with Mauritian companies which obtained contracts on Diego Garcia. Mr Grosz asked him to obtain the relevant documents including ITFB minutes and on 9<sup>th</sup> July 1990 advised him that, among other matters they needed the assistance of a reliable Mauritius lawyer. On 20<sup>th</sup> July, Mr Herve Lassemillante, wrote to Bindmans saying that he had been retained by Mr Michel to act for the Ilois. Thereafter, despite chasing from Bindmans, nothing appears to have happened until January 1991 when Mr Michel wrote to say that they were going to court in Mauritius to obtain documents from the ITFB which had refused to provide them. Mr Bancoult said that he knew nothing of this, for he was now in full-time work, but had no money to buy newspapers. Work was his priority, he had no time for the CIOF and he went to no meetings. On 19<sup>th</sup> July 1991, "*L'Express*" reported that the Supreme Court had ordered the ITFB to hand over the documents; these were said to include the forms of release and details of where the money had gone. The report said that the Ilois were intending to send them to Bindmans for use in a case which was to be brought against the UK Government relating to the Ilois' right to return to Chagos.

753. Again there appears to have been little done by these Ilois until May 1992, when Sylvio Michel sent instructions to Bindmans, which included documents which had been disclosed by the ITFB. But these were insufficient for Bindmans to advise on and clearer instructions were sought.

754. On 22<sup>nd</sup> July 1992, the Michel brothers, saying that they had been unable to meet Mr Ollivry QC, sent to Bindmans, (or referring to what they had already sent) what they described as "*release forms*", "*documents whereby most Ilois have renounced their rights to return to the Chagos, their native land in exchange of a financial compensation*". But some had not so signed and it was on their behalf that advice was sought. Various other relevant material was sent in August 1992. There was also an issue about the entitlement of the Mauritius Government to require renunciations in its favour. A preliminary internal memo of Bindmans shows awareness of the need to instruct a Mauritian lawyer in particular in relation to land rights and of the problem created by limitation periods. They also researched nationality and citizenship. Eventually, on 29<sup>th</sup> October 1992,

instructions were sent to Professor Anthony Bradley to advise the CIOF. General advice was sought initially. He was sent the advice of Mr MacDonald, the Permal decision, the renunciation forms and relevant statutory material. The instructions refer to the rights which the Ilois might have in respect of their compulsory removal from the Chagos, but the problems of legislation and of limitation were referred to. The question of the renunciation forms was raised. The Ilois were said to have signed them when they could not read them and had had no explanation of the contents; many thought that they were only renouncing their right to return for five years. They were also interested in what rights they might have to return when the islands were returned to Mauritius and whether Mauritius could legitimately demand renunciation forms as a result of the 1982 agreement.

755. He gave advice in conference on 16<sup>th</sup> February 1993, at which a draft opinion was considered. After a long discussion, records the attendance note, "*we came to the conclusion that there is no arguable remedy against the Governments of the United Kingdom [or] Mauritius and that any arguable claim would, in any event be barred by the lapse of time*", (C/1053). Nonetheless, further research was contemplated into the rights of indigenous peoples, and political avenues were suggested. Professor Bradley mentioned the rights of "*Ilois who had not signed away any of their own rights*" but was cautious about the effect of the lapse of time.

756. His long and considered Opinion of 5<sup>th</sup> April 1993 made the same points, (A/174). He said, "*It is necessary to consider whether, against what are likely to be long odds, it would be possible to put together an arguable case that might be mounted in a judicial forum, as a means of drawing public attention to their grievances - and in the hope that this might be the catalyst for political action*". The legal issues which he examined were whether the Ilois had any rights arising out of their compulsory removal from the Chagos, whether the ITFB acted properly in requiring renunciation forms, what the effect was of those forms, and whether those who had not signed such forms and had received no compensation had any enforceable rights, particularly of return. As to the first, a number of jurisdictional problems were considered but Professor Bradley concluded that proceedings in respect of the events of 1968-1973 would now be time barred. As to the second, he concluded that the 1982 agreement did not of itself take away any rights which the Ilois might have had against the UK Government, but that the *Permal* decision meant that a statutory alternative to a claim against the UK Government had been provided; this did not have the effect of barring claims against the Mauritius Government. He then considered claims to return; in order to justify a refusal to allow the Ilois to return, the BIOT Commissioner would have to rely on the Immigration Ordinance of 1971, and he touched upon the validity of that Ordinance and its "*draconian*" powers as he saw them. But he did not suggest that it was ultra vires. He concluded that the renunciation forms would not provide a defence to all possible claims which might be covered by its very wide wording and that there were arguments which might be mounted to overcome any effect which they might have, such as mistake, duress and unconscionability. However, the Ilois "*today could not sue in respect of wrongful acts committed 10 or 20 years ago*". Those who had received no compensation and had signed no renunciation forms and those who had, if those forms were ineffective, could assert a right to return and maintain proceedings but the difficulty would be to overcome the 1971 Ordinance. International law remedies were addressed but held out little hope. More research might be valuable.

757. The Ilois held a meeting to discuss this Opinion; both were reported on in "*L'Express*" on 24<sup>th</sup> May 1993 in an article referring by name to Anthony Bradley and to Bindmans as lawyers. It reported on the two resolutions passed: claims were to be made against the UK Government in respect of the right to return at the Hague, and against the Mauritius Government for damages arising out of the conditions in which they had been living.



758. Sylvio Michel wrote to Bindmans on 8<sup>th</sup> August 1993 saying that after consultation with Ilois leaders and on the advice of Mr Lassemillante, it had been decided to bring proceedings in Mauritius and in Vienna, with possible proceedings in London on behalf of those who had not signed renunciation forms. By 8<sup>th</sup> September, the CIOF had appointed a new attorney to review matters with Mr Lassemillante. Advice was sought from Bindmans as to whether those 13 who had not signed renunciation forms could sue the UK Government. Shortly after, Harbottle and Lewis contacted Professor Bradley on the recommendation of Mr Dalyell MP, because they were advising a TV company interested in the Ilois and sought to explore the legal issues over the right to return.
759. On 12<sup>th</sup> October 1993, Mr Sylvio Michel wrote to Bindmans asking a number of pertinent questions which he had been advised to pursue by the Mauritian lawyers. These included the prospects of bringing an action against the UK Government over the constitutionality of the BIOT immigration laws, the compulsory acquisition of land, damages for the removal of the Ilois, and the limitation periods. A number of these issues were discussed in conference between Mr Grosz and Professor Bradley, Mr Elie Michel and Mr Lassemillante on 22<sup>nd</sup> October 1993. The latter met the BIOT Administrator and Commissioner at the FCO and discussed the availability of BIOT legislation and other matters relating to the return of the Ilois and their well-being.
760. On 16<sup>th</sup> November 1993, Mr Lassemillante wrote to Bindmans explaining the scandalous citizenship position, as he saw it, of those Ilois who had not renounced their BIOT based nationality when they became 18, and who in consequence had lost their Mauritian citizenship. A draft letter was discussed on behalf of Marie Elyse to the BIOT Commissioner, who was by now based at the FCO, in London, seeking to return to the Chagos as a BIOT subject for a visit. Bindmans redrafted it and advised that other Ilois should make similar applications. The Michel brothers proposed that they should try to register all Ilois at the British High Commission. In December 1993, Bindmans made applications on behalf of 12 Ilois enclosing letters which identified the lawyers who were advising them. Mr Grosz said that neither he nor Mr MacDonald had ever doubted that the Ilois were citizens of the United Kingdom and Colonies.
761. Discussions then ensued early in the New Year between Bindmans and the BIOT Commissioner about the trip. The proposal received press publicity in Mauritius; it said that this was the first step towards regaining a right of residence which had been renounced in the forms which they had had to sign. The article referred to the lawyers and to the legal advice which the Michel brothers had had, and said that they had been advised that these forms were null and void. Another article referred to the claims for UK passports which had been made on behalf of over 200 Ilois.
762. By April 1994, the negotiations over the trip were becoming complicated by the fact that the CIOF wanted to take along with their leader, a well known journalist and a film crew. Despite the continuing involvement of lawyers, research by Mr Lassemillante in the USA and possible sources of political support, permission was refused for the trip on 6<sup>th</sup> June 1994. Mr Grosz, whose evidence tallied with and effectively relied on the documents, as he often made clear, remembered a petition in June 1994 from Sylvio Michel with 812 Ilois signatures or thumbprints demanding immediate entry to Chagos, including Mr Bancoult. These were activists rather than just CIOF members, thought Mr Grosz. Sylvio, a non-Chagossian, could read and write English, unlike Elie Michel. Mr Bancoult said he knew nothing of this.
763. The BIOT Representative on Diego Garcia was concerned about the real purpose of the visit. This decision was not however, conveyed to the applicants until 15<sup>th</sup> July. The CIOF were already urging judicial review of any refusal of the visit or of any delay in the decision together with applications for permanent residence, in a letter to Bindmans of 30<sup>th</sup> June 1994, before they knew of the decision. After taking advice from Professor Bradley, Bindmans threatened an

application for mandamus. It was thought that a good nuisance tactic would be to make the BIOT Commissioner set up the BIOT Court. The letter of 15th July merely said that the Commissioner would not authorise the group visit in its present form. But it did provide the address of the BIOT Supreme Court sub-registry in the UK, which at that time was "*The Glebe Cottage, Woolfardisworthy East, Nr Crediton*", (D/1552). Legal Aid was not available in that Court system. A letter of 1<sup>st</sup> August 1994 from the BIOT Commissioner provided more details for the refusal. He was concerned that the party would not leave at the end of the visit, a concern which for him was reinforced by the proposed presence of journalists. He also saw no justification for a visit to Diego Garcia. Bindmans advised against a trip without permission and against including people by subterfuge. The BIOT Commissioner supplied Bindmans with copies of some BIOT legislation and told them where other BIOT legislation could be obtained.

764. On 19<sup>th</sup> August 1994, Mr Sylvio Michel wrote to Bindmans pointing out the two routes which could be followed, appeal or a challenge to the very constitutionality of the BIOT Immigration Ordinance. Bindmans advised that the appeal route be followed first; he did not consider that the latter route was available. Accordingly, an appeal was lodged. Mr Grosz said to the Court that if there had been a case in the United Kingdom with reasonable prospects of success, legal aid would have been sought, but in the light of the advice which he had received, there was no such case.
765. The Commissioner agreed that he would appoint a delegate to hear the appeal in his stead and an offer which he made to grant permits for only some of the group was rejected. With various toings and froings and submissions, it was not until 12<sup>th</sup> May 1995 that Mr Wenban-Smith issued his decision on the appeal. He granted the applications of the 8 Ilois on compassionate grounds to visit Peros Banhos and Salomon, and subject to further authorisations, Diego Garcia. The applications of the journalists and of Elie Michel were refused because they showed no compassionate grounds. The details of the visit remained to be worked out.
766. There was a suggestion from Mr Michel that those who had been refused permission to go on the trip would nevertheless attempt to make the voyage, but Bindmans counselled against this. However, cost and other difficulties led to the trip being postponed till April 1996. There were internal ructions in the CIOF between Sylvio Michel, who eventually left it, and Mr Lassemillante. Mr Grosz did not know how far the advice which was given at various times was communicated to the Ilois, but in 1990 he thought that the CIOF, his clients, were generally representative.
767. On 25<sup>th</sup> October 1995, the BIOT Social Committee was set up, advised by Mr Lassemillante, its Rules were promulgated and it was registered with the Registrar of Associations. Its supporting signatories number some 1,200, (B510). Mr Bancoult said that it was not his signature on the forms; he had always opposed Mr Lassemillante. His address, however, was correct and his wife had signed, as had his sister-in-law and others at the address. They had not told him. He had kept press cuttings about the BIOT Social Committee and Mr Lassemillante and Ilois activities in the 1990s because he decided to do so and not because he supported Mr Lassemillante, who was always talking about human rights but never did anything serious. Mr Grosz said that this was the organisation to which the Ilois turned, though Mr Saminaden said he had not heard of it.
768. It is this Committee which represents the Claimants living in Mauritius and has organised them for the purposes of these proceedings.
769. Through 1995 and 1996 there was some desultory and inconclusive correspondence between Mr Lassemillante, Mr Sylvio Michel and Bindmans. It was proposed by Mr Lassemillante that a visit to Diego Garcia be organised for his clients for May 1996. But in April the BIOT Administrator advised Mr Grosz that a fresh application for a permit would be needed. Little came of this. The Ilois

clients of Mr Lassemillante decided to apply for a permit to make a visit in September 1996.

770. On 16<sup>th</sup> December 1996 some Ilois in the Seychelles wrote a petition to the Secretary General of the UN, the Queen, the Prime Minister, the President of the USA and others which described themselves as refugees and exiles and implored that their case be examined so that they receive a monthly compensation from the date of their exile until their return to Chagos. On 24<sup>th</sup> January 1997 the FCO wrote to the Ilois Group of the Seychelles saying that the UK Government was under no obligation to pay compensation. This was in response to a letter from that group to the UK Prime Minister, among others, seeking compensation.
771. On about 3<sup>rd</sup> October 1997, the Chagos Social Committee (Seychelles) Association was registered. The Committee aimed to establish the rights of the Ilois in the Seychelles as British citizens and passport holders, intending to seek for them fair and just compensation and a safeguarding of their rights under UNHCR. In November 1997 there was an exchange of correspondence between Jeanette Alexis on behalf of the Chagos Social Committee in Seychelles and the High Commission there, which referred to some 200 Ilois deported from Chagos. The High Commission denied that there was any compensation due to any Seychellois because they had all been on terminable work contracts and there was no possibility of their returning to Chagos. The correspondence from the High Commission pointed out that the British passport holders were citizens of the British dependent territories and had no right of abode either in the UK or automatically in the dependent territory of which they were citizens. That depended on the immigration policy of that territory. It also said that the majority of those returning to Seychelles were contract labourers returning home and that the structural problems which were faced in Mauritius did not arise in the Seychelles. There was no infrastructure which would permit a return to the Islands and there was no commercially viable prospect of establishing a community. This debate continued into the spring of 1998. On 30<sup>th</sup> March 1998, the FCO wrote to Jeanette Alexis referring to the compensation paid in 1973 to the Government of Mauritius and to the further payment in 1982. It said that those were designed "*to assist with the resettlement of the contract workers in Mauritius*", (9/1925). The resettlement problems in Mauritius were said not to have existed in the Seychelles on the same scale.
772. On 15<sup>th</sup> April 1998, the BIOT administration wrote to Mr Gifford of Sheridans which firm was again involved, (9/1925A). This letter denied that there was any right at common law to return to the country of nationality or birth and that there was no limit on the power of a colonial legislature, represented by the power to make laws for the "*peace, order and good government*" of the colony. It denied any suggestion that the Immigration Ordinance 1971 was invalid. But on 1<sup>st</sup> May 1998 legal aid certificates were granted to two individuals for the purposes of a proposed Judicial Review. There then followed correspondence between Sheridans and the BIOT Commissioner contending that the Immigration Ordinance was invalid, which the Commissioner rejected. On 30<sup>th</sup> September 1998 the Bancoult application for leave to apply for Judicial Review was filed. On 3<sup>rd</sup> March 1999 leave to apply for Judicial Review was granted by Scott-Baker J after a contested hearing. The application contended that the Immigration Ordinance was *ultra vires* the Commissioner's powers to make laws for the peace, order and good government of BIOT. It also contended that the policy of refusing Chagossians the right to return BIOT was unlawful and disproportionate because there was no reason to prevent their return to Peros Banhos and Salomon.
773. In the meantime, the Seychellois Ilois had continued to press for the payment of compensation and had received the same reply to the effect that the reason why no compensation was to be paid was that there were very few Chagossians who went to the Seychelles and they did not face the same problems as those going to Mauritius had faced. The Chagos Social Committee (Seychelles)

Association was the committee which organised the Seychelles part of the Chagossians for the purpose of these proceedings. For the purposes of the Judicial Review proceedings, the Treasury Solicitor wrote to Sheridans on a number of occasions in 1999 responding to the suggested obligation on the government or the BIOT Commissioner to permit the return of the Chagossians to the Chagos Archipelago. Correspondence pointed out that there was no infrastructure or means of support and no practical way of subsisting there without such support, and seeking information as to what it was the Chagossians said the governments should do in that respect. It was said by Sheridans that there was considerable commercial interest in restoring economic life to the Islands. On 21<sup>st</sup> June 2000, the Assistant Secretary of State for Political-Military Affairs to the FCO sent a letter, (9/1954a), expressing serious concern at the impact on the strategic value of Diego Garcia that would follow from any permanent resident population on the Archipelago. Even the resettlement of Peros Banhos and Salomon would risk other states or hostile organisations monitoring or impeding strategic operations and add to the vulnerability to terrorist attack.

774. The Claimant in the Judicial Review proceedings did not pursue the argument in relation to the obligation on the Defendants to facilitate the return of the Chagossians to Chagos or any island in the Archipelago. Nonetheless, the Claimant succeeded in his contention that that part of the Immigration Ordinance which permitted the Islands to be cleared of its resident population was outside the Commissioner's legislative powers. Judgment was delivered by the Divisional Court (Laws LJ and Gibbs J) on 3<sup>rd</sup> November 2000; [2001] QB 1067, [2001] 2 WLR 1219. Permission to appeal was granted but not pursued.

775. The BIOT Immigration Ordinance 2000 altered the position so that permits were not required for BIOT British Dependent Territory citizens to go to islands other than Diego Garcia.

776. Following the success of this action, the Chagossians felt a sense of confidence in a single leader, Olivier Bancoult, and confidence in lawyers and the ability of a legal system to provide redress. Over recent years, documents previously withheld in the Vencatessen litigation or provided in only a redacted form, were becoming available at the expiry of the 30-year period. The present proceedings were contemplated, the preliminary steps were undertaken and finally on 25<sup>th</sup> April 2002, the Group Claim Form was issued and these proceedings commenced.

777. Much of the oral evidence to which I have already referred is relevant to the limitation arguments. There was additional oral evidence also relevant to these arguments to which I now turn. It dealt with why no further proceedings had been brought if it had been thought that no rights had been renounced and there was only a five year embargo, or until 1985, on suing the United Kingdom.

778. Mr Ramdass remembered a little about the Board retaining £250,000 until 31<sup>st</sup> December 1985, or the conclusion of prior claims. He had understood that there was to be no renunciation of rights because of this retention. The £250,000 was kept back in case other claims were made within five years of the time of signing the Agreement. He said that nobody had brought proceedings after the expiry of the five years, which he thought was the period that had to elapse without cases being brought before the £250,000 would be paid out, because Mr Mandarin, another lawyer, was striving to get into negotiations but unfortunately nothing came of it. It was a long process for Mr Ramdass to grapple with the question about whether the Ilois could ask the British Government for more, after the £4m had been paid. He thought that definitely that could be done but when he was asked why it had not been done, bearing in mind the poverty from which

they said they suffered, he said that was a matter for other people but he was tired and had stopped doing it. He said that Mr Mandarin had been trying to arrange negotiations all the time as an Ilois. He agreed that because he had not thought that he had renounced his rights until very recently, he had thought that he had all his rights still left intact. It was extremely difficult to get him to answer the question as to why, if he thought he had not given up his rights until very recently when he discovered what was in the document, no Ilois had brought any proceedings. He answered by saying that nobody had told him that he had given up his rights. He did eventually say that he thought that the Ilois could have brought another case in the same way that Mr Vencatessen had done but Mr Mandarin had failed in his negotiations.

779. In about 1982, Mr Saminaden said that he had heard about the fact that some of the money, which the ITFB received, had to be kept back for five years to meet claims which might be brought against the British Government and that the money could be released early after all the Ilois had promised not to bring claims against the British Government. He agreed that the Ilois wanted the money actually paid out although he did not know when it was actually released. He knew nothing about signing forms in order to unblock the remaining £250,000. He could not say why no case had been brought in the years since the five year period ended, even if he was able to grasp that the money might have been released earlier if all the Ilois had signed. He did not think that the reason why no case had been brought was because the Ilois thought they had no right to do so. They had never promised not to do so. He thought that the Chagossians had always thought they could make a new claim against the British Government but did not do so because there was nobody to lead them; they were all blind or drowning. It was about four or five years ago under the CRG that they realised what they could do. He agreed in 1990 that he was poor and blamed the British Government for his poverty, knew that his brother-in-law had brought a case in Britain but he did not do so because he just followed the groups. He knew nothing of Mr Lassemillante.

780. Mr Michel and the CIOF did not have the vision, he said, to help the Ilois and Mr Saminaden was in any event not part of that group. He did not think that people had full confidence in Mr Michel even though he had been elected by the Ilois to the ITFB.

781. He had only found out about five or six years ago that the Chagossians were British citizens. He said that he did not think that the Ilois knew that after the £4m had been paid they knew that there would never be any more payments. They had thought that £4m might be enough but it became clear that it was not.

782. I asked why, when they realised that the money was not enough, which was a long time ago, what he thought they had to do persuade the UK Government to pay more. He said that they would have to organise again to come to court but it took a long time to organise Chagossians. They would have to do the same thing which was to make a claim in the courts. He said that for seven or eight years they had been trying to make a claim but each person had to get things organised. It was after they had met Olivier Bancoult that everything was put together.

783. I asked Mrs Alexis why, after five years had passed after 1983, no other Ilois family brought a case against the Government in view of their continued poverty and she said they had not thought about that until the CRG spoke of it last year. The Vencatessen case was not well known as it was a private case, but it was well known to the Ilois that he had been made to withdraw it. She said they knew that after five years they would have the right to claim the blocked money. They also knew, she told me, that after the five years had passed and the money had been claimed, as she understood it, that there was nothing to prevent them bringing a case. She said that the £4m was not the final payment and the sort of steps they could take to make the British Government pay more would be to bring a case to court. I asked her why no case had been brought ten years

ago. She said that the Chagossians did not have that mentality; they were very, very stupid, but later they formed the Chagos Refugee Group. She knew Gaetan Duval and he had helped over getting a passport for her son in the test case. She had not had direct contact with Ollivrey. She also knew the lawyer who had represented her when she had been prosecuted as a result of a demonstration. She could remember no Ilois trying to raise money to pay for a lawyer in 1990-1992 because they could scarcely afford to eat.

784. Mrs Alexis said she did not recall meeting any lawyers in the 1970s. Nobody explained anything to her about a legal right to return to Chagos. It was not until four years ago that Olivier Bancoult had taken her to see Mr Mardemootoo, the Mauritian lawyer. No-one had given her advice about her legal rights before that.
785. Olivier Bancoult said that nobody had told them about their rights and that the Claimants had not obtained legal advice about remedies in the English courts until 1998. But they all held the British responsible. He produced a sort of group statement, signed by many Chagossians, saying that they supported CIOF or CRG and had never received information from an English lawyer about bringing a case in England, nor had they renounced any rights. He had heard of Mr Lassemillante; he had "*supposedly*" represented the Ilois but had never told them they had a right to sue the British Government. He had simply been concerned to be seen as a defender of human rights but was never an advocate representing them in the British courts. Mr Bancoult said that by the age of 15 or 16 he was discussing rights and compensation with his family, but he did not understand the relevant law.
786. Jeanette Alexis said she could not afford a lawyer although she thought of it, but she did not know anybody who had brought a case in a court of law.
787. Mr Gifford said that faced with the denial of responsibility by the FCO and BIOT for the removal of the islanders and their subsequent plight and in light of the obvious difficulties for those living in Mauritius or the Seychelles of gaining access to evidential materials, it was difficult to see how any of the Claimants could be said to have known all of the relevant facts constituting the alleged torts involved in this action. The material relied on in the Bancoult Judicial Review had been drawn almost entirely from public records available after the expiring of the 30-year period, at the Public Record Office. He said that the possibility that the islanders might return one day to the islands had led to the preliminary study prepared by the Defendants and a more detailed preliminary study, Phase 2B, examining the scope for return to the outer islands. The whole case had been about the desire to return to the Chagos Islands. The feasibility of this return was being discussed in late 2002. He took issue with the factual basis upon which Laws LJ had held (paras 7 and 58) that the islanders had no property rights.
788. He said that the current case had come about, when in January 1998 he had been first instructed by Mr Mardemootoo on behalf of two ladies in connection with their nationality claim, and he first met Mr Bankrupt, who was Chairman of the Chagos Refugee Group, the first organisation set up by the Ilois for the Ilois. He had dealt with Mr Bancoult as an individual, however. The whole community had coalesced around this group after leave had been granted in the Judicial Review proceedings in June 1999 and which gave hope to the Ilois community.
789. He said that his understanding of what had happened after the Vencatessen litigation was that the Chagos Social Committee, like the other groups, had suffered from a lack of communication between the Ilois and the leadership. Its leader could not read or write. In practice, the whole Ilois community was led by Mr Lassemillante who was quite close to the Mauritius Government which regarded the Chagos issue as one of sovereignty. The Ilois did not trust the Mauritius Government because it thought that it had sold out the community for the eventual gaining or regaining of Mauritius sovereignty over the Chagos.

790. The position of the Ilois was a burning issue right through the 1980s and 1990s. He thought that the leaders of the Chagos Social Committee were aware of the position but that the Ilois were just a lumpen mass in terrible circumstances who knew nothing and the CSC which held the stage he thought from 1983 till about 2000 had discouraged the pursuit of claims against the British Government based on British citizenship.
791. He derived this appraisal from contacts which he had in preparing the Bancoult Judicial Review, which included meetings with the former Prime Minister, a participant in the 1968 independence negotiations, the High Commissioner, various political and professional people, newspapers, journalists and Mr Mardemootoo. The Chagos Refugee Group were one of those organising this action and he was aware that people associated with this group had been elected at various times to the ITFB. The success of the Judicial Review enabled Mr Bancoult's group to sweep the slate.
792. He accepted that there were some Ilois who had had access to legal advice before 1998 because Bindmans had advised the CIOF. He thought the causes of action were different from those which were then the subject matter of advice. He said that many of the Committee members were not Ilois and the committees did not have the penetration or representation amongst the Ilois as they had claimed.
793. He was asked questions about the affidavit sworn by Mr Bancoult in the Judicial Review proceedings in September 1998 which is in English and not translated or signed as having been translated to Mr Bancoult before he signed it. However, Mr Gifford said that when he first spoke to Mr Bancoult, which was around that time, he could not then speak English. Mr Gifford accepted that there were certain practices about taking statements in Mauritius which concerned him.
794. He thought that the Legal Aid system in Mauritius would provide only very limited legal aid, perhaps confined to criminal cases. Although lawyers sometimes took work on a compassionate basis, if that happened it would only be for existing clients. Although there was a strong overlap between law and politics, the lawyers who went into politics did not generally practise and because of the mix of law and politics in Mauritius to go to a politician there for legal advice would be unsatisfactory. Even if a politician was able to offer some assistance putting them on the right track as Mr Duval helped Mr Vencatessen, there would be very few lawyers willing to take on a case like this because of its complexity, the poverty of the clients and the strength of the opposition. It would only be a firm like Sheridans or Bindmans who could do it.
795. He said that Mr MacDonald's advice had been pretty forlorn, because it was beyond anyone at that stage with the extent of documentation in respect of which immunity from disclosure had been claimed, to have assessed the position fairly. Indeed, taking instructions from the clients would be difficult and even for the committees difficult too. He said it was quite wrong that there was a period of quiet after the 1982 agreement. He said that there was an almost constant clamour of demonstrations. But on the legal front, they had come to a dead end and having called their best shot, had failed. He said that unlike this current case and the Judicial Review, the Vencatessen litigation had been conducted in an obstructive way. The position of the Ilois was a more or less constant political sore in Mauritius, but by 1982 they had come to a dead end in Britain.

**TAB 4**

*Chagos Islanders v Attorney General and the BIOT Commissioner* [2004] EWCA Civ 997



Neutral Citation Number: [2004] EWCA Civ 997  
IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
(MR JUSTICE OUSELEY)

Case No: A2/2004/0224

Royal Courts of Justice  
Strand,  
London, WC2A 2LL

Thursday 22 July 2004

Before :

THE PRESIDENT  
LORD JUSTICE SEDLEY  
and  
LORD JUSTICE NEUBERGER

Between :

CHAGOS ISLANDERS  
– and –  
(1) THE ATTORNEY GENERAL  
(2) HER MAJESTY'S BRITISH INDIAN OCEAN TERRITORY  
COMMISSIONER

Applicants/Claimants

Respondents/Defendants

-----  
(Transcript of the Handed Down Judgment of  
Smith Bernal Wordwave Limited, 190 Fleet Street  
London EC4A 2AG  
Tel No: 020 7421 4040, Fax No: 020 7831 8838  
Official Shorthand Writers to the Court)  
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Mr Robin Allen QC and Mr Thomas Coghlin (instructed by Sheridans) for the Applicants/Claimants  
Mr John Howell QC, Mr Rhodri Thompson QC and Mr Kieron Beal (instructed by The Treasury Solicitor) for the  
Respondents/Defendants

-----  
Judgment  
As Approved by the Court

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Lord Justice Sedley :

1. All three members have contributed to this judgment of the court. In view of the importance of the issues, it will not be subject to the usual restraints on its use.
2. The application before the court is made by Robin Allen QC, on behalf of former inhabitants of the Chagos Islands and their descendants, for permission to appeal against the decision of Ouseley J to strike out the entirety of their claim against – in effect – Her Majesty's Government for damages and declaratory relief designed to compensate for and if possible to reverse the effects of their enforced removal or exclusion from their homeland some three decades ago.

*The background*

3. The Chagos Islands are an archipelago in the Indian Ocean which includes the island of Diego Garcia. During the 1960s the United States administration decided that it required Diego Garcia as a strategic military base. The government of the United Kingdom set about accommodating this request, but at an early stage realised that it and the neighbouring islands had a substantial population, mostly Seychellois contract workers, but some (known as the Ilois) springing from former slaves who had remained there after emancipation or from migrant labourers who had settled there. It decided that both Diego Garcia and the neighbouring islands needed to be cleared of their population.
4. To accomplish these ends the islands were separated in 1965 from the British colony of Mauritius and (together with some other islands detached from the Seychelles) made a separate colony, the British Indian Ocean Territory (BIOT). Mauritius itself in 1968 became an independent state. Its constitution gave Mauritian citizenship to everyone born in what had previously been the colony of Mauritius. This of course include the Chagos islanders, who were thereby entitled to settle in Mauritius.
5. In 1967 the United Kingdom bought out the freehold interest of the company which now farmed copra on the islands and which employed virtually its entire population. It was the claimants' case that those of them who went to Mauritius or the Seychelles for medical treatment and other things that could not be had on the islands were prevented from returning, and that the remainder were deported by ship. The defendants attributed the depopulation to the closure of the plantations on the islands. What is clear is that between 1967 and 1973 the entire population was removed to Mauritius and the Seychelles, where they had neither homes nor work.
6. The political history of the removals and of the endeavours to secure redress can be found in compelling detail, first in the judgment of Laws LJ in *Bancoult* (below) and secondly in the judgment of Ouseley J in the present proceedings. In the light of it, it would be wrong of us to move on to the legal issues without acknowledging, as Ouseley J went out of his way to do in a judgment to the comprehensiveness of which we pay tribute, the shameful treatment to which the islanders were apparently subjected. The deliberate misrepresentation of the Ilois' history and status, designed to deflect any investigation by the United Nations; the use of legal powers designed for the governance of the islands for the illicit purpose of depopulating them; the uprooting of scores of families from the only way of life and means of subsistence that they knew; the want of anything like adequate provision for their resettlement: all of this and more is now part of the historical record. It is difficult to ignore the parallel with the Highland clearances of the second quarter of the nineteenth century. Defence may have replaced agricultural improvement as the reason, but the pauperisation and expulsion of the weak in the interests of the powerful still gives little to be proud of.
7. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 Laws LJ and Gibbs J held that Immigration Ordinance 1971 by which the enforced removal of the population was purportedly authorised was beyond the powers of governance conferred by the colony's constitutive instrument, the British Indian Ocean Territory Order 1965, and so unlawful. The decision was not appealed. Although John Howell QC for the defendants has indicated that, if permission to appeal is granted, he will contend that *Bancoult* was wrongly decided, we unhesitatingly approach the present application on the footing that (at least in this respect) it was rightly decided. It follows for present purposes that there is no defence of statutory authority to any tort which can be established.
8. It cannot be supposed that the United Kingdom, having bought the Chagos freeholds, was as much at liberty as any other landowner to evict the occupants for any or no reason. Unlike the landowners and tenant farmers who cleared the Highlands of their labouring population, the state is not at liberty to act arbitrarily or unjustly: it is the task of the courts, which are part of the state, to see that it does not. It cannot lie in the mouth of the United Kingdom government, having enacted powers for the governance of the islands, to contend that its officials can ignore the limits on those powers and act outwith them.

9. The many hundreds who were initially displaced have grown to a still impoverished population of several thousand. A compensation payment of £650,000 from the British government, with accrued interest, was distributed in 1977–8 to a total of 595 displaced families then in Mauritius. It did little if anything to relieve their massive problems of rudimentary housing, unemployment and social isolation. Nor did the partial reversal of the Immigration Ordinance in relation to two of the islands following the divisional court's judgment afford any concrete help, since there are now effectively no means of subsistence there. But over the intervening years attempts have been made to secure fuller compensation and redress from the British state which displaced them.

### *Renunciation*

10. In 1975 proceedings were issued in London by Michael Vencatessen, one of the last deportees from Diego Garcia, claiming damages for intimidation, deprivation of liberty and assault arising out of his enforced removal. The action was settled in 1982 for a payment by the defendants (in effect Her Majesty's Government) of £4,000,000 plus costs, designed to settle all the claims of all the islanders. 1,344 quitance forms were signed (that is, for the most part, thumbprinted) upon receipt of a share of this sum. It is accepted by Mr Allen that the claims to which this settlement related are in substance the same as the present claims. What he does not accept is that any of the forms of renunciation should bar the present action.
11. Mr Howell has made it clear that it will not be sought to debar any claimant who, despite having taken reasonable steps, did not understand what he or she was signing. But none of the cases so far examined by Ouseley J has fallen into this class.
12. The form of renunciation, executed by the great majority of the claimants during 1982 and 1983, contained a clear statement by the signatory to the effect:
- "In consideration of the compensation paid to me by the Ilois Trust Fund and of my settlement in Mauritius × I renounce to all claims, present or future, that I may have against the government of the United Kingdom, the Crown in the right of the United Kingdom, the Crown in right of any British possession, their servants, agents or contractors ×."

in respect of actions which, it is realistically accepted on behalf of the applicants, form the basis of the current claims. The Trust Fund was established by a Mauritian statute, and was endowed principally by the United Kingdom government. In *Permal –v– Ilois Trust Fund* [1984] MR 65 at 70, the Supreme Court of Mauritius held that an individual Ilois had

"a cause of action under the [Ilois Trust Fund] Act [1982] in Mauritius [against the Trust Fund] so as to avail himself of the remedy there provided as a statutory alternative to any other course of action in the United Kingdom × against the United Kingdom authorities that he might also possess".

13. The contention that those claimants who signed the renunciation forms are nonetheless entitled to maintain their present claims is based on the following propositions:
- i) It is an abuse for the defendants to raise the issue in these proceedings, given that they failed to raise it in *Bancoult* ;
  - ii) It is and was not open to the defendants to contend that the Ilois could compromise or renounce "their fundamental and constitutional rights".

We do not consider that either of these propositions is tenable.

14. In *Bancoult* , the issue was whether or not s4 of the Immigration Ordinance was ultra vires the BIOT constitution. The divisional court held that it was. We are very doubtful whether the fact that Mr Bancoult had signed a renunciation form would have been held by the divisional court to disqualify him from pursuing his successful

challenge to s.4 of the 1971 Ordinance. We do not consider that the renunciation forms could sensibly be construed as applying to the creation of ordinances.

15. Even if that is putting it too high, we agree with what the judge said in paragraph 594 of his judgment:

"There is a significant difference between saying that a claim for compensation, made after a final settlement has been reached, is an abuse, and saying that an application for Judicial Review to determine the validity of legislation in force is an abuse of process."

16. Accordingly, even if, which we doubt, a claimant who had signed a renunciation form would have been debarred from seeking the relief sought and obtained in *Bancoult*, we consider that it is perfectly understandable that the point was not taken against Mr Bancoult in those proceedings. It would have been a departure from the high standard of fairness with which government ordinarily conducts litigation before our courts had it been contended that Mr Bancoult's public law proceedings should be struck out on the unattractive and limited ground that he had signed a renunciation form in a related private law claim. It is one thing for the government to rely on the renunciation form, and the financial benefits which it conferred on the signatory, as a reason for striking out a subsequent claim by the signatory for compensation; it is quite another for it to seek to shelter behind the renunciation form in order to avoid a finding that its secondary legislation was unlawful. In any event, as Mr Howell says, to have taken the point against Mr Boucault would have been "a pointless diversion", because the Ilois would have found a substitute applicant who had not signed a renunciation form.
17. As to the second ground advanced for not giving the renunciation forms their natural effect, we were not referred to any recognisable principle of law, any discussion in any textbook, or any authority, whether in this or any other jurisdiction, to support the proposition that it is not open to a person who has had his fundamental rights infringed by the state validly to compromise any claim which he may thereby have for damages or other relief in private law. Clearly, if the state put unreasonable or improper pressure on the claimant in order to persuade him to settle his claim, that would be a different matter, but in such a case the claimant would be able to impeach the settlement on the ground that it had been induced by such pressure.
18. It is right to mention that, in the Notice of Appeal, albeit not developed in their skeleton argument, the claimants contended that "the renunciation forms did not meet the test for abuse of process set out in *Johnson -v- Gore-Wood & Co* [2002] 2 AC 1". Given that the point was raised in their Notice of Appeal, it is right to mention it, but, given that it has not been developed in their skeleton argument, or indeed orally, we merely record our agreement with the judge's reasoning on this issue at paragraphs 482–484 of his judgment.
19. In our judgment Ouseley J was therefore right to hold that those who signed quittance forms on receipt of compensation payments, inadequate though the payments may have turned out to be, bindingly compromised the claims which they now seek to pursue. What follows is therefore strictly material only to those Chagossians who signed no disclaimer or who did not appreciate what they were signing. But it is relevant to all the claims should we be wrong about the signed renunciations.

#### *The causes of action*

20. The three principal causes of action which Mr Allen seeks to resurrect, each of them having been held unsustainable by the judge, are misfeasance in public office, unlawful exile and deceit. Each of these is a private law claim against the British state. In a civil law system, the judgment in *Bancoult* would be enough to entitle the claimants, other things being equal, to an award of damages against the state: see the historic decision of the French Conseil d'État in *Blanco* (TC 8 Feb. 1873), and see generally D. Fairgrieve, *State Liability in Tort: a comparative study* (2003). The unlawful exclusion and removal of the islanders would be regarded in such a system as *faute lourde* and would be compensable in damages. But the English common law has no knowledge of the state. Public law recognises the Crown as the repository of a range of prerogative and statutory powers. By the prerogative writs and orders, it has for centuries called ministers to account if they abuse the latter, and in recent years if they misuse the former. But the State has no tortious liability at common law for wrongs done by its servants, from ministers down. In England at least (Scottish law has historically differed) either the Crown's servants are personally liable or there is no redress. It was to change this anomalous situation that the Crown Proceedings Act 1947 was passed. But the 1947 Act does not work by making the state a potential tortfeasor: it works by making the Crown vicariously liable for the torts of its servants. It has only been with the enactment of

the Human Rights Act 1998 that the Crown, in the form of a 'public authority', has acquired a primary liability for violating certain rights. Where, of course, a limb of the state has corporate legal personality - a local authority, for example, or the Bank of England - no such problem arises; but this is not such a case.

21. Mr Allen's submissions have not faced squarely up to this problem. He has sought in relation to each of his three main causes of action to implicate the state directly, and has fallen back on vicarious liability for individual wrongdoing only as a second resort.

#### *Exile*

22. The fallacy of his approach is seen most plainly in the contention that to exile people from the Queen's dominions without lawful authority is - because it must be - a tort. Exile without colour of law is forbidden by Magna Carta. That it can amount to a public law wrong is already established by the judgment in *Bancoult*. But to make it a state tort requires a legal system in which the Crown, in private law, can do wrong; and this, apart from the Human Rights Act, we do not have.
23. It may well be, however, that removing or excluding people from an entire territory against their will, at least in the legal situation set out earlier in this judgment, is a trespass to the person committed by whoever threatens them with force if they do not comply. At least one of the individual accounts, that of Marie Therèse Mein, set out by way of example in the particulars of claim, tells a harrowing story of enforced removal from Diego Garcia, although when called as a witness Mrs Mein was able to recall very little.
24. On the evidence which he heard, however, Ouseley J found no such trespass. This is not to say that there were no such cases, though they cannot include those of the second generation of exiles. Mr Allen offered to particularise any such cases by way of amendment if we were to hold that actions lay in trespass to the person. This is not an acceptable way of proceeding. Ouseley J in paragraph 331 drew specific attention to the want of any pleaded case in trespass: "There is no allegation that there was any trespass to the person to anyone nor that anyone on behalf of the defendants authorised or carried out any such act." Even at this stage we have no proffered case histories from which to derive the facts which would controvert Ouseley J's conclusion on the written and oral evidence before him: "There is not the slightest evidence of the threat or the actual use of force or intimidation to bring about the removal of the Ilois, or that there was any for which either defendant was responsible."
25. We cannot believe that the possibility of pleading trespass to the person was not considered at an early stage of these proceedings. It seems to us probable that it was rejected because it would divide the claimants almost arbitrarily into those who had been forcibly removed or prevented from returning and those who had not. Beyond this, however, it would be necessary to show not only the threat of force to effect the removals and exclusions, but also to show that the threat came from persons for whom the Crown was liable as if it were a private person and they were its servants or agents. Beyond the point to which Ouseley J's findings go, the evidence still does not offer to fill the space.

#### *Misfeasance in public office*

26. Mr Allen's principal contention, here too, has been that the state can be institutionally liable. But the same fundamental problem arises: the state is not a potential tortfeasor. The nature of misfeasance in public office is tailored to this fact: it is concerned with individuals who consciously abuse powers entrusted to them by the state and do so knowing that it may well harm someone: see *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1, per Lord Steyn at page 191.
27. Mr Allen founds upon what Lord Hutton said at paragraph 126 of his speech on the application to strike out the claims against the Bank of England: "It is clear from the authorities that a plaintiff can allege misfeasance in public office against a body such as a local authority or a government ministry: see *Dunlop v Woollahra Municipal Council* [1982] AC 158 and *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716." But *Dunlop* self-evidently concerned a local corporation. The claim against the nominated department of state in *Bourgoin* depended on proof that "the minister's motive was to further the interests of English turkey producers by keeping out the produce of French turkey producers - an act which must necessarily injure them" (per Oliver LJ at 777). In other words, if the necessary knowledge and motive could be brought home to the minister, the Crown in the nominal form of MAFF (pursuant to the list of authorised departments published under s.17 of the Crown Proceedings Act 1947) would be vicariously liable. It is in that sense that Lord Hutton was speaking of departmental liability for misfeasance in public office.
28. Faced with this inescapable difficulty, Mr Allen submits that he is able to implicate officers of state in the tort so as to make the Crown vicariously liable. He points to the documentary evidence that the Foreign Secretary and Prime Minister of the day were both privy and party to the scheme - he would say the scheming - by which the islands

were to be depopulated. What he cannot point to, however, is evidence that they or any of their subordinates (who constitutionally are their alter ego) knew that it was illegal. Such case-law as there was (for example *Ibrelebbe v The Queen* [1964] AC 900, 923) confirmed that the power to make ordinances for the government of dependencies went extremely wide. It was not until the divisional court decided *Bancoult* that a line was drawn.

29. For all these reasons there is no viable claim here for misfeasance in public office.

## *Deceit*

30. The claimants raised two arguments in relation to deceit, based on:

- i) allegedly deceitful representations made to the claimants;
- ii) allegedly deceitful representations made to third parties.

31. So far as the representations made to the claimants are concerned, the judge accepted, in paragraphs 367 and 368 of his judgment, that it was arguable that it had been represented to the claimants that they had no right to remain on any of the Chagos Islands. In their application for permission to appeal, the claimants contend that this representation was false, because "as a permanent population of a non-self-government territory, the islanders had a right to be consulted and to make choices for themselves", which is a slightly different formulation from that adopted by the judge.

32. Despite this difference in formulation, we consider that the judge was right in holding that this aspect of the claim was unarguable, and that there is no real prospect of an appellate court holding otherwise. Apart from anything else, the judge's finding in paragraph 369 that there was "no evidence that anyone who might have made any such representations × knew of or was reckless as to the falsity of [the relevant] statement" is fatal to any such case on deceit. Further, the fact that at least some of the claimants could be described as "a permanent population" does not mean, as a matter of domestic law, that they had a right to be consulted about their removal. This aspect of the claim, as put to the judge, involved reliance on article 73 of the UN Charter, which he held could not assist the claimants, because the article "confers no individual rights" and could be disregarded by the UK "so far as any domestic law obligations go" (paragraph 369). We do not understand that conclusion to be challenged, and, if it is, we would be bound to reject the challenge. In any event, in reality, this aspect of the deceit claim is a reformulation of the claim based on misfeasance in public office; if the misfeasance claim cannot succeed, then this aspect of the deceit claim could not succeed either.

33. We turn to the second way in which the claim in deceit is made, namely that the defendants had made false representations to the UN, the UK Parliament, the British press and the government of Mauritius, to the effect that none of the Ilois were permanent residents, or had the right to be on the islands, or were British citizens, or had any rights under article 73 of the UN Charter. To quote from the claimants' skeleton argument before us, it is said that such representations "were known by the defendants to be false and × were made by the defendants with the intention that [the relevant] bodies should desist from intervening in the situation and otherwise giving help to the Chagossians, so that the Chagossians would suffer harm".

34. In paragraph 364 of his judgment, the judge accepted

"that it is arguable that false statements were knowingly made to third parties about the status of the Ilois as residents of Chagos, but with the intent that these third parties should act on them, rather than communicate them to the Ilois, who would have known that the statements were untrue. They may have been intended [to] persuade those third parties to do nothing to investigate or assist the Ilois or to reduce opposition to the defendants' defence policies "

35. But the basis upon which the judge rejected this head of claim was that the law did not recognise a cause of action by a claimant who sought to recover damages as a result of loss suffered from a deceitful statement made by the defendant to a third party, in circumstances where the third party was not the agent of the claimant and did not communicate the statement to the defendant.
36. There is no authority which suggests that the tort of deceit has been, or can be, extended to apply to the case which, on the arguable facts found to be established, the claimants seek to bring. The judge may very well be right in his conclusion that, as a matter of law, no such cause of action exists as a matter of principle. But it is conceivable that in certain exceptional circumstances, for instance where the defendant, by the very making of the deceitful statement or for some other reason, had assumed liability to the claimant, a cause of action could exist.
37. Had there been no other conclusive answer to the claim in the present proceedings, we would have been prepared to give permission to appeal on this issue, if only because the possibility of such an enlargement of the kinds of situation giving rise to a cause of action in deceit was a question of principle which deserved the attention of the court.

#### *The Mauritius Constitution*

38. The case argued before Ouseley J under the Mauritius Constitution, and rejected by him as unarguable, was of great range and complexity. The single ground of appeal now pursued is that, contrary to what the judge held, the Mauritius Constitution applied to the British Indian Ocean Territory - that is to the Chagos Islands - and was justiciably violated by the enforced removals.
39. Mauritius was given a constitution by the United Kingdom in 1964, four years before it became independent, in the graceless but customary form of a schedule annexed to an Order in Council. (It was, however, drafted by the doyen of English public lawyers, Professor de Smith.) It set out a right to the protection of the home (s.1) and to protection from inhuman treatment (s.5). It applied, naturally, only to Mauritius, but in 1964 Mauritius included much of what in the following year became the British Indian Ocean Territory. The BIOT Order by s.18 altered the Mauritius Constitution by excising from Mauritius those islands which by the same instrument became part of the BIOT. It also, as was usual, contained a provision in s.15 continuing in force in the BIOT the laws that were in force immediately before the making of the Order.
40. The claimants submit that s.15 thereby continued in force in the new territory the material provisions of the Mauritius Constitution. The defendants submit that the whole purpose of the Order was to sever the Territory from Mauritius and therefore to exclude the latter's constitution from its laws. The judge at paragraphs 416-7 pointed out that BIOT was also to include islands which until then had been part of the Seychelles, and concluded: "It would be very odd if by the sidewind of the general incorporation of existing laws from the two colonies from which the islands had been detached, BIOT had incorporated a part of the Constitution of the colony from which it was being detached, and had provided for fundamental rights to be enjoyed only by those who were in the former Mauritius part." He considered it "incontestable" that the Mauritius Constitution had not been incorporated.
41. We are not so sure. Holt CJ three centuries ago remarked that while an Act of Parliament could do no wrong, it could do some pretty strange things; and Orders in Council are no different. Knowing what we do of the ulterior purpose of the BIOT Order, we can accept that Whitehall would not have wanted to grant the people of the BIOT any of the fundamental rights conferred by the Mauritius Constitution. But the court's task is to give meaning and effect to the words on the page, not to the agenda of those who wrote them. And it is not in fact strange that a newly created territory should be given as its patrimony the body of laws previously in force there. There is in reality no other way of providing continuity of governance, and the process was used in grants of independence throughout the former Empire.
42. Standing by itself, therefore, we consider this point to be arguable.

#### *Limitation*

43. On the face of it, given that the present proceedings were only begun in 2002, while the matters complained of took place in the 1960s and 1970s, there is an unanswerable defence based on limitation. The judge held that, if any of the claims had been otherwise valid (and in two respects we have held that they might have been), they would have been defeated by a limitation defence.

44. However, the claimants raise three arguments to defeat the defendants' limitation case, namely:

- i) unconscionability;
- ii) disability; and
- iii) concealment.

It is relevant that, this not being an action in respect of defamation or malicious falsehood (cf s.32A), and the judge's rejection of any possibility of enlargement of time in relation to personal injury (cf. s.33) being now unchallenged, the court has no residual discretionary power to enlarge time.

45. The claimants' first argument is that it would be unconscionable for the defendants to be allowed to rely on limitation. We consider that the judge was very probably right in rejecting this argument as a matter of principle, on the grounds that the Limitation Act 1980 is intended to provide a complete code, including the circumstances in which it is unconscionable for a defendant to seek to invoke limitation, and that it is simply not open to the courts to seek to circumvent the effect of the 1980 Act by adding fresh grounds.
46. However, it is plainly possible for a defendant validly to contract not to take a limitation point, or to estop himself from taking a limitation point. Particularly bearing in mind the basis of estoppel, it is, we think, conceivable that a court may be prepared to hold that, by his conduct, a defendant had rendered it so inequitable for him to take limitation point that the court will effectively not permit him to do so. In the present case, the claimants would seek to argue that, by the very actions complained of in these proceedings, namely removing them to Mauritius, and leaving them in a position where they were poor, ignorant, and without recourse to the courts, the UK government and its representatives cannot now be heard to say that the claimants have lost their right to seek relief promptly where the delay is due to these very circumstances.
47. We also consider that the claimants' second argument, while unlikely to succeed, could conceivably do so. Thus it seems to us that there is a case for contending that, owing to the circumstances just described, the claimants were "under a disability", so that time was prevented from running by virtue of s. 28(1) of the 1980 Act. It is true that in s38(2) of the same Act it is provided that "a person shall be treated as under a disability whilst he is an infant, or of unsound mind", but we think that there is just scope for arguing that this is not an exhaustive definition of disability. We do not think that the contrary is established beyond doubt by *Yeats –v– Thakeham Tiles Limited* [1995] PIQR 135 (relied on by the judge at paragraph 614 of his judgment) or by *Thomas –v– Plaistow* (unreported 23<sup>rd</sup> April 1997) as suggested by the defendants. Subject to other considerations, the point is not one which in principle the claimant should be shut out from taking on appeal.
48. However, even assuming, what for present purposes we are prepared accept is arguable, that the claimants would have a sufficient case based on unconscionability and/or disability to contend that time did not start running when they were first removed from the Chagos Islands, it seems to us that these two arguments face insuperable difficulties after 1983 at the very latest. We have mentioned earlier in this judgment that in 1975 one of the islanders, Mr Michael Vencatessan, brought proceedings in this country by which he claimed damages for his removal from Diego Garcia and the subsequent events. This action proceeded to discovery, which the judge described in paragraph 56 as "particularly complex", and resulted in an open offer from the United Kingdom government in 1978 to settle all the claims of the Ilois for £500,000 plus the costs of the claim brought by Mr Vencatessan. The Treasury Solicitor agreed to pay for the claimant's solicitor to go to Mauritius and advise all the Ilois, which he did in October 1979. By then, he had the benefit of an increased offer from the UK government, and the advice of Louis Blom-Cooper QC. He held meetings with many of the Ilois, who had appointed a committee to negotiate on their behalf. The detailed history of the negotiations thereafter is set out in paragraphs 62–80 of the judgment. A group of Ilois who had not been anxious to accept the original offer set up a committee, known as CIOF, who instructed a new firm of solicitors. They in turn sought the advice of John Macdonald QC. As a result of further discussions, the UK government substantially increased its offer, which finally resulted in the Trust Fund, set up for the benefit of the Ilois, to which reference has already been made.



49. In light of this history, it appears to us that any argument which might otherwise have a chance of stifling the defendants' limitation defence on grounds of unconscionability or of rebutting it on grounds of disability would be doomed to failure. The unconscionability argument could only prevent time starting to run so long as the effect of the events giving rise to the unconscionability continued to operate. Equally, it is clear from s28(1) that any disability merely suspends the limitation period until the disability ceases. It appears to us that, given the events of 1975–1983, from the initiation of Mr Vencatessan's action to the setting up of the Trust Fund, there is no prospect at all of showing that the unconscionability or disability, assuming that either or both can be established, survived beyond 1983. Given that the present proceedings were issued in 2002, we are therefore of the view that there is no prospect of the Court of Appeal disagreeing with the judge's conclusion on limitation, unless the claimants can succeed on their case of deliberate concealment, to which we now turn.
50. The proper effect of s32(1) and (2), which prevent time running under the 1980 Act during such period as the defendant has "deliberately concealed" relevant facts from the claimant, has been considered in a number of cases, perhaps most importantly *Cave –v– Robinson Jarvis & Rolf* [2002] 2 WLR 1107.
51. The judge's analysis and conclusions in relation to the claimants' case on deliberate concealment are set out in paragraphs 621–686 of his judgment. It is full and careful. We agree with the judge that, in light of the disclaimer on behalf of the claimants that there was "any allegation that there was any impropriety by anyone in the conduct of the Vencatessan litigation during the process of discovery", it is impossible for the claimants to succeed in any contention that there was deliberate concealment by non-disclosure of documents in the Vencatessan proceedings.
52. The judge's statement in paragraph 646 of his judgment that "deliberate concealment otherwise plainly entails a positive act"; although the claimants take issue with it, appears to us to be unexceptionable, particularly in light of what was said in paragraph 14(iii) of the judgment of this court in *Williams –v– Fanshaw Porter* [2004] EWCA Civ 157. Further, we do not consider that the judge can be criticised, as the claimants suggest he can be, for having concluded at paragraph 652 of his judgment that the claimants had to prove that they could not, with reasonable diligence, have discovered the concealed facts earlier. That requirement was clearly established in this court in *Paragon Finance Limited –v– D B Thakerar & Co* [1999] 1 All ER 400 at 416F–418F, and endorsed in *Biggs –v– Sotniks* [2002] EWCA Civ 272 at paragraph 50.
53. In these circumstances, we consider that, even if the judge was wrong in holding that the claimants could not establish a valid cause of action against the defendants, any such claim would inevitably be defeated on grounds of limitation.

### Conclusion

54. This judgment brings to an end the quest of the displaced inhabitants of the Chagos Islands and their descendants for legal redress against the state directly responsible for expelling them from their homeland. They have not gone without compensation, but what they have received has done little to repair the wrecking of their families and communities, to restore their self-respect or to make amends for the underhand official conduct now publicly revealed by the documentary record. Their claim in this action has been not only for damages but for declarations securing their right to return. The causes of action, however, are geared to the recovery of damages, and no separate claims to declaratory relief have been developed before us. It may not be too late to make return possible, but such an outcome is a function of economic resources and political will, not of adjudication.
55. In dismissing this application for permission to appeal, we record our acknowledgement of the prodigious amount of work put into the case by the lawyers for both sides and by the judge.

Order: Application for permission to appeal is dismissed.

(Order does not form part of the approved judgment)

**TAB 5**

*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2009] 1 AC  
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A

House of Lords

**Regina (Bancoult) v Secretary of State for Foreign and  
Commonwealth Affairs (No 2)**

[2008] UKHL 61

B

2008 June 30;  
July 1, 2, 3;  
Oct 22

Lord Hoffmann, Lord Bingham of Cornhill,  
Lord Rodger of Earlsferry, Lord Carswell,  
Lord Mance

C

*Crown — Colony — Subordinate legislation — Orders in Council for governance of colony made under royal prerogative — Orders preventing return of exiled citizens — Whether Orders susceptible to judicial review on grounds of illegality, irrationality or procedural impropriety — Whether vires of Orders challengeable on ground of failure to conduce to peace, order and good government — Whether challengeable on ground of repugnancy to fundamental common law principle — Whether Human Rights Convention relevant — Whether Orders resulting from abuse of power — Whether unlawful — Colonial Laws Validity Act 1865 (28 & 29 Vict c 63), ss 2, 3 — British Indian Ocean Territory Order 1965 (SI 1965/1920) — British Indian Ocean Territory (Constitution) Order 2004, s 9 — British Indian Ocean Territory (Immigration) Order 2004*

D

E

F

G

H

In 1965 the islands of the Chagos Archipelago in the Indian Ocean, which had been ceded to Great Britain by France in the 19th century, were constituted a separate colony, the British Indian Ocean Territory ("BIOT"), by virtue of the British Indian Ocean Territory Order 1965. Under an Immigration Ordinance made in 1971 by the Commissioner for BIOT as the legislature of the colony, purportedly pursuant to the 1965 Order, the inhabitants of the Chagos Islands were compulsorily removed, mainly to Mauritius, because Diego Garcia, the principal island in the archipelago, was required for a US military base. In 2000 the claimant, a British dependent territory citizen who had been born in the archipelago but had been prevented from returning there since 1971, obtained a Divisional Court order quashing the 1971 Ordinance on the ground that the exclusion of an entire population from its homeland lay outwith the purposes of the parent Order in Council. In a written ministerial statement made at that time, the Foreign Secretary accepted the Divisional Court's ruling and announced that a new Immigration Ordinance would be put in place which would allow the islanders to return to the islands other than Diego Garcia. The Immigration Ordinance No 4 of 2000 accordingly exempted from the need for an entry permit those, including the claimant, with the relevant connection to the islands. However, in June 2004 the Government decided to reintroduce immigration controls so that the islanders would no longer be allowed to return to the outer islands without a permit. In accordance with that decision and without consulting the islanders or having recourse to Parliament, ministers drafted two Orders in Council, the British Indian Ocean Territory (Constitution) Order 2004<sup>1</sup> and the British Indian Ocean Territory (Immigration) Order 2004, which removed any right of abode and disentitled the islanders from entry or presence on the islands without specific permission. The draft Orders were placed before Her Majesty in Council who, on the advice of her ministers, without debate in Council, and exercising her prerogative powers, gave her formal assent to the Orders. The claimant issued judicial review proceedings seeking, among other relief, a declaration that the Orders were unlawful in that they (i) without the authority of Parliament purported to remove his right to enter and reside in BIOT, and (ii) frustrated the islanders' legitimate expectation, which had been raised by the ministerial statement

<sup>1</sup> British Indian Ocean Territory (Constitution) Order 2004, s 9: see post, para 1.

given in 2000, that their right of abode would not be taken away, if at all, without prior consultation and the opportunity for parliamentary discussion. The Secretary of State resisted the claim on the grounds, inter alia, that the Orders were immune from judicial scrutiny, having been made by the Queen exercising her sovereign powers in respect of the governance of a colony, and that in any event, by virtue of sections 2 and 3 of the Colonial Laws Validity Act 1865<sup>2</sup>, the Orders were only susceptible to review by the courts on the basis that they were repugnant to an imperial statute extending to the colony, which was not the case. The Divisional Court rejected the Secretary of State's submissions and granted the declaration. The Court of Appeal, dismissing his appeal, affirmed the Divisional Court's order.

On appeal by the Secretary of State—

*Held*, (1) that there was no reason in principle why prerogative legislation should not, like other prerogative acts, be reviewable by the courts on ordinary principles of legality, rationality and procedural impropriety; that the Crown's prerogative power to legislate by Order in Council on the advice of its ministers in relation to a territory such as BIOT was therefore susceptible to judicial review; and that (Lord Rodger of Earlsferry and Lord Carswell dissenting) since the British Indian Ocean Territory (Constitution) Order 2004 was not only part of the local law of BIOT but, as imperial legislation, was made in the interests of the undivided realm of the United Kingdom and its non-self-governing territories, it was not "a colonial law" for the purposes of the 1865 Act and that Act, accordingly, presented no obstacle to the review jurisdiction of the United Kingdom courts (post paras 34–41, 68, 71, 105, 122, 141–142).

*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, HL(E) applied.

*Campbell v Hall* (1774) 1 Cowp 204 considered.

(2) Per Lord Hoffmann, Lord Rodger of Earlsferry, Lord Carswell and Lord Mance that, since BIOT had become a new political entity in 1965 to which the Convention for the Protection of Human Rights and Fundamental Freedoms had not been extended, the Convention had no application there and the Crown's actions there could not infringe the provisions of the Human Rights Act 1998 (post, paras 64–65, 116, 131, 142).

(3) Per Lord Hoffmann, Lord Rodger of Earlsferry and Lord Carswell, that the Crown's prerogative power to legislate for a ceded territory, although expressed in customary terms, was not limited by the requirement that legislation should be for the peace, order and good government or other benefit of the inhabitants of the colony, and might properly be exercised in the wider interests of the United Kingdom; and that it was not open to the courts to strike down legislation enacted under a power so described on the ground that it did not conduce to those objects (post, paras 48–51, 107–109, 127–130).

*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, DC overruled.

(4) Allowing the appeal (Lord Bingham of Cornhill and Lord Mance dissenting), that the vires of section 9 of the British Indian Ocean Territory (Constitution) Order 2004 could not be challenged on the ground of its repugnancy to any fundamental principle of English common law in respect of the rights of abode of the Chagos Islanders as "belongers" in the islands; that, having regard to the factors taken into account by the Secretary of State, in particular, the feasibility of resettlement in the context of long-term prior depopulation, together with the requirements of public expenditure and the state's security and diplomatic interests, which lay peculiarly within the competence of the executive, the decision to reimpose immigration control and prevent resettlement was neither unreasonable nor an abuse of power; that the statement made by the Secretary of State when revoking immigration controls in 2000 did not amount to a clear and unambiguous promise that the

<sup>2</sup> Colonial Laws Validity Act 1865, ss 2, 3: see post, para 36.

- A Chagos Islanders would be allowed to return and settle permanently on the outer islands; and that, accordingly, no legitimate expectation had been created on which they might rely (post, paras 44–45, 53–58, 61, 67, 102, 110–115, 117–118, 126, 132–134, 136).  
Decision of the Court of Appeal [2007] EWCA Civ 498; [2008] QB 365; [2007] 3 WLR 768 reversed.
- B The following cases are referred to in the opinions of the Committee:  
*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; [1947] 2 All ER 680, CA  
*Attorney General v De Keyser's Royal Hotel Ltd* [1919] 2 Ch 197, CA; [1920] AC 508, HL(E)  
*Attorney General for Canada v Cain* [1906] AC 542, PC  
*Auld v Murray* (unreported) 1864
- C *British Broadcasting Corpn v Johns* [1965] Ch 32; [1964] 2 WLR 1071; [1964] 1 All ER 923, CA  
*Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372  
*Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75; [1964] 2 WLR 1231; [1964] 2 All ER 348, HL(Sc)  
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- E

#### APPEAL from the Court of Appeal

The Secretary of State for Foreign and Commonwealth Affairs appealed, with leave of the Appeal Committee of the House of Lords (Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Carswell) granted on 23 October 2007, from the decision of the Court of Appeal (Sir Anthony Clarke MR, Waller and Sedley LJ) dated 23 May 2007 dismissing his appeal from the Divisional Court of the Queen's Bench Division (Hooper LJ and Creswell J) which, by orders sealed on 16 May and 23 June 2006, had allowed a claim by the claimant, Louis Olivier Bancoult, for judicial review and, in particular, had quashed section 9 of the British Indian Ocean (Constitution) Order 2004.

The facts are stated in the opinions of Lord Hoffmann and Lord Mance.

*Jonathan Crow QC* and *Kieron Beal* (instructed by the *Treasury Solicitor*) for the Secretary of State.

The claim to have a right of abode or to enjoy some other relevant right as "a believer" in the British Indian Ocean Territory ("BIOT") is ill-founded. The claimant has no such rights as must be respected by Her Majesty's legislation. The concept of a "believer" is a creature of legislation, it has no independent existence in the common law and cannot found any legally enforceable right. There is no case law authority for the claimant's proposition and the word is not found in legal dictionaries. In any event the concept is incapable of sufficiently certain and uniform definition for its application or the consequences if it were to apply. Although the words

“belong” and “belonger” are used, and defined, in legislation (see *Plender, International Migration Law*, 2nd ed (1988)), they have no independent existence in the general law, and as a result, unless and until they are used and defined expressly in legislation, they have no application or meaning: see *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB) at [380]. Similarly, rights of entry and abode in relation to any part of Her Majesty’s dominions only exist in municipal law by virtue of express enactment. They form no part of the common law: see *Halsbury’s Laws of England*, 4th ed, 2002 reissue, vol 4(2), para 44. A

A British overseas territory citizen does not have a legal right of entry and abode in a particular British overseas territory which can override, irremovably, the constitution of that territory. It is the constitution of a territory, and/or any immigration law duly made from it, which defines rights of entry and abode. The position is now defined exhaustively by statute in relation to the United Kingdom: see the Immigration Act 1971. Absent any express statutory enactment, a British citizen’s right of entry into the United Kingdom may have existed only as a matter of public international law, not as a private law right enforceable by the individual against the state. Any state is entitled, as a matter of international law, to expel aliens; and accordingly there is a concomitant obligation on the state of which he is a national to receive him, if no other state will do so. But those complementary rights and obligations appear to exist only as between states in public international law: see *R v Secretary of State for the Home Department, Ex p Thakrar* [1974] QB 684, 702, 708–710 and *Thornton v The Police* [1962] AC 339. Accordingly the state is entitled to exclude British citizens from entering particular British possessions. Any decision about who is permitted to enter which territory is a matter of policy, to be implemented by legislation; it is not a matter of overriding law to be determined by the court and imposed on the legislator. B C D E

The authorities relied on by the claimant do not support his case: the right, preserved since Magna Carta and explained in *Blackstone’s Commentaries on the Laws of England*, 15th ed (1809) and *Chitty’s Prerogatives of the Crown* (1820) not to suffer exile except “by the law of the land”, and the proposition that every state must admit its own nationals to its territory (see *Plender, International Migration Law*, 2nd ed, pp 133, 138 and 142–143) are not in point. Similarly, *R v Bhagwan* [1972] AC 60 is not in point and dicta in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, para 39 are irrelevant, wrong and obiter. F

The relationship between an individual and the state, including any right of abode, is defined by its constitution. Here, the constitution of BIOT is contained in the British Indian Ocean (Constitution) Order 2004. That instrument is the only source of a person’s right of entry; the claimant cannot have a constitutional right of entry or abode when the constitution specifically says that he has not (see *R v Lord Chancellor, Ex p Witham* [1998] QB 575, 585) and he cannot identify any other source for his assertion of such a right. The 2000 Immigration Ordinance did not “recognise” any such right. No recognition can be inferred from section 4 of the Ordinance or from the continuance it provided of the absolute prohibition on entry to Diego Garcia. In those circumstances it is impossible to interpret the instrument as recognising a right to enter and remain when G H

A the wording expressly flouted it. Since all land in BIOT is owned by the Crown, and the Chagos Islanders themselves own none, they commit trespass to the extent that they claim a right to enter and settle. The 2004 Orders are not therefore unlawful on the basis that they violate any substantive legal right to enter or reside there.

B The constitutional relationship between the United Kingdom and its overseas territories is a matter of public law; it is not determined by the private law of the territory in question: see *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 721. The Crown's power to provide a constitution to a ceded colony such as BIOT derives from the royal prerogative which is a creature of the common law. Its existence and scope are matters for the courts to determine but only for Parliament to cut down, if it decides to do so: see *Roberts-Wray, Commonwealth and Colonial Law* (1966), p 157;  
C *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Proclamations Case* (1611) 12 Co Rep 74; *Sammur v Strickland* [1938] AC 678 and *Attorney General v De Keyser's Royal Hotel Ltd* [1919] 2 Ch 197.

D The prerogative power to constitute a ceded colony is not circumscribed by the expression "peace, order and good government". Those words are a legislative formula used regularly to define the scope of a colonial legislature's authority. They are not part of the common law and do not define the royal prerogative. As such they do not limit the Crown's constituent power in relation to an overseas territory. As a matter of principle, the enactment of legislation for a ceded colony is an expression of the sovereign legislative authority of the state. It remains so unless and until the royal prerogative is cut down by Parliament or by conferring  
E representative government in the territory without reservation of powers. Different territories have been constituted for different purposes: in each case the underlying purpose for which the territory is constituted will inform any assessment of what might be regarded as conducive to its peace, order and good government. But the formula cannot itself define, or limit, the constituent power: see *Roberts-Wray, Commonwealth and Colonial Law*, p 157 and *Chenard & Co v Arissol* [1949] AC 127.

F However, if those words do define the prerogative constituent power, they describe, but do not limit, the legislative authority of a fully sovereign state: see *Jennings & Young, Constitutional Laws of the British Empire* (1938), p 29; *R v Burah* (1878) 3 App Cas 889; *Hodge v The Queen* (1883) 9 App Cas 117; *Powell v Apollo Candle Co Ltd* (1885) 10 App Cas 282; *Riel v The Queen* (1885) 10 App Cas 675; *R v Earl of Crewe, Ex p Sekgome* [1910] 2 KB 576; *Attorney General for Ontario v Attorney General for Canada* [1912] AC 571; *Li Hong Mi v Attorney General for Hong Kong* [1920] AC 735; *Croft v Dunphy* [1933] AC 156; *Ibralebbe v The Queen* [1964] AC 900; *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 and *Durham Holdings Pty Ltd v State of New South Wales* (1999) 47 NSWLR 340; (2001) 205 CLR 399.

H The United Kingdom may lawfully constitute a ceded colony in exercise of the royal prerogative, and there are no substantive legal limits which preclude the territory being constituted for particular purposes, including those relating purely to the interests of the United Kingdom itself, such as defence: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and*

*Commonwealth Affairs* [2006] 1 AC 529; Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th ed (1915), pp 42, 48, 67. The availability of the royal prerogative as a tool for enacting legislation for ceded colonies is an important and well-established feature of colonial governance; and, although now limited in practice, Parliament has chosen to leave the prerogative power of constituent legislation intact in that area and the courts should respect that judgment.

The royal prerogative by Order in Council has regularly been used to confer constitutions on former colonies when they attain independence. Since the prerogative cannot confer authority it does not itself embody, and, since it is used to confer sovereign independence in those circumstances, its power is as extensive as the scope of Her Majesty's authority in Parliament: see *Roberts-Wray, Commonwealth and Colonial Law*, p 157 and *Halsbury's Laws of England*, 4th ed, 2003 reissue, vol 6, para 823. Two constraints only have been held to apply to the exercise of the royal prerogative power to constitute ceded colonies: see *Campbell v Hall* (1774) 1 Cowp 204. The first, that Her Majesty's power was limited by the terms of cession, cannot survive subsequent authority: see *Cook v Sprigg* [1899] AC 572, 578; *Sobhuza II v Miller* [1926] AC 518, 528–529 and *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733. The second constraint, that the monarch could not make laws contrary to “fundamental principles”, cannot survive the enactment of the Colonial Laws Validity Act 1865 and *Liyanage v The Queen* [1967] 1 AC 259. Her Majesty's prerogative power in relation to conquered or ceded colonies has always been regarded as unlimited (see *Nyali Ltd v Attorney General* [1956] 1 QB 1) and, in particular, not limited by the concept of “peace, order and good government”.

With regard to the reviewability of the royal prerogative, the exercise of the prerogative constituent power is not in principle immune from judicial scrutiny by reference to allegations of ultra vires. The courts retain their power to determine whether any purported exercise of the prerogative falls within an area of legislative activity where the prerogative is still recognised. But where, as here, the scrutiny of the constitution of an overseas territory is in issue, the courts can have no relevant function in judicially reviewing prerogative constituent legislation by reference to allegations of illegality because there are no substantive limits to the royal prerogative in that regard. Nor has the court a relevant function in judicially reviewing the constitution by reference to allegations of irrationality or procedural impropriety.

The enactment of the 2004 Constitution Order is a legislative measure, not an executive act. Therefore within the framework of the conventional tripartite separation of powers the 2004 Order is the foundational law of BIOT; it did not involve any exercise of executive authority and, although in line with constitutional practice it was implemented on the advice of Her Majesty's ministers, it was not thereby an act of the executive branch of government, but rather it is an expression of Her Majesty's legislative sovereignty: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, paras 19, 64 and 79. As distinct from being made under an Order in Council, such as is empowered by statute to make subordinate legislation, the 2004 Order is a prerogative Order in Council and, thereby, is a piece of primary legislation: see

- A *Bradley & Ewing, Constitutional and Administrative Law*, 14th ed, (2006), p 680; section 21(1) of the Human Rights Act 1998; section 1 of the Statutory Instruments Act 1946 and *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 399.

- B It is inappropriate and unprecedented for the 2004 Order to be susceptible to judicial review. The court should respect the separation of powers and any attempt at judicial scrutiny would offend against that principle: see *R (ProLife Alliance) v British Broadcasting Corp* [2004] 1 AC 185, paras 75–76. The remedy for an “unconstitutional” exercise of prerogative legislation is political, not judicial (despite the modern “upsurge of judicial activism”). As a matter of constitutional principle, therefore, the courts never make prerogative orders against the Crown, though they may make them against ministers: see *M v Home Office* [1994] 1 AC 377;
- C *Chandler v Director of Public Prosecutions* [1964] AC 763; *Blackstone, Commentaries on the Laws of England*, 15th ed, p 251 and *Wade & Forsyth, Administrative Law*, 9th ed (2004), pp 45–47. That analysis has been confirmed by the Human Rights Act 1998 (see section 21) and is unaffected by the *Council of Civil Service Unions* case [1985] AC 374.

- D In any event the 2004 Order is particularly inapt for judicial scrutiny. The test of legality requires a decision-maker to understand and correctly apply the law which regulates his decision-making power; but, in the present context, there are no objective criteria by reference to which the substantive lawfulness of any colonial constitution can be tested against allegations of illegality. Whether the courts have no jurisdiction, or will not exercise their powers in such areas, the subject matter does not lend itself to challenge by reference to allegations of irrationality, just as certain other areas of state activity do not readily lend themselves to judicial scrutiny: see *Jennings & Young, Constitutional Laws of the British Empire*, pp 29–30; *R v Burah* 3 App Cas 889, 904–905; *Hodge v The Queen* 9 App Cas 117, 132; *Chenard & Co v Arissol* [1949] AC 127, 132; *Nyali Ltd v Attorney General* [1956] 1 QB 1, 16; *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette* (unreported) 26 July 2000, para 29 and *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76, para 106. [Reference was also made to *Buck v Attorney General* [1965] Ch 745.]

- E The formulation of the constitution of any territory is driven by considerations of pure policy. The subject matter does not lend itself to legal evaluation since there are no legal principles by reference to which competing policy considerations can be tested. Any judicial attempt to assess a constitution’s rationality would go beyond the court’s function; the power to constitute a ceded colony is so fundamentally a matter of open policy that there can be no informed role for the court in assessing its rationality. The position is further compounded here since the constitution of BIOT is driven by defence interests in respect of which the courts are reluctant to second-guess the informed assessment of government.

- G In any event the judicial process is itself inappropriate since the procedures available to the court render it unsuitable to conduct a review of the competing policy considerations that require evaluation in enacting a constitution. In any event the Privy Council is the ultimate appellate court in relation to colonial law; the principles applicable to the interpretation of colonial constitutions are *sui generis* and the consequence of allowing such a

review in the English courts is that an appeal will ultimately be heard not before the Privy Council but the Appellate Committee of the House of Lords. Accordingly prerogative Orders in Council are not subject to judicial review and, in particular, constituent legislation is inapt for judicial scrutiny by reference to allegations of illegality or irrationality or procedural impropriety. A

If, however, judicial process is appropriate the Order is not unlawful on grounds either of illegality or irrationality. The threshold test for irrationality is high: see *R v Secretary of State for the Environment, Ex p Nottinghamshire County Council* [1986] AC 240; *R v Ministry of Defence, Ex p Smith* [1996] QB 517 and *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696. The court is rightly cautious about conducting any review of the royal prerogative involving considerations of defence and national security or in respect of foreign affairs; it should also be cautious where its assessments might involve issues relating to the distribution of public funds, or the balancing of competing societal interests: see the *Council of Civil Service Unions* case [1985] AC 374, 411; *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 556; *British Airways Board v Laker Airways Ltd* [1984] QB 142; *R v Chief Constable of Sussex, Ex p International Trader's Ferry Ltd* [1999] 2 AC 418; *R v Secretary of State for the Environment, Ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 and *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349. B C D

It is not appropriate to replace the established criteria of illegality, irrationality and procedural impropriety with the more generalised principle of “abuse of power” which imports a subtle but important difference and leads to uncertainty and subjectivity: see [2008] QB 365 and *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363; *The Times*, 14 December 2005. If such a category is to apply, it will only be in cases of exceptional unfairness: see *R v Inland Revenue Comrs, Ex p Unilever plc* [1996] STC 681 and *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397. E F

Given the number of competing interests to be balanced, objective weight could not be attributed to each consideration and it would have been impossible for a court fairly to reach a conclusion that the 2004 Order was irrational.

Any attempt to challenge the 2004 Order by means of judicial review would be defeated by the Colonial Laws Validity Act 1865. The purpose and effect of the 1865 Act is to preclude any legal challenge to a colonial law, expressly and deliberately defined as including an Order in Council (see section 1), on the ground that it is repugnant to English law other than on the basis that it is repugnant to an Act of the Westminster Parliament. The claim that the 2004 Order is susceptible to judicial review and can be impugned as being repugnant to the law of England is precisely what the 1865 Act prohibits; under that Act the courts cannot deploy English common law principles of review to invalidate a colonial law. The Act only prevents a challenge being made to colonial laws by reference to English law, leaving unaffected the possibility of legislation being challenged by reference to the law of the territory in question, but the challenge here is to the 2004 Order, not a piece of local legislation, and the basis of the challenge is that the Order G H

- A is unlawful by reference to English law. That is why the 1865 Act precludes such a claim: see John Finnis, "Common Law Constraints: Whose Common Good Counts?" (2008) Oxford Legal Studies Research Paper No 10/2008; O'Connell & Riordan, *Opinions on Imperial Constitutional Law* (1971), pp 60–73 and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, para 47. Were the claim available, it would deprive the Act of all effect: see *Liyanage v The Queen* [1967] 1 AC 259, 284–286; *Phillips v Eyre* (1870) LR 6 QB 1, 20; *Li Hong Mi v Attorney General for Hong Kong* [1920] AC 735, 737; *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733, 747 and *Macleod v Attorney General for New South Wales* [1891] AC 455.

- A legitimate expectation may be founded on an express promise or representation that a policy will not be changed. In deciding whether such an expectation has arisen the court has to consider the precise terms of the promise or representation, the circumstances in which it was made and the nature of the particular statutory or other discretion. The essential question is how, on a fair reading, the alleged representation would have been understood by those to whom it was directed: see *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, para 56 and *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 56.

- The legitimate expectation may entail either (1) no more than that the decision-maker will take his existing policy into account, or (2) an obligation on the decision-maker to consult those affected before changing his policy, or (3) an obligation for the decision-maker to confer a substantive benefit on an identified person or group. Those categories represent an ascending hierarchy which must be reflected in the precision, clarity and irrevocability of any alleged representation or promise on which the expectation is said to be based. To rely successfully on a substantive expectation a claimant must be able to show that the promise was unambiguous, clear and devoid of relevant qualification, that it was made in favour of an individual or small group of persons affected; that it was reasonable for the claimant to rely on it; and that he did rely on it generally, but not invariably, to his detriment: see *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73, 88–89; *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545; *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1124, 1131, 1134; *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348; *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, paras 27–30; the *Coughlan* case [2001] QB 213, paras 64, 70–71; *R v Falmouth and Truro Port Health Authority, Ex p South West Water Ltd* [2001] QB 445, 459–460; *R v Ministry of Defence, Ex p Walker* [2000] 1 WLR 806, 813 and *R v Jockey Club, Ex p RAM Racecourses Ltd* [1993] 2 All ER 225, 236–237.

- A substantive expectation will only be upheld where not to do so would be equivalent to a breach of contract or an abuse of power; but it can lawfully be frustrated if there is an overriding public interest which justifies that course. Whether the test of overriding interest is one of proportionality or irrationality, the court's supervision in assessing any justification in the macro-political field will be less intrusive and even where an expectation is found to arise, the decision-maker will not necessarily be required to honour

a promise where to do so would be to assume executive powers: see *R v Inland Revenue Comrs, Ex p Preston* [1985] AC 835, 866–867; *Secretary of State for the Home Department v Zeqiri* [2002] Imm AR 296, para 44; the *Coughlan* case [2001] QB 213, paras 57, 59 and 82; *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68]–[69]; *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, paras 58–62 and *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, paras 23, 41. A  
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The doctrine of substantive legitimate expectation, as developed in relation to administrative decision-making, is either inapplicable to prerogative, primary legislation or applies in such an attenuated form as not to be relevant in the present case: see *Bates v Lord Hailsham of St Marylebone* [1972] 1 WLR 1373, 1378; *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 339; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, para 55; *Sobhuza II v Miller* [1926] AC 518, 528–529; *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733; *R v Customs and Excise Comrs, Ex p Kay & Co Ltd* [1996] STC 1500, 1528; *R v Secretary of State for the Home Department, Ex p Chaumun* [1999] INLR 479, 487; *R (Aggregate Industries UK Ltd) v English Nature* [2003] Env LR 83, para 117 and *Environment Agency v Anglian Water Services Ltd* [2002] EWCA Civ 5 at [29]–[33]; *The Times*, 18 February 2002. Other common law jurisdictions have been reluctant to give effect to the doctrine: see *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281. C  
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In the present context there is no basis for reliance on any such legitimate expectation or for challenging the enactment of the 2004 Order as involving an abuse of power. A public authority is entitled to change its policy; a decision-maker cannot lawfully fetter his discretion and he does not need to justify any change by reference to an overriding public interest: see *In re Findlay* [1985] AC 318, 337–338; *Hughes v Department of Health and Social Security* [1985] AC 776, 788; *R v Secretary of State for the Home Department, Ex p Hargreaves* [1997] 1 WLR 906, 918; *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407, 496–497 and *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76, para 86. E  
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*Sir Sydney Kentridge QC, Anthony Bradley and Maya Lester* (instructed by *Clifford Chance LLP*) for the claimant.

Although Mauritius and its dependencies, including the Chagos Archipelago, were “ceded” to the British Crown and accordingly BIOT has been classified as a “ceded” rather than a “settled” colony (see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067), there is now little significance in that classification: see *Campbell v Hall* 1 Cowp 204, 208 and *Forsyth, Cases and Opinions on Constitutional Law* (1869), pp 326–328. As British subjects the inhabitants owed the Crown allegiance and were owed a reciprocal duty of protection by the Crown: see *Joyce v Director of Public Prosecutions* [1946] AC 347 and *Mutasa v Attorney General* [1980] QB 114. The constitutional relationship between the subject and the Crown is governed by English common law; while private law in Mauritius was French, public law was English and the supreme legislative power over the colony is not the monarch but the G  
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- A Parliament of the United Kingdom. In accordance with those principles the extent of the royal prerogative in a ceded, conquered or settled colony is a matter of English law which applies throughout the Queen's dominions, including BIOT: see *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 721–722; *Union Government (Minister of Lands) v Estate Whittaker* 1916 AD 194; *Kodeeswaran v Attorney General of Ceylon* [1970] AC 1111; *Ruding v Smith* (1821) 2 Hag Con 371; *Sammut v Strickland* [1938] AC 678, 697 and *Liquidators of the Maritime Bank of Canada v Receiver General of New Brunswick* [1892] AC 437, 441.
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The constitution of Mauritius, granted by the Queen in Council in 1964 and applied to the Chagos Archipelago as part of Mauritius, recognised and declared the existence and continuance of certain fundamental rights and freedoms there; they included the right to reside in any part of the territory and to enter and to leave with immunity from expulsion: see Chapter 1 and section 12. Those rights, applicable to all who belonged there, were subject to restrictions reasonably required in the interests of defence, public safety and public order, any such restriction being reasonably justifiable in a democratic society. When BIOT became a separate colony in 1965 the Order in Council provided for the continuation of laws in force at its date in any of the islands comprising the territory, including section 12 of the Constitution of Mauritius: see section 15 of the 1965 Order.

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- The Queen in Parliament has supreme and unquestionable legislative power over all British colonies or dependencies; that has not been true of Her Majesty in Council since the 16th century. The power to legislate for a colony exercised by the Queen in Council is “primary” in the sense that it is not derived from a statute. Parliamentary legislation is immune from
- E judicial review not because it is primary, but because the common law as applied by the courts recognises the supremacy of Parliament: see *R (Jackson) v Attorney General* [2006] 1 AC 262, paras 102, 177. The scope of judicial review of the royal prerogative includes review of its exercise on grounds of unreasonableness, abuse of power, procedural impropriety and breach of legitimate expectations: see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Operation Dismantle Inc v The Queen* [1985] 1 SCR 441, 504; *Black v Canada (Prime Minister)* (2001) 54 OR (3d) 215, 230–231 and *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76. Prerogative acts, being in reality acts of the executive, may be subject to judicial review if they directly affect the rights or legitimate expectations of citizens, or in some cases, inhabitants generally. The 2004 Orders fall into that category.
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- Certain common law rights are recognised as “fundamental rights” despite the vagueness and uncertainty referred to in *Liyanage v The Queen* [1967] 1 AC 259, 271. A citizen's right of abode in and return to the territory of his citizenship is such a right: see *R v Lord Chancellor, Ex p Witham* [1998] QB 575; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115; *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554–555; *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696; *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514 and *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728. As a citizen of the United Kingdom and Colonies by reason of his birth in and connection with BIOT the claimant has retained his right
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of abode there, including the right not to be excluded or exiled from BIOT. That is a fundamental right of citizenship. The right of entry and abode in relation to any part of Her Majesty's dominion is part of the common law of England and does not exist only by virtue of express enactment: see the *Bancoult* case [2001] QB 1067, para 39. The right is an ancient one; the Crown never had a prerogative power to prevent its subjects from entering the kingdom, or to expel them from it: see Magna Carta, ch 29; *Holdsworth, History of English Law*, vol 10 (1981), p 393; *R v Bhagwan* [1972] AC 60, 74 and *R v Governor of Pentonville Prison, Ex p Azam* [1974] AC 18. Although in relation to specific territories within the Empire or Commonwealth, laws might be passed which controlled the entry of British subjects from other British territories, there is no example of any law prohibiting a British subject or citizen who belonged to a particular territory from entering or remaining in it except in the cases of the Antarctic, which is uninhabited, and BIOT (see *Plender, International Migration Law*, 2nd ed, pp 142–143) and *Thornton v The Police* [1962] AC 339 is not in point. The fact that the islanders did not own real estate on the islands cannot affect their position in public or constitutional law: see *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB).

The 2004 Orders are not valid in so far as they purport to remove the right of abode. The only authority claimed for them is the royal prerogative. However, the prerogative is the residue of discretionary or arbitrary authority which at any given time is left in the hands of the Crown: see *Dicey, An Introduction to the Study of the Law of the Constitution*, 8th ed, p 421. It is for the courts to determine whether a prerogative exists and if so its extent: see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398 and *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513. No new prerogative power can be recognised, even if grounded on state necessity: see *British Broadcasting Corp'n v Johns* [1965] Ch 32, 79 and *Entick v Carrington* (1765) 19 State Tr 1029, 1066. The courts' role has been, historically, to limit the Crown's powers and, in modern society, to guard the rule of law under a system of democratic government. When a new question arises for decision the court examines the extent to which, as a matter of precedent, the prerogative has previously been used: see *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 524, 538–539, 552, 563, 573 and *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 99, 101. There is no precedent for use of the prerogative in the present context of removing and excluding the entire population of British subjects from their homes and places of birth. The absence of such precedent should be decisive.

Her Majesty in Council has power to legislate for British colonies, but the prerogative power is not unfettered. In the case of settled colonies the Crown had formal power to grant a constitution but not to make other laws; in ceded or conquered colonies the power extended to both classes of legislation: see *Sammut v Strickland* [1938] AC 678 and *In re Colenso* (1865) 3 Moo PC NS 115. Accordingly, in respect of the prerogative of colonial legislation, the courts scrutinise the claims to prerogative power as they do other claims to prerogative power and the Crown must establish a recognised historical basis for legislation such as that contained in sections 9 and 15 of the 2004 Order. Those provisions have no special or superior status and were beyond the law-making powers of Her Majesty.

- A The prerogative does not remain in its pristine condition unless cut down by Parliament. It may be changed by developments such as the expansion in the Commonwealth of representative democracy, the evolution to its modern form of judicial review, the recognition of the rule of law and the principle of legality as a governing principle of public administration. Part of that process is the recognition that some rights are fundamental so
- B that even the most general words in a statute will be read as being subject to the basic rights of the individual: see *Ex p Simms* [2001] 2 AC 115, 131. The same principles are to be applied to define the scope of prerogative powers in the absence of evidence of an accepted precedent for the particular exercise claimed; the vires of the Orders in Council, as acts of the executive, are now to be examined by the courts in the light of the state's international obligations: see *In re McKerr* [2004] 1 WLR 807; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening)* [2005] 2 AC 1 and *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221. There should therefore be some compelling reason of state for removing the fundamental rights of the inhabitants of a dependent territory that could be legally enacted by the Westminster Parliament.
- D In modern times the Queen in Council has never claimed under the prerogative of colonial legislation a legislative power as wide and unlimited as that of Parliament. With regard to conquered or ceded colonies such prerogative power is to make laws for the peace, order and good government of the territory in question: those are the terms in which the monarch's legislative powers are reserved. In conferring legislative powers on a colonial legislature Her Majesty in Council customarily used the same terms
- E and such powers have been described by the courts as "plenary" or "the widest law-making powers appropriate to a sovereign": see *Ibralebbe v The Queen* [1964] AC 900, 923. But in no case was the colonial law under consideration comparable with the purported laws exiling the claimant and his fellow islanders and a colonial legislature will have plenary powers only within the limits which circumscribe those powers: see *R v Burah* 3 App Cas 889; *Hodge v The Queen* 9 App Cas 117; *Powell v Apollo Candle Co Ltd* 10 App Cas 282; *Riel v The Queen* 10 App Cas 675; *R v Earl of Crewe, Ex p Sekgome* [1910] 2 KB 576; *Attorney General for Ontario v Attorney General for Canada* [1912] AC 571; *Li Hong Mi v Attorney General for Hong Kong* [1920] AC 735; *Croft v Dunphy* [1933] AC 156 and *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733.
- F "Peace, order and good government" are not words of limitation in the sense that only such laws can be made as conduce, factually, to peace, order and good government. That is not an inquiry into which a court may go: but the laws must be capable of so conducing to those ends. A law excluding the whole permanent population of the colony could not do that: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067; *Trustees Executors and Agency Co Ltd v Federal Comr of Taxation* (1933) 49 CLR 220; *Ibralebbe v The Queen* [1964] AC 900;
- H *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; *Ashbury v Ellis* [1893] AC 339; *Croft v Dunphy* [1933] AC 156; *Macleod v Attorney General for New South Wales* [1891] AC 455; *Attorney General for Canada v Cain* [1906] AC 542 and the British Settlements Act 1887

(50 & 51 Vict c 54). *Union Steamship Co of Australia Pty Ltd v King* 166 CLR 1; *Jefferys v Boosey* (1854) 4 HL Cas 815 and *Durham Holdings Pty Ltd v State of New South Wales* 205 CLR 399 do not assist the Secretary of State. A

It is a misreading of the Colonial Laws Validity Act 1865 to interpret it as providing that no challenge may be made to the validity of any colonial law, including the 2004 Order, save on the ground of repugnancy to an enactment of the Westminster Parliament. Section 2 of the 1865 declares only the extent to which a colonial law shall be declared void in the event of repugnancy; that is confirmed by the wording of section 3. The question whether a colonial law is otherwise within the powers conferred on a colonial legislation or of the Queen in Council is not answered by the Act: it depends on the terms in which the power is conferred, or the extent of Her Majesty's legislative power: see *R v Burah* 3 App Cas 889, 904. The prior question is therefore one of the limits on power; repugnancy is a different question. Further, by asserting that the Orders are susceptible to judicial review, the claimant does not impugn them on the basis of repugnancy to the law of England contrary to the 1865 Act. The term "repugnant" connotes inconsistency or incompatibility; when a law, regulation or executive decision is judicially reviewed and held to be invalid it would be a distortion of language to say that it is so because it is incompatible with the principles of judicial review. Those principles and the subject matter of the impugned law or decision are not *pari materia*. The Secretary of State's reliance on John Finnis, "Common Law Constraints: Whose Common Good Counts?" (2008) Oxford Legal Studies Research Paper No 10/2008 is misplaced. B C D

The courts below were correct to hold that the subject matter of the Orders in Council was not an area which is not amenable to judicial review within the principles set out in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and that the Orders were reviewable as executive acts directly affecting the subject in respect of the removal of his rights of abode: see pp 408, 410-411, 416-418, 420-421, 423. It is not inapt for the courts to subject the making of the Orders to scrutiny on the ground of irrationality, nor should the court adopt "a light touch" so as only to find the decision-maker irrational when it could be said that "he had taken leave of his senses". Where a measure affects fundamental human rights or has particularly intrusive effects the courts will employ the anxious scrutiny test, requiring the public body to demonstrate that the most compelling justification existed for such a measure: see *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554; *R v Lord Saville of Newdigate, Ex p A* [2000] 1 WLR 1855, paras 33, 36-37; *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, 531; *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839, 867; *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 125-131; *R v Secretary of State for the Home Department, Ex p Turgut* [2001] 1 All ER 719, 729 and *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368. E F G H

Where a right under the European Convention for the Protection of Human Rights and Fundamental Freedoms or a fundamental constitutional right recognised by the common law is in play, the proportionality approach is appropriate which invites response to the threefold question: whether the

- A objective is sufficiently important to justify limiting the right, whether the measure is rationally connected to that objective and whether the means used impair the right in a way that is no more than necessary: see *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paras 21, 28, 35, 36. The court's review is not removed because the subject matter in issue is defence: see *A v Secretary of State for the Home Department* [2005] 2 AC 68; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Chandler v Director of Public Prosecutions* [1964] AC 763 and *The Zamora* [1916] 2 AC 77. Given the profound effect of the Orders overwhelming justification for them must be shown. The findings of the courts below correctly show that the interests of the islanders were not taken into account and that the Orders cannot be justified whether on grounds of illegality, irrationality, proportionality, unreasonableness, conspicuous unfairness or as an abuse of power: see *R v Inland Revenue Comrs, Ex p Unilever plc* [1996] STC 681; *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, para 26 and *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCACiv 1363 at [67].
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- D If the claimant's submissions are otherwise rejected, he has a valid claim to relief under the European Convention since it has, at all material times, applied to the Chagos Islands by virtue of the declaration extending rights to the territory made pursuant to article 56 (ex article 63), and the absence of any denunciation under article 58 (ex article 65) of that declaration. The Order creating BIOT cannot be read as diminishing the inhabitants' rights. The Crown, having conferred those rights on them and having entered into an international obligation under the Convention to respect
- E them and refrain from withdrawing them is obliged to secure them.

- Further, having regard to the legislative arrangements made for BIOT under the 1965 and 1976 Orders and sections 3 and 4 of the Courts Ordinance 1983, in the absence of a declaration by the commissioner applying or disapplying a statute which alters the law of England, it is for the court to determine whether a statute is received into the law of BIOT by section 3 of the 1983 Ordinance. In consequence the Human Rights Act 1998 has had effect in BIOT since it came into force in England in 2000. It was therefore in force when the 2004 Orders in Council were made. Although the 1998 Act might require modification to take account of local circumstances (see section 3 of the 1983 Ordinance) any adaptations could not be so extensive as to disapply the Act in BIOT. Her Majesty in Council, making laws for BIOT, acted as a public authority under the 1998 Act as
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- G applied to BIOT and she could not have power under the prerogative to make laws for BIOT in conflict with the Convention. The 2004 Orders may therefore be held incompatible under the Act: see *R v Attorney General, Ex p Lake* (unreported) 17 July 2002.

- H Exclusion of the entire population from its traditional home is an infringement of the United Kingdom's treaty obligations to respect the islanders' rights to self-determination under, inter alia, the United Nations Charter and customary international law. It is an infringement of the United Kingdom's duties under article 73 of the Charter which requires recognition of the principle that the interests of the inhabitants are paramount, and acceptance, as a sacred trust, of the duty to promote their well-being to the utmost. As a matter of public international law the rules of jus cogens have a

peremptory quality and are absolutely binding on all states: see article 53 of the Vienna Convention on the Law of Treaties (1969) (Cmnd 4140) and *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte* (No 3) [2000] 1 AC 147. The English common law has long recognised that customary international law is part of the law of England and changes in international law may have direct consequences for national law: see *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 and *R v Tower Hamlets London Borough Council, Ex p Chetnik Developments Ltd* [1988] AC 858. As a matter of public international law the right to self-determination is *jus cogens*: see the United Nations Charter, articles 2(2), 55, 73–74; *Oppenheim's International Law*, 9th ed (1992), vol 1, pp 282–295; *Brownlie, Principles of Public International Law*, 6th ed (2003), pp 488–490, 553–555 and *In re Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada* (1998) 161 DLR (4th) 385. On the assumption that the population of a non-self-governing overseas territory constitute a people entitled to self-determination, the prerogative should not be recognised as including a power to legislate in a manner contradictory of that right.

*Bradley* following.

The concept of substantive legitimate expectations is a recent and evolving area of public law which has developed from case law relating to the procedural protection of such expectations: see *R v Liverpool City Council, Ex p Liverpool Taxi Fleet Operators' Association* [1975] 1 WLR 701; *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213; *In re Findlay* [1985] AC 318; *Hughes v Department of Health and Social Security* [1985] AC 776; *R v Ministry of Defence, Ex p Walker* [2000] 1 WLR 806; *R v Secretary of State for the Home Department, Ex p Hargreaves* [1997] 1 WLR 906; *R v Inland Revenue Comrs, Ex p Unilever plc* [1996] STC 681; *Oloniluyi v Secretary of State for the Home Department* [1989] Imm AR 135; *Rowland v Environment Agency* [2005] Ch 1; *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348; *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397 and *R (BAPCO Action Ltd) v Secretary of State for the Home Department* [2008] AC 1003, per Lord Rodger of Earlsferry and Lord Mance. In all cases of legitimate expectation, whether substantive or procedural, the court must determine (1) to what the public authority, whether by practice or by promise, has committed itself; and (2) whether the authority has acted or proposed to act unlawfully in relation to its commitment: see *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237. Wherever a legitimate expectation arises as a result of an assurance or promise the court must decide whether that affects the legality of the action subsequently taken by the authority and, depending on the circumstances, it may decide that the authority need only bear in mind its previous policy or representation, giving weight to it as the authority thinks fit. In such a case the court's review will be restricted to the *Wednesbury* criteria: see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. Alternatively the court may consider that the promise or practice induces a legitimate expectation such as to give rise to a duty of consultation; in which case an opportunity for consultation

- A must be given unless there is an overriding reason to resile from it. In such a case the court will assess the adequacy of the reasons by reference to the requirements of fairness or, more broadly, good administration: see *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363. Finally, if the court considers that a lawful promise has induced a legitimate expectation of a substantive benefit, it may, where appropriate, conclude that to frustrate the expectation is so unfair that to take a different course would amount to an abuse of power.

- B The Court of Appeal were correct to conclude that such was the case: that the Secretary of State's statement was clear, unambiguous and devoid of relevant qualification and that it gave rise to reasonable and legitimate expectations amounting to an assurance which could not be ignored: see *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213; *R v Inland Revenue Comrs v MFK Underwriting Agents Ltd* [1990] 1 WLR 1545; *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 and *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Detriment, although not a necessary ingredient as it would be in private law estoppel, does exist here in the form of the reliance placed by the islanders on resettlement.

- D It is not correct that the principles of substantive legitimate expectation do not apply to prerogative legislation, or that, if they do, they only do so in so attenuated a form as not to apply here. Judicial review is not limited to administrative action but extends to the review of legislative measures taken under the prerogative. While considerations of fairness do not affect primary legislation (see *Bates v Lord Hailsham of St Marylebone* [1972] 1 WLR 1373) such immunity is not extended to other forms of legislation: see *R v Her Majesty's Treasury, Ex p Smedley* [1985] QB 657 and *R (BPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 at [33]. Parliamentary legislation, even if contrary to prior ministerial assurances, cannot be reviewed by the courts; but prerogative orders, being primary legislation only in the sense that the authority under which they are made is not derived from other legislation, are made solely as a result of an executive, not a legislative, process. Although a public authority can change its policy if it lawful for it to do so, that principle cannot apply in the present case. The Secretary of State's action was an executive act and breach of the legitimate expectation relied on by the islanders occurred when the Orders in Council were drafted and submitted to the Privy Council for formal endorsement.

Crow QC in reply.

- G The notification by the United Kingdom in 1953 of the Convention rights under article 56 (ex article 63) to Mauritius and the Seychelles did not refer in terms to the Chagos Islands and lapsed in respect of the islands when BIOT was created. No separate extension of the Convention has ever been notified in relation to BIOT. The United Kingdom is not therefore responsible for alleged violations there of any rights guaranteed by the Convention. In any event notification applies to a legal entity; the effect of the United Kingdom's notification in respect of Mauritius was to make the United Kingdom responsible for any violations of the Convention in the territory of that colony; the effect of the creation of the legal entity of BIOT was that the islands ceased to be part of the legal entity in respect of which notification had been made and the notification ceased to apply to them.

BIOT was a new and separate legal entity in respect of which no notification was ever made. In 1968, after the grant of independence to Mauritius, the United Kingdom, being no longer responsible for its international relations, the 1953 notification lapsed in its entirety. On no footing, therefore, could the Convention extend to BIOT. A

Even if the Convention had been extended to BIOT under article 56 (ex article 63) the position would be no different. Since the claimant's challenge is to the 2004 Orders' interference with his ability to return to BIOT, and since he was in Mauritius when the Orders were made, he was not within the "legal space" to which it might be assumed the Convention extends. His complaint, being that he may not enter the territory to which he claims the Convention extends, cannot engage such rights. Even if he owned property there the imposition of immigration controls which would prevent enjoyment of his property rights there would not involve an interference under article 1 of the First Protocol. The claimant wishes to enter BIOT to begin enjoying rights there; but that is not a right protected by the Convention since the right to freedom of movement protected by the Fourth Protocol has not been ratified by the United Kingdom. B C

Doctrines such as "effective control" of a territory which are in principle capable of extending the application of the state's responsibility under the Convention outside its national territory are inapplicable to dependent territories such as BIOT where article 56 (ex article 63) is the only route: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529 and *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2008] AC 153. D

If there is no claim under the Convention there can be no claim under the Human Rights Act 1998. The purpose of the latter was to give effect to the former by providing a remedial structure in domestic law: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, para 44; the *Quark* case, paras 25, 34–36, 43, 62, 93–95 and the *Al-Skeini* case at paras 58–59, 134. That conclusion is unaffected by the BIOT (Courts) Ordinance 1983. Under section 3 of the Ordinance the 2004 Constitution Order is a "specific law" which would override the 1998 Act (on the assumption that it applied at all) and could not be impugned by it since that would reverse the effect of the wording of section 3. In any event the 1998 Act clearly relates to the United Kingdom: see section 21(1). Sections 4, 6 and 7, in referring to a "court", a "public authority" and the "appropriate court or tribunal" respectively cannot sensibly refer to BIOT. *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643 does not affect that position. Accordingly the claimant cannot rely on the 1998 Act. E F G

International agreements do not give rise to enforceable legal rights, except in so far as they have been incorporated into domestic law: see *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696; *R v Lyons* [2003] 1 AC 976 and *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499–500. The same applies in relation to overseas territories: see *Attorney General for Canada v Attorney General for Ontario* [1937] AC 326. Thus rights recognised in treaties of cession do not override any subsequent exercise of the royal prerogative and the latter may be exercised in disregard of international agreements: see *Sobhuza II v Miller* [1926] AC 518; *Nyali Ltd v Attorney General* H



- A [1956] 1 QB 1; *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733 and *Post Office v Estuary Radio Ltd* [1968] 2 QB 740.

The prerogative constituent power is not constrained by any obligation not to legislate inconsistently with the United Kingdom's treaty obligations: see *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189; *Chundawadra v Immigration Appeal Tribunal* [1988] Imm AR 161 and *Behluli v Secretary of State for the Home Department* [1998] Imm AR 407.

- B Cases to the contrary were decided per incuriam on this point: see *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] QB 811 and *R v Uxbridge Magistrates' Court, Ex p Adimi* [2001] QB 667.

As an abstract statement of principle a rule of customary international law is capable of being incorporated into domestic law, if it is accepted as forming part of the common law: see *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2007] 1 AC 270 and *R v Jones (Margaret)* [2007] 1 AC 136. However principles of customary international law are not, in general, automatically incorporated into common law. Any such practice would be contrary to principle: see *Cook v Sprigg* [1899] AC 572; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418; *Mortensen v Peters* (1906) 8 F (J) 93; *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271; *Chung Chi Cheung v The King* [1939] AC 160; *R v Lyons* [2003] 1 AC 976 and *R v Keyn* (1876) 2 Ex D 63.

The Committee took time for consideration.

- E 22 October 2008. **LORD HOFFMANN**

1 My Lords, this appeal concerns the validity of section 9 of the British Indian Ocean Territory (Constitution) Order 2004 ("the Constitution Order"):

- F "(1) Whereas the territory was constituted and is set aside to be available for the defence purposes of the Government of the United Kingdom and the Government of the United States of America, no person has the right of abode in the territory.

"(2) Accordingly, no person is entitled to enter or be present in the territory except as authorised by or under this Order or any other law for the time being in force in the territory."

- G 2 The constitution was made by prerogative Order in Council. The Divisional Court (Hooper LJ and Cresswell J) held section 9 to be invalid and this decision was affirmed by the Court of Appeal (Sir Anthony Clarke MR and Waller and Sedley LLJ). The Secretary of State appeals to your Lordships' House.

- H 3 The British Indian Ocean Territory ("BIOT") is situated south of the equator, about 2,200 miles east of the coast of Africa and 1,000 miles south-west of the southern tip of India. It consists of a group of coral atolls known as the Chagos Archipelago of which the largest, Diego Garcia, has a land area of about 30 km<sup>2</sup>. Some distance to the north lie Peros Banhos (13 km<sup>2</sup>) and the Salomon Islands (5 km<sup>2</sup>).

4 The islands were a dependency of Mauritius when it was ceded to the United Kingdom by France in 1814 and until 1965 were administered as part

of that colony. Their main economic activity was gathering coconuts and extracting and selling the copra or kernels. In 1962, when the plantations were acquired by a Seychelles company called Chagos Agalega Ltd (“the company”) the settled population was a very small community (less than 1,000 on the three islands) who called themselves Ilois (Creoles des Iles) and whose families had in some cases lived in the islands for generations. With the assistance of contract labour from the Seychelles and Mauritius, the Ilois were mainly employed in tending the coconut trees and producing the copra. A  
B

5 The evidence suggests that the Ilois, who now prefer to be called Chagossians, lived an extremely simple life. The company, whose managers acted as justices of the peace, ran the islands in feudal style. Each family had a house with a garden and some land to provide vegetables, poultry and pigs to supplement the imported provisions supplied by the company. They also did some fishing. There was work in the copra industry as well as some construction, boat building and domestic service for the women. No one was involuntarily unemployed. Most of the Chagossians were illiterate and their skills were confined to those needed for the activities on the islands. But they had a rich community life, the Roman Catholic religion and their own distinctive dialect derived (like those of Mauritius and the Seychelles) from the French. C

6 Into this innocent world there intruded, in the 1960s, the brutal realities of global politics. In the aftermath of the Cuban missile crisis and the early stages of the Vietnam War, the United States felt vulnerable without a land based military presence in the Indian Ocean. A survey of available sites suggested that Diego Garcia would be the most suitable. In 1964 it entered into discussions with Her Majesty’s Government which agreed to provide the island for use as a base. At that time the independence of Mauritius and the Seychelles was foreseeable and the United States was unwilling that sovereignty over Diego Garcia should pass into the hands of an independent “non-aligned” government. The United Kingdom therefore made the British Indian Ocean Territories Order 1965 (“the BIOT Order”) which, under powers contained in the Colonial Boundaries Act 1895 (58 & 59 Vict c 34), detached the Chagos Archipelago (and some other islands) from the colony of Mauritius and constituted them a separate colony known as BIOT. The order created the office of Commissioner of BIOT and conferred upon him power to “make laws for the peace, order and good government of the territory”. Those inhabitants of BIOT who had been citizens of the United Kingdom and Colonies by virtue of their birth or connection with the islands when they were part of Mauritius retained their citizenship. When Mauritius became independent in 1968 they acquired Mauritian citizenship but, by an exception in the Mauritius Independence Act 1968, did not lose their UK citizenship. D  
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F  
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7 At the end of 1966 there was an exchange of notes between Her Majesty’s Government and the Government of the United States by which the United Kingdom agreed in principle to make BIOT available to the United States for defence purposes for an indefinitely long period of at least 50 years. It subsequently agreed to the establishment of the base on Diego Garcia and to allow the United States to occupy the other islands of the Archipelago if they should wish to do so. H

8 In 1967 the United Kingdom Government bought all the land in the Archipelago from the company but granted the company a lease to enable it

A to continue to run the coconut plantations until the United States needed  
vacant possession. It took some time for the US Defence Department to  
obtain Congressional approval but in 1970 it gave notice that Diego  
Garcia would be required in July 1971. After receiving this notice the  
Commissioner of BIOT, using his powers of legislation under the BIOT  
order, made the Immigration Ordinance 1971. It provided in section 4(1)  
B that “no person shall enter the territory or, being in the territory, shall be  
present or remain in the territory, unless he is in possession of a permit . . .  
[issued by an immigration officer]”.

9 Between 1968 and 1971 the United Kingdom Government secured  
the removal of the population of Diego Garcia, mostly to Mauritius and the  
Seychelles. A small population remained on Peros Banhos and the Salomon  
Islands, but they were evacuated by the middle of 1973. No force was used  
C but the islanders were told that the company was closing down its activities  
and that unless they accepted transportation elsewhere, they would be left  
without supplies. The whole sad story is recounted in detail in an appendix  
to the judgment of Ouseley J in *Chagos Islanders v Attorney General* [2003]  
EWHC 2222 (QB); *The Times*, 10 October 2003.

10 My Lords, it is accepted by the Secretary of State that the removal  
and resettlement of the Chagossians was accomplished with a callous  
D disregard of their interests. For the most part, the community was left to  
fend for itself in the slums of Port Louis. The reasons were to some extent  
the usual combination of bureaucracy and Treasury parsimony but very  
largely the Government’s refusal to acknowledge that there was any  
indigenous population for which the United Kingdom had a responsibility.  
The Immigration Ordinance 1971, denying that anyone was entitled to enter  
E or live in the islands, was part of the legal façade constructed to defend this  
claim. The Government adopted this position because of a fear (which may  
well have been justified) that the Soviet Union and its “non-aligned”  
supporters would use the Chagossians and the United Kingdom’s obligations  
to the people of a non-self-governing territory under article 73 of the  
United Nations Charter to prevent the construction of a military base in  
the Indian Ocean.

F 11 When the Chagossians arrived in Mauritius they found themselves  
in a country with high unemployment and considerable poverty. Their  
conditions were miserable. There was a long period of negotiation between  
the Governments of Mauritius and the United Kingdom over payment  
for the cost of resettlement, but eventually in September 1972 the two  
Governments agreed on a payment of £650,000, which was paid in March  
G 1973. The Mauritius Government did nothing with the money until 1977  
when, depleted by inflation, it was distributed in cash to 595 Chagossian  
families.

12 The Chagossians sought support and legal advice. In February  
1975 Michael Vencatessen, who had left Diego Garcia in 1971, issued a writ  
in the High Court in London against the Foreign and Defence Secretaries and  
the Attorney General. His proceedings were funded by legal aid and he  
H received the advice of distinguished counsel. The claim was for damages for  
intimidation and deprivation of liberty in connection with his departure  
from Diego Garcia, but the proceedings came to be accepted on both sides as  
raising the whole question of the legality of the removal of the Chagossians  
from the islands.

13 Negotiations took place between the UK Government and Mr Vencatessen and his advisers, who were treated as acting on behalf of the Chagossians as a whole. In 1979 an agreement was reached with Mr Vencatessen and his advisers for a payment of £1.25m in settlement of all the claims of the Chagossians. His solicitor went to Mauritius to seek the approval of the community but was unable to obtain it. Further negotiations, in which the Government of Mauritius participated, took place over the next three years. Finally in July 1982 it was agreed that the UK Government would pay £4m into a trust fund for the Chagossians, set up under a Mauritian statute. The agreement was signed by the two Governments in the presence of Chagossian representatives and provided for individual beneficiaries to sign forms renouncing all their claims arising out of their removal from the islands. About 1,340 did so, but a few did not.

14 At that point the UK Government might have thought that, however badly its predecessors in office may have behaved in securing the removal of the Chagossians from the islands, the matter was now settled and a line could be drawn under this unfortunate episode. Any such hope would have been disappointed. Sixteen years later, on 30 September 1998 Mr Bancoult, the applicant in these proceedings, applied for judicial review of the Immigration Ordinance 1971 and a declaration that it was void because it purported to authorise the banishment of British Dependent Territory citizens from the territory and a declaration that the policy which prevented him from returning to and residing in the territory was unlawful.

15 The Government's reaction to the institution of these proceedings was to commission an independent feasibility study to examine whether it would be possible to resettle some of the Chagossians on the outer islands of Peros Banhos and the Salomon Islands. There was no question of their return to Diego Garcia, which the United States was entitled to occupy until at least 2016. It must have been clear to both parties that the challenge to the validity of the 1971 Ordinance was largely symbolic. There was no evidence that it had ever been used to expel anyone from the islands. The islanders who left between the time it was made and the final evacuation in 1973 did so because they were left with the alternative of being abandoned without support or supplies. Nor would its revocation have any practical effect on whether the Chagossians could go back and reside there. That would require an investment in infrastructure and employment which the Chagossians could not themselves provide. As was demonstrated by subsequent actions, the judicial review proceedings were only a part of a new campaign by the Chagossians to obtain UK Government support for their resettlement to right the wrongs of 1968–1973.

16 On 3 November 2000 the Divisional Court (Laws LJ and Gibbs J) gave judgment in favour of Mr Bancoult: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 (“*Bancoult (No 1)*”). They decided that a power to legislate for the “peace, order and good government” of the territory did not include a power to expel all the inhabitants. The relief granted was an order quashing section 4 of the Immigration Ordinance 1971 as ultra vires.

17 After the judgment had been given, the Foreign Secretary (Mr Robin Cook) issued a press release:

“Following the judgment in the BIOT Case on 3 November, Foreign Secretary Robin Cook issued the following statement: ‘I have decided to

A accept the court's ruling and the Government will not be appealing. The work we are doing on the feasibility of resettling the Ilois now takes on a new importance. We started the feasibility work a year ago and are now well underway with phase two of the study. Furthermore, we will put in place a new Immigration Ordinance which will allow the Ilois to return to the outer islands while observing our Treaty obligations. This Government has not defended what was done or said 30 years ago. As  
B Laws LJ recognised, we made no attempt to conceal the gravity of what happened. I am pleased that he has commended the wholly admirable conduct in disclosing material to the court and praised the openness of today's Foreign Office.'"

18 On the same day, the commissioner revoked the 1971 Immigration Ordinance and made the Immigration Ordinance 2000. This largely  
C repeated the provisions of the previous Ordinance but contained a new section 4(3) which provided that the restrictions on entry or residence imposed by section 4(1) should (with the exception of Diego Garcia) not apply to anyone who was a British Dependent Territories citizen by virtue of his connection with BIOT.

19 As was to be expected, the change in the law made no practical  
D difference. Some Chagossians made visits to the outer islands to tend family graves or simply to see and try to recognise their former homeland, but such visits had been made by permit under the old Ordinance and were invariably funded by the BIOT. No one went to live there. They awaited the report of the feasibility study.

20 In April 2002, before the production of the report, a group action was commenced on behalf of the Chagos Islanders against the Attorney  
E General and other ministers, claiming compensation and restoration of the property rights of the islanders and declarations of their entitlement to return to all the Chagos Islands and to measures facilitating their return. On 9 October 2003 Ouseley J in *Chagos Islanders v Attorney General* [2003] EWHC 2222 struck out this action on the grounds that the claim to more compensation after the settlement of the Vencatessen case was an  
F abuse of process, that the facts did not disclose any arguable causes of action in private law and that the claims were in any case statute-barred.

21 The importance of this judgment was that it unequivocally affirmed the validity of the 1982 settlement. The UK Government had discharged its obligations to the Chagossians by payment in full and final settlement.

22 On 22 July 2004, the Court of Appeal (Dame Elizabeth Butler-Sloss P, Sedley and Neuberger LJ) [2004] EWCA Civ 997 refused leave to appeal.  
G Sedley LJ, who gave the judgment of the court, ended by saying, at para 54:

"This judgment brings to an end the quest of the displaced inhabitants of the Chagos Islands and their descendants for legal redress against the state directly responsible for expelling them from their homeland. They have not gone without compensation, but what they have received has done little to repair the wrecking of their families and communities, to  
H restore their self-respect or to make amends for the underhand official conduct now publicly revealed by the documentary record. Their claim in this action has been not only for damages but for declarations securing their right to return. The causes of action, however, are geared to the recovery of damages, and no separate claims to declaratory relief have

been developed before us. It may not be too late to make return possible, but such an outcome is a function of economic resources and political will, not of adjudication.” A

23 The question of economic resources was of course what the feasibility study had been commissioned to investigate. The report was produced in June 2002. It concluded that “agroforestral production would be unsuitable for commercial ventures”. So there could be no return to gathering coconuts and selling copra. Fisheries and mariculture offered opportunities although they would require investment. Tourism could be encouraged, although there was nowhere that aircraft could land. It might only be feasible in the short term to resettle the islands, although the water resources were adequate only for domestic rather than agricultural or commercial use. But looming over the whole debate was the effect of global warming which was raising the sea level and already eroding the corals of the low lying atolls. In the long term, the need for sea defences and the like would make the cost of inhabitation prohibitive. On any view, the idyll of the old life on the islands appeared to be beyond recall. Even in the short term, the activities of the islanders would have to be very different from what they had been. B C

24 There followed discussion of the report between the Government (represented by Baroness Amos, Parliamentary Under-Secretary of State at the Foreign Office) and the applicant Mr Bancoult, his advisers and other representatives of the Chagossians. The Government was unwilling to commit itself one way or the other to a definite policy on resettlement until the Chagos Islanders action, which was claiming a legal entitlement to resettlement, had been resolved. But it resisted attempts on the part of the islanders to claim that the Foreign Secretary’s press announcement and the revocation of the 1971 Immigration Ordinance amounted already to the adoption of a policy of resettlement. That decision would have to await the outcome of the litigation. D E

25 The judgment of Ouseley J in October 2003 in *Chagos Islanders v Attorney General* [2003] EWHC 2222 made it clear that there was no legal obligation upon the United Kingdom, whether by way of additional compensation or otherwise, to fund resettlement. The Government did not make any immediate statement, presumably because until 22 July 2004 there was still the possibility of an appeal. Before then, however, there was a development which gave the Government concern. Newspaper articles appeared in Mauritius suggesting that the Chagossians and their supporters (principally a political group in Mauritius calling itself LALIT) were planning some form of direct action by landings on the islands. A “flotille de la paix” would be assembled to take some of the Chagossians to Diego Garcia or the outer islands. As might be expected, the various participants in this project had somewhat different aims. For LALIT, it was part of an anti-American campaign to close the base at Diego Garcia. Mr Bancoult did not want the base closed (he hoped it might employ resettled Chagossians) but was willing to lead a landing on the outer islands. In either case, since permanent resettlement on the islands was impractical without substantial investment, the landings, even if followed by temporary camps, could be no more than gestures in furtherance of the respective political aims of the parties, designed to attract publicity and embarrass the Governments of the United Kingdom and the United States. (On 12 March 2008 the “Guardian” F G H

A reported that two British “human rights campaigners” had been arrested off Diego Garcia. They said that they were part of a group called the People’s Navy which has been seeking to highlight the plight of the Chagossians and to protest against the military use of the islands.)

B 26 The Foreign Office was advised by its High Commission in Mauritius that the possibility of landings on the islands in the autumn of 2004 should be taken seriously. The United States also informed the UK Government of its concern at any action which might compromise what it regarded as the unique security of Diego Garcia. The Government had decided that in view of the feasibility report, it would not support resettlement of the islands. It therefore decided to restore full immigration control. On 10 June 2004 Her Majesty made the Constitution Order which revoked the BIOT Order and granted a new constitution including section 9, which I quoted at  
C the commencement of my speech. At the same time, another Order in Council, the British Indian Ocean Territory (Immigration) Order 2004 (the “Immigration Order”) was made dealing with the details of immigration control. In a written statement to the House of Commons on 15 June 2004 the Foreign Office Under Secretary of State Mr Bill Rammell explained that in the light of the feasibility report it would be “impossible for the  
D Government to promote or even permit resettlement to take place. After long and careful consideration, we have therefore decided to legislate to prevent it” (Hansard (HC Debates), col 32 WS).

E 27 The minister went on to say that there had been “developments in the international security climate” since the judgment in *Bancoult (No 1)* to which “due weight has had to be given”. He did not mention the threatened landings which precipitated the decision to legislate, but the Foreign Secretary, in a letter dated 9 July 2004 to the chairman of the Foreign Affairs Committee of the House of Commons explaining why the committee had not been shown the Constitution Order in draft before it was made, said that “we needed to preserve complete confidentiality if we were to avoid the risk of an attempt by the Chagossians to circumvent the Orders before they came into force”.

F 28 These proceedings were commenced by a claim for judicial review dated 24 August 2004, applying for section 9 of the Constitution Order and the Immigration Order to be quashed. The Divisional Court [2006] EWHC 1038 (Admin) at [120]–[122] accepted an argument that the Orders were irrational because their rationality had to be judged by the interests of BIOT. That meant the people who lived or used to live on BIOT. The Orders were not made in the interests of the Chagossians but in the interests of the  
G United Kingdom and the United States and were therefore irrational.

H 29 This reasoning was not adopted, at any rate in quite the same form, by the Court of Appeal [2008] QB 365. Sedley LJ came nearest when he said that the removal or subsequent exclusion of the population “for reasons unconnected with their collective wellbeing” could not be a legitimate purpose of the power of colonial governance exercisable by Her Majesty in Council. It was an abuse of that power. He also considered that the Foreign Secretary’s press statement after the judgment in *Bancoult (No 1)* and the Immigration Ordinance 2000 were promises to the Chagossians which gave rise to a legitimate expectation that, in the absence of a relevant change of circumstances, their rights of entry and abode in the islands would not be revoked. There had been no such change.

30 Sir Anthony Clarke MR and Waller LJ agreed that the applicant was entitled to succeed on the ground of a legitimate expectation. The Master of the Rolls also agreed with Sedley LJ that the Orders were an abuse of power because (see para 123) “they did not have proper regard for the interests of the Chagossians”.

31 Before your Lordships the case has been most ably argued by Mr Jonathan Crow for the Crown and Sir Sydney Kentridge for the respondent. It is common ground that as BIOT was originally ceded to the Crown, Her Majesty in Council has plenary power to legislate for the territory. The law is stated in *Halsbury’s Laws of England*, 4th ed reissue, vol 6 (2003), para 823:

“In a conquered or ceded colony the Crown, by virtue of its prerogative, has full power to establish such executive, legislative, and judicial arrangements as the Crown thinks fit, and generally to act both executively and legislatively, provided the provisions made by the Crown do not contravene any Act of Parliament extending to the colony or to all British possessions. The Crown’s legislative and constituent powers are exercisable by Order in Council, Letters Patent or Proclamation . . .”

32 Authority for these propositions will be found in Lord Mansfield’s judgment in *Campbell v Hall* (1774) 1 Cowp 204, 211 (“no question was ever started before, but that the King has a right to a legislative authority over a conquered country”). This appeal requires your Lordships to determine the limits of that power.

33 On this point, both sides put forward what I would regard as extreme propositions. On the one hand, Mr Crow argued the courts had no power to review the validity of an Order in Council legislating for a colony. This was either because it was primary legislation having unquestionable validity comparable with that of an Act of Parliament, or because review was excluded by the terms of the Colonial Laws Validity Act 1865. On the other hand, Sir Sydney submitted that a right of abode was so sacred and fundamental that the Crown could not in any circumstances have power to remove it. Only an Act of Parliament could do so. I would reject both of these propositions.

34 It is true that a prerogative Order in Council is primary legislation in the sense that the legislative power of the Crown is original and not subordinate. It is classified as primary legislation for the purposes of the Human Rights Act 1998: see paragraph (f)(i) of the definition in section 21(1). That means that it cannot be overridden by Convention rights. The court can only make a declaration of incompatibility under section 4.

35 But the fact that such Orders in Council in certain important respects resemble Acts of Parliament does not mean that they share all their characteristics. The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality; although it may be legislative in character, it is still an exercise of power by the executive alone. Until the decision of this House in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, it may have been assumed that the exercise of prerogative powers was, as such, immune from judicial review. That objection being removed, I see no reason why prerogative legislation should



- A not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action. Mr Crow rightly pointed out that the *Council of Civil Service Unions* case was not concerned with the validity of a prerogative order but with an executive decision made pursuant to powers conferred by such an order. That is a ground upon which, if your Lordships were inclined to distinguish the case, it would be open to you to do so. But I see no reason for making
- B such a distinction. On 21 February 2008 the Foreign Secretary told the House of Commons that, contrary to previous assurances, Diego Garcia had been used as a base for two extraordinary rendition flights in 2002 (Hansard (HC Debates), cols 547–548). There are allegations, which the US authorities have denied, that Diego Garcia or a ship in the waters around it have been used as a prison in which suspects have been tortured. The idea
- C that such conduct on British territory, touching the honour of the United Kingdom, could be legitimated by executive fiat, is not something which I would find acceptable.

- 36 The argument based on the Colonial Laws Validity Act 1865 is rather more arcane. The background to the Act is the statement of Lord Mansfield in *Campbell v Hall* 1 Cowp 204, 209 that although the King had power to introduce new laws into a conquered country, he could not make
- D “any new change contrary to fundamental principles”. If the King’s power did not extend to making laws contrary to fundamental principles (presumably, of English law) in conquered colonies, it was regarded as arguable, in the first half of the 19th century, that the same limitation applied to the legislatures of settled colonies. It was never altogether clear what counted as fundamental principles and the Colonial Laws Validity Act
- E was intended to put the question to rest by providing that no colonial laws should be invalid by reason of repugnancy to any rule of English law except a statute extending to the colony. In section 1 it defined “colonial law” as a law made for a colony by its legislature or by Order in Council. It defined “colony” as “all of Her Majesty’s possessions abroad in which there shall exist a legislature”. It then provided:

- F “2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

- G “3. No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.”

- 37 Mr Crow submits that BIOT is a colony with a legislature, namely, the Commissioner. The Constitution Order is a law made for the colony by
- H Order in Council and therefore a “colonial law”. It therefore cannot be void or inoperative by reason of its repugnancy to English common law doctrines of judicial review.

- 38 The Court of Appeal rejected this argument on the ground that the 1865 Act was concerned with the repugnancy of otherwise valid colonial

laws to the law of England. The principles of judicial review, on the other hand, determined whether the Order in Council was valid in the first place. No question of repugnancy arose because, if the Order in Council was beyond the powers of Her Majesty in Council, there was no colonial law which could be repugnant to anything. A

39 In a paper written for the Oxford Law Faculty “Common Law Constraints: Whose Common Good Counts?” ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1100628](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100628)) Professor Finnis of University College has persuasively argued that this is a slippery argument because repugnancy to English law (or fundamental principles of English law) can be regarded, and was regarded in the first half of the 19th century, as limiting the powers of colonial legislatures rather than as being an independent ground for invalidating laws otherwise validly made. I agree that a distinction between initial invalidity for lack of compliance with doctrines of English public law and invalidity for repugnancy to English law is too fine to be serviceable. B  
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40 Nevertheless, I would reject the argument based on the Colonial Laws Validity Act 1865 for a different reason. In my opinion the Act was intended to deal with the validity of colonial laws (whether made by the local legislature or by Her Majesty in Council) from the perspective of their forming part of the local system of laws administered by the local courts. Section 3 made it clear that in considering the validity of such laws, the courts were not to concern themselves with the law of England, although they might well apply local principles of judicial review identical with those existing in English law. But these proceedings are concerned with the validity of the Order, not simply as part of the local law of BIOT but, as Professor Finnis says, as imperial legislation made by Her Majesty in Council in the interests of the undivided realm of the United Kingdom and its non-self-governing territories. The Constitution Order created the BIOT legislature, in the form of the Commissioner, and it seems to me to illustrate the amphibious nature of the Order in Council, as both British and colonial legislation, that the legislature which is said to bring BIOT within the definition of a colony for the purposes of the Act was created by the very Order which is said to be a law “made for a colony”. The fact is that Parliament in 1865 would simply not have contemplated the possibility of an Order in Council legislating for a colony as open to challenge in an English court on principles of judicial review. It was concerned with the law applicable by colonial courts, not English courts. D  
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41 It therefore seems to me that from the point of view of the jurisdiction of the courts of the United Kingdom to review the exercise of prerogative powers by Her Majesty in Council, the Constitution Order is not a colonial law, although it may well have been from the point of view of a BIOT court applying BIOT law. G

42 Sir Sydney’s proposition that the Crown does not have power to remove an islander’s right of abode in the territory is in my opinion also too extreme. He advanced two reasons. The first was that a right of abode was a fundamental constitutional right. He cited the 29th chapter of Magna Carta: “No freeman shall be taken, or imprisoned . . . or exiled, or any otherwise destroyed . . . but by the lawful judgment of his peers, or by the law of the land.” H

43 “But . . . by the law of the land” are in this context the significant words. Likewise Blackstone (*Commentaries on the Laws of England*,

A 15th ed (1809), vol 1, p 137): “But no power on earth, except the authority of Parliament, can send any subject of England *out of* the land against his will; no, not even a criminal.”

B 44 That remains the law of England today. The Crown has no authority to transport anyone beyond the seas except by statutory authority. At common law, any subject of the Crown has the right to enter and remain in the United Kingdom whenever and for as long as he pleases: see *R v Bhagwan* [1972] AC 60. The Crown cannot remove this right by an exercise of the prerogative. That is because since the 17th century the prerogative has not empowered the Crown to change English common or statute law. In a ceded colony, however, the Crown has plenary legislative authority. It can make or unmake the law of the land.

C 45 What these citations show is that the right of abode is a creature of the law. The law gives it and the law may take it away. In this context I do not think that it assists the argument to call it a constitutional right. The constitution of BIOT denies the existence of such a right. I quite accept that the right of abode, the right not to be expelled from one’s country or even one’s home, is an important right. General or ambiguous words in legislation will not readily be construed as intended to remove such a right: see *R v Secretary of State for the Home Department, Ex p Simms* [2000] D 2 AC 115, 131–132. But no such question arises in this case. The language of section 9 of the Constitution Order could hardly be clearer. The importance of the right to the individual is also something which must be taken into account by the Crown in exercising its legislative powers—a point to which I shall in due course return. But there seems to me no basis for saying that the right of abode is in its nature so fundamental that the legislative powers of the Crown simply cannot touch it.

E 46 Next, Sir Sydney submitted that the powers of the Crown were limited to legislation for the “peace, order and good government” of the territory. Applying the reasoning of the Divisional Court in *Bancoult* (No 1), he said that meant that the law had to be for the benefit of the inhabitants, which could not possibly be said of a law which excluded them from the territory.

F 47 There are two answers to this submission. The first is the prerogative power of the Crown to legislate for a ceded colony has never been limited by the requirement that the legislation should be for the peace, order and good government or otherwise for the benefit of the inhabitants of that colony. That is the traditional formula by which legislative powers are conferred upon the legislature of a colony or a former colony upon the attainment of independence. But Her Majesty exercises her powers of prerogative legislation for a non-self-governing colony on the advice of her ministers in the United Kingdom and will act in the interests of her undivided realm, including both the United Kingdom and the colony: see *Halsbury’s Laws of England*, 4th ed reissue, vol 6, para 716:

H “The United Kingdom and its dependent territories within Her Majesty’s dominions form one realm having one undivided Crown . . . To the extent that a dependency has responsible government, the Crown’s representative in the dependency acts on the advice of local ministers responsible to the local legislature, but in respect of any dependency of the United Kingdom (that is, of any British overseas territory) acts of

Her Majesty herself are performed only on the advice of the United Kingdom Government.” A

48 Having read Professor Finnis’s paper, I am inclined to think that the reason which I gave for dismissing the cross-appeal in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, 551 was rather better than the reason I gave for allowing the Crown’s appeal and that on this latter point Lord Nicholls of Birkenhead was right. B

49 Her Majesty in Council is therefore entitled to legislate for a colony in the interests of the United Kingdom. No doubt she is also required to take into account the interests of the colony (in the absence of any previous case of judicial review of prerogative colonial legislation, there is of course no authority on the point) but there seems to me no doubt that in the event of a conflict of interest, she is entitled, on the advice of Her United Kingdom ministers, to prefer the interests of the United Kingdom. I would therefore entirely reject the reasoning of the Divisional Court which held the Constitution Order invalid because it was not in the interests of the Chagossians. C

50 My second reason for rejecting Sir Sydney’s argument is that the words “peace, order and good government” have never been construed as words limiting the power of a legislature. Subject to the principle of territoriality implied in the words “of the territory”, they have always been treated as apt to confer plenary law-making authority. For this proposition there is ample authority in the Privy Council: *R v Burah* (1878) 3 App Cas 889; *Riel v The Queen* (1885) 10 App Cas 675; *Ibralebbe v The Queen* [1964] AC 900 and the High Court of Australia *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1. The courts will not inquire into whether legislation within the territorial scope of the power was in fact for the “peace, order and good government” or otherwise for the benefit of the inhabitants of the territory. So far as *Bancoult (No 1)* departs from this principle, I think that it was wrongly decided. D

51 Sir Sydney placed great reliance upon a statement of Evatt J in *Trustees Executors and Agency Co Ltd v Federal Comr of Taxation* (1933) 49 CLR 220, 234 that the question was “whether the law in question can be truly described as being for the peace, order and good government of the Dominion concerned”. But this statement must not be wrenched from the context in which it was made. The judge was concerned with the principle of territoriality (the case was about whether Australian estate duty could be levied on movables situated abroad) and the emphasis was on the words “of the Dominion concerned”. There was no suggestion that if the law satisfied the principle of territoriality (as this law and the Immigration Ordinance 1971 in *Bancoult (No 1)* obviously did) the courts could inquire into whether its objects could be said to be peace, order and good government. E

52 Having rejected the extreme arguments on both sides, I come to what seems to me the main point in this appeal, namely the application of ordinary principles of judicial review. On this question there was a radical difference in the approaches advocated by the parties. Mr Crow said that because the Crown was acting in the interests of the defence of the realm, diplomatic relations with the United States and the use of public funds in supporting any settlement on the islands, the courts should be very reluctant F

A to interfere. Judicial review should be undertaken with a light touch and the Order set aside only if it appeared to be wholly irrational. Sir Sydney, on the other hand, said that because the Order deprived the Chagossians of the important human right to return to their homeland, the Order should be subjected to a much more exacting test. As he said in his printed case, at para 137:

B “Where a measure affects fundamental rights, or has profoundly intrusive effects, the courts will employ an ‘anxious’ degree of scrutiny in requiring the public body in question to demonstrate that the most compelling of justifications existed for such measures.”

53 I would not disagree with this proposition, which is supported by a quotation from the judgment of Sir Thomas Bingham MR in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554. However, I think it is very important that in deciding whether a measure affects fundamental rights or has “profoundly intrusive effects”, one should consider what those rights and effects actually are. If we were in 1968 and concerned with a proposal to remove the Chagossians from their islands with little or no provision for their future, that would indeed be a profoundly intrusive measure affecting their fundamental rights. But that was many years ago, the deed has been done, the wrong confessed, compensation agreed and paid. The way of life the Chagossians led has been irreparably destroyed. The practicalities of today are that they would be unable to exercise any right to live in the outer islands without financial support which the British Government is unwilling to provide and which does not appear to be forthcoming from any other source. During the four years that the Immigration Ordinance 2000 was in force, nothing happened. No one went to live on the islands. Thus their right of abode is, as I said earlier, purely symbolic. If it is exercised by setting up some camp on the islands, that will be a symbol, a gesture, aimed at putting pressure on the Government. The whole of this litigation is, as I said in *R v Jones (Margaret)* [2007] 1 AC 136, 177 “the continuation of protest by other means”. No one denies the importance of the right to protest, but when one considers the rights in issue in this case, which have to be weighed in the balance against the defence and diplomatic interests of the state, it should be seen for what it is, as a right to protest in a particular way and not as a right to the security of one’s home or to live in one’s homeland. It is of course true that a person does not lose a right because it becomes difficult to exercise or because he will gain no real advantage by doing so. But when a legislative body is considering a change in the law which will deprive him of that right, it cannot be irrational or unfair to consider the practical consequences of doing so. Indeed, it would be irrational not to.

54 My Lords, I think that if one keeps firmly in mind the practical effect of section 9 of the Constitution Order, the issues in this appeal fall into place. The Government does not consider that it is in the public interest that an unauthorised settlement on the islands should be used as a means of exerting pressure to compel it to fund a resettlement which it has decided would be uneconomic. That is a view it is entitled to take. In the Court of Appeal, Sedley LJ treated the question of funding as irrelevant. The applicant was not asking for an order that the Government fund resettlement. To focus on the logistics of resettlement was, he said, at p 407, to miss the point: “The point is that the two Orders in Council negate one of the most

fundamental liberties known to human beings, the freedom to return to one's own homeland, however poor and barren the conditions of life . . .” A

55 I respectfully think that this misses the point. Funding is the subtext of what this case is about. The Chagossians have, not unreasonably, shown no inclination to return to live Crusoe-like in poor and barren conditions of life. The action is, like *Bancoult* (No 1), a step in a campaign to achieve a funded resettlement. The attempt to achieve that through domestic litigation foundered before Ouseley J. But that does not mean that the Secretary of State is bound to assume that these expensive proceedings are purely academic. The Secretary of State is surely entitled to take into account that once a vanguard of Chagossians establishes itself on the islands in poor and barren conditions of life, there may be a claim that the United Kingdom is subject to a sacred trust under article 73 of the United Nations Charter to “ensure . . . [the] economic, social and educational advancement” of the residents and to send reports to the Secretary-General. B C

56 It is true that the Chagossians will now require immigration consent even to visit the islands. But the Government have made it clear that such visits, to tend graves and so forth, will be allowed, and since in practice they are funded by the BIOT administration, immigration consent will be no more than an additional formality. Furthermore, there is no reason why, if at some time in the future, circumstances should change, the controls should not be lifted. D

57 In addition, as Mr Rammell told the House of Commons, the Government had to give due weight to security interests. The United States had expressed concern that any settlement on the outer islands would compromise the security of its base on Diego Garcia. A representative of the State Department wrote a letter for use in these proceedings, giving details of the ways in which it was feared that the islands might be useful to terrorists. Some of these scenarios might be regarded as fanciful speculations but, in the current state of uncertainty, the Government is entitled to take the concerns of its ally into account. E

58 Policy as to the expenditure of public resources and the security and diplomatic interests of the Crown are peculiarly within the competence of the executive and it seems to me quite impossible to say, taking fully into account the practical interests of the Chagossians, that the decision to reimpose immigration control on the islands was unreasonable or an abuse of power. F

59 The applicant's alternative ground for judicial review was that the Foreign Secretary's press announcement after the judgment in *Bancoult* (No 1), accompanied by the revocation of immigration controls by the 2000 Ordinance, was a promise which created a legitimate expectation that the islanders would be free from such controls. In the absence of a change in relevant circumstances, the Crown should be required to keep its promise. G

60 The relevant principles of administrative law were not in dispute between the parties and I do not think that this is an occasion on which to re-examine the jurisprudence. It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is “clear, unambiguous and devoid of relevant qualification”: see Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration H

A in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called “the macro-political field”: see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131.

B 61 In my opinion this claim falls at the first hurdle, that is, the requirement of a clear and unambiguous promise. The Foreign Secretary said that the Crown accepted the decision in *Bancoult (No 1)* that the 1971 Immigration Ordinance was outwith the powers the BIOT Order and that a new Ordinance would be made which would allow “the Ilois to return to the outer islands”. This was done. Nothing was said about how long that would continue. But the background to the statement was the ongoing study “on the feasibility of resettling the Ilois”. If that resulted in a decision to  
C resettle, then one would expect the right of abode of the Chagossians on the outer islands to continue. On the other hand, if it did not, the whole situation might need to be reconsidered. It was obvious that no one contemplated the resettlement of the Chagossians unless the Government, taking into account the findings of the feasibility study, decided to support it. If they did not, a new situation would arise. The Government might decide  
D that little harm would be done by leaving the Chagossians with a theoretical right to return to the islands and for two years after the feasibility report, that seems to have been the view that was taken. But the Foreign Secretary’s press statement contained no promises about what, in such a case, would happen in the long term.

E 62 No doubt the Chagossians saw things differently. As we have seen, they tried to persuade the Government that the press statement amounted to the adoption of a policy of resettlement. They realised that what mattered was whether the Government was willing to fund resettlement. Otherwise they had secured an empty victory. But the question is what the statement unambiguously promised and in my opinion it comes nowhere near a promise that, even if there could be no resettlement, immigration control would not be reimposed.

F 63 Even if it could be so construed, I consider that there was a sufficient public interest justification for the adoption of a new policy in 2004. For this purpose it is relevant that no one acted to their detriment on the strength of the statement, that the rights withdrawn were not of practical value to the Chagossians and that the decision was very much concerned with the “macro-political field”.

G 64 That leaves two points which were not considered by the Divisional Court or the Court of Appeal and which were lightly touched upon in argument but upon which the House is invited to rule. They are whether, in principle, the validity of the Constitution Order may be affected by the Human Rights Act 1998 or by international law. I do not think that the Human Rights Act 1998 has any application to BIOT. In 1953 the United Kingdom made a declaration under article 56\* of the European Convention  
H on Human Rights extending the application of the Convention to Mauritius as one of the “territories for whose international relations it is responsible”. That declaration lapsed when Mauritius became independent. No such declaration has ever been made in respect of BIOT. It is true that the

\* *Reporter’s note.* Article 56 is now article 63 of the amended Convention.

territory of BIOT was, until the creation of the colony in 1965, part of Mauritius. But a declaration, as appears from the words “for whose international relations it is responsible” applies to a political entity and not to the land which is from time to time comprised in its territory. BIOT has since 1965 been a new political entity to which the Convention has never been extended. A

65 If the Convention has no application in BIOT, then the actions of the Crown in BIOT cannot infringe the provisions of the Human Rights Act 1998: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529. The applicant points out that section 3 of the BIOT Courts Ordinance 1983 provides that the law of England as in force from time to time shall apply to the territory. So, they say, the Human Rights Act, when enacted, became part of the law of the territory. So be it. But the Act defines Convention rights (in section 21(1)) as rights under the Convention “as it has effect for the time being in relation to the United Kingdom”. BIOT is not part of the United Kingdom and the Human Rights Act, though it may be part of the law of England, has no more relevance in BIOT than a local government statute for Birmingham. B C

66 As for international law, I do not understand how, consistently with the well-established doctrine that it does not form part of domestic law, it can support any argument for the invalidity of a purely domestic law such as the Constitution Order. D

67 I would allow the appeal, set aside the orders of the Divisional Court and the Court of Appeal and dismiss the application.

#### LORD BINGHAM OF CORNHILL

68 My Lords, the issue in this appeal is whether section 9 of the British Indian Ocean Territory (Constitution) Order 2004 is lawful. The courts below held it to be unlawful. For reasons given by my noble and learned friend, Lord Mance, which I would respectfully endorse and adopt, I agree with that conclusion. Without wishing to detract from or contradict my noble and learned friend’s reasoning and analysis in any way, I would state in briefest summary what seem to me the key factors pointing to the unlawfulness of the section. I gratefully adopt and need not repeat the summary of the factual background given by my noble and learned friends, Lord Hoffmann and Lord Mance. E F

69 Section 9 was given effect in exercise (or purported exercise) of the royal prerogative to legislate by Order in Council. The royal prerogative, according to Dicey’s famous definition (*An Introduction to the Study of the Law of the Constitution*, 8th ed (1915), p 420), is “the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown”. It is for the courts to inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398E. Over the centuries the scope of the royal prerogative has been steadily eroded, and it cannot today be enlarged: *British Broadcasting Corp’n v Johns* [1965] Ch 32, 79E. As an exercise of legislative power by the executive without the authority of Parliament, the royal prerogative to legislate by Order in Council is indeed an anachronistic survival. When the existence or effect of the royal prerogative is in question the courts must conduct an historical inquiry to ascertain whether there is G H



A any precedent for the exercise of the power in the given circumstances. "If it is law, it will be found in our books. If it is not to be found there, it is not law": *Entick v Carrington* (1765) 19 State Tr 1030, 1066. Such an inquiry was carried out by the Court of Appeal [1919] 2 Ch 197 and the House [1920] AC 508, 524-528, 538-539, 552-554, 563, 573 in *Attorney General v De Keyser's Royal Hotel Ltd*. In *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101, Lord Reid said:

B "The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute. So I would think the proper approach is a historical one: how was it used in former times and how has it been used in modern times?"

C 70 The House was referred to no instance in which the royal prerogative had been exercised to exile an indigenous population from its homeland. Authority negates the existence of such a power. Sir William Holdsworth, *A History of English Law*, (1938), vol X, p 393, states: "The Crown has never had a prerogative power to prevent its subjects from entering the kingdom, or to expel them from it." Laws LJ, in para 39 of his *Bancoult (No 1)* judgment which the Secretary of State accepted, cited further authority:

D "For my part I would certainly accept that a British subject enjoys a constitutional right to reside in or return to that part of the Queen's dominions of which he is a citizen. Sir William Blackstone says in *Commentaries on the Laws of England*, 15th ed (1809), vol 1, p 137: 'But no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal.' Compare *Chitty, A Treatise on the law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (1820), pp 18, 21. Plender, *International Migration Law*, 2nd ed (1988), ch 4, p 133 states: 'The principle that every state must admit its own nationals to its territory is accepted so widely that its existence as a rule of law is virtually beyond dispute . . .' and cites authority of the European Court of Justice in *Van Duyn v Home Office* (Case 41/74) [1975] Ch 358, 378-379 in which the court held that 'it is a principle of international law . . . that a state is precluded from refusing its own nationals the right of entry or residence'. Dr Plender further observes, *International Migration Law*, p 135: 'A significant number of modern national constitutions characterise the right to enter one's own country as a fundamental or human right', and a long list is given. And I should cite this passage,

G at pp 142-143: 'Without exception, the remaining dependencies of the United Kingdom impose systems of immigration control applicable to British citizens coming from the United Kingdom and to those from other dependencies. In two very exceptional cases, immigration control is applied to all persons whatever. Elsewhere, a distinction is drawn between those who belong to the territory and are accordingly immune from immigration control and those who do not belong. In several instances, the statute uses the very word 'belonger'. Thus, a person has the right to land in Hong Kong if he is a 'Hong Kong believer'. Dr Plender's 'two very exceptional cases' are the British Antarctic Territory and BIOT. The British Antarctic Territory has no believers. BIOT has."

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This is not a surprising conclusion, since the relationship between the citizen and the Crown is based on reciprocal duties of allegiance and protection and the duty of protection cannot ordinarily be discharged by removing and excluding the citizen from his homeland. It is not, I think, suggested that those whose homes are in former colonial territories may be treated in a way which would not be permissible in the case of citizens in this country. Hence the disingenuous pretence, in the 1960s–1970s, that there was no population which belonged to the outer islands of the Chagos Archipelago, to which alone this dispute relates. It is unnecessary to consider whether some power such as that claimed might be exercisable in the event of natural catastrophe or acute military emergency, since none such existed. Nor is it to the point that the Queen in Parliament could have legislated to the effect of section 9: it could, but not without public debate in Parliament and democratic decision.

71 I accordingly conclude that there was no royal prerogative power to make an Order in Council containing section 9, and it is accordingly void. But if (contrary to that conclusion) there was power to make it, I agree with my noble and learned friends that the section is susceptible in principle to review by the courts. Applying familiar judicial review principles, I am satisfied that section 9 was unlawful on two main grounds.

72 First, section 9 was irrational in the sense that there was, quite simply, no good reason for making it. (1) It is clear that in November 2000 the re-settlement of the outer islands (let alone sporadic visits by Mr Bancoult and other Chagossians) was not perceived to threaten the security of the base on Diego Garcia or national security more generally. Had it been, time and money would not have been devoted to exploring the feasibility of resettlement. (2) The United States Government had not exercised its treaty right to extend its base to the outer islands. (3) Despite highly imaginative letters written by American officials to strengthen the Secretary of State's hand in this litigation, there was no credible reason to apprehend that the security situation had changed. It was not said that the criminal conspiracy headed by Osama bin Laden was, or was planning to be, active in the middle of the Indian Ocean. In 1968 and 1969 American officials had expressly said that they had no objection to occupation of the outer islands for the time being. (4) Little mention was made in the courts below of the rumoured protest landings by LALIT. Even now it is not said that the threatened landings motivated the introduction of section 9, only that they prompted it. Had the British authorities been seriously concerned about the intentions of Mr Bancoult and his fellow Chagossians they could have asked him what they were. (5) Remarkably, in drafting the 2004 Constitution Order, little (if any) consideration appears to have been given to the interests of the Chagossians whose constitution it was to be. (6) Section 9 cannot be justified on the basis that it deprived Mr Bancoult and his fellows of a right of little practical value. It cannot be doubted that the right was of intangible value, and the smaller its practical value the less reason to take it away.

73 Secondly, section 9 contradicted a clear representation made by the then Secretary of State in his press release of 3 November 2000. There was no representation that the outer islands would be resettled irrespective of the findings of the feasibility study, or that Her Majesty's Government would finance resettlement, and it was implicitly acknowledged that observance of its Treaty obligations might in future oblige the Government to close the

- A outer islands. But there was in my opinion a clear and unambiguous representation, devoid of relevant qualification, that (1) the Government would not be challenging the Divisional Court's decision that Mr Bancoult and his fellow Chagossians had been unlawfully excluded from the outer islands for nearly 30 years, (2) the Government would introduce a new Immigration Ordinance which would allow the Chagossians to return to the
- B outer islands unless or until the United Kingdom's treaty obligations might at some later date forbid it, and (3) the Government would not persist in treating the Chagossians as it had reprehensibly done since 1971. This representation was clearly addressed to Mr Bancoult and those associated with him in the litigation. It was fortified by the making, on the same day, of the Immigration Ordinance 2000 which made special provision for persons
- C (like Mr Bancoult and the Chagossians) who were British Dependent Territories citizens under the British Nationality Act 1981 by virtue of their connection with the British Indian Ocean Territory, together with their spouses and dependent children. Mr Bancoult and his fellows were clearly intended to think, and did, that for the foreseeable future their right to return was assured. The Government could not lawfully resile from its representation without compelling reason, which was not shown. It is not in
- D such circumstances necessary for the representee to show that he has relied on or suffered detriment in reliance on the representation. In any event, by analogy with the law of estoppel, it is enough if the representee would suffer detriment if the representor were to resile from his representation (*Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641).

74 I would for my part dismiss the appeal.

E LORD RODGER OF EARLSFERRY

- 75 My Lords, the unhappy—indeed, in many respects, disgraceful—events of 40 years ago which have ultimately led to this appeal are described in detail in various court decisions and, in particular, in the appendix to the judgment of Ouseley J in *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB). The speech of my noble and learned friend, Lord Hoffmann, includes a briefer, but vivid, description of the islanders' way of
- F life and of how they came to leave the Chagos Archipelago. He has also explained the course of the various litigations. It would serve no useful purpose for me to repeat what he has said. It all forms the background to the legal issue which the House has to decide, viz, whether section 9 of the British Indian Ocean Territory (Constitution) Order 2004 ("the Constitution Order") is valid. It is common ground that, if section 9 is invalid, the same
- G must go for the relevant provisions of the British Indian Ocean Territory (Immigration) Order 2004 ("the Immigration Order").

- 76 In *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529 there was a dispute as to the capacity in which Her Majesty in Council had given an instruction to the Commissioner of South Georgia and the South Sandwich Islands. At the hearing of the present appeal, however, it was common ground that
- H the Constitution Order was made by Her Majesty in right of the United Kingdom.

77 The ultimate source of much of the argument of Sir Sydney Kentridge on behalf of Mr Bancoult was chapter 29 of Magna Carta, one of the few provisions of the charter which is still on the statute book for

England and Wales. It provides inter alia: “No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled . . . but by lawful judgment of his peers, or by the law of the land.” Starting from there, Sir Sydney first argued that, while Parliament could pass a law exiling the Chagossians from the islands, the Queen in Council had no power to do so under the royal prerogative. In any event, he submitted, when making the Order, the Secretary of State who advised Her Majesty had failed to take account of the interests of the islanders, as he was required to do. Further, following the judgment of the Divisional Court in 2000 [2001] QB 1067, the then Foreign Secretary, Mr Cook, had made a statement which gave rise to a legitimate expectation on the part of the Chagossians that they would be allowed to return to live on the outer islands. There were no sufficient policy reasons to entitle the Secretary of State to defeat that legitimate expectation by advising Her Majesty to enact the Constitution Order containing section 9.

78 On behalf of the Secretary of State Mr Crow sought to head off these challenges with two fundamental arguments. First, he said that the Constitution Order was primary legislation enacted by Her Majesty in Council under the royal prerogative and that, as such, it was not open to review by the courts. Secondly, he argued that, in any event, a challenge was precluded by sections 2 and 3 of the Colonial Laws Validity Act 1865 which provide:

“2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

“3. No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.”

79 The Chagos Archipelago, along with Mauritius, was formerly a French dependency. Under the Treaty of Paris 1814, the French King ceded them to the British Crown. It follows that Mauritius and its dependencies, including the Archipelago, were a ceded colony: *Sir Kenneth Roberts-Wray, Commonwealth and Colonial Law* (1966), p 727. That remains the legal position so far as BIOT is concerned. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (“*Bancoult* (No 1)”) [2001] QB 1067, 1102, para 52, Laws LJ so held and, at the hearing before the House, both parties proceeded on that basis.

80 The division of colonies into settled and conquered or ceded colonies has been described as “arcane” and Professor Tomkins was disappointed that in *Bancoult* (No 1) Laws LJ had relied on “such ancient and formal niceties”: Adam Tomkins, “Magna Carta, Crown and Colonies” [2001] PL 571, 579. Laws LJ was surely right to do so, however. Just like much of the rest of our law, colonial law has developed over centuries. What makes it different is that, for obvious reasons, courts are rarely called upon to apply it today and so there are comparatively few

- A modern cases. Nevertheless, when Parliament has not intervened to alter them, the rule of law requires courts to apply the established principles—such as the readily comprehensible distinction between ceded and settled colonies—on which the whole body of colonial law rests. I should add that, precisely because the case raises questions of colonial law, in the discussion I have referred to “colonies” etc, even though, of course, in today’s terminology, BIOT is one of the small number of British Overseas Territories.

- B 81 The classification into settled and ceded colonies matters in this case because it has been settled law since the decision of Lord Mansfield CJ in *Campbell v Hall* (1774) 1 Cowp 204 that the King (without the concurrence of Parliament) can legislate for a ceded colony, unless he has granted it a representative legislature. See also *In re Colenso* (1865) 3 Moo PC NS 115.
- C In the present case, there is, of course, no representative legislature: apart from Her Majesty in Council, the only person who can legislate for the territory is the Commissioner, acting under section 10 of the Constitution Order.

82 In *Campbell v Hall* Lord Mansfield described the King’s power of legislation in the case of a ceded colony in this way, 1 Cowp 204, 209:

- D “The sixth, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.”
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- What matters at the moment is that the King’s power to legislate for a ceded colony without the concurrence of Parliament is only subordinate, i.e., subordinate to his legislative power with the concurrence of Parliament. It follows that, without the concurrence of Parliament, the King cannot legislate for the colony in a way that would conflict with the provisions of any Act of Parliament extending to the colony.
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- 83 In settled colonies the common law of England and “such statutes as have been passed in affirmance of the common law previous to their acquisition, are in force there . . .”: *William Forsyth, Cases and Opinions on Constitutional Law* (1869), p 18. Therefore, if Mauritius had been a settled colony, it would be highly arguable that Magna Carta had “followed the flag” and had formed part of the common law of the island and its dependencies from the time of their settlement.
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- 84 In fact, however, Mauritius was ceded to the British Crown in 1814 and, in accordance with the terms of the Treaty of Paris, French law continued to apply. The relevant principle is that “the laws of a conquered country continue in force, until they are altered by the conqueror”: *Campbell v Hall* 1 Cowp 204, 209. At no time while Mauritius was a colony was legislation passed to replace the existing law of the island or its dependencies, wholesale, with the law of England. Therefore, when the Chagos Archipelago was separated from Mauritius in 1965, chapter 29 of Magna Carta formed no part of its statute law.
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85 On 1 February 1984, however, section 3 of the British Indian Ocean Territory Courts Ordinance 1983 came into force and provided that the law of the territory was to be the law of England as from time to time in force: A

“Provided that the said law of England shall apply in the territory only so far as it is applicable and suitable to local circumstances, and shall be construed with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary.” B

The change in law was to be subject to, inter alia, prerogative Orders in Council which applied or extended to BIOT.

86 Mr Crow did not argue that chapter 29 of Magna Carta was not applicable or suitable to the circumstances of BIOT. So I proceed on the basis that it applies and that no-one can be exiled from BIOT “but by the law of the land”. Prima facie, however, the law of BIOT includes both the Constitution Order and the Immigration Order. So, unless they can be said to be invalid for some reason, there is nothing in the terms of chapter 29 of Magna Carta which would make any banishment of the Chagossians by virtue of these Orders unlawful. C

87 Of course, Sir Sydney contended that the Orders were indeed invalid. In the words of Lord Mansfield in *Campbell v Hall* 1 Cowp 204, 209, Her Majesty had no power to legislate by Order in Council “contrary to fundamental principles” of English common law. And, he submitted, the right of a “belonger” not to be excluded from the territory to which he belonged was just such a fundamental principle. As support for its existence, in addition to chapter 29 of Magna Carta, Sir Sydney cited the statement of Blackstone, *Commentaries on the Laws of England*, 15th ed (1809), vol 1, p 137, that “no power on earth, except the authority of Parliament, can send any subject of England *out of* the land against his will; no, not even a criminal”. I accept that both of these point to the existence of such a principle. D E

88 Although not cited by counsel, there are two other passages which might tend to support the view that the right not to be banished from a British colony is indeed a fundamental principle of English law. In his *British Rule and Jurisdiction beyond the Seas* (1902), p 6, Sir Henry Jenkyns F said that, while in a ceded or conquered colony the existing law is usually presumed to continue until altered, nevertheless “any laws contrary to the fundamental principles of English law, e.g. torture, banishment, or slavery, are ipso facto abrogated”. Among the authorities cited in support of that proposition is a passage from the judgment of Lord de Grey CJ in *Fabrigas v Mostyn* (1774) 20 State Tr 82. In 1771 Minorca was a ceded colony of the British Crown. The Governor, General Mostyn, apparently fearing that Fabrigas would stir up danger for the garrison, committed him to the worst prison on the island, with no bed and only bread and water, and with no contact with his family. He then confined him “on board a ship, under the idea of a banishment to Carthage”. Fabrigas sued General Mostyn for damages in the King’s Bench. Upholding the award of £3,000 as damages against him, Lord de Grey said, at col 181: G H

“I do believe Mr Mostyn was led into this, under the old practice of the island of Minorca, by which it was usual to banish: I suppose the old Minorquins thought fit to advise him to this measure. But the governor knew that he could no more imprison him for a 12-month, than he could

- A inflict the torture; yet the torture, as well as the banishment, was the old law of Minorca, which fell of course when it came into our possession. Every English governor knew he could not inflict the torture; the constitution of this country put an end to that idea. This man is then dragged on board a ship, with such circumstances of inhumanity and hardship, as I cannot believe of General Mostyn; and he is carried into a foreign country, and of all countries the worst; for I believe there are directions given, that no persons should go to Spain, or be permitted to quit the port of Carthagea.”
- B

See also, generally, *Forsyth, Cases and Opinions on Constitutional Law*, p 13.

- 89 On the basis of these various authorities it appears to me certainly arguable that there is a “fundamental principle” of English law that no citizen should be exiled or banished from a British colony and sent to a foreign country. Assume that section 9 of the Constitution Order is inconsistent with that principle, by reason of declaring that no-one who used to live in the Archipelago now has a right of abode in BIOT. Is the section void as purporting to change the law of BIOT in a way that is inconsistent with that fundamental principle?
- C

- 90 Although the passage from the judgment of Lord Mansfield in *Campbell v Hall* 1 Cowp 204, 209 has regularly been cited for the proposition that the King cannot legislate contrary to fundamental principles of that kind, I suspect that this is to read too much into his remark. The passage may be more readily understood if the punctuation is modernised in this way:
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- “The sixth, and last proposition is that, if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.”
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All the examples of “fundamental principles” which Lord Mansfield gives are classic examples of ways in which, before 1689, the King—without the concurrence of Parliament—used the dispensing power of the Crown in relation to statutes. So what Lord Mansfield appears to be saying is that the King cannot use his power to legislate for a ceded colony without the concurrence of Parliament so as to exempt an inhabitant of the colony from the laws of trade, or from some Act of Parliament or to give him some exclusive privilege. Such legislation would amount to a revival of the dispensing power, which it had been one of the achievements of the Glorious Revolution to abolish.

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- 91 There is no point in exploring Lord Mansfield’s meaning further, however, since, as a matter of historical fact, in the first half of the 19th century, the passage in his judgment was interpreted by some lawyers as authority for the wider proposition that the King could not make changes in the law that were contrary to “fundamental principles”. The obvious problem was that, if the examples given by Lord Mansfield were simply
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examples of fundamental principles of an unspecified nature, it was difficult to identify the “many other instances” of those principles. So legislation by the King for ceded colonies was apparently open to challenge if it could be said to be contrary to a principle which was “fundamental”. If that were established, the King would have had no power to make the law in question, whether by letters patent or by Order in Council. A

92 The main problem was slightly different. The King did not usually legislate for most colonies. They were given a legislature of some kind which made the laws for the colony—but the instrument creating the legislature gave it power, for example, to make laws “not contrary or repugnant to the lawes and statutes of this our realme of England” (Massachusetts Bay Charter, 1629) or required that the laws should not be “repugnant to the law of England”: section 29 of the Australian Constitutions Act 1842 (5 & 6 Vict c 76). In the case of settled colonies, provisions of this kind had the potential to cause acute difficulties. For one thing, it was hard to tell how much of the statute law, technically in force in England, had been carried into the colony at its settlement. Moreover, the very point of establishing a legislature in any kind of colony was that it should pass appropriate new laws to suit the conditions of the colony, even though the new laws were different from English law. So a view emerged, for all colonies, that the colonial legislature could make laws which were different from English law, provided that they were not repugnant to the “fundamental principles” of English law. B C D

93 The possibility that some provision of a statute passed by a colonial legislature was repugnant to an imperial statute applying to the colony or to some fundamental principle of English law was not only, or indeed principally, of concern to the courts. Some colonial statutes were reserved for the assent of His Majesty, while all of them could be disallowed by His Majesty by Order in Council within a year. So copies of all the thousands of statutes passed by colonial legislatures were sent back to London where they were scrutinised, inter alia for repugnancy, by lawyers working for the Colonial Office. In practice, even where doubts arose, relatively few provisions were disallowed since, if the colonial legislature persisted, the Colonial Office found that it tended to lose the resulting ping-pong of legislation and disallowance. The problem of scrutinising legislation by reference to “fundamental principles” was described by “Mr Over-Secretary Stephen” of the Colonial Office, Sir James Stephen, in a memorandum in 1834: E F

“To have required, on pain of nullity, an adherence to the fundamental principles of English legislation would, I think, have involved more than one absurdity. It may very reasonably be doubted whether these principles have any real and definite existence, and even if, by a great effort of abstraction and subtlety, our written or unwritten law could be made to yield a body of fundamental maxims pervading the whole mass, it would have been strange if Parliament had required a rigid observance of those maxims in a society of which all the material circumstances, and the whole elementary character differ essentially from what has ever been known in the Parent State.” G H

The passage is quoted at p 57 of D B Swinfen’s masterly study, *Imperial Control of Colonial Legislation 1813–1865* (1970), to which I am generally indebted. The difficulties to which Sir James refers are easy to see when it is



A recalled that, until shortly before, slavery had formed part of the law of many colonies in the West Indies and statutes were not infrequently passed by local legislatures dealing with different aspects of slavery.

94 Two decades later, one of Sir James Stephen's successors, Sir Frederic Rogers, writing a memorandum on a South Australian Act designed to legalise the marriage of a man with his deceased wife's sister, described the position in this way:

B "But a question not infrequently occurs whether there are not, in the English law, certain fundamental enactments of statute or principles of common law of so binding a nature that the legislation of all British Dependencies must be conformable to them, and that colonial laws which are not so conformable are void; either in virtue of the general relations between a British colony and the Mother Country, or as being at variance with some positive Instructions or Acts of Parliament which require that Colonial Laws shall not be 'repugnant to the laws of England'. This seems to have been the doctrine of former times, and as late as 1843, doubts seem to have been entertained whether a colonial law passed to admit unsworn testimony would not be repugnant to the law of England, and therefore null and void. But in practice the tendency has long been to consider Colonial Legislatures as legally competent to pass almost any law, which they are not precluded from passing by some Imperial Statute intended by Parliament to be binding in the colony—the Crown remaining at liberty to intervene by way of disallowance or otherwise in order to prevent the enactment of laws manifestly at variance with the fundamental principles of English legislation. In the larger colonies, the prevailing, if not universal opinion is said to be (as might be expected) that most favourable to the pretensions of their own Legislature. This I am aware is a very vague statement, but I do not know that the present state of the law can be laid down with greater precision."

See *Swinfen, Imperial Control of Colonial Legislation 1813–1865*, pp 62–63.

95 This was the situation around the time when a member of the South Australian Supreme Court, Boothby J, began to issue decisions holding that various statutes passed by the local colonial legislature were void on the ground of repugnancy to the law of England. In 1862 the Law Officers agreed that laws which were contrary to fundamental principles of British law, "as by denying the sovereignty of Her Majesty, by allowing slavery or polygamy, by prohibiting Christianity, by authorising the infliction of punishment without trial, or the uncontrolled destruction of aborigines, etc" would unquestionably be repugnant, but added: "We are unable to lay down any rule to fix the dividing line between fundamental and non-fundamental rules of English law . . ." See *D P O'Connell, A Riordan, Opinions on Imperial Constitutional Law* (1971), pp 62–64. As their successive opinions show, between 1862 and 1865 the Law Officers became convinced that the only way to remedy the state of uncertainty caused by Boothby J's various pronouncements was to pass legislation similar to section 3 of the British North America Act 1840 and—to forestall similar problems elsewhere—to extend it to all of the colonies: *O'Connell, Riordan, Opinions on Imperial Constitutional Law*, pp 60–71.

96 The result was the Colonial Laws Validity Act 1865. The terms of section 3 could not be clearer: no colonial law was to be void or inoperative

on the ground of repugnancy to the law of England, unless it was repugnant to the provisions of some Act of Parliament which was made applicable to the colony by express words or necessary intendment. A

97 This explicit provision applied to Orders in Council since, by section 1, the term “colonial law” includes laws made for any colony by Her Majesty in Council. While it is unclear why letters patent were not included, this cannot detract from the fact that Orders in Council are expressly included—and the significance of their inclusion cannot be wished away as being only for the sake of completeness. Nor can I discern any reason to say that, for purposes of the 1865 Act, the Constitution Order might be a colonial law from the point of view of a BIOT court applying BIOT law but not for a court in the United Kingdom. Such an interpretation would leave the status of the law in limbo—valid in the courts of the colony, but open to challenge in the English courts—where, of course, such challenges could be and were, in practice, mounted. See, for instance, *Phillips v Eyre* (1870) LR 6 QB 1, 20–23. Leaving this room for uncertainty would have been inconsistent with the whole purpose of the 1865 Act, which was to remove the possibility of challenges by reference to general principles of English law and to confine the doctrine of repugnancy to repugnancy to an Act of the Imperial Parliament extending to the colony. Equally, I would readily conclude that sections 2 and 3 were intended to cover legislation establishing a constitution for a colony since the decision of Boothby J in *Auld v Murray* (unreported) 1864, relating to a Constitution Act passed by the local legislature, was one of those which had caused uncertainty. See *Swinfen, Imperial Control of Colonial Legislation 1813–1865*, pp 177–178. B C D

98 Sedley LJ considered that, despite the terms of sections 2 and 3 of the 1865 Act, courts in this country would surely always have struck down an Order in Council permitting the use of torture to obtain evidence and that the same would have almost certainly been the case with an Order in Council abolishing all recourse to law in a colony or introducing forced labour. Professor Finnis describes this as a “parade of horribilia”: *Common Law Constraints: Whose Common Good Counts?*, para 13. So it is. But the challenge has to be confronted. In my view, it is clear that, as Professor Finnis argues, the whole purpose of the 1865 Act was indeed to prevent challenges in the courts on any ground of repugnancy other than repugnancy to the provisions of an imperial statute extending to the colony in question. So, unless there were statutes extending to the colony, to which the horribilia were repugnant, the validity of the provisions could not be challenged for repugnancy in the courts. This would not mean that nothing could have been done about any such hypothetical provision: in particular, on being sent back to London and scrutinised by the Colonial Office lawyers, it would presumably have been immediately disallowed by Her Majesty in Council, on the advice of the Colonial Secretary. Apart from that, the policy was, precisely, to trust the legislatures and to leave control not to the courts, but to the legislatures and, ultimately, to the electorates, both at home and, where appropriate, in the colony concerned. If anything, that policy might have been expected to apply, a fortiori, to legislation by Order in Council countersigned by the Colonial Secretary himself. E F G H

99 In *Bancoult (No 1)* [2001] QB 1067, para 43, Laws LJ referred to “the wintry asperity” of the Privy Council authority, *Liyanage v The Queen* [1967] 1 AC 259. The decision itself was, in fact, far from wintry and the

A aspect to which Laws LJ was referring was correct, indeed inevitable, in the light of the 1865 Act.

100 The appellant, who had been involved in an attempted coup in Ceylon, sought to argue that a retroactive law relating to his trial was void. The board upheld that argument on the basis that the separation of powers inherent in the Constitution had been infringed. The appellant's conviction was quashed.

B 101 The board rejected another argument, however, to the effect that the law in question was void because it was repugnant to the fundamental principles of justice. Starting from *Campbell v Hall* 1 Cowp 204, 209, the contention for the appellant was that, since the Crown had had no power to make laws for the colony of Ceylon which offended against fundamental principles, at independence it could not hand over to Ceylon a higher power than it possessed itself. The board quoted *A B Keith, The Sovereignty of the British Dominions* (1929), pp 45–46, who said of the 1865 Act:

D “The essential feature of this measure is that it abolished once and for all the vague doctrine of repugnancy to the principles of English law as a source of invalidity of any colonial Act . . . The boon thus conferred was enormous; it was now necessary only for the colonial legislator to ascertain that there was no Imperial Act applicable, and his field of action and choice of means became unfettered.”

The board continued [1967] AC 259, 284–285:

E “Their Lordships cannot accept the view that the legislature while removing the fetter of repugnancy to English law, left in existence a fetter of repugnancy to some vague unspecified law of natural justice. The terms of the Colonial Laws Validity Act and especially the words ‘but not otherwise’ in section 2 make it clear that Parliament was intending to deal with the whole question of repugnancy. Moreover, their Lordships doubt whether Lord Mansfield was intending to say that what was not repugnant to English law might yet be repugnant to fundamental principles or to set up the latter as a different test from the former.

F Whatever may have been the possible arguments in this matter prior to the passing of the Colonial Laws Validity Act, they are not maintainable at the present date. No case has been cited in which during the last 100 years any judgment (or, so far as one can see, any argument) has been founded on that portion of Lord Mansfield’s judgment.”

G Pace Sedley LJ [2008] QB 365, 392–393, para 28, it is loyalty to the terms of sections 2 and 3 of the 1865 Act, rather than any mid-20th-century lack of appreciation of what might count as “fundamental principles”, which ultimately drives Lord Pearce’s reasoning.

H 102 I am accordingly satisfied that neither section 9 of the Constitution Order nor the Immigration Order is open to challenge in the English courts on the ground that it is repugnant to any “fundamental principle” of English common law that a “belonger” cannot be sent out of the territory and so has a right to return there.

103 But, just as the whole history of the developments leading to the 1865 Act shows that a challenge based on repugnancy to fundamental principles is unsustainable, it also shows—equally clearly—that the 1865 Act was concerned only with repugnancy to statute and to fundamental

principles, which had been said to make legislation ultra vires the legislature, whether Her Majesty in Council or the colonial legislature. There is nothing to suggest that in 1865 anyone contemplated the need to head off a challenge to the validity of legislation by either the Queen in Council or another colonial legislature acting intra vires or ultra vires for some other reason.

104 It is therefore important to notice that Sir Sydney's other challenges to section 9 of the Constitution Order and to the Immigration Order were not based on some unspecified fundamental principle of the law to which the provisions of the Orders were said to be repugnant. Rather, he contended, first, that, in making the Orders, Her Majesty in Council acted ultra vires, because the legislation was not "for the peace, order and good government of the territory". Next, he contended that Her Majesty failed to have regard to the interests of the Chagos islanders or acted in defiance of their legitimate expectation created by the statement of the Foreign Secretary in November 2000. The provisions of sections 2 and 3 of the 1865 Act do not constitute a bar to these challenges—any more than they constitute a bar to a challenge to legislation, purporting to apply outside the colony or state concerned, as not being for the peace, order and good government of that colony or state.

105 Mr Crow contended that, even without the 1865 Act, any exercise of the royal prerogative to make a legislative Order in Council could not be reviewed by the courts. I would reject that submission. In *Campbell v Hall* 1 Cowp 204 Lord Mansfield was prepared to hold that the Crown had no power to make the letters patent imposing the tax on Grenada. He would surely have done the same if the tax had been imposed by Order in Council: the precise form of the legislation was of no significance for that purpose. The court was, in effect, reviewing the legality of the letters patent. Nowadays, a broader form of review of other prerogative acts is established: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Therefore, like Lord Hoffmann, I see no reason in principle why, today, prerogative legislation, too, should not be subject to judicial review on ordinary principles of legality, rationality and procedural impropriety. Any challenge of that kind must, of course, be based on a ground that is justiciable.

106 Nor am I impressed by Mr Crow's argument—little more than a makeweight—that judicial review of an Order in Council would trespass against the rule that prerogative orders are regularly made against ministers in their official capacity, but never against the Crown: *M v Home Office* [1994] 1 AC 377, 407. That is nothing more than a rule of English procedural law: it does not reach the substance of the challenge. Under the Crown Suits (Scotland) Act 1857 (20 & 21 Vict c 44) the Advocate General for Scotland represents the Crown in right of the United Kingdom. There would therefore be nothing, for instance, to prevent Mr Bancoult bringing proceedings for judicial review in the Court of Session against the Advocate General, as representing the Crown, and, if successful, having the orders quashed. The realistic approach to such matters was identified by Lord President Hope in the old case, *Edwards v Cruickshank* (1840) 3 D 282. Referring to the jurisdiction of supreme courts, he said, at pp 306–307:

"With regard to our jurisdiction, and the jurisdiction of the supreme courts in every civilized country with which I am acquainted, I have no doubt. They have power to compel every person to perform their duty—persons whether single or corporate; and, in our noble constitution,

- A I maintain—though at first sight it may appear to be a startling proposition—the law can compel the Sovereign himself to do his duty, ay, or restrain him from exceeding his duty. Your Lordships know that the Sovereign never acts by himself, but only through the medium of his ministers or executive servants; and if any duty is refused to be done by any minister in the department over which he presides, or if he exceed his duty to the injury of the subjects, the law gives redress. In England the court would proceed, according to the nature of the case, by injunction or mandamus, or a writ of quo warranto. In this country a person would proceed by action or by petition; and, if he was right, a decree would be passed and would be enforced by ordinary process of law.”
- B

- C Admittedly, the Lord President’s understanding of the position of the English courts turned out to be unduly optimistic. But, on Scots Law, on general principle, and on the substance of the matter, he was surely absolutely right.

- D 107 Sir Sydney submitted that both the Constitution Order and the Immigration Order are unlawful because Her Majesty’s full power to legislate is confined to making “laws for the peace, order and good government of the territory”. These are undoubtedly the customary terms in which Her Majesty’s reserved legislative powers are described, for instance, in section 15(1) of the Constitution Order. Section 15(1)(b) goes on to provide that: “no such provision shall be deemed to be invalid except to the extent that it is inconsistent with the status of the territory as a British overseas territory or otherwise as provided by the Colonial Laws Validity Act 1865.” Section 15 therefore provides the measure of the legislative powers available to Her Majesty when making the Immigration Order
- E but, when enacting the Constitution Order itself, She was exercising her prerogative power after revoking the British Indian Ocean Territory Orders 1976 to 1994, in accordance with the power reserved under section 15 of the 1976 Order. The formula in section 15(1) is, of course, classical, but there is no authority which defines the prerogative power of legislation in those terms. Nevertheless, I am content to accept them as a description of the prerogative power, provided that they are interpreted and applied in accordance with the equally well known and well settled jurisprudence relating to them.
- F

- G 108 The classical case law was summarised by the High Court of Australia in a unanimous judgment in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1. Their Honours were considering the scope of the power conferred by section 5 of the Constitution Act 1902 (NSW) to make laws “for the peace, welfare, and good government of New South Wales”. Referring to similar provisions in other constitutions, the High Court said, at pp 9–10:

- H “Lord Selborne, speaking for the Judicial Committee in *R v Burah* (1878) 3 App Cas 889, said that the Indian legislature ‘has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself’. Later, Sir Barnes Peacock in *Hodge v The Queen* (1883) 9 App Cas 117, speaking for the Judicial Committee, stated that the legislature of Ontario enjoyed by virtue of the British North America Act 1867 (Imp): ‘authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the

plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament . . .’ In *Riel v The Queen* (1885) 10 App Cas 675, Lord Halsbury LC, delivering the opinion of the Judicial Committee, rejected the contention that a statute was invalid if a court concluded that it was not calculated as a matter of fact and policy to secure the peace, order and good government of the territory. His Lordship went on to say that such a power was ‘apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to’. In *Chenard & Co v Arissol* [1949] AC 127, Lord Reid, delivering the opinion of the Judicial Committee, cited *Riel* and the comments of Lord Halsbury LC with evident approval. More recently Viscount Radcliffe, speaking for the Judicial Committee, described a power to make laws for the peace, order and good government of a territory as ‘cannot[ing], in British constitutional language, the widest lawmaking powers appropriate to a Sovereign’: *Ibralebbe v The Queen* [1964] AC 900. These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words ‘for the peace, order and good government’ are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a state, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score.”

This authoritative statement of the position in Australia must be preferred to the opinion of Street CJ in *Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 383 which was the one that Sedley LJ found the most illuminating: [2008] QB 365, 400–401, para 53.

109 Assuming, then, that Her Majesty’s constituent power can properly be described as a power to make “laws for the peace, order and good government of the territory”, such a power is equal in scope to the legislative power of Parliament. As the statements in *Riel v The Queen* 10 App Cas 675, *Chenard & Co v Arissol* [1949] AC 127 and *Union Steamship Co of Australia Pty Ltd v King* 166 CLR 1 show, it is not open to the courts to hold that legislation enacted under a power described in those terms does not, in fact, conduce to the peace, order and good government of the territory. Equally, it cannot be open to the courts to substitute their judgment for that of the Secretary of State advising Her Majesty as to what can properly be said to conduce to the peace, order and good government of BIOT. This is simply because such questions are not justiciable. The law cannot resolve them: they are for the determination of the responsible ministers rather than judges. In this respect, the legislation made for the colonies is in the same position as legislation made by Parliament for this country, as the High Court of Australia pointed out. In both cases, the sanction for inappropriate

A use of the legislative power is political, not judicial. The difference—and it is, of course, very important—is that Orders in Council are made without the concurrence of Parliament or of any other representative legislature and so the political control is less direct. That lack of direct political control over them may well be considered undesirable in today's world. If so, the appropriate remedy is for Parliament, not the courts, to get involved in scrutinising the substance of such Orders in Council.

B 110 Section 9 of the Constitution Order removes any right of abode on the Chagos Archipelago which the claimant or anyone else may have had. It is a stark provision. But the Secretary of State's decision to have it enacted and the effect of that decision have to be judged against the circumstances at the time it was taken. No-one was then actually living on the outer islands and, even though the islanders had enjoyed a right to return since November 2000, none of them had done so. They were "instead seeking support from the UK and US Governments to financially assist their return or alternatively to provide compensation": *Feasibility Study Phase 2B*, Executive Summary, para 1.1.1. More importantly, there was no prospect that anyone would be able to live on the outer islands, except on a subsistence basis, in the foreseeable future: *Feasibility Study Phase 2B*, Executive Summary, para 1.1.1.1. Sir Sydney did not dispute this, but contended that it was irrelevant. In other words, the position was just the same as if people had actually been living on the islands when the Orders were made. I am unable to accept that submission. The impact of the legislation on the people concerned would be very different in the two situations. In my view, in reviewing the Secretary of State's decision to remove the right of abode, it is relevant that there was actually no prospect of the Chagossians being able to live on the outer islands in the foreseeable future. The Government accepts, of course, that they can apply for permits to visit the islands and that an unreasonable refusal could be judicially reviewed. Such visits have taken place in the past.

111 Against that background, can it be said that no reasonable Secretary of State could have decided to have section 9 enacted?

F 112 On 15 June 2004 a junior minister, Mr Rammell, made a written statement to Parliament. His good faith has not been impugned by the respondent. The statement shows that, in deciding to legislate to prevent people resettling on the outer islands, the Government took into account the fact that the economic conditions and infrastructure which had once supported the way of life of the Chagossians had ceased to exist. Something new would have to be devised. The advice was that the cost of providing the necessary support for permanent resettlement was likely to be prohibitive and that natural events were likely to make life difficult for any resettled population. Human interference within the atolls was likely to exacerbate stress on the marine and terrestrial environment and would accelerate the effects of global warming. Flooding would be likely to become more frequent and would threaten the infrastructure and the freshwater aquifers and agricultural production. Severe events might even threaten life. H The minister recorded that, for these reasons, the Government had decided to legislate to prevent resettlement. Although he made no mention of it, the decision to legislate and to introduce immigration controls at that particular time appears to have been prompted by the prospect of protesters attempting to land on the islands. In addition, Mr Rammell said that restoration of full

immigration control over the entire territory was necessary to ensure and maintain the availability and effective use of the territory for defence purposes. He referred to recent developments in the international security climate since November 2000 when such controls had been removed.

113 The ministerial statement indicates that a decision to legislate was taken on the basis of the experts' (second) report on the difficulties and dangers of resettling the islands—these difficulties and dangers being dangers and difficulties which would affect the Chagossians themselves, if they were to try to live on the outer islands. Given the terms of that report alone, it could not, in my view, be said that no reasonable Government would have decided to legislate to prevent resettlement. In particular, the advice that the cost of any permanent resettlement would be “prohibitive” was an entirely legitimate factor for the Government—which is responsible for the way that tax revenues are spent—to take into account. In addition, the Government had regard to defence considerations, the views of its close ally, the United States, and the changed security situation after 9/11. These additional factors reinforce the view that the decision to legislate was neither unreasonable nor irrational.

114 Of course, the decision was adverse to the claim of the Chagossians to return to settle on the outer islands. But that does not mean that their interests had been ignored: a realistic assessment of the long-term position of any potential Chagossian settlers on the outer islands was central to the expert report on which the Government relied. In addition, the Government considered the overall interests of the United Kingdom. It was entitled to do so. There is no support whatever for a proposition that, as a matter of English law, in legislating for a colony, either Parliament or Her Majesty in Council must have regard only, or even predominantly, to the immediate interests of the population of the colony. On the contrary, the authority of Parliament and the Crown could always be exercised on “trade, shipping, or matters of law and policy affecting the whole empire”: *Jenkyns, British Rule and Jurisdiction beyond the Seas*, p 22. Since most colonies had legislatures, these wider interests were usually given effect by making an Order in Council disallowing offending statutes rather than by enacting legislation. But, in crucial areas, such as the abolition of slavery, or the regulation of merchant shipping, Parliament would enact legislation for Her Majesty's possessions as a whole. The underlying assumption was, of course, that the policies in question were for the ultimate benefit of all those possessions. Similarly, assuming, of course, that the Government had to take account of the interests of the islanders, it was nevertheless entitled to give appropriate weight to the wider, economic, foreign affairs and defence interests of the United Kingdom when it decided whether to enact the Orders in Council. In the absence of any relevant legal criteria, judges are not well placed to second-guess the balance struck by ministers on such a matter.

115 The final major submission on behalf of the respondent was that, by enacting the Constitution Order and the Immigration Order, the Government had breached a promise made by the then Foreign Secretary, Mr Cook, following the judgment in *Bancoult (No 1)*, when the Immigration Ordinance 2000 was made by the Commissioner. This submission was accepted by all the members of the Court of Appeal. Nevertheless, for the reasons given by Lord Hoffmann, I would reject it. In substance, what is in dispute is a right for the Chagossians to return and live



- A permanently on the outer islands. Unquestionably, the Foreign Secretary said that, while observing its Treaty obligations, the Government would put in place a new Immigration Ordinance which would allow the Ilois to return to the outer islands. But the Foreign Secretary had already referred to the work which the Government was doing on “the feasibility” of resettling the Ilois and which now took on a new importance. In other words, the Government had still to complete its work to see whether or not resettlement would be possible, “feasible”. For that reason I am unable to spell out of the statement, or the Government’s action in putting the Immigration Ordinance in place, a clear and unambiguous promise that the Chagossians would be allowed to return and settle permanently on the outer islands.

116 I agree with what Lord Hoffmann says about the two remaining grounds of challenge, based on the Human Rights Act and international law.

- C 117 For all these reasons I am satisfied that the Constitution Order and the Immigration Order are not invalid and therefore form part of the law of BIOT. It follows that, assuming that chapter 29 of Magna Carta is part of the law of BIOT, it does not make any banishment of the Chagossians by virtue of these Orders unlawful.

118 For these reasons I would allow the appeal.

D LORD CARSWELL

- 119 My Lords, the Chagos Islands are an archipelago of low-lying coral atolls in the middle of the Indian Ocean, over 1,000 miles from Mauritius. In 1965 they were formed into a separate colony or dependent territory, under the name of the British Indian Ocean Territory (“BIOT”). Unhappily for the inhabitants, that very remoteness gave the islands a geopolitical importance. In the 1960s the United States Government desired to establish a secure defence facility on the island of Diego Garcia, the largest and most populated of the Chagos Islands. Agreement was reached with HM Government and between 1968 and 1973 the Chagossians were in effect uprooted and removed from the islands to Mauritius. The unhappy story of their removal and the consequences has been told at length in the judgments given in the previous proceedings and summarised by my noble and learned friend, Lord Hoffmann, in his opinion in this appeal. I can only echo the distress and indignation expressed by those who have given these previous judgments about the way that the Chagossians were treated.

- F 120 I have had the advantage of reading in draft the opinions prepared by my noble and learned friends, Lord Hoffmann and Lord Rodger of Earlsferry. I agree with their conclusions and, with very little qualification, with their reasoning, and I can accordingly shorten this opinion considerably.

- G 121 The respondent, Louis Olivier Bancoult, is the standard bearer for the campaign promoting the expressed wish of many of the Chagossians to return to what they regard as their homeland in the Chagos Islands. That wish, they claim, has been frustrated by the passing in 2004 of the British Indian Ocean Territory (Constitution) Order and the British Indian Ocean Territory (Immigration) Order. It is put on an abstract basis by their counsel, for it is quite clear that for them to resettle in the islands is wholly impracticable without very substantial and disproportionate expenditure. They are not in a position to meet such a cost. It could only be shouldered by the British Government, which has made it clear that it is willing to permit and fund from time to time short visits to the outlying islands, but not to

support a large-scale permanent resettlement. One might ask the question why this campaign is being pursued, for the Chagossians already can pay visits and there is no realistic prospect of resettlement unless it is funded for them at huge expense. I do not find it necessary to seek an answer to that question, but the practical difficulties in the way of resettlement are in my view relevant to the rationality of the Government's decision to make the 2004 Orders in Council.

122 The two sides have, as Lord Hoffmann has said, put forward in argument extreme and incompatible propositions. Like him, I am unable to accept either in its unqualified form. I would reject the appellant's submission that the validity of an Order in Council made under the prerogative legislating for a colony cannot be reviewed by the courts. I agree with the reasons which Lord Hoffmann has given for this conclusion and do not need to add anything to them.

123 The opposing contention, persuasively advanced by Sir Sydney Kentridge, requires a little more discussion. The desire to be able to remain in one's homeland is so deeply ingrained in the human psyche that the right not to be exiled could readily be regarded as fundamental. Given its high importance, the issue is how near it is to being an inalienable constitutional right.

124 It has been part of the law of England at least since Magna Carta, chapter 29 of which provides that no freeman shall be exiled otherwise than by the lawful judgment of his peers or by the law of the land. Historically this was no doubt aimed at preventing the King from arbitrarily banishing his more important subjects, in particular the barons, but it has come to be accepted as a right possessed by every citizen, which Blackstone said could only be removed by the authority of Parliament (*Commentaries on the Laws of England*, 15th ed (1809), p 137, the same wording also appearing in the 11th edition, published in 1791 and containing Blackstone's ipsissima verba). Since the Crown has plenary legislative authority over a ceded colony, there appears to be no compelling reason why an Order in Council should not validly have the same effect in a Crown colony as an Act of Parliament would have in the United Kingdom.

125 In contending that the inhabitants of a colony could not lawfully be exiled by an Order in Council Sir Sydney relied on a statement of Lord Mansfield CJ in *Campbell v Hall* (1774) 1 Cowp 204. The action concerned a challenge by the plaintiff to the validity of a duty upon goods exported from Grenada, which had been imposed by letters patent some months after an earlier proclamation providing for the constitution of assemblies with power to pass laws for Grenada. The Court of King's Bench held in favour of the plaintiff, who sued for the recovery of duty paid, on the ground that the King had by the proclamation divested himself of legislative authority over Grenadan affairs. In the course of his judgment Lord Mansfield enunciated six general propositions concerning the law governing colonies. The sixth of these propositions read, at p 209:

"if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for

- A instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.”

Like Lord Rodger, I think that too much has been read into this statement. It was made in the context of the imposition of taxes, and is primarily directed to the possibility of the exemption of particular persons from taxes or the granting of the type of valuable privilege given in earlier times. I share the doubt expressed by the Privy Council in *Liyanage v The Queen* [1967] 1 AC 259, 284, whether Lord Mansfield intended to say that what was not repugnant to English law might yet be repugnant to fundamental principles, which it categorised as “some vague unspecified law of natural justice”.

- B 126 Doubts of this kind did not prevent the emergence of the view in the 19th century that colonial laws could be struck down as null and void if their provisions were contrary to such “fundamental principles”, notwithstanding the clear contrary view expressed in 1834 by Sir James Stephen, quoted by Lord Rodger at para 93. The problem became acute when Boothby J of the Supreme Court of South Australia exercised this supposed jurisdiction with great freedom. In order to deal with it Parliament passed the Colonial Laws Validity Act 1865, designed to remove the possibility of such challenges to the validity of colonial laws. I agree with the reasons set out by Lord Rodger in paras 96 to 101 of his opinion and his conclusion that the question of the inviolability of fundamental principles is put beyond doubt by the 1865 Act. I therefore am of the same view that none of the provisions of the 2004 Orders in Council is open to challenge in the English courts on the ground of repugnancy to any fundamental principle relating to the rights of abode of the Chagossians as “belongers” in the Chagos Islands.

- E 127 It was argued on behalf of the respondent that the provisions of the Orders in Council were not for the “peace, order and good government” of the Chagos Islands, a proposition which had been accepted by the Divisional Court in relation to the Ordinance in the case which has been termed *Bancoult (No 1)* and by Sedley LJ in the Court of Appeal in the present case. The Orders in Council, unlike the Ordinance, were made in right of the United Kingdom, not in right of the BIOT. Mr Crow for the appellant advanced the proposition that the very familiar trilogy of objects of legislation, if it be a limitation on the plenitude of legislative power, does not apply to Orders in Council made under Her Majesty’s prerogative power to establish laws for a Crown colony. He pointed out that there is a complete dearth of authority for the application of the phrase to the prerogative power. Nevertheless it is found in the British Indian Ocean Territory Orders of 1965 and 1976 and the British Indian Ocean Territory (Constitution) Order 2004. In each Order the Commissioner is given power to make laws for the peace, order and good government of the territory, which is a standard provision when legislative power is devolved. More significantly, however, in each Order there is reserved to Her Majesty “full power to make laws for the peace, order and good government” of the territory.
- H This throws more than a little doubt on the correctness of Mr Crow’s proposition, as it is apparent that the draftsman of each Order considered that this was the correct definition of the Crown’s law-making power. I am therefore willing to accept, as does Lord Rodger, that the Orders had to be laws made for the “peace, order and good government” of the colony.

128 That ritual phrase does not, however, permit a court to strike down a provision in such an order on the ground that it does not consider that it furthered that object. The locus classicus for this proposition is in the decision of the Privy Council in *Riel v The Queen* (1885) 10 App Cas 675. Lord Halsbury LC, giving the judgment of the board, said in a well known sentence at p 678, referring to the British North America Act 1871 (34 & 35 Vict c 28), giving the Canadian Parliament authority to make laws for the administration, peace, order and good government of territories not yet included in any province: “The words of the statute are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to.” In the previous paragraph he specifically rejected the suggestion that

“if a court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order and good government, that they would be entitled to regard any statute directed to those objects, but which a court should think likely to fail of that effect, as ultra vires and beyond the competency of the Dominion Parliament to enact.”

The High Court of Australia confirmed the application in Australia of the same principle in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10:

“These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words ‘for the peace, order and good government’ are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a state, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score.”

129 The issue received some consideration in Northern Ireland, where section 4 of the Government of Ireland Act 1920 conferred upon the Parliament of Northern Ireland power to make laws for “the peace, order, and good government of . . . Northern Ireland”, except for certain specified objects. This provision was considered in several decided cases, but without any resolution of the plenitude of the power conferred by it. In *Gallagher v Lynn* [1937] AC 863 the House of Lords considered the Milk and Milk Products Act (Northern Ireland) 1934, but the decision turned upon the issue whether the Act was a law in respect of trade (an excepted object) or in respect of precautions taken to secure the health of the inhabitants by protecting them from the dangers of an unregulated supply of milk. The House did not pronounce upon the appellant’s argument that the power to make laws for the peace, order and good government was limited. Nor did the Court of Appeal in Northern Ireland rule upon the extent of the power in *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79, where

A it was not disputed that legislation in respect of transport came within the power. In *Duffy v Ministry of Labour and National Insurance* [1962] NI 6 legislation to safeguard the employment of Northern Ireland workers (to the detriment of others who did not so qualify) was held by Lord MacDermott LCJ in the Court of Appeal to be clearly a matter within the power. It is notable that there was no successful challenge during the period  
B (some 50 years) of existence of the Parliament of Northern Ireland to any statutory provision on the ground that it fell outside the general power conferred by section 4 of the 1920 Act. It is suggested in *Calvert, Constitutional Law in Northern Ireland* (1968), pp 170–172 that such a challenge might nevertheless succeed in an appropriate case, but its absence is at least negative evidence against the correctness of the suggestion.

130 I accordingly agree with Lord Rodger in holding that it is not for  
C the courts to substitute their judgment for that of the Secretary of State advising Her Majesty as to what can properly be said to conduce to the peace, order and good government of BIOT. A court might understandably be strongly attracted to the view that a law which removes the Chagossians from their homeland cannot be said to be for the peace, order and good government of the colony. But it is not for the courts to declare the law  
D invalid on that ground. Once they enter upon such territory they could very easily get into the area of challenging what is essentially a political judgment, which is not for the courts of law. However distasteful they may consider a provision such as those under consideration in the present case, I think that the rule of abstinence should remain unqualified and the courts should not pronounce on the validity of such a provision on the ground that it is not for the peace, order and good government of the colony in question.

131 I turn then to the question of the rationality of the 2004 Orders in  
E Council. It must be borne in mind that it is the *Wednesbury* (*Associated Provincial Picture Houses Ltd v Wednesbury Corp*n [1948] 1 KB 223) standard which must be applied to the Secretary of State's decision to have the Orders in Council enacted. The Human Rights Act 1998 and the European Convention on Human Rights do not apply to BIOT—see Lord Hoffmann's opinion at paras 64–65—and therefore the applicable standard  
F is not that of proportionality in the Convention context. I think that it may be appropriate, however, to adopt the approach set out by Sir Thomas Bingham MR in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554:

“The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether  
G the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.”

H The time at which the factors governing reasonableness have to be assessed is, self-evidently, the time of making the decision called into question. One must therefore look at the situation obtaining at the time when the Orders in Council were made and consider whether it was reasonable in the *Wednesbury* sense, as qualified by *Smith*, to prohibit the Chagossians from

returning to their homeland. Could it be said, as Lord Rodger asks, that no reasonable Secretary of State could have so decided? A

132 Lord Rodger has set out in paras 112–114 the considerations which were taken into account in making the decision and I need not repeat them. The feasibility reports make it abundantly plain that resettlement in the Chagos Islands, even with substantial financial support, would have been impracticable. The whole substructure of their economy had disappeared and could not be recreated. The practicability of starting replacement occupations was extremely doubtful. The wisdom of settling in the atolls, given the ecological factors now pertaining, was questionable. Looming over all considerations were the twin issues of prohibitive cost and the United Kingdom's interests in co-operation with an important ally in maintaining a secure defence installation. The Secretary of State was quite justified in taking all these factors into account. Criticisms have been advanced of the validity of the reasons advanced on behalf of the United States for wanting to keep the whole of the territory free from settlement, but even if it might be said that the concerns expressed appear exaggerated, the fact remains that the US clearly desired to keep a large clear area around the base. Decisions about how far to accommodate such concerns and wishes are very much a matter for ministers, who have access to a range of information not available to the courts and are accountable to Parliament for their actions. I think that courts should be more than a little slow to pin that butterfly to the wheel. I accordingly conclude, in full agreement with Lord Hoffmann and Lord Rodger, that the Secretary of State's decision should not be set aside on the ground of irrationality. B C D

133 The final issue which I want to discuss is that of legitimate expectation. All members of the Court of Appeal were in agreement that the Chagossians had a legitimate expectation that they would be permitted to return, and that the prohibition contained in the 2004 Orders in Council brought about a breach of that. The principles governing what is now known as substantive legitimate expectation were outlined by the Court of Appeal in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 in a judgment which has now become very familiar. They have not yet been considered in depth by the House, although in *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348, 358, para 34 Lord Hoffmann accepted *Coughlan* as correct. I would therefore prefer not to express a concluded opinion on the limits of the concept. I am content, however, for present purposes to accept that breach of such an expectation can give rise to an actionable claim and to consider the issue on that basis. E F

134 Following the publication of the court's decision in *Bancoult* (No 1), the Secretary of State issued the following press release on 3 November 2000: G

"I have decided to accept the court's ruling and the Government will not be appealing. The work we are doing on the feasibility of resettling the Ilois now takes on a new importance. We started the feasibility work a year ago and are now well underway with phase two of the study. Furthermore, we will put in place a new Immigration Ordinance which will allow the Ilois to return to the outer islands while observing our Treaty obligations. This Government has not defended what was done or said 30 years ago. As Laws LJ recognised, we made no attempt to conceal H

- A the gravity of what happened. I am pleased that he has commended the wholly admirable conduct in disclosing material to the court and praised the openness of today's Foreign Office."

The respondent and the other Chagossians claim that this statement without more gave rise to a legitimate expectation on their part that they could return to the Chagos Islands. As Lord Hoffmann has pointed out in para 61, the background to the statement was the feasibility study, reference to which was prominent in the press statement. I agree with him that it could not be said that the statement gave an unequivocal assurance that they could be allowed to resettle the islands, irrespective of the conclusions of the feasibility study. Their desire to be allowed to pay more transient visits is not at the centre of the dispute, and this has indeed been accommodated. For the reasons given by Lord Hoffmann and Lord Rodger, I also consider that the Government did not give the Chagossians a clear and unambiguous promise that they would be allowed to return and resettle permanently on the outer islands. I might add two other points. The press statement was not an assurance directed towards one individual or a small number of people, whereas in *Coughlan*, para 60, the Court of Appeal regarded such a limitation as a significant feature in favour of the applicant's claim. Secondly, if the Government were obliged to resettle the Chagossians, the consequences could be more than financial, as it could give rise to friction with the United States: see *Coughlan*, para 60.

135 The basis of the jurisdiction is abuse of power and unfairness to the citizen on the part of a public authority: see *Coughlan*, para 82. On this basis it has been held that two factors, both present in the case before the House, tend to show that there has not been an abuse of power. The first is when the authority changes its policy on sufficient public grounds. If there is an overriding public interest behind its change of policy, it will not be an abuse of power: *Coughlan*, para 57; *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1130–1131. The second factor is whether the claimant has relied on the promise or representation, in particular whether he has thereby suffered any detriment. The Court of Appeal has affirmed the necessity for this. In *Begbie* Peter Gibson LJ said at p 1124 that it would be "wrong to understate the significance of reliance in this area of the law. It is very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation". Cf also *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, 246, where the court adopted at para 29 the statement in *Craig, Administrative Law*, 4th ed (1999), p 619 that "detrimental reliance will normally be required". If it could be said, contrary to my opinion, that the press statement of 3 November 2000 did contain a sufficiently clear and unambiguous promise or representation, these factors would militate against affording a remedy to the Chagossians.

136 For the reasons which I have given I would allow the appeal and make the order proposed by Lord Hoffmann. I do not do so through any lack of sympathy with the Chagossians. They were undoubtedly treated very shabbily when they were removed from the Islands. They were paid some compensation, but very tardily, while they suffered considerable privations after their removal. No one could fail to feel distressed about their plight at that time. It is the function of the courts, however, to adjudicate upon legal rights, and no matter how sympathetic they may be to

a party who has been badly treated in the past, they are required to apply the law in the present and apply it properly and impartially—in the words of the Book of Common Prayer, truly and indifferently minister justice. It is that imperative which has taken me to the conclusion which I have reached.

## LORD MANCE

### *Introduction*

137 My Lords, there is a much traversed history to this latest appeal arising from the creation of the British Indian Overseas Territories (“BIOT”) in 1965 and its vacation over the next eight years by its inhabitants, the Ilois or Chagossians. Accounts will be found in paras 6 to 20 of the Divisional Court’s judgment in previous proceedings brought by Mr Bancoult, *R (Bancoult) v Secretary of State for the Foreign and Commonwealth Affairs* (“*Bancoult* (No 1)”) [2001] QB 1067, in the judgments given by Ouseley J in *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB) and by the Court of Appeal in the same proceedings [2004] EWCA Civ 997 as well as in the judgments below in the present case [2006] EWHC 1038 (Admin); [2008] QB 365. The speech of my noble and learned friend, Lord Hoffmann, contains in paras 1–30 an outline of events up to the commencement of the present proceedings which I am happy to adopt for present purposes with few qualifications.

138 One qualification concerns paras 15 and 23, in relation to which I note that it is clear that the 1971 Ordinance (Ordinance No 1 of 1971) was enacted by the Commissioner of BIOT on 16 April 1971 following a decision taken in London in or by March 1971 that all the Chagos Islands should be cleared of their “extremely unsophisticated” inhabitants; that the Chagossians’ objection to the 1971 Ordinance does not depend upon whether or not the 1971 Ordinance was the reason why they left; and that it is not in my view shown that the Chagossians have been, in *Bancoult* (No 1) or the present proceedings, engaged in a mere campaign to obtain United Kingdom Government support for resettlement or to embarrass the United Kingdom and United States Governments. Their wish for recognition of their historic connection, and on their case rights of abode, in relation to the Chagos Islands is deep-felt, longstanding and, in my view, understandable. Arguments that any right of abode is symbolic, since it would be impracticable to exercise without expensive government support to which it is accepted that there is no right and which would not be forthcoming, in my view miss the point. If anything, they indicate that the right claimed could be recognised without this being likely to have any practical effect on the present state of the Chagos Islands. These islands (apart from Diego Garcia) appear to exist as an unspoilt nature paradise to which an increasing number of long-distance yachtsmen venture to spend periods of months without noticeable disturbance to the operations of the United States base at Diego Garcia many miles away.

139 BIOT consists of the Chagos Archipelago, originally a dependency of Mauritius, which was (after capture in 1810) ceded to the United Kingdom by France in 1814. Mr Bancoult was born in the Chagos Islands, living it appears on one of the islands, Peros Banhos (considerably more than 100 miles north of Diego Garcia), until March 1968. In 1965 the Chagos Islands together with three other islands previously part of the Seychelles



- A (Aldabra, Desroches and Farquhar) were constituted a separate colony by the British Indian Ocean Territory Order 1965. The Order established the office of Commissioner and gave him the right to make laws for the peace, order and good government of BIOT. The Order was also expressed to reserve to Her Majesty “full power to make laws from time to time for the peace, order and good government of [BIOT] (including, without prejudice to the generality of the foregoing, laws amending or revoking this Order)”.
- B In 1976 Aldabra, Desroches and Farquhar were returned to the Seychelles as part of the preparation for the Seychelles’ independence. The 1965 Order was at the same time replaced by an Order in similar terms, but confining BIOT to the Chagos Islands. In the meanwhile, the Commissioner had enacted the 1971 Ordinance, providing that no-one should enter or be present in BIOT without a permit, and the Chagossians had in fact
- C (it appears by the end of May 1973) all left the Chagos Islands. The Divisional Court’s judgment, handed down formally in *Bancoult (No 1)* on 3 November 2000 but no doubt distributed in draft some days beforehand, established that the 1971 Ordinance was ultra vires the commissioner and the 1965 Order.

- 140 The Foreign Secretary, then Mr Robin Cook, decided to accept the court’s decision and not to appeal, and, accordingly, on the day the judgment was handed down, issued the press release which my noble and learned friend Lord Hoffmann has set out in para 17. Also on 3 November 2000 the Commissioner made Ordinance No 4 of 2000 substituting, for the restrictive regime which had been held void of the 1971 Ordinance, a new regime. The new regime contained an exception from the requirement in section 4(1) to have a permit in order to enter or remain in BIOT, for any
- D person being under the British Nationality Act 1981 “a British Dependent Territories citizen . . . by virtue of his connection with [BIOT]”: section 4(3). On 10 June 2004 Her Majesty in Council enacted the British Indian Ocean Territory (Constitution) Order 2004 (“the BIOT Order 2004”), revoking the 1976 and other previous orders, re-enacting various constitutional provisions, but including section 9. Section 9 recites that, whereas BIOT
- E “was constituted and is set aside to be available for defence purposes” of the Governments of the United Kingdom and of the United States, “no person has the right of abode in the territory” (section 9(1)) and that “Accordingly, no person is entitled to enter or be present in the territory except as authorised by or under this Order or any other law for the time being in force in the territory”: section 9(2). By a separate British Indian Ocean Territory (Immigration) Order 2004 (“the Immigration Order”) on
- F the same date, Her Majesty in Council prohibited any entry or presence without a permit which an immigration officer might issue or renew “acting in his entire discretion”. Mr Bancoult’s present challenge is directed primarily at the validity of section 9 of the BIOT Order 2004, which is the basis for the Immigration Order.
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- 141 At the heart of this appeal lie questions as to the scope of the prerogative legislative power which Her Majesty in Council retains over
- H BIOT and its vulnerability or otherwise to any form of review or challenge. I can identify at the outset some points on which I am in full agreement with my noble and learned friend, Lord Hoffmann, and one point which I prefer to leave open. First, the prerogative power of the Crown to legislate by Order in Council on the advice of Her Majesty’s ministers in relation to a

territory such as BIOT is subject to judicial review. Dicey observed in his *Introduction to the Study of the Law of the Constitution*, 8th ed (1915), that “we may use the term ‘prerogative’ as equivalent to the discretionary authority of the executive” (p 421) and that “it applies . . . also to that large and constantly increasing number of proceedings which, though carried out in the King’s name, are in truth wholly the acts of the Ministry”: p 422. Into the latter category fall the making of legislative Orders in Council such as the BIOT Order 2004. I see no good reason why they should not be reviewable in the same way as other steps, administrative or legislative, by the executive, and every reason why they should be, on the familiar grounds of legality, rationality and procedural propriety, due weight being of course given to the executive’s effective role as primary decision-maker. A recognition that a legislative Order in Council is invalid by a judgment given in proceedings such as the present directed against the minister responsible for the making of the order no more involves the making of an impermissible order against the Sovereign than a successful challenge to any other prerogative act undertaken in Her name.

142 The second point is that the Colonial Laws Validity Act 1865 is no obstacle to such review in the present case, for the reasons given by my noble and learned friend, Lord Hoffmann, in paras 36–41. The third point is that, for the reasons given by Lord Hoffmann in paras 64–65, the Human Rights Act and Convention have no role to play in this litigation. The fourth point is one that, in the light of the other conclusions which I reach on this appeal, I prefer to leave for consideration in another case. It is whether and, if so, to what extent, international law may have any relevance to the exercise or to judicial review of the exercise of the power to make Orders in Council in respect of a territory such as BIOT: see also para 145 below.

#### *Scope of the prerogative power*

143 Logically prior to any question of judicial review of its exercise is the question whether the scope of the prerogative legislative power is subject to any relevant limit. That is any limit affecting the ability of the Crown to make an Order in Council precluding Chagossians, and Mr Bancoult in particular, from returning to BIOT without a permit. Mr Jonathan Crow for the Secretary of State relies heavily upon the equivalence, as he submits, of the power to make laws of Her Majesty in Parliament in the domestic sphere (in which it is now recognised that this is the only way in which laws can be made) and of Her Majesty in Council to make laws in the present sphere, where the Crown in Council remains the primary legislative authority in relation to BIOT, so long as Parliament has not by statute otherwise provided. He notes that in relation to other overseas territories Parliament has substituted for prerogative rule a statutory scheme (eg in the West Indies), and that BIOT and Gibraltar remain exceptions where prerogative rule survives, by inference by Parliament’s deliberate will.

144 These are powerful considerations. But they do not lead necessarily to a conclusion that the Crown’s prerogative power in respect of a ceded colony or territory is without any limit. First, it is to be noted that in relation to settled territories the Crown’s prerogative power was at common law confined to establishing a constitution granting settlers the right to legislate for themselves: see *Roberts-Wray, Commonwealth and Colonial Law* (1966) p 151 and *Sammut v Strickland* [1938] AC 678, 701, where Lord Maugham

A observed that “The Crown clearly had no prerogative right to legislate in such a case”. This lack of power was addressed by the British Settlements Act 1887 (50 & 51 Vict c 54), which conferred on the Queen in Council power to make such laws as appear to her “necessary for the peace, order, and good government of Her Majesty’s subjects and others within any British settlement”. The aim was to equate the powers of the Queen in Council in British settlements with her powers over ceded colonies: see  
B *Roberts-Wray*, at pp 166–168.

145 There is, as Mr Crow points out, no express definition of the Queen’s powers over ceded colonies in terms of their “peace, order and good government”, but the British Settlements Act suggests that this phrase reflects the generally understood nature of such powers. However, it is also, as Mr Crow submits, a phrase which has received the widest interpretation.  
C “Once it is found that a particular topic of legislation is among those upon which [a legislature] may competently legislate” under the relevant constitution, the words “authorise the utmost discretion of enactment for the attainment of the objects pointed to”: see *Croft v Dunphy* [1933] AC 156, 163–164, per Lord Macmillan giving the opinion of the board and quoting in the latter part *Riel v The Queen* (1885) 10 App Cas 675, 678, per Lord Halsbury LC; and see also *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733. In *Croft v Dunphy* Lord Macmillan went on, at p 165:  
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“When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the state which has conferred the power.”  
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The permissible topics of legislation referred to in these authorities were expressed in the relevant constitutions. In *Croft v Dunphy* the Privy Council left open also a possibility that the power conferred in that case by the British North America Act 1867 on the Dominion Parliament might implicitly be limited to the enactment of legislation conforming with international law.  
F This is the point that, as I have mentioned, I prefer to leave open. But the fact that the Privy Council contemplated the possibility underlines the difference between legislation by the Crown in Council and by the Crown in Parliament. This appeal raises the question whether there is any implied limitation as regards the topics upon which Her Majesty may at common law legislate in Council for a ceded territory such as BIOT.

G 146 A second point is that the Crown in Council may suspend or divest itself of its prerogative power of legislation in a territory subject to the Crown, in contrast at least theoretically with the Crown in Parliament. The rule was established in *Campbell v Hall* (1774) 1 Cowp 204, where the court in a judgment delivered by Lord Mansfield held, after the case had been “very elaborately argued four several times”, that in relation to the conquered colony of Grenada the Crown had, by issuing letters patent providing that subordinate legislation over the island should be exercised by an assembly with the consent of the governor and council, divested itself of the power to legislate by later letters patent relating to excise duties, something that “can only now be done, by the assembly of the island, or by an Act of the Parliament of Great Britain”: pp 213–214. The scope of this  
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limitation is discussed in *Roberts-Wray*, at pp 157–162. The conclusion there reached is that the grant of legislative institutions is irrevocable, unless the power of revocation is reserved (a proposition vouched by *Sammut v Strickland*, at p 704), but that amendment of a constitution not amounting to revocation of the grant remains within the prerogative rights of the Crown. For present purposes, what matters is that the Crown’s legislative prerogative in council was not treated as parallel in all its features to the sovereign and inalienable power of the Crown in Parliament.

147 Thirdly, in *Campbell v Hall* the court laid down six general propositions which it thought “quite clear” and which included limitations on the Crown’s power: the first was that a conquered country becomes a dominion of the King in right of his Crown and therefore necessarily subject to the legislature, the Parliament of Great Britain; the second, that the conquered inhabitants once received under the King’s protection, become subjects and are to be universally considered in that regard, not as enemies or aliens; the third, that the articles of capitulation and peace are sacred and inviolable according to their true intent and meaning; the fourth, that the law and legislative government of every dominion equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there; the fifth, that the laws of a conquered country continue in force, until they are altered by the conqueror; and the sixth and last

“that, if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as, for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many instances which might be put.” (P 209.)

148 In *Liyanage v The Queen* [1967] 1 AC 259 the appellants sought to invoke Lord Mansfield’s sixth proposition in the context of an argument that, since Ceylon’s independence was the product of one or more Orders in Council in 1946 rather than of Parliamentary legislation, the Ceylon Parliament could not have been granted greater powers than those of the Queen in Council, and that, as a result, legislation altering ex post facto the definition and procedures relating to certain criminal offences could be disregarded as contrary to fundamental principle and void. The Privy Council held that the Colonial Laws Validity Act 1865 had been passed to overcome any suggestion that colonial legislative acts might be regarded as void for any reason other than repugnancy to an Act of the United Kingdom, and that this had been repeated and extended by Act of the United Kingdom Parliament (the Ceylon Independence Act 1947) which provided that no law of the Ceylon Parliament should be void as repugnant to any existing or future Act of the United Kingdom Parliament. The board did not accept that the removal of the fetter of repugnancy to English law “left in existence a fetter of repugnancy to some vague unspecified law of natural justice”: p 284G. Strictly, the decision does not touch the question whether Lord Mansfield’s sixth proposition still applies to the scrutiny in this jurisdiction

A of the BIOT Order 2004, for the reasons given by my noble and learned friend, Lord Hoffmann, in paras 40–41 of his speech. But it is right to add that the board in *Liyanage* doubted “whether Lord Mansfield was intending to say that what was not repugnant to English law might yet be repugnant to fundamental principles or to set up the latter as a different test from the former” (p 285A), and it noted that “no case has been cited in which during the last 100 years any judgment (or, so far as one can see, any argument) has been founded on that portion of Lord Mansfield’s judgment”: p 285B.

B 149 Fourthly, the scope of the royal prerogative to legislate in council is “a pure question of English common law”: *Sammut v Strickland*, at p 697. The principle goes back to *The Case of Proclamations* (1611) 12 Co Rep 74, 76, where Coke CJ said that “the King hath no prerogative, but that which the law of the land allows him”. Lord Mansfield’s six propositions in C *Campbell v Hall* demonstrate, first, that the Crown’s prerogative power to legislate in council was not regarded as an equivalent or parallel power, but rather as subordinate, to the Crown’s power to legislate in Parliament, and that the primary legislative body was the latter, and, second, that the court was ready and able to attach what were at that time considered appropriate limits to the Crown’s power to legislate in council. Further, in determining D the scope of the royal prerogative, the courts will look for guidance to its previous mode of exercise. Considering the scope of the admittedly residual prerogative power to take property in times of war in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101D, Lord Reid said that the proper approach was “a historical one: how was it used in former times and how has it been used in modern times?”.

E 150 The present case concerns the legitimacy of using the royal prerogative to introduce into a constitution for BIOT a provision that no Chagossian has a right of abode or a right to enter or be present in BIOT except as authorised under the constitution (which contains no presently relevant authorisation) or by any other law (the only other relevant law being the Immigration Ordinance, under which entry and presence depend on executive discretion). It would be surprising if any precedent F could be found for such a provision, and none has been shown. The operational words of section 9 of the BIOT Order 2004 (“no person has the right of abode”) were prefaced by the apologia that BIOT was “constituted and is set aside to be available for the defence purposes” of the two Governments. That would be innocuous if BIOT had been without inhabitants or (to use a word much deployed at the time in Government and civil service memoranda) “belongs” when BIOT was in 1965 constituted G by its separation from other British territories. But the history of this sad case shows that, despite attempts to make the facts fit another picture, BIOT had a not inconsiderable number of such inhabitants, certainly hundreds, maybe approaching a thousand. Once BIOT was created with such inhabitants, they in Lord Mansfield’s words were by virtue of their connection with BIOT “under the King’s protection . . . subjects and are to be universally considered in that light, not as enemies or aliens”: *Campbell v H Hall* 1 Cowp 204, 208.

151 Mr Crow submits nevertheless that the Crown’s subjects inhabiting BIOT had in public law no right of abode, and nothing of which they could therefore be deprived. It is common ground that this would not be the position in the United Kingdom. The right is fundamental and, in the

informal sense in which that term is necessarily used in a United Kingdom context, constitutional. Chapter 29 of Magna Carta provides that “no freeman shall be . . . exiled . . . but by lawful judgment of his peers, or by the law of the land”. Blackstone (*Commentaries on the Laws of England*, vol 1, p 137) states the position in these terms:

“A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ ne exeat regnum, and prohibit any of his subjects from going into foreign parts without licence . . . But no power on earth, except the authority of parliament, can send any subject *out of the land* against his will; no, not even a criminal. For exile, and transportation, are punishments at present unknown to the common law . . .”

The power which Shakespeare records that Richard II, with the advice of his Council, exercised in banishing Henry Bolingbroke, Duke of Hereford, and Thomas Mowbray, Duke of Norfolk, (*King Richard II*, Act I, Scene III) had by the time of Blackstone long since disappeared. In the Divisional Court in *Bancoult* (No 1) Laws LJ cited international textbook and case law authority to like effect to Blackstone: see also *Chalmers’ Opinions of Eminent Lawyers* (1814), vol 1, p 4 and *Joseph Chitty, A Treatise on the Law of the Prerogatives of the Crown* (1820), p 21. In *R v Bhagwan* [1972] AC 60, Lord Diplock identified the right of a British subject at common law “to enter the United Kingdom without let or hindrance when and where he pleased and to remain here as long as he listed” (p 74B), and of such subjects “to go wherever they like within the realm”: p 77G. In respect of persons who were British citizens by virtue of their connection with a part of the Commonwealth other than the United Kingdom, that right was from 1962 onwards made subject progressively to statutory qualifications: see *R v Bhagwan* and *R v Governor of Pentonville Prison, Ex p Azam* [1974] AC 18. Thus, from 1973 when the Immigration Act 1971 came into force, all Commonwealth citizens entering the United Kingdom without leave were liable to prosecution. But the common law right to enter and remain within the United Kingdom remains unchanged in respect of those with British citizenship based on their connection with the United Kingdom.

152 The common law position relating to aliens differs significantly.

“One of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order, and good government, or to its social or material interests: *Vattel, Law of Nations*, book 1, s 231; book 2, s 125”: *Attorney General for Canada v Cain* [1906] AC 542, 546;

and see *Chalmers’ Opinions of Eminent Lawyers*, vol 1, p 4 and *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 111F–G, where Lord Scarman proceeded on the basis that “an alien is liable to expulsion under the royal prerogative and a non-patrial has no right of abode”.

A 153 Mr Crow submits that the common law principles governing persons with a right of abode in England have no relevance to ceded territories like BIOT. In this submission, inhabitants of BIOT never had any right of abode, and certainly none which could survive or be the basis of any objection to section 9 of the BIOT Order 2004. In any event, he submits, the concept of an inhabitant of BIOT is too uncertain to receive legal recognition. As to the latter submission, there may be issues about who in B and after 1965 was an inhabitant of the BIOT, as opposed to an inhabitant of, say, Mauritius or the Seychelles working as temporary labour in BIOT. However, it is clear enough that there were at the least hundreds of persons who could only properly be described as Chagossians, even though they may have had no property rights in BIOT as a matter of private law. Above all, it is, as Sir Sydney submitted, clear that Mr Bancoult was a Chagossian by C birth. And there was no difficulty in identifying the concept of a Chagossian for the purposes of the 2000 Ordinance (see section 4(3) quoted in para 140 above).

154 As to Mr Crow's former submission, the common law position must in my opinion be that every British citizen has a right to enter and remain in the constitutional unit to which his or her citizenship relates. That is the case with the United Kingdom. In relation to overseas territories D acquired by the Crown, there exists in relation to private law a distinction between those acquired by settlement on the one hand and those acquired by conquest or cession on the other. In the case of the former, the settlers take with them English private law. In the case of the latter, the local private law remains in place, subject to potential but presently irrelevant qualifications, unless and until varied (as it was in the case of BIOT under the British Indian E Ocean Territory Courts Ordinance 1983 which provided for English law to apply in BIOT so far as applicable and suitable and subject to any necessary modifications, adaptations, qualifications and exceptions as local circumstances rendered necessary).

155 However, no such distinction exists as regards public law, or in particular as regards constitutional questions including the nature and extent of the Crown's prerogative. Even where the Crown acquires overseas F dominions by conquest or cession, the relationship between the Crown and its subjects becomes subject to the like public law principles to those applicable in the United Kingdom: see *Sammut v Strickland* [1938] AC 678, 697, *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 721C-F, *Kodeeswaran v Attorney General of Ceylon* [1970] AC 1111, 1118A-D (referring to *Ruding v Smith* (1821) 2 Hag Con 371, 382, a case concerning G the validity of a marriage in the English form in the Cape Colony after its conquest from the Dutch in 1795, where Lord Stowell said that "Even with respect to the ancient inhabitants, no small portion of the ancient law is unavoidably superseded, by the revolution of government that has taken place. The allegiance of the subjects, and all the law that relates to it . . . and all the laws connected with the exercise of the sovereign authority—must undergo alterations adapted to the change"), *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 and *Halsbury's Laws of England*, 4th ed reissue, vol 6 (2003), para 878. The inhabitants of H BIOT came in Lord Mansfield's words under the protection of the Crown, became subjects and were to be universally considered in that regard, not as enemies or aliens. They acquired as against the Crown the like

constitutional right of abode and the like immunity from exile as the common law confers on citizens of the United Kingdom: see para 151 above. After 1965, the only constitutional unit to which Mr Bancoult's and other Chagossians' citizenship and right of abode related was BIOT. As Mr J H Lambert pointed out in a confidential memorandum on the status of the inhabitants of BIOT dated 4 September 1968 (disclosed by the Government in these proceedings), if such Chagossians applied for a UK passport, "presumably the colonial endorsement could only reveal that they belonged to BIOT since there was no other British colony to which they could belong". Mr Crow's submission that Chagossians had no common law right of abode in BIOT comes close to treating them as if they were aliens, and is one that I would reject.

156 That does not resolve this appeal, because of Mr Crow's further and principal submission that any common law right of abode in BIOT that Chagossians may have had could always be and was overridden and removed by Her Majesty in Council. This, Mr Crow submits, is what section 9 of the BIOT Order 2004 on any view achieves. Within the United Kingdom, such a result could only be achieved by Parliament, whereas in territories such as BIOT it is submitted that the royal prerogative reigns unlimited in scope, subject only (Mr Crow's contrary submission being already rejected) to judicial review.

157 This submission treats BIOT and the prerogative power to make constitutional or other laws relating to BIOT as if they related to nothing more than the bare land, and as if the people inhabiting BIOT were an insignificant inconvenience (a phrase which reflects the flavour of some of the Government's internal memoranda in the 1960s), liable to be dispossessed at will for any reason that might seem good to the executive in the interests of the United Kingdom. Sir Sydney accepts that in administering BIOT the Crown in Council was entitled to have regard to the interests of the United Kingdom and its territories generally, and was not confined to consideration of the benefits to BIOT alone. He also accepts that the United Kingdom could, in the defence interests of itself and its ally, require Chagossians resident in one part of the territory (Diego Garcia) to move to another part, and that there might be extreme circumstances of necessity (eg where a whole territory became unsafe for inhabitation, due to volcanic eruption or imminent threat of inundation) where the United Kingdom could by Order in Council require its evacuation. But enacting a constitution for a conquered or ceded colony which has the aim of depopulating the whole of a habitable territory in the interests of the United Kingdom or its allies is another matter. A colony, whether conquered, ceded or settled, consists, first and foremost, of people living in a territory, with links to a parent state. The Crown's "constituent" power to introduce a constitution for a ceded territory is a power intended to enable the proper governance of the territory, at least among other things for the benefit of the people inhabiting it. A constitution which exiles a territory's inhabitants is a contradiction in terms. The absence of any precedent for the exercise of the royal prerogative to exclude the inhabitants of a colony from the colony is significant, although to my mind entirely unsurprising. Until the present case, no-one can have conceived of its exercise for such a purpose. Territories, such as Gibraltar or Malta, have been conquered or ceded with military purposes in mind, but never, so far as appears, has there been either



A an original purpose or a subsequent attempt compulsorily to exclude their natural inhabitants. It may not have been necessary in the present case to use force to empty BIOT, but the logic of the Government's position is that this too would have been permissible.

B 158 The only two cases which offer any support to Mr Crow's position in this connection are *Co-operative Committee on Japanese Canadians v Attorney General for Canada* [1947] AC 87, where a Dominion statute was interpreted as authorising removal from Canada not merely of persons of Japanese origin who requested repatriation, but also of their wives and children under 16 who resisted their own removal, and *Zabrovsky v General Officer Commanding Palestine* [1947] AC 246, where the Privy Council in dicta endorsed the decisions of Palestinian courts below which had accepted the legality of a deportation order, made in respect of a Palestinian citizen under an Order in Council and Emergency Regulations, as not being ultra vires a limited territorial power like Palestine, citing the cases of *Attorney General for Canada v Cain* and the *Co-operative Committee on Japanese Canadians* case. No close examination appears to have been undertaken in the former case of the scope of the power of the Dominion legislature or in the latter case of the power which could be or was conferred by the Order in Council. Both cases were concerned with emergency situations and in the latter the Board relied upon *Liversidge v Anderson* [1942] AC 206 as support for an extended and more "permissive" interference with personal liberty in "the troublous times of war". As both courts below have noted, that precedent is not a happy one, and I for my part think that *Co-operative Committee on Japanese Canadians* and *Zabrovsky* must be regarded as of no real assistance on the fundamental point which now arises.

E 159 Had the present issue arisen 225 years ago when Lord Mansfield was developing and examining the principles governing overseas colonies, the reasoning in *Campbell v Hall* leaves no real doubt about his answer. I do not believe that the common law has over the last two hundred years taken in this respect a more amenable line towards the exercise of executive power over the removal or exiling of a whole population. To treat an executive decision of this nature as non-justiciable is, in my view, even less easy to justify today when, I understand, all your Lordships agree that the reasonableness of such a decision is reviewable on grounds of, inter alia, rationality: see paras 141 above and 162 et seq below. No doubt it is true, and I accept, that Parliament could by statute achieve the result at which the BIOT Order 2004 aimed. But that is not, as Mr Crow urged in his written case and oral submissions, a reason for holding that the Queen in Council can or must "logically" be able to do the same. On the contrary, as Waller LJ rightly observed in the Court of Appeal (para 106), there are fundamental differences between legislation enacted by the executive through Her Majesty in Council and legislation subject to democratic debate in Parliament. In the present case, the process adopted affected basic common law rights without any form of consultation whatever with the Chagossians affected. The only justification advanced for this by H Mr Rammell, Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, in the Parliamentary debate on 7 July 2004 was that "There is no settled population within BIOT and that is why we have to make decisions that we have to make" (Hansard (HC Debates), col 293 WH). But section 9 affected the rights to enter BIOT of a category of

persons defined by the 2000 Ordinance, with a number of known representatives. Not only was there no opportunity for democratic debate outside or within Parliament, but the process of Parliamentary scrutiny of Orders in Council by the Foreign Affairs Committee could be and was overridden by the executive, with the result that the committee only learned of the BIOT Order 2004 after it was made. (The Secretary of State's evidence is that this usual process was supplemented in mid-2002 by specific committee request to see any draft orders effecting constitutional changes in overseas territories, a request in which the Foreign Secretary said in reply that he saw "merit". The explanation given after 10 June 2004 for the scrutiny override was that complete confidentiality needed to be preserved if "the risk of an attempt by the Chagossians to circumvent the Orders before they came into force" was to be avoided.)

160 In my opinion, the royal prerogative to legislate in relation to BIOT did not extend to enacting legislation aimed at depriving BIOT of its inhabitants' right to enter and be present there, if they wished, and so reducing BIOT to mere territory (apart from the military use of Diego Garcia reserved to the United States). There is no legal obligation to facilitate this entry or presence. Still less is there any to fund resettlement: that has been established by the dismissal of the claims in *Chagos Islanders v Attorney General* [2003] EWHC 2222 by Ouseley J in October 2003 and the Court of Appeal's refusal of permission to appeal against that dismissal in July 2004, and Mr Bancoult through Sir Sydney Kentridge accepts and is entitled to rely on this, without agreeing to forego such moral pressure as it may be possible to bring to bear to obtain voluntary support. The Crown having, it is understood, acquired by purchase all the land on the Chagos Islands may also have private law rights and remedies which would enable it to prevent any private initiative to settle there. But the present proceedings are concerned with the public law rights of the Chagossian inhabitants.

161 For the reasons I have given, it would not as a matter of public law have been permissible for the Crown to legislate by Order in Council to introduce a provision such as section 9 of the BIOT Order during the period 1965 to 1973 while Chagossians continued to live in BIOT. Chagossians who were British citizens by virtue of their connection with BIOT in the period 1965 onwards retain any right of abode that they had during that period, although many now appear also to have British citizenship with the right to come to the United Kingdom under sections 2 and 6 of the British Overseas Territories Act 2002. It has not been suggested that this (as opposed to the BIOT Order 2004) deprives them of any right of abode they may have in respect of BIOT, although it has been submitted that the force of their connection with BIOT diminishes with time. The present issue is however concerned with vires, and, if section 9 could not have been enacted by Order in Council during the period 1965 to 1973, it remained in my opinion outside the legitimate scope of the exercise of the legislative prerogative in 2004. That, I reiterate, would not prevent the Crown legislating by United Kingdom statute in any terms which proved acceptable to Parliament, a process which would involve open debate.

#### *Judicial review*

162 I turn to the position on the hypothesis that the conclusion expressed in the previous paragraphs is not accepted. On that basis, there

A was no absolute fetter to prevent the Crown in Council from exiling the Chagossian inhabitants of the Chagos Islands, either in 1971 or in 2004. However, in the courts below, the Crown's decision to do so has been held void on judicial review grounds. In the Divisional Court these were expressed in terms of irrationality. In the Court of Appeal, all three members of the court reached the same conclusion on the grounds of a legitimate expectation generated by Mr Cook's 3 November 2000 press release  
B accompanied by the 2000 Ordinance. Sedley LJ (paras 68–71) and Sir Anthony Clarke MR (para 123) also based their decision on the separate ground of irrationality.

163 I start with the United Kingdom Government's reasons given for introducing the BIOT Order of 10 June 2004. Unusually, for any form of legislation, section 9 contains in its text the explanation, to which I have  
C already referred, for the provision that no person has the right of abode in BIOT: BIOT was, it says, "constituted and is set aside to be available for the defence purposes" of the United Kingdom and United States. Mr Crow rightly submits that this explanation involves an area which courts themselves should be cautious about entering. The executive is par excellence better placed to judge the imperatives of the defence interests of  
D this country and its ally. However, the present case presents striking and unusual features. The only letters produced by the appellant dealing with the position in relation to Chagos Islands other than Diego Garcia come from United States sources, in each case after the commencement of the proceedings in which they were produced, although similar sentiments in relation to landings on the outer Chagos Islands are said to have been repeated from time to time informally. The letters are dated 21 June 2000,  
E 16 November 2004 and 18 January 2006.

164 In the first, the author, Assistant Secretary of State for Political-Military Affairs, described the central defence role played by Diego Garcia and the advantages of its strategic location and isolation, and then argued that

F "the settlement of a permanent civilian population on the islands of the Chagos archipelago, even those at some distance from Diego Garcia, would seriously diminish that isolation and as a consequence erode the island's nearly unparalleled strategic importance."

He referred to the "alarming prospect of the introduction of surveillance, monitoring and jamming devices that have the potential to disrupt, compromise or place at risk vital military operations", arguing that in  
G Western Europe or the United States, efforts to introduce surveillance, monitoring and jamming devices carry a considerable risk of discovery "if only because of the large number of people in the surrounding area", whereas "the return of small and scattered populations onto islands of the archipelago would make introduction and use of such devices possible with much less risk of discovery because this would occur in an isolated and undeveloped area", with the "Peros Banhos and Salomon atolls . . .  
H located only about 140 miles north of Diego Garcia". He referred to the introduction of settlements on the outlying islands as putting "Diego Garcia more easily within potential reach of hostile states or terrorists operating by boat", to difficulty and a risk of diversion of resources involved in ensuring the safety of any resident population in the event of an attack on the Chagos

Islands, to the inability of Diego Garcia to serve as a back-up airport “in the unlikely event that an international airport were built on one of the outer islands to support limited touristic activities” and to the absence of other sources of back-up supplies and services for the nearby civilian population as “one of the most telling factors distinguishing the situation of the military facility on Diego Garcia from US bases in the United Kingdom”. Finally, he observed that the United States might in “currently unforeseeable circumstances” one day require use of the outer Chagos Islands for defence purposes, something to which it would in that event be entitled under the inter-governmental agreement between the United Kingdom and the United States.

165 The letter of 16 November 2004 was written five months after the making of the BIOT Order 2004 and three months after the commencement of these proceedings. It referred to discussions “over the past several months” and said that, post 11 September 2001, the considerations explained in the letter of 21 June 2000 “have become even more cogent”, that “an attempt to resettle any of the islands of the Chagos Archipelago would severely compromise Diego Garcia’s unparalleled security and have a deleterious impact on our military operations” and that “we appreciate the steps taken by Her Majesty’s Government to prevent such resettlement”. The letter of 18 January 2006, written at the request of representatives of the United Kingdom Government and no doubt again intended for use in this litigation, was in similar but more extended vein. Noting that “it has been argued that vessels routinely pass within close proximity of Diego Garcia” (i.e. on the high seas, outside it appears a three mile territorial limit), and that “the low density and irregularity of such vessel transits afford military operators the opportunity to identify and closely monitor their movement and activity”, it went on to say that the same level of tracking and surveillance “would not be possible if the volume or density of the vessels indiscriminately transiting in the vicinity of Diego Garcia or the outer islands on a routine basis increased due to repopulation of the islands”, and that the United States was moreover seriously concerned that repopulating the outer islands “would provide terrorists the cover and concealment to establish permanent operating bases from which they could monitor island operations with minimum risk of counter detection”.

166 Not all the points made in these letters (particularly the primary letter of 21 June 2000) are easy to follow, and some of them raise on their face more questions than they resolve. The letters appear all to have been addressed to the possibility of permanent and extensive re-settlement of the outer islands, an unlikely future event in June 2000 or 2004 or 2006. In any event, it is clear that the United Kingdom Government in 2000 either did not share the United States’ assessment or did not consider that it bore on or precluded the grant to the Chagossians of a right to enter and be present in the outer islands. This is clear from the terms of Mr Robin Cook’s press statement and the BIOT Ordinance issued on 3 November 2000 after the decision in *Bancoult (No 1)*. The United States authorities themselves also appear to have recognised a reality in somewhat different terms to that indicated in their letter of 21 June 2000, in view of the affirmative answer given (subject to correction, but none occurred) by Mr John Battle, Minister of State, Foreign and Commonwealth Office, on 9 January 2001 to the Parliamentary question: “has the United States agreed that the islanders may

A return to any of the outlying islands? The letter of 21 June stated that that could imperil the base's status. Has that now changed?" (Hansard (HC Debates), col 193WH).

167 In the written statement by which the BIOT Order 2004 was on 15 June 2004 explained to Parliament, defence considerations were presented only briefly (although "equally") in a short seventh paragraph after two longer paragraphs explaining the decision as one reached  
B "after long and careful consideration" on grounds relating to the lack of feasibility of resettlement. A similar conjunction of lack of feasibility and defence considerations (with the emphasis on the former) appeared in a letter dated 22 June 2004 from Mr Jack Straw as Foreign Secretary to Mr Corbyn MP explaining the reasons for the BIOT Order 2004; likewise in the explanation given to Parliament by Mr Rammell, the Parliamentary  
C Under-Secretary of State for Foreign and Commonwealth Affairs, in the debate on 7 July 2004 (Hansard (HC Debates), cols 287WH–293WH). In that debate, Mr Rammell also said (col 293WH) that the decision to make the BIOT Order 2004 was entirely the United Kingdom Government's own. It was "not as the result of any pressure or lobbying from other parties" and he had not received, and did not believe that the  
D Foreign Secretary had "for a significant number of years received", any representations on the issue from the United States (col 293WH). (That points towards the United States' communication of 21 June 2000 as the last significant communication.)

168 As explained in the written statement, in Mr Straw's letter and by Mr Rammell, the Government had commissioned an independent feasibility study during the proceedings in *Bancoult (No 1)*. After saying that the latest  
E feasibility report had been delivered after the November 2000 judgment and placed in the House of Commons library, the written statement quoted passages and drew the conclusion that

"anything other than short-term resettlement on a purely subsistence basis would be highly precarious and would involve expensive underwriting by the UK Government for an open-ended period—  
F probably permanently. Accordingly, the Government considers . . . that it would be impossible for the Government to promote or even permit resettlement to take place."

The report is in fact dated 28 June 2002, so the BIOT Order 2004 was enacted two years after the report, and nine months after Ouseley J's decision that the Government had no duty to fund resettlement, although a  
G month before the Court of Appeal finally refused permission to appeal against that decision. In the absence of any legal obligation to fund resettlement, the prospective cost of doing so appears to me (as it did to Sedley LJ in the Court of Appeal: para 71) an unconvincing reason for withdrawing any right of abode and any right to enter or be present in BIOT. The Secretary of State notes in his written case that, even in the absence of  
H any legal obligation to fund resettlement (and although the United Kingdom has made clear its determination to resist any suggestion that it should provide such funds on a voluntary basis), there could be "public and political pressure claiming that the United Kingdom should provide funding for the cost of resettlement". That is not a reason articulated at the time or supported by any reference in the written case.

169 There was certainly concern in the late 1960s and early 1970s to avoid, if at all possible, any suggestion that BIOT had settled inhabitants to which the United Kingdom's international obligations under article 73 of the Charter of the United Nations would apply. Article 73 provides:

"Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses; b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement . . . d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialised international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this article . . ."

The Government's position in these proceedings has been that any international obligations which the United Kingdom has or may have had are not relevant to its obligations to the Chagossians under domestic law. It is established and accepted that the Government has no enforceable legal obligation to fund resettlement. There is no realistic prospect of resettlement without funding for which no realistic source is suggested to exist (and the Government itself relies on the absence of any steps towards resettlement in the years 2000 to 2004). Currently in issue is a right to enter and be present which would be likely to be exercised, if at all, only transiently and by very few.

170 A third factor, now mentioned in conjunction with lack of feasibility and defence considerations, is "the imminence of the intention to repopulate". This factor was not mentioned in the written statement, or in the letter written by Mr Jack Straw as Foreign Secretary to Mr Corbyn MP to explain the reasons for the BIOT Order 2004 or, as a reason for the Order, by Mr Rammell in the debate on 7 July 2004. The only brief allusion to it by Mr Rammell was, in his reply to a question why the Order had been made secretly, that "There was always going to be an opportunity for these issues to be debated, but it was right, given the imminence of the intention to repopulate, that we took considered action, and I believe that we did so" (Hansard (HC Debates), col 291WH). On 9 July 2004 Mr Straw also gave the Foreign Affairs Committee as the explanation for the secrecy that "we needed to preserve complete confidentiality if we were to avoid the risk of an attempt by the Chagossians to circumvent the Orders before they came into force".

171 The factual basis for these latter statements consists in press reports involving a group called LALIT (Creole for *La Lutte*) with diverse mixed

- A support and aims, some of which, shared by some of LALIT's supporters, involved action directed at protesting against or ending United States involvement in Diego Garcia, including some openly publicised, but very general, ideas about sailing a large "peace boat" to the Chagos Islands from Mumbai. Mr Bancoult was reported in *Le Mauricien* as attending one such meeting in mid-April 2004, but as expressing opposition to any steps to close the base at Diego Garcia. Rather than endorse any such steps, he said that
- B the base at Diego Garcia would permit Chagossians to have employment, while adding that, if there was a boat to take Chagossians to the other islands apart from Diego Garcia, as authorised by the High Court on 3 November 2000, he would take them. Mr Bancoult's aims were thus both measured and consistent with the existing permission granted by the 2000 Ordinance. The most likely time for any such sailing was, in the
- C estimation of the United Kingdom authorities, during the summer of 2004. Hence, it is said the urgency of enacting the BIOT Order 2004 in June 2004. No boat ever sailed so far as appears, and the preparation required, the distances involved and the information in, for example, the United States authorities' letters of 21 June 2000 and 18 January 2006 about identification and monitoring of vessel movements make it implausible to suggest that any
- D actual sailing would not have been detected at a very early stage or that, if any immediate threat developed, it would not have been diverted or apprehended with ease. There is nothing that could in any event justify a permanent withdrawal of the basic rights of entry, presence and abode addressed by section 9.

- 172 The reasons given for the BIOT Order 2004 must be viewed in context. Two aspects of the context stand out. First, in the light of what
- E I have already said any order removing the Chagossians' right of abode in the Chagos Islands was abrogating what Sedley LJ [2003] QB 365, para 71 described, in my opinion appropriately, as "one of the most fundamental liberties known to human beings, the freedom to return to one's homeland, however poor and barren the conditions of life". I do not think that one needs to go as far back in history as Sedley LJ did (para 58) to recognise how enduring and strongly held a human instinct this is. Assuming that such a
- F right can be removed by the Crown in Council, none the less it is one the removal of which calls for both careful consideration and good reason. The situation is one where an anxious or heightened review is called for: see *R v Ministry of Defence, Ex p Smith* [1996] QB 517 and *Doherty v Birmingham City Council* [2009] 1 AC 367. It is mistaken, and in my opinion conflates quite separate considerations, to dismiss from consideration the legal
- G freedom to return and all that it represents for the human spirit on the basis that return is impractical or uneconomic; or that the existence of legal freedom to return might be used as a moral pressure point on the United Kingdom to provide funds which it would be uneconomic to provide and which the Government has established in court that it has no duty to provide; or that the right may in practice remain symbolic. Symbols can themselves be important, more so in some cultures than others. Recognition
- H of a wrong can be as valuable as, sometimes valued more than, concrete compensation. The denial of a legal right to return, however remote the prospects of its exercise in practice, may add insult to injury. In any event, if the right is likely to remain symbolic, most of the reasons advanced for removing it lose force.

173 Secondly, the introduction of section 9 must be considered in the light of Mr Cook's response on 3 November 2000 to the decision in *Bancoult (No 1)*, in the form of his press statement and the making of the 2000 Ordinance. Mr Bancoult's case, accepted in the Court of Appeal, was that this gave him a legitimate expectation that, barring significant changes, the Chagossians would be recognised as having a right of abode and a right to enter and be present in the outer Chagos Islands. The Secretary of State maintains, and my noble and learned friend Lord Hoffmann accepts, that this is not so. There was, it is said, no unconditional promise, no recognition of any right of abode, and any limited recognition of a right to enter and be present was on a temporary basis and was, above all, subject to the outcome of the ongoing feasibility study. The Court of Appeal did not accept this analysis of the events and of the press statement and nor do I.

174 The press release should be construed according to the ordinary meaning that would be attached to it by those, principally the Chagossians and their supporters, to whom it was directed. It was issued by the Foreign Secretary on behalf of the United Kingdom Government. It was they who said that they had "decided to accept" the court's ruling in *Bancoult (No 1)* [2001] QB 1067 and would "not be appealing". They indicated that a new Immigration Ordinance would be put in place to "allow the Ilois to return to the outer islands while observing our Treaty obligations". They said that "this Government has not defended what was done or said 30 years ago", a clear reference to the wrong done by the 1971 Ordinance and the attitude taken at that time to the Chagossians and their connection with their homeland. All these statements are only consistent with a clear policy decision taken by the United Kingdom to recognise and give legal effect to a right to return on the part of the Chagossians, while continuing the feasibility study which had already been started, in order to assess the feasibility of any resettlement programme which the Government might or might not in due course support.

175 A lawyer who studied the issues closely would know that the ratio of the court's ruling in *Bancoult (No 1)* was, strictly viewed, confined to the legitimacy or otherwise of the 1971 Ordinance issued by the BIOT Commissioner. But Laws LJ had also addressed the question whether the same result could simply be achieved by Order in Council and expressed considerable doubt about this: paras 39 and 61. To treat the Foreign Secretary of the United Kingdom as recognising merely the inappropriateness of proceeding by Commissioner's Ordinance, or as reserving the right for the United Kingdom Government on whose behalf he was speaking to make an Order in Council in like terms to the 1971 Ordinance or the later BIOT Order 2004, would be unrealistic legalism.

176 Mr Crow's main submission was, however, that the press statement was subject to the outcome of the ongoing feasibility study. Again, I do not consider that this corresponds in any way with its natural meaning. The statement amounted to an unconditional recognition, coupled with an assurance that this would be given effect, of a legal right to enter and to be present, whether on a temporary or long-term basis. So too, the subsequent Parliamentary statement by Mr Battle as well as other later statements, as for example that of Baroness Amos in a letter to Mr Bancoult's solicitors dated 28 April 2003. None of these statements was made conditional on or subject to the feasibility study. The feasibility study



- A went to a different question, whether resettlement would be economically feasible, so that the Government as a matter of broader policy or outsiders might be encouraged and prepared to fund it. (Had the Government lost the case of *Chagos Islanders v Attorney General*, the feasibility study could no doubt also have been very relevant to the extent of a legal responsibility on their part.) Accordingly, withdrawal in June 2004 of any right of abode and any right to enter and be present in BIOT has to be seen against a background in which the Government in November 2000 assured Chagossians that they would have such a right, without undertaking any commitment to fund it.

- B 177 The relevant legal principles are not in dispute. Mr Crow accepts for present purposes the Court of Appeal's decision in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 (while reserving the right to argue in another case that it was wrongly decided). In *Coughlan* Lord Woolf MR giving the judgment of the court identified (para 57) three possible outcomes in a case where a member of the public has, as a result of a promise or other conduct, a legitimate expectation that he or she would be treated in one way and the public body wishes now to treat him or her in a different way; the court may decide that: (a) the authority is only required to give its previous policy weight, but not more, in which case the court's review of the decision will be on *Wednesbury* grounds, or that (b) the promise or practice induces a legitimate expectation of consultation, which will accordingly be required unless there is an overriding reason otherwise; or that (c) a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, in which case to frustrate the expectation may in some circumstances be regarded as so unfair as to amount to an abuse of power. Lord Woolf went on to say that in the first two categories of case the court's role was a conventional role of review (on grounds of rationality in the first, procedural fairness in the second), whereas in the third the court's task was to determine whether there was a sufficient overriding interest to justify a departure from the previous promise or practice, weighing the two considerations against each other: paras 57–58. He acknowledged the difficulty of segregating the categories, and of working out the role of legitimate expectation in each: paras 59 and 71. The approach to judicial review of a decision to depart from an established policy was further considered with reference to *Coughlan* in *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, where Lord Steyn, in whose speech three other members of the House concurred, said, at para 60:

- C “The Home Secretary decided to depart from the policy . . . Was he entitled to depart from the policy? In the Divisional Court [2002] 1 WLR 1857 Simon Brown LJ observed, at p 1866, para 32: ‘There are, of course, cases in which substantive legitimate expectations have been built up where nowadays public authorities will be required to honour their statements of policy or intention. All this is exhaustively and authoritatively discussed by the Court of Appeal in *R v North and East Devon Heath Authority, Ex p Coughlan* [2001] QB 213, 238–251, paras 51–82 inclusive. As, however, is there made plain, the question for the court is ultimately one of reasonableness and fairness. Would a departure from policy represent an abuse of power? That is a question to be asked in the circumstances of the particular case. It cannot in my
- H

judgment be suggested that the Secretary of State can never in any circumstances depart from his stated policy with regard to the payment of ex gratia compensation. He should, of course, give the person concerned an opportunity to say why in his particular case the policy should be applied rather than disappplied. But no problem of that sort arises here. The opportunity was given and taken. The Secretary of State was simply not persuaded.’ I am in respectful agreement with these observations.”

178 The approach in *Coughlan* has been applied and considered in subsequent Court of Appeal authorities, particularly *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115; *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237 and *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363. The judgments in all of these authorities are helpful in illuminating the issues. In *Ex p Begbie* Laws LJ (drawing on para 60 of Lord Woolf’s judgment in *Coughlan*) underlined the importance that may attach to whether the decisions in question affect only a few individuals or involve wide-ranging questions of general policy, moving into the “macro-political” field, where judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis: pp 1130A–1131D.

179 The significance of detrimental reliance in relation to Lord Woolf’s third category, substantive legitimate expectation, is also considered in *Ex p Begbie* and in the judgment of the court given by Schiemann LJ in *Bibi*. In each case it was accepted that proof of such reliance was not a pre-condition to recognition of such an expectation. But Peter Gibson LJ in *Ex p Begbie* stressed that it would be very much the exception that it was not present (p 1124B–C), and Schiemann LJ in *Bibi* accepted that it would “normally be required”, and that “in a strong case, no doubt, there will be both reliance and detriment; but it does not follow that reliance (that is, credence) without measurable detriment cannot render it unfair to thwart a legitimate expectation”: paras 29–31. He gave as an example of the latter type of case one of departure from an established policy in relation to a particular person: para 30. On the other hand Sedley LJ, in *Ex p Begbie* had

“no difficulty with the proposition that in cases where the Government has made known how it intends to exercise powers which affect the public at large it may be held to its word irrespective of whether the applicant had been relying specifically upon it,”

whereas in *Ex p Begbie* itself, where the basis of claim was that a pupil-specific discretion should be exercised in certain pupils’ favour, he found it “difficult to see how a person who has not clearly understood and accepted a representation of the decision-maker to that effect can be said to have such an expectation at all”: p 1133D–E.

180 In *Bibi* Schiemann LJ also identified (in paras 50–51) the need for any decision maker to take properly into account in the decision making process any legitimate expectation generated by previous statements or conduct. Dyson LJ giving the judgment of the court in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, paras 74–75, quoted the relevant passage from Schiemann LJ’s judgment without qualification.

181 In *Nadarajah* Laws LJ giving the only full judgment identified six factors tendered by Mr Underwood as counsel for the minister as relevant to

A the existence or otherwise of any substantive legitimate expectation: (1) a promise specifically communicated to an individual or group, which is then ignored, as in *Coughlan*, (2) the clarity of the representation, (3) the singling out of an individual who is then treated less favourably than others also affected by the representation, (4) detrimental reliance, (5) whether the original promise was the result of an honest mistake, which is being corrected and (6) maladministration. But Laws LJ also sought to carry the  
B law's development and the search for principle beyond terms such as abuse of power or even fairness and beyond a list of a range of factors "which might make the difference": paras 67–68. He identified the underlying principle as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public, and the litmus test for departures from a previously announced promise or practice  
C as being whether the departure represented "a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest": para 68. He added that this approach made no distinction between procedural and substantive expectations, but noted that proportionality itself involved an assessment of factors such as those included in Mr Underwood's list: para 69.

D 182 For my part, I have no difficulty in accepting as the underlying principle a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. I prefer to reserve for another case my opinion as to whether it is helpful or appropriate to rationalise the situations in which a departure from a prior decision is justified in terms of proportionality, with its overtones of another area of public law. It is on any view necessary to make an assessment of the relevant  
E factors on each side. In *Coughlan* (para 57) Lord Woolf spoke of the court's "task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy", but that was on the basis that a lawful promise or practice inducing a legitimate expectation of a substantive benefit had already been established. The nature and clarity of the promise or practice and of the legitimate expectation which it engenders combine with  
F the circumstances and reasons giving rise to the proposed change of practice as factors which have to be weighed together in order to consider whether and how far justice requires that the public authority should be held to a position consistent with the promise or practice.

183 On the facts of the present case, I have come to the conclusion that the courts below reached the right result. First, there is no indication that the Government gave any real weight to the common law right of abode which  
G the Chagossians, Mr Bancoult in particular, in my view still enjoyed in 2004 by virtue of their birth and connections with BIOT. Second, there is no indication that the Government gave any real weight to the legitimate expectation generated by its words and conduct in 2000. This is a particularly powerful consideration on the facts of this case, where such words and conduct would have been seen as righting a historic wrong and resolving the Chagossians' legal entitlement. Third, there was no  
H consultation with the Chagossians or anyone before the BIOT Order 2004 was issued. Fourth, the factors relied upon as justifying section 9 of the BIOT Order 2004 (defence and the outcome of the feasibility study) are factors directed on their face to a remote and unlikely risk of large scale resettlement of the outer Chagos Islands. Both appear now to be related by

the Secretary of State to some extent to a risk, not substantiated in legal or, to any realistic extent, practical terms in either 2004 or now, that the United Kingdom Government would have positively to fund and arrange such resettlement, or that a right of resettlement could cause friction with the United States of America. The defence considerations (some hard to follow in themselves, though that is not critical to the view I have formed) were not regarded as any bar to the recognition of a legal right to enter and be present in the outer islands in 2000 or after the events of 11 September 2001, and nothing has been shown to suggest any significant change in such considerations since then. The outcome of the feasibility study was known from June 2002 without any steps being felt necessary for two years. Its bearing is not on the legal right of abode, entry or presence, but on the feasibility of the United Kingdom or others deciding to support a positive programme of resettlement. That, for reasons I have given, is not what is in issue in these proceedings. The practical likelihood of any large-scale resettlement serves also to counter any argument (based on *Coughlan*, para 60) that the Chagossians number considerably more than a “few” individuals—a most unattractive argument anyway against the background of the determined pretences lying at the origins of this matter 40 years ago that there were no Chagossians at all.

184 Fifth, the threat of “imminent” invasion which is said to have been apprehended in 2004 was never advanced at the time as a justification for the making of the BIOT Order 2004 (so that it is unsurprising if it received no attention in the judgments below), but merely to explain its timing and the absence of any consultation before its making. Even now it only appears in the Secretary of State’s written case (para 241) as “the single most immediate stimulus” to the making of the BIOT Order 2004. Bearing in mind the primary explanations put forward to the public and to Parliament as well as the references to “long and careful consideration”, it is clear that any “imminent” threat is not being relied upon as a substantive ground for the BIOT Order, but merely for its timing. But however it is relied upon, and even if one disregards the apparently inchoate nature of LALIT, its supporters and their plan, it is difficult to accept as a substantial justification, having regard to the joint powers’ avowed and obvious monitoring, tracking and surveillance capabilities and activities in relation to Diego Garcia.

185 Sixth, if one looks for particular factors such as those mentioned as *Nadarajah* (para 181 above), the present case concerns an unequivocal assurance and conduct, on a matter on which it is not suggested that there can have been any mistake. The assurance was directed at Chagossians as defined by the Ordinance of 3 November 2000. It was intended to right an historic grievance, and was understood and no doubt relied upon (in the sense that it was given credence) accordingly. The sense of grievance likely to arise from its revocation without the most careful consideration and strong reason is obvious. The Secretary of State’s argument that no-one acted upon his statement and Ordinance to his or her detriment between 3 November 2000 and 10 June 2004 is in my view answered by the considerations that specific detriment is not an absolute pre-condition and that in the context of a general public statement proof of individual reliance may not be expected (see per Sedley LJ in *Ex p Begbie* quoted in para 179 above). I also note that Mr Bancoult was plainly acting and relying on the statement and the Ordinance when attending and speaking at the LALIT

A meeting of 19 April 2004. It is not without irony that it was Mr Bancoult's reliance in this respect on the statement and Ordinance which is now said to have been one factor triggering the BIOT Order 2004. But the dominant consideration in my opinion is that the Government's statement and conduct were intended and understood to resolve the long-standing controversy regarding the Chagossians' right to enter and be present in the outer Chagos Islands, and that it would be and in the circumstances was maladministration to go back on that resolution without any consultation and without strong cause, which has not been shown.

B 186 Since writing this speech, I have had the benefit of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill, which encapsulates with force and brevity the main points on which I would also decide this appeal and bring this unhappy saga to a legal conclusion. The  
C primary basis on which I would dismiss the appeal is therefore lack of vires: paras 143–161 above. But in the alternative I would uphold the Court of Appeal's reasoning and conclusions and dismiss this appeal on judicial review grounds (paras 162–185): the first, that the decision to enact section 9 of the BIOT Order 2004 was made without regard to relevant considerations and interests, and that, when regard is had thereto, no decision could rationally have been taken on the material available in the  
D sense in which it was, and the second, that the Foreign Secretary's press statement and conduct in introducing the Ordinance on 3 November 2000 gave rise to a legitimate expectation from which no sufficient ground of departure, let alone departure without any prior consultation, has been shown. Both in 1971 and in 2004 the Chagossians were entitled to say, like the Duke of Norfolk in response to the order of exile for life with  
E which Richard II in council unexpectedly halted his impending trial by battle against Henry Bolingbroke: "A heavy sentence, my most sovereign liege, And all unlook'd for from your Highness' mouth." To which in my opinion the Crown cannot here simply reply: "It boots thee not to be compassionate; After our sentence plainning comes too late."

*Appeal allowed.*

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DECP

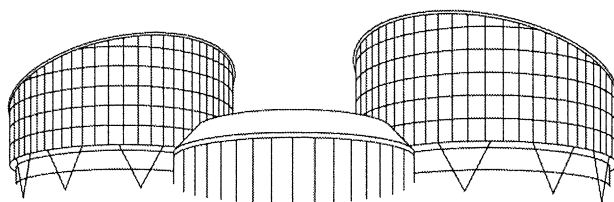
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**TAB 6**

*Chagos Islanders v United Kingdom* (2012) 56 EHRR



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 35622/04  
CHAGOS ISLANDERS  
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 11 December 2012 as a Chamber composed of:

David Thór Björgvinsson, *President*,

Lech Garlicki,

Nicolas Bratza,

Päivi Hirvelä,

George Nicolaou,

Ledi Bianku,

Nebojša Vučinić, *judges*,

and Lawrence Early, *Section Registrar*,

Having regard to the above application lodged on 20 September 2004,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the comments submitted by interveners, Human Rights Watch and Minority Rights Group International,

Having deliberated, decides as follows:

THE FACTS

1. The applicants are natives of, or descendants of natives of the Chagos Islands, sometimes referred to as “Ilois” or “Chagossians”. They are resident largely in Mauritius, the Seychelles and the United Kingdom. Letters of authority have been received from 1,786 applicants and are contained in the file. They were represented before the Court by Mr Gifford,

a lawyer practising in London. The United Kingdom Government (“the Government”) were represented by their Agent.

### **The circumstances of the case**

2. The facts of the case, as submitted by the parties, may be summarised as follows.

3. The Chagos Islands are in the middle of the Indian Ocean, comprising three main island groups (Diego Garcia the largest with a land area of about 30 km<sup>2</sup>, Peros of about 13 km<sup>2</sup> and Salomon of about 5km<sup>2</sup>) and consisting of 65 islands in total. Since the nineteenth century they have been part of a colony of the United Kingdom. Until 8 November 1965 they were administered as part of the Colony of Mauritius, which is some 1,200 miles to the south-south-west.

4. According to materials in the file, the first visitors to the islands were Malaysians, Arabs and Portugese in 1743. There were at that time no human inhabitants. The first settlers, probably French, began coconut (copra) plantations, which were to be the basis of the islands’ economy for the future. The islands passed to British rule from 1814. At the beginning of the twentieth century there was a floating population of some 426 families of African, Malagasy and Indian origin, although most regarded themselves as permanent residents. The copra production company provided living quarters but the Ilois people as they were known generally preferred to build their own thatched cottages. There was no electricity, sanitation or other infrastructure. The men and women who worked on the plantations received a monetary wage but the chief payment was barter. Copra workers also fished and most families had small kitchen gardens and reared chickens and ducks. During the decades which followed there was movement of workers between the islands and Mauritius and the Seychelles under contract to the plantation company, while there were other inhabitants who had been born on the island and whose families went back several generations. By the early 1960s the islands’ population was in decline, due to low wages, monotonous work, the lack of facilities and the great distance from Mauritius and the Seychelles, while the plantations were suffering from a lack of investment. In 1962, when the Chagos Agalega Company Ltd acquired the plantations, the settlement population was a very small community of less than a thousand, settled on the three main islands. No one had lived on the outer islands for years.

5. In 1964 discussions started between the Governments of the United States of America and the United Kingdom over the establishment of American defence facilities in the region. It was envisaged from the beginning that any inhabitants would be transferred or resettled.

6. On 8 November 1965, the British Indian Ocean Territory (BIOT) Order in Council (SI 1965/120) established a new colony, which included



the Chagos Islands and other islands formerly part of the Colony of Mauritius and of the Seychelles. The order created the office of the Commissioner of BIOT and bestowed on him the power to “make laws for the peace, order and good government of the Territory”. Those inhabitants of BIOT who had been citizens of the United Kingdom and Colonies by virtue of their birth or connection with the islands when they were part of Mauritius retained their citizenship.<sup>1</sup>

7. On 20 December 1966, the United Kingdom and United States Governments agreed that the latter should have use of the islands of BIOT for defence purposes for an indefinite period with provision for a review in 2016. The United Kingdom Government acquired the land and interests held by the plantation company that owned most of the property on the islands. Internal documents indicated that it was considered expedient to treat the islands as having no “permanent population” with a view to avoiding difficulties with the United Nations as regards, *inter alia*, obligations under the United Nations Charter to protect the population and foster independence. The company continued to run the plantations under a lease until the United States needed vacant possession. After obtaining congressional approval, the US Defence Department gave notice that Diego Garcia would be required in July 1971.

8. The evacuation of the islands was effected between 1967 and 1973. Some islanders were prevented from returning after visits elsewhere, others were transferred either to Mauritius or to the Seychelles. For a while some islanders were given alternative accommodation on outlying islands. In 1971, the US construction teams arrived on Diego Garcia. Houses were demolished. No force was used but the islanders were told that the company was closing down its activities and that unless they accepted transportation elsewhere, they would be left without supplies.

9. In the various bodies of the United Nations where the matter was discussed, the United Kingdom Government claimed that the population had consisted of migrant workers, that their position had been fully protected and that they had been consulted in the process.

10. On 16 April 1971, the BIOT Commissioner enacted the Immigration Ordinance 1971, No. 1 of 1971 which made it unlawful, and a criminal offence, for anyone to enter or remain in the territory without a permit.

11. The islanders suffered miserable conditions on being uprooted, having lost their homes and livelihoods. In 1973, the United Kingdom paid 650,000<sup>2</sup> pounds sterling (GBP) to the newly independent Government of Mauritius to assist with the costs of resettlement. This sum was distributed, with interest, by the Mauritius authorities in 1977 after discussions on how best to use the money. The islanders rejected a proposed resettlement plan

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<sup>1</sup> When Mauritius became independent in 1968, they acquired Mauritian citizenship but did not lose their UK citizenship.

<sup>2</sup> The equivalent today of some 7 million euros.

in favour of a cash distribution to 595 families. No compensation was paid to the evacuees on the Seychelles.

12. In February 1975, Michel Ventacassen, a Chagossian, brought a case in the High Court in London concerning the expulsions (“the *Ventacassen* case”). In February 1978, the Government made an open offer to settle the claims of all the islanders. In March 1982, a settlement was reached in which the Government agreed to pay GBP 4,000,000<sup>1</sup> to the Mauritian Government, which in turn agreed to put in land to the value of GBP 1,000,000. A trust fund (“the Fund”) was set up by the Mauritius Government and between 1982 and 1984 payment was made to 1,344 Chagossians in Mauritius of GBP 2,976 each. The Mauritius Government provided some low cost housing. Nothing was paid to the Chagossians on the Seychelles, who numbered around 500 and who apparently played no part in the negotiations.<sup>2</sup> The applicants later claimed that they were unaware that the settlement involved any renunciation of their rights to return to their homeland. On the receipt of the last tranche of money, all but 12 of the identified islanders or the descendants who refused, had signed or thumbprinted renunciation forms in English.

13. In August 1998, Olivier Bancoult, a Chagos Islander, brought an action in London, challenging the validity of the 1971 Immigration Ordinance which had the effect of excluding the islanders from BIOT (“*Bancoult 1* case”).

14. On 3 November 2000, the Divisional Court in its judgment noted *inter alia* that none of the islanders owned any land or held any right to permanent use of the land, which was held by the Crown. It went on however to find that the Ordinance was *ultra vires* the 1965 Order, since the power to make legislation for “peace, order and good government” did not permit legislation to exclude the population from the territory. It issued a declaration that the Ordinance was invalid. There was no appeal.

15. On 3 November 2000, the Foreign Secretary announced that they were examining the feasibility of resettlement of the islanders and that they intended to issue a new immigration ordinance which would allow them to return to the outer islands while observing their treaty obligations with the United States.

16. On the same date, the Commissioner of BIOT revoked the 1971 Immigration Ordinance and made the BIOT Immigration Ordinance 2000, which largely repeated the provisions of the previous ordinance but contained a new section 4(3) which provided that restrictions on entry or

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<sup>1</sup> The equivalent today of some 11.5 million euros.

<sup>2</sup> The Divisional Court in its judgment of 3 November 1999 noted that the Seychelles workers, Ilois and Government were not involved in the discussions. The Seychelles islands within BIOT had never been evacuated and they were returned to the Seychelles on its independence in 1976. The Seychelles Government saw the Ilois not as a special group but as Seychellois.

residence should (with the exception of Diego Garcia) not apply to anyone who was a British Dependent Territories Citizens by virtue of connection with BIOT. Entry to Diego Garcia remained subject to permit.

17. Despite the lifting of the immigration bar, none of the islanders went to live in the islands. A few made visits to outer islands to tend family graves or see their former homes, such visits being funded by BIOT.

18. In April 2002, islanders (a total of 4,466 claimants) commenced group litigation against the Attorney-General, to secure compensation for past and continuing wrongs and to seek a declaration of their right to return to Diego Garcia ("the *Chagos Islanders* case").

19. On 9 October 2003, Mr Justice Ouseley struck out the action on the grounds that the claim to more compensation after the settlement in the *Ventacassen* case was an abuse of process, that the facts did not give rise to any arguable causes of action in private law and in any event all the claims were statute-barred. He rejected arguments that the Limitation Act 1980 did not apply as the applicants had been subject to a disability (for instance, impoverishment or being outside the jurisdiction) and considered that there had been no deliberate concealment of facts relevant to the individual causes of action which could affect the calculation of the time-limit. He also accepted the defendant's arguments that the islanders who had accepted money from the Fund and signed a form renouncing further claims would be in abuse if they continued the proceedings. He held that it was generally known in Mauritius at the time that the 1982 Agreement was final and did not consider that they had reasonable prospects of showing that the Government had acted in a morally culpable manner leading to an oppressive transaction from which the claimants should be relieved. The islanders had had at the time legal representation or access to legal representation. He also found that the Seychelles Chagossians knew the same relevant facts at the same time as their counterparts in Mauritius. The islanders had owned no immovable property nor owned their houses. Even if any property rights had existed, he noted that these would have been extinguished twelve years after events by operation of section 17 of the Limitation Act.

20. On 22 July 2004, the Court of Appeal refused permission to appeal. While it was accepted that there were arguments of disability and unconscionability, nonetheless from 1983 onwards those circumstances no longer applied. Nor had the applicants succeeded in showing any deliberate concealment since that time. It rejected the arguments of the islanders that the renunciation forms could not be relied on by the Government as they were unable to compromise or renounce their fundamental rights. It concluded:

"This judgment brings to an end the quest of the displaced inhabitants of the Chagos Islands and their descendants for legal redress against the state directly responsible for expelling them from their homeland. They have not gone without compensation, but

what they have received has done little to repair the wrecking of families and communities, to restore their self-respect or to make amends for the underhand official conduct now publicly revealed by the documentary record. Their claim in this action has been not only for damages but for declarations seeking their right to return. The causes of action, however, are geared to the recovery of damages and no separate claims to declaratory relief have been developed before us. It may not be too late to make return possible, but such an outcome is a function of economic resources and political will, not adjudication. "

21. Newspaper articles appeared in Mauritius suggesting that the Chagossians and their supporters were planning some form of direct action by landings on the island. As later described in domestic court judgments, the participants had varying aims; for one group known as LALIT it was part of an anti-American campaign to close the base at Diego Garcia. Others did not want the base closed as it might offer employment but since permanent resettlement on the islands was not practicable without substantial investment, the landings, even if they led to temporary camps, would largely be gestures in furtherance of respective political aims, designed to attract publicity and embarrass the Governments of the United Kingdom and the United States. Contacts with the United States authorities made it clear that their view was that any attempt to resettle any of the islands would severely compromise Diego Garcia's security, and have a deleterious impact on military operations. To them Diego Garcia was a vital and indispensable platform for global U.S. military operations, as demonstrated by its important role in Operations Enduring Freedom and Iraqi Freedom as well as its continuing role in the Global War on Terrorism; in particular it had unique and exceptional security from armed attack, intelligence collection, surveillance and monitoring and electronic jamming.

22. On 10 June 2004, the BIOT (Constitution) Order 2004 was issued. It declared that no person had the right of abode in the territory or the right to enter it except as authorised. The same day there passed into law the BIOT (Immigration) Order 2004, repealing the 2000 Ordinance. This prohibited anyone from entering the territory without a permit from the immigration officer (members of the armed forces, public officers and contractors working on the American base were exempt or deemed to hold a permit).

23. On 15 June 2004, the Government issued a statement announcing the abandonment of the feasibility study into resettlement. It stated that the report by independent experts had concluded that:

"whilst it may be feasible to resettle the islands in the short-term, the costs of maintaining long-term inhabitation are likely to be prohibitive. Even in the short-term, natural events such as periodic flooding from storms and seismic activity are likely to make life difficult for a resettled population ... Human interference within the atolls, however well managed, is likely to exacerbate stress on the marine and terrestrial environment and will accelerate the effects of global warming. Thus resettlement is likely to become less feasible over time. "

24. With reference to climate change the report was quoted as stating that "the main issue facing a resettled population on the low-lying islands will be flooding events, which are likely to increase in periodicity and intensity and will not only threaten infrastructure, but also the freshwater aquifers and agricultural production. Severe events may even threaten life." It also highlighted the implications on such low-lying islands of the predicted increase in global sea levels.

25. The statement concluded that anything other than short-term resettlement on a purely subsistence basis would be highly precarious and involve expensive underwriting by the Government for an open-ended period, probably permanently. Accordingly, the Government considered that there was no further purpose in pursuing the study and it would be impossible to promote or even permit resettlement to take place. It was for this reason that the Orders in Council were issued to restore full immigration control over all the islands in BIOT, making it clear that no person had the right of abode in the territory or unrestricted access to it.

26. Much of the area had meanwhile apparently been declared an Environmental Zone, with Special Conservation Areas and Strict Nature Reserves.

27. One of the applicants, Mr Bancoult, instituted judicial review proceedings seeking to challenge the 2004 Orders barring their return to the islands as unlawful (the "*Bancoult 2* case").

28. In its judgment of 11 May 2006, the Administrative Court upheld his claims, finding that the provisions of the Orders were invalid as not being in the interests of the Chagossians. The Secretary of State for Foreign and Commonwealth Affairs appealed, claiming that legislation precluded any attack on the validity of colonial orders in council and that the orders as a sovereign act of the Crown were only challengeable on ground of incompatibility with imperial legislation.

29. On 23 May 2007, the Court of Appeal dismissed the appeal, finding that the prerogative power of colonial governance enjoyed no generic immunity from judicial review and that the permanent exclusion of an entire population from its homeland for reasons unconnected with their collective well-being could not have the character of a valid act of governance. Lord Justice Sedley considered that while resettlement would be difficult if not impossible without capital expenditure, it had not been suggested on either side that the United Kingdom was under any obligation to fund it. It was the bolting of the door to the Chagossians' home, not the failure to provide transport there or to refurbish it which was in issue. Indeed the Crown had rights as a landowner which were capable of answering any attempt to resettle there.

30. The Secretary of State obtained leave to appeal to the House of Lords. In its judgment of 22 October 2008, the House of Lords upheld the appeal by three votes to two. The majority considered that there had been no

legitimate expectation that the islanders would be allowed to resettle on the islands. The Human Rights Act had no application to BIOT, as the declaration made in respect of Mauritius lapsed when it became independent. There was no basis for holding that the prerogative power of the Crown was limited to acts in the interests of the inhabitants and there was nothing irrational about the orders. Seen in the context of the present day, rather than 1968, any right of abode of the islanders was purely symbolic. None had gone to live on the islands in the four years when the 2000 ordinance had been in force. The islanders' way of life had been irreparably destroyed and the practicalities were such that they would be unable to exercise any right to live on the outer islands without financial support which the Government were not willing to provide. Any attempt to exercise the right of abode by setting up some camp on the islands would be a symbol or gesture aimed at putting pressure on the Government. Thus, when considering the rights in issue in the case, which had to be weighed against the defence and diplomatic interests of the state, it was essentially about the right to protest in a particular way and it was not unreasonable of the Government to seek to avoid an unauthorised settlement on the islands which could be used as a means of exerting pressure to compel it to fund a resettlement. Funding had been the subtext of the case.

31. Lord Bingham, in the minority, considered that legal precedent negated the existence of a prerogative power to exile an indigenous population from its homeland. The orders were also irrational in the sense that there was no good reason for making them, the security arguments being weak and vague. The argument that the islanders were deprived of a right of little practical value provided no justification, since the right was of intangible value and the smaller its practical value the less reason to take it away. Additionally, in his view, the orders contradicted a clear representation by the Secretary of State in his statement of 3 November 2000, from which the Government could not resile without compelling reason, which had not been shown.

## COMPLAINTS

32. The applicants complained under Article 3 about the decision-making process leading to the removal from the islands, the removal itself and the manner in which it was carried out, the reception conditions on their arrival in Mauritius and the Seychelles, the prohibition on their return, the refusal to facilitate return once the prohibition had been declared unlawful and the refusal to compensate them for the violations which had occurred.

33. The applicants complained under Article 8 about the above matters as disclosing violations of their right to respect for private life and home.

The original removal was not “in accordance with the law” and the subsequent interferences were either not lawful in that they failed to comply with the *Bancoult 1* judgment or to the extent that they were lawful were disproportionate in that they prohibited return. They also alleged that these acts and omissions disclosed continuing unjustifiable interferences with their right to respect for their home.

34. The applicants alleged that these matters also violated their rights under Article 1 of Protocol No. 1, by both depriving them of their possessions and/or controlling their use and that these interferences were unlawful both as a matter of English and international law.

35. The applicants complained under Article 6 that the administrative authorities’ unilateral and extrajudicial annulment of the effect of the *Bancoult 1* judgment has frustrated their right to a final judgment and that the courts’ refusal to grant a hearing on their civil right to damages had denied them access to court.

36. Finally, they complained under Article 13 of the Convention that they had no effective remedy because of the extra-judicial annulment of the *Bancoult 1* judgment and the United Kingdom’s reliance on the limitation defence – after concealing facts relevant to the applicants’ claims – to deprive them of an adjudication of their claim to compensation.

## THE LAW

### A. The submissions before the Court

#### 1. *The Government*

##### a. Delay

37. The Government submitted that the applicants had lodged the application form on 14 April 2005 more than six months after the final decision in the case, stated in the form as the Court of Appeal decision of 22 July 2004.

##### b. Compatibility *ratione loci*

38. The Government submitted that the Convention and Protocols thereto had never been extended to BIOT. No notification had ever been made under Article 56 § 1 of the Convention or Article 4 of Protocol No. 1. None of the events relating to the removal from BIOT or their conditions in Mauritius and Seychelles took place within the United Kingdom. Also the applicants’ continued exclusion from BIOT could only be regarded as an act

or omission having its effect in BIOT. Insofar as the applicants relied on the fact that many of them now lived in the United Kingdom, their physical presence within the jurisdiction was irrelevant.

39. Insofar as the applicants argued that the United Kingdom was liable for events occurring in BIOT because it exercised effective control over the territory, the Government relied on the Court's jurisprudence to the effect that the only means by which a State's responsibility under the Convention could be engaged for a territory, for whose international relations it was responsible, was by means of a notification under Article 56 (referring to *Quark Fishing Ltd v. the United Kingdom* (dec.), no. 15305/06, ECHR 2006-XIV). Any test for State responsibility which depended on the level of the autonomy of the territory (only those with a sufficient form of self-rule attracting the application of Article 56) would depend on an impossible evaluative test and run the risk of fluctuation in changing circumstances. In any event, there was no difference in that respect between the South Georgia and South Sandwich Islands ("the SGSSI"), which were in issue in *Quark*, and BIOT, both of which were administered by officials located elsewhere and a Commissioner under the direct control of the Secretary of State in London. The principle of effective control had been developed to apply to a completely different situation such as the Turkish occupation of northern Cyprus and to prevent a gap arising in the protection provided within the Convention space. The Grand Chamber judgment in *Al-Skeini and Others v. the United Kingdom* ([GC], no. 55721/07, 7 July 2011) also indicated that the test of effective control applied outside the scope of application of Article 56 and was not an alternative means of applying Convention jurisdiction to overseas territories.

40. It was for Contracting States to decide the extent to which all or some of the Convention rights were extended to overseas territories for whose international relations they were responsible. The concept of "State agent authority or control" and "effective control over an area" were not intended by the Court to supplant the declaratory system put in place by Article 56. The fact that the Contracting State was responsible for the international relations of an overseas territory and therefore might exercise a degree of control over certain of its governmental functions did not mean that all overseas territories fell within the jurisdiction of that Contracting State for the purposes of Article 1. Otherwise, the Convention would effectively be applicable to all overseas territories of a Contracting State regardless of the local requirements of the territory in question. Such construction would supplant and replace the system of declarations established under Article 56. The Court in *Al-Skeini* expressly stated that it was not doing so.

41. Insofar as the applicants contended that the Convention extended to BIOT as notification had been given by the United Kingdom in relation to Mauritius at a time when the Chagos Islands were part of that colony, the



Government rejected as wrong the purported legal analysis that the notification continued to have effect as regards the newly-created BIOT when severed from Mauritius on independence. The notification lapsed in respect of the Chagos Islands when BIOT was created in 1965 and it lapsed in its entirety when Mauritius achieved independence in 1968. No separate extension was ever notified in relation to BIOT. The applicants mistakenly based themselves on the assumption that a notification under Article 56 related to a specific physical area, which was then fixed for all time. The notification rather applied to a political entity, which a "territory" plainly was. This was common sense since a Contracting Party could not be responsible for the international relations of a geographical area except to the extent it was a political entity. Also the area of land within a political entity might change over time (for example, by acquisition, erosion or reclamation) but the notification would continue to apply within the political frontiers; if land was removed from the political entity the notification would lapse for that portion of land. Furthermore, even if this was not the case, it had to be noted that the right of individual petition under Article 56 § 4 was never extended to Mauritius; the applicants would not be entitled to bring a claim even if the Convention did apply. Also, Protocol No. 1 had never extended to Mauritius at all.

42. Lastly insofar as the applicants argued that the supervisory human rights bodies of the United Nations considered that their instruments applied to BIOT and that it would thus be anomalous if the Convention did not, the Government submitted that it was for the Court to decide. It was in any event contested whether the International Covenant on Civil and Political Rights applied to BIOT, the Government considering it did not as there was no permanent civilian population there.

#### **c. Victim status**

43. The Government argued that the applicants could not claim to be victims, pointing out that compensation had been paid out in 1972 and then in 1982, when four million pounds sterling had been paid in settlement of the *Ventacassen* case and renunciation forms had been signed by all save 12 of the relevant Chagossians. Even if no payments had been made to the Seychellois Chagossians (about 200), the Government stated that the Seychellois islands in BIOT were made part of Seychelles in 1976, the majority were contract labourers returning home and there were no findings by the courts that these had suffered any privation, being integrated into Seychellois society. The proceedings had been treated as a representative action, the Seychellois had been informed of the settlement negotiations but they had not participated. The claims by the Seychellois Chagossians had been dismissed on limitation grounds alone as they could have applied for compensation but did not. The Government also noted that some

1,000 Chagossians had applied for and been given full British citizenship, allowing full rights of settlement within the United Kingdom.

**d. Exhaustion of domestic remedies**

44. The Government pointed out that a number of claims raised had never been articulated before the domestic courts: namely, none had complained that their homes had been destroyed before their eyes or of the conditions of any sea voyage, none had made claims concerning conditions on arrival in the Seychelles and no particularised claim had been made about islanders having been driven to suicide. As concerned property complaints, these had been rejected by Mr Justice Ouseley as unarguable as no relevant property rights arose; the applicants had not appealed against this finding.

**2. The applicants**

**a. Delay**

45. The applicants pointed out that they had introduced the application by letter dated 9 December 2004, which was within six months of the Court of Appeal's decision on 22 July 2004.

**b. Jurisdiction *ratione loci***

46. The applicants argued that their complaints under Articles 6 and 13 in the English courts clearly fell within the jurisdiction of the United Kingdom, irrespective of extraterritorial aspects (citing *Markovic and Others v. Italy* [GC], no. 1398/03, § 54, ECHR 2006-XIV). The key issue was whether the applicants came under the actual authority and responsibility of the State. The United Kingdom Government exercised complete authority and responsibility for BIOT, as shown by the acceptance of jurisdiction by the domestic courts.

47. The applicants considered that BIOT remained the same territory for whose foreign policy the United Kingdom was responsible and to which the notification under Article 56 continued to apply; the United Kingdom had never denounced the Convention under Article 56 § 4 in respect of the islands; nor had the islands achieved independence and become a separate subject of international law. It would be absurd if a Contracting Party could evade its responsibilities by simply renaming a territory and placing it under its own direct rule. The Convention therefore applied to the Chagos Islands.

48. As regards the right of individual petition, the applicants submitted that this was distinct from Article 56. Under Article 34 the Contracting Party accepted competence to examine complaints relating to the acts of its own officials acting under its direct authority; the applicants' complaints concerned just that (*Loizidou v. Turkey* (preliminary objections), 23 March

1995, § 88, Series A no. 310). The fact that some acts may have been committed by an official in the guise of “BIOT Commissioner” was nothing more than a legal fiction, as noted by the domestic courts. They argued that the Government relied mistakenly on *Quark* (cited above), asserting that even if a territory did not come within the legal space of the Convention, it was still open to applicants to demonstrate the existence of special circumstances bringing the territory within a Contracting State’s jurisdiction under Article 1 (citing *Issa and Others v. Turkey*, no. 31821/96, § 75, 16 November 2004). Such circumstances arose attracting responsibility here, where the State had effected hostile occupation of a territory and assumed overall, effective and exclusive control of it, such that their responsibility derived from their own Convention obligations as opposed to the mere voluntary assumption of vicarious responsibility for a local public authority as envisaged by Article 56. *Quark* concerned vastly different facts, without special circumstances; alternatively, they argued that *Quark* was decided without consideration of all the relevant case-law and raised a serious question of interpretation and application of the Convention that should be reconsidered. They argued further that BIOT was unlawfully excised from Mauritius, which did not recognise United Kingdom sovereignty and had lodged protests with the United Nations; thus, Article 56 was not applicable as it was part of Mauritius under international law. In the further alternative, BIOT formed part of the metropolitan territory of the United Kingdom and Article 1 jurisdiction applied, in particular as the islands had been completely constitutionally integrated into the United Kingdom, and as they had never been included in the list of non-self-governing territories with the United Nations.

49. In the submission of the applicants, the existence of effective control was a question of fact. The United Kingdom authorities exercised and continued to exercise total domination over the Chagos Islands, those authorities having depopulated the islands, occupied them with its military forces and those of its United States allies and installed a subordinate local administration consisting of United Kingdom civil servants. Further, the United Kingdom authorities achieved their direct domination over the area through the excision of the Chagos Islands from the former colonies of Mauritius and the Seychelles. The historical facts of the case clearly amounted to “exceptional circumstances” requiring a finding of extraterritorial jurisdiction under the Court’s case-law namely, the United Kingdom’s exercise of direct and physical authority over them as persons when securing their removal from the Chagos Islands and the subsequent exercise of total domination over the area of the Chagos Islands.

50. In *Al-Skeini* the Court made clear that the existence of the Article 56 (ex Article 63) mechanism could not limit the scope of the term “jurisdiction” in Article 1. The legislative purpose of the Article 56 mechanism was to take account of the fact that it might be inappropriate in

the light of local requirements to impose the obligations required by the full application of the Convention on the public authorities of certain colonial territories (*Tyrer*); it was not designed to enable Contracting States to evade responsibility for the acts of their own officials acting under their direct authority when that would otherwise amount to an exercise of jurisdiction under Article 1. Any other interpretation would give rise to the perverse result that the United Kingdom could be held responsible for the conduct of its own authorities anywhere in the world in the exceptional circumstances described in the Court's case-law, even in territories which had historically, geographically and culturally never been included in the European family of nations, whereas victims of the same breaches in the same circumstances committed by the same authorities in land that had been part of the United Kingdom's sovereign territory for over 200 years would be without protection under the Convention.

51. The applicants' situation differed from that of the applicants in *Bui Van Thanh and Others v. the United Kingdom* (no. 16137/90, Commission decision of 12 March 1990), in which the Commission held that the mere fact that the acts of the Hong Kong authorities under Hong Kong immigration law had been based on United Kingdom policy was insufficient to amount to an exercise of the latter's Article 1 "jurisdiction" and in *Yonghong v. Portugal* (no. 50887/99, Commission decision of 25 November 1999), where the final decision to allow the applicant's extradition to proceed lay with the Macanese authorities and not the Portuguese courts. The case differed also from that of *Quark Fishing Limited* (cited above) in which, in contrast to the approach of the domestic courts in *Bancoult (1)* and *Bancoult (2)*, the House of Lords held that the Secretary of State had acted "in right of" the Government of the South Georgia and South Sandwich Islands and not of the United Kingdom. Further, all three cases concerned the acts of public authorities in respect of a territory for whose international relations the Contracting State was responsible rather than, as in the present case, the acts of the Contracting State's own officials acting under its direct authority.

52. The applicants further argued that, absent a duly notified denunciation of the Convention, the effect of the excision of the Chagos Islands from the territory to which the Convention had been extended and their placement under the direct rule of the United Kingdom had to be to transfer responsibility for securing Convention rights in the territory from the colonial government directly to the United Kingdom in its own right, such that the "jurisdiction" exercised there no longer arose by virtue of the extension of Article 56 but due to the acts of its own officials acting under its direct authority.

**c. Victim status**

53. The applicants had not lost victim status as there had been no explicit or substantial recognition of the violations, no adequate redress for the violations, *inter alia* since only 471 of the applicants had received compensation payments and that of an inadequate amount, and since the Seychellois had received nothing whatsoever and had not played any role in the *Ventacassen* litigation and settlement. Nor had there been any valid or unequivocal renunciation of remedies. Many of the present applicants had not thumb-printed any renunciation forms, and those forms in any event did not cover any new violations following the judgment in *Bancoult 1*. Those who did had been largely illiterate, Creole-speaking and vulnerable and did not appreciate what they were signing, as well as there being a lack of evidence that the islanders as a group knew or accepted the Government's intention to impose finality.

**d. Exhaustion of domestic remedies**

54. The applicants claimed that they had raised the complaints that they had witnessed the destruction of their homes, about the conditions of the sea voyage in domestic proceedings, about suicides and the plight of those taken to the Seychelles, evidence being heard on most of these points. Since English law did not apply the Convention approach to property, there had been no point in appealing against the striking out of their property claims.

**3. The interveners**

55. Human Rights Watch and Minority Rights Group International submitted that the purpose of Article 56 was to cater for overseas dependencies with some form of domestic autonomy. The drafters of the Convention had never intended that States should not be responsible for their extraterritorial actions. It would be unconscionable to permit States to commit acts overseas which they could not perpetrate on their home territory, whether within or outside the regional space of the Council of Europe. Article 1 should be interpreted in line with jurisdiction provisions of other international human rights instruments. Article 2 of the ICCPR had been interpreted to mean that State parties had to ensure rights to all persons in their territory and to anyone "within the power or effective control of that State Party even if not situated within the territory of the State Party". In the Inter-American system, the notion of jurisdiction had been broadly interpreted to include responsibility for acts and omissions of a State's agents which produced effects or were undertaken outside that State's own territory. At the least where there was a direct and immediate link between the extraterritorial conduct and the alleged violation of individual rights, the individual should be treated as falling within the State's control, authority or

power and therefore jurisdiction. The Human Rights Committee considered that the ICCPR applied to BIOT despite the United Kingdom's view.

56. They also submitted that it was well-established in international human rights instruments that peoples had collective rights. The United Nations Permanent Forum on Indigenous issues had developed a modern understanding of the term indigenous peoples, based on self-identification as indigenous peoples at the individual level and acceptance by the community, historical continuity with pre-colonial and/or pre-settler societies, strong links to territories and surrounding natural resources, distinct social economic or political systems, distinct language, culture and beliefs, non-dominant grouping of society and resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities. The 2007 UN Declaration on the Rights of Indigenous Peoples included such rights as the right not to be subjected to forced assimilation or destruction of culture, the right not to be forcibly removed from lands or territories, the right to redress for lands, territories and resources that have been taken. Property could be acquired through traditional occupation of land rather than requiring indigenous or other peoples to have held the property in accordance with conventional domestic legal systems.

57. Further, forced evictions disclosed serious human rights violations. For example, the UN Committee on Economic, Social and Cultural Rights had stated in General Comment No. 7 on Forced Evictions that forced evictions may breach a number of civil and political rights including the rights to life, security of person and property; that states should explore all alternatives in consultation with the affected groups beforehand and that adequate compensation should be paid. Forced evictions had also been recognised as crimes against humanity, and may disclose inhuman and degrading treatment or punishment.

## **B. The Court's assessment**

### *1. Delay*

58. The Court observes that the applicants submitted the substance of their complaints by way of introductory letter dated 9 December 2004. While it is true, as the Government alleged, that the application form was received on 15 April 2005, this is not decisive for the calculation of the six month time-limit imposed by Article 35 § 1 of the Convention. Rule 47 § 5 of the Rules of Court provides that the date of introduction of an application is generally considered to be the date of the first communication setting out, even summarily, the subject-matter of the application, provided that a duly completed application form is submitted within due time. There is no discernible reason in this case not to take the date of the introductory letter

which arrived within six months of the final relevant domestic decision identified in the application form as that of the Court of Appeal of 22 July 2004.

59. The Government's objection is accordingly rejected.

2. *Compatibility ratione loci*

60. The Government objected also on this ground. The Court notes that the applicants asserted on various grounds that the matters of which they complained fell within the Court's Convention jurisdiction. Firstly, they considered that the Convention had extended to BIOT when it was part of the Colony of Mauritius and its application had never been denounced; secondly, it was argued that in any event they were at all times within the jurisdiction of the United Kingdom in relation to all the acts and omissions of the United Kingdom alleged to violate the Convention, either because the United Kingdom had had effective control of BIOT throughout and/or because the acts originated from within the jurisdiction of the United Kingdom, the administration of BIOT being effected in London, and the policies and measures of the relevant ministers of Government being taken and implemented there.

i. *Question of acceptance of the right of individual petition in the territory concerned*

Article 56 provides as relevant:

"1. Any state may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the ... Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.

...

4. Any state which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention."

61. The Court notes that until 8 November 1965, the Chagos Archipelago was part of the Colony of Mauritius in respect of which the United Kingdom had made a declaration under former Article 63 of the Convention (now Article 56) acknowledging the Colony as territory for whose international relations the United Kingdom was responsible and to which the Convention was to apply. On that date the islands became part of the British Indian Ocean Territory (BIOT) and ceased to be part of Mauritius. Subsequently, on 14 January 1966, the United Kingdom ratified for the first time the right of individual petition, which ratification (extending briefly to the Colony of Mauritius) was prospective only. BIOT

was not subject at that time or since to a declaration by the United Kingdom Government under former Article 63 of the Convention or under the present Article 56 concerning the extension of the Convention to territories for which the United Kingdom is responsible.

62. It is therefore incontrovertible that at no time was the right of individual petition extended to BIOT. Even if the applicants' argument that an express denunciation of the Convention was required after BIOT was severed from the Colony of Mauritius was to be accepted, the applicants' claim for jurisdiction on this basis fails as they can still derive no individual right to petition the Court concerning the territory of BIOT.

*ii. Applicants' residence in the United Kingdom and status of BIOT*

63. Concerning the applicants' other arguments as to jurisdiction, the Court cannot accept the argument that the fact that many of the applicants now live within the United Kingdom brings their complaints within the Court's competence. The applicants' place of residence has no incidence on the point, acts or measures otherwise outside the Court's competence cannot become justiciable in Strasbourg merely because an applicant moved address. It is the subject-matter of the applicants' complaints alone that is relevant in this regard.

64. Similarly, the applicants' contention that BIOT must be regarded as part of metropolitan United Kingdom due to the Government's total control of BIOT cannot be accepted. The constitutional status of BIOT is set out in the domestic courts' judgments; it is an overseas Crown territory and not part of the United Kingdom itself, the Crown's legislative and constituent powers being exercised by Order in Council, Letters Patent and Proclamation.

*iii. Arguments alleging that the impugned measures were acts taking place within the United Kingdom*

65. The Court has next considered the applicants' argument that in fact the acts complained of all took place within the territorial jurisdiction of the United Kingdom itself, to which, plainly, the Convention applies in full force. This would mean founding jurisdiction on the fact that the decisions, *inter alia*, to close down the plantation and to arrange for the transfer of the inhabitants of the islands to Mauritius and Seychelles and subsequent administrative acts governing immigration controls were all taken in London, under the auspices of the United Kingdom Government and by their agents. The Court is not however persuaded by the argument. It may be noted that in *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII the fact that decisions might have been taken and actions planned within Contracting States which had led to the most serious consequences for applicants in Belgrade (then outside Convention space) did not lead to the NATO bombing being brought within the Court's



competence. Similarly unsuccessful was the applicant's argument in *Quark Fishing Ltd v. the United Kingdom* (cited above) that it was irrelevant that Protocol No. 1 had not been extended to South Georgia and the Sandwich Islands since in any event the officials in the Falklands who took and implemented the decisions on fishing licences were either directly controlled or could be overruled by the authorities in the United Kingdom. In the present application, the decisions and measures of which the applicants complained related mostly to acts or regulations implemented by the legislative and administrative authority for BIOT and taking effect purely in BIOT. The ultimate decision-making authority of politicians or officials within the United Kingdom is not a sufficient ground on which to base competence under the Convention for an area otherwise outside the Convention space.

66. Insofar as the applicants complained of the decisions of the United Kingdom domestic courts under Article 6, the Court would consider that the applicants' claims to enjoy a right to a fair trial in the determination of any of their civil rights and obligations do fall within its competence; the Court's examination would however be limited to the procedural rights guaranteed under that provision; this would not open up to the Court the competence to re-decide the merits of the issues examined by the domestic courts. It will deal with this aspect further below.

*iv. Jurisdiction under Article 1 of the Convention*

67. There remain the arguments founded on the interpretation of the relationship between Article 1 and Article 56 of the Convention. In essence, it is argued that, even if the Government have never extended the Convention and right of individual petition to BIOT, this does not preclude jurisdiction arising under different grounds.

68. The Court recalls that very similar arguments were raised by the applicants in the *Quark* case (cited above). There, where Protocol No. 1 to the Convention had not been extended to the overseas Crown territory of the South Georgia and the South Sandwich Islands, the Court found that the fact that the United Kingdom had effective control of the territory could not provide a basis of jurisdiction that replaced the system of declarations which the Contracting States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. It referred to constant case-law to the effect that no jurisdiction arose where a Contracting State had not, through a declaration under Article 56 (former Article 63), extended the Convention or any of its Protocols to an overseas territory for whose international relations it was responsible (see *Gillow v. the United Kingdom*, 24 November 1986, § 62, Series A no. 109; *Bui Van Thanh and Others v. the United Kingdom*, no. 16137/90, Commission decision of 12 March 1990, Decisions and Reports 65, p. 330; and *Yonghong v. Portugal* (dec.), no. 50887/99, ECHR 1999-IX).

69. The applicants have sought to distinguish this decision, arguing that this Court did not find that Article 1 and Article 56 were mutually exclusive but this decision only stood for the more limited proposition that the doctrine of extraterritorial responsibility had not rendered the declarations system superfluous or outdated; that in any event the facts were different from those of *Quark* and disclosed “exceptional circumstances” which brought the applicants’ complaints under the United Kingdom’s jurisdiction; and alternatively, that the decision was wrongly decided.

70. The Court must now have regard to the most recent and authoritative statement of principles as regards jurisdiction under Article 1 pronounced by the Grand Chamber in *Al-Skeini and Others* (cited above, §§ 130-141). These may be summarised as follows for the purposes of this case:

i. A State’s jurisdictional competence under Article 1 is primarily territorial;

ii. Only exceptional circumstances give rise to exercise of jurisdiction by a State outside its own territorial boundaries;

iii. Whether there is an exercise of jurisdiction is a question of fact;

iv. There are two principal exceptions to territoriality: circumstances of “State agent authority and control” and “effective control over an area”;

v. The “State agent authority and control” exception applies to the acts of diplomatic and consular agents present on foreign territory; to circumstances where a Contracting State, through custom, treaty or agreement, exercises executive public powers or carries out judicial or executive functions on the territory of another State; and circumstances where the State through its agents exercises control and authority over an individual outside its territory, such as using force to take a person into custody or exerting full physical control over a person through apprehension or detention.

vi. The “effective control over an area” exception applies where through military action, lawful or unlawful, the State exerts effective control of an area outside its national territory.

vii. In the exceptional circumstances of the cases before the Grand Chamber, where the United Kingdom had assumed authority and responsibility for the maintenance of security in South East Iraq, the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, had exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.

71. The Court would first note that extraterritorial jurisdiction still remains exceptional after *Al-Skeini*.

72. Next, as regards the applicants’ arguments that Article 1 jurisdiction may apply even in respect of overseas territories for which a Contracting

State has not accepted the Convention, the Court observes that the Grand Chamber stated:

“140. The “effective control” principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, “with due regard ... to local requirements,” to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term “jurisdiction” in Article 1. The situations covered by the “effective control” principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible (see *Loizidou* (preliminary objections), cited above, §§ 86-89 and *Quark Fishing Ltd v. the United Kingdom* (dec.), no. 15305/06, ECHR 2006-...).”

73. It is true that the Court was in that passage answering the Government’s argument, based on Article 56, that finding jurisdiction covered the actions of their armed forces in Iraq would have the strange result that a State was free to choose whether or not to extend the Convention and its Protocols to a territory outside the Convention “*espace juridique*” over which it might in fact have exercised control for decades, but was not free to choose whether to extend the Convention to territories outside that space over which it exercised temporary control as a result of military action: this is in effect the obverse of the argument being advanced by the applicants in the present case. However, the Court’s judgment on the point was cast in general terms: the Grand Chamber not only cited the *Quark* decision as an authority but in fact adopted the reasoning in that decision that the situations covered by the “effective control” principle were clearly separate and distinct from circumstances falling within the ambit of Article 56. The Court is not therefore persuaded that *Quark* can be regarded as wrongly decided or as having wrongly held that the South Sandwich and South Georgia islands were outside the jurisdiction of the Convention due to the absence of an Article 56 declaration.

74. Nor can the Court agree with the applicants’ contention that any possible basis of jurisdiction under Article 1 such as set in the *Al-Skeini* judgment (cited above) must take precedence over Article 56 on the ground that it should be set aside as an objectionable colonial relic and to prevent a vacuum in protection offered by the Convention. Anachronistic as colonial remnants may be, the meaning of Article 56 is plain on its face and it cannot be ignored merely because of a perceived need to right an injustice. Article 56 remains a provision of the Convention which is in force and cannot be abrogated at will by the Court in order to reach a purportedly desirable result.

75. The question remains as to whether the passage from *Al-Skeini* cited above indicates that there must now be considered to be alternative bases of jurisdiction which may apply even where a Contracting State has not extended application of the Convention to the overseas territory in issue, namely, that the United Kingdom can be held responsible for its acts and omissions in relation to the Chagos Islands, despite its exercise of its choice not to make a declaration under Article 56, if it nonetheless exercised “State agent authority and control” or “effective control” in the sense covered by the Grand Chamber judgment. This interpretation is strongly rejected by the respondent Government and would indeed render Article 56 largely purposeless and devoid of content since Contracting States generally did, and do, exercise authority and control over their overseas territories.

76. However, even accepting the above interpretation, the Court finds it unnecessary to rule on this particular argument since, in any event, the applicants’ complaints fail for the reasons set out below.

### 3. *Victim status*

77. The Government have submitted that the applicants can no longer claim to be victims due to the settlement reached in the *Ventacassen* litigation.

78. The Court recalls (as set out above at paragraph 12) that proceedings were brought in 1975 concerning the expulsion and the damage that this inflicted on the lives of the Chagos Islanders (the *Ventacassen* case, paragraph 12 above). These proceedings were settled in 1982 on payment of 4 million pounds by the United Kingdom and provision of land worth one million pounds by Mauritius. In so settling, the islanders agreed to give up their claims. In the later *Chagos Islanders* case, the High Court found that an attempt to claim further compensation and make further claims arising out of the expulsion and exclusion from the islands was an abuse since the claims had been renounced by the islanders.

79. The Court notes that the applicants have argued that not all of them had signed the waiver forms in the settlement or that those that did had not understood or properly consented to what was involved. However, these issues were argued in the domestic proceedings in the *Chagos Islanders* case and the arguments that the applicants had been subject to oppression or did not realise the settlement was final were rejected by the High Court judge in a detailed judgment after hearing extensive evidence. Of particular relevance is the fact that the Chagos Islanders were represented by lawyers in the litigation which settled.

80. Insofar as the applicants have asserted that only 471 of them were involved in the settlement, the Court would refer to the finding of the domestic courts that the existence of the proceedings was widely known at the time. Any other islanders affected by the impugned conduct of the United Kingdom could have also made claims at that time and thus taken

advantage of the settlement offer put forward or, if they preferred, pursued their claims in the domestic court proceedings.

81. The Court would reiterate that the possibility of obtaining compensation in civil proceedings for the claims of breaches of the rights invoked in the present case will generally, and in normal circumstances, constitute an adequate and sufficient remedy. Where applicants accept a sum of compensation in settlement of civil claims and renounce further use of local remedies therefore, they will generally no longer be able to claim to be a victim in respect of those matters (see application nos. 5577-5583/72, *Donnelly and Others v. the United Kingdom*, dec. 15.12.75, DR 4 p. 4 at pp. 86-87, *Caraher v. the United Kingdom*, (dec.), no. 24520/94, ECHR 2000-I; *Hay v. the United Kingdom*, (dec.) no. 41894/98, ECHR 2000-XI). It would run counter to the object and purpose of the Convention, as set out in Article 1 - that rights and freedoms should be secured by the Contracting State within its jurisdiction - and thus interfere with the primarily subsidiary nature of the Court's role, if applicants were able to invoke the Court's jurisdiction by dispensing with the available and effective domestic mechanism of redress. In the present case, the applicants could have pursued their claims and obtained the domestic courts' findings as to the alleged unlawful actions and breaches of their rights and compensation for damage flowing from the expulsion and exclusion from their homes. They chose, however, to settle their claims without obtaining such a determination. It is not for the Court, in that event, to undertake the role of a first-instance tribunal of fact and law. In these circumstances, the Court finds that in settling their claims in the *Ventacassen* litigation and in accepting and receiving compensation, those applicants have effectively renounced further use of these remedies. They may no longer, in these circumstances, claim to be victims of a violation of the Convention, within the meaning of Article 34 of the Convention. Those applicants who were not party to the proceedings but who could at the relevant time have brought their claims before the domestic courts have, for their part, failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention.

82. It is true that there are applicants who were not born at the time of the settlement. It is also true that the applicants' claim under Article 8 of the Convention relates not merely to their original removal from the islands but to the prohibition on their return to the islands imposed by the 2004 Ordinance which is said to have amounted to a continuing unjustified interference with their right to respect for their home. As to the former point, the Court would note, first of all, that those applicants who were not born on the islands and never had a home on the islands, can have no claim to victim status arising out of those events and their immediate aftermath (see, *mutatis mutandis*, *Demopoulos and Others v. Turkey* [GC] no. 46113/99 *et al*, decision of 1 March 2010, ECHR 2010-...; § 136 and the cases cited therein, *Papayianni and Others v. Turkey*, no. 479/07 *et al*,

decision of 6 July 2010; and the cases cited therein). As to the second point, it is evident that until the judgments in the *Bancoult 2* case, the domestic courts considered that the *Ventacassen* litigation had already resolved all the issues relating to the applicants' claim to infringement of their rights. The Court of Appeal noted on 22 July 2004 that the islanders had no further possibility of legal recourse and that any remaining issues were of a political nature. In the most recent House of Lords judgment, Lord Hoffman stated that it had been clear since 2003 (when the High Court struck out the islanders' claims due to the previous settlement), that there was no legal obligation on the Government to pay any additional compensation or to fund resettlement. The most recent proceedings involved an unsuccessful challenge by the applicants by way of judicial review to legislative measures imposing immigration control on the islands which barred entry without leave under those rules. The Court notes that, in rejecting the claim, the House of Lords held that in the context of the present day, rather than 1968, any right of abode on the outer islands was purely symbolic, none of the islanders having gone to live on the islands in the four year period when this had been permitted under the ordinance then in force. While it remained open to the applicants to apply for permits as in the past for transient visits, there was no prospect of their being able to live on the islands in the foreseeable future without funding which the Government were not willing to provide and which was not likely to be forthcoming from any other source. In these circumstances, the Court finds that the 2004 ordinance cannot be said to have amounted to an interference with the applicants' right to respect for their homes. Indeed, it is apparent from the judgments given that whatever the outcome of those proceedings that the applicants continued to have no legal, or practical, prospect of being able to enter or settle on the islands.

83. The Court is therefore not persuaded that recent events disclose any developments relevant to the applicants' victim status. The heart of the applicants' claims under the Convention is the callous and shameful treatment which they or their antecedents suffered from 1967 to 1973, when being expelled from, or barred from return to, their homes on the islands and the hardships which immediately flowed from that. These claims were raised in the domestic courts and settled, definitively. The applicants' attempts to pursue matters further in more recent years must be regarded, as held by the House of Lords, to be part of an overall campaign to bring pressure to bear on Government policy rather than disclosing any new situation giving rise to fresh claims under the Convention. Having regard to the facts submitted by the parties and the complaints raised by the applicants, the Court finds that that no separate issues concerning the applicants' substantive rights under the Convention have been shown to arise nor any arguable claims of breaches of such rights engaging Article 13 of the Convention.

#### 4. Access to court and fair trial issues (Article 6)

84. As concerns any remaining issues that might arise under Article 6 due to the procedures before the courts over recent years (see paragraph 66 above), the Court considers that there are two principal strands of argument advanced by the applicants: firstly, that the 2004 orders constituted an act of the executive which deprived the unappealed judgment in *Bancoult (I)* of its intended effect (with reference, *inter alia*, to *Brumărescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII; *Hornsby v. Greece*, 19 March 1997, *Reports of Judgments and Decisions* 1997-II); and secondly that the refusal to grant a substantive hearing of their claim to civil damages constituted an unjustified impediment to their access to court in particular due to the application of domestic rules of limitation.

85. As to the first strand of argument, the Court has found no trace of such complaint being raised in the subsequent domestic proceedings, in the most recent of which Convention arguments could have been directly ventilated. In any event, the situation in this case is not comparable to that in the *Brumărescu* line of cases, where a Government officer had a final decision re-opened and re-decided. In the present application, there was no re-opening or re-deciding of the validity of the 1971 immigration ordinance; that remained invalid. Nor does the *Hornsby* case lend assistance to the applicants' argument, since the decision in *Bancoult I* which declared the 1971 ordinance invalid contained no operative elements which required action or enforcement by the Government. While in the immediate aftermath of the decision the authorities explored the feasibility of resettlement, the House of Lords had found that they had been under no legal obligation to take any action, and that they had not given the islanders any legitimate expectation that their return would be facilitated. The situation evolved meanwhile, with various studies and reports highlighting the prohibitive cost of providing infrastructure and a means of livelihood for any new settlement and with the changing dimensions of the strategic role of the islands. Thus, when the new orders barring immigration were litigated in light of these new circumstances, they were upheld. Against this background, the Court perceives no appearance of depriving the applicants of the benefit of a final, enforceable decision.

86. Turning to the second strand of argument which asserts an unjustified failure by the courts to address the merits of the applicants' claims for compensation (the *Chagos Islanders' case*), the Court notes that the High Court, upheld on appeal, thoroughly examined the applicants' claims in a lengthy judgment, addressing their arguments and giving clear and detailed reasons for not accepting them, including reasons founded on abuse of process based on the past settlement and waivers of future claims, on prescription or on the lack of a cause of action. Further, the prescription period applied was not of such duration as to have been practically impossible to comply with; after hearing both parties and assessing the

documentary evidence, the domestic court also reached the conclusion that the applicants' allegations that they had been prevented from making their claims earlier as the Government had concealed relevant information had not been made out. There is no indication of any arbitrariness or unfairness in these proceedings which could be construed as a denial of access to court.

87. It follows that these complaints are manifestly ill-founded and to be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

*5. Conclusion*

Having regard to the above, this application must therefore be rejected pursuant to Article 35 §§ 1, 3 and 4 of the Convention.

For these reasons, the Court by a majority

*Declares* the application inadmissible.

Lawrence Early  
Registrar

David Thór Björgvinsson  
President



**TAB 7**

*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2014] Env LR 2

**R. (ON THE APPLICATION OF  
BANCOULT) v SECRETARY OF STATE FOR  
FOREIGN AND COMMONWEALTH AFFAIRS**

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

Richards L.J. and Mitting J.: 11 June 2013

[2013] EWHC 1502 (Admin); [2014] Env. L.R. 2

Ⓒ Abuse of power; Admissibility; Chagos Islands; Consultation; EU law; Fishing; Improper motive; International relations; Marine protected areas; Wikis

H1 *International law—nature conservation—marine protected areas—Chagos Islands—creation of Marine Protected Area—public consultation—document obtained via “Wikileaks” purporting to show improper motive for creating Marine Protected Area—whether improper motive established—environmental information—whether unlawful failure to disclose relevant environmental information in the course of a public consultation exercise—Treaty on the Functioning of the European Union art.198—whether breach of obligations relating to overseas territories within the European Union*

H2 The claimant (B) was an exiled native of the Chagos Islands, a British colony in the Indian Ocean. B had brought a number of proceedings related to the removal and subsequent exclusion of the local population from the Chagos Islands in the British Indian Ocean Territory (BIOT). Following approaches made by a US environmental group, discussions took place between representatives of the group and a Government Administrator for the BIOT in relation to the creation of a Marine Protected Area (MPA) around the Chagos Islands in which no fishing would take place (a “no take” MPA). Subsequently, the defendant (SSFCA) held a consultation exercise to assist in the assessment of whether a MPA was the right option for the BIOT. Following consideration of the responses to the consultation exercise, the decision to declare the MPA was taken by SSFCA in April 2010. The decision was then implemented by the cessation of licences for commercial fishing and through additional funding for the patrol of BIOT waters.

H3 In December 2010, *The Guardian* newspaper published a copy of what purported to be an electronic cable emanating from the US embassy in London. The document, which had been obtained from the “Wikileaks” website, purported to be a note of a 2009 meeting between British and US officials, and it was claimed that it showed that the real reason for the MPA was to prevent the residents of the Chagos Islands and their descendants from resettling the islands.

H4 B sought to challenge the decision to create the MPA on the grounds that:

- (1) the MPA had been created as a result of an improper motive, namely to exclude the exiled Chagos Islanders and their descendants;

- (2) the consultation process had been flawed by failures to: (i) reveal that the SSCFA's own consultants had advised that the resettlement of the islanders was feasible; and (ii) to disclose relevant environmental information; and
- (3) the United Kingdom was in breach of its obligations under art.4(3) of the Treaty on the European Union (TEU) and art.198 of the Treaty on the Functioning of the European Union (TFEU) not to jeopardise the objective of association of BIOT with the European Union, and not to jeopardise the objectives of association of the Chagos Islands with the European Union.

H5 **Held**, in refusing the application:

H6 (1) The Wikileaks Document was inadmissible and that undermined the factual basis of B's challenge. Without making a finding of fact that the Wikileaks Document was an accurate copy of a genuine cable, it was assumed that it was. The information contained in the document concerned international relations, had been communicated in confidence, and had been obtained illicitly. Its disclosure in the proceedings was not an offence under the Official Secrets Act 1989 because it was not damaging, adding nothing to the extensive publicity that it had already received. It was, however, inadmissible by reason of the Vienna Convention on Diplomatic Relations 1961 art.24 and art.27(2) (the Vienna Convention). Article 24 and art.27 had to be interpreted broadly and sensibly. Accordingly, although electronic, the cable was nevertheless a "document" for the purposes of art.24 and it continued to be a "document of the mission", with a subsequent right to privacy of the document being capable of surviving its dispatch to, and receipt by, a third person. It was a settled principle of public international and municipal law that the inviolability of diplomatic communications required that national courts of states that were parties to the Vienna Convention should, in the absence of consent by the sending state, exclude illicitly obtained diplomatic documents. The remaining evidence made it clear that SSCFA had made the decision to create an MPA against the advice of his officials, and there was no basis for suspecting that he had been motivated by an intention to create a way to prevent the exiled islanders from resettling the islands. For B's case on improper purpose to be right, a truly remarkable set of circumstances would have to have existed, and they simply could not be found.

H7 (2) The consultation process was neither unfair nor unlawful and the information provided was sufficient for the purposes of a valid consultation. It was not a consultation about resettlement and it was not necessary for the consultation document to address the feasibility of resettlement. Whilst it was true that the consultation document addressed the issues at a relatively high degree of generality, it accorded with the intention of making the document clear and intelligible to the wide range of consultees to whom it was addressed. Nor did the omission of any express reference to traditional Mauritian fishing rights affect the fairness of the consultation or the validity of the MPA decision.

H8 (3) Although the European Commission had already rejected a complaint from the Chagos Islanders based on TFEU art.198, it was open to B to raise the EU law issue in the proceedings and the court was not constrained by the Commission's reasoning or decision. The cases relied on by B in support of his argument that a national court was not entitled to reach a decision that would conflict with a Commission decision concerned areas such as competition, state aid and import duties. Decisions on whether to bring infringement proceedings against Member

States were of a different character, and even a reasoned opinion by the Commission did not amount to a binding decision that the Member State had breached its Treaty obligations. Thus, a decision to close the file on a complaint did not amount to a binding decision that the Member State was not in breach. However, while the obligation in TEU art.4(3) to refrain from any measure which could jeopardise the attainment of the European Union's objectives gave rise to directly effective rights on which individuals could rely, the court had come to the same conclusion as the Commission—namely that the decision to create the MPA was compatible with EU law. It did nothing to prevent any change in the government's "no resettlement" policy, which could be reversed or modified as necessary, and it had no exclusionary or prohibitive effect. It fell short of a decision depriving art.198 of effect, having no appreciable adverse effect on the economic and social development of the Chagos Islands, on economic relations between the islands and the European Union, or on the economic, social and cultural development to which the islanders aspired.

#### H9 Cases referred to:

*Masterfoods Ltd (t/a Mars Ireland) v HB Ice Cream Ltd* (C-344/98) [2000] E.C.R. I-11369; [2001] 4 C.M.L.R. 14 ECJ  
*R. v North and East Devon HA Ex p. Coughlan* [2001] Q.B. 213; [2000] 2 W.L.R. 622; [1999] C.O.D. 340 CA (Civ Div)  
*R. v Shayler (David Michael)* [2002] UKHL 11; [2003] 1 A.C. 247; [2002] A.C.D. 58 HL  
*R. (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office* [2001] Q.B. 1067; [2001] 2 W.L.R. 1219; [2001] A.C.D. 18 DC  
*R. (on the application of M) v Haringey LBC* [2013] EWCA Civ 116; [2013] B.L.G.R. 251; (2013) 157(9) S.J.L.B. 31  
*Rose v R.* [1947] 3 D.L.R. 618  
*Shearson Lehman Brothers Inc v Maclaine Watson & Co Ltd* [1988] 1 W.L.R. 16; [1988] F.T.L.R. 225; (1988) 85(2) L.S.G. 35 HL

#### H10 Legislation referred to:

Official Secrets Act 1911 s.2  
 European Convention on Human Rights art.24  
 Territorial Sea Convention 1958  
 Vienna Convention on Diplomatic Relations 1961 arts 24, 27(2), 31  
 Constitution of the Republic of Mauritius s.111  
 British Indian Ocean Territories Order 1965 (SI 1965/1)  
 Charter of Fundamental Rights of the European Union art.45  
 Convention on the Law of the Sea (United Nations) art.62, Pt 15  
 Diplomatic Privileges Act 1964 s.2(1), Sch.1  
 Immigration Ordinance 1971  
 International Tin Council (Immunities and Privileges) Order 1972 (SI 1972/120) art.7(1)  
 Official Secrets Act 1989 ss.2, 3(2)(a), 6, 7(3)(4)(5)  
 Fishery Limits Ordinance 1991 s.3(1)(3), 4; art.4  
 Council Regulation 2913/92 (Community Customs Code) art.239  
 EC Treaty arts 5, 85(3), 86, 182, 189  
 Treaty on the European Union art.4(3)

Treaty on the Functioning of the European Union arts 4(3), 20, 198–203, 258, 263  
 Freedom of Information Act 2000  
 British Indian Ocean Territory (Constitution) Order 2004 (SI 2004) reg.9  
 British Indian Ocean Territory (Immigration) Order 2004 (SI 2004)  
 Environmental Information Regulations 2004 (SI 2004/3391)  
 Fisheries (Conservation and Management) Ordinance 2007 ss.4, 20

- H11 *Mr N. Fleming QC, Mr R. Wald, Ms M. Lester and Mr S. Kosmin*, instructed by Clifford Chance, appeared on behalf of the claimant.  
*Mr S. Kovats QC, Mr K. Beal QC and Ms P. Nevill*, instructed by the Treasury Solicitor, appeared on behalf of the defendant.

## APPROVED JUDGMENT

### RICHARDS L.J.:

#### Introduction

- 1 This is the judgment of the court, to which both members have contributed. The case is a further chapter in the history of litigation arising out of the removal and subsequent exclusion of the local population from the Chagos Archipelago in the British Indian Ocean Territory (BIOT). The claimant, Mr Bancoult, has played a central role in that litigation. By the present claim he challenges the decision taken on 1 April 2010 by the Foreign Secretary to create a “no-take” Marine Protected Area (MPA) of some 250,000m<sup>2</sup> in BIOT. He brings the proceedings on his own behalf and for the benefit of others but does not act strictly in a representative capacity. He makes clear that he is in favour of environmental protection for the Chagos Islands and surrounding area, but that he objects to the “no-take” character of the MPA.
- 2 By re-amended grounds of claim, the Foreign Secretary's decision is alleged to be flawed in the following respects:
  - (1) an improper motive, namely an intention to create an effective long-term way to prevent Chagossians and their descendants from resettling in BIOT;
  - (2) the failure to reveal, as part of the consultation preceding the decision, that the Foreign Secretary's own consultants had advised that resettlement of the population was feasible;
  - (3) the failure to disclose relevant environmental information in the course of the consultation;
  - (4) the failure to disclose that the MPA proposal, in so far as it prohibited all fishing, would adversely affect the traditional and/or historical rights of Chagossians to fish in the waters of their homeland, as both Mauritian citizens and as the native population of the Chagos Islands; and
  - (5) breach of the obligations imposed on the United Kingdom under art.198 of the Treaty on the Functioning of the European Union (the TFEU), which relates to the association of overseas territories with the European Union.
- 3 There are some overlaps between those grounds, especially those dealing with the process of consultation, but the allegation of improper purpose and the alleged breach of the TFEU are largely stand-alone issues.

*Factual background*

- 4 We set out here a bare outline of the factual background in order to provide the general context for what follows. For greater detail concerning the history of BIOT up to 2008, reference can be made to the speech of Lord Hoffmann in *R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61; [2009] 1 A.C. 453 (*Bancoult (No.2)*), at [1]–[27].
- 5 Prior to 1965 the Chagos Islands were a dependency of Mauritius, which at that time was a British colony. In 1965, by the British Indian Ocean Territories Order 1965, they were detached from Mauritius and constituted a separate colony known as BIOT. Mauritius itself became independent in 1968.
- 6 The detachment of the Chagos Islands from Mauritius took place in the context of proposals for the establishment of a US defence facility in the area, in particular on Diego Garcia. An agreement concerning the availability of BIOT for defence purposes was entered into between the British Government and the US Government in December 1966, and in due course the US Government gave notice that Diego Garcia would be required for the purpose in July 1971. Prior to that date the UK Government secured the removal of the population of Diego Garcia, mostly to Mauritius and the Seychelles. The Immigration Ordinance 1971, made by the BIOT Commissioner pursuant to the 1965 Order, then provided that no person was to enter or be present or remain in BIOT unless he was in possession of a permit. A small population remaining after that date on islands other than Diego Garcia left by the end of May 1973.
- 7 In 1998, long out of time, Mr Bancoult brought a challenge by way of judicial review to the Immigration Ordinance 1971. The challenge was upheld by the Divisional Court in *R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] Q.B. 1067 (*Bancoult (No.1)*) in November 2000. The Foreign Secretary of the day accepted the court's ruling and referred to work then in progress on the feasibility of resettling the Chagossians. The Immigration Ordinance 1971 was replaced by the Immigration Ordinance 2000, which provided that the restrictions on entry or residence should (with the exception of Diego Garcia) not apply to anyone who was a British Dependent Territories citizen by virtue of his connection with BIOT. Pending the outcome of the feasibility study, however, the change in the law led to no change in practice in the situation on the islands.
- 8 The report on Stage 1 of the feasibility study had been published in June 2000. The key report, however, was that on Phase 2B of the study, which was published in July 2002. It concluded that resettlement would be problematic in the short term and that the costs of maintaining long-term inhabitation of the islands were likely to be prohibitive.
- 9 In 2004 the Foreign Secretary announced that, in the light of the feasibility study, the British Government would not support resettlement of the islands to ensure and maintain the availability and effective use of the territory for defence purposes and had decided to restore full immigration control. The British Indian Ocean Territory (Constitution) Order 2004 was then made, providing by s.9 that no person was to have the right of abode in the territory and that no person was entitled to enter or be present in the territory except as authorised by or under the Order or any other law for the time being in force in the territory. At the same time the

British Indian Ocean Territory (Immigration) Order 2004 dealt with the details of immigration control.

- 10 The 2004 Orders were the subject of a further application for judicial review by Mr Bancoult. He was successful in the lower courts but in October 2008, in *Bancoult (No.2)*, the House of Lords upheld the validity of the Orders.
- 11 Mr Bancoult and other Chagossians also applied to the European Court of Human Rights, complaining inter alia about their removal from the islands and the prohibition on their return. That application was dismissed on 20 December 2012 as manifestly unfounded and accordingly inadmissible: see *Chagos Islanders v United Kingdom* (2013) 56 E.H.R.R. SE15.
- 12 A further avenue of complaint was to the European Commission, seeking to get the Commission to bring infringement proceedings against the United Kingdom for breach of art.198 TFEU and other Treaty provisions. The Commission found no infringement of EU law and formally closed its file on the complaint in January 2013.

*The MPA consultation and decision*

- 13 The immediate background to the MPA proposal and the public consultation on it is described later in this judgment (see [54]–[65] below). The consultation itself ran from 10 November 2009 to 5 March 2010. The consultation document was published solely in electronic form, on a website, with a view to giving it wide availability.
- 14 In his foreword to the consultation document, the Foreign Secretary said: “We want to use this consultation to help us assess whether a marine protected area is the right option for the future environmental protection of the British Indian Ocean Territory.” The document stated that every effort had been made to bring the consultation to the attention of those with an interest in BIOT. It invited responses addressed to, but not restricted to, the following questions:
  - “1. Do you believe we should create a marine protected area in the British Indian Ocean Territory?  
If yes, from consultations with scientific/environmental and fishery experts, there appear to us to be 3 broad options for a possible framework:
    - (i) Declare a full no-take marine reserve for the whole of the territorial waters and Environmental Preservation and Protection Zone (EPPZ)/Fisheries Conservation and Management Zone (FCMZ); or
    - (ii) Declare a no-take marine reserve for the whole of the territorial waters and EPPZ/FCMZ with exceptions for certain forms of pelagic fishery (e.g. tuna) in certain zones at certain times of the year.
    - (iii) Declare a no-take marine reserve for the vulnerable reef systems only.
  2. Which do you consider the best way ahead? Can you identify other options?
  3. Do you have any views on the benefits listed at page 11? What importance do you attach to them?
  4. Finally, beyond marine protection, should other measures be taken to protect the environment in BIOT?”
- 15 Under the heading “Scope”, the document explained that the consultation was in response to a proposal of the Chagos Environment Network (to which a link

was given) recommending the establishment of a conservation area in BIOT. It continued:

“Any decision to establish a marine protected area would be taken in the context of the Government's current policy on the Territory, following the decision of the House of Lords in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 that the British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004 are lawful; i.e., there is no right of abode in the Territory and all visitors need a permit before entering the Territory. Access to a part of the Territory is also restricted under our Treaty obligations with the US. It is the Government's provisional view, therefore, that we would not establish a permanent research facility in any part of the Territory. Any decision to establish a marine protected area would not affect the UK Government's commitment to cede the Territory to Mauritius when it is no longer needed for defence purposes.

This consultation and any decision that may follow for the establishment of a marine protected area are, of course, without prejudice to the outcome of the current, pending proceedings before the European Court of Human Rights (ECtHR). This means that should circumstances change, all the options for a marine protected area may need to be reconsidered.”

- 16 There followed a summary of the questions and a “Background” section which described the extent of existing environmental protection of the area and set out the added value of creating an MPA. On the latter point it said that the Foreign and Commonwealth Office's view took account of the findings of a workshop held on 5–6 August 2009 at the National Oceanography Centre, Southampton, to which a link was given.
- 17 Annex A to the document was headed “Impact/Costs & Benefits”. Under “Costs” it referred to the cost of patrolling the area and the absence of fishing licence income to offset that cost if a no-take MPA were created. Under “Benefits” it gave further links to the Chagos Environment Network Brochure and the National Oceanographic Centre Workshop, and summarised conservation benefits, climate change benefits, scientific benefits and development benefits. Under “Impact” it stated

“[a]s well as the international fishing community, there are some groups who will be directly or indirectly affected by the establishment of a marine protected area and any resulting restrictions or a ban on fishing”.

As regards the United States, it referred to the possible need to exclude Diego Garcia and its three-mile territorial waters from any MPA in order to avoid any impact on the operational capability of the base there. As regards Mauritius, it referred to a July 2009 joint communiqué, set out in Annex C, following discussions between the British Government and the Mauritian Government, and it stated that the Mauritian Government had in principle welcomed the concept of environmental protection in the area. As regards the Chagossian community, it stated:

“Following the decision of the House of Lords in [*Bancoult (No.2)*], the current position under the law of BIOT is that there is no right of abode in the Territory and all visitors need a permit. Under these current circumstances, the creation of a marine protected area would have no direct immediate impact on the



Chagossian community. However, we recognise that these circumstances may change following any ruling that might be given in the proceedings currently pending before the European Court of Human Rights in Strasbourg in the case of *Chagos Islanders v UK*. Circumstances may also change when the Territory is ceded to Mauritius. In the meantime, the environment will be protected and preserved.”

- 18 The joint communiqué set out in Annex C referred to a round of bilateral talks between the Mauritian and British Governments in July 2009 and included the following (in the form in which it appeared after an initial protest by Mauritius):

“The British delegation proposed that consideration be given to preserving the marine biodiversity in the waters surrounding the Chagos Archipelago/British Indian Ocean Territory by establishing a marine protected area in the region. The Mauritian side welcomed, in principle, the proposal for environmental protection and agreed that a team of officials and marine scientists from both sides meet to examine the implications of the concept with a view to informing the next round of talks. The UK delegation made clear that any proposal for the establishment of the marine protected area would be without prejudice to the outcome of the proceedings in the European Court of Human Rights.

The Mauritian side reiterated the proposal it made in the first round of the talks for the setting up of a mechanism to look into the joint issuing of fishing licences in the region of the Chagos Archipelago/British Indian Ocean Territory. The UK delegation agreed to examine this proposal and stated that such examination would also include consideration of the implications of the proposed marine protected area.

...

Both Governments agreed that nothing in the conduct or content of the present meeting shall be interpreted as:

- (a) a change in the position of Mauritius with regard to sovereignty over the Chagos Islands/British Indian Ocean Territory;
- (b) a change in the position of the United Kingdom with regard to sovereignty over the Chagos Islands/British Indian Ocean Territory ... .”

- 19 Annex D summarised UK policy on Marine Protected Areas, including reference to relevant international programmes.
- 20 Following consideration of the responses to the consultation, the decision to declare a full no-take MPA was taken by the Foreign Secretary personally, in circumstances described later (see [67]–[73] below). The decision was announced on 1 April 2010 and the MPA was established on the same day by the BIOT Commissioner, by Proclamation No.1 of 2010. The decision has been implemented to date by ceasing to issue licences for commercial fishing and by obtaining additional funding to patrol BIOT waters. We were told that further BIOT implementing legislation is in the course of preparation.

#### Ground 1: Improper motive

- 21 The first of the five grounds on which the claimant relies to challenge the lawfulness of the decision to declare an MPA in BIOT waters is that it was made in whole or in part for an improper motive: “an intention to create an effective

long-term way to prevent Chagossians and their descendants from resettling in the BIOT”.

22 The cornerstone of the claimant's case is a document published by *The Guardian* on 2 December 2010 and by *The Telegraph* on 4 February 2011. It is claimed to be a copy of a “cable” (in fact, a communication sent, received and stored electronically but which can, if required, be printed) sent on 15 May 2009 by the US Embassy in London to departments of the US Federal Government in Washington, to elements of its military command and to its Embassy in Port Louis, Mauritius. The text, which (save as regards layout) is identical in both reports, concerns and, it is claimed, purports to record observations made by British officials to a US Embassy official on 12 May 2009 about a proposal to declare an MPA. It is common ground that there was a meeting between US officials, Mr Colin Roberts, then FCO Director for Overseas Territories and HM Commissioner for the BIOT, and Ms Joanne Yeadon, then the BIOT Administrator, on 12 May 2009 at the Foreign Office. Mr Roberts and Ms Yeadon believe that no note was taken or made of the meeting by them and none has been retrieved from FCO files. If the document is a true copy of a US Embassy “cable” it is the only near-contemporaneous record of the meeting known to exist.

23 On 25 July 2012 Stanley Burnton L.J. ordered Mr Roberts and Ms Yeadon to attend to be cross-examined about the document. In doing so, he acknowledged that what he described as “the Wikileaks documents” (three were then in issue) “must have been obtained unlawfully, and in all probability by the commission of a criminal offence or offences under the law of the United States of America”. He expressed understanding of the policy of HM Government neither to confirm nor deny the genuineness of leaked official documents (the NCND policy). The only submission made to him by Mr Kovats QC for the defendant was that it would be wrong to order cross-examination about documents which had been unlawfully obtained. He rejected that submission, for reasons which he gave at [16]:

“However, the documents in question have been leaked, and indeed widely published. No claim has been made to the effect that the documents should not be considered by the court on the grounds of public interest immunity or the like. They are before the court. The court will have to decide whether or not they are genuine documents, that they are copies of what they purport to be. The memorandum of the meeting of 12 May 2009, in particular, appears to be a detailed record, which could fairly be the basis of cross-examination.”

He went on to state that he did not see how the present claim could fairly or justly be determined without resolving the allegation made by the claimant as to what transpired at the meeting of 12 May 2009.

24 Mr Fleming QC made it clear to us that he sought not merely to cross-examine Mr Roberts and Ms Yeadon about the contents of the document but, to the extent that their written and oral evidence differed from it, to invite us to prefer its contents to their evidence. In other words, he sought to rely on the document evidentially.

25 At our invitation, the evidential status of the document and its admissibility were revisited in the course of the hearing. Issues not canvassed before Stanley Burnton L.J. were fully debated before us and permitted us to reach a firm conclusion about the use, if any, to which the document might be put.

*Application of the NCND policy*

- 26 Mr Kovats was properly handicapped in dealing with the issue because of the longstanding NCND policy of the British Government. The reason for the policy is explained in the witness statement of Mr Martin Sterling, a senior policy adviser in the Cabinet Office: it would be prejudicial to the effective administration of public affairs to do so. Confirming the accuracy of information within a leaked document would compound any prejudice already caused and would reward persons involved in the leaking. Even a denial of accuracy would, by inference, lead to an unwarranted assumption that an undenied leak was accurate. Hence, subject to exceptional circumstances, the policy must apply universally to be effective.
- 27 Founding himself on that policy, Mr Kovats did not object to cross-examination of Mr Roberts and Ms Yeadon by putting to them the contents of the document, provided that it was not asserted that it was a true copy of an Embassy “cable”. Cross-examination of Mr Roberts proceeded for some time on that basis, but there came a point when Mr Fleming asked us to rule on whether he could cross-examine Mr Roberts on the basis indicated above, with a view to inviting the court in due course to accept the document as an accurate record of the meeting and to rely on it evidentially. At that stage, towards the end of Day 2 of the hearing, we ruled in favour of permitting Mr Fleming to proceed on that basis, indicating that we would give our reasons in this judgment. In the event, however, that ruling was superseded the following day by a fresh ruling as to the effect of the Vienna Convention on Diplomatic Relations 1961, discussed below.
- 28 We make clear that if the only objection to the admission in evidence of the document were the NCND policy, we would have permitted it to be admitted, for the following reasons, which lay behind our initial ruling on the point. First, it is far from clear that the documents of other governments are covered by the policy. All that Mr Sterling states is that he “cannot see any reason for the NCND principle not applying in these circumstances”. Secondly, as Mr Sterling accepts, the policy admits of exceptions. Thirdly, it does not, as such, bind the court. Fourthly, in the circumstances with which we have to deal, the interests of justice would override the policy: the document has been in the public domain for many months, even if it got there as a result of an unlawful act. If it were necessary for us to take it into account evidentially to determine the true purpose of declaring the MPA, we would not regard the NCND policy as a sufficient reason for refusing to do so. To refuse to do so could, in principle, permit Her Majesty's Government (HM Government) to conceal an improper and unlawful motive for an executive act which is claimed to have had an adverse impact upon the rights of a significant number of individuals of Chagossian origin or descent.

*Revisiting the basis of Stanley Burnton L.J.'s decision*

- 29 Two issues, not canvassed before Stanley Burnton L.J., caused us to revisit the basis of his decision:
- (1) whether or not disclosure of the information contained in the document was or would be an offence under s.6 of the Official Secrets Act 1989, so as to require the court to exclude it; and
  - (2) whether or not the court was prohibited from admitting the document evidentially by arts 24 and/or 27.2 of the Vienna Convention on Diplomatic

Relations 1961, set out in and incorporated into English law by the Diplomatic Privileges Act 1964.

It was our decision on the second of those issues, on Day 3 of the hearing, that had the effect of superseding the ruling we had made on the application of the NCND policy.

- 30 To address those issues it is necessary to make certain assumptions about the document. In principle, it can be one of two things: an accurate copy of a genuine Embassy “cable”; or an unsourced and worthless fiction. In the latter event, it would be of no evidential value, so that no question could arise of its admission in evidence. It is only if the document is genuine that the two questions referred to above arise. For this purpose, we do not need to make any finding on the authenticity of the document. We will simply assume for the purposes of argument that it is genuine. If it is, we know little about it apart from its contents. They state that it is classified as confidential. Mr Fleming conceded, and we can safely assume, that it has not been put into the public domain by or with the authority of the US Government. Mr Fleming suggested that it may have been one of the many documents alleged by US prosecutors to have been illicitly obtained from a US facility in Iraq in 2009 and 2010 by Private Bradley Manning. We have no evidence about that. Nor do we know the manner in which, or where, US Embassy archives are held. It has not been suggested that it is likely that the document was obtained from a storage facility at the US Embassy in London. In the light of those considerations, we are prepared to assume that the document was obtained illicitly, by a person who was not authorised to obtain it, from a US electronic document storage facility elsewhere than in the US Embassy in London.

*The Official Secrets Act 1989*

- 31 Sections 2 and 3 of the Official Secrets Act 1989 make it an offence for a person who is or has been a Crown servant or government contractor to make damaging disclosure, without lawful authority, of any information document or other article relating to defence or international relations. In both cases, a disclosure is damaging if it endangers the interests of the United Kingdom abroad or is likely to do so: s.2(2)(b) and (c) and s.3(2)(a) and (b). Section 6 widens the categories of persons who may commit an offence by making a damaging disclosure beyond Crown servants and Government contractors:

“6(1) This section applies where –

(a) any information, document or other article which –

(i) relates to ... defence or international relations; and

(ii) has been communicated in confidence by or on behalf of the United Kingdom to another State ...

has come into a person's possession as a result of having been disclosed (whether to him or another) without the authority of that State...; and

(b) the disclosure without lawful authority of the information, document or article by the person into whose possession it has come is not an offence under any of the foregoing provisions of this Act

(2) Subject to sub-section (3) below, the person into whose possession the information, document or article has come is guilty of an offence if he makes a damaging disclosure of it knowing, or having reasonable cause to

believe, that it is such as is mentioned in sub-section (1) above, that it has come into his possession as there mentioned and that its disclosure would be damaging.

(3) A person does not commit an offence under sub-section (ii) above if the information, document or article is disclosed by him with lawful authority or has been previously been made available to the public with the authority of the state ... concerned ...

(4) For the purposes of this section ... the question whether a disclosure is damaging shall be determined as it would be in relation to a disclosure of the information, document or article in question by a Crown servant in contravention of section ... 2(1) and 3(1) above.

(5) For the purposes of this section information or a document or article is communicated in confidence if it is communicated on terms requiring it to be held in confidence or in circumstances in which the person communicating it could reasonably expect that it would be so held."

- 32 On the assumptions made above, the information contained in the document was communicated to US officials by British officials in confidence. It is not suggested that the information contained in the document has been made available to the public with the authority of the United States. Nor can it be suggested that any person publishing the information has lawful authority to do so. Lawful authority for a disclosure can only be given in the circumstances specified in s.7: in short, by a Crown servant in accordance with his official duty, by a government contractor in accordance with an official authorisation and by any other person, "if, and only if, it is made – (a) to a Crown servant for the purposes of his functions as such; or (b) in accordance with his official authorisation": s.7(3). "Official authorisation" means an authorisation duly given by a Crown servant or Government contractor: s.7(5). It is not suggested, and there is no evidence that, any person publishing the document has done so with lawful authority thus defined. Nor can it be suggested that the defence available to a person making disclosure under s.7(4)—that he believed he had lawful authority to make the disclosure and had no reason to believe otherwise—is available here.
- 33 The information contained in the document relates to international relations and, at least arguably, to defence. Accordingly, its disclosure by any person relevant to these proceedings would be an offence if it was damaging.
- 34 Mr Fleming submitted that the "disclosure" of the information by using the document in these proceedings would not be damaging because it would add nothing to the disclosure which has already occurred as a result of the extensive publicity given to it. He relied on para.63 of the White Paper on the reform of s.2 of the Official Secrets Act 1911. Reliance is, in principle, permissible as an aid to construction: *R. v Shayler* [2003] 1 A.C. 247 at [11], per Lord Bingham of Cornhill. However, para.63 needs to be set in its context. The draftsman of the White Paper considered "a defence of prior publication" in paras 62–64, including:

"62. Under the Government's 1979 Bill it would not have been an offence to disclose without authority information in certain categories if the defendant could show that the information had been made available to the public before his disclosure. The rationale for this defence was that, if the information in these categories was publicly available, a second disclosure could not be harmful. It seems to the Government that this rationale is flawed. There are

circumstances in which the disclosure of information in any of the categories which the Government proposes to cover in new legislation may be harmful even though it has been previously disclosed. Indeed, in certain circumstances a second or subsequent disclosure may be *more* harmful. For example, a newspaper story about a certain matter may carry little weight in the absence of firm evidence of its validity. But confirmation of that story by, say, a senior official of the relevant government department would be very much more damaging. In such circumstances, the Government considers that the official should still be subject to criminal sanctions . . . .

63. The Government does not, therefore, propose that there should be an absolute defence of prior publication for any category of information. But in cases in which the prosecution would under the Government's proposals have to show that disclosure was likely to result in harm, the offence would not be made out if no further harm is likely to arise from a second disclosure. The prior publication of the information would be relevant evidence for the court to consider in determining whether harm was likely to result from a second disclosure, but it would not be – and, in the Government's view, should not be – conclusive.”

- 35 As we have already noted, Mr Kovats did not object to the “disclosure” of the document for the purpose of cross-examining Mr Roberts and Ms Yeadon, provided that the questions were not posed on the premise that the document was genuine. It would be confirmation that it was genuine which would be damaging—an echo of para.62 of the White Paper. We are satisfied that that concern can be allayed by adopting the course that we have already stated, of making an assumption that the document is genuine, without finding as a fact that it is.
- 36 Subject to that, we accept Mr Fleming's argument. Extensive prior disclosure of the document and of the information contained in it means that the further disclosure effected by its use in these proceedings is not damaging. If no offence is thereby committed, the fact that, on first disclosure, an offence may have been committed by someone should not prevent its use in these proceedings.

#### *The Vienna Convention on Diplomatic Relations*

- 37 Section 2(1) of the Diplomatic Privileges Act 1964 provides that the articles of the Vienna Convention on Diplomatic Relations, signed at Vienna on 18 April 1961, set out in Sch.1 to the Act shall have the force of law in the United Kingdom. Those articles include arts 24 and 27.2:

##### **“Article 24**

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

##### **Article 27**

...

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

The remainder of art.27 deals with free communication between a mission and its sending state, the diplomatic bag and diplomatic couriers.

- 38 The purpose of these provisions can be identified not only from their text but also from the preamble to the Convention, which records that the states parties realise “that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States”. To that end, the text of arts 24 and 27.2 have, in the material provided to us, invariably been broadly construed.
- 39 In both the first and third editions of her authoritative analysis of the Convention, *Diplomatic Law*, Professor Eileen Denza noted in her introduction that art.27 was one of two provisions which increased for the benefit of diplomatic missions themselves the degree of immunity over what was previously accorded by customary international law.

“Article 27 sets out comprehensive rules for the protection of all forms of diplomatic communication – the most important to the functioning of a diplomatic mission of all its privileges and immunities”. (Page 4.)

She identifies the underlying purpose of art.24 as “the protection of the confidentiality of information stored”, so that “it is clearly right that the words “archives and documents” should be regarded as covering modern methods of storage such as computer discs”: p.195. In the partial award by the Eritrea Ethiopia Claims Commission handed down at The Hague on 19 December 2005, the Commission observed in para.42 that “Article 24 confirms the inviolability of all diplomatic documents and official correspondence”. In Professor Denza's view

“the inviolability of the official correspondence of a mission has two aspects – it makes it unlawful for the correspondence to be opened by the authorities of the receiving state and it precludes the correspondence being used as evidence in the courts of the receiving state. As regards use of correspondence as evidence, Article 27.2 is probably unnecessary in view of the fact that Article 24 of the Convention gives inviolability to the archives and documents of the mission ‘wherever they may be’.”

- 40 As far as we are concerned, the breadth of arts 24 and 27.2 has been conclusively determined by the speech of Lord Bridge of Harwich in *Shearson Lehman Brothers Inc v Maclaine Watson & Co Ltd (No.2)* [1988] 1 W.L.R. 16. Article 7(1) of the International Tin Council (Immunities and Privileges) Order 1972 provided that the ITC “shall have the like inviolability of official archives as in accordance with the 1961 Convention Articles is accorded in respect of the official archives of a diplomatic mission”. In the litigation which arose out of its insolvent collapse, the ITC sought to prevent the use in litigation of documents which it claimed were part of its official archives. By the time that the case reached the House of Lords, it proceeded on the basis of manifold assumptions of fact. We are only concerned with one category of document: a document which had come into the possession of third parties which had either been stolen from ITC premises or illicitly copied there or obtained by bribery or deceit of its staff: 26G–27A. The issue ultimately turned upon the actual or ostensible authority of those who had supplied documents in that category to third parties. In the chain of reasoning which led to the conclusion that the documents were supplied with the authority of the ITC, Lord Bridge, giving reasons with which all other members of the Appellate Committee agreed, stated at 27F–G:

“Mr Kentridge presented a forceful argument for the defendants based on the proposition that the only protection which the status of inviolability conferred by Article 24 of the Vienna Convention and Article 7(1) of the Order of 1972 affords is against executive or judicial action by the host state. Hence, it was submitted, even if a document was stolen, or otherwise obtained by improper means, from a diplomatic mission, inviolability could not be relied on to prevent the thief or other violator from putting it in evidence, but the mission would be driven to invoke some other ground of objection to its admissibility. I need not examine this argument at length. I reject it substantially for the reasons given by the Court of Appeal. The underlying purpose of the inviolability conferred is to protect the privacy of diplomatic communications. If that privacy is violated by a citizen, it would be wholly inimical to the underlying purpose that the judicial authorities of the host state should countenance the violation by permitting the violator, or anyone who receives the document from the violator, to make use of the document in judicial proceedings.”

- 41 Subject to the submissions made by Mr Fleming to which we refer to below, that statement of principle appears to provide a complete answer to the evidential use of the document in these proceedings. On the assumptions which we have made about its provenance, it was illicitly obtained. The claimant, has, no doubt at several removes, obtained possession of the document from the “violator”. Accordingly, he may not make use of it in judicial proceedings. Further, it is the information in the document which is the object of the protection conferred by arts 24 and 27.2, not just the document itself.
- 42 Mr Fleming submitted that Lord Bridge's observations do not or should not lead to the conclusion that we must refuse to admit the document as evidence, for the following reasons:
- (1) the original “document” was electronic. Once it had been transmitted by the Embassy, it ceased to be “official correspondence of the mission”;
  - (2) the electronic storage facility where it was held and from which it was taken was not part of the “archives and documents of the mission”;
  - (3) Lord Bridge's observations were obiter and should not be followed by us; and
  - (4) other courts of high standing have admitted “Wikileaks” documents and we should follow their example.
- 43 Mr Fleming's first point requires us to consider the nature of the document. As we have stated, we have assumed that in its original form it was created, transmitted, received and stored electronically. We are satisfied that it nevertheless was and remains a “document” for the purposes of art.24 and is included within the phrase “official correspondence” within art.27.2. Article 31 of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, requires that:
- “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”
- The object and purpose of the 1961 Convention included the purpose stated in the preamble of ensuring “the efficient performance of the functions of diplomatic



missions as representing States". Correspondence was effected in 1961 by electronic and electro-mechanical means: by telegram and by telex. Although the states parties may not have envisaged the precise means by which future methods of electronic communication might be undertaken, they cannot sensibly be taken to have tied the meaning of "document" and "correspondence" to the technical means of communication between mission and government then existing. We have no doubt that the context, object and purpose of the 1961 Convention require the words "document" and "correspondence" to include modern forms of electronic communication with the possible exception of communication by voice only. Likewise, an electronic storage system of such communications is an "archive".

- 44 The second limb of Mr Fleming's first submission is that once the electronic document has been transmitted to the recipient, it ceases to be a document "of" the mission within art.24. He relied on Lord Bridge's observation in the *ITC* case at 24F

"[i]t would seem to me perfectly natural to interpret the phrase 'the archives and documents of the mission' in Article 24 of the Vienna Convention as referring to the archives and documents belonging to or held by the mission".

He could also derive support from Lord Bridge's treatment of an old fashioned method of communication, a letter, at 27E:

"When A writes the confidential letter, it belongs to A. When B receives it, it belongs to B."

The support which he can derive from Lord Bridge's observations is, however, limited, because in the sentence following that passage Lord Bridge went on to state

"I prefer therefore to speak not of the confidentiality, but of the privacy of documents which Article 24 of the Vienna Convention and Article 7(1) of Order of 1972 are designed to protect".

It seems to us that Lord Bridge contemplated that the right to protect the privacy of the letter was capable of surviving the dispatch and receipt of the letter to a third person. If that person was under no obligation to keep the letter private, such as a member of the ITC, protection was lost. But it is implicit in his rejection of Mr Kentridge's submission that protection would not be lost in the case of a communication by an embassy to its government merely because the communication was sent to and received by that government. Further, the document with which we are concerned remained, after it was received and stored by the government, "correspondence relating to the mission and its functions" within art.27.2. We are required to apply a broad and sensible construction to arts 24 and 27.2. Taken together, they provide for comprehensive rules for the enduring protection of all forms of diplomatic communication. We are satisfied that the document remained inviolable notwithstanding that it was transmitted to and received and stored securely by the US Government.

- 45 Mr Fleming's second point is a variant upon his first. Article 24 says in terms that the archives of a mission are inviolable "at any time and wherever they may be". There is no reason why they should not be held electronically in a place which is geographically remote from the mission. We do not know how or where the US Embassy holds its archive nor whether the US Government would regard documents

originating with the Embassy but held at numerous remote sites as being part of its archive. It is unnecessary to resolve this issue because, for the reasons expressed above, the combined effect of arts 24 and 27.2 is to protect a document which, until illicitly obtained, was kept within secure electronic storage facilities under the control of the US Government.

- 46 As to Mr Fleming's third point, we have already explained why, in our view, Lord Bridge's observations at 27F–G form part of the ratio of the *ITC* case and bind us. If that is wrong, the observations are plainly of high authority and we would follow them unless persuaded that they were clearly wrong. Mr Fleming relied upon an article by Professor F.A. Mann in the *Law Quarterly Review* of 1988, in which he contended that Lord Bridge's observations did not accord with academic writings which supported a literal interpretation of the word “inviolable”: it meant only that documents were free from “executive or judicial action by the host state”. He also doubted that art.24 governed the admissibility of a document in legal proceedings. We do not share Professor Mann's doubts and prefer the observations of Lord Bridge and his reasoning, supported as it is by Professor Denza's unqualified statement to the same effect.
- 47 As to Mr Fleming's fourth point, the cases on which he relied provide little if any support for his proposition. In *Rose v R* [1947] 3 D.L.R. 618, the Quebec Court of King's Bench, Appeal Side upheld the admission in a criminal case of documents taken by a witness from the Russian Embassy which evidenced a plot, to which Russian officials were party, against the Canadian State. At that time, Canadian law recognised the general inviolability of mission documents, but held that the general principle was subject to an exception in the case of documents which put the safety of the state to which the mission was accredited in peril. In that event, if seized by the Canadian State, they lost “the privilege of immunity”: per Bissonnette J. at 23 of 53 in the print-out with which we have been supplied. The case preceded the 1961 Convention. We do not know what answer Canadian law would now give to the problem then posed. It provides no authority for the interpretation of the 1961 Convention.
- 48 The remaining cases upon which Mr Fleming relied post-date the 1961 Convention, but do not assist him because in none of them was the issue raised with, or determined by, the court. In *Prosecutor v Charles Ghankay Taylor*, the Special Court for Sierra Leone held on 27 January 2011 that two US Government cables leaked through Wikileaks and published in the *Guardian* on 17 December 2010 were, in principle, admissible to support an application by the defence to reopen their case. The decision was made under r.92*bis* of the Rules of Procedure and Evidence, which provides

“[t]he information submitted may be received in evidence if, in the view of the trial chamber, it is relevant for the purpose for which it is submitted and if its reliability is susceptible of confirmation”.

In the report of the Special Court's decision, no argument is noted to have been addressed about arts 24 and 27.2 of the 1961 Convention. The court is not a party to the Convention, although, as Mr Fleming submitted, it can be expected, if alerted to the need to do so, to abide by its terms. It was not so alerted.

- 49 In *El Masri v The Former Yugoslav Republic of Macedonia* (2013) 57 E.H.R.R. 25, in which the Grand Chamber of the Strasbourg Court handed down a final judgment on 13 December 2012, the applicant submitted US diplomatic cables in

support of his application: [77]. In its recital of the public sources highlighting concerns as to human-rights violations allegedly occurring in US-run detention facilities, the Court referred to articles in which journalists had reported that the US Ambassador in Germany had informed the German authorities that the CIA had wrongly imprisoned the applicant: [128]. The Vienna Convention on Consular Relations, done in Vienna on 24 April 1963, was cited under the heading “Relevant International Law and Other Public Material”, but only as to the obligation of competent authorities of the receiving state to inform the consular post of the sending state without delay of the arrest of one of its nationals under art.36. The 1961 Convention was not cited. Even so, the Court was careful in its findings at [160] and [218] not to rely on the leaked cables or on what the US Ambassador was said to have said to the German Government.

- 50 Finally, in *Bank Mellat v Council of the European Union*, the Fourth Chamber of the General Court at Luxembourg noted in its judgment of 29 January 2013 the Commission's submission that no account should be taken of leaked diplomatic cables: [99]. The ground upon which it did so is not recorded. The Court's only observation at [103] was that the fact that some Member States were subject to diplomatic pressure “even if proved” did not imply that such pressure affected the contested measures. There is no reference to the 1961 Convention in the judgment.
- 51 Nothing in this material persuades us that we should depart from what appears to be, by now, a settled principle of public international and municipal law, that the inviolability of diplomatic communications requires that judicial authorities of states parties to the 1961 Convention should, in the absence of consent by the sending state, exclude illicitly obtained diplomatic documents and correspondence from judicial proceedings. Accordingly, we consider the document to be inadmissible as evidence in these proceedings. We gave a ruling to that effect at the conclusion of submissions on the issue on Day 3 of the hearing, indicating that any further cross-examination of Mr Roberts and any cross-examination of Ms Yeadon must proceed on that basis.

*Consideration of the substance of Ground 1*

- 52 Mr Fleming realistically acknowledged that our ruling as to the admissibility of the document undermined the factual premise of his first ground of challenge. He indicated that, if permitted to do so, he would wish to challenge our ruling by way of an interlocutory appeal. We declined to adjourn the hearing for that purpose, for reasons we gave at the time. Mr Fleming did not then seek to cross-examine Mr Roberts further, but did cross-examine Ms Yeadon.
- 53 In the submissions that followed, Mr Fleming invited us in the circumstances to make no finding on the first ground. Mr Kovats, on the other hand, submitted that we should make findings on it. Because we have considered all of the other relevant documentary material and heard live evidence from the two officials principally concerned with the decision, Mr Roberts and Ms Yeadon (albeit we take account of the fact that cross-examination was limited in the way we have described), and we have reached a clear view about this ground, we propose to determine it and to express our detailed reasons for our findings.
- 54 The background to the challenged decision is a series of international conventions, signed and ratified by the United Kingdom, about the conservation of the Earth's fauna and flora, of which the principal examples are given in para.7 of Mr Roberts'

first witness statement. The catalyst for making and consulting upon the declaration of an MPA for the Chagos Archipelago was a proposal made by an American environmental group, Pew Environmental Group, to Professor Charles Sheppard, the environmental adviser for BIOT, in July 2007. In due course this led to a discussion on 22 April 2008 between representatives of Pew and Ms Yeadon about the creation of an MPA in which no fishing took place, in the jargon a “no take” MPA, in BIOT waters. On the same date the newly created Chagos Environmental Network, of which the founder members included Pew and Professor Sheppard, held its inaugural meeting at the Linnean Society. The meeting favoured the declaration of a “no take” MPA in BIOT waters.

55 A further meeting at the FCO on 23 April 2009, attended by Mr Roberts, Ms Yeadon and Professor Sheppard, amongst others, led to the preparation of a briefing note of 5 May 2009 from Mr Roberts to the Foreign Secretary. Its purpose was to inform him about the proposal to declare an MPA. We have a substantially unredacted copy of the note. It explained the broad concept in practical terms: to bring an end to fishing and to legislate for the protection of seas and atolls in BIOT, while leaving the military base on Diego Garcia unaffected. The note explained the benefits of the proposal: because of the absence of a settled human population and the strict environmental regime already in force, it was one of the few places in which a large scale approach to conservation was possible; it offered great scope for scientific and climate change research; because it would be the largest marine reserve in the world, it would redound to the credit of the United Kingdom and offset negative associations with Diego Garcia in the public mind; finally, it could result in greater control over access to the territory and so bring a security benefit.

56 Three “big risks” were identified in the note. The first was the claim by Mauritius to sovereignty over BIOT, a position complicated by “a side deal done at the time of excision which gave Mauritius the right to apply for fishing licences free of charge” (a modestly inaccurate description of the true position, which is set out in the section of our judgment on the “fishing rights” issue). The third risk was “the US military”, who would have to be reassured that their freedom of manoeuvre would not be impeded.

57 For the purpose of the first issue, the most significant “risk” was the second, described as “the Chagossian movements”. The note stated, correctly, that those removed from the territory when the military base was established and their descendants numbered several thousand and now lived in communities in Mauritius, Seychelles and the United Kingdom. The litigation history to that date was briefly sketched, and the parliamentary pressure for the Government to rethink its policy on resettlement noted. The part of the note on which Mr Fleming principally relied states:

“Their plans for resettlement are based on the establishment of an economy based on fishing and tourism. In the specific context of BIOT this would be incompatible with a marine reserve. They are therefore hostile to the proposal, unless the right of return comes with it. They have expressed unrealistic hopes that the reserve would create permanent resident employment based on the outer islands for Chagossians.

Assuming we win in Strasbourg (contingency for losing the cases dealt with in earlier submissions), we should be aiming to calm down the resettlement debate. Creating a reserve will not achieve this, but it could create a context for a raft of measures designed to weaken the movement. This could include:

- presenting new evidence about the precariousness of any settlement (climate change, rising sea levels, known coastal defence costs on Diego Garcia)
- activating the environmental lobby
- contributing to the establishment of community institutions in the UK and possibly elsewhere
- committing to an annual visit for representatives of the communities to the outer islands on All Saints Day
- inclusion of a Chagossian representative in the reserve governance
- [redacted]”.

Suggestions were made as to how the proposal should be carried forward if it was approved by the Foreign Secretary.

- 58 According to Mr Roberts, the meeting with the Foreign Secretary consisted of a slide or video presentation by Professor Sheppard about the environmental value of BIOT. In para.13 of his first witness statement, Mr Roberts states that he did not suggest in the oral presentation that the establishment of an MPA might prevent resettlement in the future. The Foreign Secretary's reaction was enthusiastic. On 7 May 2009, his private secretary emailed Mr Roberts:

“This looks right, and good. The Foreign Secretary was really fired up about this after the meeting, and is enthusiastic we press ahead with this. So do press ahead as you suggest, but my advice would be to keep the timelines taut, to keep him involved, and to ensure that the creation/announcement of the reserve is scheduled within a reasonable timescale.”

- 59 The next step was to discuss the proposal with US Embassy officials. The meeting, which is the subject of the excluded document, took place on 12 May 2009 at the FCO. Both Mr Roberts and Ms Yeadon were cross-examined about what Mr Roberts said at the meeting. He described the discussion as an open discussion, in which he responded to a series of questions posed by the Americans. He accepted that he would have communicated ministers' enthusiasm for the project; and said words to the effect that it would have no impact on American interests. He accepted that it was government policy that there should be no human footprint in the Chagos Archipelago other than on Diego Garcia and it is likely he would have said words to that effect. He adamantly denied making any reference to “Man Fridays”, for reasons which he explained: it was a quote from a colonial official from the 1960s and was considered in the FCO to be highly regrettable in every sense and offensive to the Chagossians. He accepted that he recognised that the declaration of an MPA, if “entrenched” (i.e. in a law which would be impossible or difficult to repeal) would create a serious obstacle to resettlement. However, he also made it clear to the Americans that the proposal was without prejudice to the decision of the Strasbourg Court on the application brought by the Chagossians against the United Kingdom.

- 60 Ms Yeadon also attended the meeting. In his submissions after she had given evidence, Mr Fleming suggested that she might not have attended the whole of the

meeting; but he did not put that to her. We have no reason to doubt that she did attend the whole of that part of the meeting attended by Mr Roberts and was able to speak, from memory, about it. She was adamant that Mr Roberts did not say that BIOT's former inhabitants would find it difficult if not impossible to pursue their claim for resettlement if the entire Chagos Archipelago were a marine reserve, and did not use the words "Man Fridays":

"Absolutely not. Mr Roberts did not say this. If he had said it, I would have been shocked. I would probably have gone out of the room at the end of the meeting saying 'I can't believe what Mr Roberts has just said'."

She later said that if Mr Roberts had said that, she would have reported it to the Director General of Defence and Intelligence because she would have been embarrassed and shocked at the use of terminology which is "just not used these days". She explained why Mr Roberts would not have said that establishing a marine park would put paid to resettlement claims: it would not have made sense. Government policy was based on s.9 of the British Indian Ocean Territory (Constitution) Order 2004, which excluded a right of abode on the islands in the Archipelago. She adamantly denied that there was a hidden agenda.

61 We found Ms Yeadon to be an impressive and truthful witness. Perhaps because of the way Mr Fleming's questions were phrased, she was less inhibited than Mr Roberts about answering questions based on the excluded document. Accordingly, her answers were blunter and more spontaneous than his.

62 Further, unknown to her when she gave those answers, there was a document, belatedly retrieved from FCO files, which unequivocally evidenced her state of mind at the time that the proposal for an MPA was being prepared for submission to the Foreign Secretary. On 25 March 2009, a meeting occurred between FCO officials, including Mr Roberts and Ms Yeadon and a Chagossian delegation which included the claimant and Mr Gifford, his solicitor. Attached to a letter sent to Mr Roberts, dated 14 April 2009, was a copy of the detailed notes of the meeting taken by Oliver Taylor, Mr Gifford's assistant. One of the topics discussed was the difference between the draft report on the feasibility of resettlement of May 2000 and the final published version of June 2000. According to Mr Gifford's notes, the advice given to officials in the draft "was an immediate unqualified one in favour of resettlement", whereas the published report contained four qualifications, "which added up to a contingent conclusion"—that resettlement would be "costly and precarious". He said that the conclusion "had been interfered with" and that interference was apparent from the handwritten amendment at the top of the document containing the draft conclusion, which had been written at a meeting attended by officials "and which had led directly to the amendment required by officials". The thrust of his comment was that the report had been doctored by or at the instigation of officials. The note does not contain the word "doctored". Mr Roberts, when questioned about this meeting, described it as an extraordinary meeting and said in terms that Mr Gifford had been offensive and had accused his predecessors of doctoring the report. Ms Yeadon, when questioned about the meeting, relying at that stage only on her memory—she thought that she had made no note of the meeting—agreed that Mr Gifford usually presented his arguments in a measured and detailed way and did not suggest that he had done otherwise at this meeting. In the late-discovered note of the meeting, written by her, she did describe Mr Gifford as "very hostile" and noted that the "atmospherics" of the

meeting were not good. Nothing turns on these differences of recollection. What is important is the concluding paragraph, which must reflect Ms Yeadon's thoughts at the time:

"The pressure being mounted by the APPG and Bancoult, Gifford etc. to try to get HMG to change its policy on resettlement is gaining in intensity. They are also trying to engage the US separately. Jeremy Corbyn and Oliver Bancoult have written to President Obama ... and three officials from the US Embassy were invited and attended the fourth APPG meeting. The focus of questions was on defence/security with the APPG questioning the need to keep islands 150 miles away from Diego Garcia clear for defence purposes. Is this keenness to get a political solution sorted out an indication of their concern about their prospects at the ECHR? If they do lose then any legal means of resettlement, other than a complete change of policy by HMG, is at an end."

63 Ms Yeadon said that 99.9 per cent of her work concerned the BIOT. She said that the opinion expressed in the last sentence of the cited passage was her view; but she could not have held it if it had in fact been the view of her official superiors that resettlement remained a possibility, which required to be frustrated by the declaration of an MPA, unless they concealed that view from her throughout her tenure of office as administrator of the BIOT. On the documentary material and oral evidence which we have considered, we reject that possibility as fanciful. We are satisfied that, as Ms Yeadon understood, at official level, HM Government regarded the resettlement issue as settled by the 2004 Order, subject only to the pending decision of the Strasbourg Court.

64 HM Government's position was restated to US counterparts at the annual political and military talks held in September 2009. According to a note prepared by "BIOT Administration" of 7 September 2009 for the talks, the following reassurance was to be given:

"Nothing in the MPA proposal affects the UK government's policy to prevent resettlement. We envisage no resident presence on the outer islands. However, any MPA proposal will be without prejudice to the current proceedings at the ECtHR."

65 By a note dated 29 October 2009, Ms Yeadon proposed to Mr Roberts and to the Foreign Secretary, via his private secretary, that consultation on the proposal to declare an MPA be launched on 10 November. Under the heading "Risks", "Chagossians", she noted that the risk of an aggressive reaction from the Chagossians and their supporters was high:

"They may claim that we are establishing a Marine Protected Area in order to ensure that they can never return to BIOT. This is not the case. By going out to public consultation we hope to counter this claim and any potential claims that a decision on establishing an MPA has already taken place and to that extent, public consultation is part of the risk strategy. However, there is a risk that the Chagossians may well seek a judicial review of the consultation process."

We are satisfied that in this passage Ms Yeadon again stated what she genuinely believed: that the proposal to establish an MPA was not to ensure that the Chagossians could never return.

- 66 Annex A to the consultation document noted that following the decision of the House of Lords in *Bancoult (No.2)*, the current position under the law of BIOT was that there was no right of abode in the territory. It continued:

“Under these current circumstances, the creation of a Marine Protected Area would have no direct immediate impact on the Chagossian community. However, we recognise that these circumstances may change following any ruling that might be given in the proceedings currently pending before the European Court of Human Rights in Strasbourg in case of *Chagos Islanders v UK*. Circumstances may also change when the territory is ceded to Mauritius. In the meantime, the environment will be protected and preserved.”

This passage is entirely consistent with Ms Yeadon's view about HM Government's policy and, we are satisfied, accurately states it.

- 67 In a note dated 30 March 2010 by Ms Yeadon to Mr Roberts and the Foreign Secretary, via his private secretary, Ms Yeadon proposed that the Foreign Secretary should publish the (favourable) report on the consultation and declare his belief that an MPA should be established, but only after further work had been done. The Foreign Secretary did not accept her advice but determined to direct Mr Roberts to declare a “no take” MPA on 1 April 2010.

- 68 There is no statement from the Foreign Secretary; but his reason for making the decision to declare an MPA against the advice of his officials can be discerned from a series of emails on 30 and 31 March 2010. The first was from the Foreign Secretary's assistant private secretary to Ms Yeadon at 18.06 on 30 March:

“The Minister is grateful for your submission. His inclination is to be bolder in our statement. He does not think that it is likely that we will be able to persuade the Mauritians or those fighting the Chagossian cause otherwise, but since the proposed MPA does not conflict with either our position on Mauritius or Chagossian rights, that we should actually decide to go ahead.”

- 69 Officials were hoping that he would not decide immediately to declare an MPA, but did not know what his decision would be. At 08.30 on 31 March 2010, John Murton emailed Ewan Ormiston, stating:

“I think Miliband will be seeing a balanced view of where we stand. I have no idea if he'll follow the recommendation or not. If he DOES then we'll be in a position of ‘looking favourably’ upon an MPA but having to work through ‘issues’ relating to Chagossians/Mauritius. I think this would be good and would provide the basis for a resumption of talks following both elections. If he goes for the park straight away, we'll face problems ... .” (The reference to “both elections” is to elections in the United Kingdom and in Mauritius).

- 70 This email was copied to Ms Yeadon, who responded at 11.47:

“The Private Office have just telephoned. The Foreign Secretary is minded to ask Colin to declare an MPA and go for option 1 (full – no take zone). BUT FINAL DECISION NOT YET TAKEN.



The FS has said that in an ideal world, he would like to go for declaring an MPA and spend the next three months reaching some sort of agreement with the Mauritian Government on the governance (management) of the area but making it clear that we will have three months to consult them. But if they won't come to any agreement, we will go ahead anyway. He has asked for ideas, whether the above is feasible, what are the implications? His objective is to find a way to mitigate the Mauritian reaction. We need to get something to him this afternoon ... .”

- 71 She copied this email to Mr Roberts, who responded at 12.07

“I think we need to give a clearer steer to the FS ... ”.

He then proposed that the Foreign Secretary should adopt a staged approach with a 12-month timescale. This prompted a critical response from Andrew Allan at 12.31:

“I think this approach risks deciding (and being seen to decide) policy on the hoof for political timetabling reasons rather than on the basis of expert advice and public consultation. That's a very different approach to the one we recommended yesterday and which the FS is still considering ... .

I continue to think we have a better chance of getting a better result if we give ourselves a chance to work the many risks through. Some will never go away. But there are a lot we ought to be able to manage down if we don't get pushed by an election timetable. If the FS chooses to push faster, then so be it. But I don't think we should be encouraging him to think it the best option; and I do think we should be flagging up risks – which will be with us for months/years to come.”

- 72 The Foreign Secretary made his decision later that day. At 17.55 his private secretary emailed Ms Yeadon:

“The Foreign Secretary was grateful for your submission and the copy of the report on consultations. He has carefully considered the arguments in the submission and the views expressed during the consultation. He was grateful for your further note today. He has considered the submission in the light of the High Commissioner's views and has given serious thought to the different possible options for announcing an MPA.

The Foreign Secretary has decided to instruct Colin Roberts to declare the full MPA (option 1) on 1 April. There will then need to be an announcement to this effect.

I would be grateful if you could take forward both.

The Foreign Secretary will then inform the House of Commons at FCO oral questions on Tuesday 6 April. I would be grateful for a brief (50 words) statement.”

- 73 This was evidently provided to him, because on 1 April 2010, he announced the creation of an MPA in BIOT which included a “no take” Marine Reserve where commercial fishing would be banned:

“I am today instructing the Commissioner of the British Indian Ocean Territory to declare a Marine Protected Area. The MPA will cover some quarter of a million square miles and its establishment will double the global coverage of

the world's oceans under protection. Its creation is a major step forward for protecting the oceans, not just around BIOT itself, but also throughout the world. This measure is a further demonstration of how the UK takes its international environmental responsibilities seriously.

The territory offers great scope for research in all fields of oceanography, biodiversity and many aspects of climate change, which are core research issues for UK science.

I have taken the decision to create this Marine Reserve following a full consultation, and careful consideration of the many issues and interests involved. The response to the consultation was impressive both in terms of quality and quantity. We intend to continue to work closely with all interested stakeholders, both in the UK and internationally, in implementing the MPA.

I would like to emphasise that the creation of the MPA will not change the UK's commitment to cede the territory to Mauritius when it is no longer needed for defence purposes and it is, of course, without prejudice to the outcome of the current, pending proceedings before the European Court of Human Rights."

Mr. Roberts duly made the proclamation on 1 April 2010.

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

- 75 It is significant that the Foreign Secretary's announcement contained the caveat which always accompanied public and private statements by officials: that the decision was subject to the pending judgment of the Strasbourg Court. Unless there was some deep plot to frustrate an adverse judgment, of which there is no evidence at all, this fact alone demonstrates that no sensible official in the FCO could have believed that the establishment of an MPA would fulfil the improper purpose alleged. Nor could it have done. The proclamation made by Mr Roberts on 1 April 2010 stated that

“[t]he detailed legislation and regulations governing the said Marine Protected Area and the implications for fishing and other activities in the Marine Protected Area and the territory will be addressed in future legislation of the territory”.

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

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

77 Mr Roberts's note to the Foreign Secretary of 5 May 2009 demonstrates the only “collateral” factor relating to Chagossian ambitions which those who advised the Foreign Secretary about the proposal had in mind: it might permit HM Government to “calm down the resettlement debate” and attract support for the Government's position from the environmental lobby. This could not have the effect of creating an effective long-term way to prevent resettlement and Mr Fleming rightly conceded that it would not taint a decision genuinely to further environmental and scientific purposes. We are satisfied that that was the limit of contemplation at official and political level of all of those who contributed to the decision to declare the MPA. We are satisfied that the decision was not taken, to any extent, for the improper purpose for which the claimant contends.

78 In those circumstances, it is not necessary for us to analyse the case-law on improper purpose in situations where more than one purpose may be in play.

#### Ground 2: The feasibility study

79 Grounds 2–4 all concern the lawfulness of the consultation that preceded the MPA decision. There was no dispute as to the relevant legal principles, including the requirement that a consultation “must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response” (*R. v North and East Devon HA Ex p. Coughlan* [2001] Q.B. 213 at [108]), and the absence of any general requirement that a consultation must present information about options that it has already been decided not to entertain (*R. (on the application of M) v London Borough of Haringey* [2013] EWCA Civ 116 at [15]–[19]).

80 Grounds 2 and 3 overlap and were dealt with together by Mr Fleming in his oral submissions. In the interests of clarity, however, we propose to deal with them separately, taking Ground 2 first.

*The claimant's submissions on Ground 2*

81 The claimant contends by Ground 2 that the MPA decision was flawed by “the failure to reveal, as part of the consultation preceding the decision, that the Foreign Secretary's own consultants had advised that resettlement of the population was feasible”. This takes one back to the reports published in the period 2000–2002 on the feasibility of resettlement of the Chagos Islands. The feasibility study was in progress in late 2000 when the Foreign Secretary accepted the Divisional Court's ruling in *Bancoult (No. 1)*, and the ultimate conclusions of the study were relied on in support of HM Government's subsequent decision to make the 2004 Orders preventing resettlement (see [8]–[9] above).

82 The draft report on Stage 1 of the feasibility study, in May 2000, contained the conclusion that “there is no obvious physical reason why one or both of the two Atolls [Peros Banhos and Salomon] should not be repopulated by the sort of numbers (up to around 1000) of Ilois who are said to have expressed an interest in resettlement”. The version published by the Foreign and Commonwealth Office in June 2000, following a meeting between the consultants and BIOT officials who are said to have exercised editorial control over the report, contained the more qualified conclusion that “resettlement of one or both atolls is physically possible, but only if a number of conditions are met ...”. The change of wording between the draft report and the published version has been known since December 2005 but forms part of the present complaint.

83 Over the period November 2001 to March 2002 the BIOT Administration commissioned Posford Haskoning, together with MacAlister Elliott and Partners Ltd and Agrisystems Ltd, to undertake Phase 2B of the feasibility study. The Phase 2B Report was published in July 2002. Its Executive Summary contained the following “general conclusion”:

“To conclude, whilst it may be feasible to resettle the islands in the short-term, the costs of maintaining long-term inhabitation are likely to be prohibitive. Even in the short-term, natural events such as periodic flooding from storms and seismic activity are likely to make life difficult for a resettled population.”

The claimant advances elaborate criticisms of that general conclusion and of the process that led to it.

84 For an exposition of his case in relation to the feasibility study the claimant relies on a 31pp. “Analysis Note on the Resettlement Studies”, prepared jointly by Mr Richard Gifford, the claimant's solicitor, and Mr Richard Dunne, a scientific adviser to the claimant and also a barrister. The Analysis Note amounts in substance to a lengthy submission and was adopted for that purpose by Mr Fleming. Some of the material referred to in it was disclosed for the first time in these proceedings, in May 2012. The matters covered in the Analysis Note include the terms of reference and structure of the study; the exercise of editorial control by the FCO over the Phase 2B Report; the changes made between the draft and final versions of the Phase 2B Report and the reasons why those changes were made; the reliability and robustness of the consultants' findings, including consideration of the nature and

quality of the process of internal peer review by the British Government's advisers, Dr Charles Sheppard (now Professor Sheppard) and Mr Brian Little; the disclosure in February 2010 by one of the consultants on the Phase 2B Team, Mr Stephen Akester (of MacAlister Elliott and Partners Ltd), that he had disagreed strongly with the proposition that resettlement was "not feasible" and had proposed to BIOT three hypothetical resettlement scenarios which provided for the return of the population (and which were not referred to in the report's Executive Summary but did appear as an appendix in another volume of the report); and a summary of reasons to doubt the reliability of the general conclusion in the Executive Summary.

85 Whilst a challenge to the scientific basis of the feasibility study is a central plank of the Chagossians' campaign in favour of resettlement, it is not the subject of the present proceedings (and an application to introduce up to date evidence directed towards the scientific basis of the feasibility study was refused by the Divisional Court in November 2012). What is said in these proceedings is that the existence of serious question marks about the feasibility study, and the existence of evidence in favour of resettlement at the time of the feasibility study, should have been included in the consultation document for the MPA proposal so as to enable consultees to make informed comments on that proposal and in particular about the relationship between environmental protection and resettlement. The feasibility of resettlement is said to have been relevant at least to the possibility that there would be a need for some resident population to manage the MPA: this would have fallen within the scope of the invitation to identify options additional to the three set out in the consultation document.

86 In support of that submission, reliance is placed on the evidence of Professor David Bellamy. Professor Bellamy did not submit an individual response to the consultation but he signed a petition by the Chagos Environment Network in favour of Option 1 (a full no-take MPA). Subsequently, however, he wrote a letter dated 12 May 2010 to Mr Gifford, the claimant's solicitor, in which he stated his belief that the marine conservation of the Chagos Archipelago was not in conflict with the resettlement of its native population, and went on to say:

"... I also recognise that the House of Lords has upheld the legality of the policy of exiling the population from its homeland. On reading the consultation document, I noted that the government did not intend to change that policy, unless there were in some unspecified way, a change of circumstances. Since, however, there was no indication as to the way in which the MPA could be redesigned to accommodate such a change, it seemed fairly clear that this was a mere distant contingency which was unlikely to affect the government's policy. Hence the options presented in the Consultation Document were clearly within the current policy context and this is how I considered them.  
[He then referred to evidence that had since emerged about the feasibility of resettlement, including the advice of the consultant Mr Akester, referred to above.]

By contrasting this advice with the claimed conclusions of the Feasibility Study, and the absence of any review of the policy of exile described in the Consultation Document, I believe that my support for option one is undermined, and the calculation of optimum benefit is thrown into question. I believe that if the Consultation Document had frankly disclosed the advice

of independent experts that resettlement was feasible, then the balance of advantage would have shifted markedly to designing a MPA which integrated the resettlement of the population with the interests of marine conservation. To that extent, I believe that the Consultation process failed to inform the outside world of material facts and this failure has cast doubt on the legitimacy of the consultation process.”

- 87 In a witness statement in these proceedings he comments on that letter and on its deployment in the Foreign Secretary's grounds of opposition. He states that the consultation document nowhere made clear that the British Government was opposed to resettlement, and that what he wrote in his letter about the government having set its face against resettlement “was not based on what I had read in the Consultation Document but was the result of my own particular knowledge about the Chagos”. He expresses the view that the possibility of resettlement was within the scope of the consultation. He goes on:

“7. As I have said before, it is in my view preferable for the MPA to have the advantage of a resident population, on purely environmental grounds and without it, the MPA is unlikely to be equally successful.

8. ... The balance to be struck between population and environment is a matter that deserves the closest and most careful study ... .

9. Consideration of some form of resettlement could not validly be excluded from the design of a serious Marine Protected Area, with the benefits to be provided from a resettled population or a permitted return of an optimum number of former inhabitants put before the consulting public for their views.

10. For these reasons I reject the suggestion that resettlement and the feasibility of resettlement is unrelated to the matters raised in the consultation.”

*The defendant's submissions on Ground 2*

- 88 Mr Kovats advanced three broad submissions in response to this ground of challenge: (i) the feasibility study was not mentioned in the consultation document because it was simply irrelevant to the MPA consultation; (ii) the claimant's attempt to use the present proceedings to attack the feasibility study is an abuse of the process of the court; and (iii) in any event, the claimant's criticisms of the feasibility study are baseless.
- 89 As to relevance, the Foreign Secretary's case is that the feasibility study was not relevant to the MPA consultation because the “no resettlement” policy was a given and was not being opened up for reconsideration under that consultation. The position was made clear in the consultation document itself: “Any decision to establish a marine protected area would be taken in the context of the Government's current policy on the Territory, following the decision of the House of Lords in [*Bancoult (No.2)*]; i.e. there is no right of abode in the Territory and all visitors need a permit before entering the Territory” (see the full passage at [15] above). The only proviso, again made clear in the consultation paper, was that the consultation and any decision for the establishment of an MPA were without prejudice to the outcome of the pending proceedings before the ECtHR and that all options might need to be reconsidered if the outcome of those proceedings led to a change of circumstances. Similar terms were used in a letter dated 19 March 2010 from the British High Commissioner in Mauritius to the Office of the

Mauritian Prime Minister, in which the point was underlined by the addition of the words: “The British Government does not intend to resettle the Chagossians in the Territory”. The proposed MPA was solely an environmental measure. It was reversible, and was not a bar to a future change of policy on resettlement, but it was not itself about resettlement. Notwithstanding the explanation given in his witness statement, Professor Bellamy's letter of 12 May 2010 shows that when considering the consultation document he had correctly understood the policy and that the British Government did not intend to change the policy.

90 The case on abuse of process is that the claimant has had ample opportunity since 2002 to mount an argument about the feasibility study. Drafts of the Stage 1 Study were disclosed in December 2005, at a time when they could have been deployed in the *Bancoult (No.2)* proceedings. The only new point relates to differences between the Phase 2B Draft disclosed in May 2012 and the final version of the report: Mr Kovats accepted that this of itself fell outside the scope of his abuse argument, but submitted that it was immaterial because one did not need the draft in order to mount an attack on the scientific validity of the report. Any challenge to the feasibility study could and should have been mounted by *Bancoult (No.2)* at the latest.

91 Mr Kovats's third main submission, concerning the substance of the criticisms made of the feasibility study, relied inter alia on the second witness statement of Ms Zaqia Rashid and the documents exhibited thereto, which give a narrative account of the drafting process. We took the view, however, that Mr Kovats did not need this point in order successfully to resist Ground 2, and we therefore did not encourage him to develop his submissions on it.

#### *Discussion of the feasibility study issue*

92 We can state our conclusions on this ground very briefly indeed. We accept Mr Kovats's primary submission, that the feasibility study was irrelevant to the MPA consultation. The consultation was clearly about conservation, not about resettlement. The “no resettlement” policy was an established policy which was not being opened up for debate. The consultation was directed at the question whether, against the background of that policy, there should be an MPA and, if so, what form it should take. Whether the policy itself was justified and whether resettlement was feasible were not within the scope of the MPA proposal. The fact that, notwithstanding the policy, some consultees might wish to put forward alternative options involving resettlement of the islands did not make it necessary for the consultation document to address resettlement. We are satisfied that the exclusion of such matters from the document was fully justified and did not render the consultation process unfair or unlawful.

93 In those circumstances we think it unnecessary to address Mr Kovats's submissions on abuse of process or his substantive response to the criticisms of the feasibility study.

#### Ground 3: Environmental information

94 The third ground alleges that the MPA decision was flawed by “the failure to disclose relevant environmental information in the course of the consultation”. The issue is a short one, adding little if anything to Ground 2, because the alleged failure to disclose environmental information concerns information relevant to the

feasibility of resettlement, not information relevant to the conservation measures proposed, and the reasoning that led to our conclusion on Ground 2 is equally applicable here.

- 95 A request for disclosure of information was made by letter dated 23 December 2009 from the claimant's solicitors, in the context of the MPA consultation. It is said that the request was made pursuant to the Environmental Information Regulations 2004 and the Freedom of Information Act 2000. There is an issue as to whether it constituted a valid request under the 2004 Regulations, but nothing turns on the point and we say no more about it. There is also an issue, about which we again need say no more, as to whether the information of which disclosure was sought was adequately particularised. What matters for present purposes is the general character of the information sought. That is set out with sufficient clarity in the claimant's written submissions:

“48. ... The documents that were sought in the course of the MPA Consultation were highly relevant to the feasibility of resettlement such that their omission prevented the actual or possible consultees from giving intelligent consideration and making informed responses to the question of whether an MPA was warranted, and if so, what form it should take.

49. As a matter of fact, the information that was disclosed for the purposes of the MPA Consultation ... did not include any information concerning the feasibility of resettlement of the exiled Chagossian population ... .

...

52. ... The documents sought described, *inter alia*, the extent of climate change impact on the outlying islands in the Chagos archipelago and how this might affect resettlement ... .

...

59. The effect of the Defendant's omission was to exclude any consideration of how the feasibility of resettlement might be relevant to consultees ... .”

- 96 As we have said in relation to Ground 2, this was not a consultation about resettlement and it was not necessary for the consultation document to address the feasibility of resettlement. The complaint that it omitted environmental information relevant to resettlement gets the claimant nowhere.

- 97 As presented by Mr Pleming, Ground 3 appeared also to have a broader aspect to it. He referred to the annex to the consultation document on “Impact/costs & benefits” (Annex A), described it as “pretty thin” and cited the criticisms made of it in a joint response to the consultation, dated 5 February 2010, by Mr Dunne and Professor Brown. The response stated that the scope and content of the impact assessment in Annex A was “lamentable”, and gave these examples: (1) failure to identify the scale, size or identity of the international fishing community or the detailed consequences, financial and employment, for the imposition of a MPA on them; (2) failure adequately to describe the full nature of the environmental status and legislative status of Diego Garcia; (3) failure adequately to describe the position of the Mauritian Government and the claims of sovereignty; and (4) failure adequately to address the issues of the claimed right of abode by the Chagossians or to indicate how this could affect the legal status or implementation of the proposed MPA. There is little in those points by way of claimed lack of environmental information. We note, moreover, that in the main body of the letter the authors concluded that “there are strong scientific and conservation reasons to



strengthen and unify existing legislation in support of the proposal to create any of the 3 options put forward in the consultation”; and that a petition by the Marine Education Trust, annexed to the letter, supported the declaration of an MPA and made no complaint about any lack of environmental information, but opposed the three options in the consultation document on the sole ground that “full no-take protection of reef areas would provide no means for resettled islanders to utilise their marine resources for subsistence or income generation”. Here too, therefore, the concern was about resettlement, not about the desirability of the conservation measures proposed.

- 98 In any event, in so far as it is contended that the consultation document was deficient in its provision of environmental information relevant to the proposed conservation measures, we reject the contention. It is true that the document itself addressed the issue at a relatively high level of generality; but this accorded with the intention of making the document clear and intelligible to the wide range of consultees to whom it was addressed, and the document included links to the Chagos Environment Network Brochure and the National Oceanography Centre Report where more detailed consideration of the environmental issues could be found (see [15]–[17] above). It is plain in any event that the environmental considerations were strongly in favour of the proposed MPA. The circumstances were in no way comparable to those of a major building development with potentially significant adverse effects on the environment, for which a detailed environmental impact assessment is therefore required by law. We are satisfied that the environmental information provided in this case was sufficient for the purposes of a valid consultation.

- 99 For those reasons we reject the claimant's case under Ground 3.

#### Ground 4: Fishing rights

- 100 The fourth ground of challenge is that the MPA decision is flawed by “the failure to disclose [in the consultation] that the MPA proposal, in so far as it prohibited all fishing, would adversely affect the traditional and/or historical rights of Chagossians to fish in the waters of their homeland, as both Mauritian citizens and as the native population of the Chagos Islands”. The main focus is on rights allegedly enjoyed by Mauritius to fish in BIOT waters, in particular as a result of an undertaking given by the British Government in September 1965 as part of the terms for the detachment of the Chagos Archipelago from Mauritius. It is said that even if it was only *arguable* that such rights existed, the point was of obvious relevance to the proposal to create a no-take MPA and should therefore have been disclosed in the consultation.
- 101 Before examining the claimant's case any further, it is helpful to summarise the factual history. That history is the subject of extensive documentation and detailed analysis in the parties' submissions and in the witness statements, particularly those of Mr Richard Dunne on behalf of the claimant. The account given below, although lengthy, seeks only to cover the main points and to convey the overall flavour.

#### *The September 1965 undertaking*

- 102 In July 1965, in the context of proposals for the establishment of a US defence facility in the area of the Chagos Archipelago, the Governor of Mauritius was instructed to commence negotiations with Mauritian ministers about proposals for

the detachment of the islands from Mauritius, which at that time was still a British colony. In early discussions the Premier of Mauritius, Sir Seewoosagur Ramgoolam, raised the question of “mineral or other valuable rights that might arise in the future”; and ministers expressed the wish for provision to be made “for safeguarding mineral rights to Mauritius and ensuring preference for Mauritius if fishing or agricultural rights were ever granted”.

- 103 The question of detachment was then discussed at a meeting on 23 September 1965 at Lancaster House, London, attended by the Secretary of State for the Colonies, Colonial Office officials and a number of Mauritian ministers, including the Premier. The official minute of the meeting records:

“22. Summing up the discussion, the SECRETARY OF STATE asked whether he could inform his colleagues that Dr Ramgoolam, Mr Bissoondoyal and Mr Mohamed were prepared to agree to the detachment of the Chagos Archipelago on the understanding that he would recommend to his colleagues the following:—

‘ ...

(vi) the British Government would use their good offices with the US Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable:

...

(b) Fishing Rights ... .”

The reference to “fishing rights” was one of a number of additions made to the draft at the request of the Premier prior to agreement of the minute. What was recorded in para.22(vi) in relation to fishing rights is conveniently referred to as “the September 1965 undertaking”.

- 104 The minute was sent by the Colonial Office to the Governor of Mauritius on 6 October 1965 with a request for confirmation that the Mauritian Government was willing to agree that Britain should now take the necessary legal steps to detach the Chagos Archipelago on the conditions enumerated in the minute; and with the statement that as regards various points, including that of fishing rights, the British Government would “make appropriate representations to the American Government as soon as possible” and would keep the Mauritius Government informed of progress in the matter. On 5 November 1965 the Mauritius Council of Ministers confirmed agreement to the detachment of the Chagos Archipelago on the conditions enumerated.

- 105 On 8 November 1965 BIOT was created by the British Indian Ocean Territory Order 1965, thus effecting its detachment from Mauritius. Mauritius itself became independent from the United Kingdom on 12 March 1968.

- 106 In a debate in the Mauritius Legislative Assembly on 21 December 1965 the Premier was asked whether the British Government had definitively undertaken the obligation that “all fishing facilities around Diego will be safeguarded”. The answer given on behalf of the Premier ducked the question:

“I am not clear what the Hon Member means by the word ‘safeguarded’. So far as I am aware the only fishing that now takes place in the territorial waters of Diego Garcia is casual fishing by those employed there and as the Hon Member is aware, they will be resettled elsewhere.”

- 107 In November and December 1965 there were communications between the Colonial Office, the Governor of Mauritius and the BIOT Commissioner concerning the nature and extent of fishing practised by the people in the Chagos Archipelago and by vessels from Mauritius and the Seychelles. A minute dated 17 November 1965 from the Governor of Mauritius described the nature of the fishing practised by the people in the Chagos Archipelago as “mainly hand line with some basket and net fishing by local population for own consumption”, and the use made of international waters in the Archipelago as “nil, though vessels from Seychelles and occasionally Mauritius use anchorage facilities”.
- 108 In early 1966 exchanges took place between government departments in London on the terms of what became a minute dated 13 March 1966 from the Colonial Office to the Governor of Mauritius, seeking his views on the case to be put to the Americans, pursuant to the September 1965 undertaking, on the subject of fishing. The minute of 13 March 1966 suggested a proposition along the lines of (a) unrestricted access before any of the islands were taken over for defence uses and cleared of population; and (b) unrestricted access thereafter by Mauritius fishing vessels to the high seas and to the islands not excluded for defence reasons, with consideration to be given to the possibility of limited access for fishing in the waters surrounding islands excluded for defence use. It said that before an approach was made to the Americans more thought would have to be given to the related questions of territorial waters and fishing limits: the effect of extending current UK law to BIOT would be a 12-mile fishery limit drawn from base lines in accordance with the 1958 Territorial Sea Convention (“granting ‘habitual fishing rights’ between the six and twelve mile lines to Mauritius and any other states whose vessels had fished in the area during the preceding ten years”) and retaining a three-mile territorial sea limit from the same base lines. It also raised the question of the extent to which the Chagos Archipelago was an important fishing ground from the point of view of Mauritius, noting that any fishing limits accepted with Mauritius primarily in mind would apply to other countries too: “It would thus be convenient to be able to base any undertaking to Mauritius on habitual or traditional fishing arrangements, provided that no other countries can claim similar use in the past. It is essential that, in helping to meet a special plea on the part of Mauritius, we can still keep other fishing fleets at a safe distance.” In that connection it sought facts and figures about existing fishing activities and any planned increases.
- 109 The Governor of Mauritius replied on 25 April 1966 that, in his view, a proposition along the lines suggested would be acceptable in Mauritius provided access to islands were interpreted as permission to establish shore facilities, and that his own information was that the only fishing in the Chagos Archipelago at present was casual fishing for local consumption.
- 110 The available documents contain no direct record of discussions with the Americans on the subject of fishing but there is some indirect reference to those discussions. It appears that the proposals referred to above were put to the Americans, who saw no difficulty with them, and that the various measures described below were also acceptable to the Americans. The subject was not, however, elaborated in the formal inter-governmental agreements. An Exchange of Notes between the British Government and the US Government dated 30 December 1966, concerning the availability of BIOT for defence purposes, made no reference at all to fishing. An Exchange of Notes dated 25 February 1976 between the two governments (replacing a 1972 Exchange of Notes) stated simply:

“... the Government of the United Kingdom will not permit commercial fishing or oil or mineral exploration or exploitation in or under those areas of the waters, continental shelf and sea-bed around Diego Garcia over which the United Kingdom has sovereignty or exercises sovereign rights, unless it is agreed that such activities would not harm or be inimical to the defence use of the island”.

*The creation of a 12-mile fisheries zone; the Fishery Limits Ordinance 1971*

- 111 The idea of applying a 12-mile fishery limit within BIOT, raised in the Colonial Office minute of 13 March 1966, was the subject of further consideration and elaboration within the British Government. A set of proposals to be put to Mauritian ministers was prepared on the basis of the minute of 13 March 1966 but with an additional paragraph about the possibility of declaring an exclusive fishing zone up to nine miles beyond the territorial sea. It is not clear whether those proposals were in fact put or what reaction they received.
- 112 A letter dated 24 August 1967 from the BIOT Administrator to the Commonwealth Office proposed the adoption of a 12-mile fishery limit under the 1958 Territorial Sea Convention, the administration of fishery control within those limits unless and until a defence presence was established, and the administration of control when a presence was established. A reply dated 24 April 1968 from the Commonwealth Office indicated no objection in principle to the enactment of legislation to create a 12-mile limit but noted the need to consider what concessions should be granted to foreign governments. It referred to the paucity of information about foreign vessels which might have established “habitual fishing rights” in the relevant waters. It also referred to the September 1965 undertaking as “an undertaking ... given to Mauritius Ministers to ensure that fishing rights remain available to Mauritius in the Chagos Archipelago as far as is practicable”. It proposed three fishing zones, which it described as “slightly more restrictive than those previously considered by the Americans and over which they saw no problem”. There was some subsequent refinement of the zones, and in October 1968 it was reported that the Americans had no significant objection to the proposed zones.
- 113 In the event, on 10 July 1969, by Proclamation No.1 of 1969, the Commissioner for BIOT, acting on the instructions of the Foreign Secretary, established an exclusive fisheries zone contiguous to the territorial sea of the BIOT, extending from the outer margin of the territorial sea to 12 miles from shore (the contiguous zone). After further discussion, effect was given to this by the Fishery Limits Ordinance 1971, s.3(1) of which made it an offence to fish in the BIOT territorial sea or the contiguous zone, subject to the other provisions of the Ordinance. Section 3(3) made provision for the taking of fish for commercial research, scientific research or sporting purposes under a licence granted by the Commissioner to the owner or operator of the boat. Section 4 provided:

“For the purpose of enabling fishing traditionally carried on in any area within the contiguous zone by foreign fishing boats to be continued, the Commissioner may by order designate any country outside the Territory and the area in which and descriptions of fish or marine product for which fishing boats registered in that country may fish.”

- 114 The background material shows that it was intended to designate Mauritius under art.4. Thus, a minute dated 2 July 1971 from the Foreign and Commonwealth Office to the British High Commission in Mauritius stated

“... the Commissioner of BIOT will use his powers under Section 4 of the BIOT Ordinance No 2/1971, to enable Mauritian fishing boats to continue fishing in the 9-mile contiguous zone in the waters of the Chagos Archipelago. This exemption stems from the understanding on fishing rights reached between HMG and the Mauritius Government, at the time of the Lancaster House Conference in 1965 ... .”

That intention was conveyed in similar terms by the High Commissioner to the Mauritius Government on 15 July 1971. In the event, no designation under s.4 was in fact made, but some fishing by Mauritian vessels in BIOT waters did take place in practice.

*Events of the late 1970s and early 1980s*

- 115 On 31 May 1977 the East African Department of the Foreign and Commonwealth Office asked its legal advisers for advice about “the legal import of our undertaking to the Mauritians” in 1965, in the context of questions about the three-mile territorial sea and the 1971 Ordinance on fishery limits. The reply, dated 1 July 1977, expressed doubt about the position but appeared to take the view on balance that the obligation was to ensure that fishing rights remained available.

- 116 The Chagossians and the status of the Chagos Islands became a factor in Mauritian internal politics in the 1970s, with a growing campaign for their return to Mauritius. In June 1980 Prime Minister Ramgoolam issued a statement referring to the excision of Diego Garcia from Mauritius before Mauritius became independent in 1968. The statement acknowledged British sovereignty over the island and referred incidentally to fishing rights:

“As a result of the excision, Diego Garcia became part of what is known as the British Indian Ocean Territories, and Great Britain has sovereignty over it, although we, by arrangement with Great Britain, have preserved our mineral rights, fishing rights. And the day Great Britain doesn't need Diego Garcia, Diego Garcia will be returned to us without compensation.”

- 117 An internal minute dated 30 June 1980 within the FCO's East African Department raised the possibility of a course of action involving concessions to boost the position of Prime Minister Ramgoolam: the proposed concessions included the declaration of a 200-mile fishing limit around the Chagos Islands, within which, apart from the United Kingdom, only Mauritius would have fishing rights.

- 118 In August 1980 the Parliamentary Undersecretary of State, with whom the issue of fishing and mineral rights in the Chagos Archipelago had been raised on a visit to Mauritius, asked his officials whether the British Government was in a position to clarify to the Mauritian Government its view of the position. A reply minute dated 29 September 1980 referred to the September 1965 undertaking and to the 1971 Ordinance on fisheries limits and stated that the legal position had not altered but “as far as we are aware the Mauritians have only one boat suitable for fishing in the waters of the Chagos Archipelago ... and have made little use of their rights”. As the discussions continued, various views were expressed: for example, in an

FCO East African Department minute dated 19 January 1982 an official gave it as his understanding that BIOT had exclusive fishing rights over the territorial sea together with the contiguous zone, but that the Mauritians had traditional fishing rights within the contiguous zone. The discussions led in due course to the 1984 Ordinance referred to below.

- 119 Notwithstanding Prime Minister Ramgoolam's June 1980 statement acknowledging British sovereignty, by 1982 Mauritius was making a legislative claim to sovereignty over BIOT. That legislative claim is currently to be found in s.111 of the Constitution of the Republic of Mauritius, which defines the territory of Mauritius as including the Chagos Islands. We were told that there has evolved a practice of exchanges of diplomatic notes between the United Kingdom and Mauritius in which each protests any assertion by the other of sovereignty over BIOT. Examples of this practice are to be found in the further history of the BIOT fishing regime, described below. Sovereignty is also the ground on which Mauritius has protested to international bodies over actions of the United Kingdom in respect of BIOT waters, as also described below. The respective positions of the United Kingdom and Mauritius in respect of sovereignty over the Chagos Archipelago or BIOT are also made clear in the joint communiqué attached as Annex C to the MPA consultation document (see [18] above). Mauritius's stance in relation specifically to the MPA is described below.

*The Fishery Limits Ordinance 1984*

- 120 Returning to the history of the fishing regime: by early 1984, as appears from an FCO East African Department minute dated 10 January 1984, consideration was being given to amending the Fishery Limits Ordinance 1971 so as to make fishing by Mauritian vessels in the territorial sea and contiguous zone subject to licence. But a licensing regime was not in fact adopted at this time. Arrangements similar to those already existing were continued by Proclamation No.8 of 1984 and the Fishery Limits Ordinance 1984. The power of designation under s.4 of the 1984 Ordinance applied, however, to fishing in the territorial sea as well as in the contiguous zone (whereas in the 1971 Ordinance it had related only to the contiguous zone); and on this occasion the power was actually exercised, on 21 February 1985, so as to "designate Mauritius for the purpose of enabling fishing traditionally carried on in areas within the fishery limits to be continued by fishing boats registered in Mauritius".

*The creation of a 200-mile fisheries zone and full licensing regime: the 1991, 1998 and 2007 Ordinances*

- 121 In 1991, in the light of conservation concerns and increased fishing by third country vessels, the decision was taken to extend the fisheries limit around the islands from 12 miles to 200 miles and to lay down a full licensing regime. A fisheries and conservation management zone extending from the territorial sea to the 200-mile limit (the FCMZ) was established by Proclamation No.1 of 1991 and the Fisheries (Conservation and Management) Ordinance 1991. Section 4 of the Ordinance prohibited fishing in internal waters, the territorial sea or the FCMZ without a licence. Section 20 empowered the Commissioner to make regulations providing inter alia for fees to be paid in respect of licences.

- 122 The minutes relating to the decision show a concern that the declaration of a 200-mile fisheries limit might exacerbate bilateral problems with Mauritius, given Mauritius's claim to the Chagos Archipelago. It was considered prudent to license Mauritian vessels without cost, so as to defuse criticism. Accordingly, by a *note verbale* dated 23 July 1991 the British High Commission in Mauritius informed the Mauritius Government of the intention to extend the fishing zone from 12 miles to 200 miles, explained the environmental reasons for the measure, and continued:

“In view of the traditional fishing interests of Mauritius in the waters surrounding British Indian Ocean Territory, a limited number of licences free of charge have been offered to artisanal fishing companies for inshore fishing. We shall continue to offer a limited number of licences free of charge on this basis.”

- 123 By a *note verbale* in response, dated 7 August 1991, the Mauritius Government protested on grounds of sovereignty:

“The Ministry wishes to remind the High Commission that the Government of Mauritius considers that the Chagos Archipelago, referred to as the British Indian Ocean Territory in the note under reference, is an integral part of Mauritius, and that the Government of Mauritius has reaffirmed its sovereignty over the Chagos Archipelago and its maritime rights in respect of the Chagos Archipelago ... .

The Ministry furthermore wishes to point out that, in the light of the above, the Government of Mauritius does not *ipso facto* accept the validity of the offer of free licences for inshore fishing.”

- 124 There ensued a debate within the FCO as to whether, for reasons of viability of the fisheries regime, charges should be imposed for licences even in respect of Mauritian vessels. The argument against such a course was that it was “clearly against the spirit” of the September 1965 undertaking to impose such a charge and that it would look shabby and greedy to do so (British High Commission minute of 15 November 1991). That argument prevailed. By letter dated 5 May 1992 to Marine Resources Assessment Group (MRAG), a commercial operation which managed the BIOT fisheries, the BIOT Commissioner confirmed that it was intended to issue free licences to Mauritian vessels. In a letter of 1 July 1992 to the Prime Minister of Mauritius, providing “clarification about British policy towards Mauritian claims to sovereignty over the British Indian Ocean Territory”, the BIOT Commissioner stated:

“... HMG takes seriously its obligations to ensure the conservation of the resources of the Archipelago and declared a 200 mile exclusive fishing zone on 1 October 1991 as its contribution to safeguarding the tuna and other fish stocks of the Indian Ocean. The British Government has honoured the commitments entered into in 1965 to use its good offices with the United States Government to ensure that fishing rights would remain available to Mauritius as far as practicable. It has issued free licences for Mauritius fishing vessels to enter both the original 12 mile fishing zone of the territory and now the wider waters of the exclusive fishing zone. It will continue to do so, provided that the Mauritian vessels respect the licence conditions laid down to ensure proper conservation of local fishing resources.”

- 125 By a *note verbale* dated 13 April 1999, the British High Commission informed the Mauritius Government that as a precautionary measure in order to conserve the fishery while the effects of coral bleaching on the Chagos reefs were monitored, the number of licences for inshore fisheries for the 1999 season would be reduced from six to four. A *note verbale* in response, dated 1 July 1999, simply reaffirmed the position of the Mauritius Government that sovereignty over the Chagos Archipelago rested with Mauritius.
- 126 On 17 September 2003, by Proclamation No.1 of 2003, the BIOT Commissioner, acting on the instructions of the Secretary of State, established for BIOT the Environment (Protection and Preservation) Zone (the EPPZ), covering the same geographical area as the FCMZ. This was an environmental measure with no impact on fishing. Once more it prompted objections from the Mauritius Government on sovereignty grounds.
- 127 The 1991 Ordinance on the FCMZ was repealed and replaced by a 1998 Ordinance, which in turn was repealed and replaced by the Fisheries (Conservation and Management) Ordinance 2007. None of this involved any material change in the fishing regime. Under the 2007 Ordinance it remains an offence to fish in the FCMZ without a licence.
- 128 In the period 1991–2009, when the licensing system was in operation, the vast majority of licences granted was for deep sea fishing by third country vessels (for example, those of France, Japan, Spain and Taiwan). According to statistics provided by MRAG, the position in relation to fishing by Mauritian-flagged vessels was as follows: for deep sea fishing, between two and six licences were granted annually in the period 1991–1999, and none thereafter; and for inshore fishing, between three and seven licences were granted annually in the period 1992–1999, between two and four licences annually in the period 2000–2004, none in the period 2005–2008, and two in 2009.
- 129 No new fishing licences have been issued since the creation of the MPA on 1 April 2010, though licences then in force were permitted to run their course and the last such licence expired in October 2010. There has been no challenge by the owner or operator of any vessel to the decision not to grant any new licences.

#### *Fishing by Chagossians*

- 130 Factually, the Chagossians themselves are brought into the fishing rights issue in two ways. First, reliance is placed on the fact that prior to their removal from the Chagos Islands the inhabitants traditionally carried on fishing for local consumption. Such Chagos-based activity, the existence of which is recognised in the contemporaneous documentation, came to an end by no later than May 1973 when the last of the resident population left the islands. Secondly, to the extent that Mauritius enjoys fishing rights in BIOT waters, reliance is placed on the position of Chagossians as indirect beneficiaries of those rights. Many Chagossians are Mauritian citizens and are able in that capacity to exercise Mauritian fishing rights. Moreover a substantial number of Chagossians worked as crew members of Mauritian-flagged vessels operating in BIOT until the MPA brought such activity to an end. In effect it is said that the position of the Chagossians became subsumed after 1973 within that of Mauritius with regard to fishing rights.
- 131 Reference is made in particular to vessels operated by three Mauritian-based companies owned or managed by members of a family with strong Chagossian



links, the Talbots. It would seem that all or most of the licences granted over the years for inshore fishing by Mauritian vessels in BIOT waters were in respect of Talbot vessels. There is also important evidence from two fishermen born on Chagos, Mr Joseph Volly and Mr Sylvestre, concerning the employment of them and other Chagossians as crew members of such vessels, and the significance of this in terms of using and maintaining their knowledge of Chagos waters, gaining an income and sustaining a link to their homeland. That evidence is summarised at [168]–[170] below, in the context of the EU law issue, where it is also an important feature of the claimant's case. The creation of a no-take MPA is said to have had a direct economic impact on such people.

*Mauritius's stance in relation to the consultation and the MPA*

132 Mauritius's stance towards the creation of the MPA has rested from the outset on its claim to sovereignty over the Chagos Archipelago.

133 In 2008 it had been agreed to have bilateral talks between the United Kingdom and Mauritius on issues relating to BIOT. The first round of talks took place on 14 January 2009, by which time the Pew Environmental Group's proposal for a large-scale BIOT marine reserve was circulating. The legal stance taken by Mauritius can be seen from a paper by Professor Sir Ian Brownlie CBE, QC, which was presented on behalf of the state. The paper put forward a legal framework within which the position of Mauritius was to be assessed. At the forefront was “recognition of the sovereignty of Mauritius in respect of the Chagos Archipelago”. Later in the paper Professor Brownlie turned to “an alternative legal framework, represented by the talks at Lancaster House in 1965, and the arrangements which resulted”. He quoted from the contemporaneous documentation (the key passages of which have been set out above) as evidence of “promises of reversionary rights”. He suggested that the undertakings involved “an indirect recognition by the United Kingdom of the legal interest of Mauritius in the Chagos Archipelago” and that it would be “entirely fitting if the present talks were to involve offers from the UK side which reflect the content of the promises which appear in the record of the 1965 talks”. Whilst Mr Pleming submitted that Professor Brownlie's paper shows that Mauritius was interested in more than an assertion of sovereignty, it seems to us that the “alternative legal framework” was bound up closely with the issue of sovereignty, suggesting a way forward towards a future deal. The paper contains no suggestion that Mauritius might enjoy fishing rights over BIOT waters on grounds other than sovereignty.

134 All this is entirely consistent with a Mauritian *note verbale* of 5 March 2009 which restated the sovereignty claim and asserted that “[t]he creation of any Marine Park in the Chagos Archipelago will therefore require, on the part of all parties that have genuine respect for international law, the consent of Mauritius”.

135 A further round of bilateral talks took place on 21 July 2009. This resulted in the joint communiqué subsequently set out in Annex C to the MPA consultation document. On publication of the consultation document on 10 November 2009, the Mauritius Government sent an immediate *note verbale* complaining about the text of the joint communiqué included within it. The text was immediately amended in order better to reflect the views expressed in the *note verbale*. But a further *note verbale*, dated 23 November 2009, complained that the amendment still did not fully reflect those views, and expressed the belief that it was inappropriate for the

consultation on the proposed MPA, so far as Mauritius was concerned, to take place outside the bilateral framework of discussions between the United Kingdom and Mauritius. The note continued:

“The Government of Mauritius considers that an MPA project in the Chagos Archipelago should not be incompatible with the sovereignty of the Republic of Mauritius over the Chagos Archipelago and should address the issues of resettlement, access to the fisheries resources, and the economic development of the islands in a manner which would not prejudice an eventual enjoyment of sovereignty. A total ban on fisheries exploitation and omission of those issues from any MPA project would not be compatible with the long-term resolution of, or progress in the talks, on the sovereignty issue.”

136 On 15 December 2009 the Secretary of State wrote to the Mauritian Foreign Minister, stressing that the public consultation did not prejudice or cut across the bilateral dialogue. The Foreign Minister's reply, dated 30 December 2009, and an accompanying *note verbale*, reiterated the Mauritian position set out previously and stated that the exclusion of such important issues as resettlement, access to fisheries resources and economic development in any discussion relating to the proposed MPA would not be compatible with resolution of the issue of sovereignty over the Chagos Archipelago and progress in the ongoing talks between Mauritius and the United Kingdom. In the circumstances Mauritius was not in a position to hold separate consultations with the UK team of experts on the proposal to establish an MPA.

137 A *note verbale* dated 19 February 2010 from the Mauritian Prime Minister's Office to the British High Commissioner repeated the position of the Government of Mauritius that the consultation document should be withdrawn. It continued:

“I further wish to inform you that the Government of Mauritius insists that any proposal for the protection of the marine environment in the Chagos Archipelago needs to be compatible with and meaningfully take on board the position of Mauritius on the sovereignty over the Chagos Archipelago and address the issues of resettlement and access by Mauritians to fisheries resources in that area.”

138 The assertion by Mauritius that the establishment of the MPA infringes its sovereignty over the Chagos Archipelago has also been advanced before the United Nations (in an address by the Mauritian Foreign Minister to the UN General Assembly on 28 September 2010) and in a claim brought by Mauritius against the United Kingdom under Pt XV of the United Nations Convention on the Law of the Sea (UNCLOS). According to the statement of claim in those proceedings, dated 20 December 2010, the dispute relates to the interpretation and application of numerous provisions of UNCLOS; and in support of its claims, Mauritius also invokes other rules of international law, including the principle of permanent sovereignty over natural resources. The court does not have further particulars since the arbitration is private and confidential. We are told that the United Kingdom has lodged objections to jurisdiction, which the arbitral tribunal has directed to be heard together with the merits of the claim. No resolution can be expected prior to our judgment in the case now before us.

*The absence of reference to fishing rights in the consultation document*

139 The terms of the consultation document have been set out in the introduction to this judgment. The document referred generally to the impact of the creation of an MPA on “the international fishing community”. In relation to Mauritius it annexed the joint communiqué referring inter alia to the dispute over sovereignty, but it made no mention of the issue of Mauritian fishing rights in BIOT waters. It stated in relation to the Chagossians that in current circumstances (no right of abode, and the need for a visitor permit) the creation of an MPA “would have no direct immediate impact on the Chagossian community”.

140 The third witness statement of Mr Roberts deals at length with the thinking that lay behind the terms of the consultation document. He states, for example:

“19. In the run up to the second round of bilateral talks with Mauritius [July 2009], my firm understanding as a result of the enquiries undertaken as part of the MPA scoping process and advice received from legal advisers, was that Mauritius did not have legal rights to fish in BIOT waters, whether as a result of the 1965 undertakings or otherwise, which prevented HMG from establishing an MPA, including a complete no-take MPA. If there was a ‘fishing right’, it was no more than for Mauritius flagged vessels which applied to BIOTA [BIOT Administration] for licences to be issued them free of charge, but only insofar as BIOT chose to issue licences. HMG reserved the right to decide whether or not to issue a licence. In the case of a regime where no licences were issued, the question of a free licence simply would not arise.”

Nothing that occurred at the second round of bilateral talks caused Mr Roberts to change that view: no objection to the MPA proposal was raised by Mauritius on the grounds of fishing rights. Thus, when it came to the consultation document:

“30. ... Mauritian ‘fishing rights’ or the possibility of Mauritian ‘fishing rights’ were not included in the consultation document because, as far as we were concerned, Mauritius did not have any.”

141 As to the Chagossian aspects of the claimant’s “fishing rights” point, Mr Roberts’s understanding throughout was that the arrangements to issue licences free of charge applied only to certain Mauritian-flagged vessels. He refers to the Talbot vessels and states that Mr Alain Talbot was contacted in Mauritius in July 2009 to discuss directly the proposals for an MPA. Mr Talbot did not raise the question of Mauritian or Chagossian rights, and there was never any suggestion that the Chagossians were the beneficiaries of any “fishing rights” that Mauritius might have under the arrangements for free fishing licences.

142 Mr Roberts ends his third statement:

“39. To conclude, there was no reference to any historical or traditional ‘fishing rights’ of Mauritius or the Chagossians which might stem from the 1965 understandings in the public consultation document, or the possibility that any rights might exist, because, after considering the question and receiving legal advice, we did not believe that Mauritius or the Chagossians had, or might have had, any such rights.”

143 Ms Yeaton’s third witness statement contains evidence to similar effect. She states, inter alia, that she “considered Mauritian ‘fishing rights’ under the 1965

understanding, which had in practice taken the form of free licences for Mauritian-flagged vessels to fish in BIOT waters, to be an undertaking of a political, not legal, nature”, and she gives this as her reason for not including any reference to the issue in the consultation document. She also notes that the consultation document included a link to the draft report of the workshop held on 5–6 August at the National Oceanography Centre (see [16] above), in which reference was made to “Mauritian/Chagossian historical fishing rights, at present regulated through free licences” (in the final report, published in December 2009, the reference to “Chagossian” historical fishing rights was removed at Ms Yeadon's request).

144 The full detail of the advice received by Mr Roberts and Ms Yeadon is not known (privilege in the legal advice has not been waived), but the claimant makes various points in relation to the advice that is known. For example, criticism is directed towards the terms of a 1996 FCO briefing paper which Mr Roberts read on coming into office as BIOT Commissioner in autumn 2008; and it is said that Mr Roberts misinterpreted Professor Brownlie's paper for the bilateral talks between the United Kingdom and Mauritius in January 2009 (see [133] above, where, however, the claimant's construction of the paper is rejected). Attention is also drawn to pre-consultation advice given on 8 July 2009 by MRAG, the company responsible for management of the BIOT fisheries. MRAG questioned the appropriateness of a full no-take MPA within BIOT and suggested a more limited option focused on the vulnerable reefs in the area of the islands (this seems to be reflected in the third of the options put forward in the consultation paper itself). Its comments included the following:

“4. Legal and historical obligations may pose a constraint on declaring the whole FCMZ as a closed area. UNCLOS requires that coast states make provision for access to its EEZ by foreign fishers; Mauritius has historical agreements to fish inside the BIOT FCMZ.

- ‘a. United Nations Conventions on the Law of the Sea ...
- b. Mauritian historical fishing rights’.

In addition to UNCLOS art.62, which refers to States whose nationals have habitually fished in the zone, the right of Mauritians to fish in BIOT waters was enshrined in the agreements made between UK and Mauritius in 1965. The 1971 ordinance on fishing also left an exception for certain foreign vessels to fish. This ‘right to fish’ has been put into practice since the declaration of the FCMZ in 1991 as ‘free licences’ although the BIOT Administration reserves the right to limit the number of licences issued relative to the surplus allowable catch. For the banks (inshore) fishery a limit of six eighty-day licences has been applied. There is documentary evidence of Mauritian fishing in the Chagos archipelago since at least 1977.”

*The claimant's submissions on the fishing rights issue*

145 By way of outline of the claimant's submissions on the fishing rights issue, Mr Fleming made the following general points:

- (1) the documents disclose at least that it is likely that Mauritius had and continues to have a right to fish in the waters surrounding the Chagos Islands;

- (2) the claimant does not have to prove as a matter of international law that Mauritius did have and continues to have such a right: that will be determined in the UNCLOS arbitration (subject to the United Kingdom's objections to jurisdiction). If it was even *arguable* that Mauritius had continuing fishing rights, that information should have been included in the consultation so that consultees could express their views on what should be the preferred option for any MPA;
- (3) fishing by Mauritians (and by Chagossians either as Mauritian citizens or as crews on Mauritian fishing boats) was clearly and obviously relevant to the form of the proposed MPA. Any existing right to fish by Mauritius would make a no-take MPA impossible, so that options with *some* fishing would become the only options and would perhaps highlight to consultees the need to consider not only the options set out in the consultation paper but also other options (Option 4) with an active role for Chagossians. Accurate and complete information on the legal position in relation to existing fishing rights was of obvious interest to all consultees, not just to Mauritius;
- (4) the views of Mauritius on fishing were also highly relevant to the consultation on a no-take MPA. If the proposal was implemented it would be a decision with international consequences, and Mauritius is expressly referred to in the consultation document;
- (5) the advice upon which Mr Roberts and Ms Yeadon appear to have relied as justifying the exclusion of any reference to Mauritian fishing rights in the consultation document was confused and incomplete. Mauritius itself continued to protest throughout the consultation process that its rights and interests were not being considered or respected, but this was not revealed to consultees;
- (6) the claimant has an interest in the fishing issue. On return to the Chagos Islands he will want to fish and will want to eat fish caught by others, and some form of commercial fishing may be necessary to support the Chagossian community. Until the Chagossians return, it is very important that their link with the sea and fishing around the Chagos Islands continues. This fact should have been reflected in the consultation document; and
- (7) the exclusion of Mauritian/Chagossian fishing rights from the consultation, given the effect of a no-take MPA on those rights, amounted to an important and material flaw in the consultation process which rendered the consultation and the subsequent decision unlawful.

146 In development of those points, Mr Fleming submitted that by the September 1965 undertaking there was a clear and unequivocal agreement or undertaking by the British Government to Mauritian ministers at the time of the detachment of the Chagos Archipelago from Mauritius in 1965. This was not a treaty (Mauritius was not a separate state at the time) but the promise was made with the intention of being acted on and of continuing beyond the independence of Mauritius. It reflected the Chagossians' traditional rights to fish in Chagos waters. The creation of BIOT and the removal of the Chagossians from the islands did not extinguish those rights. The documents show that British officials subsequently considering the issue treated the September 1965 undertaking as binding. In furtherance, or practical manifestation, of the undertaking the British Government allowed traditional fishing

to continue from 1965 onwards and, when a licensing system was introduced, granted free licences to fishing vessels from Mauritius. Those continued actions, on which Mauritius and the Chagossians relied, were consistent with the unilateral actions of the British Government having created and then recognised international law rights to fish in BIOT waters: a unilateral act by a state can found legally binding obligations in international law. Further, in light of its consistent and unequivocal behaviour over the years, the British Government is estopped as a matter of international law from denying the existence of Mauritian/Chagossian fishing rights. The contemporaneous documents evidencing the unilateral undertaking sounding in international law should be preferred to the third witness statements of Mr Roberts and Ms Yeadon.

- 147 In places the claimant's submissions appear to slide between (a) the assertion that, as a matter of international law, Mauritius had fishing rights in BIOT waters which should have been mentioned in the consultation, and (b) the contention that such rights arguably existed and were the subject of dispute between Mauritius and the United Kingdom, and that this should have been mentioned in the consultation. It is important therefore to note the basis on which the claimant was granted permission to amend the grounds of claim so as to introduce the fishing rights issue. The judgment of the Divisional Court handed down on 21 November 2012, giving reasons for the permission to amend, recorded Mr Fleming's response to the Secretary of State's objections to the raising of matters of international law:

“15. Mr Fleming QC sought to meet those arguments by saying that the claimant does not contend in these proceedings that the traditional or historical fishing rights relied on are legally enforceable, so that the question whether there are enforceable rights under international law would not arise for decision. The point made by the claimant is simply that there is credible evidence that HMG gave an undertaking to the Government of Mauritius which has subsequently been evidenced by preferential treatment for Mauritius registered fishing vessels, and that this was an important part of the background yet was not put before consultees, who were in consequence misled.”

*The defendant's submissions on the fishing rights issue*

- 148 Mr Kovat's submissions on behalf of the Foreign Secretary were in summary these:

- (1) the consultation document made no reference to Mauritian traditional and/or historic rights to fish in BIOT waters because the Foreign Secretary considered that Mauritius did not have any. The arrangements stemming from the 1965 understandings were political, not legal; and in any event by 2009 those arrangements had evolved into arrangements only that, if a fishing licence was issued, the licence fee would be waived. Mauritius had no greater right to undertake commercial fishing in BIOT waters than any other state;
- (2) what was relevant to the consultation, and was identified in the consultation document, was the proposed option of ending commercial fishing;
- (3) the claimant's secondary case, that Mauritius did have special fishing rights, involves a proposition of law that is not justiciable in the Administrative Court for four overlapping reasons: (a) any such rights belong to Mauritius

and can be claimed only by the Government of Mauritius; the claimant has no standing to assert or enforce such rights; (b) because judicial review is discretionary and for long-established reasons of comity, the Administrative Court should decline jurisdiction to determine whether Mauritius, a sovereign state, has such rights; (c) any such rights exist only on the plane of public international law and the Administrative Court has no jurisdiction to determine such a point or should decline to exercise any jurisdiction for reasons of comity and the conduct of international relations; and (d) Mauritius has instituted proceedings against the United Kingdom under UNCLOS in respect of the MPA and it is for the UNCLOS arbitral tribunal, not the Administrative Court, to determine the issue. Mr Kovats also referred to the complex issues that would arise under the principles of international law relating to unilateral declarations, state practice, acceptance and waiver;

- (4) in any event the claimant's secondary case entails that there should have been consultation on a point of law that the Foreign Secretary rejected and that Mauritius (the only person with standing to advance it) was not advancing, and that on the claimant's own case would not have precluded the creation of a no-take MPA (since the relevant ground of challenge relates only to the consultation process and it is not contended that the MPA decision itself was incompatible with the rights of Mauritius under international law);
- (5) the claimant's primary case, that as a matter of fact there was a dispute between the United Kingdom and Mauritius about the existence of fishing rights and that the fact of this dispute should have been mentioned in the consultation document, presupposes that if consultees had been aware of such a dispute they might have suggested that this was a reason for not creating a no-take MPA, a supposition which is not supported by any evidence. More importantly, the claimant is wrong on the facts. There was no such dispute and accordingly there was no such fact to mention in the consultation document. The dispute related to sovereignty, as to which the position taken by Mauritius was indeed mentioned in the consultation document; and
- (6) not only did Mauritius not raise fishing rights (as distinct from sovereignty); nor did Mr Alain Talbot (see [141] above); and although a number of international commercial fishing interests responded to the consultation document, none of them was Mauritian. The only person to mention Mauritian historical fishing rights in the responses to consultation was MRAG (whose pre-consultation advice is referred to at [144] above).

- 149 To the above summary may be added points drawn from the legal analysis in Mr Kovats's skeleton argument: that if the court accepts that it should not make a determination as to the existence or otherwise of Mauritian fishing rights as a matter of international law, it is impossible for the claimant to establish that the Foreign Secretary misdirected himself in law in taking the view that Mauritius had no such rights; that it was a rational decision not to mention the issue (and in particular not to mention the September 1965 undertaking) in the consultation document; and that the omission of reference to it in the consultation document did not give rise to unfairness, a fortiori when account is taken of the fact that this was a web-based consultation and that the consultation document contained a link to the National

Oceanography Centre workshop report which did contain a reference to “Mauritian historical fishing rights”.

*Discussion of the fishing rights issue*

150 The factual background to this issue and the rival submissions of the parties have a length and complexity that we do not intend to emulate in setting out our conclusions on the issue.

151 In so far as the claimant's fishing rights case rests on the position of Chagossians as such (as opposed to their reliance on any rights enjoyed by Mauritius), we see no tenable basis for it. Any traditional fishing rights enjoyed by the inhabitants of the Chagos Archipelago were lost with the loss of the right of abode and their removal from the islands. There is nothing in the history since the last of the resident population left in 1973 to justify the view that Chagossians as such have continued to enjoy fishing rights in respect of BIOT waters or, therefore, that a no-take MPA would have an adverse effect on such rights. Certainly there is insufficient substance in this aspect of the matter to have called for specific reference to it in the consultation document in order to meet the requirements of a lawful consultation process.

152 The real focus must therefore be on the position of Mauritius, and that is how the claimant's case was presented in practice by Mr Fleming.

153 The question whether, as a matter of international law, Mauritius enjoys fishing rights in BIOT waters is not one that we consider appropriate for determination in these proceedings. In our judgement, Mr Kovats's submissions under the general heading of justiciability are compelling. We see real objections of principle to our purporting to determine the existence or non-existence of the international law rights of Mauritius in national proceedings to which Mauritius is not a party. If and to the extent that Mauritius wishes to assert such rights, it can do so in the context of the claim that it has brought against the United Kingdom under UNCLOS. That arbitration is the appropriate forum for the determination of such an issue. This court should, moreover, avoid any pronouncement that might compromise the position of the United Kingdom in those proceedings. Both parties made substantial reference in their written submission to authorities relevant to the question of justiciability, but those authorities were touched on only lightly in oral submissions. None of them is particularly close to the situation with which we are concerned in this case, but in our view *R. (on the application of Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), upon which Mr Kovats placed particular reliance, provides more pertinent guidance than does *Republic of Ecuador v Occidental Exploration and Production Company* [2005] EWHC 774 (Comm) (affirmed by the Court of Appeal in [2005] EWCA Civ 1116; [2006] Q.B. 432), by reference to which Mr Fleming sought to counter the *CND* case.

154 We do not consider it necessary to engage in fuller analysis of this aspect of the issue because we take the view in any event that it is not *open* to the claimant to invite the court to make a determination as to whether Mauritius does or does not have fishing rights in respect of BIOT waters as a matter of international law. Permission to introduce the fishing rights issue was granted on the basis that “the claimant does not contend in these proceedings that the traditional or historical fishing rights relied on are legally enforceable, so that the question whether there



are enforceable rights under international law would not arise for decision” (see [147] above). In our judgement, the claimant should not be allowed to resile from that position. Had it not been adopted, permission to introduce the fishing rights ground might well have been refused in the first place.

155 The issue therefore comes down to whether there was a sufficient *argument* concerning the existence of Mauritian fishing rights in respect of BIOT waters as to require mention to be made of it in the consultation document if the consultation was to be lawful. In our judgement, the claimant's case attaches a wholly disproportionate significance to that point. The number of Mauritian-flagged vessels licensed to fish in BIOT waters and affected by the no-take MPA had been extremely small for many years—none in the period 2005–2008, and just two in 2009. Save in the context of the separate dispute over sovereignty, Mauritius did not suggest that it had any special rights to fish in BIOT; nor was that suggestion made by the operators of the Mauritian-flagged vessels themselves. The earlier history, through which we were taken at such length, does not serve to give the issue a significance that it lacked in current practice.

156 Whatever the precise character of the obligation undertaken by the British Government in September 1965 (whether it was simply a political promise or a legal undertaking to make representations to the US Government or a legal undertaking to achieve a particular substantive result), the reality is that Mauritius at no time contended that the effect of the undertaking was to confer fishing rights on Mauritius as a matter of international law. Had such rights existed, the introduction of an exclusive 12-mile fisheries zone by the 1971 Ordinance would have been inconsistent with them, as would the extension to a 200-mile zone and the introduction of a full licensing regime by the 1991 Ordinance, even though fishing by Mauritian vessels was permitted to continue throughout and licences were issued to such vessels without charge: we reject the claimant's characterisation of these events as being “in furtherance or practical manifestation” of the September 1965 undertaking. Yet Mauritius made no complaint that the measures were inconsistent with rights enjoyed by it pursuant to the undertaking.

157 The contemporaneous documents show that over the years some British officials believed that there was or might be a legal obligation to allow fishing by Mauritian vessels in BIOT waters, whereas others evidently looked at the question in essentially political terms. What is important, however, is that from Mauritius's perspective the issue of fishing rights was viewed from an early stage in terms of sovereignty, not as one based on the September 1965 undertaking. In diplomatic exchanges between the two governments and in the stance adopted by Mauritius on the wider international plane it was presented consistently in the context of Mauritius's claim to sovereignty over the Chagos Archipelago.

158 Mr Kovats is therefore correct in his submission that there was no dispute with Mauritius about fishing rights based on the September 1965 undertaking and there was nothing that needed to be mentioned on that score in the consultation document. The dispute with Mauritius concerned sovereignty, and that was expressly mentioned in the consultation document.

159 The absence of a relevant dispute with Mauritius is not strictly dispositive of the claimant's contention that there existed an arguable case that Mauritius enjoyed fishing rights based on the September 1965 undertaking. As we have said, the belief that such rights existed or might exist certainly formed part of the thinking of some British officials in the past. Moreover, the issue of Mauritian historical

fishing rights was still being mentioned in general terms in the run-up to the MPA consultation (see, for example, the references to it in MRAG's July 2009 comments and in the National Oceanography Centre Report on the August 2009 workshop, described above). But the issue was considered by Mr Roberts and Ms Yeadon, the officials responsible for the preparation of the consultation document, who took the view that Mauritius did not have fishing rights that would preclude a no-take MPA. The claimant cannot show that that view was wrong in law and has not persuaded us that it was an unreasonable view to take on the available evidence. The existence of arguments in favour of a contrary view was not a sufficient reason in the circumstances why the issue should have been mentioned explicitly in the consultation document.

160 Whether the omission of reference to the issue resulted in a flawed consultation must also be assessed in the context of what the consultation document did contain. The potential impact of an MPA on commercial fishing was squarely raised and must have been obvious to all concerned. The responses from fishing interests show that the impact was clearly understood. If anyone wished to raise an argument that a ban on fishing would be incompatible with Mauritian fishing rights, they were free to do. We do not place much weight on the link in the consultation document to the National Oceanography Centre Report referring to Mauritian historical fishing rights, but the point was there for anyone who wished to advance or develop it. Against that background, the omission of express reference to the point in the consultation document itself is in our view a matter of no significance. It did not affect the fairness of the consultation or the validity of the MPA decision taken following that consultation.

161 We add in passing that in so far as complaint is made about the statement in the consultation document that the creation of an MPA “would have no direct immediate impact on the Chagossian community”, it was open to consultees to draw attention to the fact that Chagossian fishermen on commercial fishing vessels would be affected by the ban on fishing in the MPA, and to the consequences of that for them and their families, whether or not that could be said to amount to a “direct immediate impact”. The way the matter was expressed in the consultation document did not give rise to a legal flaw in the consultation process.

162 For those reasons we have reached the clear conclusion that the claimant's case on the fishing rights issue should fail.

#### Ground 5: The EU law issue

163 The claimant's case on breach of EU law falls into a separate compartment from the other issues. It was the subject of submissions at the hearing by Ms Maya Lester on behalf of the claimant and by Mr Kieron Beal QC on behalf of the Foreign Secretary. The case in essence is that the decision to create the MPA was in breach of the United Kingdom's obligations under art.4(3) of the Treaty on European Union (the TEU) and art.198 of the Treaty on the Functioning of the European Union (the TFEU) not to jeopardise the objectives of association of BIOT with the European Union.

#### *The legislative framework*

164 Article 4(3) of the TEU provides:

“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

- 165 Part IV of the TFEU concerns association of overseas countries and territories. The core provision is art.198:

“The Member States agree to associate with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom. These countries and territories (hereinafter called ‘the countries and territories’) are listed in Annex II.

The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole.

In accordance with the principles set out in the preamble to the Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.”

BIOT is one of the overseas countries and territories listed in Annex II.

- 166 Article 199 provides that association shall have various objectives, which in summary are the application of equal treatment to trade between Member States and the countries and territories; the making of contributions by the Member States to the investments required for the progressive development of the countries and territories; and the regulation of rights of establishment. Article 200 prohibits customs duties on imports between the Member States and the countries and territories, and art.201 relates to the remedying of any deflections of trade caused by the level of duties applicable to goods from third countries. Article 202 concerns freedom of movement of workers.

- 167 Article 203 provides:

“The Council, acting unanimously on a proposal from the Commission, shall, on the basis of the experience acquired under the association of the countries and territories with the Union and of the principles set out in the Treaties, lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the Union ... .”

Those detailed rules and procedures are set out in Council Decision of 27 November 2001 on the association of the overseas countries and territories with the European Community (the Overseas Association Decision), which featured in the parties' written submissions but had only a background place in the case as presented at the hearing.

*The claimant's case*

- 168 The evidence on which the claimant's case on this issue is built includes witness statements from two Chagossian fishermen, Mr Joseph Volly and Mr Sylvestre Sakir, who were born on the Peros Banhos Atoll and left with their families between 1968 and 1973.
- 169 Mr Volly explains that his father was an experienced fisherman from whom he learned relevant skills and knowledge of the waters of the Chagos Archipelago. He describes the fishing methods of the Chagossians and states that between 1981 and the end of 2009 he would whenever possible make an annual winter fishing trip which lasted approximately two months, fishing in the Great Chagos Bank, treacherous waters where only Chagossian fishermen really understand where the fish are to be found. He earned enough in those trips to support his family. Since fishing in BIOT has been banned he has experienced financial difficulties: he has not been able to earn nearly as much by fishing elsewhere. He states therefore that the MPA has had a direct immediate impact on the Chagossian community. He knows of at least 20 Chagossian fishermen who were able to sustain themselves and their families by making fishing trips to the Chago Islands before the ban took effect and who since then have experienced financial difficulties. At the end of his witness statement he also makes this point: "Fishing in Chagos is an important part of our culture, and has been, over the years of our exile, the only way that any of our members have been able to sustain a real link to our homeland".
- 170 Mr Sakir gives a similar account of his own life as a professional fisherman working on licensed fishing boats operating in the waters of the Chagos Archipelago. He too states that his standard of living has dropped considerably since the MPA took effect. He says that 40–50 Chagossians have been employed in this way for the past decade. Although not allowed to set foot on the islands, "we are nonetheless at home in the waters of the Archipelago, and feel that we are entitled to the benefits of this rich fishing ground since it is, after all, the place of our birth and our ancestral home. Our traditional fishing rights have been continuously exercised by this means since our exile 40 years ago, and we regard it as an extremely valuable link".
- 171 Fishing plays an important part in proposals for resettlement of the Chagos Islands. A document entitled *Returning Home*, published in March 2008 by the Chagos Refugees Group and UK Chagos Support Association, stated that the capacity to earn money to pay for basic goods and services was essential to the success of resettlement and that tourism and fisheries were the critical components of such an income generation strategy. Reference was made to two forms of legitimate commercial fishing in the Chagos Islands (this, of course, predated the MPA): ocean (or deep sea) fishing and inshore (or bank) fishing. The operators of deep sea fishery vessels, from countries such as Spain, France, Japan and Taiwan, had no requirement for land-based facilities in the region and their only significance for Chagos resettlement was the revenue accruing from licences, but when account was taken of the costs of management of the industry the net benefit to financing resettlement was likely to be very small. Inshore fishing had an unrealised production potential and the potential for a significantly larger number of fishermen being engaged than at present: given access to boats and markets, there could be up to 50 fishermen operating from Peros Banhos and deriving significant incomes throughout the year.

- 172 Notwithstanding that *Returning Home* attached little significance to deep sea fishing for the purposes of Chagos resettlement, Ms Lester drew our attention to evidence relating to fishing in BIOT waters by vessels of EU Member States and to representations by Spanish and French fishing interests, in particular, against the creation of an MPA.
- 173 Against the background of those strands in the evidence, she submitted that the decision to create an MPA does the opposite of what art.198 requires. Far from promoting the economic and social development of BIOT, the prohibition of all fishing in BIOT stifles such development completely; it snuffs out the one consistent thread of economic activity the Chagossians have been allowed to pursue, and the one continuous link they have had with their homeland. Far from establishing close economic relations between BIOT and the European Union, it eliminates economic relations between them. It runs counter to furthering the interests and prosperity of the inhabitants in order to lead them to the economic, social and cultural development to which they aspire. It renders art.198 and its related provisions ineffective; it deprives them of their *effet utile*. In short, rather than pursuing the objectives of association of BIOT with the Union, it *dissociates* BIOT from the Union. This, she submitted, was in clear breach of the United Kingdom's Treaty obligations.

*The European Commission's rejection of the Chagossians' complaint*

- 174 By letter dated 21 January 2009 the claimant's solicitor, Mr Gifford of Clifford Chance, acting "on behalf of the displaced Chagossian population", lodged a formal complaint with the European Commission alleging that the United Kingdom's treatment of the Chagossians was in breach of art.182 of the EC Treaty (the predecessor of art.198 TFEU) and of the Overseas Association Decision, and requesting the Commission to take infringement proceedings against the United Kingdom.
- 175 Following internal exchanges between the relevant Directorate-General (which for much of the relevant period was the Directorate-General for Development and Co-operation and is conveniently referred to in short as "DG Devco") and the Commission's Legal Service, the complaint was rejected by a letter from a Commissioner dated 9 July 2009. The relevant part of that letter included these reasons:

"... Articles 182 and 183 of the EC Treaty [i.e. arts 198 and 199 TFEU] do not impose a series of absolute and unconditional obligations upon the Community. In the same vein, the overseas association decision does not entail an obligation for the Community to undertake specific actions in every area of cooperation mentioned in that decision with a view to each OCT's economic and social development.

... Moreover, the association of the OCTs with the Community does not give rise to a positive obligation for the Member States to which the OCTs are linked to actively promote, at their level, the economic and social development of their own territories. For example, the fact that several OCTs no longer receive individual financial assistance from the related Member State does not constitute a violation of Article 182 of the EC Treaty.

On the other hand, the Member States must abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. However, the

relevant Commission services are of the opinion that the UK's Orders in Council stating that no person has the right of abode in BIOT does not constitute such a measure, bearing in mind that the archipelago has not had a permanent indigenous population since the accession of the UK to the European Community."

- 176 By letter dated 1 June 2010 to the President of the Commission, Mr Gifford renewed the complaint. One of the points he made was that "the deportation of the population was not accomplished until 26 May 1973 so that at the date when the UK acceded to the European Union, there remained a population living in the Chagos Archipelago ... which is to be considered fully indigenous". In addition to elaborating the arguments previously advanced, the letter drew attention to fresh matters arising since his letter of 21 January 2009, including the creation of the "no-take" MPA:

"The effect of this is permanently to frustrate the primary economic resource of BIOT namely its fisheries potential, which even its own consultants have identified as the most available resource for the economic development of the archipelago. If unchallenged, this decision would provide a permanent obstacle of the realisation of Community objectives in regard to this OCT of the EU."

A follow-up letter dated 14 January 2011 advised the Commission of further developments, including the purported US Embassy "cable" that we have discussed at length in the section above on the issue of improper motive.

- 177 There were then further exchanges between DG Devco and the Commission's Legal Service. DG Devco prepared a draft reply based on the reply of 9 July 2009, noting that as a matter of fact the new arguments introduced by Mr Gifford did not change the legal analysis developed by the Legal Service in 2009, but at the same time drawing attention to an analysis to contrary effect developed by the services of DG Devco which included the following:

"It is agreed that no positive obligation is created by Part IV TFEU on the Member States concerned to actively promote the objectives of the OCRs-EU association ...

However, my services are of the opinion that article 198 TFEU should be construed in conjunction with Article 4(3) TEU. Article 4(3) TEU provides for the principle of sincere cooperation: 'Member States should refrain from any measure which could jeopardise the attainment of the Union's objectives'. It is my services' view that the interventions and measures taken by the UK do not contribute to and jeopardise the attainment of the objectives set in Article 198, in particular:

– The removal for an indefinite amount of time of all population from the Chagos Islands annihilates the perspectives for any economic, social and cultural development of the Chagos population ...

– The creation of a Marine Protected Area also annihilates the perspectives of attaining the objectives set in Article 198 to the extent that it excludes and forbids the return of a human population on the Chagos archipelago, including obviously the Chagos population.' (Original italics.)

These interventions make it now impossible for Articles 198 and 199 TFEU to produce any effect, as far as Chagos Islands are concerned. Although the forcible displacement of Chagossians took place decades ago, the British government is still actively hindering their return, notably by opposing their demands (also in national and international courts) and by creating a Protected Marine Area, which is likely to limit the possibility for Chagossians to return home.

In sum, it may be argued that, by forcibly displacing Chagossians, the UK jeopardised the *effet utile* of Part IV TFEU, and in particular of Articles 198 and 199 TFEU: Member States agreed to associate the BIOT to the EU (and to the EEC before it) *in order to promote their economic and social development and to lead them to the social and cultural development they aspire to*. This objective obviously cannot be pursued if those islands have been deprived of their inhabitants. In sum, it might be considered, contrary to the conclusion of the draft letter, that the UK has violated its obligation of sincere cooperation (ex Article 4(3)) by depriving Part IV TFEU of *effet utile*” (*Original italics.*)

- 178 DG Devco's contrary analysis did not commend itself to the Legal Service, which shared the view that arts 198 and 199 TFEU do not impose a series of absolute and unconditional obligations on the Community and could not as such be a sufficient legal basis for launching an infringement procedure against the United Kingdom, but gave the following reason for rejecting the argument under art.4(3) TEU:

“According to your note, it may be argued that, by clearing the Chagos Islands of their population, the UK has made it impossible for Articles 198 and 199 TFEU to produce any effect. This would be, according to your analysis, contrary to Article 4(3) TEU.

However, the UK measure at stake was taken prior to UK's accession to the EU. According to the documentation submitted by the complainant, compulsory removal of the population of the Chagos Islands was effected under the Immigration Ordinance 1971. As a consequence, the measure would not be covered by Article 4(3).

As highlighted by the complainant, the execution of the removal decision was completed only after accession. However, the remaining inhabitants, even if EU citizens, could not claim a right to return on the basis of Article 20 TFEU and Article 45 of the Charter of Fundamental Rights. These provisions do not cover movement of persons between the Member States and the OCTs.”

- 179 That reasoning is criticised on behalf of the claimant as failing to take proper account of the fact that the last of the resident population was removed from the Chagos Islands in May 1973, *after* the United Kingdom's accession to the European Community; and for failing in any event to address the effect of the MPA. It is submitted that art.4(3) TEU and art.198 TFEU impose a continuing duty and that the MPA decision breached the obligations they impose by jeopardising the *potential* for economic development, a potential which still existed at the time of the decision.
- 180 The Legal Service's view, however, prevailed within the Commission. DG Devco sent Mr Gifford a formal reply dated 7 July 2011 confirming the 2009 analysis and supplementing it with various points, including:

“The competent Commission services have come to the conclusion that neither the outcome of the feasibility study on the resettlement of the Chagossians in their islands nor the creation of a Marine Protected Area can have a bearing on our previous assessment.

You drew my attention on the fact that the Chagos Islands were still inhabited when the UK joined the European Communities on 1 January 1973, as the exile procedure was not accomplished until 26 May 1973. The competent Commission services would wish to clarify that, in any event, the expulsion was decided and entered into effect before the accession of the UK to the European Union. The expulsion at the beginning of the year 1973 of the remaining population in Peros Banhos and the Salomon Islands constituted the end of execution of a decision taken before the accession of the UK to the EU.”

181 A letter dated 3 January 2012 informed Mr Gifford of DG Devco's intention formally to propose that the Commission terminate the case, subject to any new information that might prove an infringement. That led to detailed further representations, by letters from Mr Gifford dated 23 and 31 January 2012. Following yet further internal exchanges with the Legal Service, DG Devco responded to Mr Gifford on 28 June 2012, giving brief reasons why the further representations had not caused them to modify their assessment.

182 By letter dated 15 February 2013, DG Devco informed Mr Gifford that the Commission had decided on 24 January 2013 “not to follow-up and close the file, as no infringement of EU law could be established”. At the date of the hearing before us the time for challenging the decision by an application for annulment pursuant to art.263 TFEU was about to expire. Ms Lester made clear that no appeal would be lodged. She said that it was open to doubt whether the claimant had standing to bring such a challenge and that even if the decision were challenged successfully and the Commission were required to bring infringement proceedings against the United Kingdom there would be an unacceptable delay before the process could be completed.

*The defendant's submissions*

183 It is convenient to turn at this point to Mr Beal's submissions on behalf of the Foreign Secretary, which placed heavy reliance on the Commission's decision.

184 First, he submitted that it is not open to a national court to reach a decision that would conflict with the Commission decision; and since the creation of the MPA was within the scope of the Commission procedure and was found by the Commission to be compatible with EU law, it is not open to this court to make a contrary finding.

185 Mr Beal founded that submission on *Masterfoods Ltd v HB Ice Cream Ltd* (C-344/98) [2000] E.C.R. I-11369, a case concerning parallel proceedings in the Irish courts and before the Commission in respect of agreements alleged to be in breach of the competition rules contained at that time in arts 85 and 86 of the EC Treaty. The Commission adopted a decision that the agreements were in breach, but an application was then made to the Court of First Instance for annulment of the Commission's decision. In the meantime the High Court had found the agreements to be compatible with arts 85 and 86. On an appeal against the High Court's judgment, the Supreme Court made a reference to the Court of Justice for



a preliminary ruling, asking questions about the effect of the Commission's decision and the application to the Court of First Instance on the national proceedings. The Court of Justice referred to the Commission's particular role under the Treaty in relation to application of the Community competition rules, including its exclusive competence to adopt decisions in implementation of art.85(3) and its shared competence with national courts to apply arts 85(1) and 86. The court also referred to the duty of Member States under art.5 of the EC Treaty (now art.4(3) TFEU, quoted above). The judgment continued:

“50. Under the fourth paragraph of Article 189 of the Treaty, a decision adopted by the Commission implementing Articles 85(1), 85(3) or 86 of the Treaty is to be binding in its entirety upon those to whom it is addressed.

51. The Court has held ... that in order not to breach the general principle of legal certainty, national courts must, when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of Articles 85(1) and 86 and Article 85(3) of the Treaty.

52. It is even more important that when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance.”

186 The Court then referred to the possibility of a reference for a preliminary ruling if a national court has doubts as to the validity or interpretation of an act of a Community institution, and said that when the outcome of the dispute before the national court depends on the validity of a Commission decision the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in an action for annulment by the Community courts, unless it considers that a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted.

187 The approach in *Masterfoods* was followed in *Staatssecretaris van Financiën v Heuschen & Schrouff Oriental Foods Trading BV* (C-375/07) [2008] E.C.R. I-8691, a case involving post-clearance recovery of import duties. As part of its reasoning, the court referred to the Commission's specific power of decision in this field and noted that “where an application for remission of import duties has been submitted to the Commission by a Member State for the purposes of art.239 of the Customs Code and the Commission has already adopted a decision containing assessments of fact and law in a particular case concerning import operations, such assessments bind all the authorities of the Member State to which it was addressed” ([64]).

188 Mr Beal submitted that this court is required in the present context to follow the approach in those cases. The court can entertain the issues raised but must avoid any finding that would run counter to the Commission's decision that the creation of the MPA is in accordance with EU law. If otherwise minded to take a different view from that of the Commission, the court should make a reference for a preliminary ruling as to the validity of the Commission's decision.

189 A second and related line of argument by Mr Beal was based on the judgment of the Court of Justice in *TWD Textilwerke Deggendorf GmbH v Federal Republic of Germany* (C-188/92) [1994] E.C.R. I-846. In that case the Commission had

made a decision, addressed to the Federal Republic of Germany, that aid granted to a producer was in contravention of the state aid rules of the Treaty. The producer brought proceedings in the national court to challenge the measures taken by the German authorities to give effect to the Commission's decision. On a reference for a preliminary ruling, the Court of Justice held that the producer had had the right to bring an action for annulment of the Commission's decision, and that it was not possible to question the lawfulness of the decision before the national courts in an action brought against the measures taken by the national authorities for implementing the decision: it would otherwise "enable the person concerned to overcome the definitive nature which the decision assumes as against that person once the time-limit for bringing an action has expired" ([18]).

190 In the present case, submitted Mr Beal, it was open to the claimant to bring an action for annulment of the Commission decision; once the time-limit for bringing such an action had expired the decision became definitive as against the claimant; and it is not then open to the claimant to challenge the validity of the decision by the back-door route of proceedings in the national court.

191 The third procedural argument advanced by Mr Beal is that art.4(3) TEU and art.198 TFEU do not create directly effective rights on which the claimant can rely. It is submitted that art.198 TFEU does not impose a sufficiently clear, precise and unconditional obligation on Member States not to act in a particular way. It anticipates that further legislative measures will be taken in order to give effect to the overall objectives, as confirmed by the wording of art.203 and the adoption of the Overseas Association Decision pursuant to that article. Article 4(3) TEU can be relied on in conjunction with other, directly effective provisions of EU law but does not of itself give rise to free-standing direct effect: the content of the obligation of cooperation depends on the underlying EU obligation to which it relates. It is further submitted that the *claimant* has not asserted and cannot assert any individual rights under the articles relied on. He has not himself been affected by the decision to impose an MPA, and it is not open to him to rely on the rights of others, such as the owners of Spanish-registered vessels fishing in BIOT waters. Nor does a purely hypothetical prospect of exercising a right establish a sufficient connection with EU law to justify the application of EU provisions (*Kremzow v Austrian State* (C-299/95) [1997] E.C.R. I-2637 at [16]–[18]).

192 Passing from those procedural arguments, Mr Beal submitted that in any event the MPA decision did not give rise to any substantive infringement of art.198 or related provisions. Its only practical impact was in relation to commercial fishing, but there is no evidence that any fish caught in BIOT waters were landed in BIOT or were the subject of trade between BIOT and Member States or third countries; individuals with fishing licences were able to use them until their expiry, and none of the former licensees has challenged the refusal to issue new licences following the creation of the MPA. The MPA had no conceivable impact on the economic or social development of BIOT as an overseas country or territory and did not interfere adversely with the rights of any "inhabitants" of BIOT to pursue economic, social or cultural development. It did not have the effect of dissociating BIOT from the Union or of rendering the association provisions ineffective.

*Discussion of the EU law issue*

- 193 We are not persuaded by Mr Beal's arguments as to the effect of the Commission's decision on the proceedings before us. The judgments in *Masterfoods*, *Heuschen & Schrouff* and *TWD* were directed towards areas such as competition, state aids and import duties where the Commission is entrusted with specific functions in relation to the making of binding decisions on the application of EU law to particular factual situations. Decisions whether or not to bring infringement proceedings against a Member State are of a different character. Article 258 TFEU provides:

“If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.”

Thus, even a reasoned opinion by the Commission does not amount to a binding decision that the Member State is in breach of its Treaty obligations; the Commission has to bring proceedings before the Court of Justice for the purpose of establishing an infringement. A fortiori, a decision to close the file on a complaint rather than to bring infringement proceedings does not amount to a binding decision that the Member State concerned is complying with EU law in relation to the matters that were the subject of complaint.

- 194 Further, the present proceedings cannot in any sense be regarded as a collateral challenge to the validity of the Commission's decision to close the file. The claimant is not asking the national court to re-open the file or to bring infringement proceedings against the United Kingdom. Nor is he seeking, as in *TWD*, to challenge national measures implementing the Commission's decision. What is in issue before this court is the validity of the Foreign Secretary's decision to create the MPA, not the validity of the Commission's decision.

- 195 We are therefore satisfied not only that it is open to the claimant to raise the EU law issue in the present proceedings (a point which was in any event effectively determined in the claimant's favour by the decision of the Divisional Court granting leave to amend so as to add the EU law issue), but also that the court is not constrained by the Commission's reasoning or decision when reaching a conclusion on the issue. But even if we were precluded by the *Masterfoods* approach from making a finding that ran counter to the Commission's decision, it would not give rise to any practical difficulty in this case since, for the reasons given below, we have reached the same substantive conclusion as the Commission that the MPA decision is compatible with EU law.

- 196 Nor are we persuaded that Mr Beal's arguments as to direct effect provide a sufficient answer to the claimant's case. The case is advanced on the basis that the MPA decision renders art.198 and its related provisions ineffective, along the lines of the analysis put forward by DG Devco in its exchanges with the Commission's Legal Service (see [177] above). For that purpose, as it seems to us, the obligation in art.4(3) TEU to refrain from any measure which could jeopardise the attainment of the Union's objectives is sufficiently clear, precise and unconditional to be capable of giving rise to directly effective rights on which individuals can rely. We accept that the claimant cannot rely on the rights of others, but we do not think

that his case involves him doing that. He is not seeking to rely, for example, on the rights of the owners of Spanish-flagged vessels fishing in BIOT waters (the example given by Mr Beal), but on the rights of the displaced Chagossian population and their descendants; and to the extent that any Chagossian is able to rely for this purpose on the direct effect of the relevant Treaty provisions, the claimant is in our view able to do so.

197 When it comes to the question whether there is a substantive infringement of the relevant Treaty provisions, however, Mr Beal's submissions are in our view well founded. In making the substantive assessment it is important to keep in mind that we are concerned in this case only with the lawfulness of the MPA decision, not with the removal of the indigenous population from the Chagos Islands in the first place or with the British Government's "no resettlement" policy or the 2004 Orders on which the policy is based. The issue facing us is therefore very much narrower than that addressed by the Commission when reaching its decision on the Chagossians' complaint. For example, in its reasons for rejecting the complaint the Commission attached weight to its view that the removal of the population was the result of a decision taken before the accession of the United Kingdom to the European Community; but that aspect of its decision, heavily criticised by the claimant, need not concern us. We must proceed, moreover, on the basis that the 2004 Orders and the policy to which they give effect are lawful: the Orders themselves were upheld by the House of Lords in 2008, the Commission has declined to intervene, and neither the 2004 Orders nor the policy are or can be challenged in the present proceedings.

198 As we have explained in the section of our judgment on the issue of improper motive, the decision to create the MPA was taken against the background of the "no resettlement" policy but was a discrete issue and did nothing to prevent or restrict a change in the policy or to prevent the return of the Chagossians in the event that the policy was changed. It was made clear in the consultation document that any decision to create an MPA was without prejudice to the outcome of the proceedings then pending before the Strasbourg Court; so that if those proceedings were to result in the United Kingdom having to resettle the Chagossians on the islands, the creation of an MPA would not prevent that being done. The MPA was not "entrenched". That it can be reversed or modified as necessary to accommodate any future change in the "no resettlement" policy is underlined by the fact that it has been implemented to date simply by exercising existing powers to withhold further fishing licences. In relation to the MPA we therefore disagree with the passage in the analysis put forward by DG Devco for consideration by the Commission's Legal Service which stated that the creation of an MPA "annihilates the perspectives of attaining the objectives set in Article 198 to the extent that it excludes and forbids the return of a human population on the Chagos Islands ...". The creation of the MPA had no such exclusionary or prohibitive effect.

199 All that the MPA does, for so long as it remains in force, is to prohibit fishing in BIOT waters. In terms of art.198 TFEU, that has no appreciable adverse effect on "the economic and social development" of the Chagos Islands, or on "economic relations" between the islands and the Union, or on "the economic, social and cultural development to which [the inhabitants] aspire" (even leaving aside the fact that the islands have no resident population, and assuming that the former population and their descendants can properly be regarded as "inhabitants" for this purpose). Deep sea fishing in BIOT waters has had no trading connection with the

Chagos Islands, and for reasons given in *Returning Home* (see [171] above), even if licence income could be directed towards the financing of any resettlement the net effect would be likely to be very small. The only fisheries link with the islands lies in the fact that a small number of vessels flagged to Mauritius, Comoros or Madagascar and licensed to engage in inshore fishing—no more than four such licences were granted annually in the decade prior to the introduction of the MPA—employed Chagossian fishermen resident on Mauritius, namely Mr Volly and Mr Sakir and the 20–50 others whom they mention in their witness statements (see [169]–[170] above). According to their evidence, the prohibition on fishing around the Chagos Archipelago has had a serious adverse effect on their incomes and has cut an important link with their ancestral home. No doubt it will also result over time in the diminution of their particular expertise in relation to fishing in those waters. That is clearly of some relevance to the potential effectiveness of a resettlement strategy based on fishing and tourism, as set out in *Returning Home* and on which Ms Lester placed emphasis in her submissions.

- 200 Taking all those matters into account, however, we consider that the decision to create the MPA falls far short of a decision that deprives art.198 TFEU and related provisions of their *effet utile*; it does not jeopardise the attainment of the objectives of those provisions; let alone does it amount to the dissociation of BIOT from the Union. In short, we have reached the same conclusion as the Commission that the MPA is compatible with EU law, but we have done so after adopting a narrower focus than the Commission was required to adopt and by concentrating attention on the specific character and effects of the MPA as we know them to be in the light of the evidence before this court.

### Conclusion

- 201 For the reasons we have given, the claim is dismissed.

**TAB 8**

*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR  
2921

A

Court of Appeal

**\*Regina (Bancourt) v Secretary of State for Foreign and  
Commonwealth Affairs (No 3)**

[2014] EWCA Civ 708

B

2014 March 31;  
April 1, 2;  
May 23

Lord Dyson MR, Gloster, Vos LJJ

C

*European Union — Associated countries and territories — Promotion of economic and social development — United Kingdom colony from which population removed and excluded — Foreign Secretary deciding to create no-take marine protected area for environmental protection of colony — Whether decision in breach of United Kingdom's Treaty obligations in respect of associated countries and territories — Whether Treaty obligations directly effective or directly enforceable in national courts — EU Treaty, art 4(3)EU — FEU Treaty, arts 198FEU, 199FEU*

D

*Evidence — Admissibility — Illegally obtained evidence — Colony from which population removed and excluded — Foreign Secretary deciding to create no-take marine protected area for environmental protection of colony — Claimant alleging improper motive for decision — Claimant seeking to adduce in evidence illegally obtained evidence of contents of inviolable diplomatic message — Evidence in public domain — Court ruling evidence inadmissible — Whether such evidence admissible — Whether disclosure of evidence offence — Whether damaging to national security — Whether evidence ought to have been admitted — Whether admission would have affected court's finding as to improper motive — Diplomatic Privileges Act 1964 (c 81), s 2(1), Sch 1, arts 24, 27.2*

E

F

The British Indian Ocean Territory ("the BIOT") was a British colony which included islands from which the inhabitants had been compulsorily removed and to which they were prevented from returning. The Foreign Secretary consulted on a proposal to create a "no-take" marine protected area of about 250,000 square miles in the BIOT, following which he made a decision to create the marine protected area.

G

The claimant, a British dependent territory citizen who had been born in the islands which at the time had been a dependency of Mauritius, sought judicial review of that decision on the grounds, among others, that (i) the decision had been taken for an improper motive, namely an intention to prevent the former islanders and their descendants from resettling in the BIOT and (ii) it involved a breach of the United Kingdom's obligations under article 4(3)EU of the EU Treaty<sup>1</sup> and article 198FEU of the FEU Treaty<sup>2</sup> in relation to the association of overseas territories with the European Union. In order to establish an improper motive the claimant sought to rely evidentially on a document which had been obtained unlawfully and published without authority on the Internet by a third party and which purported to be a copy of a cable sent from the United States Embassy in London to, inter alia, the United States Federal Government in Washington, about a meeting held in London between United States officials and officials of the Foreign and Commonwealth Office with responsibility for the BIOT, concerning the marine protected area proposal. The Foreign Secretary did not object to cross-examination of British officials as to the content of the document provided that it was not asserted that it was an authentic United States Embassy cable since the archives and documents of a diplomatic

H

<sup>1</sup> EU Treaty, art 4(3)EU: see post, para 117.

<sup>2</sup> FEU Treaty, art 198FEU: see post, para 118.

Art 199FEU: see post, para 119.

mission were inviolable by reason of articles 24 and 27.2 of the Vienna Convention on Diplomatic Relations 1961 as incorporated into English law by the Diplomatic Privileges Act 1964<sup>3</sup>. The Divisional Court of the Queen's Bench Division ruled that the copy cable was inadmissible as evidence, although its use in the proceedings would not be contrary to section 6 of the Official Secrets Act 1989<sup>4</sup>, and dismissed the claim.

On the claimant's appeal—

*Held*, (1) that, although a document obtained by improper means from a diplomatic mission could not be adduced in evidence by the person who had taken the document or by an individual who had received it from that person because of the inviolability of the archives and documents of the mission set out in articles 24 and 27.2 of the Vienna Convention on Diplomatic Relations 1961, the immunity of diplomatic documents from use in legal proceedings was not absolute; that inviolability connoted freedom from any act of interference on the part of the receiving state but did not refer to inadmissibility and so there were circumstances in which a mission document which was inviolable might nevertheless be admitted in evidence; that if a document found its way into the hands of a third party, even in consequence of a breach of inviolability, it was *prima facie* admissible in evidence; that such a document would be admissible in evidence in proceedings if, although obtained by a third party without the consent of the sending state, it had been put into the public domain for all the world to see, the person wishing to adduce it in evidence was not complicit in its publication and the government of the sending state had no objection to its admission; that the court would be required to exclude that evidence if it would be an offence under section 6 of the Official Secrets Act 1989 to disclose it and, since the information contained in the cable related to international relations and arguably to defence, its disclosure by any person relevant to the proceedings would be an offence if it were damaging; but that, having regard to the nature of the information and the fact that it was already in the public domain, further disclosure in the proceedings could not be damaging and therefore the court was not required to exclude it by reason of section 6 of the 1989 Act (post, paras 37, 49, 58–65, 66–68, 73).

*Shearson Lehman Bros Inc v MacLaine Watson & Co Ltd (No 2)* [1988] 1 WLR 16, HL(E) distinguished.

(2) Dismissing the appeal, that, even if the cable had been admitted in evidence, the court would have decided that the creation of the marine protected area had not been actuated by the improper motive alleged; and that, accordingly, the admission of the copy cable would have had no effect on the proceedings (post, paras 88–93, 159).

(3) That article 4(3)EU of the EU Treaty and articles 198FEU and 199FEU of the FEU Treaty were directed at the promotion of the economic and social development of overseas territories, including the BIOT, and the furtherance of the interests and the prosperity of the inhabitants of those territories on a macro-economic scale, not with the minutiae of the interests of a small number of individuals; that since there had been no commercial fishing by the former inhabitants, either at the time when they had been removed from the islands or when the marine protected area had been imposed, and there was no intention to undertake such activity unless re-settlement became a reality, it was the prohibition from living in the islands which could be said to jeopardise the promotion of the economic and social development of the BIOT, not the creation of the marine protected area; that there could have been no possible breach of article 4(3)EU taken together with article 199FEU resulting from the creation of the marine protected area, there being no evidence of any trade at the time of its creation either within the BIOT or between the BIOT and the United Kingdom or any other member state, and so the objectives in article 199FEU including equal

<sup>3</sup> Diplomatic Privileges Act 1964, Sch 1, arts 24, 27.2: see post, para 18.

<sup>4</sup> Official Secrets Act 1989, s 6: see post, para 66.



- A trade treatment, investment for progressive development and non-discrimination were not in any meaningful sense jeopardised in relation to trade with the BIOT; and that, accordingly, no infringement of articles 4(3)EU, 198FEU or 199FEU was established (post, paras 121–132, 158, 159).

- B *Per curiam.* (i) Part 4 of the FEU Treaty (which includes articles 198FEU and 199FEU) provides for objectives which are not hard-edged obligations but may be achieved in many different ways in different overseas countries and territories. Even taking into account the obligatory provision in article 4(3)EU of the EU Treaty, the objectives in articles 198FEU and 199FEU are not sufficiently clear, precise and unconditional to be regarded as directly effective or to be directly enforceable in the national courts (post, paras 142–143).

- C (ii) Where the European Commission has considered arguments on European Union law which were addressed to the national court and expressed a view, which is not binding, if the national court were to take a different view it might be appropriate to refer the matter to the Court of Justice of the European Union for a preliminary ruling under article 258FEU of the FEU Treaty on the grounds that the matter is not *acte clair* (post, para 156).

Decision of the Divisional Court of the Queen's Bench Division [2013] EWHC 1502 (Admin); [2014] Env LR 11 affirmed on partially different grounds.

The following cases are referred to in the judgment of the court:

- D *Alfons Lütticke GmbH v Commission of the European Economic Community* (Case 48/65) EU:C:1966:8; [1966] ECR 27, ECJ  
*Antillean Rice Mills NV v Commission of the European Communities* (Case C-390/95) EU:C:1999:66; [1999] ECR I-769, ECJ  
*Bank Mellat v Council of the European Union* (Case T-496/10) EU:T:2013:39; 29 January 2013, EGC  
*Chagos Islanders v United Kingdom* (2012) 56 EHRR SE173  
E *Crehan v Innpreneur Pub Co (CPC) (Office of Fair Trading intervening)* [2006] UKHL 38; [2007] 1 AC 333; [2006] 3 WLR 148; [2006] ICR 1344; [2006] 4 All ER 465, HL(E)  
*Dereci v Bundesministerium für Inneres* (Case C-256/11) EU:C:2011:734; [2012] All ER (EC) 373; [2011] ECR I-11315, ECJ  
*El Masri v Former Yugoslav Republic of Macedonia* (2012) 57 EHRR 783, GC  
*Fayed v Al-Tajir* [1988] QB 712; [1987] 3 WLR 102; [1987] 2 All ER 396, CA  
F *Hurd v Jones (HM Inspector of Taxes)* (Case 44/84) EU:C:1986:2; [1986] QB 892; [1986] 3 WLR 189; [1986] ECR 29, ECJ  
*Iraq v Vinci Constructions* (2005) 127 ILR 101  
*Masterfoods Ltd v HB Ice Cream Ltd* (Case C-344/98) EU:C:2000:689; [2000] ECR I-11369, ECJ  
*Mediaset SpA v Ministero dello Sviluppo economico* (Case C-69/13) EU:C:2014:71; 13 February 2014, ECJ  
G *Mid-east Sales Ltd v United Engineering & Trading Co Ltd* [2014] EWHC 892 (Comm)  
*NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen* (Case 26/62) EU:C:1963:1; [1963] ECR 1  
*Prosecutor v Taylor (Interlocutory Decision)* (unreported) 27 January 2011, Special Ct for Sierra Leone  
*R v Chief Constable of the Thames Valley Police, Ex p Cotton* [1990] IRLR 344, CA  
H *R v Shayler* [2002] UKHL 11; [2003] 1 AC 247; [2002] 2 WLR 754; [2002] 2 All ER 477, HL(E)  
*R (Air Transport Association of America) v Secretary of State for Energy and Climate Change (International Air Transport Association intervening)* (Case C-366/10) EU:C:2011:864; [2013] PTSR 209; [2012] All ER (EC) 1133; [2011] ECR I-13755, ECJ

- R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2001] QB 1067; [2001] 2 WLR 1219, DC A
- R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61; [2009] AC 453; [2008] 3 WLR 955; [2008] 4 All ER 1055, HL(E)
- R (Hoxha) v Special Adjudicator [2005] UKHL 19; [2005] 1 WLR 1063; [2005] 4 All ER 580, HL(E)
- Rose v The King [1947] 3 DLR 618 B
- Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd (No 2) [1988] 1 WLR 16; [1988] 1 All ER 116, HL(E)
- Stoll v Switzerland (Application No 69698/01) (unreported) 10 December 2007, GC

The following additional cases were cited in argument:

- Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109; [1988] 3 WLR 776; [1988] 3 All ER 545, HL(E) C
- EM (Zimbabwe) v Secretary of State for the Home Department [2011] UKUT 98 (IAC)
- Francovich v Italian Republic (Joined Cases C-6/90 and C-9/90) EU:C:1991:428; [1995] ICR 722; [1991] ECR I-5357, ECJ
- Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) [2012] ICJ Rep 99 D
- Gilly v Directeur des services fiscaux du Bas-Rhin (Case C-336/96) EU:C:1998:221; [1998] ECR I-2793, ECJ
- Ilașcu v Moldova and Russia (2004) 40 EHRR 1030, GC
- J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418; [1989] 3 WLR 969; [1989] 3 All ER 523, HL(E)
- John v Rees [1970] Ch 345; [1969] 2 WLR 1294; [1969] 2 All ER 274
- Jones v United Kingdom (2014) 59 EHRR 1 E
- Leplat v Territory of French Polynesia (Case C-260/90) EU:C:1992:66; [1992] ECR I-643, ECJ
- Peralta, Criminal proceedings against (Case 379/92) EU:C:1994:296; [1994] ECR I-3453, ECJ
- Persia International Bank plc v Council of the European Union (Case T-493/10) EU:T:2013:398; 6 September 2013, EGC
- Pigs and Bacon Commission v McCarren & Co Ltd (Case 177/78) EU:C:1979:164; [1979] ECR 2161, ECJ F
- R v Sang [1980] AC 402; [1979] 3 WLR 263; [1979] 2 All ER 1222; 69 Cr App R 282, HL(E)
- R (Bredenkamp) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 3297 (Admin); [2013] 2 CMLR 238
- R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154; The Times, 9 March 2005, CA G
- R (Rusbridger) v Attorney General [2003] UKHL 38; [2004] 1 AC 357; [2003] 3 WLR 232; [2003] 3 All ER 784, HL(E)
- Revenue and Customs Comrs v Ben Nevis (Holdings) Ltd [2013] EWCA Civ 578; [2013] STC 1579, CA
- Reyners v Belgian State (Case 2/74) EU:C:1974:68; [1974] ECR 631, ECJ
- Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28; [2010] 2 AC 269; [2009] 3 WLR 74; [2009] 3 All ER 643, HL(E) H
- Thornton v The Police [1962] AC 339; [1962] 2 WLR 1141; [1962] 3 All ER 88, PC
- Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249
- Völk v Établissements J Vervaecke (Case 5/69) EU:C:1969:35; [1969] ECR 295, ECJ
- Wijsenbeek, Criminal proceedings against (Case C-378/97) EU:C:1999:439; [1999] ECR I-6207, ECJ

- A *XX (Ethiopia) v Secretary of the Home Department (JUSTICE intervening)* [2012] EWCA Civ 742; [2013] QB 656; [2013] 2 WLR 178; [2012] 4 All ER 692, CA

The following additional cases, although not cited, were referred to in the skeleton arguments:

- A v Secretary of the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221; [2005] 3 WLR 1249; [2006] 1 All ER 575, HL(E)
- B *Al Matri v Council of the European Union* (Case T-200/11) EU:T:2013:275; 28 May 2013, EGC
- Asia Motor France SA v Commission of the European Communities* (Case C-29/92) EU:C:1992:264; [1992] ECR I-3935, ECJ
- Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, CA
- Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB); The Times, October 10, 2003
- C *Corfu Channel case* [1949] ICJ Rep 4
- Defrenne v Sabena* (Case 43/75) EU:C:1976:56; [1976] ICR 547; [1981] 1 All ER 122n; [1976] ECR 455, ECJ
- East Timor Case (Portugal v Australia)* [1995] ICJ Rep 90
- Engelke v Musmann* [1928] AC 433, HL(E)
- Gingi v Secretary of State for Work and Pensions* [2001] EWCA Civ 1685; [2002] 1 CMLR 587, CA
- D *Imperial Chemical Industries Plc v Colmer (No 2)* [1999] 1 WLR 2035; [2000] 1 All ER 129; 72 TC 1, HL(E)
- Jersey Produce Marketing Organisation Ltd v States of Jersey* (Case C-293/02) EU:C:2005:664; [2005] ECR I-9543, ECJ
- Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) EU:C:2008:461; [2009] AC 1225; [2009] 3 WLR 872; [2010] All ER (EC) 1105, ECJ
- E *Khan v United Kingdom* (2000) 31 EHRR 1016
- Kremzow v Austrian Republic* (Case C-299/95) EU:C:1997:254; [1997] ECR I-2629, ECJ
- Pereira Roque v Lieutenant Governor of Jersey* (Case C-171/96) EU:C:1998:368; [1998] ECR I-4607, ECJ
- PreussenElektra AG v Schleswag AG* (Case C-379/98) EU:C:2001:160; [2001] ECR I-2099, ECJ
- F *Prosecutor v Brdjanin* (Case No IT-99-36-T) 3 October 2003, International Tribunal
- Prosecutor v Haraqija* (Case No IT-04-84-R77.4) 27 November 2008, International Tribunal
- Prunus SARL v Directeur des services fiscaux* (Case C-384/09) EU:C:2011:276; [2011] STC 1392; [2011] ECR I-3319, ECJ
- Pupino, Criminal proceedings against* (Case C-105/03) EU:C:2005:386; [2005] ECR I-5285, ECJ
- G *R v AB* [1941] 1 KB 454, CCA
- R v Local Government Board, Ex p Arlidge* [1915] AC 120, HL(E)
- R v Secretary of State for Employment, Ex p Equal Opportunities Commission* [1995] 1 AC 1; [1994] 2 WLR 409; [1994] ICR 317; [1994] 1 All ER 910; 92 LGR 360, HL(E)
- R v Secretary of State for the Home Department, Ex p Manjit Kaur (JUSTICE intervening)* (Case C-192/99) EU:C:2001:106; [2001] ECR I-1237, ECJ
- H *R v Secretary of State for the Home Department, Ex p Oladehinde* [1991] 1 AC 254; [1990] 3 WLR 797; [1990] 3 All ER 393, HL(E)
- Revenue and Customs Comrs v Procter & Gamble UK* [2009] EWCA Civ 407; [2009] STC 1990, CA
- Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) EU:C:2011:124; [2012] QB 265; [2012] 2 WLR 886; [2011] All ER (EC) 491; [2011] ECR I-1177, ECJ

*Ryanair v Competition Commission (Aer Lingus Group plc intervening)* (No 2) [2014] CAT 3 A  
*Staatsecretaris van Financiën v Heuschen & Schrouff Oriëntal Foods Trading BV* (Case C-375/07) EU:C:2008:645; [2008] ECR I-8691, ECJ  
*TWD Textilwerke Deggendorf GmbH v Germany* (Case C-188/92) EU:C:1994:90; [1994] ECR I-833, ECJ  
*Von Colson v Land Nordrhein-Westfalen* (Case 14/83) EU:C:1984:153; [1984] ECR 1891, ECJ B

#### APPEAL from the Divisional Court of the Queen's Bench Division

By a claim form filed on 11 August 2010 the claimant, Louis Olivier Bancoult, sought judicial review of the decision dated 1 April 2010 by the defendant, the Secretary of State for Foreign and Commonwealth Affairs, to create a marine protected area of 544,000 km around the British Indian Ocean Territory ("the BIOT") on the basis of an absent population and with a total ban on commercial fishing. On 16 March 2012 Ouseley J granted permission to proceed with the claim and permission to amend the claim form grounds to allege that the decision had been made for an improper motive, namely to prevent the former inhabitants of the Chagos Islands and their descendants from resettling in the BIOT. The other four grounds were (i) failure to reveal, as part of the consultation preceding the decision, that the Foreign Secretary's own consultants had advised that resettlement of the population was feasible; (ii) failure to disclose relevant environmental information in the course of the consultation; (iii) failure to disclose that the marine protected area proposal, in so far as it prohibited all fishing, would adversely affect the traditional and/or historical rights of former inhabitants to fish in the waters of their homeland as both Mauritian citizens and as the native population of the Chagos Island; and (iv) breach of the obligations imposed on the United Kingdom under article 198FEU of the FEU Treaty, which related to the association of overseas territories with the European Union. On 11 June 2013 the Divisional Court of the Queen's Bench Division dismissed the claim [2014] Env LR 11. C D E

By an appellant's notice filed on 1 July 2013 and pursuant to permission granted by the Court of Appeal (Jackson LJ) on 15 October 2013 the claimant appealed, on the grounds, among others, that (1) the Divisional Court had misinterpreted and misapplied the obiter remarks in the speech of Lord Bridge of Harwich in *Shearson Lehman Brothers Inc v Maclaine Watson and Co Ltd* (No 2) [1988] 1 WLR 16, 27F–G; (2) the Divisional Court had erred in conflating inviolability and inadmissibility; (3) the ruling by the Divisional Court that the copy cable was inadmissible had deprived the claimant of a proper opportunity to test the evidence of crucial witnesses and to make the necessary link between the statement of the commissioner for the BIOT and the eventual decision taken by the Secretary of State; (4) the Divisional Court had misdirected itself in concluding that traditional fishing rights of the former inhabitants of the islands had been lost in 1973 when in fact they had continued until the decision had been taken not to renew licences in October 2010 so that there was clear and credible evidence that the no-take marine protected area would have an adverse effect on such rights; (5) the Divisional Court had misdirected itself as to the significance of the small number of Mauritian-flagged vessels licensed to fish in BIOT waters, which was not material to whether those fishing rights existed, and had erroneously concluded that Mauritius did not assert special rights to fish F G H

- A in the BIOT other than in the context of a separate dispute over sovereignty; (6) the Divisional Court had erred in finding that the marine protected area was compatible with EU law; and (7) the Divisional Court ought to have recognised that the effect of the marine protected area was to deprive the former inhabitants of all hope of return to their homeland and of developing any economic activity there, and therefore to deprive Part 4 of the FEU Treaty of its effet utile in relation to the BIOT, jeopardise the objectives set out therein and infringe article 4(3)EU of the EU Treaty.
- B

- By a respondent's notice filed on 14 November 2013 the Secretary of State asked the court to uphold the decision of the Divisional Court on the additional grounds, among others, that the Divisional Court (1) ought to have found that admission of the cable in evidence would in the circumstances be to confirm the existence and content of a leaked classified document contrary to the Official Secrets Act 1989; (2) had erred in declining to find that it should not reach a decision which was inconsistent with the European Commission's decision on the claimant's complaints without requesting a ruling from the Court of Justice of the European Union on the issue; (3) had erred in finding that article 4(3)EU of the EU Treaty was capable of giving rise to directly effective rights which might be enforced by individuals before the national courts of member states; and (4) had erred in failing to address the Secretary of State's arguments that there was no applicable EU law dimension in the present case and in failing to rule that the subject matter of the dispute did not fall within the applicable scope of EU law.
- C
- D

The facts are stated in the judgment of the court.

- E *Nigel Pleming QC, Richard Wald, Robert McCorquodale, Maya Lester, Daniel Piccinin and Stephen Kosmin* (instructed by *Clifford Chance LLP*) for the claimant.

*Steven Kovats QC, Kieron Beal QC, Malcolm Shaw QC and Penelope Nevill* (instructed by *Treasury Solicitor*) for the Secretary of State.

- F The court took time for consideration.

23 May 2014. LORD DYSON MR handed down the following judgment of the court.

1 This is the judgment of the court to which each member has contributed.

- 2 This appeal is a further chapter in the history of litigation arising out of the removal and subsequent exclusion of the native population from the Chagos Archipelago in the British Indian Ocean Territory ("BIOT"). Mr Bancoult challenges the decision taken by the Secretary of State for Foreign and Commonwealth Affairs on 1 April 2010 to create a "no-take" marine protected area ("MPA") of some 250,000 square miles in the BIOT.
- G

- 3 By re-amended grounds of claim, the decision is said to be flawed in five respects each of which was rejected by the Divisional Court (Richards LJ and Mitting J) in a detailed judgment [2014] Env LR 11 which was given on 11 June 2013. Three of these grounds are the subject of the present appeal. These are that the decision was unlawful because (i) it was actuated by an improper motive, namely an intention to prevent Chagossians and their descendants from resettling in the BIOT; (ii) the consultation paper which
- H

preceded the decision failed to disclose that the MPA proposal, in so far as it prohibited all fishing, would adversely affect the traditional and historical rights of Chagossians to fish in the waters of their homeland, as both Mauritian citizens and as the native population of the Chagos Islands; and (iii) it was in breach of the obligations imposed on the United Kingdom under article 4(3)EU of the Treaty of the European Union (“the TEU”) in conjunction with articles 198FEU and 199FEU of the Treaty on the Functioning of the European Union (“the TFEU”).

#### *Factual background*

4 The detailed history is set out in the speech of Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 2) [2009] 1 AC 453 (“*Bancoult No 2*”). Prior to 1965, the Chagos Islands were a dependency of Mauritius. By the British Indian Ocean Territory Order 1965, they were detached from Mauritius and constituted a separate colony known as BIOT. An agreement concerning the availability of BIOT for defence purposes was entered into between the UK Government and the US Government in December 1966 and in due course the US Government gave notice that Diego Garcia would be required in July 1971. The Immigration Ordinance 1971, which was made by the BIOT Commissioner pursuant to the 1965 Order, provided that no person was to enter or be present or remain in BIOT unless he was in possession of a permit. A small population remaining after that date on islands other than Diego Garcia left by the end of May 1973.

5 In 1998 Mr Bancoult brought a judicial review challenge to the 1971 Ordinance. This succeeded before the Divisional Court: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 (“the first *Bancoult* case”). The 1971 Ordinance was replaced by the Immigration Ordinance 2000 which provided that the restrictions on entry or residence should (with the exception of Diego Garcia) not apply to anyone who was a British Dependent Territories citizen by virtue of his connection with BIOT.

6 In 2004, the Secretary of State announced, in the light of a feasibility study that had been undertaken, that, in order to ensure and maintain the availability and effective use of the territory for defence purposes, the UK Government would not support resettlement of the islands. The British Indian Ocean Territory (Constitution) Order 2004 was then made. It provided that no person was to have the right of abode in the territory and that no person was to have the right to enter or be present in the territory except as authorised by or under the Order or any other law for the time being in force in the territory. At the same time, the British Indian Ocean Territory (Immigration) Order 2004 dealt with details of immigration control. The 2004 Orders were the subject of judicial review challenge by Mr Bancoult. He was successful in the lower courts, but in October 2008 his claim was dismissed by the House of Lords in *Bancoult No 2*.

7 Mr Bancoult and other Chagossians applied to the European Court of Human Rights complaining about their removal from the islands and the prohibition on their return. This application was dismissed on 20 December 2012 as manifestly unfounded and inadmissible: *Chagos Islanders v United Kingdom* (2012) 56 EHRR SE173.

A *MPA consultation*

8 There was a public consultation in relation to the MPA proposal. It ran from 10 November 2009 until 5 March 2010. In the foreword to the consultation document, the Secretary of State said: “We want to use this consultation to help assess whether a marine protected area is the right option for the future environmental protection of the British Indian Ocean Territory”. The second ground of appeal raises the question of whether the fairness of the consultation was compromised by failing to disclose the effect that the MPA would have on the Chagossians’ fishing rights. We refer to the relevant parts of the consultation document when we deal with this ground of appeal at paras 94–115 below.

C *The first ground of appeal: improper motive*

9 The claimant’s case is that the decision to declare an MPA in BIOT waters was in whole or in part actuated by the improper motive of seeking to prevent Chagossians and their descendants from resettling in the BIOT.

10 The cornerstone of the case is a document published on Wikileaks and by the Guardian on 2 December 2010 and by the Daily Telegraph on 4 February 2011. It is claimed to be a copy of a “cable” (in fact, a communication sent, received and stored electronically but which can, if required, be printed) sent on 15 May 2009 by the US Embassy in London to departments of the US Federal Government in Washington, to elements of its military command and to its embassy in Port Louis, Mauritius. The text, which (save as regards layout) is identical in both reports, concerns and, it is claimed, purports to record observations made by British officials to US Embassy officials on 12 May 2009 about a proposal to declare an MPA. It is common ground that there was a meeting between US officials and Mr Colin Roberts, then Foreign and Commonwealth Office (“FCO”) Director for Overseas Territories and HM Commissioner for the BIOT, and Ms Joanne Yeadon, then the BIOT administrator, on 12 May 2009 at the FCO. Mr Roberts and Ms Yeadon believe that no note was taken or made of the meeting by them and none has been retrieved from FCO files. If the document is a true copy of a US Embassy “cable” it is the only near-contemporaneous record of the meeting known to exist.

11 The claimant contends that the statements in the copy cable attributed to the British civil servants revealed that a material and significant motive in the decision to establish the MPA was the prevention of resettlement of the Chagos Islands by Chagossians. It recorded, for example:

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

“15. Establishing a marine reserve might indeed, as FCO’s Roberts stated, be the most effective long term way to prevent any of the Chagos islands’ former inhabitants or their descendants from resettling in the BIOT.”

12 On 25 July 2012 Stanley Burnton LJ ordered Mr Roberts and Ms Yeadon to attend to be cross-examined about the document. In doing so, he acknowledged that what he described as “the Wikileaks documents” (three were then in issue) “must have been obtained unlawfully, and in all probability by the commission of a criminal offence or offences under the law of the United States of America”. He expressed understanding of the policy of HM Government neither to confirm nor deny the genuineness of leaked official documents (“the NCND policy”). The only submission made to him by Mr Kovats QC for the Secretary of State was that it would be wrong to order cross-examination about documents which had been unlawfully obtained. He rejected that submission, for reasons which he gave at para 16 of his judgment [2012] EWHC 2115 (Admin):

“However, the documents in question have been leaked, and indeed widely published. No claim has been made to the effect that the documents should not be considered by the court on the grounds of public interest immunity or the like. They are before the court. The court will have to decide whether or not they are genuine documents, that they are copies of what they purport to be. The memorandum of the meeting of 12 May 2009, in particular, appears to be a detailed record, which could fairly be the basis of cross-examination.”

13 He went on to state that he did not see how the present claim could fairly or justly be determined without resolving the allegation made by the claimant as to what transpired at the meeting of 12 May 2009.

14 Mr Fleming QC made it clear to the Divisional Court that he sought not merely to cross-examine Mr Roberts and Ms Yeadon about the contents of the document but, to the extent that their written and oral evidence differed from it, to invite them to prefer its contents to their evidence. In other words, he sought to rely on the document evidentially.

15 Founding himself on the UK Government’s NCND policy, Mr Kovats did not object to cross-examination of Mr Roberts and Ms Yeadon by putting to them the contents of the document, provided that it was not asserted that it was a true copy of an embassy “cable”. We consider in some detail the cross-examination that took place at paras 80–87 below.

16 Two issues, not canvassed before Stanley Burnton LJ, caused the Divisional Court to revisit the basis of his decision: (i) whether or not disclosure of the information contained in the document was or would be an offence under section 6 of the Official Secrets Act 1989, so as to require the court to exclude it; and (ii) whether or not the court was prohibited from admitting the document evidentially by articles 24 and/or 27.2 of the Vienna Convention on Diplomatic Relations 1961 (“the 1961 Convention”), set out in and incorporated into English law by the Diplomatic Privileges Act 1964.

17 The Divisional Court said [2014] Env LR 11, para 30:

“To address those issues it is necessary to make certain assumptions about the document. In principle, it can be one of two things: an accurate copy of a genuine embassy ‘cable’; or an unsourced and worthless fiction. In the latter event, it would be of no evidential value, so that no question could arise of its admission in evidence. It is only if the document is genuine that the two questions referred to above arise. For this purpose, we do not need to make any finding on the authenticity of the document.



- A We will simply assume for the purposes of argument that it is genuine. If it is, we know little about it apart from its contents. They state that it is classified as confidential. Mr Fleming conceded, and we can safely assume, that it has not been put into the public domain by or with the authority of the US Government. Mr Fleming suggested that it may have been one of the many documents alleged by US prosecutors to have been
- B illicitly obtained from a US facility in Iraq in 2009 and 2010 by Private Bradley Manning. We have no evidence about that. Nor do we know the manner in which, or where, US Embassy archives are held. It has not been suggested that it is likely that the document was obtained from a storage facility at the US Embassy in London. In the light of those considerations, we are prepared to assume that the document was obtained illicitly by a
- C person who was not authorised to obtain it from a US electronic document storage facility elsewhere than in the US Embassy in London.”

Like the Divisional Court, we shall consider the 1961 Convention issues first.

*The 1961 Convention*

- 18 Section 2(1) of the Diplomatic Privileges Act 1964 provides that the articles of the 1961 Convention set out in Schedule 1 to the Act shall have the
- D force of law in the United Kingdom. Those articles include articles 24 and 27.2:

“Article 24

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

“Article 27 . . .

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

19 The remainder of article 27 deals with free communication between a mission and its sending state, the diplomatic bag and diplomatic couriers.

- F 20 The purpose of these provisions can be identified not only from their text but also from the preamble to the 1961 Convention, which records that the states parties realise “that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states”.

- G 21 In both the first and third editions of her authoritative analysis of the 1961 Convention, *Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations*, Professor Eileen Denza noted in her introduction that article 27 was one of two provisions which increased for the benefit of diplomatic missions themselves the degree of immunity over what was previously accorded by customary international law: at p 4: “Article 27 sets out comprehensive rules for the protection of all forms of diplomatic communication—the most important to the functioning of a diplomatic mission of all its privileges and immunities.”

- H 22 She identified the underlying purpose of article 24 at p 195 as “the protection of the confidentiality of information stored”, so that “it is clearly right that the words ‘archives and documents’ should be regarded as covering modern methods of storage such as computer disks”. In the partial award by the Eritrea Ethiopia Claims Commission handed down at

The Hague on 19 December 2005, the commission observed in para 42 p 221 that “article 24 confirms the inviolability of all diplomatic documents and official correspondence”. In Professor Denza’s view: A

“the inviolability of the official correspondence of a mission has two aspects—it makes it unlawful for the correspondence to be opened by the authorities of the receiving state and it precludes the correspondence being used as evidence in the courts of the receiving state. As regards use of correspondence as evidence, article 27.2 is probably unnecessary in view of the fact that article 24 of the Convention gives inviolability to the archives and documents of the mission ‘wherever they may be’.” B

23 The Divisional Court said [2014] Env LR 11, para 40 that so far as it was concerned the breadth of articles 24 and 27.2 has been conclusively determined by the speech of Lord Bridge of Harwich in *Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd (No 2)* [1988] 1 WLR 16. We discuss this decision at paras 32–37 below. C

24 Having considered and rejected various submissions made by Mr Fleming, the court concluded [2014] Env LR 11, para 51:

“Nothing in this material persuades us that we should depart from what appears to be, by now, a settled principle of public international and municipal law, that the inviolability of diplomatic communications requires that judicial authorities of states parties to the 1961 Convention should, in the absence of consent by the sending state, exclude illicitly obtained diplomatic documents and correspondence from judicial proceedings. Accordingly, we consider the document to be inadmissible as evidence in these proceedings. We gave a ruling to that effect at the conclusion of submissions on the issue on day three of the hearing, indicating that any further cross-examination of Mr Roberts and any cross-examination of Ms Yeadon must proceed on that basis.” D

25 Professor McCorquodale makes two principal submissions, the first of which was not advanced in the court below. First, articles 24 and 27.2 of the 1961 Convention have no application because the UK cannot interfere with the inviolability of diplomatic documents or archives if they are not in its territory or otherwise under its jurisdiction. The Divisional Court assumed [2014] Env LR 11, para 30 that the cable was not illicitly obtained from the archives of the US mission in London, but was illicitly obtained from a “US electronic document storage facility elsewhere than in the US Embassy in London”. He submits that, since the cable was not taken from the US mission within the territory of the UK, the UK is not a receiving state and the US is not a sending state for the purposes of the 1961 Convention. Accordingly, the 1961 Convention is not engaged. Secondly, he submits that, even if the 1961 Convention is engaged, the Divisional Court was wrong to equate “inviolability” with “inadmissibility”. E

#### *The territoriality point*

26 Mr Kovats QC submits that the phrase “wherever they may be” in article 24 should be interpreted “in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose”: see article 31.2 of the Vienna Convention on the Law of Treaties 1969 (Cmnd 4140). He says that there is no warrant for F

A interpreting the phrase more restrictively so as to mean “wherever they may be *in the receiving state*”. He submits that this is confirmed by article 45 which states that the archives remain inviolable even if diplomatic relations are broken off or a mission is permanently or temporarily recalled and even in the case of armed conflict. He relies on the comments of Professor Denza in *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (2008), at pp 192–193:

B “The third way in which the customary international law rule was extended by article 24 was that the International Law Commission and the Conference, by adding the words ‘wherever they may be’, made it clear beyond argument that archives not on the premises of the mission and not in the custody of a member of the mission are entitled to inviolability. The conference expressly rejected that part of the amendment of France and Italy which would have required archives and documents outside the mission to be identified by visible official signs. C A US amendment which would have defined ‘archives and documents’ to mean ‘the official records and reference collections belonging to or in the possession of the mission’ was withdrawn. The position of archives is thus different from other property of the mission which under D article 22(3) is not generally given inviolability unless it is on the premises of the mission. If archives fall into the hands of the receiving state after being lost or stolen they must therefore be returned forthwith and may not be used in legal proceedings or for any other purpose of the receiving state.”

E 27 He also relies on Professor Higgins in *Problems and Process: International Law and How We Use It* (1994), pp 88–89:

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

H 28 Professor McCorquodale submits that, in the light of the limits of the receiving state’s obligations under the 1961 Convention, the phrase “wherever they may be” must be restricted to those archives and documents which are held within the receiving state’s territory. It cannot be extended to archives and documents held elsewhere in the world. The territorial nature

of the obligations is exemplified by article 39 which provides that the privileges and immunities under the 1961 Convention are enjoyed only so long as the person entitled to them is in the territory of the receiving state. The words “wherever they may be” in article 24 are intended to make it clear that archives and documents are entitled to inviolability even when they are not on the premises of the mission in the receiving state and not in the custody of a member of the mission. The only exception to the requirement that the documents must be within the territory of the receiving state may be in relation to a third state’s obligations under article 40.3 which provides: “Third states shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving state . . .”

29 It follows, he submits, that the UK cannot violate the diplomatic archives or documents of the US mission in the UK if they are not in its territory or otherwise under its jurisdiction. Whether they originated in the US mission in the UK is irrelevant.

30 We see considerable force in the general approach advocated by Professor McCorquodale, but in the light of our decision on the question of admissibility below, we do not find it necessary to express a concluded view about it.

#### *Admissibility*

31 The Divisional Court accepted the submission of Mr Kovats that (as Professor Denza said) one of the aspects of the inviolability of the official correspondence of a mission is that “it makes it unlawful for the correspondence being used as evidence in the courts of the receiving state”. We need to consider the *Shearson Lehman* case [1988] 1 WLR 16 since, as we have said, the Divisional Court regarded it as having conclusively determined the admissibility issue.

#### *Shearson Lehman*

32 This decision arose from an intervention by the International Tin Council (“ITC”) which objected to the use in proceedings of documents which had emanated from it. Since there was uncertainty as to the precise nature of the documents and the circumstances in which they had been received by the parties to the litigation, the House of Lords dealt with the question of admissibility on the basis of agreed assumptions of fact. There were 13 categories of assumed facts. These included that the document or copy document (i) had been supplied to third parties with or without the consent of the ITC by a member of its staff or by one of the member states of the ITC; (ii) had been made available to and published by the House of Commons select committee; (iii) had been released by the US authorities under the Freedom of Information Act 2000; or (iv) had been a document whose provenance was unknown became widely available in the market and was referred to or quoted from in press reports.

33 Article 7(1) of the International Tin Council (Immunities and Privileges) Order 1972 provided that the ITC shall “have the like inviolability of official archives as in accordance with the 1961 Convention articles is accorded in respect of the official archives of a diplomatic mission”. The argument proceeded on the basis that article 7(1) should be

A construed as conferring inviolability on the archives and documents of the ITC to the like extent that article 24 of the 1961 Convention confers inviolability on the archives and documents of a diplomatic mission.

34 The objection of the ITC was dismissed by the House of Lords. Lord Bridge gave the only substantive speech. He said at p 24H that “the central question at the heart of the dispute which has to be asked in relation to each category is whether the documents in that category  
B ‘belong to’ the ITC”. He held at p 26E that, once a document has been communicated by the ITC to a member or representative of a member (a category 1 document), the protection of article 7(1) ceases to apply to it. In the course of his discussion about the other categories of documents (categories 2 to 13), Lord Bridge interposed the passage on which the Divisional Court relied:

C “Mr Kentridge presented a forceful argument for the defendants based on the proposition that the only protection which the status of inviolability conferred by article 24 of the Vienna Convention and article 7(1) of the [International Tin Council (Immunities and Privileges) Order 1972] affords is against executive or judicial action by the host state. Hence, it was submitted, even if a document was stolen, or  
D otherwise obtained by improper means, from a diplomatic mission, inviolability could not be relied on to prevent the thief or other violator from putting it in evidence, but the mission would be driven to invoke some other ground of objection to its admissibility. I need not examine this argument at length. I reject it substantially for the reasons given by the Court of Appeal. The underlying purpose of the inviolability  
E conferred is to protect the privacy of diplomatic communications. If that privacy is violated by a citizen, it would be wholly inimical to the underlying purpose that the judicial authorities of the host state should countenance the violation by permitting the violator, or anyone who receives the document from the violator, to make use of the document in judicial proceedings.”

35 But he continued at p 27H by saying: “At the heart of the issue on which the validity of the ITC’s claim to inviolability for the categories of document referred to in paragraphs 2 to 13 of the assumed facts depends lies the question of authority”. He concluded that, where a document was communicated to a third party by an officer or employee of the ITC, it no longer belonged to the ITC and article 7(1) did not apply. He therefore rejected the ITC’s case because, on the assumed facts, each category of  
F document was communicated with its authority. He expressed his conclusion at p 31D:

“Having regard to the way in which this matter reached your Lordships, it is not perhaps surprising that one cannot identify with precision the issues raised by the appeal and cross-appeal respectively. But the effect of the conclusions I have expressed is that the ITC have  
H failed and the defendants have succeeded on all the issues save that raised by the separate argument advanced by Mr Kentridge with respect to inviolability which I have rejected.”

36 In our view, the rejection of the separate argument advanced by Mr Kentridge was not part of the ratio of the decision. It was not necessary

for the conclusion that the documents did not enjoy the protection of article 7(1) because (i) they were assumed to have been communicated to members of the ITC or to a third party by an officer or employee of the ITC with actual or ostensible authority; therefore (ii) they no longer belonged to the ITC; and (iii) they no longer enjoyed inviolability as part of the official archives: see p 28B. A

37 We accept, of course, that what Lord Bridge said in the passage relied on by the Divisional Court is of high persuasive value, but we do not consider that we are bound by it. In any event, the present case is distinguishable on the facts. The argument rejected by Lord Bridge was that, even if a document is stolen or obtained by improper means from a diplomatic mission, the 1961 Convention permits it to be adduced in evidence by the violator or anyone who receives the document from the violator. It would be wholly inimical to the underlying purpose of the 1961 Convention to permit a document to be admitted in such circumstances. But Lord Bridge was not addressing a case (such as the present case is assumed to be) where the document has not been obtained from the mission illicitly or by improper means, is in the public domain for the whole world to see and the party wishing to adduce the document in evidence has not been complicit in the publication of the document. B C D

*The submissions on behalf of Mr Bancoult*

38 The word “inviolability” which is used in several articles of the 1961 Convention is not defined. It is used in relation to mission premises in articles 22 and 30, archives, documents and official correspondence in articles 24 and 27.2 and persons in article 29. It has been suggested by Professor Clive Parry in *A British Digest of International Law* (1965), vol 7, p 700 that it means: “immunity from all interference, whether under colour of law or right or otherwise, and connotes a special duty of protection, whether from such interferences or from mere insult, on the part of the receiving state.” E

39 This definition was cited with approval by Dr F A Mann in chapter 12 on “‘Inviolability’ and Other Problems of the Vienna Convention on Diplomatic Relations” of his book, *Further Studies in International Law* (1990), pp 326–327. F

40 It is not in dispute that it is unlawful for the mission’s correspondence to be opened by the authorities of the receiving state. That is incontestably an act of interference by the receiving state. The view of Professor Denza that, in the absence of the consent of the sending state, such documents are inadmissible is explicitly rejected by Dr Mann (*loc cit*) and is not supported by any other commentator. Dr Mann says at p 327 that “inviolability means freedom from any act of constraint, in particular search, requisition, attachment or execution ie the measures specially enumerated in article 22(3)”. Article 22(3) states: “The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.” G H

41 At p 337, Dr Mann says:

“‘Inviolability’, let it be stated once more, simply means freedom from official interferences. Official correspondence of the mission over the

A removal of which the receiving state has had no control can, as has been submitted above, be freely used in judicial proceedings.”

42 Dr Mann returned to the fray when he wrote a case comment on the decision of the House of Lords in the *Shearson Lehman* case [1988] 1 WLR 16 in (1998) 104 LQR 178 (“Inviolability” and other Problems of the Vienna Convention on Diplomatic Relations”). He said that Lord Bridge  
B should have accepted the submission that “inviolability” meant freedom from executive or judicial action by the host state. Neither in article 24 nor elsewhere in the 1961 Convention can “inviolability” have any other meaning than freedom from executive or judicial violation, interference or constraint. He added: “[although] there is no decision anywhere which construes the term for the purposes of the Convention, there is rich material in the academic writings, which supports this literal interpretation based on  
C the *Oxford English Dictionary* and other sources.”

43 Professor McCorquodale submits that, in interpreting the word “inviolable”, the court should have regard to the “object and purpose” stated in the preamble to the 1961 Convention of ensuring the “efficient performance of the functions of diplomatic missions”. A document will be “violated” for the purposes of articles 24 and 27.2 where a state has  
D interfered in the diplomatic premises, persons, archives or documents by (i) the actions of its agents in seizing documents on the premises, on the person or in the archives; (ii) the actions of its organs in compelling the production of a document from the mission; and (iii) the failure of its organs to act with due diligence to prevent an individual from obtaining and using a document from the mission or its archives against the mission or against the person of the ambassador. Professor McCorquodale draws attention to  
E article 31(2) which provides that “a diplomatic agent is not obliged to give evidence as a witness” and contrasts this with articles 24 and 27.2 which contain no reference to evidence.

44 He also relies on *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063, para 9 where Lord Hope said with reference to article 31(1) of the Vienna Convention on the Law of Treaties:

F “There is no warrant in this provision for reading into a treaty words which are not there. It is not open to a court, when it is performing its function, to expand the limits which the language of the Treaty has set for it.”

45 Professor McCorquodale submits that the word “inviolable” cannot be interpreted as including “inadmissible” and it is impermissible to insert  
G the word “inadmissible” into article 24 or 27.2.

*The submissions on behalf of the Secretary of State*

46 Mr Kovats says that the Divisional Court was right to hold that the issue of admissibility was conclusively resolved by *Shearson Lehman*. But we have already given our reasons for holding that the relevant passage in the speech of Lord Bridge was not part of the ratio of the decision and that the  
H case is in any event distinguishable on the facts: see paras 36 and 37 above. Mr Kovats also relies on and adopts the statement of Professor Denza (to which we have referred at para 22 above). He submits that the cable and any unauthorised copy of it is and remains part of the archive of the US mission;

any unauthorised attempt to use the cable or the copy in legal proceedings would be a violation of the protection accorded by articles 24 and 27.2 of the 1961 Convention; and that, the *Shearson Lehman* case [1988] 1 WLR 16 apart, the case law is either neutral or supports the decision of the Divisional Court.

*The case law*

47 The Divisional Court considered that the case law provided little if any support for Mr Bancoult's case. In *Rose v The King* [1947] 3 DLR 618, the defendant was a Canadian subject who had been convicted on charges of conspiracy to act with a group of Russian and Canadian subjects in a manner which was prejudicial to the safety of Canada. Part of the evidence was contained in documents which had been stolen by a clerk who was employed in the embassy and was handed over to the Canadian police. It was argued by the defendant that the documents were inadmissible by reason of diplomatic immunity. The Quebec Court of King's Bench, Appeal Side, held that the documents were admissible. The principal judgment was given by Bissonnette J and contains a lengthy review of the relevant international law principles. He said at p 642 that Canadian law recognised the general inviolability of mission documents in order that diplomatic agents may manage the affairs of their sovereigns in all freedom. But this general rule was not absolute: it was subject to exceptions. He held that it could not be invoked by a Canadian citizen in litigation between his government and himself; nor when the documents revealed an abuse of diplomatic privilege by the foreign state which constituted a threat to the safety of the receiving state; nor in cases where no one connected with the foreign state or its embassy claimed any privilege for the documents: see pp 646–648. This last aspect of the judge's reasoning was queried by Kerr LJ in *Fayed v Al-Tajir* [1988] QB 712, 736G. What Bissonnette J said at p 648 was:

“To sum up, I believe that diplomatic immunity is relative; that the courts must give effect to it and accord its advantage to every diplomatic agent who claims it; that the privilege of taking advantage of the immunity of a foreign state cannot be admitted for a Canadian citizen in litigation between his government and himself, when he is not part of a diplomatic corps; to impose, through a judicial decision, immunity on a state which does not claim any, would be casting a slur on its dignity, its sovereignty, and, through a gesture as ungracious as unexpected, would elevate a simple suit to a degree of international importance and create, at least in theory, a diplomatic conflict contrary to the will of the executive power itself.”

48 Mr Kovats says the explanation for the decision is that the Canadian executive was deploying the documents pursuant to its primary duty to protect its citizens and that the executive and the judiciary must speak with one voice. He submits that the decision should be treated with caution because it pre-dates the 1961 Convention. Further, he relies on Sir Ivor Roberts in *Satow's Diplomatic Practice*, 6th ed (2009), p 113 (in a section written by Professor Denza): “this decision turned on the absence of any intervention or protest either from the Canadian Government which had supplied the documents to the court or from the Soviet Union”.



A 49 To put it no higher, this decision shows that there are circumstances in which a mission document which is inviolable may be admitted in evidence. The immunity of diplomatic documents from use in legal proceedings is not absolute. Nor is the court's reasoning confined in the way that Mr Kovats suggests. To the extent that the decision was based on the fact that there was no objection by Russia to the admission of the documents in evidence, that is of direct relevance in the present case. That is because the US Government has not objected to the use of the cable in the present proceedings (although we accept that the weight to be given to this point would be greater if the US were a party to the proceedings). Furthermore, the decision cannot be brushed aside on the grounds that it predates the 1961 Convention: the preamble states that "the rules of customary public international law should continue to govern questions not expressly regulated by the provisions of the present Convention".

C 50 The other cases relied on by Mr Bancoult in the court below were dismissed by the Divisional Court on the grounds that the inadmissibility point was not taken in any of them. These are *Prosecutor v Taylor (Interlocutory Decision)* 27 January 2011, Special Court for Sierra Leone, *El Masri v Former Yugoslav Republic of Macedonia* (2012) 57 EHRR 783, Grand Chamber, and *Bank Mellat v Council of the European Union* (Case T-496/10), Fourth Chamber of the General Court at Luxembourg, 29 January 2013. Professor McCorquodale submits that the court should have considered "negative state practice" as an aid to the construction of "inviolability". He says that the very fact that no state raised the argument that article 24 and 27.2 prevented the admission of copy cables from the Wikileaks website is, of itself, evidence of state practice which is relevant to the proper interpretation of articles 24 and 27.2.

E 51 In the absence of any ruling in these cases on either the construction of the 1961 Convention or on state practice, we doubt whether much can be made of them.

F 52 In this court, Professor McCorquodale also relies on *Stoll v Switzerland* (Application No 69698/01) (unreported) 10 December 2007, a decision of the Grand Chamber of the European Court of Human Rights. The court had to consider the admissibility of a document drafted by the Swiss ambassador to the US and sent to the Swiss Government in Berne. It was subsequently obtained without the Swiss Government's consent and published in newspapers. The applicant journalist was convicted of "publishing official deliberations". He complained that his conviction was contrary to article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Swiss Government argued that the confidentiality of all diplomatic correspondence was enshrined in articles 24 to 27 of the 1961 Convention as an absolute principle of international customary law. The court held at para 126:

H "Admittedly, the disclosure in issue is not covered by the provisions on the inviolability of archives and documents contained in the Vienna Convention on Diplomatic Relations (articles 24 et seq) referred to by the Government (see para 79 above), which are designed to protect the archives and documents of the accredited state against interference from the receiving state or persons or entities under its jurisdiction.

Nevertheless, the principles derived from those provisions demonstrate the importance of confidentiality in this sphere.” A

53 Mr Kovats submits that the 1961 Convention was not relevant in this case because it was only concerned with the internal actions of a single state, namely Switzerland. The Swiss Government referred to the 1961 Convention in order to make a general point about the importance of diplomatic confidence, not to make a claim that the principle embodied in articles 24 and 27.2 applied in the instant case. In any event, what the Grand Chamber said about the 1961 Convention at para 126 contradicts the claimant’s argument. They said that the Convention protected against interference from the receiving state “or persons or entities under its jurisdiction”. B

54 We accept that the 1961 Convention was not directly relevant in the *Stoll* case (Application No 69698/01) 10 December 2007. There is no discussion about articles 24 and 27.2 beyond that to which we have referred. In these circumstances, we consider that it would be wrong to make much of para 126. We do not, however, accept that it contradicts the claimant’s argument. C

55 Mr Kovats relies on two authorities. The first is *Iraq v Vinci Constructions* (2005) 127 ILR 101, 106–107. A French company obtained a judgment from an Iraqi court for payment of a debt owed under a building contract with the Iraqi Defence Ministry. On the basis of the judgment, the company obtained attachment orders over funds held in bank accounts of the Iraqi state in Brussels. Iraq objected relying on article 24 of the 1961 Convention in relation to the bank accounts of its embassy in Brussels. The Court of Appeal of Brussels upheld the objection. It said that not to extend the protection of article 24 would interfere with the activity of a diplomatic mission to the extent that it “would be prevented in such cases from using funds in a bank account since confidentiality could ultimately not be guaranteed”. We do not consider that this decision sheds any light on the issue before this court. The question was whether there were any reasons to justify the receiving state (Belgium) *compelling* the sending state (Iraq) to disclose the bank accounts. This is an unexceptionable application of article 24. D E F

56 The second authority is *Mid-east Sales Ltd v Engineering & Trading Co PVT Ltd* [2014] EWHC 892 (Comm), Males J. It concerned an application for a third party debt order covering various bank accounts which the Pakistani High Commissioner certified were used for diplomatic purposes. The judge upheld an objection to disclosure that was based on article 24 of the 1961 Convention. This decision is of no greater assistance in the present context than *Iraq v Vinci Constructions* (2005) 127 ILR 101. G

57 To summarise, we have found little in the case law that has been cited to us which clearly points the way to resolving the admissibility issue.

#### *Conclusion on the admissibility issue*

58 We see considerable force in the argument that was advanced by Mr Kentridge and rejected in the *Shearson Lehman* case [1988] 1 WLR 16. Inviolability involves the placing of a protective ring around the ambassador, the embassy and its archives and documents which neither the receiving state nor the courts of the receiving state may lawfully penetrate. H

- A If, however, a relevant document has found its way into the hands of a third party, even in consequence of a breach of inviolability, it is *prima facie* admissible in evidence. The concept of inviolability has no relevance where no attempt is being made to exercise *compulsion* against the embassy. Inviolability, like other diplomatic immunities, is a defence against an attempt to exercise state power and nothing more. In the *Shearson Lehman* case, the Court of Appeal was reluctant to hold that a document, originally obtained in violation of the archives of the ITC, should be admissible in a court of the receiving state. It felt that a court, as an arm of the receiving state, should play its part in protecting the archives of the ITC. But Mr Kentridge submitted that, in view of the existence of an adequate range of remedies available to the ITC if a relevant document was originally obtained in violation of its archives, there was no reason to give an extended meaning to the term “inviolable”.

- C 59 This submission reflects the views expressed by Dr Mann in the publications to which we have already referred. We have already quoted the definition of “inviolability” given by Professor Clive Parry. There is no reference to inadmissibility here. As Dr Mann says, at chapter 12 of *Further Studies in International Law*, p 327, Professor Denza says that “these words are generally interpreted as according the same degree of protection as is given under article 22 of property on mission premises . . . namely immunity from search, requisition, attachment or execution”. In the US, the *Foreign Service Regulations* have prescribed since at least 1941:

- E “Premises which are occupied by a diplomatic representative and members of his staff, either as offices or residences, the goods contained therein, and the records and archives of the mission are inviolable. They cannot be entered, searched or detained by the local authorities even under process of law.”

- F 60 This definition was reaffirmed in 1965 by the *American Law Institute, Restatement of the Law Second, Foreign Relations Law of the United States*, section 77. Similar definitions are to be found in France: see *Dictionnaire de la terminologie du droit international* published in 1960; in Italy: see Professor Guilano *Recueil Des Cours* 100 (1960 ii) 111; and in Germany: see Verdross and Simma, *Universelles Völkerrecht* 3rd ed (1984), section 895. Dr Mann said that to these statements many could be added.

- G 61 In short, the universal definition of “inviolability” is freedom from any act of interference on the part of the receiving state. None of the definitions contains any reference to inadmissibility. Dr Mann says in *Further Studies in International Law* at p 330 that a state which, without the use of force or without exercising executive authority has obtained possession of the diplomat’s documents and uses them without his objection cannot be said to “violate” them within the meaning of article 24. He acknowledges that the position would be different if the state was responsible for the removal of the documents from the mission. In that event, the act of removal would itself amount to a violation of the documents and the unlawfulness of the removal would make it unlawful to benefit from the fruits of the unlawful activity.

- H 62 We note that in the *Shearson Lehman* case [1988] 1 WLR 16, Lord Bridge said at p 29B:

“An infringement of the protection must amount to a violation of the protected documents. It would surely be a misuse of language to say that a protected document had been violated because an officer of the ITC supplied it to a third party without authority, unless the recipient was or ought to have been aware of the absence of authority.” A

63 For the purpose of resolving the issue that arises in this appeal, however, it is not necessary to explore the circumstances in which documents removed from a mission without the consent of the sending state may be admitted in evidence. On the assumed facts of the present case, the documents were sent from the US mission in London to Washington with the consent of the sending state and were communicated to the world by a third party. Mr Bancoult was not implicated in the removal of the documents from the mission or their publication to the world. There is nothing in the case law or the writings of the commentators (apart from those of Professor Denza) which says that the use of documents disclosed in such circumstances in legal proceedings would be contrary to articles 24 and 27.2 of the 1961 Convention. Professor Denza gives no reasons for her opinion that it would be. B C

64 Quite apart from the fact that the weight of opinion is against the professor’s view, it seems to us that it does not sit well with the object and purpose of the 1961 Convention. The purpose of the immunity conferred by articles 24 and 27.2 is to “ensure the efficient performance of the functions of the diplomatic missions”. This idea has been articulated and applied in some of the cases: see, for example, *Rose v The King* [1947] 3 DLR 618: see para 47 above and *Iraq v Vinci Constructions* (2005) 127 ILR 101, 106: see para 55 above. Even if inviolability can in principle extend to inadmissibility of documents in some circumstances, it should not do so where the inadmissibility cannot promote or contribute to the efficient performance of the functions of a mission. The protection against the disclosure and use of the archives and documents of a mission can unquestionably promote and contribute to the efficient performance of a mission’s functions in some cases. But it cannot do so where any damage that is done to a mission by the disclosure of an archive or document has already been done by their disclosure by a third party for which the party who wishes to adduce the evidence has no responsibility. In our judgment, it makes no sense for the concept of inviolability of the mission to be extended to prevent a document that is in the worldwide public domain from being admitted in proceedings in England and Wales, simply because it emanated from a diplomatic mission in the UK. Had the document emanated from the US embassy in Paris, we doubt whether the argument would have got off the ground. There is the further relevant point, derived from *Rose v The King*, that the US Government has not objected to the use of the cable in these proceedings. D E F G

65 To summarise, we would allow the appeal on the admissibility issue on the narrow basis that admitting the cable in evidence in the instant case did not violate the archive and documents of the US mission, since it had already been disclosed to the world by a third party. H

*The Official Secrets Act 1989*

66 The issue here is whether disclosure of the material contained in the cable would be an offence under section 6 of the Official Secrets Act 1989 so

A as to require the court to exclude it. Sections 2 and 3 of the Act make it an offence for a person who is or has been a Crown servant to make “damaging disclosure”, without lawful authority, of any information, document or other article relating to defence or international relations. A disclosure is damaging if it endangers the interests of the United Kingdom abroad or is likely to do so: see section 2(2)(b)(c) and section 3(2)(a)(b). Section 6 provides:

B “(1) This section applies where— (a) any information, document or other article which— (i) relates to security or intelligence, defence or international relations; and (ii) has been communicated in confidence by or on behalf of the United Kingdom to another state . . . has come into a person’s possession as a result of having been disclosed (whether to him or another) without the authority of that state . . . and (b) the disclosure without lawful authority of the information, document or article by the person into whose possession it has come is not an offence under any of the foregoing provisions of this Act.

C “(2) Subject to subsection (3) below, the person into whose possession the information, document or article has come is guilty of an offence if he makes a damaging disclosure of it knowing, or having reasonable cause to believe, that it is such as is mentioned in subsection (1) above, that it has come into his possession as there mentioned and that its disclosure would be damaging.

D “(3) A person does not commit an offence under subsection (2) above if the information, document or article is disclosed by him with lawful authority or has been previously been made available to the public with the authority of the state . . .

E “(4) For the purposes of this section . . . the question whether a disclosure is damaging shall be determined as it would be in relation to a disclosure of the information, document or article in question by a Crown servant in contravention of section . . . 2(1) and 3(1) above.

F “(5) For the purposes of this section information or a document or article is communicated in confidence if it is communicated on terms requiring it to be held in confidence or in circumstances in which the person communicating it could reasonably expect that it would be so held.”

67 The Divisional Court held that, on the assumptions made [2014] Env LR 11, para 30 (see para 17 above), the information contained in the cable was communicated to US officials by British officials in confidence. It was not suggested that the information was made available to the public with the authority of the US. Nor could it be suggested that any person publishing the information had lawful authority to make it available. Lawful authority for a disclosure could only be given in the circumstances specified in section 7.

68 The information contained in the cable related to international relations and arguably also to defence. Thus, its disclosure by any person relevant to these proceedings would be an offence if it was damaging. It follows that, for present purposes, the critical question is whether disclosure would be damaging.

69 Mr Fleming submitted to the Divisional Court and repeated to us that the “disclosure” of the information by using the cable in these

proceedings would not be damaging because it would add nothing to the disclosure which has already occurred as a result of the extensive publicity given to it. He relied on paragraph 63 of the White Paper on the reform of section 2 of the Official Secrets Act 1911 as an aid to construction. In principle, this is permissible: *R v Shayler* [2003] 1 AC 247, para 11, per Lord Bingham. However, paragraph 63 needs to be set in its context. The draftsman of the White Paper considered “a defence of prior publication” in these terms:

“62. Under the Government’s 1979 Bill it would not have been an offence to disclose without authority information in certain categories if the defendant could show that the information had been made available to the public before his disclosure. The rationale for this defence was that, if the information in these categories was publicly available, a second disclosure could not be harmful. It seems to the Government that this rationale is flawed. There are circumstances in which the disclosure of information in any of the categories which the Government proposes to cover in new legislation may be harmful even though it has been previously disclosed. Indeed, in certain circumstances a second or subsequent disclosure may be *more* harmful. For example, a newspaper story about a certain matter may carry little weight in the absence of firm evidence of its validity. But confirmation of that story by, say, a senior official of the relevant government department would be very much more damaging. In such circumstances, the Government considers that the official should still be subject to criminal sanctions . . .

“63. The Government does not, therefore, propose that there should be an absolute defence of prior publication for any category of information. But in cases in which the prosecution would under the Government’s proposals have to show that disclosure was likely to result in harm, the offence would not be made out if no further harm is likely to arise from a second disclosure. The prior publication of the information would be relevant evidence for the court to consider in determining whether harm was likely to result from a second disclosure, but it would not be—and, in the Government’s view, should not be—conclusive.”

70 As we have already noted at para 13, Mr Kovats did not object to the “disclosure” of the document for the purpose of cross-examining Mr Roberts and Ms Yeadon, provided that the questions were not posed by Mr Fleming on the premise that the document was authentic. It would be confirmation that it was authentic which would be damaging—an echo of paragraph 62 of the White Paper. The Divisional Court said that it was satisfied that this concern could be allayed by adopting the course of making the assumption that the document was authentic, without finding as a fact that it was.

71 It held that the fact that there had been extensive prior disclosure of the cable and the information contained in it meant that the further disclosure effected by its use in the proceedings was not damaging and no offence would thereby be committed under the Official Secrets Act. The fact that, on first disclosure, an offence may have been committed should not prevent its use in these proceedings.

72 Mr Kovats did not address us orally on this issue. His original (excessively long) skeleton argument addressed the issue between paras 54 and 75. His reduced skeleton argument merely says at para 33 that the issue

A only arises if the court allowed the appeal on the 1961 Convention point. For all its length, the original skeleton argument has very little to say about whether the deployment of the cable in cross-examination would be damaging within the meaning of the Act if the court were to make no finding as to its authenticity. At para 69 of the original skeleton argument, Mr Kovats contended that, if the court were to make a finding that there was a US cable which stated what appears in the Guardian and Telegraph newspaper articles, that would for all practical purposes be understood as the court (i) authenticating the cable and (ii) overriding the NCND policy of the UK Government. He submits that these consequences would be damaging to international relations and defence within the meaning of section 6 of the Act.

C 73 We can find no fault in the approach adopted by the Divisional Court or its reasoning. In view of the assumptions that it made, we do not see how they could reasonably be understood as authenticating the cable or overriding the NCND policy. Having regard to (i) the nature of the information contained in the cable and (ii) the fact that it was already in the public domain, it was right to hold that further disclosure in the proceedings could not be damaging.

D *The effect of the exclusion of the cable*

E 74 Although we have concluded that the cable should have been admitted in evidence, the question remains whether Mr Bancoult's case was adversely affected by the Divisional Court's ruling on admissibility. Mr Fleming submits that the effect of the ruling was to deprive him of the opportunity of properly testing the evidence of the principal witness, Mr Roberts, as well as that of his junior colleague, Ms Yeadon. He says that an expression of improper purpose by Mr Roberts was capable of infecting the subsequent consultation and the propriety of the decision taken by the Secretary of State on 1 April 2010. It is not possible to know what difference cross-examination based on the cable would have made. Absent such cross-examination, it was not properly open to the Divisional Court to dismiss the possibility of an improper purpose attaching to Mr Roberts or to the Secretary of State.

H 75 The court dismissed this possibility after a careful and thorough review of the evidence at paras 53–77 of its judgment to which reference should be made. It is not necessary to rehearse in detail the review that was undertaken by the court. The following is a summary. The catalyst for making the MPA was a proposal made in July 2007 by an American environmental group, Pew Environmental Group, to Professor Sheppard, the environmental adviser for the BIOT. On 5 May 2009, Mr Roberts submitted a briefing note to the Secretary of State which explained the benefits of the proposal. These included that, because of the absence of a settled population and the strict environmental regime already in force, the BIOT was one of the few places in which a large scale approach to conservation was possible; and it offered great scope for scientific and climate change research. The Secretary of State's reaction was enthusiastic. His private secretary emailed Mr Roberts to say that the Secretary of State was "fired up" after the meeting and "enthusiastic to press ahead" with the proposal.

76 This was followed by a meeting to discuss the proposal with US Embassy officials on 12 May 2009. This is the crucial meeting the gist of which was purportedly summarised in the copy cable dated 15 May 2009. Both Mr Roberts and Ms Yeadon attended the meeting and were cross-examined about it. Mr Roberts denied making any reference to “Man Fridays”. He said that he recognised that the declaration of an MPA, if “entrenched”, would create a serious obstacle to resettlement. Ms Yeadon also denied that Mr Roberts had used the words “Man Fridays” or that he had said that establishing a marine park would put paid to resettlement claims. The Divisional Court said [2014] Env LR 11, para 61 that it found Ms Yeadon to be “an impressive and truthful witness”. Having referred to an important note of a meeting held on 25 March 2009, the court said at para 63: “as Ms Yeadon understood, at official level, HM Government regarded the resettlement issue as settled by the 2004 Order, subject only to the pending decision of the Strasbourg Court” (this is a reference to the claimant’s application which was eventually dismissed by the European Court of Human Rights on 20 December 2012: see para 7 above).

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

78 In a note dated 30 March 2010, Ms Yeadon proposed that the Secretary of State should publish the report on consultation and declare his belief that an MPA should be established, but only after further work had been done. There followed a flurry of emails between officials. The Secretary of State did not accept Ms Yeadon’s advice. On 1 April, he announced the creation of an MPA in the BIOT which included a “no take” Marine Reserve where commercial fishing would be banned. Mr Roberts duly made the proclamation on 1 April.

79 The Divisional Court expressed its conclusion on the improper motive point in these terms [2014] Env LR 11, paras 74–76:

“74. This material makes it clear that it was the personal decision of the Foreign Secretary to declare an MPA on 1 April 2010, against the advice of his officials. There is no evidence that, in doing so, he was motivated to any extent by ‘an intention to create an effective long-term way to prevent Chagossians and their descendants from resettling in the BIOT’. His private secretary could hardly have written on 7 May 2009, the day after the presentation of the proposal by Professor Sheppard to him, that he was ‘really fired up about this’ if the proposal was presented as a cynical ploy to frustrate Chagossian ambitions. It is obvious that he was responding to a proposal presented by a man, Professor Sheppard, who was keen to see it adopted and put into effect for scientific and conservation purposes only. Later, on 31 March 2010, when the Foreign Secretary made the decision to go ahead immediately, the decision had



A nothing to do with Chagossian ambitions. The decision to override  
official advice can best be understood in the political context: Parliament  
was about to be dissolved. The Foreign Secretary no doubt believed that  
the decision would redound to the credit of the Government and,  
perhaps, to his own credit. It would do so the more if a decision with  
immediate effect was taken. Officials thought that this would create  
B difficulties but it was the Foreign Secretary's prerogative to override their  
reservations and make the decision which he did. There is simply no  
ground to suspect, let alone to believe or to find proved, that the Foreign  
Secretary was motivated by the improper purpose for which the claimant  
contends.

C "75. It is significant that the Foreign Secretary's announcement  
contained the caveat which always accompanied public and private  
statements by officials: that the decision was subject to the pending  
judgment of the Strasbourg Court. Unless there was some deep plot to  
frustrate an adverse judgment, of which there is no evidence at all, this  
fact alone demonstrates that no sensible official in the FCO could have  
believed that the establishment of an MPA would fulfil the improper  
purpose alleged. Nor could it have done. The proclamation made by  
D Mr Roberts on 1 April 2010 stated: 'The detailed legislation and  
regulations governing the said Marine Protected Area and the  
implications for fishing and other activities in the Marine Protected Area  
and the territory will be addressed in future legislation of the territory.'  
The only step taken since then has been to allow fishing licences current at  
1 April 2010 to expire and to issue no more. What prevents the return of  
E Chagossians to the islands is the 2004 Order, not the MPA. If, at some  
future date, HM Government decided or was constrained by a judgment  
of a court to permit resettlement or the resumption of fishing by  
Chagossians, nothing in the measures so far taken would prevent it or  
even make it more difficult to achieve.

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

H 80 In order to test Mr Fleming's submission that the effect of the  
Divisional Court's ruling was to deprive him of the opportunity of properly  
testing the evidence of the witnesses, it is necessary to see what cross-  
examination he was able to undertake. During day 1 and day 2 of the  
hearing, Mr Fleming cross-examined Mr Roberts extensively about the

meeting of 12 May 2009 by reference to various documents, including the cable. Although Mr Roberts was not prepared to answer questions as to whether the contents of the cable were accurate (because of the NCND policy), nevertheless he answered questions as to what he might or might not have said at the meeting. Mr Fleming confirmed to the court that his general purpose in cross-examining on the cable, paragraph by paragraph, was to establish its general accuracy by reference to relatively uncontroversial passages in it. A  
B

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

82 Mr Roberts accepted that he did say to the US officials that the establishment of an MPA would in effect put paid to the resettlement claims. He said that this was “a recognition of a reality” that, if the MPA was “entrenched” (i.e. a law which would be impossible or difficult to repeal), this would be a “serious obstacle to resettlement”. He denied that he had said anything about “footprints” or “Man Fridays”: “that was not the nature of the conversation”. Mr Fleming sought to persuade the court to give a ruling as to whether Mr Roberts should be required to answer questions about the accuracy of the contents of the cable. Mitting J asked whether it was necessary to have this debate, since Mr Roberts had accepted that a consequence of establishing an MPA would be that the hopes of the Chagossians to return would be thwarted. Richards LJ was not sure how much more Mr Roberts could say. He had indicated why he declined to answer the “ultimate” question; but he had answered all the “intermediate” questions. D  
E

83 The court did not make any final ruling at this stage and Mr Fleming continued with his cross-examination of Mr Roberts by reference to the cable. He put it to Mr Roberts that his purpose was to use the MPA to prevent or kill off the claims for resettlement; and that this policy “shines out of the record of that meeting and is not a policy you would want to put in written form so that it could ever be seen by the Chagossians or in any litigation”. Mr Roberts replied: “No, I reject that suggestion entirely. I do not believe it is possible to keep a policy of that significance quiet.” F

84 On day 2, the court gave its ruling expressly allowing Mr Fleming to put questions to Mr Roberts as to the accuracy or otherwise of the summary of matters set out in the cable. A short time after Mr Fleming had resumed his cross-examination, Mr Kovats intervened to say that he wished to make submissions as to the admissibility of the cable on the basis of the 1961 Convention. G

85 Submissions were made on the morning of day 3. The court ruled that (i) articles 24 and 27.2 of the 1961 Convention precluded any reliance on the cable as a copy of a genuine cable regarding what was said at the meeting of 12 May; and (ii) any further cross-examination of Mr Roberts and any cross-examination of Ms Yeadon must proceed on that basis. Questions could not, therefore, be put on the basis that the purported cable H

A was a copy of a genuine cable and the court would allow the witnesses to answer questions on the express basis that they neither confirmed nor denied the authenticity of the purported copy cable.

86 On day four, the court amplified the effect of its ruling. Richards LJ said that there was a distinction “between putting questions on the basis that the purported copy cable, the newspaper article, is a record of the meeting, and asking whether matters that are set out in the article are correct statements of what took place at the meeting”. He added:

“it is open to [Mr Fleming] to take the witness to the newspaper publication, and to refer to the text of that and to ask ‘Is this what was said? Did you say this? Did this happen?’ without breaching our ruling. It is a fine dividing line, but . . . we would not stop you following that line of questioning”.

87 Mr Fleming did not apply to cross-examine Mr Roberts any further. He did, however, cross-examine Ms Yeadon extensively by reference to the cable. He put various paragraphs of the cable to her and asked specific questions based on them. Some questions produced forthright denials. For example, she strongly denied that Mr Roberts had used the words “Man Fridays”: “Absolutely not. Mr Roberts did not say this. If he had said it, I would have been shocked.” She also denied that he had said that establishing the MPA would in effect put paid to the resettlement claims of the former residents of the archipelago: “I’m telling the court he did not say that. It wouldn’t have made any sense. The MPA wouldn’t have done this. This was not British policy at the time.” She denied that there was a “hidden agenda”. There was no “ulterior motive”. Mr Fleming also put to her that Mr Roberts had said at the meeting that the BIOT had a great role in ensuring the security of the UK and the US, much more than anyone foresaw in the 1960s. She said that she did not recall Mr Roberts saying this, “but it is something that would have been said”. In answer to yet further questions based on the cable, Ms Yeadon said that she had no recollection as to whether what was recorded in the cable had been said or not.

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

89 For the same reasons, we consider that it is unrealistic to suggest that the court would have reached a different conclusion as to the motivation or purpose of Mr Roberts, Ms Yeadon or the Secretary of State if the cable had been formally admitted as an authentic document and as evidence of the truth of its contents. The court had the benefit of seeing Mr Roberts and Ms Yeadon give evidence over a long period. It is clear that it accepted the material parts of their evidence. In doing so, the court was alive to the fact that (as stated at para 59 of the judgment) Mr Roberts recognised that an MPA, if entrenched, would create a serious obstacle to resettlement. We do not accept that there is a realistic possibility that the court's assessment of the evidence of Mr Roberts and Ms Yeadon would have been affected if the cable had been formally admitted in evidence as an authentic document. In reaching this conclusion, we have borne in mind the need to exercise caution in denying relief on the ground that a legally correct approach would have made no difference to the outcome: see, for example, *R v Chief Constable of the Thames Valley Police, Ex p Cotton* [1990] IRLR 344, per Bingham LJ at para 60. But for the reasons that we have given, we are satisfied that the admission of the cable in evidence would have made no difference.

90 It follows that, to the extent that the claimant's case is that the improper purpose of Mr Roberts and/or Ms Yeadon is to be imputed to the Secretary of State, this was rejected by the court's finding that there was no such improper purpose. For the reasons we have given, there is no basis for challenging this finding or for remitting the matter for further cross-examination to be conducted on the footing that the cable is admitted in evidence as an authentic document.

91 More fundamentally, the Divisional Court made a clear finding [2014] Env LR 11, para 74 that it was the personal decision of the Secretary of State to declare an MPA on 1 April 2010 and that there was no evidence that *he* was motivated to any extent by an intention to prevent Chagossians and their descendants from resettling in the BIOT. It said that there was no ground to suspect, let alone to believe or to find, that the Secretary of State was motivated by the alleged improper purpose. There is no appeal against the finding that it was the Secretary of State who made the decision. Mr Fleming did not cross-examine Mr Roberts or Ms Yeadon as to any discussions they had with the Secretary of State about the proposal for an MPA, nor did he suggest to either of them that the Secretary of State was motivated by the alleged improper purpose. The fact that the cable was not admitted in evidence as an authentic document did not prevent Mr Fleming from pursuing such a line of cross-examination if that was what he wanted to do.

92 The claimant has not sought to challenge the findings of the Divisional Court at paras 74–77 in so far as they were based on the oral and documentary evidence that was placed before them. The challenge is based solely on the ground that the claimant was deprived of the opportunity of (i) adducing the cable in evidence as a near-contemporaneous authentic record of the meeting of 12 May 2009; (ii) inviting the court to accept the contents of the cable as evidence of the truth of what was said at the meeting; (iii) inviting the court to prefer the cable to the evidence of Mr Roberts and Ms Yeadon; and (iv) cross-examining Mr Roberts and Ms Yeadon on the basis that the cable should be treated as an authentic document. We have

A already sufficiently explained why in reality (iv) was not a lost opportunity. For similar reasons, we do not consider that there is any realistic possibility that, if Mr Fleming had been able to take any of the steps in (i) to (iii), the finding of the court would have been different.

B 93 We therefore conclude that, even if the cable had been admitted in evidence, the court would have decided that the MPA was not actuated by the improper motive of intending to create an effective long term way to prevent Chagossians and their descendants from resettling in the BIOT. In other words, the court's ruling that the cable was not admissible had no effect on the proceedings and is not, therefore, a ground for allowing the appeal.

*The second ground of appeal: the consultation paper*

C *The consultation paper*

D 94 The second ground of appeal relates to the claimant's challenge that the MPA decision was flawed by reason of the failure to disclose, in the consultation paper, "that the MPA proposal, in so far as it prohibited all fishing, would adversely affect the traditional and/or historical rights of Chagossians to fish in the waters of their homeland, as both Mauritian citizens and as the native population of the Chagos Islands."; see para 7(d) of the claimant's re-amended statement of facts and grounds.

E 95 As we have already said, the consultation ran from 10 November 2009 to 5 March 2010. The consultation document was published solely in electronic form, on a website, with a view to giving it wide availability. In addition to what was stated by the Secretary of State in his foreword (which we have quoted at paragraph 8 above), the document also contained the following passages which are relevant for present purposes (and are largely taken from the Divisional Court's summary):

"Who should read this document? Anyone with an interest in the British Indian Ocean Territory or the Overseas Territories in general. Anyone with an interest in the protection of the environment.

F "Making your views heard: we are keen to gather all views on Environmental Protection Agency British Indian Ocean Territory in any supporting evidence. You should not feel constrained by the specific question(s) or feel obliged to offer responses to all of them. Concentrate on those in which you have most interest. It would be helpful if you could describe your views, suggestions and experiences when responding, rather than giving 'yes' or 'no' answers. We have made every effort to bring the consultation to the attention of those with an interest in the British Indian Ocean Territory. The document has been disseminated to wider audience through website representative groups, directly to representative interested parties/government/organisations with the main interest. However, if you think there are other ways that we can increase awareness of the consultation, please do let us know.

H "Consultation Questions

"It would be helpful if you construct your response to address the question(s) below, but you should not be restricted to those questions. Please send us any information that you feel is relevant to your response.

"1. Do you believe we should create a marine protected area in the British Indian Ocean Territory? If yes, from consultations with

scientific/environmental and fishery experts, there appear to us to be 3  
 broad options for a possible framework: (i) Declare a full no-take marine  
 reserve for the whole of the territorial waters and Environmental  
 Preservation and Protection Zone (EPPZ)/Fisheries Conservation and  
 Management Zone (FCMZ); or (ii) Declare a no-take marine reserve for  
 the whole of the territorial waters and EPPZ/FCMZ with exceptions for  
 certain forms of pelagic fishery (e g tuna) in certain zones at certain times  
 of the year. (iii) Declare a no-take marine reserve for the vulnerable reef  
 systems only. A

“2. Which do you consider the best way ahead? Can you identify other  
 options? B

“3. Do you have any views on the benefits listed at p 11? What  
 importance do you attach to them?

“4. Finally, beyond marine protection, should other measures be taken  
 to protect the environment in BIOT?” C

96 Under the heading “Scope”, the document explained that the  
 consultation was in response to a proposal of the Chagos Environment  
 Network “The Chagos Archipelago: its Nature and Future” (to which a link  
 was given), which recommended the establishment of a conservation area in  
 the BIOT. The document continued: D

“Any decision to establish a marine protected area would be taken in  
 the context of the Government’s current policy on the territory, following  
 the decision of the House of Lords in *R (Bancoult) v Secretary of State for  
 Foreign and Commonwealth Affairs (No 2)* [2009] AC 453 that the  
 British Indian Ocean Territory (Constitution) Order 2004 and the British  
 Indian Ocean Territory (Immigration) Order 2004 are lawful; i e, there is  
 no right of abode in the [BIOT] and all visitors need a permit before  
 entering the [BIOT]. Access to a part of the BIOT is also restricted under  
 our treaty obligations with the US. It is the Government’s provisional  
 view, therefore, that we would not establish a permanent research facility  
 in any part of the [BIOT]. Any decision to establish a marine protected  
 area would not affect the UK Government’s commitment to cede the  
 [BIOT] to Mauritius when it is no longer needed for defence purposes.  
 This consultation and any decision that may follow for the establishment  
 of a marine protected area are, of course, without prejudice to the  
 outcome of the current, pending proceedings before the European Court  
 of Human Rights (ECtHR). This means that should circumstances  
 change, all the options for a marine protected area may need to be  
 reconsidered. An impact assessment has been written for this proposal  
 and can be found at Annex A . . .” E  
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97 There followed a “background” section which described the extent  
 of existing environmental protection of the area and set out the Foreign and  
 Commonwealth Office’s view as to the added value of creating an MPA,  
 which it was said took account of the findings of a workshop held on  
 5–6 August 2009 at the National Oceanography Centre, Southampton,  
 to which a link was given. Annex A to the document was headed  
 “Impact/Costs & Benefits”. Under “Costs” it referred to the cost of  
 patrolling the area and the absence of fishing licence income to offset  
 that cost if a no-take MPA were created. Under “Benefits” it gave further  
H

A links to the Chagos Environment Network brochure and the National Oceanographic Centre workshop, and summarised conservation benefits, climate change benefits, scientific benefits and development benefits.

98 Under the heading “Impact” it stated:

B “As well as the international fishing community, there are some groups who will be directly or indirectly affected by the establishment of a marine protected area and any resulting restrictions or a ban on fishing.”

As regards the US, it referred to the possible need to exclude Diego Garcia and its three mile territorial waters from any MPA in order to avoid any impact on the operational capability of the base there. As regards Mauritius and the Chagossian community, it stated:

C “*Mauritius*

D “We have discussed the establishment of a marine protected area with the Mauritian government in bilateral talks on the British Indian Ocean Territory—the most recent being in July 2009 (see communiqué of the meeting held in Port Lewis at Annex C). The Mauritian government has in principle welcomed the concept of environmental protection in the area. The UK Government has confirmed to the Mauritian that the establishment of the marine protected area will have no impact on the UK’s commitment to cede the [BIOT] to Mauritius when it is no longer needed for defence purposes. We will continue to discuss the protection of the environment with the Mauritians.

E “*The Chagossian community*

F “Following the decision of the House of Lords in [*Bancoult* (No 2)], the current position under the law of BIOT is that there is no right of abode in the [BIOT] and all visitors need a permit. Under these current circumstances, the creation of a marine protected area would have no direct immediate impact on the Chagossian community. However, we recognise that these circumstances may change following any ruling that might be given in the proceedings currently pending before the European Court of Human Rights in Strasbourg in the case of *Chagos Islanders v United Kingdom*. Circumstances may also change when the [BIOT] is ceded to Mauritius. In the meantime, the environment will be protected and preserved.”

G 99 The joint communiqué set out in Annex C referred to a round of bilateral talks between the Mauritian and British Governments in July 2009 and included the following (in the form in which it appeared after an initial protest by Mauritius):

H “The British delegation proposed that consideration be given to preserving the marine biodiversity in the waters surrounding the Chagos Archipelago/British Indian Ocean Territory by establishing a marine protected area in the region. The Mauritian side welcomed, in principle, the proposal for environmental protection and agreed that a team of officials and marine scientists from both sides meet to examine the implications of the concept with a view to informing the next round of talks. The UK delegation made clear that any proposal for the establishment of the marine protected area would be without prejudice to

the outcome of the proceedings in the European Court of Human Rights. The Mauritian side reiterated the proposal it made in the first round of the talks for the setting up of a mechanism to look into the joint issuing of fishing licences in the region of the Chagos Archipelago/British Indian Ocean Territory. The UK delegation agreed to examine this proposal and stated that such examination would also include consideration of the implications of the proposed marine protected area . . . Both Governments agreed that nothing in the conduct or content of the present meeting shall be interpreted as: (a) a change in the position of Mauritius with regard to sovereignty over the Chagos Islands/British Indian Ocean Territory; (b) a change in the position of the United Kingdom with regard to sovereignty over the Chagos Islands/British Indian Ocean Territory. . .”

100 Annex D summarised UK policy on marine protected areas, including reference to relevant international programmes.

101 From the date of the creation of the MPA on 1 April 2010, no new licences for commercial fishing were issued, although existing licences were allowed to run their course.

*The Divisional Court’s judgment in relation to the consultation paper*

102 The Divisional Court dealt at considerable length with the issue as to whether the consultation paper was flawed in the manner alleged by the claimant; see [2014] Env LR 11, paras 100–162. It extensively reviewed the relevant history of fishing activity in the BIOT undertaken both by Mauritian vessels under licence and by Chagossians and summarised the evidence and respective submissions of the parties. It concluded:

“160. Whether the omission of reference to the issue resulted in a flawed consultation must also be assessed in the context of what the consultation document did contain. The potential impact of an MPA on commercial fishing was squarely raised and must have been obvious to all concerned. The responses from fishing interests show that the impact was clearly understood. If anyone wished to raise an argument that a ban on fishing would be incompatible with Mauritian fishing rights, they were free to do. We do not place much weight on the link in the consultation document to the National Oceanography Centre report referring to Mauritian historical fishing rights, but the point was there for anyone who wished to advance or develop it. Against that background, the omission of express reference to the point in the consultation document itself is in our view a matter of no significance. It did not affect the fairness of the consultation or the validity of the MPA decision taken following that consultation.

“161. We add in passing that in so far as complaint is made about the statement in the consultation document that the creation of an MPA ‘would have no direct immediate impact on the Chagossian community’, it was open to consultees to draw attention to the fact that Chagossian fishermen on commercial fishing vessels would be affected by the ban on fishing in the MPA, and to the consequences of that for them and their families, whether or not that could be said to amount to a ‘direct immediate impact’. The way the matter was expressed in the



A consultation document did not give rise to a legal flaw in the consultation process.

“162. For those reasons we have reached the clear conclusion that the claimant’s case on the fishing rights issue should fail.”

B *The submissions on behalf of Mr Bancoult in relation to the consultation paper and fishing rights*

103 The broad complaint presented to this court (and to the Divisional Court) by Mr Fleming on behalf of the claimant was that the consultation paper wrongly stated that the MPA proposal had “no direct effect on the Chagossians” and failed to mention that, at the very least, Mauritius had an arguable claim to continue to fish in the proposed MPA area of the BIOT, irrespective of its claims to sovereignty. So far as the Chagossians themselves were concerned, Mr Fleming submitted that, in reality, the evidence clearly showed that the Chagossians had traditionally enjoyed and exercised fishing rights in Chagos waters in the no-take area of the MPA at least up until 1973, when the last of the resident population left the islands; that thereafter a considerable number of Chagossians, who were Mauritian citizens, exercised such traditional fishing rights by working as crew members on Mauritian-flagged vessels operating in the BIOT, until the imposition of the MPA, coupled with the decision taken in October 2010 not to grant any new commercial fishing licences, brought such activity to an end; and that, moreover, the claimant and other displaced Chagossians had an entitlement to the preservation of their important historic links with the sea and fishing around the Chagos Islands, against the day when they should return to the islands, whether under British or Mauritian (or joint UK-Mauritian) sovereignty.

104 Mr Fleming submitted that the absence of any (or any adequate) mention of the Chagossian and Mauritian fishing interests and/or rights in the consultation paper, amounted to an important and material flaw in the consultation process which had the result of making the consultation and the subsequent decision unfair and unlawful. The FCO played down the interests of the Chagossians and the Mauritians in the paper, with the result that not only the Chagossians, but also the wider world, were deprived of the opportunity of making relevant representations on behalf of the Chagossian community. He referred by way of example to a statement of Professor David Bellamy, an environmentalist.

105 Mr Fleming mounted three principal challenges to the Divisional Court’s decision in relation to what was said (or not said) in the consultation paper in relation to fishing rights:

C *Ground (i)*: he submitted that the Divisional Court [2014] Env LR 11, para 151 had misdirected itself in concluding that Chagossian traditional fishing rights were lost in 1973 “with the loss of the right of abode and their removal from the islands” and that “there is nothing in the history since the last of the resident population left in 1973 to justify the view that Chagossians as such have continued to enjoy fishing rights in respect of BIOT waters or, therefore, that a no-take MPA would have an adverse effect on such rights”. He submitted that the right of abode was not lost in 1973, was expressly affirmed by the Divisional Court in 2000 (per Laws LJ in the first *Bancoult* case [2001] QB 1067, para 39) and remained until 2008 when it was finally extinguished as a result of the House of Lords’ judgment in the

*Bancoult No 2* case [2009] AC 453. Despite their physical removal from the islands by the UK Government, Chagossians continued to exercise traditional fishing rights in the Chagos Archipelago, albeit from fishing vessels which now travelled from Mauritius, or under a Mauritian flag. These were Chagossian traditional fishing rights which continued, not just at the time of the public consultation on the MPA in late 2009/early 2010, but until the decision was taken not to renew licences in October 2010. Accordingly he submitted there was clear and credible evidence that “a no-take MPA *would* have an adverse effect on such rights” of the Chagossians.

*Ground (ii)*: Mr Pleming submitted that the Divisional Court [2014] Env LR 11, para 55 had misdirected itself as to the significance of the “number of Mauritian-flagged vessels licensed to fish in BIOT waters and affected by the no-take MPA” and as to the question of whether this constituted “a sufficient argument concerning the existence of Mauritian fishing rights in respect of BIOT waters as to require mention to be made of it in the consultation document if the consultation was to be lawful”. The fact that the number of Chagossians engaged in this fishing was small was not material. In the circumstances, the statement in the consultation document that the creation of an MPA “would have no direct immediate impact on the Chagossian community” was materially misleading in as much as the traditional fishing rights practised by Chagossians owning and employed on vessels from Mauritius fishing in BIOT waters would be extinguished by a no-take MPA.

*Ground (iii)*: Mr Pleming submitted that, the Divisional Court misdirected itself when considering the legal stance taken by Mauritius in the paper by Professor Sir Ian Brownlie CBE, QC. It wrongly concluded [2014] Env LR 11, para 133 that the “alternative legal framework” which was advanced in that paper “was bound up closely with the issue of sovereignty” and that “the paper contains no suggestion that Mauritius might enjoy fishing rights over BIOT waters on grounds other than sovereignty”. In so concluding, the Divisional Court disregarded important sections of the paper which clearly demonstrated that, notwithstanding the argument by Mauritius as to sovereignty, the “alternative legal framework” involved promises or undertakings offered by the United Kingdom in 1965. One such promise was tied to the acknowledgment of then existing fishing rights. Furthermore there was a direct distinction to be drawn between what Professor Brownlie called “reversionary rights” and those giving immediate and continuing access to the natural resources of the BIOT such as fishing rights. Professor Brownlie’s paper, properly understood, therefore stated that undertakings acknowledging then existing fishing rights were distinct from the issue of Mauritian sovereignty. In para 144 of its judgment the Divisional Court erred in implicitly accepting the evidence of Mr Roberts as to why he considered that Mauritius had expressed no claim to fishing rights and so concluded, erroneously, at para 155 that “save in the context of the separate dispute over sovereignty, Mauritius did not suggest that it had any special rights to fish in BIOT”. The overall finding at para 159 that there “was not a sufficient reason in the circumstances why the issue should have been mentioned explicitly in the consultation document” was a product of the Divisional Court’s misdirection.

- A 106 Accordingly, Mr Fleming submitted, the consultation was materially flawed when it said that the creation of the MPA “would have no direct immediate impact on the Chagossian community”, and failed to mention the arguable Mauritian claims to fishing rights. These flaws (contrary to the conclusion of the Divisional Court at [2014] Env LR 11, para 161) were not cured by the fact that consultees could disagree and raise additional questions.
- B 107 The particular points made by Mr Fleming were that the consultation process was flawed because the consultation paper: (i) did not refer to the fact that, prior to their final departure from the Chagos Islands in May 1973, Chagossians living in the islands had traditionally engaged in fishing in the Chagos Archipelago of a nature which was described in a minute dated 17 November 1965 from the Governor of Mauritius to the Colonial Office as “mainly hand line with some basket and net fishing by local population for own consumption”; see para 107 of the judgment; on any basis, as Mr Kovats pointed out, this could not be described as commercial fishing of the waters; (ii) did not expressly refer to the fact that, following the expulsion of the remaining Chagossians in 1973, until such time as the decision was taken not to renew licences in October 2010, a relatively few Chagossians, living in Mauritius, were employed on fishing vessels which travelled from Mauritius, or under a Mauritian flag, and commercially fished in the waters of the Chagos Islands; (iii) did not refer to the fact that the Chagossians claimed to have an entitlement to the preservation of their historic links with the sea and fishing around the Chagos Islands, against the day when they should ultimately return to the islands; (iv) stated that the creation of an MPA “would have no direct immediate impact on the Chagossian community”; (v) did not state that it was arguable that Mauritius had fishing rights in respect of BIOT waters, independent of its claim to sovereignty to the Chagos Islands.
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*Conclusion on the consultation paper issue*

- F 108 Largely for the reasons given by the Divisional Court, we reject the claimant’s appeal on this ground. We comment on each of the three grounds of challenge as follows.
- G 109 Ground (i): we can see no fault with the statement [2014] Env LR 11, para 151 to which we have referred at para 105 above. The reality is that, since 1973, the Chagossians had neither enjoyed, nor exercised, any rights in their capacity as Chagos Islanders to fish the BIOT waters. The evidence demonstrated that there was no history of commercial fishing in the BIOT by Chagossians, even before 1973 and certainly not after that date. Being employed as crew members on Mauritian (or other) flagged vessels, which had licences to fish the BIOT waters, cannot be equated with the exercise of “traditional fishing rights” by the Chagossians. In this context it is, in our view, immaterial precisely when the right of abode was lost and there is no need to explore any application of the doctrine of “relation back” in respect of the House of Lords’ judgment in the *Bancoult (No 2)* case [2009] AC 453 in 2008. What is clear is that, as at the date of the consultation paper, the House of Lords had determined in the *Bancoult (No 2)* case that there was no right of abode in the BIOT.
- H 110 Ground (ii): likewise we reject Mr Fleming’s second ground of challenge. The reality was, as the Divisional Court pointed out [2014]

Env LR 11, paras 153–156, not only that the numbers engaged in the fishery were small, but also that Mauritius had at no time contended that the effect of the obligation undertaken by the UK Government in September 1965 was to confer fishing rights on Mauritius as a matter of international law, separate from the issue of sovereignty. A

III Ground (iii): but, in our judgment, even if, as Mr Fleming submitted, the legal stance taken by Mauritius in relation to fishing rights (as set out in the paper by Professor Sir Ian Brownlie CBE, QC) was not limited to the issue of sovereignty, but extended to an alternative “legal framework” that Mauritius might claim to enjoy fishing rights over the BIOT waters on grounds other than sovereignty, that was no basis for concluding that the consultation process was flawed. In para 144 of its judgment the Divisional Court accepted the evidence of Mr Roberts as to why he considered that Mauritius had expressed no claim to fishing rights. If that had been wrong as a matter of fact, there was nothing to prevent Mauritius, or indeed anyone else, from raising the argument that a ban on fishing would have been incompatible with Mauritian fishing rights. It follows that we concur with the view expressed in the last two sentences at [2011] Env LR 11, para 160 by the Divisional Court: B C

“Against that background, the omission of express reference to the point in the consultation document itself is in our view a matter of no significance. It did not affect the fairness of the consultation or the validity of the MPA decision taken following that consultation.” D

#### *Generally*

112 We reject the submission that the consultation process was flawed because the detailed points raised by Mr Fleming were not expressly referred to in the consultation paper. The impact of the proposed imposition of the MPA was clearly addressed. The reality was that the terms of the consultation paper offered a clear opportunity to the Chagossians, and indeed to anyone else, to canvas the alleged fishing rights of the Chagossians as traditionally enjoyed and their alleged entitlement to preserve their historic links with, and knowledge of, fishing in Chagos Islands waters and to raise concerns that the proposals might damage such links. It would (or should) also have been obvious to anyone reading the paper that the proposals might affect both the continued ability of Mauritius (and indeed other flagged) vessels to fish in Chagos Islands waters under licence, and that, consequently, the livelihood of Chagossians employed on such vessels might be threatened. It was open to consultees to draw attention to the fact that the total ban imposed by the MPA might weaken the Chagossians’ knowledge of, and traditional links with, the BIOT waters. It was also open to consultees to draw attention to the fact that Chagossian fishermen on Mauritian commercial fishing vessels might be affected by the ban on fishing in the MPA, and the consequences of that to them and their families. We do not accept Mr Fleming’s submission that non-Chagossian consultees might have responded to the consultation differently if the asserted claims of the Chagossians had been more strongly emphasised or underlined in the consultation paper. E F G H

113 Accordingly we reject the second ground of appeal.

A *The third ground of appeal: breach of the FEU Treaty*

114 This part of the judgment addresses the four European law questions that have been argued on this appeal. The first question, which was raised by the claimant, was whether the Divisional Court had misdirected itself in finding that the declaration of an MPA was compatible with EU law. The claimant's primary submission was that the imposition of the MPA causing the elimination of existing fishing activity and potential consequential economic development of the BIOT was sufficient to engage and breach the UK's EU Treaty obligations in article 4(3)EU of the EU Treaty read in conjunction with articles 198FEU and 199FEU of the FEU Treaty. The remaining three questions were raised by the Secretary of State's respondent's notice as follows: (i) Whether the Divisional Court was wrong to hold that article 4(3)EU, read together with articles 198FEU and 199FEU, was capable of giving rise to directly effective rights which could be enforced by individuals before national courts; (ii) Whether the Divisional Court ought to have held that the subject matter of the dispute fell outside the applicable scope of EU law; and (iii) Whether the Divisional Court was wrong to hold that it could reach a decision that was inconsistent with the decision of the European Commission without requesting a preliminary ruling from the Court of Justice of the European Union ("the CJEU").

115 It would be logical to deal with the first two points raised in the respondent's notice first, since they go to the heart of the applicability of EU law to the Secretary of State's decision to declare an MPA. None the less, we think we should start by considering the way in which the Divisional Court addressed the application of EU law to the facts. We shall do so on the assumption, but without deciding at this stage, that the Secretary of State would not succeed on his respondent's notice. Before doing that, however, we should recite the basic provisions of the treaties on which primary reliance is placed.

*The central provisions of the treaties*

116 We set out only the central provisions of the treaties relied on by the claimant, but we do so adding emphasis to the parts of the provisions on which particular reliance is placed.

117 Article 4(3)EU provides as follows:

"Pursuant to the principle of sincere co-operation, the Union and the member states shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The member states shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. *The member states shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*"

118 Article 198FEU provides as follows:

"The member states agree to associate with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom. These countries and territories (hereafter called 'the countries and territories') are listed in Annex II. *The purpose of association shall be to promote the*

*economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole. In accordance with the principles set out in the Preamble to the treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.”*

119 Article 199FEU provides as follows:

“Association shall have the following objectives.

“1. Member states shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to the Treaties.

“2. Each country or territory shall apply to its trade with member states and with the other countries and territories the same treatment as that which it applies to the European state with which it has special relations.

“3. The member states shall contribute to the investments required for the progressive development of these countries and territories.

“4. For investments financed by the Union, participation in tenders and supplies shall be open on equal terms to all natural and legal persons who are nationals of a member state or of one of the countries and territories.

“5. In relations between member states and the countries and territories the right of establishment of nationals and companies or firms shall be regulated in accordance with the provisions and procedures laid down in the chapter relating to the right of establishment and on a non-discriminatory basis, subject to any special provisions laid down pursuant to article 203.”

120 Article 203FEU allows the Council, acting unanimously on a proposal from the European Commission, to lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the EU. The Council Decision 2013/755/EU of 25 November 2013 on the association of overseas countries and territories with the European Union (“Overseas Association Decision”) (OJ 2013 L344, p 1) and its predecessors duly laid down such provisions, which were applicable to the BIOT. No specific provision of the Overseas Association Decision is relied on by the claimant.

*Did the Divisional Court misdirect itself in finding that the declaration of a MPA was compatible with EU law?*

121 The core of the claimant’s argument on substantive infringement is that article 4(3)EU and article 198FEU were breached by the UK when it imposed the MPA, because the MPA could jeopardise the attainment of the EU’s objectives including the promotion of the economic, social and cultural development of the BIOT and the furtherance of the interests and the prosperity of the potential inhabitants of the BIOT. The UK had, it is said, a negative obligation under these articles not to jeopardise these specific objectives.

122 The claimant points to certain findings of fact made by the Divisional Court. First, the MPA had a serious adverse effect on the incomes

A of the Chagossian fishermen resident in Mauritius and employed on boats registered in other countries. Secondly, the MPA had cut an important link between those Chagossian fishermen and their ancestral home. Thirdly, the MPA would result over time in the diminution of the particular expertise of those Chagossian fishermen in relation to fishing in BIOT waters. Finally, the Divisional Court accepted that these matters were relevant to the potential effectiveness of a resettlement strategy based on fishing and tourism as suggested in the “Returning Home” paper of March 2008 produced by the Chagos Refugees Group.

B 123 In the light of those findings, the claimant submits, in essence, that it was not open to the Divisional Court to conclude that (i) the MPA had no appreciable adverse effect on the economic cultural and social development of the islands, (ii) the decision to create the MPA fell far short of a decision that deprived article 198FEU of its effet utile, and (iii) the MPA did not jeopardise the attainment of the objectives of the treaties.

C 124 In so far as the Divisional Court was relying on a margin of appreciation or the principle encapsulated in the maxim ‘de minimis non curat lex’, the claimant argues that it was wrong to do so, first because no such principles apply to breaches of these Treaty obligations, secondly because the effect of the MPA was to sever the last remaining link between the Chagossians and their homeland, so giving the MPA a far greater significance, and thirdly because the Divisional Court ignored the significance of the elimination of the potential for economic development. The claimant urged the court to view all these alleged breaches in the context of the history of the UK’s unlawful expulsion of Chagossians from their homeland, and of the Chagossians’ aspirations to return to their homeland.

E 125 In answer, the Secretary of State submits that the Divisional Court made no error of law on this point, but instead undertook a multi-factorial evaluative assessment with which this court should not interfere. He relies in particular on the findings made by the Divisional Court to the effect that: (i) there was no commercial fishing (as opposed to hand fishing for personal consumption) in the BIOT before the population left; (ii) the only fishing that continued in the BIOT was fishing by a small number of vessels flagged to non-EU countries; and (iii) the only Chagossian involvement in this fishing activity was by 20–50 employees on Mauritian registered boats. Finally, the Secretary of State points, as the Divisional Court did, to the reversible nature of the MPA and the fact that it was concerned only with the lawfulness of the imposition of the MPA and not the removal of the indigenous population.

F 126 In our judgment, the Divisional Court was entitled to reach the factual conclusions that it did. It undertook a careful evaluation of the evidence and concluded that there were actually no Chagossian fishing activities at all when the MPA was imposed. The few Mauritian ships holding licences to fish were, it was true, manned by some Chagossians, but that did not turn Mauritian fishing activity into Chagossian fishing activity. The effect on a few individual exiled Chagossians and the maintenance of their local fishing expertise cannot, in our judgment, even arguably, amount to jeopardising the promotion of the economic and social development of the BIOT and the furtherance of the interests and the prosperity of the inhabitants of the BIOT, whether or not the inhabitants can properly be interpreted as including those with aspirations to return to the BIOT.

127 Article 4(3)EU and articles 198FEU and 199FEU are all directed at the macro-economic picture, not at the minutiae of the interests of a handful of individuals. As we have already pointed out above in the second section of this judgment, there was no commercial fishing by Chagossians in the BIOT before the Chagossians were removed; the main commercial activity having been coconut farming, not fishing. There was no Chagossian fishing activity when the MPA was imposed, and no intention to undertake such activity unless re-settlement became a reality. The EU's objectives of promoting economic, social and cultural development of the BIOT cannot be attained or even aspired to whilst the Chagossians are prohibited from living in the islands. It is that prohibition that could be said to jeopardise the promotion of the economic, social and cultural development of the BIOT. Realistically, the MPA had no meaningful or real effect at all on such development.

128 Moreover, there can have been no possible breach of article 4(3)EU taken together with article 199FEU. There was no evidence of any trade within the BIOT at the time of the MPA, and no evidence of any trade between the BIOT and the UK or any other member state. Accordingly, the objectives in article 199FEU including equal trade treatment, investment for progressive development and non-discrimination were not in any meaningful sense jeopardised in relation to trade with the BIOT.

129 EU treaties must be given a purposive construction. We do not accept that the loss of some local fishing knowledge held by a few individuals can amount to a violation of the EU objectives of promoting economic, social or cultural development. Nor do we accept the argument that the MPA jeopardises the potential for a resettlement strategy based on fishing and tourism. The MPA can, as the Divisional Court held, be removed or amended at any time. The FCO itself announced in January 2014 a new resettlement feasibility study including the possibility of reintroducing fishing. That demonstrates directly the unreality of the suggestion that the MPA is itself responsible for damaging the development of the BIOT.

130 We do not think it is necessary for us to decide whether the de minimis or the margin of appreciation principles could or should be applied in the context of an alleged breach of these Treaty obligations, because we do not think there was a breach whether or not the principles apply. Nor do we think that it is necessary to decide whether the word "inhabitants" in article 198FEU can include prospective or former inhabitants. Both issues raise potentially difficult questions of EU law that might themselves be appropriate for a preliminary ruling if they were likely to be determinative of the point we have to decide. But we do not think they are. We are prepared to assume both points in favour of the claimant. Even making that assumption, we cannot see that there has been a breach of the articles concerned.

131 In truth the allegations are an artificial construct. The obligations in article 4(3)EU read together with articles 198FEU and 199FEU are looking at the big picture. Viewed from that perspective, it is impossible to contend that the facts found by the Divisional Court as consequences of the imposition of the MPA actually or prospectively jeopardised the EU's objectives of promoting the economic, social and cultural development of the BIOT. Such development of the BIOT, and the furtherance of the interests and prosperity of inhabitants of the BIOT, are simply not about the



A individual incomes of Chagossians resident in Mauritius, individuals' historic local knowledge, or even the severing of a cultural link (which was in practice severed long before the Chagossians were removed from the BIOT). To breach the Treaty articles, the member state would have to be shown to have done something significant to jeopardise the macro objectives of the promotion of economic, cultural and social development of the BIOT or the furtherance of the interests of the inhabitants of the BIOT. In truth, it is not the MPA that can be said to jeopardise those objectives, even if the prohibition on Chagossians living in BIOT could be said to do so. The findings made by the Divisional Court did not arguably amount to a breach of article 4(3)EU read together with articles 198FEU and 199FEU.

C 132 In these circumstances, we have reached the clear conclusion that the Divisional Court did not misdirect itself in finding that the MPA was compatible with EU law. This was a conclusion that the Divisional Court was entitled to reach on the evidence. It was unaffected by any error of law, and it was a conclusion with which this court ought not to interfere.

D 133 Accordingly, the three EU law points raised by the respondent's notice (direct effect, outside the scope of EU law, and the effect of the commission's decision) do not strictly need to be decided. Significant argument was, however, addressed to them, and, as we have said, at least the first two arise logically *before* the question of whether the Divisional Court misdirected itself as to the application of EU law. We think, therefore, that we should shortly express our views on these points.

E *Was the Divisional Court wrong to hold that article 4(3)EU, read together with articles 198FEU and 199FEU, was capable of giving rise to directly effective rights which could be enforced by individuals before national courts?*

F 134 The Divisional Court concluded [2014] Env LR 11, para 196 that the obligation in article 4(3)EU to refrain from any measure which could jeopardise the attainment of the Union's objectives was sufficiently clear, precise and unconditional to be capable of giving rise to directly effective rights on which individuals can rely before the domestic courts.

G 135 The argument on this point has been somewhat obscured by a disagreement between the parties as to what precisely the claimant was contending for. The Secretary of State seems to have understood the claimant as contending that there was a positive obligation on the UK under article 4(3)EU and article 198FEU to promote the economic and social development of BIOT, whilst the claimant submits that he contends only for a negative obligation to refrain from jeopardising the objective of promoting economic development. The point is important, because it is easier to reject the notion of such a positive obligation as the European Commission expressly did in the conclusion it reached in dealing with the claimant's complaint on 7 July 2011 saying that articles 198FEU and 199FEU did not "give rise to a positive obligation for the member states to actively promote the economic and social development of their OCTs [overseas countries and territories]".

H 136 The parties are, however, agreed as to two matters: first, that the basic test for directly effective Treaty obligations is whether the obligation in question is sufficiently clear, precise and unconditional (see *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Nederlandse*

*Administratie der Belastingen* (Case 26/62) [1963] ECR 1 relating to “obligations which the Treaty imposes in a clearly defined way on . . . member states”), and secondly, that there is no authority which directly decides whether the obligations in article 4(3)EU, read together with articles 198FEU and 199FEU as to OCTs, are of direct effect. A

137 The Secretary of State placed great reliance on the decision of the CJEU in *Hurd v Jones (HM Inspector of Taxes)* (Case 44/84) [1986] QB 892. In that case, an English teacher at a European School in Luxembourg claimed that supplements paid to him should be exempt from UK tax under European law, and claimed that the UK was obliged under article 5 (the then equivalent of article 4(3)EU) to give effect to a 1957 Decision to which it had acceded when the UK joined the EU. The argument was that article 5 prevented the UK taking measures that jeopardised the attainment of the EU’s objectives detrimental to the functioning of the school. The CJEU said: B C

“38. As regards, more specifically, article 5 of the EEC Treaty, it should be noted that the second sentence of the first paragraph of that article imposes on member states an obligation to facilitate the achievement of the Community’s tasks, while the second paragraph requires member states to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty. As the court held in particular in its judgment of 10 February 1983 (*Luxembourg v European Parliament* (Case 230/81) [1983] ECR 255), that provision is the expression of the more general rule imposing on member states and the Community institutions mutual duties of genuine co-operation and assistance. Those duties, which are derived from the treaties, cannot be applied to agreements between the member states which lie outside that framework, such as for example the statute of the European school. D E

“39. The position would be different if the implementation of a provision of the treaties or of secondary Community law or the functioning of the Community institutions were impeded by a measure taken to implement such an agreement concluded between the member states outside the scope of the treaties. In that event the measure in question could be regarded as contrary to the obligations arising under the second paragraph of article 5 of the EEC Treaty. . . .” F

“47. According to a consistent line of decisions of the court, a provision produces direct effect in relations between the member states and their subjects only if it is clear and unconditional and not contingent on any discretionary implementing measure. G

“48. Those requirements are not fulfilled with regard to the obligation at issue in these proceedings, namely the obligation arising from article 5 of the EEC Treaty to refrain from any unilateral measure that would interfere with the system adopted for financing the Community and apportioning financial burdens between the member states. The differences which exist in that respect between the practices of the member states concerning the detailed rules and procedures for exempting teachers from domestic taxation show that the substance of that obligation is not sufficiently precise. It is for each member state concerned to determine the method by which it chooses to prevent its tax treatment of teachers at the European schools from producing H

A detrimental effects for the system of financing the Community and apportioning financial burdens between the member states.

B “49. . . . it must therefore be stated that, by virtue of the duty of genuine co-operation and assistance which member states owe the Community and which finds expression in the obligation laid down in article 5 of the EEC Treaty to facilitate the achievement of Community’s tasks and to refrain from jeopardizing the attainment of the objectives of the Treaty, member states are prohibited from subjecting to domestic taxation the salaries paid by the European schools to their teachers, where the burden of such taxation is borne by the Community budget. That obligation does not produce direct effects capable of being relied on in relations between member states and their subjects.”

C 138 In *Hurd v Jones*, therefore, the relevant obligation was held, as Ms Maya Lester (who argued this aspect of the case for the claimant) submitted, not to have been sufficiently precise. More importantly perhaps, the CJEU was pointing out that article 4(3)EU was “the expression of the more general rule imposing on member states and the Community institutions mutual duties of genuine co-operation and assistance”, and that such duties, could not be applied to “agreements between the member states which lie outside that framework”.

D 139 Mr Kieron Beal QC, who argued this aspect of the case for the Secretary of State, referred us to numerous CJEU decisions where the nature of article 4(3)EU was considered. As it seems to us, however, none of them took us much further than the principles enunciated in the *van Gend & Loos* case [1963] ECR 1 and *Hurd v Jones* [1986] QB 892. They depended very much on the particular circumstances in which article 4(3)EU was deployed, none of which was even similar to the situation in this case. The closest the authorities came to giving assistance on this point was *Antillean Rice Mills NV v Commission of the European Communities* (Case C-390/95) [1997] ECR I-769, where Advocate General Alber indicated somewhat elliptically at paras 54–55 of his opinion that he did not think that article 132 (the predecessor of article 199FEU) was directly effective.

F 140 In our judgment, the underlying question of direct effect in this case is not quite as straightforward as the Divisional Court perceived it to be. The authorities do not seem to us to say that, simply because you can spell out of treaty provisions a clear, precise and unconditional obligation on a member state, that obligation will automatically be directly enforceable. The question of direct effect is also concerned with whether the provisions in question are in the nature of general rules imposing on member states mutual duties of genuine co-operation and assistance, and whether there are likely to be legitimate differences that exist between the practices of the member states concerning the detailed rules and procedures for implementing the general rules. These factors will have a bearing on whether the provisions are properly to be regarded as being of direct effect.

G H 141 It is worthy of note in this case that the detailed applicable rules for achieving the objectives in Part 4 of the TFEU (which includes article 198FEU and 199FEU) have been laid down in successive Overseas Association Decisions, yet the claimant in this case has placed no reliance on any of those detailed provisions.

142 We have formed the view that it would be surprising if the objectives stated in articles 198FEU and 199FEU could properly be regarded as sufficiently clear, precise and unconditional to be regarded as directly effective. This is not because one cannot spell a clear obligation out of the words of article 4(3)EU read together with articles 198FEU and 199FEU. It is because articles 198FEU and 199FEU are all about the attainment of objectives of association between OCTs and the European Union, not about the detailed ways in which that association and those objectives should be fulfilled. Simply adding to the statement of the objectives the words of article 4(3)EU requiring member states to “refrain from any measure which could jeopardise the attainment of the Union’s objectives” does not seem to us to turn what are statements of aspiration into directly effective provisions of EU law.

143 The claimant’s argument is attractive in one sense. It is easy to state that, by the imposition of the MPA, the UK has taken (or, in the words of article 4(3)EU, not refrained from) a measure which might jeopardise the promotion of the economic, social and cultural development of the BIOT. That statement reads as if it is an obvious breach. But this is not a semantic exercise. It is a substantive one; and in our judgment, Part 4 of the TFEU provides for objectives that are not hard-edged obligations. The objectives may be achieved in many different ways in different OCTs, and we do not believe, that, even taking into account the obligatory provision in article 4(3) EU, they can have a direct effect or be directly enforceable in the national courts.

144 As we have already mentioned, this part of our decision is not determinative of the outcome. Had it been determinative, we would not have considered the matter to be free from doubt, and bearing in mind the lack of any direct CJEU authority on the point, we would have thought it appropriate to refer the matter for a preliminary ruling to the CJEU.

*Ought the Divisional Court to have held that the subject matter of the dispute fell outside the applicable scope of EU law?*

145 The Divisional Court did not expressly address this point, even though it was argued by the Secretary of State. And once again, we have been deluged with a host of CJEU cases. We can address the point shortly, because all of Mr Beal’s main propositions were common ground. They were, essentially at least, that: (i) OCTs are treated as non-member countries by the EU, save to the extent that they are expressly brought within the scope of EU law; (ii) relations between a member state and an OCT cannot be equated with the relations between two member states; and (iii) facts and matters that concern a wholly internal situation between a UK national and the UK Government do not fall within the scope of EU law.

146 Ms Lester submitted for the claimant that the free movement cases on which the Secretary of State relied were nothing to the point. Here, the claimant relies on his aspiration to return to his homeland and on the economic activity or potential economic activity in which he hopes to engage. The EU dimension is that the BIOT is specifically mentioned in Annex II to the TFEU, and the UK has assumed responsibilities in relation to it.

147 In our judgment, if the obligations in article 4(3)EU read together with articles 198FEU and 199FEU were of direct effect, it would be open to

- A the claimant to assert those rights against the UK. It is true that the claimant is now a UK citizen, but his assertions do not, in any sense, relate to a wholly internal UK situation. There is no analogy with the way in which a member state treats its own nationals or nationals of third party states (eg *Dereci v Bunderministerium für Inneres* (Case C-256/11) [2012] All ER (EC) 373). It is true also that the Divisional Court held that the claimant could not rely on the rights of others, but we think it was correct to say that the claimant was asserting his own rights as a displaced Chagossian. Displaced Chagossians are the only persons affected by the UK's obligations in relation to the BIOT, because there is no resident population. The fact that these persons are UK citizens would not, of itself, deprive them of the right to assert EU law rights in relation to the BIOT against the UK.

- C 148 In the circumstances, we think that the Divisional Court was right not to have held that the subject matter of the dispute fell outside the applicable scope of EU law.

*Was the Divisional Court wrong to hold that it could reach a decision that was inconsistent with the decision of the European Commission without requesting a preliminary ruling from the CJEU?*

- D 149 The Divisional Court [2014] Env LR 11, paras 174–182 summarised the complaint that the claimant made to the European Commission and the decisions that the commission reached in relation to it, ultimately closing the file. We do not propose to repeat that material in this judgment.

- E 150 It is clear to us, however, that the arguments advanced by the claimant in support of his complaint to the commission were substantively the same as the argument advanced to us. The arguments were more wide ranging but, when the commission came ultimately to reject the claimant's complaint, it did so on 28 June 2012 on the basis that “your letter refers to a violation of article 4(3)FEU [sic] in conjunction with articles 198FEU and 199FEU . . . However, as already indicated, no infringement of articles 198FEU and 199FEU could be established”.

- F 151 Accordingly, the conclusion that we have already reached as to the breach of the Treaty articles is, as was the Divisional Court's conclusion, the same as that reached by the commission. The point now raised by the Secretary of State is, therefore, more academic than our consideration of “direct effect” which underlay the need to decide on the question of the alleged breach of the Treaty articles relied upon. We propose, therefore, to deal with matter very briefly.

- G 152 The legal basis for the commission's action in responding to the claimant's complaint is contained in article 258FEU which provides that:

- H “If the commission considers that a member state has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the state concerned the opportunity to submit its observations. If the state concerned does not comply with the opinion within the period laid down by the commission, the latter may bring the matter before the Court of Justice of the European Union.”

In *Alfons Lütticke v European Commission* (Case 48/65) [1966] ECR 27, the CJEU made clear:

“[the] part of the procedure which precedes reference of the matter to the court constitutes an administrative stage intended to give the member state concerned the opportunity of conforming with the treaty. During this stage, the commission makes known its view by way of an opinion only after giving the member state concerned the opportunity to submit its observations. *No measure taken by the commission during this stage has any binding force*” (emphasis added).

153 The Divisional Court concluded [2014] Env LR 11, para 193 that the decision to close the file, rather than to bring infringement proceedings before the CJEU, did not amount to a binding decision that the UK was *complying* with EU law in relation to the matters complained about. It was, therefore, open to the claimant to raise the EU law matters in these proceedings without the court being constrained by either the reasoning or the conclusion of the commission.

154 Four authorities are relevant. In *R (Air Transport Association of America) v Secretary of State for Energy and Climate Change (International Air Transport Association intervening)* (Case C-366/10) [2013] PTSR 209, the CJEU said at paras 47–48 that there was settled case law to the effect that national courts do not have the power to declare acts of the European Union institutions to be invalid. In *Masterfoods Ltd v HB Ice Cream Ltd* (Case C-344/98) [2000] ECR I-11369, which the Divisional Court dealt with extensively at paras 185–187, the CJEU held, in effect, that in respect of a breach of EU competition rules, general principles of legal certainty require national courts to avoid giving decisions which would conflict with the commission’s decision. In *Mediaset SpA v Ministero dello Sviluppo economico* (Case C-69/13) 13 February 2014, paras 25, 28, 29–31 and 36, the CJEU decided that statements of position made by the commission, whilst not binding on the national court, should be taken into account as a relevant factor in its assessment, even if its own findings would not call into question any binding decision of the commission. Finally, in *Crehan v Intntrepreneur Pub Co (CPC) (Office of Fair Trading intervening)* [2007] 1 AC 333, the House of Lords held that the *Masterfoods* case was inapplicable to that case because there was no possibility of a conflict between “a decision of the commission that the Whitbread agreement infringed article 81 and a decision of the national court that the Intntrepreneur agreements did not”: see paras 56 and 69 of Lord Hoffmann’s speech.

155 In our judgment what these cases show is that it is necessary to identify precisely in any given situation what the European Commission is deciding and what it is not deciding. Here, there was no question of the national court declaring an act of the commission to have been invalid. The commission’s rejection of the claimant’s complaint was not formally brought before the court. Moreover, the position is not analogous to a competition infringement on which the commission has reached a concluded view.

156 Undoubtedly, however, in this case, the European Commission has considered and opined on the arguments that were addressed to the national court. Although the commission’s decision is not binding, and the questions considered by the commission were never referred to the CJEU under article 258FEU, the commission has expressed a view. As it turns out, that

A view is similar to the views of this court. The question of a reference does not therefore arise. But had these views clashed, we think that it might well have been appropriate to refer the matter to the CJEU for a preliminary ruling on the grounds that the matter was not *acte clair*.

B 157 We conclude, therefore, on this point that the Divisional Court was wrong to say that the court was not in any way constrained by the commission's statement of position and reasoning in response to the claimant's complaint. Had it been reaching an opposite conclusion to that of the commission, it should, at least, have given careful consideration to the need for a reference to be made for a preliminary ruling from the CJEU. Happily, that has not proved necessary since our conclusions and reasoning broadly accord with those of the commission.

158 Accordingly, we reject the third ground of appeal.

C *Disposal*

159 It follows that, for the reasons we have given, we dismiss the claimant's appeal.

*Appeal dismissed.*  
*Claimant to pay 50% of Foreign*  
*Secretary's costs of appeal.*  
*Detailed assessment of claimant's*  
*publicly funded costs.*  
*Permission to appeal refused.*

SUSAN DENNY, Barrister

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**TAB 9**

*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No.4) [2017] AC  
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Supreme Court

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**Regina (Bancourt) v Secretary of State for Foreign and  
Commonwealth Affairs (No 4)**

[2016] UKSC 35

2015 June 22;  
2016 June 29

Lord Neuberger of Abbotsbury PSC,  
Baroness Hale of Richmond DPSC,  
Lord Mance, Lord Kerr of Tonaghmore,  
Lord Clarke of Stone-cum-Ebony JJSC

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*Supreme Court — Jurisdiction — Power to set aside earlier decisions — Foreign Secretary appealing against quashing as irrational of ministerial determination not to resettle colonial territory — Foreign Secretary failing to disclose certain relevant documentation — House of Lords allowing appeal — Whether Supreme Court having jurisdiction to set aside earlier decisions of itself or House of Lords — Grounds on which jurisdiction might be exercised — Whether failure to disclose impugning House of Lords' decision — Whether decision to be set aside*

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The United Kingdom agreed to make the islands which formed the British Indian Ocean Territory ("BIOT") available to the United States for defence purposes. In 1971 the United States took over the largest island as a military base and the Immigration Ordinance 1971, made by the Commissioner for BIOT, provided for the indigenous inhabitants to be compulsorily removed and, by section 4, prohibited them from returning to the islands. In 2000 the applicant, a citizen of BIOT who had been born there and was prevented from returning there by the Ordinance, successfully claimed judicial review by way of an order quashing section 4 of the 1971 Ordinance. The Foreign Secretary accepted the court's decision and announced that a recently commissioned feasibility study into the prospects of resettling the islanders would proceed to a second stage of assessment. The commissioner revoked the 1971 Ordinance and by the Immigration Ordinance 2000 permitted the indigenous population to return to all but the largest island. In 2002 a report of the study was published which concluded that while resettlement was feasible in the short term, the long-term cost was likely to be prohibitive and that, even in the short term, natural events such as storms and seismic activity were likely to make life difficult for a resettled population. In 2004 the Foreign Secretary decided not to proceed with resettlement and immigration controls were reintroduced by section 9 of the British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory Immigration Order which prohibited entry to or presence or residence in the islands. The claimant successfully sought judicial review by way of an order to quash section 9 of the 2004 Constitution Order but the House of Lords, by a majority, allowed the Foreign Secretary's appeal, concluding that the Foreign Secretary's decision not to permit return was not, in all the circumstances, irrational or unfair. During those proceedings no challenge was made to the feasibility report, the findings of which were relied on by the Foreign Secretary and accepted by the applicant. In separate subsequent litigation the Foreign Secretary disclosed certain relevant documents (the "Rashid documents") relating to the preparation and finalisation of the feasibility report on which he had relied in the earlier proceedings.

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The applicant applied to set aside the House of Lords' decision on the grounds that (i) the Rashid documents cast doubt on the reliability of the feasibility report and should, pursuant to the Foreign Secretary's duty of candour in public law proceedings, have been disclosed in the earlier proceedings, and (ii) fresh evidence was now available which invalidated the basis on which the House of Lords had proceeded and provided independent justification for setting aside its decision. In

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A particular the applicant asserted that the Rashid documents showed that alterations made by government officials to the draft report undermined the objectivity and independence of the final report and that, had the Rashid documents been disclosed in the earlier proceedings, the reliability of the feasibility report could have been successfully challenged. In 2014–2015, following the departure of the United States from its base, a new feasibility study was commissioned which recognised the possibility of resettlement of BIOT.

B On the application to set aside the House of Lords' decision—

*Held*, (1) that, although the Supreme Court would not reopen an appeal because it thought the decision originally reached was wrong, it had inherent jurisdiction to correct any injustice caused by an earlier judgment reached by it or by the House of Lords where a party, through no fault of his, had been subjected to an unfair procedure which had probably resulted in significant injustice and there was no alternative effective remedy, or where fresh evidence was discovered after a judgment had been given which was not susceptible of appeal, or where a party had failed to disclose material which might constitute important evidence and (per Baroness Hale of Richmond DPSC and Lord Kerr of Tonaghmore JSC) might have had a decisive effect on the outcome; and that, having regard to the duty of candour lying on a state party in public law proceedings, the Foreign Secretary should have located and disclosed the Rashid documents and failure to do so, though unintentional and not in bad faith, was reprehensible (post, paras 3, 5–8, 24, 151–152, 154–161, 183–186, 190–192).

D *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte* (No 2) [2000] 1 AC 119, HL(E), *Taylor v Lawrence* [2003] QB 528, CA and *In re Uddin (A Child)* [2005] 1 WLR 2398, CA applied.

But (2), refusing the application (Baroness Hale of Richmond DPSC and Lord Kerr of Tonaghmore JSC dissenting), that on detailed examination of the 2008 decision and the Rashid documents, and, having regard to the general conclusions and the assessment of the vulnerability involved in resettlement expressed in the draft report which remained unaltered in the final report, there was no real possibility, likelihood or prospect that a court would or could have seen in the process of finalising the report or in the associated materials now adduced anything which made it irrational or otherwise unjustifiable for the Foreign Secretary to act as he had done in 2004; that there was nothing in the fresh evidence and materials to indicate that there was any basis for setting aside the House of Lords' decision; that the new circumstances created by the new feasibility study would provide a fresh opportunity for the executive to consider the question of resettlement and for any islander to challenge the 2004 Orders in the light of all the information now available; and that, accordingly, the House of Lords' decision would not be set aside (post, paras 64–76, 77–80).

The following cases are referred to in the judgments:

- G *Bain v The Queen* [2009] UKPC 4, PC  
*Broome v Cassell & Co Ltd (No 2)* [1972] AC 1136; [1972] 2 WLR 1214; [1972] 2 All ER 849, HL(E)  
*Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB); *The Times*, 10 October 2003; [2004] EWCA Civ 997; *The Times*, 21 September 2004, CA  
*Chagos Refugees Group in Mauritius v Information Comr* (EA/2011/0300) (unreported) 4 September 2012, FTT
- H *Feakins v Department for Environment, Food and Rural Affairs* [2006] EWCA Civ 699; [2006] NPC 66, CA  
*Graham v Police Service Commission* [2011] UKPC 46, PC  
*Ladd v Marshall* [1954] 1 WLR 1489; [1954] 3 All ER 745, CA  
*Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234; [1966] 3 All ER 77, HL(E)

- R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte* (No 2) [2000] 1 AC 119; [1999] 2 WLR 272; [1999] 1 All ER 577, HL(E) A
- R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545; [1990] 1 All ER 91, DC
- R v Ministry of Defence, Ex p Smith* [1996] QB 517; [1996] 2 WLR 305; [1996] ICR 740; [1996] 1 All ER 257, CA
- R (AHK) v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin); [2012] ACD 66 B
- R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067; [2001] 2 WLR 1219, DC
- R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 2) [2006] EWHC 1038 (Admin); [2006] ACD 81, DC; [2007] EWCA Civ 498; [2008] QB 365; [2007] 3 WLR 768, CA; [2008] UKHL 61; [2009] AC 453; [2008] 3 WLR 955; [2008] 4 All ER 1055, HL(E)
- R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 3) [2013] EWHC 1502 (Admin); [2014] Env LR 2, DC; [2014] EWCA Civ 708; [2014] 1 WLR 2921; [2015] 1 All ER 185, CA C
- R (Edwards) v Environment Agency* (No 2) [2010] UKSC 57; [2011] 1 WLR 79; [2011] 1 All ER 785, SC(E)
- R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409, CA
- Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528; [2002] 3 WLR 640; [2002] 2 All ER 353, CA D
- Uddin (A Child), In re* [2005] EWCA Civ 52; [2005] 1 WLR 2398; [2005] 3 All ER 550, CA

The following additional cases were cited in argument:

- Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize* (Practice Note) [2003] UKPC 63; [2003] 1 WLR 2839, PC E
- Chagos Islanders v United Kingdom* (2012) 56 EHRR SE15
- Cie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, CA
- Connelly v Director of Public Prosecutions* [1964] AC 1254; [1964] 2 WLR 1145; [1964] 2 All ER 401, HL(E)
- Couwenburgh v Valkova* [2004] EWCA Civ 676; [2004] CP Rep 38, CA; [2005] EWCA Civ 145, CA F
- R v Barnsley Metropolitan Borough Council, Ex p Hook* [1976] 1 WLR 1052; [1976] 3 All ER 452, CA
- R v Berry* [1991] 1 WLR 125; [1991] 2 All ER 789, CA
- R v Chard* [1984] AC 279; [1983] 3 WLR 835; [1983] 3 All ER 637, HL(E)
- R v Walsh* [2007] NICA 4; [2007] NI 154, CA(NI)
- R (Navadunskis) v Serious Organised Crime Agency* [2009] EWHC 1292 (Admin); [2009] Extradition LR 309, DC G
- Vasquez v The Queen* [1994] 1 WLR 1304; [1994] 3 All ER 674, PC

#### APPLICATION to set aside decision of the House of Lords

By a notice dated 9 January 2015 the applicant, Louis Olivier Bancoult, applied to the Supreme Court to set aside the judgment of the House of Lords in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 2) [2008] UKSC 61; [2009] AC 453 on grounds of material non-disclosure by the defendant, the Secretary of State for Foreign and Commonwealth Affairs, of relevant documentary information in his possession, in serious breach of his duty of candour in public law H

- A proceedings, and which was of such a nature as to have highly affected the decision reached by the majority judgment of the House of Lords. On 23 January 2015 the Secretary of State gave notice that he objected to the application on grounds that (1) there was currently an independent feasibility study underway and nearing completion which would provide the factual analysis for the basis on which discussion would take place as to the future of the British Indian Ocean Territory, resettlement of which depended not just on its feasibility but on the strategic interests of the United Kingdom and financial considerations; (2) the question of law decided by the Appellate Committee of the House of Lords, namely that the British Indian Ocean Territory Constitution Order 2004 and the Immigration Ordinance were lawful, was untouched by the factual question whether settlement was feasible; (3) the application had been made far too late; (4) the non-disclosure alleged was not material to the outcome of the case; and (5) there had accordingly been no miscarriage of justice requiring the House of Lords' decision to be set aside.

- The issues on which the court, in particular, invited submissions were (1) whether there was jurisdiction for the court to set aside a decided judgment on the basis of non-disclosure by the successful party; and (2) assuming that there was such jurisdiction, whether on the facts the court should reopen the case.

The facts are stated in the judgments of Lord Mance and Lord Kerr of Tonaghmore JJSC.

*Edward Fitzgerald QC, Paul Harris QC and Amal Clooney* (instructed by *Clifford Chance LLP*) for the applicant.

- E The Supreme Court has succeeded to the powers exercised by the House of Lords and accordingly has jurisdiction to correct any injustice caused by an earlier order of the Appellate Committee of the House or of the Supreme Court. The jurisdiction is also invoked under the court's inherent power to ensure that its procedure is not abused: see *Connelly v Director of Public Prosecutions* [1964] AC 1254. Where it considers it necessary to do so it may set aside the impugned judgment and reopen the appeal, but the following factors apply. "Injustice" denotes some serious defect in the earlier proceedings which cannot otherwise to be put right; that can include non-disclosure in the earlier hearing where that materially affects the outcome; it is not necessary to establish bad faith, a fundamental failure to comply with the state's duty of candour is sufficient; in such cases, the state's duty is to make full disclosure of all relevant materials: see *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119; *R (Edwards) v Environment Agency (No 2)* [2011] 1 WLR 79; *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize (Practice Note)* [2003] 1 WLR 2839; *Taylor v Lawrence* [2003] QB 528; *Bain v The Queen* [2009] UKPC 4; *In re Uddin (A Child)* [2005] 1 WLR 2398 and *Feakins v Department for the Environment, Food and Rural Affairs* [2006] EWCA Civ 699; [2006] NPC 66. The jurisdiction to reopen is triggered where the court has been misled, even inadvertently. Where an appeal is reopened, all issues will be at large (see *Couwenbergh v Valkova* [2004] CP Rep 38 and [2005] EWCA Civ 145 and *R v Berry* [1991] 1 WLR 125) and so the Supreme Court has power to

reconsider the decision and to admit new evidence: see *R v Barnsley Metropolitan District Council, Ex p Hook* [1976] 1 WLR 1052; *Cie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 and *R v Chard* [1984] AC 279. A

It is now accepted that the removal of the entire population of the Chagos Islands was unlawful, unjust and unauthorised by the primary legislation which supposedly justified it: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453, 477, 493 and *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB) at [349]. [Reference was also made to *Chagos Islanders v United Kingdom* (2012) 56 EHRR SE15.] The feasibility study in the form in which it was provided to the House of Lords [2009] AC 453 was central to the majority's decision as to the rationality of the Secretary of State's view that resettlement was not viable. The jurisdiction to reopen the judgment is invoked on the basis of serious Government non-disclosure, whether deliberate or not, which had a decisive effect on that outcome. Although it is not necessary to show that the outcome would have been different, only that it may well have been so, in the present case it can be shown that the outcome would have been different. B C D

Early in the litigation, the applicant made disclosure requests of the documents relating to the feasibility study, in particular copies of the draft report of the phase 2B study together with comments on it made by the relevant government departments. The Government's response through its solicitors was contradictory and, in part, untrue. Further inquiries were sought throughout the stages of the litigation. [Reference was made to *Chagos Refugees Group in Mauritius v Information Comr* (EA/2011/00300) (unreported), 4 September 2012.] Contrary to the Government's repeated denials, a substantial file ("the Rashid documents") emerged from the Government and was eventually disclosed in 2012: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2014] Env LR 2, DC; [2014] 1 WLR 2921, CA. E

Disclosure of the Rashid documents was obviously necessary for a fair and just resolution of the case. The Secretary of State is wrong to suggest that disclosure was not required and that the applicant could rely on his own experts: a rationality challenge cannot be based on a simple conflict of experts' reports. The explanations given for such non-disclosure do not meet the case. There was a clear breach of the duty of candour and the duty to disclose all materials reasonably required for the court to arrive at an accurate decision. In particular, where the respondent is a public authority, not least central Government, it is under a very high duty to assist the court with full and accurate explanations of all the facts relevant to the issue under challenge; and the extent of the duty includes materials which are reasonably required for the court to arrive at an accurate decision: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409; *Graham v Police Service Commission* [2011] UKPC 46 and *R (AHK) v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin); [2012] ACD 66. F G H

The effect of the Rashid documents was that they altered the applicant's understanding of the status of phase 2 of the feasibility study; formerly it

- A had been understood to have been independent, but the draft showed that there had been extensive alteration to the final report to reflect the Foreign and Commonwealth Office's views. The documents revealed that the Government scientific adviser had endorsed criticism of the phase 2 feasibility study contained in a review previously commissioned by the applicant's advisers. The documents also revealed evidence of lack of objectivity in the scientific adviser's input into the draft before it was finalised. They showed that the alteration of the study between the draft and the final version distorted the original findings of the consultants in relation to some of the difficulties for resettlement. The overall impact of the documents was that, had they been disclosed before or during the litigation, they would have caused the applicant to challenge the reliability of the feasibility study and that that would have led to a different decision by the majority on the central issue of rationality. The House was misled into relying on the feasibility study as being authoritative when it was not. As a result the majority concluded that the Government's decision was rational since the Secretary of State had reasonably relied on the feasibility study: see paras 23, 26, 54, 112–113, 121, 132, 136. But that was wrong: new evidence and subsequent developments have considerably undermined and invalidated the entire basis on which the majority justified the removal of the right of abode: see *Vasquez v The Queen* [1994] 1 WLR 1304; *R v Walsh* [2007] NI 154 and *R (Navadunskis) v Serious Organised Crime Agency* [2009] EWHC 1292 (Admin); [2009] Extradition LR 309. If the decision is now set aside, it is very likely that a new hearing will reach a different decision, namely, that it was not open for a rational decision-maker to have terminated the further phase of the resettlement study, given the grave injustice done to the islanders by their removal from their homeland.

*Steven Kovats QC, Kieron Beal QC and Julian Blake* (instructed by *Treasury Solicitor*) for the Secretary of State.

- The jurisdictional position is accepted: see *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119; *R (Edwards) v Environment Agency (No 2)* [2011] 1 WLR 79 and *In re Uddin (A Child)* [2005] 1 WLR 2398. *R v Chard* [1984] AC 279 is not in point. It is also accepted that it must be shown, in order to set aside a judgment, on the ground of material non-disclosure that the non-disclosure had, or might well have had, a decisive effect on the outcome.

- The application is unnecessary and, in any event, academic. There is currently underway an independent study into the resettlement of the Islands. It is that study, not the 2002 feasibility study, which will inform the Government's decision as to the future. The resettlement of BIOT depends not only on the feasibility of resettlement; the United Kingdom's strategic interests are also highly relevant to any future decision. If the current study were to show that resettlement was not feasible it is of no practical benefit to the applicant to set aside the House of Lords' decision [2009] AC 453. If resettlement were to be currently feasible the House's decision would not preclude it. The point of law decided by the majority was that the BIOT Constitution and Immigration Ordinance were lawful even though they stated that there was no right of abode. That question of law is untouched by the factual question of whether settlement is feasible.

Any non-disclosure was immaterial because the merits and demerits of the 2002 phase 2 feasibility study depended on the scientific material advanced by the Government's scientific adviser and the applicant could have obtained his own evidence and his own advisers to rebut it. The 2002 feasibility study in no way precluded him from doing so, nor was he inhibited by lack of funding. The present application is made far too late. With regard to the suggested material non-disclosure the applicant relies on the draft study, internal departmental correspondence on the review of that draft and the scientific consultants' evidence. None reveals material non-disclosure; while, in the light of the requests for disclosure, the Rashid documents should have been capable of location and disclosure pursuant to a general duty of candour, failure to disclose was not due to deliberate misconduct and the content of the documents did nothing to alter the tenour of the disclosed material or to inhibit the applicant in the case he advanced. Such material had no effect on the conclusions reached by the Secretary of State or on the outcome of the House of Lords' decision.

There has therefore been no miscarriage of justice in the House of Lords' decision [2009] AC 453 and it should not be set aside.

*Fitzgerald QC* replied.

The court took time for consideration.

29 June 2016. The following judgments were handed down.

**LORD MANCE JSC** (with whom **LORD NEUBERGER OF ABBOTSBURY PSC** and **LORD CLARKE OF STONE-CUM-EBONY JSC** agreed)

### *Introduction*

1 In 2008 Lord Bingham of Cornhill and I were the dissenting minority when the majority in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453 ("*Bancoult (No 2)*") allowed the Secretary of State's appeal and upheld the validity of section 9 of the British Indian Ocean Territory (Constitution) Order 2004 ("the 2004 Constitution Order"). Section 9 provides that, since the British Indian Ocean Territory ("BIOT") was set aside for defence purposes, no person shall have any right of abode there (section 9(1)) and further that no person shall be entitled to enter or be present there except as authorised by the Order itself or any other law.

2 I have not changed my opinion as to what would have been the appropriate outcome of the appeal to the House of Lords. But that is not the issue before us. The issue before us is whether the majority decision should be set aside, not on the grounds that it was wrong in law, but on grounds that the Secretary of State failed, in breach of his duty of candour in public law proceedings, to disclose relevant documents containing information which it is said would have been likely to have affected the factual basis on which the House proceeded. That was that the Secretary of State, when enacting section 9, could justifiably rely on the stage 2B report prepared by Posford Haskoning Ltd ("Posford") for its conclusion that any long-term resettlement on the outlying Chagos Islands was infeasible, other than at

A prohibitive cost. In addressing the issue now before us, we are bound by the legal reasoning which led the majority to its conclusion—indeed, strictly bound without possibility of recourse to the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, since this is an application in the same proceedings.

3 The relevant documents are conveniently described as “the Rashid documents”, after Ms Rashid, the deponent from the Treasury Solicitor’s Department who by witness statement dated 1 May 2012 first produced them. She did this without commentary in Administrative Court proceedings in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2014] Env LR 2, regarding the declaration of a Maritime Protected Zone (“MPA”) in the high seas around BIOT. Ms Rashid made clear that she had no personal knowledge of events leading to the earlier failure to disclose. That the failure to disclose the Rashid documents in the *Bancoult (No 2)* proceedings was culpable is not, and could not be, disputed. On the other hand, it is accepted that it was not intentional and did not involve any bad faith. I shall address the circumstances, the contents of the documents and their significance in due course.

D 4 In addition to relying on the alleged breach of candour, Mr Bancoult also seeks to adduce four heads of new material, put forward as constituting evidence unavailable at the time of the House of Lords decision. All are said to go to the reliability of the stage 2B report, to undermine or invalidate the basis on which the House proceeded and to constitute an independent justification for reopening the decision. I will revert to this ground of application later in this judgment, and focus in the meanwhile on the alleged breach of candour.

*The jurisdiction to set aside in cases of unfair procedure and fresh evidence*

5 *Unfair procedure*: There is no doubt that the Supreme Court has inherent jurisdiction to correct any injustice caused by an earlier judgment of itself or its predecessor, the House of Lords, though it is also clear that it “will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure” and that “there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong”: *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 132, per Lord Browne-Wilkinson. One party’s failure to disclose relevant documentary information is clearly capable of subjecting the other party to an unfair procedure.

6 However, a decision to reopen an appeal also has important evaluative as well as discretionary aspects. The present applicant was, in the application to set aside (paras 109–130), content to express the evaluative aspect in terms used in an analogous context in the Court of Appeal in *Taylor v Lawrence* [2003] QB 528 and followed by the Privy Council in *Bain v The Queen* [2009] UKPC 4. As the Privy Council said in the latter case at para 6, quoting Lord Woolf CJ in the former case [2003] QB 528, 547: “What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy.”



7 *Fresh evidence*: That the jurisdiction to set aside also extends to situations where fresh evidence is discovered after a judgment has been rendered which is not susceptible of appeal is also recognised in Court of Appeal authority: *In re Uddin (A Child)* [2005] 1 WLR 2398; *Feakins v Department for Environment, Food and Rural Affairs* [2006] EWCA Civ 699. The latter was a case where it was discovered that a DEFRA official had provided materially incorrect information to the court in a witness statement. In each case, however, it was emphasised that it was not sufficient simply to rely on the principles in *Ladd v Marshall* [1954] 1 WLR 1489, which apply when fresh evidence is sought to be adduced for or on an appeal. Rather, as it was put in *In re Uddin*, para 22:

“it must at least be shown, not merely that the fresh evidence demonstrates a real possibility that an erroneous result was arrived at in the earlier proceedings . . . but that there exists a powerful probability that such a result *has in fact* been perpetrated.”

This statement was quoted from and accepted in the application to set aside: para 121. Further, as to the discretionary aspect, the court noted in *Feakins*, at para 12:

“The court [in *In re Uddin*] held that although that was a necessary condition, it was not sufficient; the court would have also to consider the extent to which the complaining party was author of his own misfortune and that there was no alternative remedy.”

8 In oral submissions, Mr Edward Fitzgerald QC did not directly challenge the above principles as stated in *In re Uddin*, stating in his reply that there was nothing between the parties on jurisdiction. However, in his written speaking note, directed specifically to jurisdiction in response to the court’s invitation to focus on this, the matter was put differently, and as follows (para 2.4(iv)): “As to whether there would now be a different outcome, it is submitted that it is only necessary to show at this threshold stage that there *may well be* a different outcome on a reconsideration.” See also, e.g. the submission (para 8.8) that Dr Shepherd “may well have had an ‘axe to grind’”. For my part, particularly where, as here, a party has failed to disclose the documents which it is now submitted constituted important evidence, I prefer to leave open whether a test of “probability” or, in the context of fresh evidence, “powerful probability” is too inflexible to cater for all possibilities. The egregiousness of a procedural breach and/or the difficulty of assessing the consequences of such a breach or of the significance of fresh evidence might, it seems to me, in some situations militate in favour of a slightly lower test, perhaps even as low as (though I do not decide this) whether the breach “may well have had” a decisive effect of the outcome of the previous decision. I shall consider the present application in that light also, although I do not in the event consider that the outcome of this application depends at any point on the test applied.

#### *The course of events leading to the present application*

9 The regrettable facts lying behind these and other proceedings such as *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 and (No 3) were outlined by Lord Hoffmann in paras 1–30

- A of his judgment in *Bancoult* (No 2), in terms which both Lord Bingham and I accepted with only a few (presently immaterial) qualifications: see paras 68 and 137–139. BIOT consists of the Chagos Islands, the largest being Diego Garcia. In 1966 the United Kingdom agreed in principle to make BIOT available to the United States for at least 50 years for defence purposes, and with effect from July 1971 the United States took over Diego Garcia as a base.
- B At the same time, by the Immigration Ordinance 1971, the commissioner of BIOT prohibited any person from entering or being in BIOT without a permit issued by an immigration officer.

- 10 Mr Bancoult represents Chagossians (or Ilois), indigenous inhabitants of BIOT, whose removal and resettlement the United Kingdom procured between 1968 and 1973 by various non-forceful means with “a callous disregard of their interests”: Lord Hoffmann, para 10.
- C Compensation, initially in the 1970s of £650,000 and then in 1982 of a further £4m in a trust fund set up under a Mauritian statute, was paid and accepted in satisfaction of all claims by most (some 1,340) Chagossians, though a few refused to sign. A challenge to this settlement was later made but struck out as an abuse of process by Ouseley J in *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB), leave to appeal being refused.
- D by the Court of Appeal [2004] EWCA Civ 997. Ouseley J’s judgment made clear that there was no further economic obligation on the United Kingdom to fund resettlement in BIOT.

- 11 A challenge to the Immigration Ordinance 1971 was on the other hand successful. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, the Divisional Court decided that the commissioner for BIOT’s power to legislate for the “peace, order and good government” of BIOT did not include a power to expel its inhabitants.
- E The then Foreign Secretary, Mr Robin Cook, stated publicly that he accepted this decision, and revoked the 1971 Ordinance by the Immigration Ordinance 2000. This confined the restriction on entry or presence to persons not British Dependent Territories citizens by virtue of their connection with BIOT. Mr Cook also announced that a recently completed
- F feasibility study into the prospects of resettling the Ilois would now proceed to a second stage. This was originally intended to involve two phases, the first (Phase 2A) relating to hydrological monitoring, the second (Phase 2B) to a more general examination, prior to a cost-benefit analysis (Phase 3). The second stage reports were undertaken by Posford as project managers.

- 12 In the event, the first two phases were amalgamated, leading to a report entitled stage 2B published in July 2002. Its “General Conclusions”,
- G para 1.11, stated:

- “To conclude, whilst it may be feasible to resettle the islands in the short term, the costs of maintaining long-term inhabitation are likely to be prohibitive. Even in the short term, natural events such as periodic flooding from storms and seismic activity are likely to make life difficult
- H for a resettled population.”

13 The Secretary of State in this light decided not to proceed with Phase 3, terminated consideration of resettlement and on 10 June 2004 introduced a new prohibition on residence in BIOT by section 9 of the 2004 Constitution Order, to the effect set out in para 1 above. A new Immigration

Order 2004 was at the same time also enacted, but needs no separate treatment here. The present proceedings were begun for judicial review to quash section 9 of the Constitution Order. They succeeded before the Divisional Court and Court of Appeal, but failed by a majority of three to two before the House of Lords.

14 All members of the House accepted that the 2004 Constitution Order was susceptible to judicial review on ordinary principles of legality, rationality and procedural impropriety. But the majority (Lord Hoffmann, Lord Rodger of Earlsferry and Lord Carswell) held: that, although the Chagossians had had important common law rights of abode, they were not so fundamental that they could not be removed by section 9; that the Secretary of State's decision to remove such rights, to reimpose immigration control and to prevent resettlement was in the circumstances neither unreasonable nor an abuse of power; and that the previous Foreign Secretary's statements in 2000 (para 11 above) did not amount to a clear and unambiguous promise that the Chagossians would be permitted to return and settle permanently creating any legitimate expectation on which they could now rely. Lord Bingham and I took the opposite view on these points, and would have dismissed the Secretary of State's appeal.

15 During the proceedings no challenge was made or suggested to the stage 2B report or its findings. The Secretary of State relied on its findings in para 106 of his skeleton argument before the Administrative Court dated 25 November 2004, stating:

"in any event, the defendant submits that it cannot conceivably be said to be irrational for steps to be taken to ensure that the BIOT is not resettled in circumstances where no viable long-term resettlement can be supported; where the costs of resettlement would be extensive, prohibitively expensive and potentially open-ended; and where the UK's defence interests and Treaty obligations strongly militate against permitting resettlement of the archipelago."

Sir Sydney Kentridge QC expressly disavowed any challenge to the report's conclusions when opening the Chagossian's case before the Divisional Court on 6 December 2005; and amended particulars put before that court on 13 December 2005 on the issue of irrationality likewise made no such challenge.

16 Before the House of Lords the stage 2B report and its findings were equally uncontentious. All members of the House proceeded on that basis. The argument on behalf of the Chagossians was throughout that the findings did not justify the making of the 2004 Constitution Order. Lord Bingham and I accepted that argument, but the majority rejected it and, to differing extents, deployed the relevant findings in their reasoning. Lord Hoffmann said, at para 53:

"I think it is very important that in deciding whether a measure affects fundamental rights or has 'profoundly intrusive effects', one should consider what those rights and effects actually are. If we were in 1968 and concerned with a proposal to remove the Chagossians from their islands with little or no provision for their future, that would indeed be a profoundly intrusive measure affecting their fundamental rights. But that was many years ago, the deed has been done, the wrong confessed,

A compensation agreed and paid. The way of life the Chagossians led has  
 been irreparably destroyed. *The practicalities of today are that they*  
*would be unable to exercise any right to live in the outer islands without*  
*financial support which the British Government is unwilling to provide*  
*and which does not appear to be forthcoming from any other source.*  
 B During the four years that the Immigration Ordinance 2000 was in force,  
 nothing happened. No one went to live on the islands. Thus their right of  
 abode is, as I said earlier, purely symbolic. If it is exercised by setting up  
 some camp on the islands, that will be a symbol, a gesture, aimed at  
 putting pressure on the Government. The whole of this litigation is, as  
 I said in *R v Jones (Margaret)* [2007] 1 AC 136, 177, the ‘continuation of  
 C protest by other means’. No one denies the importance of the right to  
 protest, but when one considers the rights in issue in this case, which have  
 to be weighed in the balance against the defence and diplomatic interests  
 of the state, it should be seen for what it is, as a right to protest in a  
 particular way and not as a right to the security of one’s home or to live in  
 one’s homeland. It is of course true that a person does not lose a right  
 because it becomes difficult to exercise or because he will gain no real  
 D advantage by doing so. But when a legislative body is considering a  
 change in the law which will deprive him of that right, it cannot be  
 irrational or unfair to consider the practical consequences of doing so.  
 Indeed, it would be irrational not to.” (Italics added for emphasis.)

17 Lord Rodger said, at paras 110–114:

E “110. Section 9 of the Constitution Order removes any right of abode  
 on the Chagos Archipelago which the claimant or anyone else may have  
 had. It is a stark provision. But the Secretary of State’s decision to have  
 it enacted and the effect of that decision have to be judged against the  
 circumstances at the time it was taken. No-one was then actually living  
 on the outer islands and, even though the islanders had enjoyed a right to  
 return since November 2000, none of them had done so. They were  
 F instead ‘seeking support from the UK and US Governments to financially  
 assist their return or alternatively to provide compensation’: *Feasibility*  
*Study Phase 2B, Executive Summary, para 1.1. More importantly, there*  
*was no prospect that anyone would be able to live on the outer islands,*  
*except on a subsistence basis, in the foreseeable future: Feasibility Study*  
*Phase 2B, Executive Summary, para 1.11. Sir Sydney did not dispute*  
*this, but contended that it was irrelevant.* In other words, the position  
 G was just the same as if people had actually been living on the islands  
 when the Orders were made. I am unable to accept that submission.  
 The impact of the legislation on the people concerned would be very  
 different in the two situations. In my view, in reviewing the Secretary of  
 State’s decision to remove the right of abode, it is relevant that there was  
 actually no prospect of the Chagossians being able to live on the outer  
 islands in the foreseeable future. The Government accepts, of course,  
 H that they can apply for permits to visit the islands and that an  
 unreasonable refusal could be judicially reviewed. Such visits have taken  
 place in the past.

“111. Against that background, can it be said that no reasonable  
 Secretary of State could have decided to have section 9 enacted?

“112. On 15 June 2004 a junior minister, Mr Rammell, made a written statement to Parliament. His good faith has not been impugned by the respondent. The statement shows that, in deciding to legislate to prevent people resettling on the outer islands, the Government took into account the fact that the economic conditions and infrastructure which had once supported the way of life of the Chagossians had ceased to exist. Something new would have to be devised. *The advice was that the cost of providing the necessary support for permanent resettlement was likely to be prohibitive and that natural events were likely to make life difficult for any resettled population. Human interference within the atolls was likely to exacerbate stress on the marine and terrestrial environment and would accelerate the effects of global warming. Flooding would be likely to become more frequent and would threaten the infrastructure and the freshwater aquifers and agricultural production. Severe events might even threaten life. The minister recorded that, for these reasons, the Government had decided to legislate to prevent resettlement.* Although he made no mention of it, the decision to legislate and to introduce immigration controls at that particular time appears to have been prompted by the prospect of protesters attempting to land on the islands. In addition, Mr Rammell said that restoration of full immigration control over the entire territory was necessary to ensure and maintain the availability and effective use of the territory for defence purposes. He referred to recent developments in the international security climate since November 2000 when such controls had been removed.

“113. *The ministerial statement indicates that a decision to legislate was taken on the basis of the experts’ (second) report on the difficulties and dangers of resettling the islands—these difficulties and dangers being dangers and difficulties which would affect the Chagossians themselves, if they were to try to live on the outer islands. Given the terms of that report alone, it could not, in my view, be said that no reasonable government would have decided to legislate to prevent resettlement. In particular, the advice that the cost of any permanent resettlement would be ‘prohibitive’ was an entirely legitimate factor for the Government—which is responsible for the way that tax revenues are spent—to take into account.* In addition, the Government had regard to defence considerations, the views of its close ally, the United States, and the changed security situation after 9/11. These additional factors reinforce the view that the decision to legislate was neither unreasonable nor irrational.

“114. Of course, the decision was adverse to the claim of the Chagossians to return to settle on the outer islands. But that does not mean that their interests had been ignored: a realistic assessment of the long-term position of any potential Chagossian settlers on the outer islands was central to the expert report on which the Government relied. In addition, the Government considered the overall interests of the United Kingdom. It was entitled to do so . . . In the absence of any relevant legal criteria, judges are not well placed to second-guess the balance struck by ministers on such a matter.” (Emphasis added.)

18 Lord Carswell said (para 120) that he agreed “with very little qualification” with the reasoning of Lord Hoffmann and Lord Rodger, but his specific reasoning focused on the lack of long term feasibility. He said, at

A para 121, that the Chagossians' expressed wish to return to their homeland was:

B “put on an abstract basis by their counsel, for *it is quite clear that for them to resettle in the islands is wholly impracticable without very substantial and disproportionate expenditure. They are not in a position to meet such a cost.* It could only be shouldered by the British Government, which has made it clear that it is willing to permit and fund from time to time short visits to the outlying islands, but not to support a large-scale permanent resettlement. One might ask the question why this campaign is being pursued, for the Chagossians already can pay visits and there is no realistic prospect of resettlement unless it is funded for them at huge expense. I do not find it necessary to seek an answer to that question, but the practical difficulties in the way of resettlement are in my view relevant to the rationality of the Government's decision to make the 2004 Orders in Council.” (Emphasis added.)

D 19 On the present application, Mr Bancoult submits that, had the Rashid documents been available prior to the hearing before the Divisional Court, the Court of Appeal or the House of Lords, they would have led to a challenge being mounted to stage 2B report, the conclusions drawn in that report would have been discredited, and the majority reasoning in the above extracts would have been impossible. This brings me to a consideration of the Rashid documents.

#### *The Rashid documents*

##### *(a) Circumstances of late disclosure*

E 20 By letter dated 5 December 2005 disclosure had been made on behalf of the Secretary of State to Sheridans, solicitors acting for Mr Bancoult, of a copy letter dated 23 May 2002 sent by Mr Charles Hamilton of BIOT to Ms Alex Holland, the “senior environmental scientist” who was Posford's project manager. This raised questions and made comments on a draft stage 2B report. Between November 2005 and February 2006, requests were made on behalf of Mr Bancoult for disclosure of this draft report as well as any draft of the earlier feasibility study. The Treasury Solicitor, while replying that these requests did not go to any issue in *Bancoult (No 2)*, made searches, but was in the event only able to locate a draft feasibility study which was disclosed in early December 2005.

G 21 By letter dated 13 January 2006 Mr Bancoult's solicitors, Sheridans, questioned, in relation to the stage 2B report, whether there had been “official input into the work of consultants which undermines its authority”. The Treasury Solicitor responded that this was an “extremely serious” allegation and needed to be particularised. It was not particularised and, as stated, no challenge to the stage 2B report was then made. A further allegation that, in the absence of the draft stage 2B report, the General Conclusions must be assumed not to be the unguided advice of independent consultants was made by note dated 13 March 2009. On 7 October 2010 an email dated 29 May 2002 sent by Mr Charles Hamilton to Ms Holland advising that the final draft omit development scenarios (advice not in fact followed: para 40 below) was disclosed on behalf of the Secretary of State in the context of the issues arising in *Bancoult (No 3)*. By letter dated

21 December 2010 Clifford Chance (now acting for Mr Bancoult as a result of the move to that firm of Mr Gifford the individual partner handling Mr Bancoult's affairs) wrote asserting that "the total absence of any records" of meetings in May–June 2000 and June/July 2002 regarding what became respectively the feasibility study and stage 2B report "casts grave doubts on the ability of FCO to explain its conduct or to justify what appears to be serious and concerted influence practised to achieve a conclusion which reflected the views of officials and contradicted the unguided advice of consultants." Clifford Chance referred in this connection to the disclosure of the email dated 29 May 2002 and to statements made to them in a letter dated 11 February 2010 by Mr Stephen Akester, one of the Phase 2B consultants, that resettlement was always feasible within reasonable cost parameters, but that he was not in the committee that drafted the stage 2B report.

22 On 10 October 2011 Clifford Chance wrote in the light of the above urging a yet further search for documents pursuant to the Secretary of State's duty of candour in the context of both *Bancoult (No 2)* and *Bancoult (No 3)*.

23 The further search then made led to the Treasury Solicitor discovering previously undisclosed documents, including the draft stage 2B report, in circumstances described in its letter dated 15 March 2012 to Clifford Chance as follows:

"In the context of the aforementioned matters, TSol recalled archived files held by a third party document storage company that were generated during the conduct of the *Bancoult (No 2)* litigation. In the course of reviewing these files, it has become apparent that they contain certain documents concerned with the drafting of the Phase 2B report which originate from the FCO but are no longer retained by the FCO on its own files as a result of its document retention."

It was subsequently further explained that:

"there was clearly a point, occurring during 2005, when the FCO no longer held the draft Phase 2B Executive Summary on its files, as it was removed according to the FCO's document retention policies, and yet TSol retained a copy on its *Bancoult (No 2)* files."

The documents so discovered, including the draft stage 2B report, were then disclosed by Ms Rashid's witness statement dated 1 May 2012.

24 The Secretary of State accepts that, in the light of the requests made and despite the absence of any challenge to the stage 2B report, the Rashid documents should have been capable of location and should have been located and disclosed pursuant to his general duty of candour in public law proceedings. The failures in this regard were and are highly regrettable. But there is, as stated previously, no basis for attributing them to any deliberate misconduct. The question is what significance would or might have attached to, and what consequences would or might have flowed from, their disclosure.

*(b) Alleged significance of the Rashid documents*

25 In Mr Bancoult's written case, it is alleged that the Rashid documents would have been significant under four heads: (i) As showing

- A that, instead of being independent as understood, the final report was subject to extensive alterations to reflect FCO views. Head (iv) below concerns one particular difference alleged to be “centrally important” to the stage 2B report’s conclusions. (ii) As revealing that Dr Sheppard, the FCO’s scientific adviser, had criticised the draft stage 2B report in an email sent to Charles Hamilton on 14 May 2002 and had, after the issue of the final report, also
- B endorsed criticisms of it made by a resettlement anthropologist, Jonathan Jenness, instructed on behalf of Mr Bancoult. (iii) As revealing evidence of lack of objectivity in Dr Sheppard’s input into the stage 2B report before it was finalised. More specifically, it is said that the documents show that Dr Sheppard was the only reviewer of the whole draft, that heavy reliance on only one specialist made the report unsafe and that, as a coral reef specialist well known to be strongly dedicated to their conservation, there is “concern”
- C whether he could reasonably be regarded as an objective assessor on the issue of reintroducing human settlement. (iv) As showing alterations between the draft and final version of the stage 2B report in a manner which conflates and distorts the consultants’ original finding in relation to storms creating difficulties for resettlement.

- 26 Taken together, it is submitted that it is certain that, had the Rashid documents been disclosed, they would have caused the applicant’s representatives to challenge the reliability of the feasibility study, that it is highly likely that the challenge would have succeeded and that, if the House of Lords’ judgment is set aside, a new hearing will reach a different conclusion.
- D

- 27 The focus of the first and fourth heads of alleged significance of the Rashid documents is alterations alleged to have been made and to have distorted the final stage 2B report. The focus of the second and third heads is Dr Sheppard. The second relies on his criticisms of the draft. The third suggests that his input lacked objectivity and was unreliable.
- E

*(c) The first and fourth heads*

- 28 These two heads stand or fall together. They are reproduced in the speaking note which Mr Edward Fitzgerald used at the hearing before the Supreme Court. That speaking note refers to “extensive alterations to the original draft in the final draft”, which it suggests are likely to have “reflected FCO views and input” and to have been “unsupported by evidence in the body of the study”. According to Clifford Chance’s letter dated 10 October 2011, there were 94 revisions over a period when the document
- F
- G was open for editing for a total of seven and a half hours. The speaking note says that “some” of the key changes are summarised in a summary note dated 17 February 2015 prepared by counsel for Mr Bancoult. This was based in turn on a lengthy analysis note prepared by Mr Bancoult’s solicitor, Mr Gifford, in conjunction with a coral scientist, Mr Dunne. In addition to the change relating to storms and resettlement identified in head (iv), the summary note identifies three further “key amendments”.

- H 29 That alterations would or might be made in the final report following comments by the FCO and BIOT on the draft report cannot come as any surprise to those representing Mr Bancoult, or be regarded as in any way unnatural. The stage 2B report was prepared by Posford under a contract expressed to be between the commissioner for BIOT and Posford



Duvivier Environment dated 10 December 2001. The terms of reference set out in section 4 of the contract provided by clause 6 for monthly reporting and further by clause 6.3 that A

“A draft final report, containing an account of the work done, conclusions and recommendations will be submitted within four months of commencing the assignment. Within two weeks of the receipt of comments on the draft from recipients, consultants will submit a final report.” B

30 In this respect clause 6.3 echoed the provisions of clause 17 of the terms of reference for the earlier contract dated 13 April 2000 made with David Crapper for the feasibility study, which, when made was according to its terms intended also to cover stage 2. Clause 17 provided:

“A draft report will be produced for the Government of the BIOT. On receiving comments on the draft report from the Government of the BIOT, the consultant will finalise the report and provide the text in both paper and electronic form to the Government of the BIOT.” C

Sheridans received a copy of this earlier contract, and in a letter dated 28 November 2005 noted and set out clause 17 specifically, not by way of objection, but in order to ask for the draft report and for any comments on it made by the FCO and the Government of BIOT. Whether any of the actual alterations made can be described as “extensive” or “as reflecting FCO views”, or be seen to have unbalanced the report as a result, are matters to which I will come. D

31 Before doing so, it is convenient to examine events in more detail to identify any overt trace of undue executive influence over the final report. After entry into force of the contract dated 10 December 2001, Posford set about preparing for field studies in BIOT, in particular on the two outlying islands of Ile de Coin and Ile Boddam, as contemplated by its terms. These took place in February 2002, after which Posford submitted a second progress report dated 1 March 2002. This was tabled and discussed at a meeting with the FCO and BIOT on 6 March 2002. There is no suggestion or likelihood that the draft executive summary was available to anyone at this stage, and Ms Holland’s letter dated 12 April and Mr Hamilton’s email dated 15 April 2002 (E2404) indicate that, once drafted and reviewed, such a draft was only submitted to the FCO in early April 2002. E

32 It is convenient at this point to introduce the fourth piece of new evidence on which the applicant seeks to rely. It is a note of the 6 March 2002 meeting made by Posford dated 7 March 2002. It was only obtained by the applicant’s advisers, after a chance meeting, from Mr Stephen Akester of MacAlister Elliott & Partners (“MEP”), sub-contractors to Posford who arranged the on-site investigations in the Chagos in early 2002. As such it is not a document which was at any relevant time in the possession of or available to the executive. But it records a meeting at which FCO and BIOT representatives were present, and, taking it as an accurate record of what took place at that meeting, what it records was within their knowledge, and may also throw light on their roles in relation to the re-drafting and finalisation of the stage 2B report. Mr Huckle of the FCO is reported as “reiterating the political importance of the forthcoming feasibility report” F

A which he stressed “had been heightened in recent weeks because the Ilois are currently pursuing legal action against the British and American Governments”. He went on to point out that “the outcome of the court case will either be compensation, or financial assistance to the Ilois in resettling the islands” and that the questions were “how much, and what forms of livelihood development will the British Government permit”, which he said was “where the feasibility report comes in”.

B 33 There is nothing here which appears to be anything other than a genuine explanation as to the report’s current relevance—couched if anything in terms anticipating that it would accept the possibility of resettlement. The FCO appears a little later as saying that it “had hoped that Phase II would negate the need for Phase III, ie if it concluded that resettlement wasn’t feasible, but realistically, that was never likely to be the outcome. The FCO is hoping that the section on Climate Change will resolve its difficulties, but Brian [Little] and I pointed out that a considerable amount of money could be made in 25–100 years, and let’s not assume that the Ilios are considering a return to subsistence or reliance on natural resources . . .”. Again this confirms, if anything, that the FCO was resigned to a report accepting the feasibility of some form of resettlement, and that D Posford was well capable of standing up for what it believed correct. Indeed, earlier in the note Posford recorded that “allegedly, a number of those whom we competed against in the bidding process . . . have been taking pot shots at our approach within earshot of ‘important’ people. Sounds like sour grapes. That all said, our findings and arguments must be tight and convincing.” There is no suggestion that the FCO was inviting changes to bolster any sort of findings or conclusions in either the draft and the final E report, and no basis for regarding Posford as susceptible to any such invitation. The express purpose of the 6 March meeting was, as stated, to “provide a de-briefing” on Posford’s recent field studies on Ile du Coin and Ile Boddam.

34 In all the circumstances, the 7 March 2002 note provides no real support to a suggestion that the content even of the draft stage 2B report was F unduly interfered with or influenced by the FCO or BIOT, still less that any subsequent alterations between the draft submitted in April and the stage 2B report as finalised in June were the result of any such undue interference or influence.

35 The follow-up exchanges after Posford had completed and submitted all sections of the draft report in April 2002 are evidenced by the Rashid documents as well as the previously disclosed messages dated 23 and G 29 May 2002 from Mr Hamilton to Ms Holland. They are also significant. Dr Sheppard had on 14 May 2002 sent Mr Hamilton very detailed comments on the draft report. In relation to the Executive Summary, he wrote:

H “This important section does not always reflect the content of the volumes very well. This is doubtless due to haste and short deadlines. Several key issues missed out are stated in the text and in the conclusions. I suggest that after a period of reflection this is revisited. Several conclusions are apparently at odds either with each other or with other, known facts. During the rewrite, these apparent contradictions in the text can be resolved. They make parts of the report somewhat vulnerable.

One example is the widely varying estimates of numbers of people that could be sustainably supported.” A

36 Dr Sheppard went on in sections dealing with the body of the draft report to note (a) the risk of water contamination, observing that the draft did not “clearly state how such contamination could be prevented through the thin ‘roof’ of the aquifers”, (b) a contradiction between statements that “Water recharge of aquifers would *increase* by vegetation clearing (Groundwater resources section) . . . But: water recharge would *decrease* with clearance of plants and development (from volume IV)”, and (c) under “Other points”: “The point about Chagos is that it lies in the most nutrient poor part of the Indian Ocean. The Chagos bank fishery potential is estimated to be half that of other banks”: p 146. B

37 Mr Hamilton then wrote to Ms Holland on 23 May 2002, noting that he had studied the drafts of the report in some detail, that it and any recommendations which followed from it would be carefully examined and that “we are particularly anxious therefore that its scientific content is as complete and watertight as possible”. He made detailed comments on the draft, drawing heavily on Dr Sheppard’s comments, particularly when writing this in relation to the Executive Summary: C

“This important section does not always reflect the content of the volumes very well. Several key points and conclusions in the main text are important and stand out, but are not well reflected in the summary. Further, several conclusions are apparently at odds either with each other or with other known facts. During your revision, I would be grateful if you would resolve these apparent contradictions as they make parts of the report unclear. Examples of issues needing reconciliation include widely varying estimates of numbers of people that could be sustainably supported, issues of water contamination and the balances of water use for different activities, whether plants increase or decrease water recharge, and the Chagos bank fishery potential. Synthesis would doubtless resolve many of these. I understand that different consultants wrote different sections, so I think that this summary may be a suitable place for an overall, concise synthesis, which would also include overall environmental management recommendations. Many of these points are noted in the attachments relating to different sections, but are crucial for the writer of this Executive Summary.” D

38 As is apparent, Mr Hamilton was here picking up points made by Dr Sheppard as indicated above. In attachment 7, relating to volume III of the draft dealing with resettlement issues, Mr Hamilton discussed three scenarios which had been included, noting various issues and that nothing had been said either on scenario 3 (based partly around expensive tourism), although this appeared to be the only attractive development option for interested parties, or on a possible scenario 4 (non-residential, but settled seasonally for some fishing). The discussion ended “Possibly use of the ‘three scenarios’ just adds confusing complexity and begs several questions which are not answered”. He ended by underlining the importance attaching to “the overall synthesis (Executive Summary) which should clearly highlight the main points which are brought out in the text”, and indicated that G

A following the draft's revision he would call a meeting of all concerned to finalise the report.

39 Posford then prepared its own detailed comments on Mr Hamilton's letter which were sent to him by Ms Holland under cover of a faxed letter dated 28 May 2002. Her letter stated:

B "To summarise the attached, we consider that some of the comments are valid and we will revise our report in light of these suggestions. However, we feel that others are somewhat inaccurate and do not reflect the understanding we had with the BIOT Administration on our approach. I should like to discuss these comments with you at your earliest convenience."

C In the body of the comments, Posford replied to the points made on the three scenarios as follows:

D "Three scenarios: There was much debate during the drafting of the report as to whether the three scenarios should be included, but several of those involved considered that these helped to develop conclusions about whether certain resettlement activities would be possible, particularly in the drafting of the environmental appraisal. We stopped at three hypothetical scenarios, but recognise that there could be many more combinations of activities. The suggestion of 'scenario 4', which is based on non-residential and non-development, does not actually constitute resettlement and was therefore not considered as a scenario. However, you will note that Option 1 for fisheries development (p 165) does refer to this form of livelihood activity. We would be grateful if you would give direction as to whether you wish us to include or exclude the development scenarios from the final report."

To this last request, Mr Hamilton simply replied by email on 29 May 2002: "You asked about the inclusion of development scenarios in the final report. Our advice is that it would be better if these are excluded".

F 40 However, as Mr Gifford's and Mr Dunne's analysis note acknowledges, this "advice" was not in fact taken up in the final stage 2B report, "where the development scenarios can be seen to be crucial to several parts of the study". Nevertheless, the analysis note seeks to portray Mr Hamilton's letter and comments dated 23 May 2002 as an exercise of editorial control, and his email of 29 May 2002 as "yet further attempts to exercise editorial control over the final report". To my mind, there is nothing untoward about them at all. The impression conveyed is one of independently minded exchanges, passing between people whose genuine concern was to have as thorough, accurate and watertight a final report as possible.

G 41 Posford's comments dated 28 May 2002 were evidently also sent to Dr Sheppard, since he commented on them by email on 31 May 2002. There were further technical exchanges between Brian Little, who had been appointed as FCO Feasibility Study Project Manager under contract dated 29 January 2001, and Posford in late May and early June, and a further set of comments by Tony Falkland of Posford responding on 9 June to Dr Sheppard's comments as well as to Brian Little's comments. Dr Sheppard noted Mr Little's comments on 11 June, and Mr Little sent an email

commenting on Posford's response on 12 June. A meeting was set up to discuss the final report on Friday 12 June, in relation to which Mr Hamilton invited Dr Sheppard to act as a devil's advocate. This he evidently did. Some "changes/deletions" were made, leading to the final report. A

42 Reading all these exchanges, nothing in them suggests anything but a proper, professionally oriented and independent process, with all involved seeking to arrive at objective and sustainable findings and conclusions. B

43 I turn to the alterations which can now be seen to have been made between the original draft and the final report. The General Conclusions, to which Sheridans rightly attached importance in their note dated 13 March 2009 (para 21 above), are now available in both their draft and their final form in the executive summary. A fundamental point which risks being overlooked in discussion about differences elsewhere in the executive summary or body of the text is that the "General Conclusions" can now be seen to have been in identical terms in both their draft and their final versions. Their terms have been set out in para 12 above. They represent the critical conclusions, on which the majority in the House of Lords relied as justifying the Secretary of State's decision to make the 2004 Constitution Order, and they were unaltered between the original draft and final versions. C

44 Immediately preceding these General Conclusions also appeared the following section headed "Vulnerability": D

"There appear to be sufficient groundwater, soils, fisheries, and environmental (eg limited tourism) resources to support a small population on a subsistence basis with some commercial opportunity, but there are some more fundamental issues surrounding the feasibility of resettlement. These relate to the vulnerability of a resettled population to current and predicted climatic conditions, and the fragility of the environment to human-induced disturbance. E

"Under the present climate, it is assumed, based on historic meteorological patterns and observations, that the islands are already subject to regular overtopping events, flooding, and erosion of the outer beaches. As global warming develops, these events are likely to increase in severity and regularity. In addition, the area is seismically active, and the possibility of a tsunami is a concern. These events would threaten both the lives and infrastructure of any people living on the islands. Whilst it might be possible to protect the islands to some extent in the short term through coastal defence measures, it is likely to be cost-prohibitive and non-pragmatic to consider this form of defence in the long-term. F

"The environment of the Chagos Archipelago is highly diverse and yet very susceptible to human disturbance. Coral reefs, which are one of the most important ecosystems within the Archipelago, are already exhibiting signs of stress from increased sea surface temperatures and other climatic phenomenon. Predictions from climate change experts indicate that mass mortality of reef building corals in the Indian Ocean is likely to occur as global warming increases, may be as soon as within the next 20 years. This will not only have huge implications for the long-term coastal defence of the islands, and hence their very existence, but will also adversely affect livelihoods, particularly fisheries and tourism, which are likely to be the mainstay of any resettled population. Human interference G H

- A within the atolls, however well managed, is likely to exacerbate stress on the marine and terrestrial environment and will accelerate the effects of global warming. Thus resettlement is likely to become less feasible over time.”

Again this passage was in identical form in the draft and final stage 2B report, and, as the analysis note acknowledges, it constitutes the basis for the overall negative assessment in the General Conclusions.

- B 45 The identity of these core sections of the Executive Summary in the draft and final reports raises obvious problems for the present application. But it is said that these key sections refer back in turn to section 1.8. It is in section 1.8 that the summary note dated 15 February 2015 identifies in total four “key amendments”.

- C 46 The following passages underlined and marked A, B or C in the following extracts from the draft report are passages on which Mr Bancoult relies in support of his case of inappropriately motivated or influenced alteration:

“1.8 CLIMATE CHANGE

- D “The reports of the International Panel on Climate Change were evaluated to determine the latest projections on climate change. Global sea levels are expected to rise by about 38cm between 1990 and the 2080s. Indian and Pacific Ocean islands face the largest relative increase in flood risk. Although there will be regional variation, *it is projected that sea level will rise by as much as 5mm per year, with a range of 2–9mm per year, over the next 100 years [B]*. With a rise of 0.5 metres in sea level, the implications of climate change on the Chagos Archipelago are considerable, given that mean maximum elevation of the islands is only two metres; the diversity of livelihoods available is limited; and the relative isolation and exposure of the islands to oceanic influences and climatic events. These implications are discussed in the light of biodiversity and resettlement.

- F “1.8.1 Implications for biodiversity

- The impacts of climate change on highly diverse and productive coastal ecosystems such as coral reefs and atoll islands will depend upon the rate of sea-level rise relative to growth rates and sediment supply. In addition, space for and obstacles to horizontal migration, changes in the climate-ocean environment such as sea surface temperatures and storminess as well as human pressures will influence the capacity of ecosystems to adapt to the impacts of climate change.

- G “[Two paragraphs dealing with coral bleaching and reefs]

- “Species that occupy terrestrial habitats for all or part of their life-cycle, such as birds, turtles and coconut crabs, will also be adversely affected by sea level rise. There is considerable uncertainty about how climate change will affect the natural environment in the Chagos Archipelago, but that the outcome is likely to be an unfavourable shift in biodiversity.

- H “1.8.2 Implications for resettlement

- “The most significant and immediate consequences of climate change on a resettled population within the Chagos Archipelago are likely to be

related to changes in sea levels, rainfall regimes, fresh water resources, soil moisture budgets, prevailing winds (direction and speed) and short term variation in regional and local patterns of wave action. *At present, the Chagos Archipelago lies just north of an active cyclone belt, however, a small northward shift of this belt could lead to frequent cyclones in the area [A].* This would lead to more frequent flooding of the islands, with corresponding risk to life and any infrastructure. It would also reduce agricultural potential and the freshwater contained within the island aquifers would experience higher levels of salinity. A  
B

“Irrespective of whether the Chagos Archipelago becomes subjected to regular cyclones, *the general increase in storminess that may accompany climate change would result in increased wave energies and an increasing frequency of over-topping events [C].* Based on a 0.5m rise in sea level scenario, models of overtopping events demonstrate an increase of between 20–50% of the frequency of severe events. Of further significance is the probability that sea level rise and overtopping events would threaten the characteristics and sustainability of the fresh groundwater lens. C

“The rate of erosion of the ocean coasts are likely to increase with sea level rise and increased storminess, and would be accompanied by an increase in sediment transport, which would have implications for shoreline infrastructure. On islands where physical space is limited, as in Chagos, coastal defences are likely to be low key and would need to be developed with a view to sustainability. D

“It is advised that future settlers on the outer atolls should be made aware of the risks of climate change in terms of their own safety and that of any physical investment. Should people wish to return, it would be prudent to provide specialist assistance in the preparation of appropriate and sustainable land use and coastal defence policies, which would ensure that the vulnerability of the resettled population was minimised as far as possible.” E

47 In the final stage 2B report, section 1.8 of the executive summary reads as follows. Again, the passages underlined and marked A, B and C are passages on which Mr Bancoult relies in support of his case of inappropriately motivated or influenced alteration: F

“CLIMATE CHANGE

“According to the International Panel on Climate Change global sea levels are expected to rise by about 38cm between 1990 and the 2080s. Indian and Pacific Ocean islands face the largest relative increase in flood risk. Although there will be regional variation, *it is projected that sea level will rise by an average of 5mm per year over the next 100 years [B].* The implications of these predictions for resettlement of the Chagos Archipelago are considerable, given that mean elevation of the islands is only two metres. G

“The most significant and immediate consequences of climate change for the Chagos Archipelago are likely to be related to changes in sea-level, rainfall regimes, soil moisture budgets, prevailing winds, and short term variation in regional and local patterns of wave action. *As a consequence, most islands will experience increased levels of flooding, accelerated erosion, and seawater intrusion into freshwater sources. The extent and* H

A *severity of storm impacts, including storm surge floods and shore erosion are predicted to increase [A].* Although the risks associated with climate change are not easily established the implications of these issues to resettlement of the outer atolls of the Chagos Archipelago are outlined briefly below.

B *“Implications for water resources:* Rising sea level would not have a significant effect on island freshwater lenses in the Chagos archipelago unless land is lost by inundation. If rising mean sea level causes land to be permanently inundated, then there will be a consequent loss in fresh groundwater.

C *“Increased storminess [C]:* The Chagos islands have a small storm surge envelope thus even small changes in sea level and storm surge height implies an increase in the area threatened with inundation. It has been predicted that the flooding severity for a 1 in 50-year storm event with 0.5m of sea level rise is almost as high as the present day 1 in 1000-year event. Inundation can cause seawater intrusion into freshwater lenses. This not only reduces the availability of water for human consumption, but if salinity concentrations are high enough it can lead to decreased agricultural production.

D *“Biological systems and biodiversity:* Climate change is predicted to have a significant impact on the marine and terrestrial environments of the Archipelago. Coral reefs are one of the most important ecosystems likely to be affected, and their ability to cope will depend upon the rate of sea-level rise relative to their growth rate. The Chagos coral reefs were severely affected by the 1998 El Nino event, therefore any future sea surface warming would increase pressure on already stressed coral reefs.

E The added pressure of human interference within the marine environment would further weaken the ability of these systems to cope with climate change.

F *“Fisheries and aquaculture:* It is predicted that climate change may have a severe impact on the abundance and distribution of reef fish populations. In addition, there is strong evidence of a correlation between the annual incidence of ciguatera (fish poisoning) and local warming of the sea surface, which will have an impact on fisheries potential, for subsistence and commercial purposes. Climate change is expected to have both positive and negative impacts on aquaculture; but the implications for seaweed farming (as investigated during this study) is not positive, with increased temperatures leading to reductions in productivity [D].

G *“Human health, settlement and infrastructure:* Populations, infrastructure and livelihoods are likely to be highly vulnerable to the impacts of climate change. Sustainability in food and water availability will be among the most pressing issues, together with the vulnerability of infrastructure to flooding and storm surges. *Vulnerability and adaptation:*

H There is a wide range of adaptation strategies that could be employed by a resettled population in response to climate change. Integrated coastal management has been strongly advocated as the key planning framework for adaptation.

*“Adapting to island instability:* There are two issues that need to be taken into account in adapting to island instability: shoreline erosion and



sediment inundation of the island surface. Adaptation can fall within three broad categories depending on the level of infrastructure and population density on islands: no response; accommodation (infrastructure and dwellings are replaced at a rate commensurate with island migration); or protection (maintenance of infrastructure through coastal protection measures). The latter is likely to be the most costly strategy, and should be avoided through wise land use planning.

*“Adaptation to inundation:* Response to inundation will vary depending on the level of development on islands. On islands that will have little infrastructure, as is likely to be the case in Chagos, the costs to protect against inundation are likely to be prohibitive. Adaptation measures will include siting of infrastructure in low risk areas and the application of appropriate infrastructure designs, such as revised floor levels and open structures. More robust measures to prevent inundation, such as seawalls, are not recommended as they necessitate costly maintenance and future vertical extension as sea level rises, and they can lead to adverse impacts on coastal habitats.

*“Adaptation to reef response:* Discussion of the possible response of coral reefs to sea-level rise indicates that at worst reef food and sediment resources diminish and at best they are maintained at similar levels or may even increase. The importance of reefs as both natural coastal protection structures and providers of food means that any adaptation measures against climate change, and any human livelihood activities, should not compromise the health of the reef system. Minimising adverse effects on reefs will require robust pollution control measures and effective waste management.

“From an examination of projected climate change scenarios, it is likely that the Chagos Archipelago, and any population settled on the outer atolls, will be vulnerable to its effects. The main issue facing a resettled population on the low-lying islands will be flooding events, which are likely to increase in periodicity and intensity, and will not only threaten infrastructure but also the freshwater aquifers and agricultural production. Severe events may even threaten life. Increases in sea surface temperatures are likely to have adverse effects on coral reefs and consequently their ability to act as a coastal defence to the islands, and to support fisheries. This will place more pressure on resettled populations to not only counteract the pressures of climate change but also to ensure that their subsistence and income needs are met.”

48 The “key amendments” relied upon therefore fall under four heads. It is worth emphasising their limited extent in the overall context of the report, and particularly in the light of the unaltered General Conclusions and Vulnerability sections. Whatever the suggestion—whether it is that the alterations were the product of undue executive influence or that they in some way demonstrate that the final report was unreliable or that the Secretary of State would have reached a different decision regarding the making of the 2004 Constitution Order if he had only been shown the draft rather than the final report—the limited extent of the alterations in the overall context of the report points to my mind sharply against giving it credence or weight.

A 49 However, I must also examine the amendments more closely. Taking first the change identified at [A] the main criticism is that

B “The effect of this change is to delete from the feasibility study the important fact that the Chagos Islands *are not within the cyclone belt at present*, but to the North of it. There is no information anywhere in the Phase 2B study to indicate that (1) the cyclone belt has moved, either northward or in any other direction, in the past; or (2) that it is likely to move in the future; or (3) that if it were to move it would move closer to the Chagos Islands as opposed to moving further away from them.”

C This is not however correct. Both the Gifford/Dunne analysis note and Mr Jenness’s report demonstrate that the passage removed from the draft executive summary remained in the body of the report: see passages cited from Part III which set out the same information as appeared in the draft about the effect of a small shift north in the cyclone belt.

D 50 A second criticism addressed to the change at [A] relates to the addition of new sentences stating that “As a consequence [of climate change], most islands will experience increased levels of flooding, accelerated erosion, and seawater intrusion into freshwater sources” and that “The extent and severity of storm impacts, including storm surge floods and shore erosion are predicted to increase”. For the latter, it is said, “There is no factual basis and it is not supported by a close reading of the body of the report”. As to this, two points arise. First, both the draft and the final reports start by stating that the “most significant and immediate consequences of climate change for the Chagos Archipelago are likely to be related to changes in sea levels, rainfall regimes, soil moisture budgets, prevailing winds and . . . wave action”. The statements in the final version that “As a consequence most islands will experience increased levels of flooding, accelerated erosion, and seawater intrusion into freshwater sources” and that the extent and severity of storm impacts, including storm surge floods and shore erosion are predicted to increase” follow unsurprisingly from this initial sentence.

F 51 Second, as to the criticism of lack of evidential support, no basis appears for doubting that these statements were fully endorsed, and if anything regarded as understated, by Dr Sheppard. Dr (now Professor) Sheppard was at the time Head of Biological Sciences at Warwick University, and was (unlike Mr Jenness, who was a resettlement anthropologist) an acknowledged expert on climate change and marine science in general and on BIOT in particular. He supported Posford’s conclusions in this area and believed that they were, if anything, understated: see e.g. on 14 May 2002 he commented on the draft report:

H “Oceanographic, climate, groundwater and soils sections are scientifically sound (with some queries and revisions suggested). These broadly show that development in the islands is not sensible, long term nor sustainable (and may even become dangerous) for the first two development scenarios.”

See further, on 31 May Dr Sheppard noted, in relation to rainfall and recharging of the lenses and in view of changes to future rainfall projected by the Hadley Centre’s website, that the “consequences to sustainable

settlement numbers could be considerable”; and in October 2002 he responded to Mr Jenness’s criticisms of the final version, stating, in particular, that “past lack of flooding, lack of erosion, steady temperature, are no guide at all to conditions from now on . . .” and that “our climatic entry into the ‘unknown’ is difficult to accept for those who are unversed in such matters, as seems to be the case with Jenness”.

52 Dr Sheppard went on:

“The climate modelling section, which is the part which most effectively supports the notion that resettlement will be ‘hazardous’ is the most criticised by Jenness. In fact the model is pretty rigorous and is probably correct. It does miss some detail, but its general tenet is almost certainly, unhappily for the Chagos islands, quite accurate, and fits well with climate modelling and predictions from many other sources. Again, Jenness is unaware just how much change is forecast. (If he is aware, he is writing propaganda, not a scientific critique.)”

53 If anything, it is clear that Dr Sheppard thought that Posford should have gone further. Thus he is recorded as having advised on 31 May 2002 that “following should be further addressed or resolved in the final report”, viz:

“Effects of sea level rise on the boundaries or depths of the lenses, especially in islands whose central parts are near sea level (two islands were ‘levelled’ and this could be usefully incorporated).”

Posford’s response was that “The effects of sea level rise on the groundwater systems was not in the TOR for the groundwater section”. As a further example, commenting on Mr Jenness’ views, Dr Sheppard records:

“Cyclones and Earthquakes

“Posford do go on a lot about cyclones and earthquakes, which is validly criticised by Jenness. Whatever weather changes will occur, cyclones (and certainly earthquakes) are not expected to change at all. Jenness is correct to say that Posford went overboard unjustifiably on this. (Posford should—as was recommended to them—have made more on sea level rise and warming, which is touched on, and would have been unassailable.)”

Dr Sheppard’s view about cyclones quite probably led to the removal of the reference to cyclones from the executive summary to the body of the text. The final bracketed sentence also speaks against any idea that Posford were engaged in a whitewash, or that the consultants were not acting independently.

54 Dr Sheppard went on:

“Erosion and overtopping

“• Jenness says that ‘there is no need to defer any plans (for resettlement) before rates of island erosion are established’. That is plain daft, unless all constructions are moveable.

“• Jenness says that lack of overtopping damage in the past means that estimates of increased overtopping in future are exaggerated. The climate is changing, and the past is now no guide to the future in this respect.

- A “• Jenness acknowledges elsewhere that climate change is occurring and that things may get worse. But he says that this is no reason to not develop. All that is needed is that development should use ‘careful’ land use planning and management with strong components for costal management and reef health. What does he mean? This sweeps a huge issue (*the* issue) under the carpet. The only land which will be above projected flooding is a rim around part of most islands. He says ‘it should not preclude resettlement of the Chagos in a prudently planned fashion’. Where?”
- B

55 A final quotation from Dr Sheppard reads:

- C “Jenness has much to say about the omissions on health, economics etc Some are valid. But he really should go and stand on one of the islands, holding a copy of the island’s profile above sea level, before he says ‘Land loss may be inevitable and should be planned for. Loss of groundwater can be planned for . . .’ and ‘can be managed with modest investment’. This may be true for, say 20 years. But beyond that we are talking here not about a little loss of a beach, but possibility of broaching of the rims and flooding of large inland areas.”

- D 56 The upshot is in my opinion that there is no basis for regarding as suspicious or actually or potentially significant in any way either (a) the removal in the final version of paragraph 1.8 of the reference to the possibility of a small northward shift of the cyclone belt or (b) the inclusion of (i) a reference to increased levels of flooding, accelerated erosion and seawater intrusion into freshwater sources or (ii) the predicted increase in severity of storm impacts, including storm surge floods and shore erosion.

- E 57 I can take the other three key amendments, [B], [C] and [D] quite briefly. The first, a change in respect of future sea water level rises from a range of 2–9mm per year to an average of 5mm a year cannot conceivably be sinister or significant, or, if it had been known to or focused on by any decision-maker, have led to a change in any ministerial decision. The second
- F is a complaint that the draft executive summary referred to “the general increase in storminess that may accompany climate change” while the final executive summary contained a paragraph starting “Increased storminess”. The Summary Note does not record that the latter paragraph continues “the Chagos islands have a small storm surge envelope thus even small changes in sea level and storm surge height implies an increase in the area threatened with inundation”. To my mind, there is therefore nothing in the difference.
- G But, if there is, it is clear from Dr Sheppard’s views, already set out, that he would support the reported threat. The third and last point relates to a new paragraph noting that “it is predicted that climate change may have a severe impact on the abundance and distribution of reef fish populations”. The complaint is that the body of the report is expressed in more nuanced terms. Again, it is clear that Dr Sheppard took a clear view of the likely effects of
- H climate change, and there is no reason to suspect that the final version represented anything other than a genuine prediction. Any difference in nuance should also have been apparent and, whether or not so, cannot conceivably support an argument that the minister acted irrationally in making the Orders he did on the basis of the final report.

*Heads (ii) and (iii)*

58 These two heads face in opposite directions. Both aim at undermining the stage 2B report. But head (ii) does so by relying on Dr Sheppard and his alleged endorsement of criticisms by Mr Jenness, the resettlement anthropologist instructed on behalf of Mr Bancoult to consider the stage 2B report in autumn 2002, while head (iii) suggests that Dr Sheppard's input into the stage 2B report lacked objectivity and was unreliable.

59 As to the latter suggestion, the applicant has through his representatives been prepared for a long time to cast wide ranging aspersions on a large number of people, including Dr Sheppard. But I do not think that they are made good, and that includes the suggestions that Dr Sheppard allowed his interest in preserving coral reefs to influence the advice he gave government. On the contrary, Dr Sheppard comes across in the material as a forthright and very independent character, not hesitating to comment bluntly on those working for government or for the applicant: see e.g. his email of 14 May, comments of 14, 30 and 31 May 2002 and further comments on Mr Jenness (some cited above). I also see no basis for regarding the stage 2B report as unreliable or for treating reliance on it as irrational in 2004, simply because Dr Sheppard had been the sole outside reviewer instructed by the executive, in addition to Mr Little, who had been appointed as FCO Feasibility Study Project Manager.

60 As to the former suggestion, although Dr Sheppard agreed with aspects of Mr Jenness's report, it is apparent from his comments on that report which I have already set out that he disagreed fundamentally with any suggestion that Mr Jenness's report undermined the conclusions in the stage 2B report, and that he would himself have gone, if anything, further in discounting the risks of climate change that underlay those conclusions.

*Conclusion relating to the Rashid documents*

61 The essential issues, as summarised in Mr Fitzgerald's speaking note, are (i) whether due disclosure of the Rashid documents would have led to a challenge by Mr Bancoult's representatives to the stage 2B report in the original judicial review proceedings, and, if so, (ii) whether it is likely that such a challenge would have resulted in a different outcome in the House of Lords on the rationality of the removal by the 2004 Constitution Order of the right of abode. The two questions are of course interconnected, since any decision whether or not to challenge the stage 2B report would have depended on an assessment of the prospects of such a challenge succeeding.

62 As to the first question, some caution is in my view required before accepting outright the submission that it is "certain" that there would have been such a challenge. Mr Bancoult's advisers had in December 2005 had disclosure of Mr Hamilton's extensive letter dated 23 May 2002 evidencing the nature of the FCO's involvement in and input into the process of re-drafting and finalisation of the report: see paras 20, 37–38 above. Mr Bancoult's solicitors felt able, from January 2006 onwards, to make serious allegations about lack of independence of the stage 2B report as well as about allegedly significant alterations between the draft and final versions of the preliminary study from January 2006 onwards. Yet, at the

A same time, the applicant through Sydney Kentridge QC was expressly disclaiming before the Divisional Court any challenge to the study or its outcome. Mr Bancoult's advisers did not at that stage think they could or should even try to overcome the first hurdle. Further, they maintained this attitude for years, including after disclosure in October 2010 of the email dated 29 May 2002 (paras 21 and 39–40 above), despite continuing to  
B make serious allegations in correspondence of lack of independence and invalidity.

63 For present purposes, I am however prepared to assume without deciding that a challenge would have been made, and to proceed directly to a consideration of the second. In Mr Fitzgerald's formulation, that is whether it is likely that such a challenge would have resulted in a different  
C outcome—but in my judgment it makes no difference ultimately whether the test should be formulated at the slightly higher level of a requirement to show "a probability" that it would have done so or at the perhaps slightly lower level of whether it "may well have" done so.

64 The second question reduces itself ultimately to a question whether it is probable or likely, or whether it may well be, that the material now  
D available would have led the court (at whichever level the case was being considered) to conclude that it was irrational or unjustified for the Secretary of State to accept and act on the General Conclusions set out in the stage 2B report. Those were the General Conclusions on which the Secretary of State acted when making, and which the majority in the House of Lords regarded as justifying his decision to make, section 9 of the 2004  
E Constitution Order. In addressing this question, I proceed on the basis that it is necessary and appropriate to treat the Secretary of State, when deciding in June 2004 whether to make section 9 of the 2004 Constitution Order, as having available to him or within his knowledge all the contemporary material which in fact existed in the possession of the executive. That includes the draft report and all the exchanges taking place and advice  
F received in the process of its redrafting and finalisation. Is it either probable or likely, or may it well be, that the court would have concluded that the material now shown to have been within the executive's possession or knowledge at the relevant date in June 2004 undermines the rationality or justifiability of the Secretary of State's decision to rely on such Conclusions?

65 The answer in my opinion is clear. The General Conclusions, and  
G the section on Vulnerability immediately preceding them remained unaltered from the draft to the final stage 2B report. There is no probability, likelihood or prospect (and, for completeness, in my view also no real possibility) that a court would have seen or would see, in the process of preparation, re-drafting and finalisation of the stage 2B report and in the associated material which can now be seen to have existed, anything which  
H could, would or should have caused the Secretary of State to doubt the General Conclusions, or which made it irrational or otherwise unjustifiable to act on them in June 2004. On that basis, the application to set aside the House of Lords' judgment by reference to the Rashid and other documents disclosed late must fail.

*Additional evidence*

66 The first head consists of the analysis note. This, as its name indicates, consists essentially of an analysis of primary material and/or submissions on it. Its development has taken place over years starting originally it seems as early as 2006 and continuing up to at least 2012. We have it in various forms. It is not conceived or presented as evidence, though I have taken its contents into account in considering the parties' respective cases and submissions on the material which is admissible and relevant.

67 The second head consists of information provided by Mr Stephen Akester, who, after their chance meeting, wrote to Mr Gifford a letter dated 11 February 2011 explaining the role of his company, MEP, as a sub-contractor to Posford. MEP was principally concerned with water resources and fisheries, and organised the site visit to the Chagos in early 2001. Mr Akester explains that his own experience was in regional development. In his letter, Mr Akester said that after the site visit, MEP reported and it appears provided Posford with the three development scenarios, after which Posford and he had no further involvement. But he explained:

"Because I and our team considered that resettlement was feasible, I prepared a draft of the different levels of development that would be appropriate to support such resettlement, given the fragility of the islands and bearing in mind that there had, in contravention of the normal practice of consulting potential settlers, been no consultation with the Chagossians themselves (this was excluded from our terms of reference)."

"After submitting our report via PH to BIOT, I was surprised that we heard nothing further concerning the text of it either from PH or from BIOT. I was not invited to any further meetings with BIOT, did not receive any draft prior to its critique by BIOT on 23 May 2002, and heard nothing more about the terms of the report until the final Executive summary had been approved by BIOT and sent to me. By then, it was of course too late to make any further comments. We were therefore unable to modify the terms of the 'General Conclusion' which I find to be wrong in its claim that resettlement involves obstacles which cannot be overcome by reasonable measures. Such issues are inherent in small island development and are regularly resolved within reasonable cost parameters."

68 That Posford's sub-contractor may have disagreed with conclusions drawn by Posford is a matter outside any conceivable sphere of information or knowledge that the Secretary of State or executive may be treated as having had at any material time. The material is thus correctly analysed as potential fresh evidence. But fresh evidence going to what issue? The ultimate issue is whether the Secretary of State was justified in acting as he did on the material which was or should have been available to him at the time, not whether his decision could be justified on a revisiting of the whole issue of resettlement in the light of any other material which either party could adduce now. In any event, the views expressed by Mr Akester in the letter dated 11 February 2010 cannot meet the test, however relaxed the

A terms in which this might be expressed, for setting aside the House of Lords judgment, even if they were material to any issue. I say this quite apart from the fact that, despite complaints regarding suggested lack of independence, no step was taken to set aside that judgment in the years following receipt of such letter, until after the Rashid documents had been disclosed.

B 69 The third piece of evidence is a further review of the report, prepared for the applicant by Professor Paul Kench of the University of Auckland dated 5 October 2012. According to the applicant's case:

C "He concludes that not only were the findings of the ocean and coastal processes section in the feasibility study unsound, because of lack of specialist understanding and methodological flaws, but also that the relevant summary (section 1.6) in the Executive Summary was not supported by those findings. This conclusion casts grave doubt on the pivotal findings of the feasibility study with regard to increased risk of sea-water flooding, which influenced the decision of the majority in the House of Lords . . ."

D 70 Like the information in Mr Akester's letter, this material does not go to any issue relevant to the question whether the Secretary of State acted rationally in the light of the material to be treated as available or within his or the executive's knowledge in June 2004. It would be relevant if the issue were whether the conclusions in the stage 2B report were sustainable today. But that is not the issue. I add for completeness that I am also unpersuaded that any good reason has been shown for not obtaining such an expert's report at any time prior to the disclosure of the Rashid documents, having regard to the serious allegations of inadequacy and lack of independence of the report that were being made at such time, both before and after receipt of Mr Akester's letter dated 11 February 2010.

E 71 The fourth piece of evidence is Posford's memorandum dated 7 March 2002, the information in which I am, for reasons already explained, prepared to take into account as material within the executive's knowledge, but which does not persuade me that there is any basis for setting aside the House of Lords judgment.

*Other relevant considerations*

G 72 There is one other factor, which would have been both relevant and in my opinion decisive, had I reached a conclusion that the threshold test for setting aside was or might otherwise have been satisfied. The applicant submits that nothing other than a reversal of the House of Lords decision (in so far as it proceeded on the basis that the stage 2B report could be relied on) will overturn the constitutional bar on their return to the Chagos. But there has been a new 2014–2015 feasibility study, published by KPMG in March 2015, which assesses the risks differently from the prior report and finds that, at some cost and taking into account (for the first time) the possibility of resettlement on Diego Garcia itself, there would be scope for supported resettlement. In practical terms, the background has shifted, and logically the constitutional ban needs to be revisited. As Mr Steven Kovats QC expressly accepted during oral submissions, it is open to any Chagossian now or in the future to challenge the failure to abrogate the 2004 Orders in



the light of all the information now available. That is in my opinion a factor militating strongly against the setting aside of the House of Lords' judgment and ordering a rehearing either of the whole appeal or of the limited issue whether it was rational for the Secretary of State to make the 2004 Constitution Order in the light of the material available to him or the executive generally in 2004. Even the latter issue could lead to further lengthy litigation and, quite possibly, a completely fresh hearing at first instance about a factually superseded study report.

73 There has been a yet further development consisting of the declaration by the Secretary of State on 1 April 2010 of the Marine Protected Area ("MPA") in the high seas surrounding the Chagos Islands. That declaration is the subject of a challenge by Mr Bancoult by way of judicial review in *Bancoult (No 3)*. The challenge failed before the Divisional Court on 11 June 2013, [2014] Env LR 2, and before the Court of Appeal on 23 May 2014, [2014] 1 WLR 2921. It is now the subject of a combined application to the Supreme Court for permission to appeal and for a protective costs order without which it is said that it will not be possible to pursue any appeal.

74 The Secretary of State's notice of objection dated 6 February 2015 in respect of this application supports the Court of Appeal's statement that the MPA (the only practical effect of which according to the Divisional Court was to prohibit commercial fishing in BIOT waters) had no meaningful or real effect at all on the economic, cultural or social development of BIOT, basically because there never had been commercial fishing there and there is no resident population in BIOT outside the US naval defence facility. Having said that, the notice goes on to state that:

"The MPA does not preclude resettlement in the event that Her Majesty's Government concludes that it is appropriate to permit and/or support resettlement of the islands. Whilst that decision is being considered in the light of an ongoing Feasibility Study commenced in January 2014 (and expected to be the subject of an imminent report by a panel of experts), the possibility of commercial fishing within the BIOT by a resident population is not realistic without resettlement and without a resident population.

"The Court of Appeal was right to note that it was therefore the prohibition on residential settlement on the BIOT which directly impacted upon the economic, social and cultural development of the BIOT. But that was not the decision that was under challenge in *Bancoult (No 3)*. That decision was unsuccessfully challenged in *Bancoult (No 2)*, culminating in a decision of the House of Lords . . ."

75 These passages confirm that resettlement is not precluded by the MPA, if the outcome of the new KPMG feasibility study of the ensuing public consultation on resettlement options, and of the ongoing governmental policy review persuades the Government that it is appropriate to permit and support resettlement. If the outcome of that study, consultation and review does not persuade the Government, then Mr Bancoult will be able, in principle, to apply to challenge the Government's refusal to permit and/or support resettlement as irrational, unreasonable and/or disproportionate, whichever may in context be the right test, by way of judicial review. If the

A MPA does prove to prejudice or limit the prospects of resettlement or the nature of any resettlement that may be permitted by the Government or on judicial review by the court, that will be a result of the MPA, which can only be avoided or removed by a successful challenge in the *Bancoult* (No 3) proceedings.

B *Conclusion*

76 For all the reasons I have given, this application to set aside the House of Lords' judgment and to direct a rehearing of the appeal to the House of Lords in *Bancoult* (No 2) fails in my opinion and must be dismissed.

**LORD CLARKE OF STONE-CUM-EBONY JSC**

C 77 I am in many ways sympathetic to the case advanced by Mr Bancoult. Indeed, I was a member of the Court of Appeal which decided the appeal in his favour. In these circumstances it is not perhaps surprising that I much prefer the reasoning of the minority to that of the majority in the House of Lords. It is however common ground that the question now before the court is not whether the majority were correct but whether the issue should be reopened. I have read the judgments of Lord Kerr of Tonaghmore JSC and Baroness Hale of Richmond DPSC on one side and of Lord Mance JSC, supported by Lord Neuberger of Abbotsbury PSC, on the other. I have reluctantly concluded that Lord Mance JSC's analysis is to be preferred and that the application should be refused for the reasons he gives.

D 78 One of the factors which has led me to that conclusion is that, as I see it, that is not the end of the road. I agree with Lord Mance JSC's conclusion in para 72 that there is a critical factor which is in any event conclusive. The background to much of the debate between the parties had been the feasibility of the Chagossians returning to the Chagos Islands. The 2014–2015 feasibility study considers, among other things, the possibility of resettlement on Diego Garcia. Given that new factor, the study concludes that there would be scope for supported resettlement. As Lord Mance JSC puts it, the background has now shifted and logically the constitutional ban needs to be revisited. The outcome of the new (and ongoing) feasibility study will no doubt consider the prospects of resettlement.

E 79 In the light of the results of the study the Government will no doubt consider whether it is (as Lord Mance JSC puts it at para 75) appropriate to permit and support resettlement. It was expressly accepted on behalf of the Government that it will be open to any Chagossian to challenge the failure to abrogate the 2004 Orders in the light of all the information which is now available or becomes available in the light of the ongoing study. For example, it will, at any rate in principle, be open to Mr Bancoult to institute judicial review proceedings to challenge any future refusal of the Government to permit or support resettlement as, in Lord Mance JSC's words "irrational, unreasonable or disproportionate".

F 80 In all these circumstances I do not think that it would be right now to set aside the judgment of the House of Lords and to direct a rehearing. It would be disproportionate to do so without having regard to the new circumstances taking into account the possibility of resettlement on Diego Garcia.

LORD KERR OF TONAGHMORE JSC (dissenting) (with whom  
BARONESS HALE OF RICHMOND DPSC agreed) A

### *Introduction*

81 The Chagos Islands are in the middle of the Indian Ocean. Since the early 19th century they had been part of the British colony of Mauritius but they were detached from that country before Mauritius gained its independence in 1968. B

82 The islands consist of a group of coral atolls. The largest of these, Diego Garcia, has a land area of approximately thirty square kilometres. To the north of this are Peros Banhos (thirteen square kilometres) and the Salomon Islands (five square kilometres).

83 In 1962 a Seychelles company acquired the coconut plantations on these three islands. The gathering of coconuts and the extraction and sale of the copra or kernel from them was the main form of employment for the inhabitants. After the acquisition of the plantations, it appears that the company exercised a paternalistic, even feudal, control of the islands' affairs. Company officers acted as justices of the peace and generally administered most aspects of civilian life. Partly as a consequence of that, Chagossians had what might be considered to be a simple existence. They were largely illiterate and their skills were confined to those that the activities on the islands required. But it was an existence which they valued and, especially when contrasted with what transpired after 1971, one which was unquestionably worthwhile. C D

84 Apart from indigenous inhabitants, some workers on the plantations came from Mauritius and the Seychelles. But the settled population of the three islands was some 1,000 in 1962. Many of the families which comprised that population had lived in the islands for generations. Their living conditions, although not at all affluent, were far from deprived. Every family had a house and some land. They grew vegetables on the land and kept poultry or pigs to supplement the imported provisions which the company supplied. Some fishing also took place. All who wanted to have and were capable of employment had a job. This was principally in the copra industry but employment was also to be had in construction, boat building and domestic service. The Chagossians therefore enjoyed what Lord Hoffmann (in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 2) [2009] AC 453, para 5) described as "a rich community life". E F

85 World affairs were soon to interrupt that simple but rich community life. Events are well described in para 6 of Lord Hoffmann's speech: G

"Into this innocent world there intruded, in the 1960s, the brutal realities of global politics. In the aftermath of the Cuban missile crisis and the early stages of the Vietnam War, the United States felt vulnerable without a land based military presence in the Indian Ocean. A survey of available sites suggested that Diego Garcia would be the most suitable. In 1964 it entered into discussions with Her Majesty's Government which agreed to provide the island for use as a base. At that time the independence of Mauritius and the Seychelles was foreseeable and the United States was unwilling that sovereignty over Diego Garcia should H

A pass into the hands of an independent, ‘non-aligned’ government. The United Kingdom therefore made the British Indian Ocean Territories Order 1965 (‘the BIOT Order’) which, under powers contained in the Colonial Boundaries Act 1895 (58 & 59 Vict c 34), detached the Chagos Archipelago (and some other islands) from the colony of Mauritius and constituted them a separate colony known as BIOT.”

B 86 In 1966, in an exchange of notes between the British and United States’ Governments, the United Kingdom agreed in principle to make BIOT available to the United States for defence purposes. Later in the same year it was agreed that a military base on Diego Garcia would be established and that the United States would be allowed to occupy the other islands if they wished.

C 87 In 1967, the UK Government bought all the lands held by the Seychelles company. Although the company was granted a lease which allowed it to continue to run the coconut plantations, it was stipulated that this would come to an end whenever the United States needed the islands. In 1970 the US Government gave notice that it would need Diego Garcia in July 1971 and, acting under powers granted to him by the British Indian Ocean Territories Order 1965 (SI 1965/1920), the commissioner for  
D BIOT promptly made the Immigration Ordinance 1971. It provided (in section 4(1)) “that no person shall enter the territory or, being in the territory, shall be present or remain in the territory, unless he is in possession of a permit . . . [issued by an immigration officer]”.

88 Even before the making of this Ordinance, the UK authorities were active in preparing for the occupation of Diego Garcia by the United States.  
E Between 1968 and 1971 they secured the removal of the inhabitants of the island, mainly to Mauritius and the Seychelles. A small population remained for a short time on Peros Banhos and the Salomon Islands, but they too were evacuated by the middle of 1973. The islanders were told that the company was closing down its activities and that unless they accepted transportation elsewhere, they would be left without supplies. In effect,  
F therefore, although they were not forcibly removed, they were given no choice but to leave their homes.

89 The Chagossians were resettled mainly in Mauritius. There they were largely left to their own devices. Since that country suffered high unemployment and considerable poverty, the conditions in which the displaced Chagossians were required to live, principally in the slums of St Louis, were miserable and squalid. It is now beyond question that their  
G interests had not been considered by the British authorities to any extent. Indeed, one might say that the removal of the Chagossians from their homes was cynically engineered by ensuring that the Seychelles company could no longer continue its commercial activities and that the inhabitants’ means of livelihood was thereby brought to an inevitable end. As Lord Hoffmann put it (in para 10 of his speech), “the removal and resettlement of the  
H Chagossians was accomplished with a callous disregard of their interests.”

#### *Legal proceedings*

90 In 1975 proceedings were issued by a former inhabitant of Diego Garcia, Michael Vencatessen, against the Foreign Secretary, the Defence

Secretary and the Attorney General. Damages were claimed for intimidation and deprivation of liberty associated with the circumstances in which he had been required to leave Diego Garcia. In negotiations between the UK Government and Mr Vencatessen's advisers, the latter were treated as acting on behalf of all the Chagossians.

91 An initial purported settlement of the claim failed to win the approval of the Chagossian community and negotiations resumed in which the Mauritius Government was also involved. Finally in July 1982 it was agreed that the UK Government would pay £4m into a trust fund for the Chagossians, set up under a Mauritian statute. The agreement was signed by the two governments in the presence of Chagossian representatives. It provided that individual beneficiaries should sign forms renouncing all their claims arising out of their removal from the islands. The vast majority of the displaced persons signed.

92 Matters did not end there. On 30 September 1998 Mr Bancoult applied for judicial review of the Immigration Ordinance 1971 and a declaration that it was void because it purported to authorise the banishment of British Dependent Territory citizens from the Chagos Islands. He also sought a declaration that the policy which prevented him from returning to and residing in the territory was unlawful. The UK Government reacted to these proceedings by commissioning an independent feasibility study to examine whether it would be possible to resettle some of the Chagossians on Peros Banhos and the Salomon Islands. Return to Diego Garcia was regarded as unfeasible because, under the arrangements made with the UK Government, the United States was entitled to occupy that island until 2016 at least.

93 On 3 November 2000 the Divisional Court (Laws LJ and Gibbs J) gave judgment in favour of Mr Bancoult: *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 ("*Bancoult (No 1)*"). An order was made quashing section 4 of the Immigration Ordinance 1971 as ultra vires. The Government did not appeal this decision. Instead the Foreign Secretary issued a statement in which he referred to the feasibility study, Phase 2 of which was, he said, well under way. As a result of the court's judgment, the statement said, the feasibility of resettling the Chagossians took on "a new importance" and a new Ordinance allowing them to visit the outer islands would be made.

94 On the same day that the statement was issued, the commissioner revoked the 1971 Immigration Ordinance and made the Immigration Ordinance 2000. This largely repeated the provisions of the previous Ordinance but contained a new section 4(3) which provided that the restrictions on entry or residence imposed by section 4(1) should (with the exception of Diego Garcia) not apply to anyone who was a British Dependent Territories citizen by virtue of his connection with BIOT. Some Chagossians visited the outer islands to tend family graves or to re-familiarise themselves with the lands that they had been forced to leave. No-one attempted to resettle there.

95 Before the feasibility study was published, a group action was begun on behalf of the Chagossians. This claimed compensation and restoration of the property rights of the islanders and declarations of their entitlement to return to all the Chagos Islands and to measures facilitating their return.

A The action was taken against the Attorney General and other ministers. On 9 October 2003 Ouseley J in *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB) struck out this action on the grounds, inter alia, that the claim to more compensation after the settlement of the *Vencatessen* case was an abuse of process, and that the claims were in any case statute-barred. An application for leave to appeal against that order was refused on 22 July 2004 (Dame Elizabeth Butler-Sloss P, Sedley and Neuberger LJJ) [2004] EWCA Civ 997.

96 The feasibility report was published in June 2002. Its findings were summarised by Lord Hoffmann in para 23 of his speech:

C “It concluded that ‘agroforestral production would be unsuitable for commercial ventures’. So there could be no return to gathering coconuts and selling copra. Fisheries and mariculture offered opportunities although they would require investment. Tourism could be encouraged, although there was nowhere that aircraft could land. It might only be feasible in the short term to resettle the islands, although the water resources were adequate only for domestic rather than agricultural or commercial use. But looming over the whole debate was the effect of global warming which was raising the sea level and already eroding the corals of the low lying atolls. In the long term, the need for sea defences and the like would make the cost of inhabitation prohibitive. On any view, the idyll of the old life on the islands appeared to be beyond recall. Even in the short term, the activities of the islanders would have to be very different from what they had been.”

E 97 In light of the feasibility report the Government decided that it would not support resettlement of the islands. In any event, in their perception, Diego Garcia would have to be excluded from any resettlement plans because of what was considered to be the UK’s Treaty obligations to the United States. Added to these considerations were reports of planned direct action by various groups who intended to launch landing expeditions to the islands. These factors combined to prompt the Government to restore full immigration control. The British Indian Ocean Territory (Constitution) Order 2004 (the Immigration Order) was made. This included section 9 which provided:

G “(1) Whereas the territory was constituted and is set aside to be available for the defence purposes of the Government of the United Kingdom and the Government of the United States of America, no person has the right of abode in the territory.

“(2) Accordingly, no person is entitled to enter or be present in the territory except as authorised by or under this Order or any other law for the time being in force in the territory.”

H 98 A challenge to the validity of section 9 by way of judicial review was made. The Divisional Court [2006] EWHC 1038 (Admin) at [120]–[122] held that it was invalid because its rationality had to be judged by the interests of BIOT. That meant the people who lived or used to live on BIOT. The Court of Appeal (Sir Anthony Clarke MR, Waller and Sedley LJJ) [2008] QB 365 affirmed that decision but on somewhat different grounds. Sir Anthony Clarke MR and Sedley LJ held that there had been an abuse of

power in enacting the 2004 Order because the interests of the Chagossians had not been taken into account. All three members of the Court of Appeal agreed that the Foreign Secretary's statement after the judgment in *Bancoult (No 1)* and the Immigration Ordinance 2000 constituted promises to the Chagossians which gave rise to a legitimate expectation that, in the absence of a relevant change of circumstances, their rights of entry and abode in the islands would not be revoked and there had been no such change. The Court of Appeal's decision was appealed to the House of Lords and by a majority (Lord Hoffmann, Lord Rodger of Earlsferry and Lord Carswell; Lord Bingham of Cornhill and Lord Mance dissenting) in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453 the appeal was allowed and the decision of the Court of Appeal was reversed.

#### *The present application*

99 By this application, Mr Bancoult, the respondent in the appeal before the House of Lords, seeks to have its decision set aside on the ground of material non-disclosure. He claims that documents held by the defendant which should have been produced in the course of the earlier proceedings are likely to have made a significant difference to the outcome of those proceedings. Before examining that claim, it is necessary to say something about the various stages and phases that were planned for the feasibility study and how those stages and phases changed in the course of its progress. It will also be necessary to consider the opinions of the House of Lords before assessing whether disclosure of the documents is likely to have affected its decision.

#### *The various stages of the feasibility study and the process of disclosure*

100 The report on stage 1 of the feasibility study had been published in June 2000 just before the hearing of *Bancoult (No 1)*. It was, the applicant claims, largely in favour of resettlement. It identified fishing as a major means of subsistence for a resettled population. Shortly after the Foreign Secretary's statement following the decision in *Bancoult (No 1)*, the stages of the feasibility study were re-named. Stage 1 was now referred to as the preliminary study. Phase 2A was to be a technical report on hydrogeological monitoring on the Salomon and Peros Banhos atolls. A more substantial Phase 2B was to be a general examination of some pre-requisites to resettlement, prior to the full cost benefit analysis that was originally intended to come at stage 2 but which would now be a stage 3 of the report.

101 Phase 2A, the hydrogeological survey, was started in 2001 but was never published as a separate report, its work being subsumed into Phase 2B. The latter phase was begun in late 2001 and completed in mid-2002. A report on it was published in July 2002. The full cost-benefit analysis, contemplated as stage 3 was never carried out. Phase 2B reported that resettlement would be precarious and that its cost would be prohibitive. The Government decided not to proceed with the planned stage 3 (the cost-benefit analysis). It terminated consideration of resettlement, and introduced the 2004 Order prohibiting residence on the islands.

102 Richard Gifford was a partner in the firm of solicitors which acted for Mr Bancoult in the litigation which culminated in the decision of the House of Lords. In advance of the hearing before the Divisional Court he

- A sought disclosure of the drafts of the three phases of the feasibility study and of any comments made on these by officials. Correspondence was exchanged with the Treasury Solicitor in which the relevance of some of the material sought was disputed but it is unnecessary to review this. Comments on the draft of the preliminary study could not be located at first. They were then discovered and supplied. Mr Gifford claims that they revealed “clear evidence of a crude re-writing of the important ‘General Conclusion’ from an entirely positive statement to a qualified one”.

- 103 It might be thought that since the document which is said to have prompted the 2004 Order was the report on the Phase 2B study, the re-writing of the preliminary report’s conclusion is of no particular importance. The fact that it was rewritten, however, when set against the now known position that there was extensive rewriting of the draft Phase 2B report may indicate a greater need for caution in examining the reasons for this rewriting.

- 104 On 6 December 2005 the Treasury Solicitor had written to Mr Gifford stating that draft reports for the preliminary feasibility study and the Phase 2B study report had been located and were available for inspection. In a letter of 13 December, however, this statement was corrected and it was stated that only a draft of the preliminary study had been found. No draft for the Phase 2B report had been found. This was confirmed in a letter of 23 December 2005.

- 105 During the hearing before the Divisional Court a number of inquiries were made by the judges of the defendant as to whether all relevant documents had been disclosed. The court was informed that if any further relevant documents were found these would be disclosed. Subsequently, on 3 February 2006, Mr Bancoult’s solicitor wrote to the defendant, specifically asking for the disclosure of “all documents and materials which demonstrate and support your . . . counsel’s assertion that resettlement of the Chagos Islands is ‘not feasible’”. This was met with the response that the material was not relevant but, when the appeal against the Divisional Court’s decision was pending, the UK Chagos Support Association asked for a copy of the draft of the Phase 2B report, and was informed by letter from the Foreign and Commonwealth Office on 6 October 2006 that no copy of the draft report had been retained on their files. This was confirmed on 9 November 2006, in response to a Freedom of Information request.

- 106 The applicant claims that, faced with the absence of relevant documentation relating to the production and acceptance of the feasibility study, it was considered that a challenge to the reliability of the study could not be made. Counsel for the claimant in the Court of Appeal therefore stated that the Government’s entitlement to terminate the feasibility study after the Phase 2B report and to decline to support a return to the islands was not contested. In view of the applicants’ knowledge at that time, I do not consider that this was in any sense unreasonable.

- 107 In any event, the stance taken by counsel did not make the feasibility study irrelevant to the case, however. The report remained relevant as being the alleged “good reason” relied on for not proceeding with resettlement and for denying Chagossians the right to return.

- 108 But the challenge to the Government’s decision would have been, the applicant claims, of a very different stripe, if the existence of highly



critical comments on the Phase 2B report had been known. Then the rationality of the decision not only not to fund resettlement but to deny Chagossians the right to return to the islands would have been strongly contested. That challenge would have been founded directly on the lack of reasonableness in relying on a report which was so obviously flawed and open to criticism.

109 The existence of undisclosed documents first became known in the course of the hearing before the High Court of a case called *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2014] Env LR 2. That case concerned the creation of a “no take” marine protected reserve around the Chagos Islands on 1 April 2010. In those proceedings Mr Bancoult challenged the legality of the creation of the reserve. Exhibited to a witness statement filed on behalf of the Foreign Secretary (the defendant in the proceedings) was a bundle of documents. The statement to which the documents were exhibited was that of Zaqia Rashid, a solicitor in the Treasury Solicitor’s department. She observed that she produced the documents without comment as to the reasons that they had not been disclosed earlier.

110 Before Ms Rashid’s statement in *Bancoult (No 3)* had been received, Mr Bancoult had made a number of freedom of information requests to the Foreign and Commonwealth Office concerning drafts of the feasibility reports. He was not satisfied with the replies that he received and lodged a complaint with Information Commissioner and a subsequent appeal to the First-tier Tribunal (General Regulatory Chamber): *Chagos Refugees Group in Mauritius v Information Comr* (Case EA/2011/0300). The hearing of the appeal took place after the documents attached to Ms Rashid’s statement had been received and was therefore principally concerned with two memoranda which had not been included in those documents. It also touched on explanations given for the failure to disclose the documents, however. The Foreign Office explained that this was due to a combination of factors. There had been a clerical oversight in relation to some of these and a recall of archived material which was more rigorously reviewed in the course of the *Bancoult (No 3)* litigation led to others being disclosed.

111 What have become known as the Rashid documents (ie those exhibited to Ms Rashid statement) contained a draft version of the executive summary of the Phase 2B feasibility study; and a covering letter from Posford (Royal) Haskoning (the consultants appointed to carry out the study) forwarding the remaining draft volumes. They also contained a number of documents generated during the preparation and finalisation of the feasibility study. These included (1) documents relating to the scope of work to be undertaken both for the first part of the original two stage study, later re-named the preliminary study under the Phase 2A contract and under the Phase 2B contract; (2) a memorandum of a meeting between BIOT officials and the consultants; (3) correspondence between the FCO and an external scientific adviser in relation to the Chagos Archipelago, Dr Charles Sheppard; (4) correspondence between the Foreign Office and the consultants and (5) details of the amendments to the draft Phase 2B report.

A *The House of Lords decision*

112 The appeal to the House of Lords from the Court of Appeal's decision ranged over three principal areas, only one of which is relevant to this application. The first concerned the scope of the courts' power to review the validity of an Order in Council legislating for a colony. What were described as "the extreme propositions" adopted by the parties were both  
B rejected by Lord Hoffmann. It had been argued on behalf of the Government that no review of the making of an Order in Council was legally legitimate since this involved the exercise of a legislative power. On behalf of the Chagossians it was claimed that the right of abode in one's homeland was so sacred that the Crown did not have power to remove it in any circumstances. Lord Hoffmann decided that there was a power of review and that the main point in the appeal was "the application of the ordinary  
C principles of judicial review": para 52. The question whether there had been any contravention of those principles was the second principal area involved in the appeal and it is this ground which underpins the current application. I will consider it presently.

113 The other two members of the majority, Lord Rodger and Lord Carswell, agreed with Lord Hoffmann on his rejection of the "extreme  
D propositions" of the parties on whether the Government had power to make the Order. They also agreed that the courts had power to review the making of the 2004 Order on the normal judicial review grounds: paras 105, 122.

114 The third area of dispute was whether a legitimate expectation on the part of the Chagossians had been created by the Foreign Secretary's statement and the 2000 Ordinance. Lord Hoffmann held that this argument  
E failed at the first hurdle—that there had to be a promise which was "clear, unambiguous and devoid of relevant qualification" per Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. Lord Rodger and Lord Carswell agreed.

115 In powerful dissenting speeches, Lord Bingham and Lord Mance concluded that the Government did not have power by Order in Council to exclude the Chagossians from their homeland: Lord Bingham at para 71 and  
F Lord Mance at para 160. They also held that the Foreign Secretary's statement and the making of the 2000 Ordinance created a legitimate expectation on the part of the Chagossians that they would be allowed "to return to the outer islands unless or until the United Kingdom's Treaty obligations might at some later date forbid it": Lord Bingham at para 73. These findings and their conflict with the conclusions of the majority are not  
G relevant to this application. The findings of Lord Bingham and Lord Mance in relation to the rationality of the decision to make the 2004 Order most certainly are, however. But before examining their reasons for determining that that decision was irrational, it is necessary to look at the speeches of the majority in order to see precisely why they considered that the charge of irrationality had to fail.

116 The summary of the findings of the feasibility report contained in  
H para 23 of Lord Hoffmann's speech has been set out above: para 96. This provided the backdrop to his examination of the issue of irrationality. Having accepted Bingham MR's statement of principle in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554, to the effect that where a measure affects fundamental rights or has profoundly intrusive effects, the courts will

anxiously scrutinise the decision to introduce it, Lord Hoffmann said, at para 53: A

“However, I think it is very important that in deciding whether a measure affects fundamental rights or has ‘profoundly intrusive effects’, one should consider what those rights and effects actually are. If we were in 1968 and concerned with a proposal to remove the Chagossians from their islands with little or no provision for their future, that would indeed be a profoundly intrusive measure affecting their fundamental rights. But that was many years ago, the deed has been done, the wrong confessed, compensation agreed and paid. The way of life the Chagossians led has been irreparably destroyed. The practicalities of today are that they would be unable to exercise any right to live in the outer islands without financial support which the British Government is unwilling to provide and which does not appear to be forthcoming from any other source. During the four years that the Immigration Ordinance 2000 was in force, nothing happened. No one went to live on the islands. Thus their right of abode is, as I said earlier, purely symbolic. If it is exercised by setting up some camp on the islands, that will be a symbol, a gesture, aimed at putting pressure on the Government. The whole of this litigation is, as I said in *R v Jones (Margaret)* [2007] 1 AC 136, 177 the ‘continuation of protest by other means’. No one denies the importance of the right to protest, but when one considers the rights in issue in this case, which have to be weighed in the balance against the defence and diplomatic interests of the state, it should be seen for what it is, as a right to protest in a particular way and not as a right to the security of one’s home or to live in one’s homeland. It is of course true that a person does not lose a right because it becomes difficult to exercise or because he will gain no real advantage by doing so. But when a legislative body is considering a change in the law which will deprive him of that right, it cannot be irrational or unfair to consider the practical consequences of doing so. Indeed, it would be irrational not to.” B C D E

117 Some observations can be made about this passage. In the first place it clearly implies that a decision to remove the Chagossians from their homeland with little or no provision for their future would indeed be a profoundly intrusive measure and one for which compelling justification would be required. And, of course, this is precisely what happened between 1968 and 1973. The Chagossians were removed. The islanders’ need to accept that removal must have been seen by them as a matter of survival. Whatever one might think of the argument that the evacuation of the islands was necessary (and, therefore, justified) in order to accommodate the American bases, it is impossible to defend the failure to ensure that the Chagossians were adequately housed and provided for in their new surroundings. F G

118 In accordance with the standard set by Lord Hoffmann, the decision to remove the Chagossians without making adequate provision for them and their subsequent actual removal when that provision was not in place must therefore have been irrational when those events occurred. The fact that their removal, when it in fact occurred, was unreasonable cannot, in my opinion, be left out of account in assessing whether the subsequent H

A decision to perpetuate the Chagossians' exile was rational. I will give my reasons for that conclusion later.

119 Secondly, it appears that Lord Hoffmann considered that the importance of the right to live in the outer islands, because it could not be fulfilled without financial help, was diminished because it was "purely symbolic". This was a view strongly challenged in the speech of Lord Mance. In para 138 he said:

B "[The wish of the Chagossians] for recognition of their historic connection, and on their case rights of abode, in relation to the Chagos Islands is deep-felt, longstanding and, in my view, understandable. Arguments that any right of abode is symbolic, since it would be impracticable to exercise without expensive government support to which it is accepted that there is no right and which would not be forthcoming, in my view miss the point. If anything, they indicate that the right claimed could be recognised without this being likely to have any practical effect on the present state of the Chagos Islands. These islands (apart from Diego Garcia) appear to exist as an unspoilt nature paradise to which an increasing number of long-distance yachtsmen venture to spend periods of months without noticeable disturbance to the operations of the United States base at Diego Garcia many miles away."

120 This passage throws into sharp focus the question whether the practicability of fulfilment of an undeniable right affects its intrinsic worth. It also emphasises the need to look closely at the question whether it was necessary to deny the Chagossians the right to live on the outer islands in order to avoid responsibility for funding such an option. At a theoretical level at least, a clear distinction can be drawn between, on the one hand, a refusal to underwrite the costs of resettlement, and, on the other, depriving the Chagossians of the right to return to their homeland. If all that the British Government wanted to avoid was paying for the cost of resettlement, why should it not simply say so? But the riposte to an argument that it was unnecessary to forbid return to the islands and that refusing to fund such a return was enough to achieve the Government's aims might be that given by Lord Hoffmann himself. This was that to permit an unfunded return would merely assist in the campaign on which the Chagossians were embarked. In order to frustrate that campaign, it was necessary to remove from the Chagossians their right to return to the place where they and their ancestors were born and had lived.

G 121 Lord Mance suggested (also in para 138 of his speech) that it had not been shown that

"that the Chagossians have been, in *Bancoult* (No 1) or the present proceedings, engaged in a mere campaign to obtain the United Kingdom Government support for resettlement or to embarrass the United Kingdom and United States Governments."

H Whether or not there was evidence from which to infer that there was such a campaign, it is clear from Lord Hoffmann's speech that the rationality of the decision to enact the 2004 Order depended crucially on its being shown that the conclusion that it was necessary in order to forestall a campaign by the Chagossians was not unreasonable. This is also clear from the speeches of

Lord Rodger and Lord Carswell. At para 112, Lord Rodger said that “the decision to legislate and to introduce immigration controls . . . appears to have been prompted by the prospect of protesters attempting to land on the islands.” And at para 132 Lord Carswell expressed his full agreement with Lord Hoffmann and Lord Rodger.

122 Does the decision of the majority on the issue of irrationality preclude any re-examination of the question of whether the right of the Chagossians to go and live where they were born was merely symbolic or, if it was, that its importance was thereby devalued? Is the second question set out above (whether the purpose of the Chagossians’ challenge was to advance a campaign to obtain financial support from the UK Government and to embarrass the UK and US Governments) forever settled by the decision of the majority? In my opinion, the answer to these questions is a conditional “No”. The conclusion that the decision to enact the 2004 Order could withstand the charge of irrationality was multi-factorial. If it now transpires that one of the bases for that conclusion was reliance on information that has now proved to be wrong or incomplete, this inevitably reflects on the cogency of the other grounds on which the conclusion was based. The various reasons for a decision such as this are, of their nature, interlinked. They may also be interdependent. Weight given to one factor may be affected by the discovery that the weight given to another can no longer be sustained. If, therefore, it emerges that the decision on the feasibility of resettlement was reached on information that was plainly wrong or open to serious challenge and that it is at least distinctly possible that a different decision on that question would have been formed had the full picture been known, it seems to me that the rationality of the enactment of the 2004 Order should be re-examined generally.

123 Leaving that debate aside for the present, however, it is necessary to focus directly on the feasibility of a return to the islands and the various views expressed about that.

124 Lord Hoffmann’s summary of his conclusions (para 23 of his speech) on this question have already been discussed. He also relied on the written statement to the House of Commons on 15 June 2004 (Hansard (HC Debates), col 33WS) by the Under-Secretary of State for Foreign and Commonwealth Affairs, Mr Bill Rammell, that in the light of the feasibility report it would be impossible for the Government to promote or even permit resettlement to take place.

125 Lord Rodger also relied on the contents of the feasibility report and Mr Rammell’s statement. At paras 112 and 113 he said:

“112. On 15 June 2004 a junior minister, Mr Rammell, made a written statement to Parliament. His good faith has not been impugned by the respondent. The statement shows that, in deciding to legislate to prevent people resettling on the outer islands, the Government took into account the fact that the economic conditions and infrastructure which had once supported the way of life of the Chagossians had ceased to exist. Something new would have to be devised. The advice was that the cost of providing the necessary support for permanent resettlement was likely to be prohibitive and that natural events were likely to make life difficult for any resettled population. Human interference within the atolls was likely to exacerbate stress on the marine and terrestrial environment and would

A accelerate the effects of global warming. Flooding would be likely to become more frequent and would threaten the infrastructure and the freshwater aquifers and agricultural production. Severe events might even threaten life. The minister recorded that, for these reasons, the Government had decided to legislate to prevent resettlement. Although he made no mention of it, the decision to legislate and to introduce

B immigration controls at that particular time appears to have been prompted by the prospect of protesters attempting to land on the islands. In addition, Mr Rammell said that restoration of full immigration control over the entire territory was necessary to ensure and maintain the availability and effective use of the territory for defence purposes. He referred to recent developments in the international security climate since November 2000 when such controls had been removed.

C “113. The ministerial statement indicates that a decision to legislate was taken on the basis of the experts’ (second) report on the difficulties and dangers of resettling the islands—these difficulties and dangers being dangers and difficulties which would affect the Chagossians themselves, if they were to try to live on the outer islands. Given the terms of that report alone, it could not, in my view, be said that no reasonable government

D would have decided to legislate to prevent resettlement. In particular, the advice that the cost of any permanent resettlement would be prohibitive was an entirely legitimate factor for the Government which is responsible for the way that tax revenues are spent to take into account. In addition, the Government had regard to defence considerations, the views of its close ally, the United States, and the changed security situation after 9/11. These additional factors reinforce the view that the decision to legislate

E was neither unreasonable nor irrational.”

126 Although Lord Rodger noted that factors other than those outlined in the experts’ second report were in play, it is clear from these paragraphs that he acknowledged that the report was the principal influence in the Government’s decision. He identified a number of features from it as being

F of particular importance: 1. the cost of permanent resettlement was likely to be prohibitive; 2. natural events would make life difficult for the inhabitants; 3. stress on the marine and terrestrial environments would be aggravated; 4. the effects of global warming would be increased; 5. flooding was likely to become more frequent and fresh water supplies and agricultural production would be endangered; and 6. severe events might even threaten life. By any standard, these were anticipated consequences of considerable moment.

G 127 Lord Carswell also relied heavily on the report. At para 121 he said that it was “quite clear” that resettlement was “wholly impracticable without very substantial and disproportionate expenditure”. The practical difficulties in the way of resettlement were in his view “relevant to the rationality of the Government’s decision”.

H 128 The claims made for the rationality of the decision to introduce the 2004 Order were forthrightly rejected in a lucid and strong passage of Lord Bingham’s speech. At para 72 he said:

“section 9 was irrational in the sense that there was, quite simply, no good reason for making it. (1) It is clear that in November 2000 the resettlement of the outer islands (let alone sporadic visits by Mr Bancoult

and other Chagossians) was not perceived to threaten the security of the base on Diego Garcia or national security more generally. Had it been, time and money would not have been devoted to exploring the feasibility of resettlement. (2) The United States Government had not exercised its Treaty right to extend its base to the outer islands. (3) Despite highly imaginative letters written by American officials to strengthen the Secretary of State's hand in this litigation, there was no credible reason to apprehend that the security situation had changed. It was not said that the criminal conspiracy headed by Osama bin Laden was, or was planning to be, active in the middle of the Indian Ocean. In 1968 and 1969 American officials had expressly said that they had no objection to occupation of the outer islands for the time being. (4) Little mention was made in the courts below of the rumoured protest landings by LALIT. Even now it is not said that the threatened landings motivated the introduction of section 9, only that they prompted it. Had the British authorities been seriously concerned about the intentions of Mr Bancoult and his fellow Chagossians they could have asked him what they were. (5) Remarkably, in drafting the 2004 Constitution Order, little (if any) consideration appears to have been given to the interests of the Chagossians whose constitution it was to be. (6) Section 9 cannot be justified on the basis that it deprived Mr Bancoult and his fellows of a right of little practical value. It cannot be doubted that the right was of intangible value, and the smaller its practical value the less reason to take it away."

129 Now, it is true that none of the reasons outlined in this paragraph touches on the question of feasibility as such but they provide a powerful and, in my view, unanswered case for rejecting the claim that the decision to introduce the 2004 Order was rational *unless* it could be shown that the feasibility argument was so strong as to outweigh it. This is crucial. If significant doubt could have been cast on the claims made in relation to feasibility, then the case for the Government that its decision was rational would have been thrown into considerable disarray.

130 Lord Mance was unimpressed by the use of the feasibility report as a basis for denying the Chagossians their fundamental right of abode in their homeland. At para 168 he pointed to the central incongruity of using a report published in 2002 to justify the enactment of the 2004 Order, two years later and to the circumstance that the Government had been found to be under no legal obligation to fund resettlement:

"The report is in fact dated 28 June 2002, so the BIOT Order 2004 was enacted two years after the report, and nine months after Ouseley J's decision that the Government had no duty to fund resettlement, although a month before the Court of Appeal finally refused permission to appeal against that decision. In the absence of any legal obligation to fund resettlement, the prospective cost of doing so appears to me (as it did to Sedley LJ in the Court of Appeal: para 71) an unconvincing reason for withdrawing any right of abode and any right to enter or be present in BIOT. The Secretary of State notes in his written case that, even in the absence of any legal obligation to fund resettlement (and although the United Kingdom has made clear its determination to resist any suggestion

A that it should provide such funds on a voluntary basis), there could be ‘public and political pressure claiming that the United Kingdom should provide funding for the cost of resettlement’. That is not a reason articulated at the time or supported by any reference in the written case.”

B 131 The logic of this reasoning is, in my opinion, irresistible. At its height, the feasibility report spoke to the impracticability of resettlement and the inordinate cost of funding any attempt by the Chagossians to resettle in their homeland. But it had been held that the Government was under no legal obligation to fund a resettlement. As a justification for denying the fundamental right of abode in the country of one’s birth, therefore, the report could be relied on only to forestall “public and political pressure” on the United Kingdom that the Government should meet what the feasibility  
C report said was the inordinate cost of resettlement. Quite apart from the consideration that, as Lord Mance pointed out, this was not a reason proffered by the Government either by way of explanation of the reason for the 2004 Order or in its written case, this was a heavy burden for the report to bear. It was not enough that it be shown that the cost was exorbitant or that resettlement was impracticable; these had to be so great that *the risk of*  
D *the Government coming under pressure to meet the cost and permit resettlement* was such that the Chagossians had to be refused the right to return to their traditional home.

E 132 Against that background, any reservations about the veracity of the claims made in the report assume an unmistakable significance. Unless the report was compelling and irrefutable in its conclusions, its capacity to act as the sole justification for the denial of such an important right was, at least, suspect.

F 133 Many criticisms of the reliability of the Phase 2B feasibility study have been made on behalf of the applicant. These have included examination of 1. the approach of the consultants to their task; 2. the editorial control exercised by the FCO; 3. the avowedly misleading representation that the consultants acted wholly independently; 4. the alterations to the terms of reference of the preliminary study; 5. the criticisms made of the scientific value of the Phase 2B report; and 6. the changes to the text of the report. Many documents prepared to support the applicant’s case have been submitted. While I have read and closely considered all of these, I do not find it necessary or helpful to set all of them out in any detail. What follows is a summary of the principal matters to emerge from all this material which are  
G pertinent to the central issue to be determined viz whether this appeal should be reopened.

*The draft preliminary report and some of the changes made to it*

H 134 An examination of the background to the Phase 2B report must begin with the preliminary stage report. As mentioned (para 102 above) Mr Gifford claimed that there had been a crude rewriting of the conclusion of this report from the version in the original draft. In its original conception the feasibility study was intended to comprise two stages, the first of which was to see whether “settlement appears possible and environmentally acceptable” (with an estimate of the numbers who might wish to return to



the outlying islands). Consultants delivered a draft report in May 2000. The principal conclusion was contained in para 5.1.1: A

“The conclusion of this preliminary study is that there is no obvious physical reason why one or both of the two atolls should not be repopulated, by the sort of numbers (up to or around one thousand) of Ilois [Chagossians] who are said to have expressed an interest in resettlement . . . Carrying capacity is largely a function of the nature of economic activity which accompanies resettlement, and its capability of financing the necessary amount of resources to ensure adequate supplies of water and to minimise the environmental impact.” B

135 It was recognised that further feasibility studies would have to be undertaken and so the draft report continued at para 5.1.13: C

“If a decision is taken to examine further the feasibility of resettlement, the next stage of the feasibility study should be largely concerned with examining the technical, financial, economic and environmental aspects of specific development proposals put forward by groups of islanders who are serious about resettlement and who have proper financial and technical backing for their proposed enterprises.” D

136 When the report reached its final form, there was a notable alteration to the principal conclusion. In the published version it read in para 5.1: E

“The conclusion of this preliminary study is that resettlement of one or both of the two atolls is physically possible, but only if a number of conditions are met. These include confirmation that: F

- “• a sustainable and affordable water resource can be developed;
- “• the nature and scale of settlement will not damage the environment;
- “• public money is available to finance infrastructure and basic services;
- “• and one or more private investors are willing to develop viable enterprises which can generate sufficient incomes to pay for the investment and recurrent costs of resettlement.” F

137 Taken on its face, this change may not appear especially significant. But, apart from the difference in language and structure, it had incorporated as essential pre-conditions matters which the draft report had indicated should be the subject of further study and investigation. Again, however, this may betoken no more than a recognition of a need for caution about future planning. It is perhaps on this account that these changes did not feature to any great extent in the presentation of Mr Bancoult’s case at any of the stages of the proceedings which ended in the appeal to the House of Lords. In light of changes to and criticisms of the draft Phase 2B report, it may be that greater importance should be attached to them and that they could be regarded as heralding a reluctance on the part of the Government to countenance any return of the Chagossians to Peros Banhos and the Salomon Islands. Certainly, it is not difficult to conclude that such an argument would have been made, had the criticisms of the draft Phase 2B report and the changes made to it been known. What would have been made G H

- A of such an argument is now perhaps difficult to say but the fact that it could have been—but was not—advanced should weigh in the balance as to whether the decision of the House of Lords should be set aside.

*The draft Phase 2B report and the criticisms made of it*

- B 138 In his statement to the House of Commons Mr Rammell had said that the Government had “commissioned a feasibility study by *independent experts* to examine and report on the prospects for re-establishing a viable community in the outer islands of the territory”: Hansard (HC Debates), 15 June 2004, col 33 WS. While it is strictly true that the consultants were independent, the terms of reference for the study made it clear that the BIOT Government (for convenience, in the next sections this will be referred to as “BIOT”) retained the right to see and comment on a draft of the final report.
- C In particular, para 6.3 of the terms of reference for Phase 2B of the study provided that a draft final report, containing a report of the work done, conclusions and recommendations, had to be submitted to BIOT within four months of the assignment starting. After BIOT received the draft, it was then able to make comments on it and it was only after these had been received that the final version of the report would be published. All of this might be
- D regarded as, if not standard government practice, at least not untoward. But the applicant suggests that the way that the procedure in fact operated in this case robbed the final report of any claim to true independence. He claims that when the extent of the widespread changes to the draft originally submitted became known (after the Rashid documents became available) what might have appeared as a wholly independent report took on a very different complexion.

- E 139 It is further suggested that this conclusion is reinforced by a consideration of the contents of a memorandum of a meeting on 6 March 2002 between Alex Holland of the consultants, Alan Huckle (head of the Overseas Territories Department and BIOT Commissioner), Louise Savill (BIOT Administrator) and Brian Little (FCO Feasibility Study Project Manager). This followed 21 days of field work in Peros Banhos and the
- F Salomon Islands. A progress report covering the period from 25 January to 28 February 2002 was considered at the 6 March meeting. This report laid down the future work programme, with draft reports from individual consultants due at Posford Haskoning by 22 March 2002, followed by submission of the entire first draft to BIOT on 31 March 2002.

- G 140 The memorandum of this meeting was prepared by Ms Holland. In it she recorded Mr Huckle as saying: “The FCO had hoped that Phase II would negate the need for Phase III, i.e. if it concluded that resettlement wasn’t feasible.” The comment is then made, “realistically, that was never likely to be the outcome”. Lord Mance JSC has stated at para 33 that there is “no suggestion that the FCO was inviting changes to bolster any sort of findings or conclusions in either the draft and the final report, and no basis for regarding Posford as susceptible to any such invitation”. It is true that
- H there is no record of an explicit invitation to “bolster” or change findings. But it is telling that the memorandum recorded that “FCO is hoping that the section on climate change will resolve its difficulties.” In my view, while these statements might be supposed not to entirely undermine the subsequent findings of the consultants, it is clear that the consultants were

being given an unmistakable steer as to what FCO wanted the outcome of the report to be and, inevitably, whatever one might think about Posford's susceptibility to suggestions, this at least raises questions about the independence and impartiality of the judgment that the consultants ultimately made. Those questions in turn play into the validity of the scientific analysis made by the consultants.

141 The Executive Summary of the draft report was received by BIOT in the week beginning 8 April 2002. The remaining sections of the draft arrived on 15 April. On 24 April 2002 Charles Hamilton (who had just succeeded Louise Savill as BIOT Administrator) asked Dr Charles Sheppard (a tropical marine ecologist at Warwick University who had extensive previous work experience in the Chagos) to carry out a peer review of the consultants' report. This was provided on 14 May 2002. Dr Sheppard wrote an email to accompany his report. In this he excoriated some parts of the consultants' work. Some sections of the report were, he said, "quite hopeless". These related principally to the resources section. Importantly, however, Dr Sheppard endorsed the consultants' conclusions on the practicability of resettlement largely on account of anticipated climatic conditions. The consultants' views on this were, Dr Sheppard said, "supported by emerging science connected with tropical science generally". It might therefore be said that on the central issue which influenced the majority in the House of Lords, *viz* whether resettlement was a feasible option, the consultants' assessment was essentially supported by Dr Sheppard.

142 The applicant points to a more general criticism voiced by Dr Sheppard, however. This, he says, is bound to have prompted his advisers to mount a wholesale and direct challenge to the methodology and reliability of the feasibility report generally. In this connection, the applicant relies particularly on a sharp criticism of the report by Dr Sheppard in the following strongly-worded terms:

"the present Posford report should not in my view be released in its present form; some of its science would be badly savaged by anyone not happy with your conclusions, and so, by implication, could some of the conclusions themselves."

143 The claim that if this comment had been known by the applicant's advisers, it would have led to a more direct challenge to the feasibility report must be approached with caution in light of the fact that the applicant had engaged a resettlement anthropologist, Jonathan Jenness. He was asked to conduct a review of the feasibility report primarily to provide input on the resettlement issues which were excluded from the Phase 2B study, but Mr Jenness also made some strong criticisms of the claimed conclusions of the study, without knowing how those conclusions had been arrived at.

144 Mr Jenness' report was submitted to FCO. The applicant and his advisers were unaware that it had been subjected to a critique by Dr Sheppard until FCO wrote to his solicitors on 2 December 2002 enclosing Dr Sheppard's report. He challenged and criticised a number of Mr Jenness' conclusions but he said that many of his points about the inadequacies and errors in the Posford report were valid. There must be some doubt, however, that Dr Sheppard's acknowledgment that parts of Mr Jenness' criticisms of the feasibility study were sound would have led to a

A markedly different strategy on the part of Mr Bancoult's advisers, not least because of the astringency of Dr Sheppard's other observations on Mr Jenness' report.

B 145 Whether disclosure of Dr Sheppard's critique of Mr Jenness would have led to a different conclusion by the majority in the House of Lords calls for rather more subtle consideration, however. As I have said, the essential issue for the House of Lords was whether the cost of resettlement was so exorbitant or that resettlement was so impracticable that the risk of the Government *coming under pressure* to meet the cost and permit resettlement was such that the Chagossians had to be refused the right to return to their traditional home. It seems to me that, in light of Dr Sheppard's general criticisms of the consultants' report and his endorsement of some of Mr Jenness' disparagement of it, it is at least questionable that such heavy  
C reliance would have been placed by the majority on its conclusions.

*Alterations made to the draft Phase 2B report*

146 The draft report contained a supremely important passage at the second part of para 1.8, which was originally included in the section on resettlement. It reads:

D "the most significant and immediate consequences of climate change on a resettled population within the Chagos Archipelago are likely to be related to changes in sea levels, rainfall regimes, fresh water resources, soil moisture budgets, prevailing winds (direction and speed) and short term variation in regional and local patterns of wave action. At present the Chagos archipelago lies *just north of an active cyclone belt*, however,  
E a small northward shift of this belt *could* lead to frequent cyclones in the area. This *would* lead to more frequent flooding of the islands, with corresponding risk to life and any infrastructure. It *would* also reduce agricultural potential and the freshwater contained within the island aquifers *would* experience higher levels of salinity". (emphasis added)

F 147 The final version of the report in the equivalent section was in the following terms:

G "The most significant and immediate consequences of climate change for the Chagos Archipelago are likely to be related to changes in sea level, rainfall regimes, soil moisture budgets, prevailing winds and short term variation in regional and local patterns of wave action. As a consequence most islands *will* experience increased levels of flooding, accelerated erosion, and seawater intrusion into freshwater sources. *The extent and severity of storm impacts, including storm surge floods and shore erosion are predicted to increase.* Although the risks associated with climate change are not easily established the implications of these issues to resettlement in the outer atolls of the Chagos Archipelago are outlined briefly below." (Emphasis added.)

H 148 The most obvious and significant points to be made about these two passages is in (i) the transformation of a conditional forecast of frequent flooding etc, predicated on a possible northward shift of the active cyclone belt, into a firm prediction that these and other consequences *will* occur; (ii) the omission of any reference to the cyclone belt in the final version; and

(iii) the new wording in the final version predicting an increase in storm surge floods and shore erosion unconnected with cyclones. A new sentence has been added stating that “The extent and severity of storm impacts, including storm surge floods and shore erosion are predicted to increase”. No evidence was provided to support the assertion contained in this sentence.

149 The significance of translating the prediction of possible consequences of climate changes into a positive statement that these *will* occur lies, of course, in the impetus that it gives to the notion that there really was no practical means of resettling the islands. As it happens, there is no evidence that these consequences have begun to materialise even now, although that may not be taken into account on the issue of whether the application to reopen the appeal should be allowed. But the essential message of the final report that these consequences *would* occur cannot but have influenced the decision of the majority of the House of Lords that the perceived need to enact the 2004 Order was not irrational. It is one thing to say that it is rational to forbid Chagossians to return to their homeland if the dire consequences that were spoken of were going to occur. It is quite another to say that it was reasonable if it was merely possible that they might happen.

*The jurisdiction to set aside a decision of the House of Lords and the test to be applied*

150 It is possible, at least theoretically, to distinguish between the question whether this court has jurisdiction to set aside a decision of its predecessor and the test to be applied in deciding whether to do so. In practice, however, these concepts overlap because the jurisdiction tends to be defined in terms of the conditions which justify its invocation.

151 In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 132 Lord Browne-Wilkinson said:

“In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Broome v Cassell & Co Ltd (No 2)* [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.”

152 There is likewise no relevant statutory limitation on the jurisdiction of this court. And its inherent jurisdiction must comprehend the right to correct an injustice caused by an earlier order made by it or however such injustice arises. This point was made by Lord Hope of Craighead DPSC, delivering the judgment of the panel in *R (Edwards) v Environment Agency (No 2)* [2011] 1 WLR 79, para 35 where he said:

“The Supreme Court is a creature of statute. But it has inherited all the powers that were vested in the House of Lords as the ultimate court of appeal. So it has the same powers as the House had to correct any

A injustice caused by an earlier order of the House or this court. It would however be more consistent with the principle which Lord Browne-Wilkinson described to say that the power is available to correct any injustice, however it may have arisen.”

B 153 Of course, in this context, what is meant by injustice is the critical issue. Providing a comprehensive definition of the circumstances in which it would be appropriate to exercise this jurisdiction is impossible but one can begin with the uncontroversial statement that it must be sparingly invoked. Lord Browne-Wilkinson was careful to make that point in emphatic terms. At p 132 of the *Pinochet* case, he said:

C “it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.”

D 154 By “wrong” in this connection one may safely assume that Lord Browne-Wilkinson had in mind a conclusion that the earlier court’s decision was, in the minds of the subsequent panel, one which should not have been reached on the particular facts and legal issues before it. So it is not sufficient to show that the earlier decision was wrong in that sense. But is it necessary to show that, not only was a party “subjected to an unfair procedure” but that a “wrong” decision was thereby procured? On one view, the statement in the earlier passage quoted above, that the jurisdiction should be invoked to “correct any injustice” might indicate this, for how could an injustice occur if the outcome of the proceedings would have been the same in any event? But Lord Browne-Wilkinson’s later reference to *Broome v Cassell* (No 2) [1972] AC 1136 suggests that the jurisdiction is not so confined. This appears to indicate that where parties have not had a fair opportunity to address argument on a relevant point, an injustice, sufficient to animate the jurisdiction, is present.

F 155 The question remains, however, whether it is a necessary prerequisite that the earlier decision would not have been, or is likely not to have been, reached, if the defect in procedure or other irregularity had not occurred. The applicant has accepted that “it must be shown that the non-disclosure probably had, or may well have had, a decisive effect on the outcome”. This concession was based largely on Court of Appeal jurisprudence. The respondent agreed with the applicant’s formulation of the appropriate test.

G 156 In *Taylor v Lawrence* [2003] QB 528, para 55, it was held that the Court of Appeal could reopen proceedings which it had already heard and determined if it was “clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy”. It is apparent that “significant injustice” in that case connoted an actual injustice (in the form of an adverse result which should not have occurred), although, as it happens, no such injustice was held to have happened there. A tangible injustice in the form of the probably wrong outcome was considered to be necessary. This approach was followed in *Feakins v Department of*

*Environment, Food and Rural Affairs* [2006] EWCA Civ 699; [2006] NPC 66. A

157 After *Taylor v Lawrence* was decided, CPR r 52.17 headed “Reopening of final appeals” was promulgated on 6 October 2003. It provided:

“The Court of Appeal . . . will not reopen a final determination of any appeal unless— (a) it is necessary to do so in order to avoid real injustice; B  
(b) the circumstances are exceptional and make it appropriate to reopen the appeal; and (c) there is no alternative effective remedy.”

158 No such provision exists in the Supreme Court Rules. Obviously, there will customarily be no alternative effective remedy where the decision that is sought to be reopened is one of the Supreme Court. Should the approach of this court be the same as that otherwise indicated in this provision? For reasons earlier given, the power to reopen should be invoked sparingly and the need for exceptional circumstances is unobjectionable. C  
The requirement that the circumstances are such as to make it appropriate to reopen the appeal is somewhat general and rather begs the question, when is it appropriate that the appeal should be reopened. This is an issue on which, I think, it is quite impossible to be prospectively prescriptive. It seems to me, D  
therefore, that the truly important condition in CPR 52.17 is that the reopening of an appeal should be necessary in order to avoid injustice and that this is the touchstone which this court should adopt as a guide to when this exceptional course should be followed.

159 Does real injustice involve a conclusion that the circumstance which prompts the application to reopen the appeal probably had, or may well have had, a decisive effect on the outcome? I am content to say that this should normally be required. But I enter two caveats to that proposition. E  
In the first place, it may not always be possible to forecast that such a decisive effect would probably or might well accrue. In that event, I would not preclude in every circumstance the possibility of a reopening of the appeal. The second possible exception to the general rule might arise where the F  
behaviour of the party whose failure to place before the court relevant material was so egregious that, even if it was not considered likely that the outcome of the appeal would be affected, it would nevertheless be appropriate that the appeal be reopened in order to demonstrate that all pertinent information had been fully considered and that due process had been followed.

160 Neither situation arises here. I am satisfied, therefore, that it is incumbent on the applicant to show that if the material in the Rashid G  
documents had been available to the House of Lords they would have had, or may well have had, a decisive effect on the outcome of the appeal. I am entirely satisfied, however, that it is enough that it be established that there is a real possibility that a different outcome would have occurred had the information been available at the time of the original hearing. How could it be otherwise? If it is shown that it is distinctly possible that a party might H  
have achieved a different result had relevant material been available to it, I cannot understand how it could be said that that party has not suffered an injustice by being denied the material and thereby being denied the opportunity of securing the outcome that they sought. If I might have

A persuaded the court that it should reach a different view if I had material that could have influenced that view, have I not suffered an injustice by being deprived of that chance? Of course I have. To the extent that *Taylor v Lawrence* and *Feakins v Department of Environment, Food and Rural Affairs* suggest otherwise I emphatically disagree with them.

B 161 It is, therefore, my firm belief that it is not necessary to show that it was probable that a different outcome would have been brought about; it is enough that there exists a distinct possibility that this would be so. Furthermore, the formulation whether “it was irrational or unjustified for the Secretary of State to accept and act on the General Conclusions” does not focus on the essential issue here. It was not simply a question of the Secretary of State accepting the conclusions; it was a matter of using those conclusions as a basis for denying a right of abode to the Chagossians *solely*  
C *in order to deter a campaign by the Chagossians to be allowed to return to their homeland*. The House of Lords was not addressing in the abstract the question of the “rationality or justifiability of the Secretary of State’s decision to rely on such conclusions” (Lord Mance JSC in the final sentence of para 64). What it was about was an examination of the sufficiency of his reliance on those reasons as a basis for denying the Chagos Islanders’  
D entitlement to return to live in their homeland, when there was no question of any legal obligation on the part of the Government to fund that return.

162 It is therefore, I am afraid, not enough to say that there was nothing in  
“the re-drafting and finalisation of the stage 2B report . . . which could, would or should have caused the Secretary of State to doubt the General Conclusions, or which made it irrational or otherwise  
E unjustifiable to act on them in June 2004”: Lord Mance JSC, para 65.

The critical issues were the nature of the action taken and the background against which it occurred. It might not be irrational to accept the conclusions of the report but that, with respect, is simply not the point. The question is whether it was rational to deny these islanders their fundamental  
F right to live where they and their ancestors were born for the sole reason of seeking to avoid a potentially embarrassing campaign that the British Government should put right the callous disregard that had been shown them when they were effectively forced from the islands between 1968 and 1973.

163 The House of Lords was not merely considering whether it was reasonable for the Secretary of State to accept the report’s findings. The  
G rationality challenge was to the action that he took, having accepted those findings. In the knowledge that the British Government was not under any legal obligation to fund resettlement and that the most it had to fear was a campaign by the islanders that they be allowed to return home and that the Government should facilitate that, the minister decided that they should be denied their right of abode in their homeland. That is the true nature of the  
H rationality challenge. And that is why (as I explain at para 165 below) that it is necessary to recognise how severe the challenge to justify the 2004 Order truly was. When that central truth is confronted, it becomes clear how *any* doubt on the authority of the report was likely to or certainly should have caused the majority of the panel to question the rationality of the decision.



And that is why there is, at the very least, a distinct possibility that there would have been a different outcome. A

*Would the Rashid documents have had, or may they well have had a decisive effect?*

164 In my view the principal relevant documents exhibited to Ms Rashid's statement were: 1. the memorandum of the meeting of 6 March 2002 in which the Government's hopes for the outcome of the feasibility study were made clear; 2. Dr Sheppard's critique of the draft Phase 2B report; 3. Dr Sheppard's endorsement of some of Mr Jenness' criticism of the feasibility study; and 4. the draft Phase 2B report which, when contrasted with the final report, illustrated the distinct change in emphasis in the prediction of climate changes, especially since these bore directly on the question of the feasibility of resettlement. B C

165 In deciding whether the disclosure of these documents before the appeal was heard by the House of Lords would or might well have had a decisive effect on the outcome, one must keep closely in mind the real issue on rationality. This was whether it was rational to deny the Chagossians the right to return to their homeland in order to deflect or prevent a campaign that the UK Government should fund resettlement costs. The issue *was not* whether it would be reasonable for the Government to meet those costs. It had been decided that there was no legal obligation on them to do so. It could not, therefore, be sought to justify the decision to introduce the 2004 Order on the basis that it was not reasonable that the UK Government should have to fund the resettlement costs. The Government did not need to defend a decision that it would not pay for resettlement. It had been told by a court that it was not legally obliged to do so. D E

166 What motivated the decision to categorically forbid the Chagossians the right to go back to live in their homeland was an anticipated campaign that might have been politically embarrassing for the Government. When this apprehended harm is pitted against the importance of the right to be denied, it is not difficult to recognise how severe the challenge to justify the 2004 Order truly was. People were told that they could not go back to live where they and their ancestors had lived. Moreover, that denial took place against a background that they had been evacuated from the islands in circumstances which were plainly unjustified. When the decision came to be made in 2004 whether they should be allowed to return to live in the outlying islands, the fact that their removal from them had been organised with "callous disregard of their interests" was a plainly relevant circumstance. It could not have been properly left out of account by a conscientious decision-maker. There is no evidence that regard was had to that factor. Irrespective of whether it was or not, however, the circumstances in which the Chagossians were originally removed from their homeland rendered any subsequent decision to refuse to allow them to return all the more difficult to justify. F G

167 If the Rashid documents had been before the House of Lords, the following matters would have had to be squarely confronted: (i) despite the claims for their independence, the consultants had been told in unequivocal terms what the Government hoped would be the outcome of their report; (ii) the draft report had to be submitted to BIOT officials who had the H

A opportunity to approve or require amendment of its contents; (iii) much of the science of the report (although not that relating to climatic changes) had been severely criticised by Dr Sheppard; (iv) many of the criticisms of the report by Mr Jenness had been endorsed by Dr Sheppard (even though he was also extremely critical of Mr Jenness); (v) most importantly, the draft report's central findings in relation to climate change, couched in conditional terms, had been altered to provide a firm prediction that such changes *would* take place.

B 168 In my view, the collective effect of these revelations is that the appeal might well have been decided differently. The passages from the speeches of the majority which have been quoted earlier, for perfectly understandable reasons, bear no trace of reservation or doubt as to the anticipated consequences of any attempt to resettle the islands. If the members of the House of Lords knew that much of the science of the report was considered to be suspect by the scientist retained by the FCO; that the consultants had been given a clear indication of what the Government hoped the report would deliver; that the changes to the conclusions of the preliminary study (which were known) proved to be a mild herald of the more radical changes to the Phase 2B report; that the Chagos Islands were not in an active cyclone belt and that this had a direct bearing on the predictions contained in the report, is it likely that the speeches of the majority concerning the anticipated consequences of an attempt to resettle would have been expressed in such emphatic terms? In my judgment it is not. And if the majority felt compelled, as it surely would, to recognise the lack of certainty in some of the central predictions, is it likely that they would have been prepared to hold as rational a decision to completely deny the Chagossians the right to return to their homeland, simply because a failure to do so would give rise to a campaign that the Government should fund resettlement, when it had already been held that they were under no obligation to do so? In my opinion, it is at least distinctly possible that a different view would have been taken by the majority and that the outcome of the appeal would have been different. I would therefore grant the application to reopen the appeal.

#### *Other matters*

##### *(i) New evidence*

C 169 The applicant sought to introduce new evidence which, he claimed, would show that the dire consequences which the feasibility study predicted have not in fact materialised and were, in any event, highly suspect from the start. Four species of evidence were involved: (i) a "comprehensive analysis of the Phase 2 feasibility study based . . . on a comparison of the original draft disclosed in the Rashid documents . . . with the final published version of the study" and on other information contained in the documents. This was prepared by Richard Gifford and by a coral reef scientist, Richard Dunne; (ii) information provided to the applicant by Stephen Akester, who was one of the members of the team which prepared the feasibility study. Mr Akester stated that he did not agree with the conclusion of the feasibility study that resettlement was not feasible, and that he was not consulted about the finalisation of the original draft of the study. It is claimed that he was the only member of the team of consultants the only person with direct

experience of resettlement on small coral atolls; (iii) a review of the feasibility study, prepared by Professor Paul Kench, of the University of Auckland, New Zealand, dated 5 October 2012. He concluded that not only were the findings of the ocean and coastal processes section in the feasibility study unsound, because of lack of specialist understanding and methodological flaws, but also that the relevant summary in the executive summary was not supported by those findings. This conclusion, it was claimed, cast grave doubt on the pivotal findings of the feasibility study especially in relation to increased risk of sea-water flooding; (iv) the written note of 6 March 2002, referred to in para 138 above.

170 It is not open to an applicant for a reopening of an appeal to adduce evidence solely for the purpose of retrospectively impeaching the decision of the court whose judgment he seeks to have reviewed. This would, in effect, allow an appeal against the decision based on information acquired for the purpose of undermining the judgment. An application to reopen an appeal must be based on the contention that if the original appeal had been conducted in the way that it ought to have been, it is probable or at least distinctly possible that there would have been a different outcome.

171 On this account, much of the material which the applicant seeks to introduce is not admissible, irrespective of whether it complies with the conditions which should be met, based on the principles of *Ladd v Marshall* [1954] 1 WLR 1489, for the introduction of fresh evidence. In truth, an application to reopen an appeal will rarely, if ever, be the occasion for an application to introduce fresh evidence in the conventional meaning of that term. The essence of an application to reopen an appeal, in so far as it relates to evidence, is that evidence which *should have been before the original court* was not. For this reason, I consider that none of the so-called items of evidence in the first three categories above is admissible.

172 The memorandum of 6 March 2002, by contrast constitutes material which ought to have been disclosed before the Divisional Court hearing. If it had been, I consider that it would unquestionably have featured in that and subsequent proceedings in the case, bearing, as it undoubtedly did, on not only the independence of the consultants but also on the result that the Foreign Office hoped to obtain from the feasibility study.

*(ii) The paucity of the peer review of the feasibility study and Dr Sheppard's impartiality*

173 It was argued on behalf of the applicant that, in light of the range of subjects covered by the feasibility study, a professional peer review of the draft study, carried out by up to six specialists was essential. Unique reliance on the expertise of Dr Sheppard, whose specialism is coral reef ecology, was insufficient to give the report the authority that it required. There is nothing in this point. If the rationality of deciding to introduce the 2004 Order depended at all on the robustness of the peer review of the feasibility study, this point could have been made during the earlier proceedings. But, in any event, while it may be good practice to have a comprehensive peer review of a report such as the feasibility study, that is a very far cry from saying that it was irrational to rely on the study in the absence of such a review.

- A 174 It was suggested that Dr Sheppard's input into the revision of the draft of the feasibility study was mainly composed of criticisms of those parts of the study which tended to suggest that resettlement was feasible. Thus in his input to the final version he described the natural resources sections, which suggested a variety of ways in which natural resources could be exploited to provide a livelihood for the islands as "dismal", while stating
- B that the oceanographic, climate, groundwater and soils sections were scientifically sound. This, it was claimed, reflected the fact that Dr Sheppard was "well known to be strongly dedicated to [the] conservation . . . [of coral reefs]" and it was therefore questionable whether he could "reasonably be regarded as an objective assessor of a study on the issue of reintroducing human settlement to the pristine and now deserted environment which he was so committed to protecting".
- C 175 Even if one was prepared to take these highly contentious and untested claims at their height, they fall very far short of showing that taking Dr Sheppard's views into account in deciding to introduce the 2004 Order was irrational. The applicant does not dispute that Dr Sheppard was a well-recognised expert in his field. The suggestion that he might have allowed his interest in preserving coral reefs to influence the advice that he gave to the
- D Government is, at best, speculative. I consider that this argument is without merit.

*Is the application moot?*

- 176 The respondent has argued that events occurring since the decision of the House of Lords and a further review of the feasibility of resettlement
- E render this application unnecessary. In July 2013 the respondent announced that a new feasibility study would be carried out. The terms of reference for this study were published on 31 January 2014. The new study was to consider a range of options for the resettlement of BIOT, including not just the outer Chagos Islands but also Diego Garcia where the United States military base is located.
- F 177 These developments do not render the reopening of the appeal of merely academic interest. If the original judgment of the House of Lords is not set aside, the starting point for all future consideration of the resettlement issue will be that section 9 of the Constitution Order is valid, and that the removal of the Chagos Islanders' right of abode was lawful. If it proves that there would have been a different outcome in the appeal before
- G the House of Lords if the material from the Rashid documents had been before their Lordships, it would obviously not be right that the position concerning the Chagossians' right to return to their homeland, recognised first by the Divisional Court, should not be retrospectively vindicated, with whatever legal consequences that this might entail.
- H 178 Lord Mance JSC in para 72 and Lord Clarke of Stone-cum-Ebony JSC in para 78 of their judgments have characterised as "conclusive" the consideration that the 2014–2015 feasibility study takes into account the possibility of resettlement on the islands, including Diego Garcia. They both suggest that "the background has now shifted" and that "the constitutional ban needs to be revisited". With respect, whatever the outcome of the 2014–2015 feasibility study, it cannot be right to suggest that this is relevant

to a decision whether the appeal should be reopened, much less that it is conclusive of that issue. A

179 The fallacy of the suggestion can be demonstrated in this way: let us suppose that timeous disclosure of the Rashid documents would have led the House of Lords to a different conclusion on the question of the rationality of the decision to make the 2004 Orders. Could it seriously be suggested that the appeal should not be reopened because of the *possibility* that the Chagos Islanders might be allowed to resettle in entirely different circumstances and for completely different reasons than those which underlay the original decision? What is the juridical basis on which such a conclusion might be made? Is it an instance of the exercise of judicial discretion to deny a remedy to which the applicant is otherwise plainly entitled? For such a result, it would be necessary to demonstrate that the applicant *would* achieve the *same result* as would accrue on the successful reopening of the appeal. B C

180 Alternatively, it might be suggested that there are occasions where it is appropriate for a court to take a pragmatic view and dispose of a case in a particular way because of a new factual context. Quite apart from the unfortunate imprecision of such an approach, it must surely only be permissible when the particular disposal allows the court to achieve justice in the changed circumstances. Given the narrowness of the issue before the Supreme Court on this appeal, taking account of changed circumstances in the Chagos Islands does not achieve justice. We are not in a position to make an order that vindicates the applicant's right to resettle on Diego Garcia or elsewhere on the archipelago. The suggestion that we need not reopen this appeal because of the possibility that the 2014–2015 feasibility study would permit resettlement depends on (a) the Government changing its stance as a result of the study; failing which (b) the applicant or others of like mind having the appetite to bring forward yet further litigation, despite the unhappy previous experience of past proceedings; (c) their being able to secure the services of lawyers prepared to work for them pro bono or on some other uncertain basis; and (d) the courts deciding in favour of the Chagossians in that speculative litigation. Even if it could be said that a favourable outcome of the 2014–2015 feasibility study is possible, the Chagossians' ability to obtain the result that the original appeal, if successful before the House of Lords, would have achieved is remote in the extreme. That this should provide a basis for denying them an outcome to which they were otherwise entitled is in my view inconceivable. D E F

#### Delay G

181 The respondent has claimed that there was undue delay in making the application to reopen the appeal. I do not consider that there is any merit in that claim. The Rashid documents were disclosed on 1 May 2012, in the course of the *Bancoult* (No 3) proceedings. The applicant sought to raise the issue of their non-disclosure in those proceedings. He was not permitted to do so. It was held that the feasibility study had not played a part in the decision to create a marine protected area [2014] Env LR 2, paras 81–93, judgment given on 11 June 2013. That decision was appealed to the Court of Appeal, and judgment was given in the Court of Appeal [2014] 1 WLR 2921 on 23 May 2014. H

- A 182 The applicant then sought to resolve the matter by inviting the respondent to agree that the judgment in the present action should be set aside by consent. This request was made in a letter dated 5 December 2013. It was refused on 5 January 2014. Counsel's opinion was obtained on 26 January 2014 and legal aid was applied for immediately. It was eventually granted on 29 September 2014. There is no suggestion that the applicant was in any way responsible for delay between the submission of the application for legal aid and its grant. The application form was filed on 9 January 2015. There was no culpable delay on the part of the applicant.
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*Duty of candour*

- C 183 A respondent's duty of candour in judicial review proceedings is summarised in *Fordham's Judicial Review Handbook*, 6th ed (2012), p 125:

D "A defendant public authority and its lawyers owe a vital duty to make full and fair disclosure of relevant material. That should include (1) due diligence in investigating what material is available; (2) disclosure which is relevant or assists the claimant, including on some as yet unpleaded ground; and (3) disclosure at the permission stage if permission is resisted . . . A main reason why disclosure is not ordered in judicial review is because courts trust public authorities to discharge this self-policing duty, which is why such anxious concern is expressed where it transpires that they have not done so."

184 In *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at [50] Laws LJ said,

- E "there is a . . . very high duty on public authority respondents, not least central Government, to assist the court with full and accurate explanations of all the facts relevant to the issue which the court must decide."

F The duty extends to disclosure of "materials which are reasonably required for the court to arrive at an accurate decision": *Graham v Police Service Commission* [2011] UKPC 46 at [18]. The purpose of disclosure is to

- G "explain the full facts and reasoning underlying the decision challenged, and to disclose relevant documents, unless, in the particular circumstances of the case, other factors, including those which may fall short of public interest immunity, may exclude their disclosure": *R (AHK) v Secretary of State for Home Department (No 2)* [2012] EWHC 1117 (Admin) at [22].

H 185 The Rashid documents should have been disclosed. That is accepted by the respondent. They contained material that was obviously germane to the issues between the parties. The fact that they were not disclosed, despite numerous pointed requests for their production and the circumstance that, in some instances, their very existence was denied are deeply disturbing. The failure to locate the documents throughout the proceedings before the Divisional Court, the Court of Appeal and the House of Lords is not merely unfortunate, it is plainly reprehensible.

186 But I am not persuaded that the non-production of the documents until the hearing in *Bancoult (No 3)* was deliberate. The applicant has

accepted as much, having said in his written case that the non-disclosure of the documents may “conceivably” have been due to an oversight. I believe that the preponderance of evidence suggests that this is the most likely explanation, although it was a grievous oversight and one which, it is to be hoped, will be so regarded by the relevant authorities. An omission by government to disclose such material as was contained in the Rashid documents and its failure thereby to discharge its duty of candour was wholly unacceptable when such a fundamental right was at stake. A

187 The applicant has suggested that, in light of the seriousness of the failure to disclose these documents and in view of their high relevance, judicial criticism will not suffice and that the decision of the House of Lords should be set aside on account only of their non-disclosure. I do not agree. If there are circumstances in which a failure to disclose documents would alone be cause for setting aside a judgment, they are not present here. For the reasons earlier given, however, I consider that the decision should be set aside and the appeal reopened. B

#### BARONESS HALE OF RICHMOND DPSC (dissenting)

188 This is another chapter in the epic saga of the Chagossians, their expulsion from their homeland and their persistent attempts to secure, if not their actual return, then at least the recognition of their right to do so. It is a saga which shows how D

“the imperial common good is riven by competing theoretical justifications for empire: one, based in liberal imperialism, emphasises the civilising nature of empire and focuses on the good governance of colonies; the other, based in a utilitarian imperialism, instead focuses on how to best appropriate colonial possessions for the benefit of the imperial power”: Tom Frost and CRG Murray, “The Chagos Island cases: the empire strikes back” (2015) 66 NILQ 263, 266. E

Thus far, it is the latter which has not only driven the actions of government but has also triumphed in the courts: F

“Lord Hoffmann acknowledged that a choice between the liberal and utilitarian faces of imperialism did rest with the court, and decisively affirmed the utilitarian importance of the imperial interests at stake . . .”: Ibid, 287.

189 Courts have, of course, to do justice according to law. Any doubts about whether it is legally possible for the imperial power to exile a people from their homeland have to be rigorously suppressed. That question of law has been finally resolved in these proceedings by the decision of the majority in *Bancoult* (No 2). Nevertheless, the decision to exile a people has to be taken in accordance with the law; and the people to whom it is of such momentous importance are entitled to expect the highest standards of decision-making and the most scrupulous standards of fairness from the institutions of imperial government. The challenge in the main proceedings is to the rationality of the decision in 2004 to *re-impose* the denial of the Chagossians’ right of abode in their homeland, the first denial in 1971 having been declared unlawful in *Bancoult* (No 1), a decision which was G

A accepted by the government of the day. The challenge in this application is to the decision of the majority in *Bancoult (No 2)* that the Government's decision was rational. The question for the appellate committee, as Lord Kerr of Tonaghmore JSC has explained, was not whether it was rational to accept the conclusions of the feasibility study, but whether, on the basis of that report, it was rational to take the drastic decision to re-impose the denial of the right of abode.

B 190 The question for us is not whether the majority got the answer to that question wrong. We could no more set that decision aside on that basis than we could set aside their decision that the imperial government had the power to do this. The basis upon which this court could set aside the earlier decision is that explained by Lord Browne-Wilkinson in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 132:

C "In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House . . . However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. When an order D has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong."

E 191 The previous decision in that case was set aside because of Lord Hoffmann's connection with an intervener in the case. He should not have decided the case without that connection being disclosed to the other parties. The House did not therefore have to consider whether his participation made any difference to the result (although, given that the earlier decision had been reached by a majority of three to two and that at the re-hearing a rather different decision was reached, there was surely a very real possibility that it did). I accept that, even if it has power to do so, this court should not set aside a decision reached after an unfair procedure if the result would F inevitably have been the same had the procedure been fair. However, if it is clear that the procedure was unfair, this court should not struggle too hard to discover that the result would have been the same. It is for the court which rehears the case to reach its own conclusions. The parties are entitled to procedural as well as substantive justice.

G 192 It is a proud feature of the law of judicial review of administrative action in this country that the public authority whose actions or decisions are under challenge has a duty to make full and fair disclosure of all the relevant material. Only if this is done can the court perform its vital role of deciding whether or not those actions or decisions were lawful. There is no doubt in this case that the Rashid documents should have been disclosed. They were obviously relevant to the issues in the case. Not only that, the Government was asked for them many times and denied their existence. H This is scarcely a good advertisement for the quality of government record keeping. No doubt files are sometimes transferred to the Treasury Solicitor for litigation purposes and their existence forgotten. But this should not happen in any well-regulated system of file-keeping. It was deeply unfair to the applicant, and to the court, that these documents were not disclosed.



This was all the more unfair, given the sorry treatment of the Chagossians in the past and the importance of what was at stake for them. A

193 Given that context, this court should not take much convincing that their disclosure might have made a difference to the decision in the case. What light they do cast upon the rationality of the decision under challenge will be a matter for the court which does reconsider the case. To my mind, it is quite obvious that they might have made a difference and we certainly cannot be satisfied that they would not. They showed that the science of the report had been severely criticised both by the Government's own expert and by an expert on behalf of the islanders; it matters not in what direction those criticisms had tended; what they did was cast doubt upon the authority of the report. They showed that the Government had made it plain to the consultants what it wanted the conclusions to be. They showed that important changes had been made to the conclusion. They showed that the central findings about climate change had been changed. They showed that the islands were not in a cyclone belt. The question whether this might have made a difference has to be answered objectively rather than by reference to the particular judges who were then sitting on the case. B C

194 Ultimately, this is a case about justice. While I deeply admire the industry and intellectual honesty of Lord Mance JSC, which has led him to the conclusion that the decision with which he disagreed at the time should not be set aside, for the reasons given by Lord Kerr JSC, with which I agree, I would grant this application. Justice to my mind demands that the applicant be given a fair chance to satisfy this court that the decision to re-impose the denial of the islanders' right of abode was not a rational one. D

*Application refused.* E

DIANA PROCTER, Barrister

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**TAB 10**

*R (Horeau and Others) v Secretary of State for Foreign and Commonwealth Affairs* [2016]  
EWHC 2012 (Admin)

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 12 August 2016

**Before:**

**The Honourable Mrs Justice Andrews DBE**

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**Between:**

**THE QUEEN (on the application of  
SOLANGE HOREAU and others)**

**Claimant**

**- and -**

**SECRETARY OF STATE FOR FOREIGN AND  
COMMONWEALTH AFFAIRS**

**Defendant**

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**Ben Emmerson QC and Toby Fisher (instructed by Leigh Day) for the Claimants**  
**Penelope Nevill and Adam Boukraa (instructed by The Government Legal Department) for**  
**the Defendant**

Hearing dates: 11 August 2016  
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**Judgment Approved**

**Mrs Justice Andrews:**

1. This is a renewed application for permission to bring judicial review of a consultation exercise carried out by the Foreign & Commonwealth Office as part of its British Indian Ocean Territory (BIOT) policy review ("the Review"). The oral argument was very ably presented before me by counsel on the afternoon of 11 August 2016, but through no one's fault, submissions did not conclude until after 4:30pm, and I then indicated that I would wish to consider the arguments carefully overnight before giving my decision.
2. It was agreed, after discussing the matter with counsel for both parties, that instead of delivering my judgment orally on the morning of 12<sup>th</sup> August, I would state my decision and give my reasons for it in writing, which would avoid the necessity for counsel to attend. This would also provide the Claimants, some of whom I understand have travelled a very long distance to attend the hearing, with a document that they could read and consider straight away, instead of having to wait for a transcript. Taking this course has meant that I have been unable to afford counsel the normal opportunity to see a draft of my judgment and to correct any typing errors beforehand.

I have already indicated that any matters arising may be addressed in writing, and I would hope that any such corrections could be made as part of the same process.

3. The Claimants are representatives of those former inhabitants of the Chagos Islands who were forcibly exiled from their homeland on the Chagos Archipelago some 45 years ago to make way for the building of a US naval support facility, and who now live in the Seychelles. Many of them are living in conditions of considerable hardship. There has been a long line of cases seeking redress for this historic wrong, in the course of which it has been established (i) that the Chagossians have no legal right to resettle the islands in consequence of the British Indian Ocean Territory (Constitution) Order, made by prerogative order in Council in 2004, and (ii) that they have no right to compensation for their exile.
4. Following the final decision on the latter topic by the European Court of Human Rights, in December 2012 the Foreign Secretary announced that the Government intended to take stock of the question of resettlement of the Islands. To that end, in March 2014 an independent feasibility study was commissioned by the BIOT administration. KPMG, which carried out that study, produced its report on 31 January 2015. It found that there was no clear indication of the likely demand for resettlement, and that the costs and liabilities to the UK taxpayer were uncertain and potentially significant. On 24 March 2015 the Parliamentary Under-Secretary informed the House of Commons that Ministers had now agreed that further work should proceed to address those fundamental uncertainties to a point that a decision on the way ahead was possible.
5. As part of that further work, the Government decided to run a consultation exercise between August and October 2015 to seek views from Chagossians and other interested parties on certain areas. Paragraph 3 of the Consultation document made it clear that the document was not a statement of UK Government policy and that no decisions in respect of resettlement have yet been made, but for the purposes of better gauging demand, the UK Government had sought to present the most realistic ways in which such a settlement would hypothetically take place. Four different options for resettlement were contained in the body of the document, ranging from a pilot option on a 1-2 year temporary basis for between 50 and 150 people to settle on the island of Diego Garcia, (option 1) through two medium options for settling 500 people either on Diego Garcia (option 2) or on the outer islands (option 3), to a large option in which 1500 people would settle on Diego Garcia and on the outer islands (option 4).
6. Based on those potential ways in which resettlement would take place, the consultation document invited views on:
  - i) how many Chagossians want to resettle in BIOT?
  - ii) The UK Government's latest assessment of the likely costs and liabilities to the UK taxpayer.
  - iii) Alternative options not involving resettlement that could respond to Chagossians' aspirations.
7. The consultation document indicated, amongst other things, that because it would be necessary to evacuate anyone requiring serious medical treatment from the islands to

the nearest suitable treatment centre, those persons requiring specialist health advice and treatment or dedicated medical care would not be eligible for resettlement. It also indicated that for those who resettled, appropriate allowances and support specifically designed for BIOT would be provided by the Government, based on need in exceptional circumstances e.g. if an individual loses their job unexpectedly or becomes ill and is unable to work temporarily. Child allowances could also potentially be provided, but this was unlikely to be made available in a pilot option. The UK Government would not provide UK pensions to those currently ineligible. There was no suggestion that any other form of pension would be paid.

8. The document also said that the UK Government would provide housing, utilities and telecommunications where possible to standards similar to those currently available in Diego Garcia (not the UK). Resettled Chagossians would be required to pay for the same services as other occupants, e.g. Internet provision and consumables. It was likely that as resettlement developed with increased numbers of people, utility charges would become payable by Chagossians, as well as local BIOT taxes.
9. Paragraph 16 of the consultation document considered options *not* involving resettlement, which it was said were being developed to enable the UK Government to consider “the full range of options that could respond to Chagossians’ aspirations”. It was explained that the principle behind these ideas was to provide support for Chagossians to flourish in their current communities and build their lives there, while allowing a degree of access to BIOT that recognises their historic connection to it without returning on a long-term basis.
10. To that end, Paragraph 17 set out a list of potential measures which was said not to be mutually exclusive or an exhaustive list of options. The Government said that it would also be interested to hear ideas for other sustainable measures of benefit to the Chagossian communities. The express examples of such measures listed in the consultation document did not include any reference to any form of direct financial support by means of ad hoc payments to any Chagossians who did not resettle on the islands. They included training and educational support for jobs, increased opportunities for Chagossians to visit BIOT, and their increased participation in conservation enforcement and science work in BIOT, or key roles in new limited tourism in the outer islands.
11. The Claimants responded in 2 letters dated 28 September 2015 and 27 October 2015 written by Mr Pierre Prosper, the Chairman of the Chagossian Committee Seychelles. In the earlier letter Mr Prosper said, among other things, that Chagossians were getting older and dying, and that some are still living in poverty. He asked the Government to consider in the meantime support structures for communities in general, in the Seychelles, the UK and in Mauritius. He said this “we ask for a fair compensation to be considered, pension for all Chagossians wherever one may reside, financial support for families and for those in need, a scholarship programme for the younger upcoming generations.” He then went on to ask the Government to reconsider its position on the payment of compensation.
12. In a debate in Parliament on 28 October 2015 the Parliamentary Under Secretary of State for Foreign & Commonwealth Affairs said this:

*“it is important that we consult as widely as possible. While we know that many Chagossians do want to go back, it is important to recognise – as shown in the independent feasibility study and more recently – that some Chagossians are more interested in securing other forms of support in the places where they live. We should assess what we can do for everyone, not just those who are returning.”*

13. The relevant part of the response from the BIOT review team to Mr Prosper’s letters, which was not sent until 18 January 2016, although it bears the date 10 December 2015, stated that eligibility for UK pensions and social benefits, and access to UK healthcare would remain unchanged. No further compensation was being considered within the scope of the Review, which was limited to a potential resettlement of the islands. It said that Mr Prosper’s other points had been formally noted within the consultation exercise, and that the Government would reflect on these in coming to a decision in due course. Correspondence between solicitors prior to the commencement of these proceedings clarified that “compensation” was an expression that embraced all forms of direct financial support including of the type that the Government contemplated making available in connection with resettlement.
14. The Claimants characterise the belated response to Mr Prosper’s letters in the letter dated 10 December 2015 as a Direct Financial Support Decision (“the DFS decision”) in which they allege the Defendant confirmed that it had made an unpublished policy decision, contrary to the broad terms of the consultation paper, that the Review had excluded the possibility of providing ad hoc financial support to Chagossians in their current communities. The Defendant contends this is a mischaracterisation of the letter. There was no “DFS decision” communicating the adoption of some fresh policy, but rather, it was reiterating its long-standing policy not to pay compensation to the Chagossians who had resettled in the Seychelles.
15. The claim for judicial review is based on 3 grounds:
  - i) Ground 1 alleges that the consultation itself was legally flawed because it was carried out in breach of the *Coughlan* principles (see *R v N North East and Devon HA ex parte Coughlan* [2001] QB 212 at [108]), or in breach of the common law duties of procedural fairness. It was said that whilst the consultation paper purported to consult on the “full range” of options to provide support to Chagossians to flourish in their current communities, this was a misrepresentation of the true position, because the Defendant was not prepared to pay direct financial support to those Chagossians who were not resettling.
  - ii) Ground 2 is that the DFS decision was irrational, because the Defendant was prepared to pay certain types of direct financial support to those who resettled, but not to those who remained behind. It is argued that the latter may have a much stronger need for such payments; that the making of financial support payments to those who remain would be far more cost-effective than paying those who resettle; and that without including the option of some form of financial support for those who remain behind, which might have an impact on a person’s enthusiasm for resettlement, it would be impossible for the Defendant to carry out a proper comparative exercise assessing the costs benefits and desirability of resettlement options as compared to alternatives.

- iii) Ground 3 is that the DFS decision was taken in breach of the Defendant's duty under section 149 of the Equality Act 2010 (known as the PSED). It is contended that there is no evidence that the Defendant had regard to the PSED before taking that decision. In the event that resettlement is permitted, the elderly and those who are disabled are likely to be disproportionately represented amongst those who are not allowed to resettle, and they would not be entitled to any of the types of financial support that would be available to those who do resettle.
16. In rejecting the application for permission on the papers, Ouseley J identified the real obstacle in the way of the claim as being that, at the heart of the claim and its purpose, is the contention that the Defendant was obliged to consult on the possibility of making direct financial payments to Seychelles Chagossians, whether because none were made earlier or because of their continuing plight, and whether truly called compensation or not; no rational consultation process could ignore that. That is Ground 2. He said that the Government was entitled to decide that it would not make such payments. That decision has been made, and it cannot be said to be irrational. To hold that irrational would be to hold that there was a duty to make the payments, which is untenable. Even if there was some arguable uncertainty over the intended scope of the consultation process, and it had been narrowed down by the Government contrary to what it had said the consultation process would be about, and even if the consultation process were held unlawful on that account, it is impossible to see that the Claimants would obtain relief, since the Government has made it plain that it is not interested in such responses and it did not intend to consult about that point.
17. He also concluded that even if a new consultation process had to be undertaken, the Government would plainly exclude direct financial support from its scope, so that in the absence of evidence that the responses would have been different, there would be no point in granting relief on Ground 1 even if it were successful. That is an analysis with which I respectfully agree; indeed it is difficult to reach any other conclusion on the basis of the material before the court.
18. Mr Emmerson QC, on behalf of the Claimants realistically conceded that he would be unable to succeed in the claim for judicial review on Ground 1 alone, for the reasons stated by Ouseley J. He would therefore need to persuade me that there was a real prospect of successfully arguing that it would be irrational of the Government to expressly exclude direct financial support for those who did not resettle from the scope of a new consultation process. For that reason, his submissions focused on Ground 2, although it was integrally bound up with Ground 1.
19. Mr Emmerson refined the point by submitting that a decision at this stage of the decision-making process to exclude the possibility of any financial support for any Chagossians in their current communities would be irrational. He stressed the words "at this stage of the decision-making process" because all 4 of the options set out in the consultation paper were still live options which it must be assumed the Government is genuinely considering. In the event of large-scale resettlement (option 4) a significant number of people would receive (or become eligible to receive in certain circumstances) certain types of direct financial assistance from the Government, whereas those who remain behind would not. This would mean that the elderly and disabled who were unable to resettle even if they wanted to, would receive no ad hoc financial support, whereas the fit and healthy returnees would. He

realistically accepted that the argument would be a difficult one, if not impossible to run, in relation to the other 3 options.

20. Mr Emmerson stressed that the Claimants are not arguing that there is any duty on the Government in the abstract to provide financial support to Chagossians in their current communities in the Seychelles. The claim is more focused: it is that it is irrational at this stage of the process to rule out the possibility of ever providing any form of financial support to such Chagossians, including to those who through no fault of their own and purely as a consequence of age, disability or medical need are unable or ineligible to resettle (but would have otherwise wanted to). The decision to rule out financial support would be irrational, he submitted, if unfairness resulted in consequence of large-scale resettlement. Mr Emmerson made it clear that the argument did not relate to anyone who simply chose not to resettle.
21. I am not persuaded that there is any realistic prospect of that argument, even in its refined version, succeeding if this matter proceeded to a full hearing. No decision on any of the options has yet been taken. If options 1, 2 or 3 were eventually chosen, there would be nothing wrong with the "DFS decision". It follows, as a matter of logic from Mr Emmerson's argument, that if option 4 were removed, the Claimants would have no ground for complaint about the decision to rule out of consideration any form of ad hoc payment to those who remain. The decision would be perfectly rational. Therefore, the rationality of the decision not to make any payment to those remaining behind is said to be inexorably linked with the number of people who it is currently contemplated might resettle. That is a concept which I find quite difficult to grasp. Why should the lawfulness of the decision to rule out payment to any Chagossians who cannot resettle be a flexible concept depending upon how many do resettle? Moreover, why should the lawfulness of that decision depend on whether the Chagossians who remain behind do so voluntarily or because they are ineligible for resettlement? Put another way, the argument appears to be that the Government would have no choice but to grant financial support to those remaining behind (or at least to those who wished to resettle but were too old or infirm to do so) if it decided to go for option 4. I do not consider that argument even gets off the ground.
22. The Consultation does contemplate that *in exceptional circumstances* those who resettle and find themselves in need may receive some form of allowance designed for the BIOT, such as a type of short-term sickness benefit or unemployment benefit, and that some form of child allowance might also be paid. Nothing in the Consultation promises a pension or any right to social security payments across the board. The fact that such payments are contemplated amounts to no more than a recognition by the Government that those who may otherwise wish to resettle might be put off the idea if there is no form of safety-net to cater for such eventualities. Mr Emmerson contended that there was no justification for looking at the payments purely as incentives, or as being linked to relocation, but in my judgment they are plainly intended to be part and parcel of the possible support on offer for those who resettle, in the same way as the provision of housing and the payment for utilities, at least in the short term.
23. There is a logical fallacy in the argument that because the Government is willing to offer certain types of benefit to someone who is ready, willing and able to resettle, it is outside the range of reasonable decisions open to it to refuse to contemplate providing the same or any other type of benefit for someone who does not meet the criteria for resettlement. On the contrary, these are matters well within the ambit of



reasonable policy decisions. I cannot see how such a decision would become irrational even if it were possible that option 4, if chosen, might create unfairness because a significant number of those who resettle would be better off in terms of access to financial support than the elderly and infirm who would be left behind. Ground 3 raises wholly discrete issues; at present I am only concerned with the rationality challenge.

24. I agree with Miss Nevill's submission that the Government was under no duty to consult on a decision that it was not intending to make. This consultation was clearly about resettlement, and the alternatives that were being explored in paragraphs 16 and 17 were being looked at within the confines of that purpose, with a view to considering what might be done, short of resettlement, to help the Chagossians to remain in touch with their heritage. Whilst paragraph 17 does not expressly rule out financial help, it seems plain to me that it was not what the Government had in mind, and that should have been apparent to anyone reading the document as a whole and against the background that the Government had made it clear that it was not going to pay compensation (whether or not properly so-called).
25. It is obvious that it was never the Government's subjective intention to consult on the making of ad hoc financial payments to Chagossians who did not resettle, whether that was done out of choice or by reason of necessity or ineligibility. It is difficult to interpret the consultation document as inviting submissions on that matter. Logically it could not be inferred from the fact that it was contemplated that certain payments might be made to those who resettled, in exceptional circumstances, that it was also contemplated that similar payments might be made to those who remained, in any circumstances. Even if the language of the consultation document, and paragraphs 16 and 17 in particular, were wide enough to be capable of that interpretation, I do not accept that the Consultation can be castigated as legally flawed merely because it was open to an objective interpretation that was never subjectively intended. Nor can the Defendant be criticised for pointing out that error, as it did in the 10 December 2015 letter and subsequent clarification.
26. For those reasons, and in agreement with those expressed by Ouseley J, I refuse permission on Grounds 1 and 2.
27. As to Ground 3, Ouseley J said: "it may be that an arguable PSED challenge could be mounted to a decision that has been reached on what is to happen to resettlement and support for returners without due regard to that duty. That is the point at which age differentials might mean that the resettlement decision and arrangements, without considering support for those left behind, had breached the PSED. But a specific context within which that decision-making is proceeding, far more coherent than now, is required for an arguable challenge."
28. Mr Emmerson contended that the challenge was not premature because the Government had essentially closed its mind to making any form of payment to those left behind even if option 4 were chosen. Thus, the relevant decision that will in the event of resettlement necessarily have a negative and unequal impact on the elderly as compared to the young, and the disabled as compared to the able-bodied, has already been taken, without regard to the PSED. I am not persuaded by this argument, nor by the argument that it would be impossible to cure any deficiency in that regard by

considering the PSED and taking it into account before any substantive decision on which (if any) of the options is to be implemented is made.

29. Once again I find myself in complete agreement with Ouseley J for the reasons that he has given. Ground 3 does not meet the threshold for permission at this stage, and may never arise. I refuse permission on this Ground also.
30. It follows that despite the eloquence with which Mr Emmerson sought to persuade me that the arguments on all three grounds stood reasonable prospects of success, and that Ouseley J was wrong to conclude that ground 1, even if successful, would get the Claimants nowhere in terms of substantive relief, this renewed application for permission to bring judicial review is refused on all three grounds.

**TAB 11**

*R (on the application of Bancoult No. 3) (Appellant) v Secretary of State for Foreign and Commonwealth Affairs* (Respondent) [2018] UKSC 3



Hilary Term  
[2018] UKSC 3

*On appeal from: [2014] EWCA Civ 708*

## **JUDGMENT**

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

before

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

**JUDGMENT GIVEN ON**

**8 February 2018**

**Heard on 28 and 29 June 2017**

*Appellant*

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

*Respondent*

Steven Kovats QC  
Professor Malcolm Shaw QC  
Penelope Nevill  
  
(Instructed by The Government  
Legal Department)

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

*Introduction*

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

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

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

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

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

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

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

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

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

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

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

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



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

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

### *The admissibility of the cable*

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

#### “Article 24

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

#### Article 25

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

...

#### Article 27

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

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

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

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

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

6. The sending State or the mission may designate diplomatic couriers ad hoc. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.”

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

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

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

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

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

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

Professor Higgins wrote:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

### *The allegation of improper purpose*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

75. It is significant that the Foreign Secretary's announcement contained the caveat which always accompanied public and private statements by officials: that the decision was subject to the pending judgment of the Strasbourg Court. Unless there was some deep plot to frustrate an adverse judgment, of which there is no

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

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

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

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

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

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

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

indicated why he declined to answer the ‘ultimate’ question; but he had answered all the ‘intermediate’ questions.

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

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

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

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

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

“Their plans for resettlement are based on the establishment of an economy based on fishing and tourism. In the specific context of BIOT this would be incompatible with a marine reserve. They are therefore hostile to the proposal, unless the right of return comes with it. They have expressed unrealistic hopes that the reserve would create permanent resident employment based on the outer islands for Chagossians.

Assuming we win in Strasbourg [*as in the event occurred*], we should be aiming to calm down the resettlement debate. Creating a reserve will not achieve this, but it could create a context for a raft of measures designed to weaken the movement. This could include:

- presenting new evidence about the precariousness of any settlement (climate change, rising sea levels, known coastal defences costs on Diego Garcia)
- activating the environmental lobby
- contributing to the establishment of community institutions in the UK and possibly elsewhere
- committing to an annual visit for representatives of the communities to the outer islands on All Saints’ Day



- inclusion of a Chagossian representative in the reserve government.
- [an irrelevant redaction]”

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

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

That remains the position before the Supreme Court.

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

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

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

The ensuing paragraphs included the following:

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

The final paragraph of comment included this:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and that this

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

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

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

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

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

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



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

### *Fishing rights*

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

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

The appellant’s case, as explained by Mr Fleming before the Administrative Court, was

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“Very limited fishing anyway, so limited environmental benefit from a ban.

Could have significant consequences for the Chagossians.  
What effect on the Chagossian community?

Should not be possible to use MPA as a way of entrenching no right of abode.

Inconsistent, as far as concerns fishing, with the law of the sea (UNCLOS).”

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

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

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

“[There] Are fishing rights which they need in their sea.”

and

“Need human rights first - wrong to come before ECHR judgment.”

60. The Divisional Court observed (para 160):

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

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

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

62. It was open to Mauritius or anyone affected to raise this objection in response to the consultation. Mauritius notably did not respond at all. Others made various points about the option of a no-take ban in territorial waters and/or the loss of alleged fishing rights. It would be wholly inappropriate to treat the consultation process as invalid, when the party to whom the alleged rights belonged (the Republic of Mauritius) had full opportunity of asserting them in response to the consultation, and when others indirectly involved actually took advantage of the opportunity of raising them. Finally, there is also no reason to believe that the ultimate decision would or could have been any different, if the consultation had specifically drawn attention to the possible existence of such fishing rights.

## *Conclusion*

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**LORD KERR: (dissenting)**

***Improper motive***

*(i) Background*

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

*(ii) The curtailing of cross examination*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iv) *The correct test*

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

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

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

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

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

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

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

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

(v) *The genesis and development of the MPA*

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



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

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

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

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

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

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

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

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

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

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

121. I consider, therefore, that the Court of Appeal should have recognised that there was a substantial possibility that, not only would the Divisional Court have taken a different view of the evidence of Mr Roberts and Ms Yeadon, if they had admitted the cable and the case had proceeded to its conventional conclusion, but that there was an equally substantial possibility that it would have concluded that the Foreign Secretary's decision could be impugned because it was taken on a misapprehension of the true facts and circumstances. For these reasons, I would have allowed the appeal and ordered that the matter be remitted for hearing before a Divisional Court with the direction that it be reconsidered on the basis that the cable was admissible in evidence.

### ***Fishing rights***

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

### **LADY HALE:**

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

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

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

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

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

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

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