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[2008] UKHL 61
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OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

R (on the application of Bancoult) (Respondent) *v* Secretary of State for Foreign and Commonwealth Affairs (Appellant)

Appellate Committee

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Lord Bingham of Cornhill
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LORD HOFFMANN

My Lords,

1. This appeal concerns the validity of section 9 of the British Indian Ocean Territory (Constitution) Order 2004 ("the Constitution Order"):

> "(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."

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 LJJ). The Secretary of State appeals to your Lordships' House.

3. The British Indian Ocean Territory ("BIOT") is situated south of the equator, about 2200 miles east of the coast of Africa and 1000 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^2. Some distance to the north lie Peros Banhos (13 km^2) and the Salomon Islands (5 km^2).

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 Company 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.

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.

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 SI No 1920 ("the BIOT order") which, under powers contained in the Colonial Boundaries Act 1895, 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.

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.

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 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) 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 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), [2003] All ER (D) 166.

10. My Lords, it is accepted by the Secretary of State that the removal and resettlement of the Chagossians was accomplished with a callous 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, denying that anyone was entitled to enter 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.

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 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 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 1340 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 (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 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 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 thirty years ago. As Lord Justice Laws 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 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 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 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 struck out this action on the grounds that the claim to more compensation after the settlement of the Vencatessen case was an 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 LJJ) refused leave to appeal. Sedley LJ, who gave the judgment of the court, ended by saying:

> "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."

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 "agroforestal 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 on 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.

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.

25. The judgment of Ouseley J in October 2003 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* reported that two British "human rights campaigners" had been arrested by the 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.)

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 the commencement of my speech. At the same time, another Order in Council (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 Government to promote or even permit resettlement to take place. After long and careful consideration, we have therefore decided to legislate to prevent it."

27. The Minister went on to say that there had been "developments in the international security climate" since the judgment in *Bancoult (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."

28. These proceedings were commenced by an application 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 (paras 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 United Kingdom and the United States and were therefore irrational.

29. This reasoning was not adopted, at any rate in quite the same form, by the Court of Appeal. 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 (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. The Master of the Rolls 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 QC for the Crown and Sir Sydney Kentridge QC 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 2003 reissue) vol 6, 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 this 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 ("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 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 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 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 is rather more arcane. The background to the Act is the statement of Lord Mansfield in *Campbell v Hall* (1774) 1 Cowp 204, 209 that although the King had power to introduce new laws into a conquered country, he could not make "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 nineteenth 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 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:

> "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."

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 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.

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) 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 nineteenth 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.

40. Nevertheless, I would reject the argument based on the Colonial Laws Validity Act 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.

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.

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."

43. "But…by the law of the land" are in this context the significant words. Likewise Blackstone (*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."

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.

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] 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.

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 (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.

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 2003 reissue) vol 6, para 716:

> "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."

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.

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.

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 Company 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 (1)* departs from this principle, I think that it was wrongly decided.

51. Sir Sydney placed great reliance upon a statement of Evatt J in *Trustees Executors and Agency Co Ltd v Federal Commissioner 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 (1)* obviously did) the courts could inquire into whether its objects could be said to be peace, order and good government.

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 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):

> "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, 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…"

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 (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.

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.

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.

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.

59. The applicant's alternative ground for judicial review was that the Foreign Secretary's press announcement after the judgment in *Bancoult (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.

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 Commissioners, 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 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.

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 (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 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 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.

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.

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."

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 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 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.

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.

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.

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

My Lords,

68. 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.

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 Corporation v Johns (Inspector of Taxes)* [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 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 St 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 Limited.* In *Burmah Oil Company (Burma Trading) Limited v Lord Advocate* [1965] AC 75, 101, Lord Reid said:

> "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?"

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*, 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 I* judgment which the Secretary of State accepted, cited further authority:

> "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 belonger.'

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

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 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 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 (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 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.

LORD RODGER OF EARLSFERRY

My Lords,

75. The unhappy – indeed, in many respects, disgraceful - events of forty 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 Her Majesty's British Indian Ocean Territories Commissioner* [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 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 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 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 QC 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 QC 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 ("the 1865 Act") 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": A Tomkins, "Magna Carta, Crown and Colonies" [2001] Public Law 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 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.

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 Lord Bishop of Natal* (1865) 3 Moore (NS) 114. 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:

> "The 6th 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."

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, ie, 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.

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…": W 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.

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.

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:

> "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."

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.

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 edition, 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.

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 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* (1773) 20 St 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 Carthagena." 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:

> "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 twelvemonth, than he could 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 Carthagena."

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?

90. Although the passage from the judgment of Lord Mansfield 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:

> "The 6th 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."

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.

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 nineteenth 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 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.

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 Charter, 1628) or required that the laws should not be "repugnant to the law of England": section 29 of the Australian Constitutions Act 1842. 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.

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:

> "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."

The passage is quoted at page 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 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:

> "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.

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 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* (1864) SAPP 53 LC, 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.

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.

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] AC 259. The decision itself was, in fact, far from wintry and the 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.

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* (1774) 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), p 45, who said of the 1865 Act:

> "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."

The Board continued, [1967] AC 259, 284-285:

> "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. Morover, 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. 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."

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-twentieth-century lack of appreciation of what might count as "fundamental principles", which ultimately drives Lord Pearce's reasoning.

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* (1774) 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 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 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, 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."

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.

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 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.

108. The classical case law was summarised by the High Court of Australia in a unanimous judgment in *Union Steamship Company 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:

> "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, rejecterd 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 authorize the utmost discretion of enactment for the attainment of the objects pointed to'. In *Chenard & Co v Joachim 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 'connot[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 ower 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*, *Chenard and Co v Arissol* and *Union Steamship Company of Australia Pty Ltd v King* 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 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.

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. 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 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?

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. 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 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 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.

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.

LORD CARSWELL

My Lords,

119. The Chagos Islands are an archipelago of low-lying coral atolls in the middle of the Indian Ocean, over 1000 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.

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.

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 QC, 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*, 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:

> " … 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."

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] AC 259, 285, 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".

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.

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 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 QC 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. 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 page 678, referring to the British North America Act 1871, 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 authorize 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 Company of Australia Pty Ltd v King* (1988) 166 CLR 1, 9-10:

> "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) Act 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 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 (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 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 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 Council. It must be borne in mind that it is the *Wednesbury* 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 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 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."

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?

132. Lord Rodger has set out in paras 112 to 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.

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, 354, 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.

134. Following the publication of the court's decision in *Bancoult 1*, the Secretary of State issued the following press release on 3 November 2000:

> "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 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 1123-1124 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, 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

My Lords

Introduction

137. 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 I")* [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) and [2007] EWCA Civ 498. The speech of my noble and learned friend, Lord Hoffmann,

contains in paras 1 to 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 I* 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 (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)". 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 (it appears by the end of May 1973) all left the Chagos Islands. The Divisional Court's judgment, handed down formally in *Bancoult I* 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 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 "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 Immigration Order on 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.

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 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 to 41. The third point is that, for the reasons given by Lord Hoffmann in paras 64 to 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 QC 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 Sir Kenneth Roberts-Wray QC's *Commonwealth and Colonial Law* (1966) p 151 and *Sammut v Strickland* [1938] AC 678, 701, where Lord Maugham 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, 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 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. "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 (PC), 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 (PC), 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: "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". 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. 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.

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 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" (pp 208-209).

148. In *Liyanage v The Queen* [1967] 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 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).

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 *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 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?".

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 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) "belongers" when BIOT was in 1965 constituted 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 regard, not as enemies or aliens".

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* Book I, p 136) 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 regno*, 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, Sc. III*) had by the time of Blackstone long since disappeared. In the Divisional Court in *Bancoult I* Laws LJ cited international text-book 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-C), 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 (CA). 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* (1814), vol 1, p 4 and *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] 1 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".

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 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 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 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 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 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 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) (2003 reissue), vol 6, Title: Commonwealth, p 515, para 878. The inhabitants of 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 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.

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.

159. Had the present issue arisen two hundred and twenty-five 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 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". 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* 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 QC 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 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 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 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 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, 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 "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 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 … 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" (ie 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 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 US agreed that the islanders may 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?" (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 "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 Under-Secretary of State for Foreign and Commonwealth Affairs, in the debate on 7 July 2004 (287WH to 293WH). In that debate, Mr Rammell also said (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 Foreign Secretary had "for a significant number of years received", any representations on the issue from the United States (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 1*. After saying that the latest 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 – 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 9 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 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 recognize 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;
>
> c. …..
>
> d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized 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" (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 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 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 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 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 I have already said any order removing the Chagossians' right of abode in the Chagos Islands was abrogating what Sedley LJ (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 right can be removed by the Crown in Council, nonetheless 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* [2008] UKHL 57, [2008] 3 WLR 636. It is mistaken, and in my opinion conflates quite separate considerations, to dismiss from consideration the legal 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 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 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 1* 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 thirty 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 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 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.

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* [2004] UKHL 18; [2005] 1 AC 1, where Lord Steyn, in whose speech three other members of the House concurred, said this (para 60):

"60. 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 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 disapplied. 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* [2001] EWCA Civ 607; [2002] 1 WLR 237 and *R (Nadarajah and Abdi) 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 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-F).

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 (ABCIFER) v Secretary of State for Defence* [2003] EWCA Civ 473; [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 QC as counsel for the minister as relevant to 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 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 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 QC's list (para 69).

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 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 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 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 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 that 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 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.

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 primary basis on which I would dismiss the appeal is therefore lack of *vires* (paras 143 to 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 to 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 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 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 plaining comes too late”.