

Case No: CO/4093/2004

Neutral Citation Number: [2006] EWHC 1038 (Admin)
IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 11th May 2006

Before :

LORD JUSTICE HOOPER

MR JUSTICE CRESSWELL

Between :

THE QUEEN

Claimant

**ON THE APPLICATION OF LOUIS OLIVIER
BANCOULT**

- and -

**THE SECRETARY OF STATE FOR FOREIGN
AND COMMONWEALTH AFFAIRS**

Defendant

Sir Sydney Kentridge QC, Mr Anthony Bradley and Miss Maya Lester (instructed by
Sheridans) for the **Claimant**
John Howell QC and Mr Kieron Beal (instructed by The Treasury Solicitor) for the
Defendant

Judgment

LORD JUSTICE HOOPER :

This is the judgment of the Court.

Introduction

1. The claimant is one of a group of people who, on 9 June 2004, had a right to enter and remain in the British Indian Ocean Territory (“BIOT”) (other than on the island of Diego Garcia), a right which had been reaffirmed by the British Government in 2000. The members of the group prefer to be known as Chagossians, and we shall use that word to describe them. Traditionally they have been known as Ilois, a Creole word for islanders.
2. The BIOT consists of the islands of the Chagos Archipelago. The right to live on the islands of the Chagos Archipelago had been enjoyed by the group’s Chagossian ancestors, some of whom were probably slaves who had worked on the plantations in the Archipelago and were subsequently freed.
3. On 10 June 2004 the British Indian Ocean Territory (Constitution) Order 2004 (the “Constitution Order”) made by Her Majesty in Council declared that no person has the right of abode in BIOT nor the right without authorisation to enter and remain there. The Chagossians were thus effectively exiled.
4. The claimant seeks a declaration from the Court that the provisions of the Constitution Order are unlawful. It is said that, whereas Parliament could remove these rights, the Queen by Order in Council could not do so. If, alternatively, the Queen by Order in Council could remove these rights then the purported exercise of the power is unlawful.
5. The source of the power to make the Order in Council was the Royal prerogative. Neither Her Majesty nor the members of the Privy Council present that day (which, coincidentally, included me) considered the merits of the Order. The Queen in Council acts upon the advice of a Minister, in the present case, the Secretary of State for Foreign and Commonwealth affairs. In reality the order was that of the Secretary of State although, of course, the Queen formally assented to it.
6. The defendant submits that an Order in Council made for a British Overseas Territory (what used to be called a colony) is not justiciable, in other words immune from all review by the courts whether by the courts in this country or by the court established for BIOT. If the defendant’s argument is right, then an Order drafted by a Secretary of State in relation to a colony to which Order the Queen in Council has assented, enjoys the same sovereign immunity at least as that of Parliament. That might be thought by many to be extraordinary and indeed as long ago as 1774 Mansfield CJ in *Campbell v Hall* (1774) 1 Cowp. 204 stated that, at common law, the powers of the Queen in Council to legislate for a colony were restricted.
7. An Ordinance made by the then Commissioner in 1971 in similar terms to the 2004 Constitution Order was quashed by the Divisional Court (Laws LJ and Gibbs J) in *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2001] 1 QB 1067, which we shall call “*Bancoullt (1)*”. Laws LJ (paragraph 57) said that the

relevant section of the Ordinance “effectively exiles the Chagossians from their territory where they are belongers and forbids their return” (a proposition which the defendant disputes on the grounds that they could apply for a permit!).

8. Following the judgment in *Bancoult (1)* the Government accepted the decision. Mr Robin Cook MP, the Secretary of State for Foreign and Commonwealth Affairs announced:

“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.”

9. By virtue of the British Indian Ocean Territory (Immigration) Order 2004 (“the Immigration Order”), also made by Her Majesty in Council, presence within the Territory without a permit became an offence punishable by 3 years’ imprisonment. It is clear that no permit will be granted to allow Chagossians to resume living in any of the islands.
10. The claimant was born of Chagossian parents in 1964 on Peros Banhos, one of the islands within the Chagos Archipelago. It is, like other islands in the Archipelago, no more than about 2 metres above sea level. The Chagos Archipelago is not unique in this respect. The well populated Maldives also does not exceed an altitude of 6 feet above sea level.
11. In 1967 the family travelled to Mauritius to seek medical treatment for the claimant’s infant sister, who had been badly injured. The claimant has only returned to Peros Banhos once since 1967. He was permitted to make a visit in connection with earlier litigation. Reliance was placed by the defendant on the fact that the claimant had not lived in Perhos Banhos since the age of three, with the implication (so it seemed to us) that there was therefore no substance in his complaints. If that is what the defendant was suggesting, then we reject it. In "Recalling Community in Cape Town" a book (not referred to in argument) which examines the clearance of District 6 in Cape Town under the apartheid regime, a member of an evicted family states:

"Some may say I was too young to remember, but now that I am older how could I forget?"

12. Likewise in the foreward to a book entitled "A Prisoner in the Garden" Nelson Mandela wrote:

"In the life of any individual, family, community or society, memory is of fundamental importance. It is the fabric of identity."

Background to the creation of the British Indian Ocean Territory in 1965

13. The Chagos Archipelago lies in the middle of the Indian Ocean. It is approximately 2,200 miles east of Mombasa in Kenya and a little over 1,000 miles south by west of the southern tip of India. It is 1,174 miles from Mauritius and 1,010 miles from Mahe, Seychelles. The largest island in the group is Diego Garcia; its irregular u-shaped sides enclose a large, deep lagoon. The group includes the Salomon islands, the islands of Peros Banhos, as well as a number of smaller islands.
14. The Chagos islands, with Mauritius, were ceded by France to the Crown by the Treaty of Paris in 1814. The islands were administered by the Crown from Mauritius as one of its "Lesser Dependencies", along with St Brandon and Agalega. Their economy was based on the production of copra and its by-product, coconut oil, from the coconut plantations. During the 19th century, the freeholds passed into the private hands of the companies which ran the plantations. The plantation companies provided the sole source of employment on the islands (other than a meteorological station on Diego Garcia), although a few children, women and elderly people served as servants for plantation company staff in order to earn their rations. These were provided together with other necessities and other limited services by the plantation companies, including a small dispensary, very basic medical attention, limited educational facilities and a priest. The abolition of slavery in 1833, and the entitlement of slaves to remain in the colony in which they were freed, meant that many slaves had continued to work the plantations.
15. Although in theory from 1838 all Mauritian labourers were on contracts of one to two years' duration, renewable annually, many plantation workers continued working without a written renewal of their contracts. The contracts could only be renewed in front of a Magistrate on his occasional, supposedly annual, visits but even that was not routinely done, at least in latter years. Contracts were sometimes renewed when a worker returned from Mauritius following leave or a trip for medical purposes.
16. Over time, the plantation workers, whether recruits from Mauritius who stayed on or the descendants of slaves who never left, had families. Some of the children would leave for Mauritius, where relatives might be and to which they looked for a more varied life; they might not return. Others would become, from an early age, and after at best the most rudimentary and brief education, plantation workers. They would inter-marry, or marry Mauritian recruited labourers and in turn have families. After the Second World War, Seychelles labourers were recruited as well, and some too inter-married, or married existing residents starting families on the islands.
17. The population came to consist of three strands, Mauritian and Seychelles contract workers and, to a degree intermingled with them, those who had been born on the islands and whose families had lived there for one or more generations. These latter were known as the Ilois, a term not always used with a precise or commonly agreed definition. Most of them lived on Diego Garcia, the largest island. They now describe themselves as "Chagossians", but again with no precise or commonly

agreed definition. Chagossians is a name which they prefer to “Ilois” because that has come to have pejorative connotations.

18. On 23 October 1953 a declaration under Article 56 ECHR (then Article 63) was made extending the Convention to Mauritius at a time when the Chagos Islands were a dependency of Mauritius.
19. By the early 1960s, the islands' population was in decline, as low wages, monotonous work, the lack of facilities and the great distance to Mauritius and the Seychelles discouraged recruitment or the retention of labour. The plantations suffered from a lack of investment.
20. In 1962, a company called Chagos Agalega Company Limited (“CACL”) was formed in the Seychelles. The company acquired almost all of the plantation islands of Diego Garcia, Peros Banhos, the Salomon Islands, and Agalega from the Mauritian companies which had owned them. The company intended to and did run the coconut plantations for the production of copra; it believed that they could be revived and run profitably, notwithstanding years of decline.
21. In 1964, discussions started in earnest between the United States and the United Kingdom Governments over the possible establishment of American defence facilities in the Chagos Archipelago, or in other Indian Ocean islands which formed part of the dependent territory of the Seychelles. A joint UK/US memorandum agreed on a course of political action, including the need to separate the requisite dependencies from Mauritius and the Seychelles.
22. The independence of Mauritius was imminent and the independence of the Seychelles was at least anticipated. The United States did not wish any facilities to be dependent on the goodwill and stability of such newly independent countries, whose view of American defence facilities in the Indian Ocean might not have coincided with its own. It proposed that the islands be detached from Mauritius and the Seychelles and formed into another, separate dependent territory. It was recognised that the establishment of a new dependency or colony would attract criticism in the United Nations, even more so were it to be created to facilitate an American military presence in the Indian Ocean. From an early stage, the United Kingdom and United States Governments agreed that it would be necessary to evacuate any persons living on an island upon which defence facilities were established. An island populated by contract workers or with an insignificant population which could be transferred or easily resettled was obviously attractive in those respects. Two documents quoted and discussed in *Bancoult (1)* show the thinking of those involved:

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

‘The line taken with regard to those persons now living and working in the dependencies would relate to their exact status. If, in fact, they are only contract labourers rather than

permanent residents, they would be evacuated with appropriate compensation and re-employment. If, on the other hand some of the persons now living and working on the islands could be considered permanent residents, i e, their families have lived there for a number of generations, then political effects of their removal might be reduced if some element of choice could be introduced in their resettlement and compensation.'

No element of choice was in the event provided.

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

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

23. In January 1965 the Americans were making plain their view that "detachment proceedings should include the entire Chagos Archipelago, primarily in the interest of security, but also to have other sites in this archipelago available for future contingencies".
24. In 1964, in pursuit of this objective, a joint Anglo-American survey of the islands including their population was undertaken. Its purpose was not publicised. It found little trace of the once distinctive Diego Garcian community. In 1965, the United Kingdom decided to proceed with the detachment of the islands. Discussions were held between the UK Government and the Governments of Mauritius and the Seychelles as to the terms of the detachment of the Chagos Archipelago from Mauritius and of Aldabra, Farquhar and Desroches from the Seychelles. Agreement was reached on the detachment of the islands with the Mauritian Council of Ministers and the Seychelles Executive Council subject to the payment of compensation to the governments, compensation to the landowners and the payment of resettlement costs. The Government of Mauritius was to receive compensation of £3m plus the resettlement costs; the Seychelles Government was to be provided with a new civil airport on Mahe.

The creation of the British Indian Ocean Territory

25. The British Indian Ocean Territory (the "BIOT") was constituted as a separate colony on 8 November 1965 by the BIOT Order 1965, SI 1965/1920. The BIOT comprised not just the Chagos Islands (which were removed from the dependencies of Mauritius by the 1965 Order) but certain other islands (Aldabra, Farquhar and Desroches) which were likewise removed from the then Colony of Seychelles. These islands (together with Mauritius and Seychelles) had been ceded to the

Crown by France pursuant to the Treaty of Paris, 1814. (The Farquhar Islands, the Aldabra Group and the Island of Desroches excised from Seychelles were subsequently restored to Seychelles in 1976 by the BIOT Order 1976 when Seychelles was granted independence).

26. The 1965 Order in Council provided the constitution for the BIOT. The Commissioner for the Territory was to be appointed to hold office during Her Majesty's pleasure, having such powers and duties as were conferred or imposed upon him by that Order or any other law or which Her Majesty might be pleased to assign him, and he was to do all things belonging to his office according to any instructions that Her Majesty might see fit to give him. One function conferred upon him by section 11 of the BIOT Order 1965 was the power to make laws for the peace, order and good government of the Territory. The Order also provided for a general continuance in force of the existing laws applicable in the islands, either Seychellois or Mauritian.
27. A series of memoranda in 1965 and 1966 reveal the thinking of the officials. The memoranda are summarised by Laws LJ in *Bancoult (1)* in this way:

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

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

12 On 5 November 1965 the Prime Minister was briefed by the Colonial Secretary. The Prime Minister was told that the proposal was to put the islands "under direct British administration" with arrangements to be made for compensation, and to seek the making of an appropriate Order in Council (which would create the new colony) on 8 November 1965; and as I have said, that was the date of the BIOT Order. There follow in the papers a series of notes and memoranda, which we examined in the course of argument, showing the concern of the British authorities to present to the outside world a scenario in which there were no permanent

inhabitants on the archipelago. I found the flavour of these documents a little odd. It is as if some of the officials felt that if they willed it hard enough, they might bring about the desired result, and there would *be* no such permanent population. There was, plainly, an awareness of a real difficulty in the way of the smooth transformation of the territory into its intended role as a defence establishment with no settled civilians. A note of 12 November 1965 read:

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

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

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

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

‘3. Our primary objective in dealing with the people who are at present in the Territory must be to deal with them in the way which will best meet our future administrative and military needs and will at the same time ensure that they are given fair and just treatment ... 4. With these objectives in view we propose to avoid any reference to 'permanent inhabitants', instead, to refer to the people in the islands as Mauritians and Seychellois ... We are ... taking steps to acquire ownership of the land on the islands and consider that it would be desirable ... for the inhabitants to be given some form of temporary residence permit. We could then more effectively take the line in discussion that these people are Mauritians and Seychellois; that they are temporarily resident in BIOT for the purpose of making a living on the basis of contract or day to day employment with the companies engaged in exploiting the islands; and that when the new use of the islands makes it impossible for these operations to continue on the old scale the people concerned will be resettled in Mauritius or Seychelles. 5. We

understand from a recent discussion with Mr Robert Newton - who had visited the islands - that, in his opinion, the people on the islands cannot be regarded as permanent inhabitants but are in fact in the category of contract labour employed by the estate owners or commercial concerns ... 6. Against this background we assume that there would be unlikely to be any undue difficulty with the inhabitants of BIOT themselves in moving over to a position in which they all held temporary residence permits on the basis of which their presence in the Territory would be allowed ... 7. Whatever arrangements are made to establish the status of the people in the BIOT as belongers of either Mauritius or Seychelles, there will in any case be a need for the enactment of appropriate immigration legislation for the Territory itself.'

The Commissioner's views were sought as to the proposal relating to temporary residence permits and other matters. A minute of June 1966 confronts the nub of the problem with considerable candour:

'They'—the Colonial Office—'wish to avoid using the phrase 'permanent inhabitants' in relation to any of the islands in the territory because to recognise that there are permanent inhabitants will imply that there is a population whose democratic rights will have to be safeguarded and which will therefore be deemed by the UN Committee of Twentyfour to come within its purview ... It is ... of particular importance that the decision taken by the Colonial Office should be that there are no permanent inhabitants in the BIOT. First and foremost it is necessary to establish beyond doubt what inhabitants there are at present in the islands, how long they have been resident there and whether any were born on the islands. Subsequently it may be necessary to issue them with documents making it clear that they are 'belongers' of Mauritius or the Seychelles and only temporarily resident in the BIOT. This device, though rather transparent, would at least give us a defensible position to take up in the Committee of Twentyfour ... It would be highly embarrassing to us if, after giving the Americans to understand that the islands in BIOT would be available to them for defence purposes, we then had to tell them that we proposed to admit that they fell within the purview of the UN Committee of Twentyfour.'

There is a manuscript note by another official which comments on this minute. It refers to "a certain old fashioned reluctance to tell a whopping fib, or even a little fib, depending on the number of permanent inhabitants". A note dated 24 August 1966 to an official, Mr D A Greenhill, quotes a minute from the

Permanent Under Secretary (I assume at the Colonial Office).
The Permanent Under Secretary unburdened himself thus:

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

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

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

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

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

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

the scope of Chapter XI of the United Nations Charter.’ (My emphasis.)”

28. We turn briefly to the proceedings on 16 November 1965 of the Fourth Committee of the UN General Assembly, Twentieth Session. We do so because of a dispute which arose towards the end of the hearing before us. In a further written argument the defendant complained of an allegation made by the claimant that the UN had been deceived. In his written argument Mr Howell referred to a passage in the judgment of the Court of Appeal refusing permission to appeal from the judgment of Ouseley J. in the Chagos Islanders litigation. Mr Howell wrote:

“When the statement, that ‘the deliberate misrepresentation of the Ilois’ history and status, designed to deflect any investigation by the United Nations...is now a matter of the historical record’, appeared in the Approved Judgment in the Court of Appeal a protest was made that no opportunity had been given to the defendant to deal with any particularised allegation to that effect. However the draft judgment was not altered. No basis has ever been identified for it. It is not accepted.”

29. In our view the following passages of the record of the proceedings show how Mr Brown representing the United Kingdom was deliberately drawing a distinction between the Chagos Islands and the Falkland Islands on the premise that the population of the former consisted of labourers from Mauritius and Seychelles. If the defendant seeks a basis for an allegation of deception, it lies in the record and the contemporaneous internal documentation. The record of the hearing reads in part:

“75. Mr Brown (United Kingdom) said that of the forty or so Territories with which the Committee was concerned under agenda item 23, about twenty were under United Kingdom administration.

76. As the reports of the Special Committee for 1964 and 1965 demonstrated, the past two years had been marked by steady advance in those Territories. A number had become fully independent and were now Members of the United Nations. There had been a series of constitutional conferences concerning certain of the Territories; the constitutional progress of other Territories had been the subject of less formal consultations between local leaders and the United Kingdom Government: and in some Territories purely local consultations had taken place with a view to reaching agreement on proposals for discussion with the United Kingdom Government. In a number of Territories there had been important constitutional changes, the details of which were included in the reports of the Special Committee. Major elections had taken place in several more.

...

80. Questions had been raised about the United Kingdom Government's plans for certain islands in the Indian Ocean. The facts were as follows. The islands in question were small in area, were widely scattered in the Indian Ocean and had a population of under 1,500 who, apart from a few officials and estate managers, consisted of labourers from Mauritius and Seychelles employed on copra estates, guano extraction and the turtle industry, together with their dependants. The islands had been uninhabited when the United Kingdom Government had first acquired them. They had been attached to the Mauritius and Seychelles Administrations purely as a matter of administrative convenience. After discussions with the Mauritius and Seychelles Governments – including their elected members – and with their agreement, new arrangements for the administration of the islands had been introduced on 8 November. The islands would no longer be administered by those Governments but by a Commissioner. Appropriate compensation would be paid not only to the Governments of Mauritius and Seychelles but also to any commercial or private interests affected. Great care would be taken to look after the welfare of the few local inhabitants, and suitable arrangements for them would be discussed with the Mauritius and Seychelles Governments. There was thus no question of splitting up natural territorial units. All that was involved was an administrative re-adjustment freely worked out with the Governments and elected representatives of the people concerned.

...

89. His delegation had listened carefully to the Argentine representative's arguments in support of his country's claim to sovereignty over the Falkland Islands. It did not intend to enter into detailed arguments since the Committee would not wish to attempt to judge on the merits of the question, except to say that the United Kingdom Government did not accept the Argentine representative's arguments and continued to have no doubts as to its sovereignty over the Territory. The question of disruption of Argentina's territorial integrity therefore did not arise. There was, however, one important point to which the Argentine representative had given inadequate attention: the interests and wishes – the two being inseparable – of the inhabitants. As his delegation had shown in its statements to the Special Committee, the Falkland Islanders were genuine, permanent inhabitants who had no other home but those islands. They had shown, in their messages to the Special Committee and in the formal declaration by their elected representatives, that they did not wish for anything other than normal, friendly relations with Argentina, but that they did not wish to sever their connections with the United Kingdom.

There were no grounds whatever for suggesting that their wishes should simply be set aside; yet that was the tenor of some of the speeches in the present debate.

90. It had been suggested that the population was somehow irrelevant on the grounds that the people were transient, that there were no births or deaths in the islands, that the people had been planted there by the United Kingdom rather than being of indigenous stock and that many of them were employed by the Falkland Islands Company. There should be no misunderstanding about their status. The population numbers slightly over 2,000 of whom 80 per cent had been born in the islands. Many could trace their roots back for more than a century in the islands. Of course they stemmed from an immigrant community; so did much of the population of North and South America and indeed Europe and Africa. It would surely be fantastic to limit the principle of self-determination to the handful of peoples who could truthfully claim to be the descendants of indigenous inhabitants. There was nothing in the charter or in resolution 1514 (XV) to warrant such a major restriction. In any case it was quite wrong to suggest that the people were transients or that there were no births or deaths in the islands. The birth and death rates were published for all to see; they were somewhat higher than the rates in the United Kingdom and that alone completely refuted the picture of garrison, regularly replaced and “rotated”, with no settled roots in the Territory.

91. The Venezuelan and Italian representatives had suggested that it was a question not of a colonial people but of a colonial Territory – not human beings but land. That was surely not an attitude which should commend itself to the Fourth Committee. As Woodrow Wilson had said, people were not chattels or pawns to be bartered about from sovereignty to sovereignty. It had been suggested that operative paragraph 6 of resolution 1514(XV) should be interpreted as denying the principle of self-determination to the inhabitants of Territories which were the subject of a territorial claim by another country. His delegation and others had already produced conclusive evidence in the Special Committee that the paragraph in question had not been intended to limit the application of the principle of self-determination in any way; in that connexion he referred to paragraphs 94-98 and 146-151 of chapter X of document A/5800/Rev.1, and to paragraph 109 of the annex to chapter XXIII of the same document. Those arguments had in no way been refuted by anything said in the present debate.”(Underlining added)

30. On 9 November 1965 an internal minute reads:

“We should for the present continue to avoid any reference to ‘permanent inhabitants’, instead referring to the people in the islands at present as Mauritians, Seychellois, or by some other similar term.”

31. A note of the next day from the Foreign Office to the UK UN Mission reads in part as follows:

“Indian Ocean Islands.

1. We recognize that we are in a difficult position as regards references to people at present on the detached Islands since we want to avoid the territory being classed as non-self governing within the terms of Chapter XI and also do not wish to give an argument to the Argentine over the Falkland Islands and also to some extent to Spain over Gibraltar.

2. Figures of total population are given in Parliamentary Answer (My telegram No. 4327.) They can all be classified as Mauritians or Seychellois but we know that a few were born on Diego Garcia and perhaps some of the other islands and so were their parents before them. We cannot therefore assert that there are no permanent inhabitants however much this would have been to our advantage.

3. In these circumstances we think it would be best to avoid all references to ‘permanent inhabitants’. We are accordingly arranging that in place of the guidance in paragraph 2(h) of our telegram No. 4327 on population the following will be used in answer to questions by the Press in London:-

“The total population in all the Islands numbers only about 1,500 persons who, apart from a few officials and estate managers, consist of labourers from Mauritius and Seychelles employed on copra estates, guano extraction, and the turtle industry together with their dependants.”

32. Another note of 15 November reads in part:

“I certainly hope that it will be possible to avoid giving a supplementary answer on whether we should or should not transmit information to the United Nations in respect of the new British Indian Ocean Territory. I have no doubt that the right answer under the Charter is that we should do so for the territory is a non-self-governing territory and there is a civilian population even though it is small. In practice, however, I would advise a policy of "quiet disregard" – in other words, let's forget about this one until the United Nations challenge us on it.” (Underlining added)

33. What Mr Brown said on 16 November 1965 is to be compared with a passage in a letter written by him on 2 February 1966:

“6. On the basis of the information available it seems to us difficult to avoid the conclusion that the new territory is a non-self governing territory under Chapter XI of the Charter, particularly since it has and will or may have a more or less settled population, however small. We cannot disclaim Charter obligations to the inhabitants because they are not indigenous, since this would destroy our case on the Falklands and Gibraltar; nor apparently would the facts substantiate a plea that the inhabitants are not permanent – even if (which is not necessarily the case) Chapter XI of the Charter were confined to permanent populations.” (Underlining added)

34. On 30 December 1966, in an Exchange of Notes, the UK and US Governments agreed that the BIOT should be available to meet their various defence needs for “an indefinitely long period”, expressed to be an initial period of 50 years, and thereafter subject to renewal for periods of 20 years, unless either Government gave notice to terminate the agreement (see below). Further Notes were exchanged in 1972 and 1976 (see below).
35. The defendant says that the BIOT was constituted as a separate colony in 1965 in order to meet the defence requirements of the United Kingdom and its allies (including specifically the United States of America). The defendant also says that when the BIOT was created the Chagossians were “neither a readily defined or ascertainable category.” The claimant says that their number exceeded 1,000. The defendant says there were many fewer: the defendant submits that in fact as at May 1967, for example, of the population of 924 on the Chagos Islands, only 487 (of whom 274 were children) classified themselves as being Chagossian.

The Exchange of Notes of 30.12.66, the Confidential Agreed Minute of December 1966 and the further Notes exchanged in 1972 and 1976

36. By an Exchange of Notes on 30 December 1966 between the UK and US Governments concerning the Availability for Defence Purposes of the islands of Diego Garcia and the remainder of the Chagos Archipelago, and the islands of Aldabra, Farquhar, and Desroches constituting the [BIOT], hereinafter referred to as “the Territory”, it was agreed that: -

“(1) The Territory shall remain under United Kingdom sovereignty.

(2) Subject to the provisions set out below the islands shall be available to meet the needs of both Governments for defence. In order to ensure that the respective United States and United Kingdom defence activities in the islands are correlated in an orderly fashion:

(a) In the case of the initial United States requirement for use of a particular island the appropriate governmental

authorities shall consult with respect to the time required by the United Kingdom authorities for taking those administrative measures that may be necessary to enable any such defence requirement to be met.

(b) Before either Government proceeds to construct or install any facility in the Territory both Governments shall first approve in principle the requirement for that facility, and the appropriate administrative authorities of the two Governments shall reach mutually satisfactory arrangements concerning specific areas and technical requirements for respective defence purposes.

(c) The procedure described in sub-paragraphs (a) and (b) shall not be applicable in emergency circumstances requiring temporary use of an island or part of an island not in use at that time for defence purposes provided that measures to ensure the welfare of the inhabitants are taken to the satisfaction of the Commissioner of the territory. Each Government shall notify the other promptly of any emergency requirements and consultation prior to such use by the United States Government shall be undertaken as soon as possible.

...

(11) The United States Government and the United Kingdom Government contemplate that the islands shall remain available to meet the possible defence needs of the two Governments for an indefinitely long period. Accordingly, after an initial period of 50 years this Agreement shall continue in force for a further period of twenty years unless, not more than two years before the end of the initial period, either Government shall have given notice of termination to the other, in which case this Agreement shall terminate two years from the date of such notice.”

37. By an Agreed Minute of December 1966 headed ‘Confidential’ it was recorded that:

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“In the course of discussions leading up to the Exchange of Notes of 30 December 1966, constituting an Agreement between the Governments of the United Kingdom and the United States concerning the use of the islands in the [BIOT] for defence purposes the following agreement and understandings were reached:

With reference to paragraph (2) (a) of the Agreement, the administrative measures referred to are those necessary for modifying or terminating any economic activity then being

pursued in the islands, resettling any inhabitants, and otherwise facilitating the availability of the islands for defence purposes.

...”

38. This minute remained confidential until revealed during the course of the *Bancoult (I)* case. The British Government, by agreeing to this, was effectively sealing the fate of those living on an island upon the Government acceding to a requirement of the United States to use that island pursuant to the 1966 Exchange of Notes. Under the terms of the minute the British Government agreed to resettle any inhabitants on such an island. In fact only the island of Diego Garcia has been “required” by the United States.
39. By an Exchange of Notes on 24 October 1972 between the UK and US Governments, pursuant to paragraph 2 (b) of the Agreement of 30 December 1966, approval in principle was conveyed by the UK to the construction of a limited US Naval Communications Facility on Diego Garcia. An Exchange of Notes on 25 February 1976 between the UK and US Governments concerning a US Navy Support Facility on Diego Garcia replaced the Agreement of 24 October 1972. There have been no further Exchanges of Notes between the UK and US Governments concerning the BIOT.

The Crown’s ownership of the land in the BIOT

40. The BIOT Ordinance No 1 of 8 February 1967, the Compulsory Acquisition of Land for Public Purposes Ordinance, empowered the Commissioner to acquire land compulsorily for a public purpose, notably and explicitly the defence purposes of the UK or Commonwealth or other foreign countries in agreement with the UK.
41. The BIOT Ordinance No 2 of 22 March 1967, the Acquisition of Land for Public Purposes (Private Treaty) Ordinance, enabled the Commissioner to acquire land by agreement for the same public purposes. It was under this power that, on 3rd April 1967, CACL vested its lands in Diego Garcia, Peros Banhos, the Salomon Islands and others in the Crown, for £660,000. The Crown also acquired Farquhar and Desroches; it already owned Aldabra.
42. The Acquisition of Land for Public Purposes (Repeal) Ordinance 1983 repealed the earlier Ordinances and declared that all the land in BIOT is Crown Land.

Mauritian Independence and Citizenship

43. On 12 March 1968, Mauritius became independent. By its constitution, Mauritian citizenship was conferred on everyone born in Mauritius by that date, including those born in that part of BIOT which had previously been part of the colony of Mauritius. The latter would also remain citizens of the United Kingdom and Colonies. This dual citizenship was not publicised at the time.
44. A person who had been born in the Chagos Islands when they formed part of the colony of Mauritius (such as the claimant) or after they formed part of the BIOT became (like a person born in the United Kingdom and in other colonies) a citizen of the United Kingdom and Colonies under the British Nationality Act 1948. The

claimant (and others born in the Chagos Islands) also became a citizen of Mauritius on that territory gaining independence in 1968. He thus had dual citizenship. Citizenship of the United Kingdom and Colonies was replaced under the British Nationality Act 1981 with effect from January 1 1983 by a number of different citizenships. The claimant then became a British Dependent Territories Citizen.

45. The British Overseas Territories Act 2002, which came into effect on 21 May 2002, renamed 'British Dependent Territories Citizens' 'British Overseas Territories Citizens' and in most cases conferred full British citizenship on such citizens (including the claimant). As a British citizen, the claimant now has a right of abode in this country (and related rights within the European Union).

The departure of those living in the BIOT (1965-1973) and those living in the BIOT thereafter

46. The Commissioner granted a lease of the islands to CACL on 15 April 1967. It was terminable on six months' notice. CACL gave notice in June 1967. Moulinie & Co (Seychelles) Limited, for which Paul Moulinie (a director of CACL) and his nephew Marcel Moulinie worked, took over the management of the plantations in January 1968. There was no signed management agreement, but the terms of an unsigned written agreement were put into operation.
47. In 1967 and 1968, on two voyages, the M.V. "Mauritius" brought plantation workers, including Chagossians, to Port Louis in Mauritius. They came on leave, or on the expiry of their contract or for medical reasons. When those who had arrived in Mauritius in 1967 and 1968 eventually tried to return to the Chagos islands in 1968 and later, they were refused passage and were unable to return. The Government of Mauritius made representations to the UK Government in September 1968 about the fate of some of those stranded in Mauritius.
48. In July 1968, the M.V. "Nordvaer" was acquired by the BIOT Administration to connect the Seychelles, where it was based, and BIOT. The shipping link between Mauritius and the Chagos largely ceased.
49. On 5 July 1968, the UK Government was told that, subject to Congressional approval, the US Government had decided to proceed with an "austere" communication and other facilities on Diego Garcia. Plans which hitherto had been uncertain in all respects were by now becoming more certain, but they were still not publicly known.
50. Approval for the US proposal was sought from the Prime Minister in submissions from the Foreign Office and the Commonwealth Office. The submission said that some 128 or 34% of the inhabitants of Diego Garcia were second-generation inhabitants. Various possibilities for their resettlement and the resettlement of other workers were canvassed. Agalega, Peros Banhos and the Salomon Islands were seen as possibilities because of their coconut plantations. The only skill which the Chagossians and many other contract workers possessed was working in coconut plantations.
51. The United States was informed of the United Kingdom's approval in September 1968. Further consideration was thereafter given to the resettlement of those living

in the Archipelago. But planning for the future of the Islands was complicated by (inter alia) the US Government's desire for its plans not to be disclosed in public until after they had received Congressional approval and by the uncertainty associated with their longer term requirements. Investment in the islands other than Diego Garcia was considered to be uneconomic without an assurance that they would not be required for defence purposes.

52. A further submission was made by the Foreign Secretary to the Prime Minister on 21 April 1969. It contemplated the complete evacuation of Diego Garcia. It was approved by the Prime Minister, the Chancellor of the Exchequer and the Secretary of State for Defence. Discussions about resettlement options continued through 1969 and 1970 but no firm conclusion was reached.
53. The defendant's case is as follows. The Foreign Secretary's conclusion was that the best plan was to try to arrange for these people, all of whom were citizens of the United Kingdom and Colonies or of Mauritius or both, to return to Seychelles or Mauritius. He recommended entering into negotiations with the Mauritian Government for that purpose. The Foreign Secretary considered that alternatives, such as resettling some of the population of Diego Garcia on Peros Banhos and Salomon and the development of those two atolls by Her Majesty's Government, were less satisfactory. The Secretary of State stated, however, that it might be necessary to fall back on such alternatives if fair and satisfactory arrangements could not be made with the Mauritian Government at a reasonable cost to the United Kingdom. The claimant's case is that the British Government simply agreed to a request by the US that all the Chagos Islands or the BIOT should be cleared of their population. The claimant's case is supported by the 1966 Confidential Minute.
54. On 17 December 1970, Congressional approval for the construction of the defence facility on Diego Garcia was announced. The US Government had told the UK Government shortly beforehand that it wanted Diego Garcia evacuated by July 1971.
55. The defendant says that on 24 January 1971, the Foreign and Commonwealth Office informed the Commissioner that no final decision had been taken on overall resettlement and that it was not yet possible to make public reference to the aim that resettlement in Peros Banhos and Salomon should be temporary. Their instructions were that the Administrator should simply say that the construction work would make it necessary for the copra plantations on Diego Garcia to close. The Administrator visited Diego Garcia on 23 January 1971. He anticipated that in July there would be 36 Chagossian families and 45 Seychellois families on Diego Garcia. The Administrator informed the Foreign Office that:-

“On the 24th January I told all the inhabitants that we intended to close the island in July but, that for some time, we would be continuing to run Peros Banhos and Salomon and that we would send as many people as possible from Diego Garcia to those two islands. This drew no comment from the Seychellois but a few of the Ilois asked whether they could return to Mauritius instead and receive some compensation for leaving their ‘own country’. [I said] that our intention was to cause as little disruption of their lives as possible and that due to the

difficulties of communications with Mauritius it would not be possible to arrange a return there until the middle of the year when the MV Mauritius would resume its calls at Mahe.”

56. According to the defendant the decision of the US Government to proceed led to a further submission to Ministers in February 1971 seeking authority to resettle the population of the Archipelago in Seychelles and, subject to negotiations with that government, in Mauritius. The Secretary of State approved that approach. Discussions between the UK and Mauritian Governments began in March 1971. It was not until 4 September 1972 that a payment of £650,000 was agreed between the UK and Mauritian Governments in discharge of the obligation undertaken in 1965 to meet the cost of resettlement of those displaced from the Archipelago since 1965 and who were yet to come. It was paid in October 1972.
57. On 16 April 1971, the BIOT Commissioner enacted the Immigration Ordinance 1971, No 1 of 1971. It made it unlawful for a person to enter or remain in the territory without a permit; it also provided for the Commissioner to make an order directing that person's removal from the territory. The 1971 Ordinance reflects the agreement reached in the 1966 Minute. In *Bancoult (1)* Laws LJ said (paragraph 1) that the removal of the Chagossian population was “effected” under the Immigration Ordinance. In fact, as Sir Sydney accepts, the Immigration Ordinance did not in fact need to be used to effect the removal.

The closing of the plantations on Diego Garcia

58. In July 1971 the MV "Nordvaer" took some Chagossians from Diego Garcia to Salomon and Peros Banhos. The "Isle of Farquhar" arrived in Diego Garcia early in September and then sailed to Peros Banhos and Salomon with mainly Chagossian families.
59. The evacuation of Diego Garcia was completed by the "Isle of Farquhar" which arrived in Mahe on 31 October 1971 with 9 Seychellois and one Chagossian woman and child. At the time of the closure of the plantations on Diego Garcia there were just over 100 Chagossian (some 36 or 37 families) on that island and some 200 Seychellois workers. About 100 Seychellois labourers had returned to the Seychelles. The Mauritian authorities estimated that there were about 1,000 Chagossians already in Mauritius, evacuated, more recently stranded or looking to return after a longer absence, having arrived since the formation of BIOT in 1965.
60. The defendant says that at that time the policy was that no-one was to be repatriated to Mauritius compulsorily but the Chagossians were to be offered alternative employment on Peros Banhos, Salomon or Agalega. The defendant adds that only a small number of Chagossian families left the Archipelago immediately following the closure of the plantations on Diego Garcia. The great majority, who transferred to the other islands, received a disturbance allowance of R500. The population of Peros Banhos and Salomon was now 65 men, 70 women and 197 children, of whom 18 men, 18 women and 49 children had been transferred from Diego Garcia.
61. In the course of argument Mr Howell QC, when asked why the families left Diego Garcia, replied (on instructions) that they did so because of the closure of the plantations. In our view the answer should have been: they left because they were

required to leave in fulfilment of the 1966 confidential Minute which required the United Kingdom to take those “administrative measures” “necessary for modifying or terminating any economic activity then being pursued in the islands, resettling any inhabitants”. We confess to being considerably disappointed by this attempt to obfuscate the history. It runs counter to what Mr Robin Cook said in 2000: “This Government has not defended what was done or said thirty years ago.”

The Salomon Islands and Peros Banhos

62. The defendant says that, following evacuation of Diego Garcia, there was no intention of evacuating the Salomon islands or Peros Banhos or of encouraging those there to leave until a settlement was reached with the Mauritian Government. However, according to the defendant, the population of the outer islands started to leave voluntarily, as they were entitled to do. The claimant strongly disputes the suggestion that the population left voluntarily in this period. It was known to them that there was no permanent prospect of the plantations being maintained in being, as they had been told by the BIOT Administrator, Mr Todd, on 24 January 1971. What they had been told was consistent with the 1971 Ordinance.
63. Meanwhile, the operation of the coconut plantations and copra production on Peros Banhos and the Salomon Islands was becoming economically unsupportable and was running down. The prospect of further closures and moves was becoming clearer to the Chagossians; they were becoming resigned and apathetic. Those on Salomon were told to move to Peros Banhos in May 1972, so as to concentrate population and production on one island, but they refused. In June 1972, the "Nordvaer" sailed to Mahe with 53 Chagossians (15 men, 15 women and 23 children) from Peros Banhos and Salomon; they went on to Mauritius. They were warned that they might not be able to return.
64. In November 1972, the "Nordvaer" took a further 120 Chagossians (73 adults and 55 children) from Peros Banhos and Salomon to Mauritius, arriving on 14 November. By now, Salomon had closed down.
65. By the Exchange of Notes on 24 October 1972 between the UK and US Governments, pursuant to paragraph 2 (b) of the Agreement of 30 December 1966, approval in principle was conveyed by the UK to the construction of a limited US Naval Communications Facility on Diego Garcia. It was no longer economic for Moulinie & Co to run copra production on Peros Banhos. Paul Moulinie and the BIOT Administrator, Mr Todd, sought closure and an evacuation in March or April 1973.
66. According to the judgment of Ouseley J on 27 April 1973, the “Nordvaer” left Peros Banhos for Mauritius carrying 26 men, 27 women and 80 children, but on arrival at Port Louis, they refused to disembark: they had nowhere to go, no money and no employment. They received an offer of accommodation in the Dockers Flats area of Port Louis and a small sum of money.
67. On 26 May 1973, the "Nordvaer" left Peros Banhos for Mauritius via the Seychelles; it arrived on 13th June 1973 carrying 8 men, 9 women and 47 children or infants. This was the last of the population on the Chagos Islands; the plantations there closed. There was no resettlement scheme when they arrived. Rampant

inflation between 1973 and 1978 substantially reduced the value of the payment of £650,000. The £650,000 paid to the Government of Mauritius in 1973 was eventually expended, with accrued interest, in 1977 and 1978, not just to the 426 families who had been identified as having left the Chagos Islands since 1965, but also to a further 169 families who had returned earlier, making 595 in all. It was paid in the form of a cash distribution. There was nothing for the Chagossians on the Seychelles.

68. The Seychelles islands within BIOT (Aldabra, Farquhar and Desroches) were never evacuated and they were returned to the Seychelles at the time of its independence in 1976.

Events after the closure of the plantations in 1973

69. The claimant has not lived on any island in the BIOT since 1967 and no Chagossian has lived there since 1973. The only persons living in the BIOT have been those associated with the administration of the BIOT and the defence facilities there. The claimant says this is because of the policies of the Government. That must be right.
70. In February 1975, Michel Vencatessen issued a writ in the High Court in London against the Attorney General, for the Secretaries of State for Defence and for Foreign and Commonwealth Affairs. Michel Vencatessen had left Diego Garcia on the "Nordvaer's" last voyage. The writ claimed damages, aggravated and exemplary, for intimidation, deprivation of liberty and assault in the BIOT, Seychelles and Mauritius in connection with his departure from Diego Garcia, the voyage and subsequent events. By 1978, it was clear that the litigation, in practice, had to be regarded as a form of group litigation. The UK Government made an open offer to settle all the claims of all the Chagossians for £500,000 plus costs in February 1978.
71. On 27 March 1982, an agreement between the Governments of the United Kingdom and Mauritius was initialled; it was also initialled by the Chagossian representatives. Under the agreement the United Kingdom was to contribute £4m, and the Mauritian Government land to the value of £1m, to assist the resettlement of those Chagossians who had left the Chagos Islands after November 1965, in Mauritius. A trust fund was to be set up to disburse the monies. The agreement was intended to provide a full and final settlement of all claims arising out of their departure without any admission of liability. The agreement made provision for Chagossians to sign individual renunciation forms. The agreement was signed by the two Governments on 7th July 1982 in the presence of Chagossian representatives.
72. On 30 July 1982, the Ilois Trust Fund Act 1982 was enacted by the Parliament of Mauritius. The Trust Fund was to be managed by a Board of Trustees which included five representatives of the Chagossians, initially appointed and subsequently subject to elections. The purpose of the Fund was to disburse the UK and Mauritian Government monies, together with a sum provided by the Indian Government, in promoting the economic and social welfare of the Chagossians and of the Chagossian community in Mauritius. Proceedings in the Vencatessen litigation were stayed by agreement on 8 October 1982.
73. The compensation fund was distributed by the Ilois Trust Fund Board ('ITFB') in tranches. The ITFB assumed responsibility for collection of "renunciation forms"

from those who received compensation. These forms renounced claims against the UK Government. Renunciation forms were signed or thumb-printed by almost all the Chagossians on receipt of the final tranche of compensation.

74. When the Chagossians went to the Social Security Office to collect this final sum, they were presented with a renunciation form to sign, or far more commonly, to put their thumbprint to. This form was a one-page legal document, written in legal English, without a Creole translation. Only 12 refused to sign, including Simon Vencatessen. He later brought proceedings against the ITFB in the Supreme Court in Mauritius, claiming that it had no power to impose on him a requirement to sign a renunciation form as a condition of obtaining this last sum of money. He lost on the grounds that the 1982 Agreement and the ITFB provided a statutory remedy for the Chagossians as an alternative to proceeding by an action in the UK or BIOT Courts. In 1989, the Supreme Court of Mauritius dismissed his claim.

The *Bancoult (1)* Litigation

75. In 1998, the claimant sought judicial review challenging the validity of the BIOT Immigration Ordinance 1971, s 4.
76. On 3 November 2000, the Divisional Court decided *Bancoult (1)*, Laws LJ and Gibbs J holding that section 4 of the Immigration Ordinance was ultra vires the BIOT constitution. The Government obtained permission to appeal, but there was no appeal against this decision.
77. In *Bancoult (1)* the Divisional Court held that section 4 of the Immigration Ordinance 1971 made by the Commissioner for the BIOT was outwith the Commissioner's power (conferred by section 11(1) of the BIOT Order 1965) to "make laws for the peace, order and good government of the Territory".
78. The issues before the Divisional Court were:
- i) As a preliminary issue, whether the High Court had jurisdiction to rule on the validity of the Ordinance? The Court held that it had jurisdiction.
 - ii) Whether the BIOT Commissioner had exercised his power under section 11 of the BIOT Order 1965 lawfully? The Court held that he had not, since the Immigration Ordinance 1971 was ultra vires as falling outwith the power of the BIOT Commissioner (under section 11 of the BIOT Order 1965) to "make laws for the peace, order and good government of the Territory".
79. Laws LJ held as follows:-
- i) The Court had jurisdiction (paragraphs 21–28).
 - ii) He set out in paragraphs 30 to 36 arguments concerning the Colonial Laws Validity Act 1865. Laws LJ declined to resolve whether Magna Carta extended to the territory of BIOT by "necessary intendment" by virtue of section 1 to the 1865 Act because it was "barren". If the lawmaker in question had the power to enact the Immigration Ordinance, the relevant provisions of Magna Carta would not be violated.

- iii) An Order in Council may in the context of the Crown's powers to make law for a colony amount to an act of primary legislation under the Prerogative (35).
- iv) 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, and BIOT had "belongers" (39).
- v) *Ex parte Witham* [1998] QB 575 did not assist the claimant (40).
- vi) The Commissioner could lawfully legislate only "within the powers conferred upon him by higher authority." (46).
- vii) The argument that the Ordinance could not be challenged as being ultra vires by virtue of the Colonial Laws Validity Act 1865 was not pursued (47).
- viii) The BIOT was a ceded colony (52), therefore the British Settlements Act 1887 did not apply (49). The Queen enjoys prerogative power to make laws for a ceded colony, but in relation to a settled colony power was conferred not by the prerogative but by the British Settlements Act 1887 (49).
- ix) The reasons for the Ordinance advanced by the BIOT Commissioner were accepted to have been "good reasons, certainly, dictated by pressing considerations of military security". (57).
- x) At paragraph 55, Laws LJ noted that: -

"the authorities demonstrate beyond the possibility of argument that a colonial legislature empowered to make law for the peace, order and good government of its territory is the sole judge of what those considerations factually require. It is not obliged to respect precepts of the common law, or English traditions of fair treatment. This conclusion marches with the cases on the Colonial Laws Validity Act, and I have dealt with that. But the colonial legislature's authority is not wholly unrestrained. Peace, order and good government may be a very large tapestry, but every tapestry has a border..."
- xi) Section 11 of the BIOT Order did not empower section 4 of the Ordinance because the colonial legislature's authority to legislate for 'peace, order and good government' is not wholly unrestrained, and section 4 cannot be described as conducive to the territory's peace order and good government because its population is to be governed not removed and the reasons given for excluding them were not reasons which may reasonably be said to touch the peace, order and good government of BIOT.
- xii) The legislation was not enacted for an improper purpose (60).
- xiii) Laws LJ doubted whether the prerogative power permitted the Queen to exile her subjects from the territory to which they belong and said there was "unexplored ground" - it would be one thing to send a Chagos believer to another part of the Queen's dominions, and quite another to send him out of

the Queen's dominions altogether. The latter could only be done by statute (61).

80. Gibbs J agreed with the judgment of Laws LJ and held as follows: -

- i) The purpose of the BIOT Order and Ordinance was to facilitate the use of Diego Garcia as a strategic military base and to restrict the use and occupation of that and the other islands within the territory to the extent necessary to ensure the effectiveness and security of the base (65). The applicant acknowledged that the Commissioner's purposes were (or could at least reasonably be described as) of benefit to the United Kingdom and the western powers as a whole.
- ii) The power to enact the Ordinance came from the Royal Prerogative, not from the British Settlements Act 1887, and the Ordinance was made on advice given to the Crown by ministers of the UK Government.
- iii) The High Court had jurisdiction to review the legality of the Ordinance, in particular whether it was ultra vires. (68).
- iv) The crucial question on the legality of the Ordinance was whether the Ordinance could reasonably be described as 'for the peace, order and good government' of BIOT. These words are not a mere formula conferring unfettered powers on the Commissioner. The phrase implies that citizens of the territory are there to take the benefits, and their detention, removal and exclusion from the territory are inconsistent with any or all of those words – to hold that the expression could justify the Ordinance would be an affront to any reasonable approach to the construction of language. The Ordinance was unlawful. (71 and 72).

The relief granted was an order quashing section 4 of the Immigration Ordinance 1971.

Events following the *Bancoult (1)* judgment

81. On the same day, a written statement was made by the then Foreign Secretary (Mr Robin Cook MP) in the following terms: -

"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."

82. At the same time, the contested Immigration Ordinance was repealed and replaced by the British Indian Ocean Territory Ordinance No. 4 of 2000 (the Immigration Ordinance 2000).

83. Section 4 of Ordinance 4 of 2000 (Restriction on entering or remaining in the Territory) enacted by the Commissioner provided: -

"4. (1) No person shall enter the Territory, or, being present in the Territory, shall remain there, unless he is in possession of a permit issued under section 6 or his name endorsed is on a permit under section 8.

(2) This section does not apply to members of Her Majesty's Forces, or to public officers, or to officers in the public service of the Government of the United Kingdom while on duty, or to such other persons as may be prescribed.

(3) Except in respect of his entry into, or his remaining in, Diego Garcia, this section does not apply to any person who

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(a) is, under the British Nationality Act 1981, ... a British Dependent Territories citizen and;

(b) is such a citizen by virtue of his connection with the Territory;

and it also does not apply to the spouse or to the dependent [sic] child, under the age of 18 years, of such a person."

84. Through 1999 and 2000, the claimant's Solicitors, Sheridans, pressed the case for compensation for the Chagossians and for the provision of infrastructure on the islands to permit a return by the Chagossians. In late 1999, before the judgment in *Bancoult (1)*, it was decided that there should be an examination by independent experts of the physical, social and environmental feasibility of a permanent resettlement on the outer islands of the Chagos Archipelago. A preliminary Feasibility Study was produced dated 20 June 2000. Following subsequent collection of data (as part of what was termed Phase 2A of the Feasibility Study), an independent report on what was called Phase 2B was published on 10 July 2002. The Report concluded that while resettlement on a short-term subsistence basis was possible, long term resettlement would be "precarious and costly."

85. Between 1999 and May 2004, there was extensive correspondence and a series of meetings between Sheridans and the defendant.

The Chagos Islanders' Litigation

86. The Group Particulars of Claim in the Chagos Islanders' Litigation were issued in April 2002. The claimants sought compensation for a number of alleged torts said to have been committed by the defendants, including misfeasance in public office, exile, negligence, interference with property rights and infringement of certain human rights. The claimants also sought a declaration "of the steps necessary to make practicable the right of return to the Chagos Archipelago, such that the Chagossians may again live in each and all of the previously inhabited islands."
87. Ouseley J gave summary judgment against the claimants on 9 October 2003 in their Group Litigation. Ouseley J found that the claims raised were not reasonably arguable and/or were time-barred and, in respect of those individuals who had signed or thumb-printed such forms who gave oral evidence before him in the Chagos Islanders' litigation, including the claimant in the present proceedings, that this claim was an abuse of process given the settlement in 1982.
88. The Court of Appeal refused the claimants' application for permission to appeal by judgment dated 22 July 2004. The reasons of the Court of Appeal were as follows: -
- i) Ouseley J. had been right to hold that those who signed renunciation forms bindingly compromised their claims for compensation (paragraph [19]);
 - ii) Exile was not a free-standing tort ([22]);
 - iii) There was no viable claim for misfeasance in public office ([29]);
 - iv) The claim in deceit in respect of any representations said to have been made to the claimants was unarguable ([32]);
 - v) The arguments based on misrepresentation to third parties and on the Constitution of Mauritius were arguable; ([37] and [42])
 - vi) Nonetheless, there was an unanswerable defence of limitation (paragraph 43). Any attempt to circumvent limitation would be doomed to failure ([49]).
 - vii) No claim for declaratory relief had been developed before the Court of Appeal ([54]).
89. The Court of Appeal refused the claimants' application for permission to appeal by judgment dated 22 July 2004.

The enactment of the contested Orders in Council and subsequent events

90. On 10 June 2004, Her Majesty by Order in Council enacted the Constitution Order and the Immigration Order. Notice of the making of the Orders in Council was given on 15 June 2004, when a written statement was made to the House of Commons by the Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs. The claimant's Solicitors were notified of the Orders in Council on the same day.
91. The Constitution Order revoked the BIOT Orders 1976 to 1994, and provided so far as material: -

“No right of abode in the Territory

9. (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.

...

Powers reserved to Her Majesty

15. (1) There is hereby reserved to Her Majesty full power to make laws for the peace, order and good government of the Territory, and it is hereby declared, without prejudice to the generality of that expression but for the avoidance of doubt that-

(a) any law made by Her Majesty in the exercise of that power may make any such provision as Her Majesty considers expedient for or in connection with the administration of the Territory; and

(b) 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.”

92. The Immigration Order 2004 repealed the Immigration Ordinance No 4 of 2000 and provided so far as material: -

“Restriction on entering or being present in the Territory

5. (1) No person shall enter the Territory or be present there unless he is in possession of a permit issued under section 7 or his name is endorsed on a permit under section 9.

(2) This section does not apply to members of Her Majesty’s armed forces, or to public officers, or to officers in the public service of the Government of the United Kingdom while on duty, or to such other persons as may be prescribed.

...

Duration of permits

8. A permit shall, unless cancelled, remain in force for a period of four years from the date of issue or for such shorter period as is stated in it. A permit renewed shall, unless cancelled, remain

in force for a period of four years from the date on which the renewal takes effect or for such shorter period as is stated in the renewed permit.

...

When unlawful for a person to enter or be present in the Territory

11. It is unlawful for any person to enter or be present in the Territory in contravention of section 5, or after the expiration or cancellation of his permit, or after the expiration of an endorsement on a permit made in respect of him, or in contravention of a condition to which his permit, or the endorsement made in respect of him, is subject, or when an order made under section 12 (1) is in force in respect of him.

Power to remove persons unlawfully present in the Territory and to prevent unlawful entry into the Territory

12. (1) The Commissioner or the Principal Immigration Officer may make an order directing that any person who is unlawfully present in the Territory shall be removed from the Territory and shall remain out of the Territory, either indefinitely or for such period as is specified in the order, or that any person not then present in the Territory shall not enter the Territory and shall remain out of the Territory, either indefinitely or for such period as is specified in the order.

...

Offences and penalties

14. (1) Any person who –

...

(g) unlawfully enters or is unlawfully present in the Territory;

...

is guilty of an offence against this Order.

(2) Any person who commits an offence against this Order for which no other penalty is provided by this Order is liable on conviction to imprisonment for 3 years or to a fine of £3,000 or to both such imprisonment and such fine.

... ”

93. In his written statement on 15 June 2004 the Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs said: -

“...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 there would be no purpose in commissioning any further study into the feasibility of resettlement; and that 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.

Equally, restoration of full immigration control over the entire territory is necessary to ensure and maintain the availability and effective use of the Territory for defence purposes, for which it was in fact constituted and set aside in accordance with the UK’s treaty obligations entered into almost 40 years ago. Especially in the light of recent developments in the international security climate since the November 2000 judgment, this is a factor to which due weight has had to be given.

It was for these reasons that on 10 June 2004 Her Majesty made two Orders in Council, the combined effect of which is to restore full immigration control over all the islands of the [BIOT]. These controls extend to all persons, including members of the Chagossian community.

The first of these two Orders replaces the existing Constitution of the Territory and makes clear, as a principle of the Constitution, that no person has the right of abode in the Territory or has unrestricted access to any part of it. The second Order replaces the existing Immigration Ordinance of the Territory and contains the detailed provisions giving effect to that principle and setting out the necessary immigration controls. These two Orders restore the legal position to what it had been understood to be before the High Court decision of 3 November 2000.”

94. In the course of a debate in the House of Commons on 7 July 2004 the Parliamentary Under Secretary of State said: -

“I shall start by acknowledging that, in my view, the decisions taken by successive Governments in the 1960s and 1970s to depopulate the islands do not, to say the least, constitute the finest hour of UK foreign policy. In no sense am I seeking to justify the decisions that were made in the 1960s and 1970s. Those decisions may be seen as regrettable, but the Government must deal with the current situation. The responsibility of the UK Government for the decisions taken in the 1960s and 1970s has been acknowledged by successive

Governments since then, as is demonstrated by the substantial compensation that has already been paid to the Chagossians.

...

At the time of the detachment of the islands from Mauritius, the population consisted solely of the employees of the copra plantations and their dependants. Some of those employees were transient contract labourers, but others had more settled roots in the islands – in some cases their families had lived there as plantation workers for several generations – and regarded the islands as their home. The people who had that sort of connection with the islands were known as the “Ilois”, which is the Creole word for islanders, or as “Chagossians”. The whole population was dependent on employment in the copra plantations for its livelihood and basic services.

...

The judgment, which was given in November 2000, held that the provision of the 1971 ordinance was invalid to the extent that it excluded the Chagossians from the whole territory. At that stage, the Government decided to accept that finding and not appeal, and the 1971 ordinance was replaced by a new one, which allowed the Chagossians to return and reside in any part of the territory, except, for defence reasons, Diego Garcia. A reasonable question at that juncture would have been, “What has changed between now and then?” That is a legitimate question to which I will try to respond.

...

Due to the fact that settlement is not feasible, the Government decided after long and careful consideration – that was genuinely the case – to legislate to prevent it. Equally, however, legislation to restore full immigration control over the entire territory is also necessary, and I do not absolve ourselves from responsibility for this so as to ensure and maintain the availability and effective use of the territory for defence purposes for which it was constituted and set aside in accordance with the UK’s treaty obligations entered into almost 40 years ago.”

95. The Claim Form in the present proceedings was issued in August 2004.
96. On 16 November 2004 Mr Lincoln P. Bloomfield, Jr the US Assistant Secretary of State for Political-Military Affairs wrote the following letter to Mr Robert N. Culshaw, the Director of the Americas and Overseas Territories, UK Foreign and Commonwealth Office:

The discussions that you and our respective colleagues have had over the past several months have included consideration of issues related to joint facilities on Diego Garcia in Chagos Archipelago. The considerations explained in the letter of June 21, 2000, from Eric Newsom, my predecessor as Assistant Secretary of State for Political-Military Affairs, to your predecessor have become even more cogent due to the significant events transpiring after that letter was written. The use of the facilities on Diego Garcia in major military operations since September 11, 2001, has reinforced the United States' interest in maintaining secure long-term access to them. The United States has an interest in preserving the security of the Archipelago and in protecting Diego Garcia's strategic value.

Diego Garcia is a vital and indispensable platform for global U.S. military operations, as demonstrated by the important role it played for U.S. and coalition military forces in Operations Enduring Freedom and Iraqi Freedom, as well as by its continuing role in the Global War on Terrorism. The Chagos Archipelago's geographic location, isolation and uninhabited state make it unique among operating bases throughout the world. Our governments' facilities on Diego Garcia have exceptional security from armed attack, intelligence collection, surveillance and monitoring, and electronic jamming.

We believe 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 we appreciate the steps taken by Her Majesty's Government to prevent such resettlement. A decline in Diego Garcia's military utility would have serious consequences for our shared defence interests. Your actions to prevent resettlement anywhere in the Chagos Archipelago have safeguarded our ability to conduct current and future military operations from the islands in support of our national security objectives.

I appreciate Her Majesty's Government's sensitivity to our common defence and security imperatives and look forward to continuing our excellent cooperation on this matter.

97. The letter was written to assist the defendant in these proceedings. A later letter gave much greater detail about the alleged dangers to the security of Diego Garcia in allowing the outer islands to be inhabited. Inhabitation (it was said) carried with it the risk of terrorists infiltrating the islands and by the use of missiles and electronic devices compromising the security of Diego Garcia.
98. During the course of the hearing we learnt that the islands of the Archipelago other than Diego Garcia are a haven for visiting yachtsmen and have been visited by a cruise ship. Although yachtsmen are not required to have a permit, the passengers

and crew on the cruise ship were. We were told that all visitors are closely monitored.

Grounds of Challenge

99. We turn to the claimant's principal grounds of challenge.
100. The Orders in Council taken together seek to abolish the right of the claimant and of all other Chagos islanders in like case to enter and reside in the Territory, notwithstanding their citizenship and notwithstanding the decision of the Court. That decision in *Bancoult (1)*, was that the denial of their right of abode in the Territory had been unlawful. While the Queen has a general power to legislate for BIOT under the prerogative, it is submitted that the claimant's right of abode in the Territory may not be abolished by prerogative act of the Crown. At common law, the Crown's prerogative has never included the power to remove or exclude British subjects from the territory to which they belong: see the authorities cited in paragraphs 39 and 61 of *Bancoult (1)*. In *Bancoult (1)*, Laws LJ observed at paragraph 61: -
- “I entertain considerable doubt whether the prerogative power extends so far as to permit the Queen in Council to exile her subjects from the territory where they belong” (p.70).
101. By virtue of the BIOT (Constitution) Order 1976, the Crown has retained the right to legislate directly for the Territory and the right to issue a new constitution for the Territory, but the Crown's legislative authority under the prerogative is not unlimited. In particular:
- i) even if BIOT be regarded as a ceded rather than a settled colony (which is not conceded), the power of the Queen in Council to legislate for the Territory is not broader than the power to make laws for the peace, order and good government of the Territory and of her subjects within it. This power is subject to the interpretation placed upon it by the Court in *Bancoult (1)*;
 - ii) the power to issue a new constitution for the Territory does not enable the Crown to secure the continued exclusion of the Territory's residents who have been unlawfully removed or excluded;
 - iii) the power of the Queen in Council to legislate for the Territory is limited by the United Kingdom's obligations under treaties, including the United Nations Charter, and customary international law, to respect the right of the Chagossian people to self-determination.
 - iv) the power of the Queen in Council to legislate for the Territory is limited by the United Kingdom's obligation to respect the human rights of the Chagossian people, in particular their right to respect for private and family life and home, and the right to peaceful enjoyment of their possessions
 - v) the courts have jurisdiction to determine the legal limits of the prerogative powers of the Queen in Council; this jurisdiction of the courts is not excluded where it is claimed that powers to legislate have been exercised under the

prerogative: cf. *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Nor is it excluded when a prerogative instrument includes provisions that purport to exclude the jurisdiction of the courts;

vi) the Colonial Laws Validity Act 1865 does not exclude the jurisdiction of the court to review the limits of the prerogative powers of the Crown.

102. The statement made by the Secretary of State for Foreign and Commonwealth Affairs on 3 November 2000, together with the representations made by the defendant or his behalf in Parliament, in correspondence or at meetings with the claimant and his representatives, and also the Terms of Reference (“TOR”) for the Feasibility Study, created a legitimate expectation on the part of the claimant and other Chagos islanders that their right of abode in the Territory would continue to be respected by the defendant and would not be taken away (if at all) without prior consultation with them and without any opportunity for parliamentary discussion. The defendant’s decision to discontinue further consideration of the feasibility of resettling the Chagos Islanders within BIOT is not a reason in fact or in law for abolishing their right of abode. In any event the defendant’s stated reasons do not justify the premature termination of the Feasibility Study.

103. During the course of the hearing the claimant sought permission to amend the grounds of challenge to expand the attack on the rationality of the Orders. Mr Howell objected to the amendment. We grant leave for its inclusion. This ground now reads as follows:

“It was irrational and disproportionate for the defendant to have made the impugned Orders in Council in June 2004 removing the right of abode and the right of entry except with a permit from the entire relevant class in respect of the entire Chagos Archipelago.

The decision to make the impugned Orders was “a decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it” and “no sensible authority acting with due appreciation of its responsibilities would have decided to adopt” them (per Lord Diplock in *CCSU*). In particular:

i. The first reason for the impugned Orders that has been put forward by the defendant is the security of the UK and the UK’s allies. That reason does not justify the removal of the right of abode from the entire relevant class in respect of the entire archipelago since:

a. It is common ground that the UK’s Treaty obligations with the USA required only that it should place restrictions on inhabitants of Diego Garcia, not the outer islands; and

b. Even under the terms of the impugned Order persons are lawfully entitled to sail into territorial waters of Diego Garcia, so it is irrational / disproportionate to remove the right of abode for all persons on the outer islands over one hundred miles away.

ii. The second reason put forward for the impugned Orders is termination of the feasibility study. That does not logically require the removal of the right of abode from the entire relevant class in respect of the entire archipelago. Nor were the true findings of the Feasibility consultants to the effect that settlement was both feasible and without serious costs consequences given due weight.

iii. No convincing reason has been given for denying the relevant class the right of abode in or the right of entry into the outer islands.

iv. The defendant failed to have regard to the following relevant considerations which no sensible authority acting with due appreciation of its responsibilities should have neglected, namely:

a. The legitimate interests of the relevant class, in particular the former inhabitants of the archipelago;

b. What would be conducive to their good governance; and

c. Their rights enshrined in international treaties to respect for home and family life, to self-determination, and their right not to be exiled and to return to their home.

v. The making of the impugned Orders was unjustified and irrational in June 2004 given that the Foreign Secretary had stated four years previously that the Chagossians would be allowed to return to the outer islands consistently with the UK's Treaty obligations. Nothing has been put before the Court to justify the alteration of that position in the intervening years."

104. During the course of argument, Mr Howell submitted that subparagraph i.a. in the irrationality challenge was not "common ground". Whether common ground or not, it seems clear to us that the USA, having only so far required the use of Diego Garcia, does not have the right under the bilateral agreements to require the United Kingdom to enact the challenged Orders in so far as they relate to the other islands.
105. During the course of argument Sir Sydney Kentridge submitted that the defendant was not entitled to rely on the second reason now put forward for the challenged Orders, given that the Constitution Order gave the following reason for declaring that there was no right of abode: "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”.

106. On 13 July 2005 Sullivan J directed that the following issues would be reserved for a further hearing if relevant.

“In respect of ground 17B(ii)) whether any resident of the BIOT was unlawfully removed or excluded;

In respect of grounds 17B(iii) and 17 C whether the United Kingdom was and/or is under any obligation under (a) any treaty or (b) customary international law to respect any right of self-determination which the Chagossian people (if it existed or exists) is alleged to have or to have had and what the effect of any such obligation might be in international law;

In respect of grounds 17 B (iv) and 17 C, to the extent that the claimant’s case in respect of legitimate expectations may seek to rely on rights alleged to be conferred on him by the European Convention on Human Rights any matter other than Issues 3 and 4 above.”

107. Sir Sydney Kentridge prepared for us a separate document dealing with the Human Rights Act. That document reads:

“1. The claimant does not seek to argue before this Court that the HRA applies to the making of the impugned Order by virtue of the fact that the ECHR applies in BIOT (following the speeches of some of their Lordships in the *Quark* case). The claimant reserves this argument to a higher Court if relevant.

2. The claimant submits that the HRA is part of the law of England, and therefore applies in BIOT by virtue of the Courts Ordinance, as part of the law of England.

3. The claimant submits that the ECHR applies to BIOT because the ECHR was extended to the territory of Mauritius when BIOT was part of Mauritius under Article 56 of the ECHR. The ECHR including Article 8 was extended to BIOT for the reasons stated in paragraphs 68 & 69 of the claimants skeleton argument.

4. The claimant asks the Court to have regard to the ECHR as an unincorporated treaty when considering the Order of Her Majesty in Council, whether or not the HRA applies.

5. The claimant does not seek to rely on Article 1 of Protocol 1.

6. The UK in entering in treaties may do so for all territories for whose international relations it remains responsible. It has bound itself in international law in respect of BIOT; ie in the

international sphere the UK has itself promised that in respect of all territories for which it has given notification under Article 56, the Convention will be respected.

7. It therefore cannot be open to HM in Council to legislate in breach of an international undertaking entered into by the UK in respect of BIOT and this Court can grant a remedy if she seeks to do so.

8. Customary international law, as distinct from treaties, becomes part of the common law of England, and therefore of BIOT.

Claimant's Skeleton para 82.

9. Customary international law includes a right of self determination. This right has been assented to by the UK.

Claimant's Skeleton para 83.

10. Here too the Crown cannot speak with two voices. Once the UK by record and conduct has assented to a rule of customary law so that it is incorporated in the common law it is not for HM to legislate in conflict with such rule of customary internal law.

11. Accordingly if the orders of the Council are found to be in breach of the right of self determination they are for that reason ultra vires."

108. Given our conclusions on other issues in the case, it is not necessary for us to resolve the above issues.

109. We propose to consider first the irrationality challenge, ignoring for the time being the question whether such a challenge may be made to an Order in Council enacted for a British Overseas Territory. In approaching the case in this way we are looking at the issues in a different order to the order in which Sir Sydney presented his arguments. The reasons for that will become clear later in the judgment.

Irrationality

110. If the Order is unlawful on public law grounds and if the other arguments of the defendant do not succeed, then there is no challenge to the jurisdiction of this Court to quash the Order. As Lord Hoffmann said in *R (Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2005] 3 WLR 837 at paragraph 65:

... There is authority both ancient and modern for the High Court's exercise of jurisdiction, first by prerogative writ and then by judicial review, over all Her Majesty's territories: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067. But that does not mean that the acts in

question are acts of United Kingdom public authorities. On the contrary, the jurisdiction exists whether the act is one of a United Kingdom public authority or not.

111. Is irrationality to be judged by reference to the interests of BIOT or the United Kingdom or both?
112. Sir Sydney argues for the former. Mr Howell submits that Orders should be judged by reference to the interests of the United Kingdom. If he is right, then the claimant would have a very difficult, if not impossible, hurdle to overcome.
113. Help on this issue is to be found in *Quark*. The case concerned an instruction given by the Secretary of State to the Commissioner of South Georgia and the South Sandwich Islands (“SGSSI”), which is a British Overseas Territory. The instruction had been given pursuant to powers granted to the Secretary of State in an Order in Council governing the Territory. The claimant successfully challenged the lawfulness of the instruction on public law grounds. Lord Bingham describes how the case then proceeded:

“But an issue remains whether Quark is entitled to damages. On that issue, raised by an application to strike out, decisions adverse to Quark have been made by Collins J at first instance ([2003] EWHC 1743 (Admin)) and the Court of Appeal (Pill, Thomas and Jacob LJ, [2004] EWCA Civ 527, [2005] QB 93). It is now accepted that Quark can recover damages against the Secretary of State only if it can show that his admittedly unlawful instruction violated its rights under article 1 of the First Protocol to the European Convention on Human Rights so as to render him liable in damages under sections 6 and 7 of the Human Rights Act 1998. But an anterior question has been raised, whether the Secretary of State, when giving his unlawful instruction, was acting for Her Majesty the Queen in right of the United Kingdom (as Quark argues) or in right of SGSSI (as the Secretary of State now argues). Collins J decided both questions against Quark. The Court of Appeal disagreed on the anterior issue, holding that the instruction had been given by the Secretary of State on behalf of Her Majesty in right of the United Kingdom, and the Secretary of State challenges that ruling before the House. But the Court of Appeal agreed with the judge that no claim could lie under the 1998 Act and the First Protocol, and Quark challenges that ruling.”

114. The appeal was dismissed. As to the “anterior question”, Lord Bingham decided (see paragraphs 12 and 19) that the instruction was given by the Queen as (and only as) Queen in right of the government of the SGSSI, the Secretary of State acting “as her mouthpiece and medium” (see to a similar effect the speeches of Lord Hoffmann, paragraph 64 and Lord Hope, paragraph 76). The Secretary of State as Secretary of State of the United Kingdom had no power to, or authority under, the constitution of the SGSSI to instruct the Commissioner.

115. Applying what Lord Bingham said in *Quark* to the present case, the challenged Orders were made (at least notionally) by the Queen in right of the Government of BIOT. Does that mean that irrationality is to be judged by reference to the interests of BIOT? *Bancoult (1)* provides assistance in answering this question. Laws LJ said (paragraph 57) as to the reasons given for the 1971 Ordinance:

“Section 4 of the Ordinance effectively exiles the Ilois from the territory where they are belongers and forbids their return. But the "peace, order and good government" of any territory means nothing, surely, save by reference to the territory's population. They are to be *governed* not removed. ... [The exclusion of the people] has been done for high political reasons: good reason, certainly, dictated by pressing considerations of military security. But they are not reasons which may reasonably be said to touch the peace, order and good governance of BIOT, and in my judgment this is so whether the test is to be found in our domestic public law, exemplified by the *Wednesbury* doctrine or in a more, or less, intrusive approach.”

116. Mr Howell accused Laws LJ of suffering from “historical amnesia” in this passage. He referred to the Sovereign Base Area in Cyprus and stated that colonies have been used in the past for the defence interests of the United Kingdom. Mr Howell attacks the decision of the Court in *Bancoult (1)* that the Commissioner’s powers were limited because his powers were to be used only for “the peace, order and good government” of BIOT. We return to that later.

117. In *Quark* Lord Bingham addressed this issue, albeit tangentially. He concluded that the instruction “may well be seen to contribute to the security of the SGSSI” albeit also in the interests of the UK (paragraph 18). There is however a passage in the speech of Lord Hoffmann in which he said: “The court is neither concerned nor equipped to decide in whose interests the act was done” (paragraph 65).

118. In our view irrationality must be judged by reference to the interests of BIOT and we see no good public law reason why this court cannot assess irrationality in a case of this kind, provided that the well known limitations inherent in the exercise of *Wednesbury* principles are borne in mind. The interests of BIOT must be or must primarily be those whose right of abode and unrestricted right to enter and remain was being in effect removed. Unlike the SGSSI there was a population of BIOT with an unrestricted right in 2004 to enter, at least, the islands other than Diego Garcia, following the decision in *Bancoult (1)* and the acceptance of that decision by the Government of the day.

119. The defendant submits that the only subjects that Her Majesty has had living in the BIOT (and its only population) for over 30 years are those associated with the administration of, and the defence facilities in, the islands. The claimant is not one of Her Majesty’s subjects within the BIOT. He was born in 1964 and his family left the Chagos Islands in 1967. No Chagossians have resided in the Chagos Islands since 1973.

120. We do not agree that the interests of those who left the islands can so easily be ignored given the circumstances in which they left and given the fact that the 1971

Ordinance was quashed by a decision of the Divisional Court in 2000, a decision which was accepted by the Government of the day.

121. In so far as the Order declares there to be no right of abode for the Chagossians and restricts their right to enter and remain, there is no reference at all to the interests of the BIOT. The justification for these provisions is clearly stated in the Constitution Order:

“9 (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.

9(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.”

122. It follows, in our judgment, that section 9 of the Order is irrational on public law grounds and (subject to the other arguments) must be quashed for this reason. Made by the Queen in right of BIOT, the Order is, on its face, not concerned with the interests of BIOT, but with the interests of the United Kingdom and of the United States. We make it clear that we are not making any judgment about the defence interests of the United Kingdom or the United States- all that we are saying is that the validity of the Order in Council made by the Queen in right of BIOT has to be tested by reference to the interests of BIOT. This Order in Council conspicuously does not do that.
123. Mr Howell argued that there was a second reason for the Orders- resettlement was not feasible, a reason given by the Minister to explain the decision. Mr Howell submitted that this was a good and lawful reason. He submitted that its absence from the Constitution Order was no bar to this court considering the rationality of this reason. We disagree. The Constitution Order makes it clear on the face of the Order what the reason was for declaring there to be no right of abode and no unrestricted right to enter and remain. That is the reason the rationality of which we must assess. We add this. If the relevant reason had related to the resettlement of the island, we would have seen much force in the argument developed by Mr Bradley that the 2000 announcement created a legitimate expectation on the part of the claimant and other Chagos islanders that their right of abode in the Territory would continue to be respected by the defendant and would not be taken away without prior consultation with them, and there was none. Given our conclusions about section 9 of the Order, it is not necessary for us to set out our views on Mr Bradley’s arguments and the opposing arguments of Mr Howell on this point.

The defendant’s claim that the Orders are immune from challenge on public law grounds

124. Central to the defendant’s case is the submission that at common law Orders in Council made for an Overseas Territory attract (at least) the same sovereign immunity as that of Parliament. Mr Howell also submits that the Orders are protected from challenge by the Colonial Laws Validity Act, 1865. We shall consider the provisions of this Act later in our judgment.

125. The thrust of the argument is that the Queen has full legislative power to legislate for the “peace, order and good government” of a ceded colony provided the legislation is not repugnant to an Act of Parliament extending to the ceded colony (or an order or regulation made pursuant to such an Act). If an Order in Council approved the obtaining of evidence by torture in BIOT, the victim of torture would have no remedy in the courts of this country unless there was an Act of Parliament which applied to BIOT and outlawed torture. He submits that if a legislator is given the power to legislate for the “peace, order and good government” of a territory, then that expression does not limit or fetter his legislative powers in relation to that territory.

126. Mr Howell submits that *Bancoult (1)* was wrongly decided and that Laws LJ was also wrong when he said in paragraph 61 (obiter):

“I entertain considerable doubt whether the prerogative power extends so far as to permit the Queen in Council to exile her subjects from the territory where they belong.”

127. Mr Howell attacks the following central passage in *Bancoult (1)* (part of which we have already set out but repeat here):

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

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

56 In answering the question whether a particular measure, here section 4 of the Ordinance, can be described as conducing to the territory's peace, order and good government, it is I think no anachronism, and may have much utility, for the court to apply the classic touchstone given by our domestic public law for the legality of discretionary public power as it is enshrined in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. Could a reasonable legislator regard

the provisions of section 4 as conducing to the aims of section 11? In answering the question, the force of the cases shows that a very wide margin of discretion is to be accorded to the decision-maker; yet in stark contrast our modern domestic law tends in favour of a narrower margin, and a more intrusive judicial review, wherever fundamental or constitutional rights are involved. This recalls the dissonance to which I referred at paragraph 43 between the rights which the common law confers here, and the thinner rule of law which the jurisprudence has accorded the colonies. But the dissonance is historic, and in my judgment does not in any event drive the result in this present case.

The legality of the Ordinance

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

by the Wednesbury doctrine or in a more, or less, intrusive approach. In short, there is no principled basis upon which section 4 of the Ordinance can be justified as having been empowered by section 11 of the BIOT Order. And it has no other conceivable source of lawful authority.”

128. Mr Howell submits in his skeleton argument:

“64....

(1) [The] decision is contrary to consistent and well established authority in the Privy Council that the formula ‘peace, order and good government’ confers full plenary legislative authority in respect of the relevant colony. The phrase is a recognised term of legal art that confers full powers to legislate for the relevant colony which are equivalent to those of Parliament or a sovereign independent State, other than a power to change the constitution itself which Her Majesty herself or Parliament has granted. It follows, as the High Court of Australia has stated, “the words ‘for the peace, order and good government’ are not words of limitation”, as the Divisional Court wrongly assumed;

(2) The Divisional Court also misunderstood the function of the reference to the territory in respect of which relevant plenary powers of legislation are conferred. The function of that reference in such a formula is simply to identify the relevant constitutional unit in respect of which legislation may be enacted. The formula confers plenary legislative competence in respect of the territory in question. Such a limitation is thus inapt to apply to Her Majesty’s powers. Where that limitation applies, however, it is sufficient that any law is for the peace, order and good government “of the constitutional unit in question” and, if it is, it matters not that it may relate to matters outwith that unit. A law satisfies this requirement if there is “even a remote and general connection between the subject matter of the legislation and the State” in question. Given such a connection the legislature’s powers are (subject to any Act of Parliament extending to the Territory) unlimited. Legislation regulating the right of abode in a territory or immigration to it plainly satisfies any territorial nexus required;

...

(4) Moreover the formula employed, ‘peace, order and good government’ of a territory, does not preclude the making of laws excluding individuals from it who are citizens of it. Thus, for example, the Privy Council has upheld an ordinance made under a power for the peace, order and

good government of Palestine that authorised the making of a law under which an order might be made deporting a Palestinian citizen from, and making it unlawful for him to seek to re-enter, Palestine. Given that a law for the peace, order and good government of a territory may exclude citizens of that territory from it, it is not for the Court to determine whether a particular law doing such things is one that conduces to such objects. As the Privy Council has stated [*Chenard v Arissol* [1949] AC 127 at p132],

‘A power to make ordinances for the peace, order and good government of a colony...has been held "to authorize the utmost discretion of enactment for the attainment of the objects pointed to," and a court will not inquire whether any particular enactment of this character does in fact promote the peace, order or good government of the colony.’

129. Mr Howell took us to *Trustees Executors and Agency Co Ltd v Federal Comr of Taxation* in order to show us, so he submitted, that Laws LJ had misunderstood the passage in the judgment of Evatt J.
130. Mr Howell cited a number of cases to support his submissions. We refer to two in particular prayed in aid in support of the wider proposition that the Queen in Council has full legislative competence for an Overseas Territory (subject to any Act of Parliament etc) and the narrower proposition that the formula ‘peace, order and good government’ of a territory does not fetter the authority of the legislator and thus does not preclude the exiling of citizens. They are *Co-operative Committee on Japanese Canadians v Att-General for Canada* [1947] AC 87 at p89-90, 104-5 and *Zabrovsky v the General Officer Commanding Palestine* [1947] AC 246.
131. We start with the *Japanese Canadians* case referring only to that aspect of the case which is relevant to the issues with which this case is concerned. The case concerned Orders in Council dated 15 December 1945, made by the Governor in Canada under the authority of The War Measures Act. One of them authorised the Minister of Labour to make orders for the deportation to Japan of a specified group of persons aged 16 or over who were resident in Canada and who had made a request for repatriation. The Order also provided that the wife and children under 16 years of age of any person for whom the Minister made an order for deportation to Japan, might be included in such an order and deported with such a person. The effect of the order was that a wife of a person within the specified groups could be returned without her consent even though she may have had no links by birth, race or nationality to Japan. The majority of the Supreme Court of Canada upheld the validity of the orders. The Privy Council dismissed the appeal. The War Measures Act provided:

"The Governor in Council may do and authorise such acts and things, and make from time to time such Orders and Regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, order and welfare of Canada...."

Included within the powers of the Governor in Council was the power to order deportation. The language reflected the language to be found in section 91 of the British North America Act, 1867. That section provided that it shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada.

132. Lord Wright giving the judgment of the Privy Council summarised part of the argument for the appellants (at 107):

"The order...not only does not show that by reason of the existence of real or apprehended war it was thought necessary for the security, peace, order, defence or welfare of Canada to make provision for their deportation but, when considered in substance, shows that these matters were not taken into consideration."

133. Lord Wright posed the question: is there "any matter which justifies the judiciary in coming to the conclusion that the power was in fact exercised for an unauthorised purpose." He continued:

"In their Lordships' opinion there is not. The first three sub-sections of section S.2 no doubt deal with the matter which primarily engaged the attention of the Governor in Council [i.e. the sub-sections dealing with the removal of the specified group] but it is not in their Lordships' view a proper inference from the terms of those sub-sections that the Governor in Council did not also deem it necessary or advisable for the security, defence, peace, order and welfare of Canada that the wives and children under 16 of deportees should, against their will, also be liable to deportation. The making of a Deportation Order as respects the husband or father might create a situation with which, with a view to forwarding this specified purpose, it was proper to deal. Beyond that it is not necessary to go."

134. Mr Howell relies on that passage to show the wide ambit of the words "peace, order and good government" and similar expressions.

135. We turn to *Zabrovsky*. The appellant had sought an order in the nature of a writ of *habeas corpus* claiming that his son was being unlawfully detained. His son, a Palestinian citizen, was arrested in Palestine pursuant to an order made under the Emergency Regulations of 1936 and was subsequently removed to Eritrea, where he was detained under military custody. Eritrea was, at that time, held by the British under the control of a Chief Administrator and was not subordinate to the Palestine government.

136. The Privy Council upheld the order in so far as it related to the appellant. By virtue of the 1922 Palestine Order in Council as amended provision was made for the administration of Palestine by a High Commissioner with authority to make ordinances for the "peace, order and good government" of Palestine. Lord Wright said that the appellant had to show not just that there had been an interference with the liberty of his son but that also that that interference was illegal. He continued:

"In the troublous times of war and in the chaotic post-war conditions the scope of legal and permissive interference with personal liberty has been extended and restraints have been legalised by the legislature which would not have been accepted as legitimate in normal times. Thus in England, in what are called the Reg.18B cases, *Liversidge v. Sir John Anderson* and *Greene v. Secretary of State for Home Affairs*, the House of Lords upheld the legality of a detention of the applicants by the Executive without trial and also held that the Executive could not be compelled to give its reasons for the detention. The Executive was, in these respects, exercising an emergency power vested in it by the legislature. There was a restraint outside the ordinary course of law, but it was not illegal because it was justified by the terms of the Statutory Regulation which gave the power and imposed the duty for the purpose of securing the defence of the realm during the world war which has recently ended. ...

In these and many similar cases the restraint or confinement was held not to be illegal, and the effect of the decisions is to vest a plenary discretion in the Executive, affecting liberty of the subject and pro tanto to substitute for the judgment of the court, based on ordinary principles of common law right, the discretion of the Executive acting arbitrarily in the sense that it cannot in substance be inquired into by the court. This is a serious interference with the liberty of the subject, but it is not illegal so long as the detention conforms to the requirements of the statute or order on which it is based. It has sometimes been said that the remedy of habeas corpus is suspended during these temporary and emergency laws. But that is not so. There is no occasion in such cases for its suspension because, as was pointed out in the House of Lords in *Greene's* case there is not illegality. The British nations have borne these temporary encroachments on their common law freedom because they were necessary for the safety of the country and were required by the paramount need of preserving its peace and good government."

137. Lord Wright later said (page 262):

"The Palestine court has accepted the legality of the orders of deportation, which are clearly within the competence of the Palestine Government. While the deportation order stands and its legality is not overruled its effect is that Eliezer (the appellant's son) is required to leave and remain thereafter out of Palestine. Such an order is not ultra vires of a limited territorial power like Palestine, nor are the further or ancillary powers of providing a place to which the deportee may proceed (see *Attorney General for Canada v Cain*, recently followed and applied by this Board in *The Co-operative Committee on Japanese Canadians v The Attorney General of Canada*)"

138. Mr Howell placed much reliance on these cases (and others) to show that the words "peace, order and good government" do not, in any way, fetter the power of the legislator, who may, amongst other things, exile citizens who, like the wives and children in the Japanese Canadians case, have done no wrong.

139. As Sir Sydney pointed out, *Liversidge v Anderson* has hardly stood the test of time. In *Reg. v. I.R.C., ex p. Rossminster* [1980] AC 952, at 1011 Lord Diplock said:

For my part I think the time has come to acknowledge openly that the majority of this House in *Liversidge v. Anderson* were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right.

In the same case Lord Scarman said, at 1025, that: “The ghost of *Liversidge v. Anderson* [1942] A.C. 206 ... need no longer haunt the law.”

140. Lord Scarman in *Reg. v. Home Secretary, Ex p. Khawaja* (H.L.(E.)) [1984] AC 84, at 110 said:

“The classic dissent of Lord Atkin in *Liversidge v. Anderson* [1942] A.C. 206 is now accepted (*Reg. v. Inland Revenue Commissioners, Ex parte Rossminster Ltd.* [1980] A.C. 952, 1011, 1025) as correct not only on the point of construction of regulation 18 (b) of the then emergency Regulations but in its declaration of English legal principle.”

See also Lord Reid in *Ridge v. Baldwin* [1964] AC 40, at 73, who described *Liversidge v. Anderson* as “a very peculiar decision”.

141. The reliance on *Liversidge v. Anderson* in *Zabrovsky*, itself relied upon by Mr Howell, brings to mind the dissenting judgment of Jackson J in *Korematsu vs. United States*, 323 U.S. 214 (1944) (not cited in argument). The case concerned an order interning Japanese Americans:

“... Once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”

142. Mr Howell accepts that there is no precedent on all fours with the present case. The power to legislate for the “peace, order and good government” of a territory has never been used to exile a whole population. The suggestion that a minister can, through the means of an Order in Council, exile a whole population from a British Overseas Territory and claim that he is doing so for the “peace, order and good government” of the Territory is, to us, repugnant. The *Japanese Canadians* case and *Zabrovsky* both demonstrate the wisdom of the passage from the judgment of Jackson J in *Korematsu*. They are the “loaded weapons” to which he refers. Notwithstanding Mr Howell’s criticisms of *Bancoult (I)* we would be minded to follow the conclusions reached by Laws LJ in paragraphs 55-57 and indeed it may well be that we are bound by them. In the words of Laws LJ: “Peace, order and good government may be a very large tapestry, but every tapestry has a border.”
143. That said, we consider that it is unnecessary to base our decision on this issue, given that in our judgment the claimant in any event succeeds on other grounds. We shall therefore proceed by making two assumptions (which we emphasise should not be taken as reflecting our view). Let it be assumed first that Laws LJ was incorrect in his conclusion that the words “peace, order and good government” do not empower

the legislator to exile a whole population. Let it be assumed second that an Order in Council made by the Queen for a ceded colony, now an overseas territory, historically attracted at least the same sovereign immunity as that of Parliament, provided that it is not repugnant to an Act of Parliament or delegated legislation. Thus we record, but do not give further consideration to, Sir Sydney's arguments that there is no prerogative power to banish or remove a British subject from British territory or to prevent him from returning thereto. Nor do we need to decide whether there are other limitations, as contended for by Sir Sydney, upon the prerogative power. Mr Howell has deployed a substantial body of cases to counter these arguments. Many of these cases, decided at the highest level, raise issues of constitutional significance for both this country and for the Commonwealth. If these issues need to be resolved, they would be better resolved by a higher court. Nor is it necessary for us to decide whether *Bancoult (1)* is binding upon us.

144. We turn now to what is for us a central issue in this case: May the Orders be challenged in the light of the modern approach to judicial review of executive action? If they are so challengeable (and given the assumptions we have made), the claimant wins.

A new approach

145. We turn now to *Council of Civil Service Unions and others v. Minister for the Civil Service* [1985] AC 374 ("*CCSU*"), a case upon which Sir Sydney places substantial reliance. In 1983, the Minister for the Civil Service gave an instruction, purportedly under article 4 of the Civil Service Order in Council 1982, for the immediate variation of the terms and conditions of service of the staff of GCHQ with the effect that they would no longer be permitted to belong to national trade unions. The 1982 Order itself was issued by the Sovereign by virtue of her prerogative on the advice of the government of the day.
146. It was submitted by counsel for the Minister (p 397):
- “ ... that the instruction was not open to review by the courts because it was an emanation of the prerogative. This submission involves two propositions: (1) that prerogative powers are discretionary, that is to say they may be exercised at the discretion of the sovereign (acting on advice in accordance with modern constitutional practice) and the way in which they are exercised is not open to review by the courts; (2) that an instruction given in the exercise of a delegated power conferred by the sovereign under the prerogative enjoys the same immunity from review as if it were itself a direct exercise of prerogative power.”
147. Lord Fraser said as to the first proposition that he would assume, without deciding, that the first proposition was correct and that all powers exercised directly under the prerogative are immune from challenge in the courts.
148. Lord Fraser rejected the second proposition. He said that, if the Order in Council of 1982 had been made under the authority of a statute, the power delegated to the

Minister by article 4 would have been construed as being subject to an obligation to act fairly. He continued (p 199):

“The Order in Council of 1982 was described by Sir Robert Armstrong in his first affidavit as primary legislation; that is, in my opinion, a correct description, subject to the qualification that the Order in Council, being made under the prerogative, derives its authority from the sovereign alone and not, as is more commonly the case with legislation, from the sovereign in Parliament. Legislation frequently delegates power from the legislating authority - the sovereign alone in one case, the sovereign in Parliament in the other - to some other person or body and, when that is done, the delegated powers are defined more or less closely by the legislation, in this case by article 4. But whatever their source, powers which are defined, either by reference to their object or by reference to procedure for their exercise, or in some other way, and whether the definition is expressed or implied, are in my opinion normally subject to judicial control to ensure that they are not exceeded. By ‘normally’ I mean provided that considerations of national security do not require otherwise.”

149. A little later he concluded (p 400):

“... there is no reason for treating the exercise of a power under article 4 any differently from the exercise of a statutory power merely because article 4 itself is found in an order issued under the prerogative.”

150. Lord Scarman went further. He said (p 407):

“My Lords, I would wish to add a few, very few, words on the reviewability of the exercise of the royal prerogative. Like my noble and learned friend Lord Diplock, I believe that the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. Without usurping the role of legal historian, for which I claim no special qualification, I would observe that the royal prerogative has always been regarded as part of the common law, and that Sir Edward Coke had no doubt that it was subject to the common law: *Prohibitions del Roy* (1608) 12 Co. Rep. 63 and the *Proclamations Case* (1611) 12 Co. Rep. 74. In the latter case he declared, at p. 76, that “the King hath no prerogative, but that which the law of the land allows him.” It is, of course, beyond doubt that in Coke’s time and thereafter judicial review of the exercise of prerogative power was limited to inquiring into whether a particular power existed and, if it

did, into its extent: *Attorney-General v. De Keyser's Royal Hotel Ltd.* [1920] A.C. 508. But this limitation has now gone, overwhelmed by the developing modern law of judicial review: *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864 (a landmark case comparable in its generation with the *Proclamations Case*, 12 Co.Rep. 74) and *Reg. v. Secretary of State for Home Affairs, Ex parte Hosenball* [1977] 1 W.L.R. 766. Just as ancient restrictions in the law relating to the prerogative writs and orders have not prevented the courts from extending the requirement of natural justice, namely the duty to act fairly, so that it is required of a purely administrative act, so also has the modern law, a vivid sketch of which my noble and learned friend Lord Diplock has included in his speech, extended the range of judicial review in respect of the exercise of prerogative power. Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter. ”

151. Lord Scarman also agreed with the speeches delivered by Lord Diplock and Lord Roskill.

152. The principle which Lord Scarman was establishing in this passage was subject, as he makes clear, to the caveat that the subject matter in respect of which the prerogative power is exercised must be justiciable, in the sense that courts can properly adjudicate upon it.

153. Lord Diplock said (p 407):

“My Lords, the English law relating to judicial control of administrative action has been developed upon a case to case basis which has virtually transformed it over the last three decades. The principles of public law that are applicable to the instant case are in my view well established by authorities”

154. He continued a little later (p 409):

“The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i.e., that part of the common law that is given by lawyers the label of “the prerogative.”

155. He continued (p 410):

“My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should *for that reason only* be immune from judicial review. Judicial review has I think developed to a stage

today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. ..."

156. Lord Diplock said that judicial review was available to challenge a decision of which the source of power is the common law on any of the three grounds. As to irrationality he said to the extent to which such decisions involve government policy (which he thought they generally will), the judicial process is not adapted to find the right answer.

157. Lord Roskill had this to say about judicial review (p 414):

"... it will be convenient to make some general observations about the process now known as judicial review. Today it is perhaps commonplace to observe that as a result of a series of judicial decisions since about 1950 both in this House and in the Court of Appeal there has been a dramatic and indeed a radical change in the scope of judicial review. That change has been described - by no means critically - as an upsurge of judicial activism. Historically the use of the old prerogative writs of certiorari, prohibition and mandamus was designed to establish control by the Court of King's Bench over inferior courts or tribunals. But the use of those writs, and of their successors the corresponding prerogative orders, has become far more extensive. They have come to be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government. Your Lordships are not concerned in this case with that branch of judicial review which is concerned with the control of inferior courts or tribunals. But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of executive action. This branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue."
(Underlining added)

158. Having considered various writings and cases, Lord Roskill continued (p 417):

"But fascinating as it is to explore this mainstream of our legal history, to do so in connection with the present appeal has an air of unreality. To speak today of the acts of the sovereign as 'irresistible and absolute' when modern constitutional convention requires that all such acts are done by the sovereign on the advice of and will be carried out by the sovereign's ministers currently in power is surely to hamper the continual development of our administrative law by harking back to what

Lord Atkin once called, albeit in a different context, the clanking of mediaeval chains of the ghosts of the past: see *United Australia Ltd. v. Barclays Bank Ltd.* [1941] A.C. 1, 29. It is, I hope, not out of place in this connection to quote a letter written in 1896 by the great legal historian F. W. Maitland to Dicey himself: ‘The only direct utility of legal history (I say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its own law’: see *Richard A. Cosgrove, The Rule of Law: Albert Venn Dicey, Victorian Jurist* (1980), p. 177. Maitland was in so stating a greater prophet than even he could have foreseen for it is our legal history which has enabled the present generation to shape the development of our administrative law by building upon but unhampered by our legal history.” (Underlining added)

159. Lord Roskill then said:

“My Lords, the right of the executive to do a lawful act affecting the rights of the citizen, whether adversely or beneficially, is founded upon the giving to the executive of a power enabling it to do that act. The giving of such a power usually carries with it legal sanctions to enable that power if necessary to be enforced by the courts. In most cases that power is derived from statute though in some cases, as indeed in the present case, it may still be derived from the prerogative. In yet other cases, as the decisions show, the two powers may coexist or the statutory power may by necessary implication have replaced the former prerogative power. If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982, so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive. To talk of that act as the act of the sovereign savours of the archaism of past centuries. In reaching this conclusion I find myself in agreement with my noble and learned friends Lord Scarman and Lord Diplock whose speeches I have had the advantage of reading in draft since completing the preparation of this speech.” (Underlining added)

160. Lord Roskill then referred, as had Lord Diplock and Lord Scarman, to decisions which could not properly be made the subject of judicial review.
161. Lord Brightman agreed with Lord Fraser.
162. In our view and for reasons which we have already set out, the irrationality challenge to these Orders does not involve government policy of the kind envisaged by Lord Diplock nor does it involve matters on which this Court could not properly adjudicate. As we have said, we have not sought to make any assessment of the defence interests of the United Kingdom or United States.
163. In our view the defendant's approach to this case involves much clanking of the "chains of the ghosts of the past". Mr Howell's persistent references to "the Queen in Council" during the course of argument cannot hide the fact that "the act in question [was] the act of the executive." "To talk of that act as the act of the sovereign savours of the archaism of past centuries." The decision was in reality that of the Secretary of State, not of Her Majesty, and is subject to a challenge by way of judicial review in the ordinary way.
164. For these reasons we reject Mr Howell's principal argument that the Orders are immune from judicial review, subject to the Colonial Laws Validity Act to which we now turn.

The Colonial Laws Validity Act

165. Mr Howell relies upon the Colonial Laws Validity Act 1865. He submits that it defeats any challenge to the Order. The Act provides: -

“(1). The Term "Colony" shall in this Act include all of Her Majesty 's Possessions abroad in which there shall exist a Legislature as hereinafter defined except the Channel Islands the Isle of Man and such Territories as may for the Time being be vested in Her Majesty under or by virtue of any Act of Parliament for the Government of India

The Terms "Legislature" and "Colonial Legislature" shall severally signify the Authority other than the Imperial Parliament or Her Majesty in Council competent to make Laws for any Colony:

The Term "Representative Legislature" shall signify any Colonial Legislature which shall comprise a Legislative Body of which One Half are elected by Inhabitants of the Colony:

The Term "Colonial Law" shall include Laws made for any Colony either by such Legislature as aforesaid or by Her Majesty in Council:

An Act of Parliament or any Provision thereof; shall in construing this Act be said to extend to any Colony when it is made applicable to such Colony by the express Words or necessary Intendment of any Act of Parliament:

The Term "Governor" shall mean the Officer lawfully administering the Government of any Colony:

The Term "Letters Patent" shall mean Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland

(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."

166. The term "Colonial Law" includes laws made for any Colony either by (a) the authority competent to make laws for any Colony or (b) Her Majesty in Council (section 1 of the 1865 Act).
167. Sections 2 and 3 of the 1865 Act provide that Colonial Laws shall be void to the extent to which they are repugnant to an Act of the United Kingdom Parliament applicable to the Colony concerned, "but not otherwise" (section 2) and that they shall not be void or inoperative on the ground of repugnancy to the Law of England (section 3).
168. The 1865 Act abolished the vague doctrine of repugnancy to the principles of English Law as a source of invalidity of any Colonial Act. The 1865 Act when removing the fetter of repugnancy to English Law, did not leave in existence a fetter of repugnancy to some vague unspecified law of natural justice. Parliament in enacting the 1865 Act intended to deal with the whole question of repugnancy (*Liyanage v The Queen* [1967] AC. 259 PC at page 284-5, Lord Pearce). In *Liyanage* Lord Pearce approved the following passage from "The Sovereignty of the British Dominions" by Professor Keith:

"The essential feature [of the 1865 Act] 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."

Sir Sydney submits that the challenge is not based on repugnancy to the principles of English law but on vires.

169. In our judgment the 1865 Act does not preclude the public law irrationality challenge which we have upheld. We are not here concerned with repugnancy. As we have already said, “the act in question [was] the act of the executive.” As such it is amenable to judicial review.

Conclusion

170. For these reasons the claimant succeeds. We invite counsel to draw up the appropriate order.