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LETTER BY E TRANSMISSION

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Dear Sir

ECHR: APPLICATION NO. 355662/04
THE CHAGOS ISLANDERS V THE UNITED KINGDOM

I refer to

- (a) your letter of 23 February communicating the above application to the UK Government and requesting the Government to submit written observations on the admissibility and merits of the case by 12 June 2009;
- (b) my letter of 28 April requesting an extension until 17 July 2009 and your letter of 4 May granting that extension; and
- (c) my letter of 14 July requesting an extension until 31 July, and your letter of 17 July granting that extension.

I am now pleased to attach the Government's Observations on the admissibility and merits, dated 31 July 2009. There are eight exhibits to the observations, which have been sent in hard copy.

Yours faithfully

Jessica Gladstone
Agent of the Government
of the United Kingdom

THE CHAGOS ISLANDERS¹

v.

UNITED KINGDOM

APPLICATION No. 355662/04²

**OBSERVATIONS
OF THE
GOVERNMENT OF THE UNITED KINGDOM
ON THE
ADMISSIBILITY & MERITS OF THE APPLICATION**

FOREIGN & COMMONWEALTH OFFICE
London SW1A 2 AH

¹ The Government has only been sent copies of the Application issued on behalf Jeanette Therese Alexis and Louis Olivier Bancoult. However, the Statement of Facts prepared by the Registry names the Applicants as ‘the Chagos Islanders’ and the Government will adopt that designation.

² The Application Number on the Application provided to the Government is 355662/04. However, on the Statement of Facts prepared by the Registry it is recorded as being 35622/04.

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I. INTRODUCTION

(i) The Issues

1. The Government is grateful for the opportunity to provide its observations on the admissibility and merits of this application. In particular, the Government will address the specific questions raised by the Court:

- “1. Does the Court have jurisdiction to examine any of the applicants’ complaints concerning their expulsion and continuing exclusion from BIOT?*
- 2. Can the applicants still claim to be victims of [a violation of] any of their rights in the light of the proceedings before the courts in the United Kingdom and the payment of compensation?*
- 3. Does the application comply with the requirements of Article 35 §1 as regards the six month time-limit?*
- 4. Has there been a violation of Article 3 as regards the circumstances surrounding the removal of the islanders to Mauritius and subsequent exclusion from the islands?*
- 5. Has there been a violation of Article 8 as regards expulsion from their homes and way of life? Has there been a breach of any positive obligation under Article 8 to facilitate the return of the islanders?*
- 6. Has there been a violation of Article 1 of Protocol No. 1 as regards destruction of their houses and property on the islands and the loss of use of common lands?*
- 7. Have the applicants been deprived of access to court contrary to Article 6 in that:*
 - i the actions of the executive in seeking to prohibit their return to their islands sought to annul the effect of the judgment of Divisional Court of 3 November 2000;*
 - ii the domestic court struck out part of their claims for compensation and gave summary judgment on the case as a whole?*
- 8. Have the applicants had an effective remedy as required by Article 13 in respect of the above alleged violations?”*

(ii) Summary of the Government’s Submissions

2. The Government’s submissions may be summarised as follows:
 - 2.1. The Application should be dismissed as inadmissible on all or any of the following grounds:

- 2.1.1. The Application was not brought within a period of six months from the date of the decisions or conduct complained of, contrary to the requirement of Article 35(1).
 - 2.1.2. The Court has no jurisdiction *ratione loci* to examine the complaint.
 - 2.1.3. The Applicants are not ‘victims’ within the meaning of Article 34.
 - 2.1.4. The Applicants have failed to exhaust their domestic remedies, contrary to the requirement of Article 35(1).
- 2.2. Alternatively, the Court should find that there has been no interference with any of the Applicants’ rights under Articles 3, 6, 8 or 13 of the Convention, or under Article 1 of the First Protocol (‘A1.P1’).
- 2.3. Alternatively, any interference with the rights guaranteed by Articles 6 or 8 of the Convention and/or by A1.P1 is justified.

II. THE FACTS

(i) Introduction

3. This dispute has its origins in events occurring in the 1960s and 1970s. Following the recent judgment of the House of Lords in *Bancoult* 2,³ the Foreign Secretary said this:

“It is appropriate on this day that I should repeat the Government’s regret at the way the resettlement of the Chagossians was carried out in the 1960s and 1970s and at the hardship that followed for some of them. We do not seek to justify those actions and do not seek to excuse the conduct of an earlier generation.”

4. Consistently with that approach, the purpose of these Observations is not to defend the morality of what was done or said nearly 40 years ago. Rather, the purpose of these Observations is to address the question whether, in the events which have happened, the Applicants are now entitled to sustain a claim in this Court. However, before turning to deal with the legal arguments in that regard, it is important first to set the factual record straight in a number of respects.

(ii) Domestic Proceedings

5. The Applicants have brought their complaints before the national courts on a number of occasions over the years. It may be convenient to start by tracing the principal contours of those various proceedings, because their significance has been underestimated by the Applicants.
6. First, there was the case of *Vencatessen v. Attorney General* which was started in February 1975. The Writ⁴ claimed compensatory damages, aggravated damages and exemplary damages for intimidation, deprivation of liberty and assault in BIOT, the Seychelles and Mauritius in connection with the claimant’s departure from Diego Garcia, the voyage and subsequent events.⁵ The claim was not formally brought as a representative action, but it was treated by both parties

³ *R (Bancoult) v. Secretary of State for Foreign & Commonwealth Affairs (No. 2)* [2009] 1 AC 453 (attached as Exhibit I), hereafter *Bancoult* 2.

⁴ Copies of the Writ, the Re-Amended Statement of Claim, the Amended Defence and Reply, as well as various Further and Better Particulars of these pleadings, are attached as Exhibit II.

⁵ The claims are summarised in the judgment of Ouseley J. in *Chagos Islanders v. Attorney General* [2003] EWHC 2222 (QB), [2003] All ER (D) 166 [Annex A3], at §55 of the judgment. References hereafter to passages in the judgment are given as *CIL* [J***] and references to the findings set out in the Appendix to the judgment are given as *CIL* [A***].

as being a test case for the benefit of the Chagossians as a whole.⁶ The claim led to a settlement between the United Kingdom, the Government of Mauritius and the Chagossians in 1982, with the UK giving £4 million to the Ilois Trust Fund for distribution to eligible Chagossians, and the Mauritian Government contributing £1 million by way of land. The Chagossians received advice from two eminent firms of English solicitors (Messrs. Bindmans and Messrs. Sheridans) and from two leading barristers (John MacDonald QC and Louis Blom-Cooper QC) confirming that the settlement reached was a reasonable one.⁷ Both English and Mauritian legal advisers were present during the course of the settlement negotiations to advise the Chagossians.⁸

7. Secondly, there was the case that has become known as *Bancoult 1* [Annex A1 & A2 to the Application].⁹ That consisted of a judicial review challenge to the legality of s. 4 of the Immigration Ordinance 1971 ('the 1971 Ordinance') [Annex B6]. The 1971 Ordinance precluded entry to BIOT without a permit. It was a piece of colonial legislation, made by the BIOT Commissioner pursuant to powers conferred on him by the British Indian Ocean Territory Order 1965 ('the 1965 Constitution Order') [Annex B5]. The decision will be revisited in detail below, but for present purposes it is sufficient to note two points:

- 7.1. The claim was brought by way of judicial review. As a result, there was no oral testimony, and the court did not need to make any findings based on contested factual evidence. The matter was dealt with solely on the basis of written evidence and legal argument.¹⁰

- 7.2. The legal issue concerned the scope of the Commissioner's legislative powers under the 1965 Constitution Order. The issue determined by the Court was whether the 1971 Ordinance was within the powers conferred on him. Nothing more.

8. Thirdly, there was the *Chagos Islanders Litigation* [Annexes A3 & A4]. This group action was brought by the Chagos Islanders acting through their present solicitor. The Claim Form sought:

- 8.1. compensation and restoration of their alleged property rights, in respect of their unlawful removal or exclusion from the Chagos Islands by the UK;

⁶ See *Bancoult 2*, per Lord Hoffmann at §12-13.

⁷ *CIL* [J67, J532, J570 and J583].

⁸ *CIL* [J529 to J533; J581 to 582; J682]; *CIL* [A575 to A586].

⁹ *R (Bancoult) v. Secretary of State for Foreign & Commonwealth Affairs*, 3.3.99 (Scott Baker J) [Annex A1] and [2001] QB 1067 (DC) [Annex A2].

- 8.2. declarations of their entitlement to return to all the Chagos Islands, and to measures facilitating their return;
- 8.3. declarations as to their property rights and restitution of property.
9. The hearing lasted 37 days and it involved hearing oral evidence from 19 of the Applicants and their legal advisers (past and present). There were approximately 30 lever arch files of material made available to the Judge during the course of the hearing. A chronology submitted by the defendants to the action alone ran to 154 pages. The judgment [Annex A3] runs to 387 pages, and it contains an extremely detailed analysis of the background to the present claim, as well as making numerous factual findings. The claims of the Chagossians were rejected.
10. Following an oral hearing, the English Court of Appeal [Annex A4] dismissed an application by the Applicants for permission to appeal against the judgment of Ouseley J [Annex A3]. (The domestic procedure in England and Wales allows for permission to appeal to be refused by the Court of Appeal on the basis that there is no arguable error of law on the part of the Judge below. The Court of Appeal in this case reviewed the Applicants' submissions, heard oral argument from the Applicants' representatives and concluded that no arguable error of law on the part of Ouseley J was disclosed that would affect the judgment that had been given. Furthermore, none of the findings of fact made by Ouseley J were overturned by the Court of Appeal.)
11. Fourthly, there was the case known as *Bancoult 2*.¹¹ This consisted of another judicial review challenge. In 2004, the Secretary of State had decided that, in the circumstances then prevailing, it was necessary to reintroduce a prohibition on anyone entering BIOT without a permit. That was achieved by means of the 2004 Constitution Order¹² and the 2004 Immigration Order.¹³ The Divisional Court and the Court of Appeal considered that the 2004 Orders were unlawful, but the House of Lords disagreed. Accordingly, the 2004 Orders remain in force.
12. It will be seen from the summary set out above that only one judicial decision in the national courts has involved any detailed consideration of the evidence concerning the events in the

¹⁰ At §6, Laws LJ said: "This is not a case where there exists any dispute of primary fact which it is the court's duty to resolve. That is not to say that all relevant facts are agreed."

¹¹ *R (Bancoult) v. Secretary of State for Foreign & Commonwealth Affairs (No. 2)* [2006] EWHC 1038 (Divisional Court); [2008] QB 365 (Court of Appeal); [2009] 1 AC 453 (House of Lords).

¹² The British Indian Ocean Territory (Constitution) Order 2004 [Annex B8].

¹³ The British Indian Ocean Territory (Immigration) Order 2004 [Annex B9].

1960s and 1970s, and only one hearing has involved any oral evidence being taken from the Applicants – namely the *Chagos Islanders Litigation*. After careful consideration, the Judge in that case reached the following conclusions:

- 12.1. The Chagossians’ oral testimony was in certain respects unreliable, and in some cases it was “deliberately false” [J155-213, especially at J163]. The witnesses had been chosen by the Chagossian organisations themselves on the basis of their knowledge of the material facts.
- 12.2. With the exception of the meteorological station staffed by non-Chagossians, there was no source of employment on the islands other than that provided by the plantations [J214-218]. No-one came there or stayed there who was not either directly or indirectly employed by the plantation business. As a result, if and when the plantations were closed, there was no means of sustaining a livelihood for the population on the Islands.
- 12.3. *Bancoult 1* had been decided at least partly on the basis of a misapprehension as to the facts. In particular, the Divisional Court in *Bancoult 1* had erroneously believed that the 1971 Ordinance was used in order to remove the population from BIOT, whereas Ouseley J found that the Secretary of State was “obviously right” in saying that that is not what happened [J257-261]. Instead, the plantations were run down, and effectively the population had no choice but to leave for that reason [J126; J261; J299-305; 315-316; 329; 331; A303].
- 12.4. There was no prospect of the Claimant showing that anyone in the UK Government knew or was reckless that the 1971 Ordinance was unlawful, or that any removal of the Applicants, or prevention of their return before or after 1973, was unlawful [J739].
- 12.5. There was no real prospect of showing that any false statement of existing fact was made to the Applicants by the Government [J744].
- 12.6. The Applicants’ claims based on misfeasance in public office failed [J257-358].
- 12.7. The Applicants’ claims based on deceit failed [J359-371].
- 12.8. The Applicants’ claims based on an alleged tort of exile failed [J372-383].
- 12.9. The Applicants’ claims based on alleged deprivation of property failed [J384-430].

12.10. There was in principle room for a claim in negligence for personal injuries [J431-461] but the claim was unsustainable because it had been settled [J462-595] and/or because it was barred by limitation [J687-735].

12.11. All other claims the Applicants might have brought were similarly settled [J462-595] and/or statute-barred [J596-686].

12.12. The claim for a declaration that the Applicants have a right of return to Diego Garcia and to receive assistance in doing so and in achieving in the Chagos Islands a certain lifestyle was unarguable [J746].

(iii) Errors in the Application

13. Regrettably, the facts alleged in the Application before this Court (which form the basis of the summary prepared by the Registry) are inconsistent in a number of material respects with the findings of fact made by Ouseley J in his lengthy and detailed judgment [Annex A3]. The Judge's findings of fact are binding in the UK's national legal system against the Applicants. The Government submits that it would be inappropriate for the Applicants to invite this Court to reach any different findings of fact from those of the national courts.

14. The Government does not propose to burden the Court with a detailed refutation of all the factual errors made by the Applicants. Nonetheless, it is important that the more significant errors should not go uncorrected. The Government attaches as Exhibit III to these Observations a summary response to the more significant factual errors in the Application.

15. For present purposes, the Government would wish to emphasise only the following key points.

(iv) Key points of fact

16. First, it is important to dispel an important error of fact which contaminates the Submissions of the Interveners. It is entirely clear from the historical records that the Chagos Archipelago was unpopulated before colonial times: *CIL* [J2-J10]. The Chagos archipelago was discovered by Portuguese explorers in the sixteenth century. There was no indigenous population. In 1786, the East India Company attempted without success to establish a settlement on the islands. In the 1790s, the French authorities granted concessions to entrepreneurs to commence copra production on the islands. Plantation workers were brought in, initially by the French, when the islands were first colonised. A number of those plantation workers were slaves. The islands were subsequently ceded to the United Kingdom in 1814 and the plantations were thereafter

operated as part of the United Kingdom's colonial governance of its dependent territories. Following the abolition of slavery in the colonies in 1833, the plantation workers continued to work on the plantations under the supervision of the plantation owners. Notwithstanding these incontrovertible facts of history, the Interveners' Submissions proceed on the basis of a fundamental misunderstanding. Their whole argument is founded on the assumption that the Chagossians are an 'indigenous people', meaning (§11 of the Interveners' Submissions) a community "having a historical continuity with pre-invasion and pre-colonial societies" who seek to "preserve, develop and transmit to future generations their ancestral territories". The Chagossians do not fall within the terms of that definition because they have no such continuity with any pre-colonial society on the Chagos Archipelago. There was none. The Chagos Islands were unpopulated before colonial times. In so far as any people moved there and had children there, those people were the product of colonial societies. The Chagossian people were not displaced from any ancestral territories on the Islands by in-coming French colonists. Rather, it was only through the colonial occupation and management of previously unpopulated territory that the people who now call themselves Chagossians were brought to the Islands and were given any connection with the territory in question. Accordingly, the Interveners are demonstrably wrong in believing that the Chagossian people enjoyed any pre-colonial connection with any 'ancestral land' on the Islands, or that they enjoyed any 'indigenous property rights' which are now being denied to them.

17. Secondly, it is important to recognise the strategic importance of the military base on Diego Garcia.

17.1. The strategic importance of the Chagos Islands was the principal reason for its selection as a military base in the 1960s and that strategic significance has increased with time. This was reflected in the Report on the Anglo-American Survey in the Indian Ocean completed by Robert Newton in September 1964,¹⁴ which at §20 confirmed that Diego Garcia was eminently suitable for a military base. At the time of the creation of BIOT, Diego Garcia was selected to become part of BIOT because of its perceived strategic and military advantages.

17.2. The letter from George Newman of the US Embassy to G. Arthur of the Foreign Office dated 14 January 1965 stated that following the Anglo-American survey, Diego Garcia had been selected as the most suitable site for a communications station and support

¹⁴ This and the other material mentioned in this paragraph are attached as Exhibit IV.

facilities. The detachment of the entire Archipelago was sought primarily on the grounds of security.

- 17.3. The subsequent Exchange of Notes on 30 December 1966 between the United Kingdom and the United States of America confirms the military and strategic importance of the islands.
- 17.4. The Affidavit of Peter John Westmacott dated 25 August 1999, sworn for the purposes of *Bancoult I* emphasised (at §8 and §22) that it was important that the land acquired for defence interests should be free from local political control. At §5 he describes that the main benefits of obtaining a military establishment in Diego Garcia were “securing US interest in the Indian Ocean area, strengthening UK relations with the US, strengthening UK influence on US policies in South and South East Asia, securing alternatives to the UK bases in Singapore and Aden, should these prove in the future to be no longer viable, and securing US assistance with the logistic backing East of Suez.”
- 17.5. The strategic importance of Diego Garcia was again confirmed in the Affidavit of Martin Lloyd Howard of the Overseas Secretariat of the Ministry of Defence, again prepared for *Bancoult I*. At § 3, Mr. Howard said this:

“Diego Garcia’s location in the heart of the Indian Ocean and the facilities it offers make it important as a base from which to monitor events in, and project military power into, areas-of strategic importance to the UK and its allies, most notably the Gulf. It is in this respect a key element in the UK/US strategic partnership. The island was used by US forces for mounting operations during the Yemen crisis (1979), the Iranian crisis (1979- 81), Operation DESERT STORM (1990-91), the UN intervention in Somalia (1992) and most recently for coalition operations against Iraq (November/December 1998). The UK and the USA have common security interests in relation to these and other matters. The island also plays a primary role in the support of US Naval units routinely operating in the Indian Ocean and Gulf. Additionally, Diego Garcia provides two of the few specially cleared berths available to nuclear-powered submarines East of Suez. This means that the berths have been subject to survey, and standard operating and safety procedures and appropriate infrastructure have been put in place to enable their use by nuclear-powered submarines.”

- 17.6. The witness statement of the Foreign & Commonwealth Office’s former Director of Americas and Overseas Territories, Mr. Robert Culshaw, dated 7 December 2004 (hereafter ‘*Culshaw I*’) summarises at §13 to §18 the defence and security interests that prompted the creation of BIOT. He also notes the reaction of the American Government to the threatened landings in 2004 on Diego Garcia by Chagossians in the company of LALIT and other political groups at §110 to §114. He stated at §114 that:

“The US authorities informally made clear to their British counterparts that they would regard landings on the Chagos Archipelago, including the outer islands, as entailing a

serious threat to the security and effective operation of their defence facility in Diego Garcia. These informal statements of the US position were subsequently reaffirmed in the regular British - US political and military discussions in respect of BIOT."

- 17.7. Mr. Culshaw also gave uncontradicted evidence before the national court in *Bancoult 2* to the effect that (*Culshaw 1* at § 119):

"The strategic importance of Diego Garcia has increased since the terrorist attacks on Western targets in the last few years. I understand from US colleagues that in September 2003, Secretary of State Rumsfeld described the facility in Diego Garcia as a "lynchpin" for the US military between the Middle East and Asia. It clearly continues to play a vital role at a time when there is instability in the region. I have already referred to the treaty obligations owed to the United States of America. The 1966 Exchange of Notes also stipulated that the outer islands should be available to meet the defence needs of both nations. In a letter dated 21 June 2000 Eric Newsom, the United States' Assistant Secretary of State for Political-Military Affairs, explained the serious concern which the United States would have at the prospect of any return of any permanent, resident population to the Chagos Archipelago . . . Their military and security concerns about resettlement of the outer islands have been reiterated subsequently in discussions with them before the provisions of the 2004 Orders in Council impugned were made. Their current views are stated in a letter from the current United States' Assistant Secretary for Political-Military Affairs, Mr Lincoln P Bloomfield Jr, to me dated 16 November 2004 . . . British Ministers shared these concerns."

- 17.8. The letter from Eric Newsom dated 21 June 2000 confirmed that the US Government was seeking permission to develop Diego Garcia as a forward operating location for expeditionary air force operations - one of only four such locations worldwide. He added:

"These locations, to which considerable funds have already been committed, are intended to serve as primary staging points for defense activities in key regions for quite some time to come . We anticipate that our commitment of resources to the-island will grow in the years ahead in order to develop the necessary infrastructure to sustain, should it become necessary, intensified military operations . Moreover, as resources for defense diminish in other areas, the centrality of the islands for ensuring U.S. and British security interests will only increase."

- 17.9. A subsequent letter from Lincoln Bloomfield dated 16 November 2004 stated that the base had been used extensively since the events of 11 September 2001. He added that:

"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."

- 17.10. The letter from Rose Likins of the US State Department to Denise Holt of the FCO received on 19 January 2006 re-affirmed the strategic significance of the Archipelago in the following terms:

“The security of Diego Garcia is absolutely imperative to the success of our two nations’ security strategies and the unimpeded use and access of the facilities on Diego Garcia in executing major military operations have proved to be critical. Preserving the security of the Archipelago and protecting Diego Garcia as a strategic forward operating base are vital to achieving our mutual national security interests.”

- 17.11. The high strategic importance of the defence facility on the Chagos Islands has been recognised throughout by the national court. Diego Garcia was described by the Divisional Court as being “of the highest importance”.¹⁵ The court said it was established “for high political reasons: good reasons, certainly, dictated by pressing considerations of military security”.¹⁶ Those purposes “were, or could at least reasonably be described as, of great benefit to the United Kingdom and the western powers as a whole”.¹⁷
- 17.12. These conclusions were perhaps unsurprising, given that the Claimant in *Bancoult 1* averred in §53 of his Statement of Grounds that “the necessity for the creation of BIOT derived from the United Kingdom’s defence and foreign policy.”
- 17.13. Similarly, the Applicants in their Group Particulars of Claim in the *Chagos Islanders Litigation* did not seek to challenge the proposition that Diego Garcia was vital to the defence interests of the United Kingdom and her allies: *CIL* [J103; J265; J269].
- 17.14. Ouseley J accepted in the *Chagos Islanders Litigation* that the UK had specifically created BIOT for the defence of the UK and her colonies: *CIL* [A28-A29], [A31], [A35], [A38] and [A40]. As Ouseley J put it in his judgment in that case at [J319], the United Kingdom “had specifically created BIOT for defence of the UK and colonies.”
18. Thirdly, it is important to recognise that the consistent security assessment by the US authorities over the years has been, not only that the defence facility is of great significance, but also that the entire Chagos Archipelago needs to be kept uninhabited. From as early as January 1965 they made 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”.¹⁸ In his letter of the 16th November 2004, the US Assistant Secretary of State stated that any attempt to resettle any of the islands in the archipelago “would severely compromise Diego Garcia’s unparalleled security and have a deleterious impact on our

¹⁵ *Bancoult 1* [Annex A2], at §1.

¹⁶ *Bancoult 1* [Annex A2], at §57.

¹⁷ *Bancoult 1* [Annex A2], at §65.

¹⁸ *Bancoult 1* [Annex A2], at §11.

military operations”.¹⁹ These considerations have only been increased by the deterioration in the international security situation in the period following the attacks of the 11th September 2001, and the correlative increase in the importance of international defence facilities, and the Chagos Islands in particular.²⁰

19. Fourthly, it should be emphasised that, after hearing all the evidence that the Applicants wished to adduce, the national court held that no force was used when the civilian population left the Chagos Islands. It is worth setting out the relevant part of the judgment in the *Chagos Islanders Litigation* [J331].²¹

“ ... There is no evidence that coercion in a physical sense was used in the removals. The pleading and the Claimants’ statements have used language which suggests it but there is no evidence for that. If the allegation is that the Ilois had no choice about leaving Diego Garcia and that they had no choice about leaving Peros Banhos, because none were given the unappealing option of staying without support, that is obviously true, but I do not think that that is what is meant. There is no allegation that there was any trespass to the person to anyone nor that anyone on behalf of the Defendants authorised or carried out any such act. The assertions about intimidation through threats of bombing or of being killed were not sustained in any evidence ... There was no evidence as to the position on Salomon when the last worker left and the evidence about what happened on Peros Banhos was vague ... There is not the slightest evidence of the threat of or the actual use of force or intimidation to bring about the removal of the Ilois, or that there was any for which either Defendant was responsible. ”

20. Fifthly, as is clear from the judgment quoted above, the reason why force did not need to be used was that there was nothing to sustain any economic livelihood on the Chagos Islands if the plantations were closed. In particular:

20.1. 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: *CIL* [J12]. The total population figures for all three islands dropped from about 1,100 in the 1950s to 747 in 1962 and, despite a brief rise in the late 1960s, to 630 by February 1971: *CIL* [A23].

20.2. Limited medical care and education were provided to the workforce by the plantation company. Food and other provisions were also provided by the company: *CIL* [J214-215; A97-98]. Inhabitants would travel to Mauritius for more intensive medical care:

¹⁹ Quoted in the Divisional Court in *Bancoult 2*, at §96.

²⁰ See the parliamentary statement on 15.6.04, quoted in the Divisional Court in *Bancoult 2* at §93, and the letter of 16.11.04, also quoted in the same judgment at §96.

²¹ See also [J36; J45; A332-336]. At [A453], Ouseley J sets out details from a proof of evidence taken by the Attorney General of Seychelles from Paul Moulinie, the former manager of the plantations, in 1976. Moulinie confirmed that no force or coercion had been used in the transfer of people.

CIL [A26]. The workforce received basic wages, rations and assistance and materials in constructing houses: *CIL* [J216]. Houses were built by the workforce only with the company's permission and the company owned the relevant land: *CIL* [J220].

- 20.3. The establishment of the BIOT for defence purposes brought about a need for the Government to acquire compulsorily the title to the land owned by the plantation company: *CIL* [A56]. The Government of Mauritius in February 1966 accepted £3 million in full and final settlement of the transfer of the Mauritian dependencies (including the Chagos Islands): *CIL* [A59]. Following the adoption of domestic legislation in BIOT permitting the compulsory acquisition of land for defence purposes, [A83-84] the land interests of Chagos Agalega Company Limited were acquired by the UK Crown in March 1967 and conveyed to the BIOT Commissioner on behalf of the Crown on 3rd April 1967 [A91-95]. The same land was leased back to Chagos Agalega Company Limited on 15th April 1967 to permit the continued operation of the plantations [A91, A96]. Chagos Agalega Company Limited gave six months' notice to terminate the lease in June 1967 [A106]. A new management agreement for the plantations was agreed with Moulinie & Co, effective from 1st January 1968 [J299; A118] with the BIOT Administration overseeing the operation of the agreement. Recruitment decisions were made by Moulinie & Co on the basis of the desire to run the plantations as efficiently as possible [J302-303].
- 20.4. There was no deliberate decision by the BIOT Administration to run down the plantations with a view to depriving the population of economic support. The BIOT Administration wished to keep the plantations operational until a decision was taken to construct defence facilities in BIOT: *CIL* [J310]. The continued operation of the plantations nonetheless proved not to be economically viable without further capital investment and the uncertainty surrounding the future of the islands discouraged such investment [A272]. The plantations were run at a loss of 80,000 Mauritian Rupees in 1970-1971 [A273].
- 20.5. Furthermore, once the decision had been taken to close the plantation on Diego Garcia, the remaining plantations on Salomon and Peros Banhos were no longer economically viable, especially as the future for copra was uncertain: *CIL* [J315; A371]. Relocation of people to Salomon and Peros Banhos was seen as a temporary solution while arrangements for longer term resettlement were put in place: *CIL* [J32]. Attempts to recruit additional workers amongst the Chagossian community in Mauritius in 1972 were only partly successful: *CIL* [A372]. Furthermore, there was demand in 1972 from Chagossians in Peros Banhos and Salomon to return to Mauritius, which the Government

initially resisted because arrangements for their resettlement had not yet been finalised: *CIL* [A379].

- 20.6. Some people were in due course transferred to Salomon and Peros Banhos, but the operation of the plantations on those islands became uneconomic. Those remaining on Salomon by November 1972 chose to leave for Mauritius or were moved to Peros Banhos. The plantation on Salomon closed down by November 1972: *CIL* [J45-46; A388-390; A393]. The operation of the remaining plantation was also uneconomic for Moulinie & Co. It too closed down in April 1973 and the last remaining inhabitants were evacuated to Mauritius or the Seychelles: *CIL* [J47-49; A396].
- 20.7. Individual workers who left the Chagos Archipelago from October 1971 onwards were paid the sum of 500 Mauritian rupees in compensation for personal possessions left behind: *CIL* [J332; A304].
21. Sixthly, it must be recognised that there has been no civilian population on the Outer Islands (*i.e.* the Islands other than Diego Garcia) for more than 30 years. Apart from Diego Garcia (where the military base is located) none of the Islands has any of the infrastructure or the resources necessary to sustain a population. There are no houses, there is no electricity supply, no sanitation, no adequate supply of fresh water, and inadequate food sources. In the circumstances, an independent Feasibility Study was commissioned by the Secretary of State into the viability of resettlement. The conclusion expressed in the Report in July 2002²² was that resettlement on a short-term subsistence basis was possible, but that long term resettlement would be “precarious and costly”. In other words, the Government is aware that, if any of the Applicants chose to live in BIOT, they would demand substantial and continuous financial support indefinitely and there would be an open-ended contingent liability for the UK Government.
22. Furthermore, the estimated costs of any resettlement would be substantial. In a report “Returning Home - A proposal for the resettlement of the Chagos Islands” which was written for the UK Chagos Support Association (‘UKCSA’) by John Howell and funded by a grant to the UKCSA from the Joseph Rowntree Reform Trust, it is estimated in section 6.3 that capital costs of at least £25 million over a five year period would be needed. But the UK Government believes this to be a significant under-estimate, as, for example, the proposal has only allowed £4 million for the construction of an airport. The second witness statement of Robert Culshaw dated 30 September

²² Exhibit V.

2005 (*Culshaw 2*) makes clear at §141 that the required capital costs would probably exceed £100 million. The Government has already spent more than some £290m on the redevelopment of less than one-half of Montserrat since 1997.²³ It is currently holding a consultation exercise with interested parties concerning the proposed construction of an airport in St. Helena, after the anticipated construction and other costs for that project increased to an approximate cost of £230 - 260 million over five years.²⁴

23. Seventhly, all of the Islands are Crown land, pursuant to the acquisitions in 1967.²⁵ In other words, as a matter of private law, the Crown has every right to keep other people off its property, as Sedley LJ recognised in *Bancoult 2* at §71.²⁶ The corollary is that none of the Applicants owns any land on the Islands. None of them has a private law right against the Crown under domestic law. In other words, the assertion by the Chagossians of a right of resettlement is effectively the assertion of a right to “a form of mass trespass”, as Ouseley J described it in the *Chagos Islanders Litigation* [J297].
24. Eighthly, it should be recognised that the Applicants have not been entirely barred from visiting the islands.²⁷ The BIOT authorities have organised (and paid for) a number of visits in 2000, 2006 and 2008 by over 100 people in total, who have been able to land on a number of different Islands, including to repair the graves of their forebears. Chagossians can also apply for employment at the US naval facility in Diego Garcia. Any Mauritian or Chagossian can apply for the jobs advertised locally in Mauritius provided they can demonstrate the required skills for the post. Selection, as everywhere, is based on the best candidate being identified. There are Mauritians, including Chagossians, working on Diego Garcia. Furthermore, on the 22nd October 2008, the Foreign Secretary gave the following assurance:

“We will keep in close touch with the Chagossian communities and consider carefully future requests to visit the territory.”

25. Ninthly, the Applicants have claimed in §154 of their Grounds that the United Kingdom Government has “formally accepted before the United Nations Human Rights Committee that its

²³ *Culshaw 2* at § 143.

²⁴ Materials referred to in this paragraphs are attached as Exhibit VI.

²⁵ See the Divisional Court decision in *Bancoult 2*, at §40-42.

²⁶ “Indeed, the Crown has rights as landowner which are capable, for the present, of answering any attempt to resettle there”.

²⁷ The Applicants are quite mistaken when they allege (Grounds §86) that, since the judgment in *Bancoult 1*, “Chagossians have not subsequently been allowed to land on the islands”.

prohibition on allowing the return of the Ilois, who had left or been removed from [the Chagos Archipelago] was unlawful”. It is important to note, however, that that admission simply reflected the Divisional Court’s finding in *Bancoult 1* that section 4 of the BIOT Immigration Ordinance 1971 was unlawful. Since then, the 2004 Constitution Order and 2004 Immigration Order have been made, and the legal challenge to their validity in *Bancoult 2* failed. The 2004 Orders accordingly remain in force, providing an entirely lawful regime which precludes any entry into the BIOT territory without a permit. The admission that was made in 2001 has accordingly been overtaken by subsequent events and it no longer applies.

26. Finally, it is common ground that the UK has, over the years, paid substantial sums in compensation and in discharge of any liability in relation to the displacement and resettlement costs (in addition to the sums mentioned in §20.7 above). In particular, the Government has paid the following sums to or for the benefit of the Applicants:

26.1. In 1973, £650,000 was paid to the Mauritian Government to cover the cost of resettlement.²⁸ In today’s terms, that sum is worth over £6 million²⁹ (or more than €7 million) based on an application of the retail price index as an inflator. While it is true that this sum was only paid out (with interest) by the Government of Mauritius in 1977, that was because discussions had taken place as to the best use to make of the money. That culminated in the rejection by the Chagossians of a proposed resettlement plan advanced by the Government of Mauritius in favour of a cash distribution to 595 families (rather than the 426 families identified as having been transferred from the Chagos Archipelago to Mauritius between 1965 and 1973): *CIL* [A417-418].

26.2. In 1982, a further £4 million was paid by the United Kingdom in settlement of the *Vencatessen* proceedings.³⁰ That sum is worth over £10 million in today’s value (or about €11.5 million), using a retail price index as an inflator. The Mauritian Government additionally contributed £1 million worth of land for the resettlement process and the Indian Government voluntarily contributed 1 million rupees to the settlement: *CIL* [A580; A628]. Pursuant to the Mauritian Ilois Trust Fund Act 1982, the UK contribution was paid to a Trust Fund which was administered by a Board consisting of 5 members

²⁸ *CIL* [J43]. The sum was agreed between the Governments in September 1972 and paid in March 1973, prior to the final evacuation from Peros Banhos [J43; J333]. The agreed sum had been reached on the basis of a resettlement report procured and approved by the Government of Mauritius [A380-381].

²⁹ The sum is significantly higher if the comparator used is the average earnings index.

³⁰ *CIL* [J71] to [J72].

appointed by the Mauritian Government and 5 members appointed from the Chagossian community.³¹

27. It was a condition of the settlement reached that Mr. Vencatessen would withdraw what was viewed on all sides as being a representative action brought against the UK Government. Proceedings were eventually stayed in October 1982 and it was only after that that the UK paid out the sum of £4 million to the Ilois Trust Fund: *CIL* [J75-76]. The Chagossians were required to sign renunciation forms as a condition of receiving payment from the Ilois Trust Fund Board.³² These forms renounced claims against the UK Government, as set out in the 1982 Agreement. The Mauritius Government had agreed to use its best endeavours to obtain one from every Ilois: *CIL* [J78]. Only 12 Chagossians refused to sign the renunciation forms. One of those who did brought unsuccessful legal proceedings against the Ilois Trust Fund Board seeking his entitlement to a share of the compensation: *CIL* [J80-81]. It was held that no money was required to be paid over without a renunciation of claim being first received.

(v) Conclusion

28. As noted above, the purpose of these Observations is not to defend the morality of what was done or said nearly 40 years ago. However, before considering the various legal arguments, it is important to bear in mind that, for the reasons outlined above, the Applicants have presented an unbalanced version of the factual background.

³¹ *CIL* [J74].

³² See *Bancoult 2*, per Lord Hoffmann at §13.

III. DOMESTIC LAW

(i) Citizenship

29. Any of the Applicants who were born in the dependent territories of Mauritius or the Seychelles prior to the 8th November 1965 were granted citizenship of the United Kingdom and Colonies ('CUKC') by virtue of the British Nationality Act 1948, ss. 4 and 12.³³
30. Following the making of the 1965 Constitution Order, CUKC citizenship was conferred on any person born in BIOT. In addition, a person born outside the Chagos islands but descended legitimately from a father who had been born within the Chagos Islands would have been granted CUKC citizenship by descent. Either form of citizenship would make the individual a British subject and a Commonwealth citizen.³⁴
31. On the 12th March 1968, Mauritius achieved independence. Under ss. 20(1), (2) and (4) of the Mauritius Independence Constitution,³⁵ every person who had been born in Mauritius itself or in the Chagos Islands and who was, immediately before the 12th March 1968, a CUKC automatically became a citizen of Mauritius on that day unless his father had been born in the Seychelles (as it was constituted immediately before the 8th November 1965). In effect therefore, all 'Chagossians' of Mauritian origin became Mauritius citizens, but those who were also CUKCs at that point retained dual citizenship. Those of Seychelles origin remained (at that point) solely CUKCs.
32. The Seychelles achieved independence on the 29th June 1976. Under Article 4(1) and (3) of the Seychelles Independence Constitution,³⁶ every person who had been born in the Seychelles (including those islands which were part of BIOT between 1965 and 1976), or whose father had been so born, and who was a CUKC immediately before Independence Day became, automatically, a Seychelles citizen on that day. In effect, therefore, all 'Chagossians' of Seychelles origin, including those who had themselves been born in the Chagos Islands but

³³ CUKC citizenship was a separate class of citizenship distinct from British citizenship. That category of citizenship under the British Nationality Act 1948 did not confer any right of abode, the allotment of which was left to the law of the territory.

³⁴ See the witness statement of Henry Steel, at §20 attached with its internal exhibits as Exhibit VII.

³⁵ See Exhibit HS 1/ 101 – 140 to the witness statement of Mr. Steel (attached as Exhibit VII).

³⁶ See the witness statement of Henry Steel, at §22 and HS1/ 145 - 214.

whose fathers had been born in Seychelles, became Seychelles citizens. Seychelles citizens who were also CUKC citizens had dual citizenship.

33. Following the entry into force of the British Nationality Act 1981 on the 1st January 1983,³⁷ CUKC citizens became British Dependent Territories Citizens ('BDTC'), again a class of citizenship distinct from British citizenship.³⁸ The status of British subject was also removed (with some irrelevant exceptions).³⁹ The 1981 Act provided for the first time (but without retrospective effect) for citizenship by descent to be acquired through either parent, so that, for example, a child born in Mauritius after the 1st January 1983 to a 'Chagossian' mother became a BDTC by descent irrespective of the nationality of the father.
34. In 2002, the UK Parliament enacted the British Overseas Territories Act 2002. The relevant provisions entered into force on the 21st May 2002. It replaced the expression 'British Dependent Territory' with the term 'British Overseas Territory'. They then became known as 'British Overseas Territories Citizens' ('BOTC'). Section 3 of the Act also made all such citizens British citizens, save for those who derived their BOTC citizenship from a connection with the Sovereign Base Areas of Akrotiri and Dhekelia.
35. Section 6 also made special provision for certain of "the Ilois", following representations made by the Chagossian community. It conferred British citizenship on those persons who met certain conditions. As a British citizen, those applicants who qualify for BOTC citizenship or British citizenship under s. 6 now have a right of abode in the United Kingdom (and related rights within the European Union) and are free from immigration control on entry to the United Kingdom, pursuant to sections 1 and 2 of the Immigration Act 1971.
36. There is not, and never has been, any such thing as 'BIOT citizenship'. BOTC citizenship by itself does not confer a right of abode in any particular territory. The local law of the territory determines the existence and scope of any right of abode there. BOTC citizens by virtue of a connection with BIOT do not have, and never have had, a right of abode in BIOT.

³⁷ This Act repealed and replaced the British Nationality Act 1948.

³⁸ No specific right of abode in respect of any particular territory was conferred by such citizenship.

³⁹ See the witness statement of Henry Steel, at §24 (Exhibit VII).

(ii) Domestic law of torts

37. Ouseley J in the *Chagos Islanders Litigation* described the applicable law governing the claim in tort raised by the Chagossians against the UK Government. His conclusions as to the applicable law were (for the most part) upheld by the Court of Appeal. Thus:

(a) Tort of Misfeasance in Public Office

38. The tort of misfeasance in public office is an intentional tort which cannot be committed accidentally or negligently or from a mere failure to act or from a misunderstanding of the legal position. The tort has two forms. The first arises where a public officer uses his power for an improper purpose with the specific intention of injuring a person, known as targeted malice. The second form arises where a public officer acts in a way in which he knew he had no power to act, or was recklessly indifferent to the legality of his act, knowing that his act would probably injure the claimant or a class of persons of which the claimant was member, or recklessly indifferent as to the probability of such harm. It was sufficient recklessness if the act was done, not caring whether it was illegal or whether the consequences happened. It is sufficient if the act was done without an honest belief that it was lawful because misfeasance is the purported exercise of power otherwise than in an honest attempt to perform the relevant duty. A decision not to act can also give rise to liability. The illegality can arise from a straightforward breach of statutory provisions, from acting in excess of powers or from exercising them for an improper purpose. The only recoverable losses are those which the public officer has foreseen as the probable consequence of his act: *CIL* [J274].

39. The Court of Appeal rejected (at §26-29)⁴⁰ the submission of the Chagossians that it was possible to combine the actions of one public officer with the culpable mental state of another public officer so as to give rise to a tortious claim against a body on aggregate, rather than vicariously as responsible for the actions of its individual officers. The Court of Appeal did not dissent from the analysis set out by Ouseley J at [J274].

(b) Tort of deceit

40. Ouseley J held that the tort of deceit was not engaged when dishonest representations as to past or existing facts were made to a third party rather than to the claimants in circumstances where the third party was not an agent of the claimant nor did the third party communicate the misrepresentation to the claimant: *CIL* [J364]. Furthermore, he held that no one had knowingly or recklessly made false statements as to existing or past facts to the claimants: *CIL* [J369].

⁴⁰ Annex A4.

41. The Court of Appeal held that the Judge had been right to find that no tort of deceit could be established in respect of statements made to the claimants in circumstances where the person making any representation did not knowingly or recklessly make untrue statements: § 32. They also accepted that no existing precedent could be found for a situation in which liability arose as a result of a dishonest misrepresentation made to a third party, rather than to the claimant. Nonetheless, they were prepared to find that it was arguable that the common law might countenance liability in such a situation, depending on the facts of the case: §36-37.

(c) The alleged tort of exile

42. Ouseley J found that there was no arguable claim that a tort of exile existed: *CIL* [J378, 382-383].
43. The Court of Appeal upheld the Judge’s decision that the alleged tort of exile was not recognised in English common law. The fact that it might amount to a public law wrong did not confer a private cause of action under tort law principles: § 22-23.

(d) Trespass to the person

44. The Judge found that no claim had been made for damages for the tort of trespass to the person: *CIL* [J331].
45. The Court of Appeal noted both that a claim for trespass against the person had not been pleaded and the absence of any evidence to support such a finding: § 24-25.

(e) Negligence

46. The Judge noted that the claim pleaded in negligence against the Government related “solely to the conditions faced by the Chagossians upon their arrival in the Seychelles and in Mauritius after the evacuations and faced by those who were [allegedly] prevented from returning to Chagos after going to Mauritius for vacation, medical treatment or the like. It did not relate to the conditions experienced on some of the voyages and indeed despite the evidence about them, there is no specific cause of action pleaded which relates to them” *CIL* [J431]. (The word “allegedly” has been inserted in square brackets because the Judge found that no one was prevented from returning to the Chagos islands by the Government.)
47. The Judge held that there was no arguable claim for any duty of care to be imposed on the Government in the terms contended for by the claimants: *CIL* [J449]. The claim for damages for

economic loss for negligence was untenable: *CIL* [J455]. There was an arguable claim for personal injury that would have needed to be pleaded properly by the claimants, had it not been statute barred: *CIL* [J460-461].

48. The claim in negligence was not pursued on appeal before the Court of Appeal. That court consequently made no findings on it.

(iii) Domestic law of limitation

49. The Limitation Act 1980 operates in England and Wales to bar the bringing of proceedings after a certain period of time from the date on which the cause of action arose. Ouseley J held that on the face of it, all of the claimants' causes of action would be statute barred by the passage of time: *CIL* [J596]. There was no arguable tort which could be described as a "continuing tort" for the purposes of the application of limitation: *CIL* [J611].
50. The Judge then went on to consider whether or not any of the discretionary extensions of time available under the Limitation Act 1980 could be applied to the claimants so as to permit the time period for limitation to be increased. The Judge found that there was no arguable claim for an extension on the grounds of disability [J614]; fraud [J620]; or deliberate concealment [J621-J686] (not least because the Chagossians had received advice in the 1990s from Messrs Sheridans, Messrs Bindmans and from Professor Anthony Bradley which dealt with the potential claims against the Government. Professor Bradley's advice was that any such claims would be statute-barred).⁴¹ Further, the claimants were found not to have any reasonable prospect of extending limitation in relation to the claim for personal injury: *CIL* [J696, 735]. Any claim to property was extinguished by virtue of the operation of section 17 of the Limitation Act 1980.
51. The Court of Appeal considered (at §45-47) that there might be an arguable case for the limitation period not being fully enforced on grounds of unconscionability and/or disability. However, even on the most generous view of the facts to the claimants, time would start to run from 1983 at the very latest, by which time the Chagossians had received extensive advice from eminent UK lawyers (§48-49). The Judge's findings on the other matters concerning limitation were upheld.

⁴¹ See Note of Conference held on 16 February 1993, summarised at [A756].

IV. JURISDICTION & ADMISSIBILITY

(i) Introduction

52. In summary, the Government submits that the Application should be dismissed on all or any of the following grounds relating to jurisdiction and admissibility:

52.1. delay;

52.2. the Court has no jurisdiction *ratione loci*;

52.3. the Applicants are not ‘victims’;

52.4. failure to exhaust domestic remedies.

(ii) Delay

53. The Application states (§16 under Section IV) that the final decision of the domestic court consisted of the Court of Appeal’s decision of the 22nd July 2004 [Annex A4] refusing leave to appeal against the decision of Ouseley J in the *Chagos Islanders Litigation* [Annex A3]. The Application was lodged with this Court on the 14th April 2005. That is the date that appears on the face of the Application itself, and it is also referred to in the letters from the Applicants’ solicitors dated the 24th & 27th May 2005 as the date on which the Application was lodged. As such, the Application was lodged more than 8 months after the final decision of the domestic court.

54. Article 35(1) of the Convention confers jurisdiction on this Court only in respect of applications which are lodged within 6 months from the date on which the final decision of the domestic court was taken.⁴² The Government accordingly submits that this Court should dismiss the Application on the ground that it is inadmissible.

⁴² The purpose of this rule is to protect legal certainty and to prevent stale claims being brought. In the present context, it is noteworthy that many of the key witnesses for the Government died long before the *Chagos Islanders Litigation* was even started. Furthermore, the BIOT Administrator in 1971, Mr. Todd, died shortly before the hearing before Ouseley J commenced. The Applicants themselves comment several times on the number of Chagossians who have died: see for example their letters to the Court dated 25 & 27.5.05 requesting expedition.

(iii) No jurisdiction *ratione loci*

(a) Introduction:

55. Alternatively, even if the Application was lodged in time, neither the Convention nor the First Protocol extends to BIOT. It is a matter of record that no notification has ever been made by the UK in relation to BIOT pursuant to Article 56(1) of the Convention, or Article 4 of the First Protocol.⁴³ As a result, the Court has no jurisdiction *ratione loci* to deal with this Application. It must be dismissed on the ground that it is inadmissible.
56. The Applicants have attempted to avoid this result by seeking to rely on 5 different arguments:⁴⁴
- 56.1. They say that most of the alleged violations of the Convention were committed by UK authorities in the UK, and therefore fall within the UK's jurisdiction within the meaning of Article 1.
- 56.2. Alternatively, they say that a significant number of the Applicants now live in the UK.
- 56.3. Alternatively, they say that BIOT is under the effective control of the UK, and as such events there fall within the jurisdiction of the UK pursuant to Article 1 of the Convention.
- 56.4. Alternatively, they say that the notifications pursuant to Article 56 extending the Convention to Mauritius took effect as if they had been made in relation to BIOT.
- 56.5. Alternatively, they say that the ICCPR is regarded as applying to BIOT, and it would therefore be 'anomalous' if the Convention did not.
57. The Government will respond to each allegation in turn.

⁴³ The territories for whose international relations the UK is responsible and to which the Convention and the First Protocol have been extended are periodically up-dated in communications made to the Secretary General of the Council of Europe. BIOT has never been included in any of those up-dates. Following the independence of Mauritius and the Seychelles, the UK Government made declarations dated 12.6.69 (amended on 30.6.69) and 17.1.79 respectively indicating that it was no longer responsible for the international relations of those territories. On neither occasion was BIOT listed as a territory to which the Convention or the First Protocol extended.

⁴⁴ These arguments appear principally in their Further Submissions of 16.11.05 and in a letter from their solicitors dated 16.12.08. Only the 3rd argument is actually advanced in the original Grounds of Alleged Violation, at §202.

(b) Acts within the UK:

58. The Applicants' first argument is that most of the alleged violations of the Convention were committed by UK authorities in the UK, and therefore fall within the UK's jurisdiction within the meaning of Article 1. They are supported in this regard by the Interveners. However, their argument is, with respect, hopeless. It is flatly contradicted by the decision of the Grand Chamber in *Bankovic v. Belgium*.⁴⁵ That was the case in which a complaint was made by a number of Serbians about the NATO bombing of FRY. The Grand Chamber rejected the complaint, holding that a Contracting State is not liable under the Convention for effects outside its territorial jurisdiction that happen to result from governmental decisions taken within its territory. The extra-territorial impact of a decision on someone outside the national territory of the Contracting State does not bring that person within the 'jurisdiction' of the State for the purposes of Article 1. The Court held at §80 that the Convention was not designed to be applied throughout the world, even in respect of the conduct of the Contracting States.
59. In the present case, the events complained of relate to actions or omissions in BIOT, Mauritius and the Seychelles. It is the Applicants' removal from BIOT, the conditions they endured in transit and their reception and treatment in Mauritius and in the Seychelles that form the subject matter of their complaint.⁴⁶ None of those events occurred within the UK. Furthermore, the Applicants' continued exclusion from BIOT can only properly be regarded as an act or omission having its effect in BIOT.⁴⁷
60. For these reasons, this Application is concerned, and concerned only, with acts and omissions relating to BIOT. In the circumstances, the position in this case is exactly covered by the decision in *Bankovic*, and the Applicants cannot claim to have been within the jurisdiction of the UK under Article 1 at the time when any of the relevant events occurred. In so far as the Interveners rely on their submissions in two other cases (*Al Skeini v. UK* (App. No. 55721/07) and *Al-Saadoon & Mufdhi v. UK* (App. No. 61498/08)), the Government relies on its Observations in those cases in response, separate copies of which can be provided to the Court in this case if necessary.

⁴⁵ App. No. 52207/99, (2001) BHRC 435.

⁴⁶ The alleged injuries are summarised in the Applicants' Grounds at §97-109: none of them involves anything occurring within the UK.

⁴⁷ The right to freedom of movement is guaranteed only by the Fourth Protocol, which the UK has not ratified. Furthermore, even if the UK were to ratify the Fourth Protocol, there would be a discretion under Article 5(4) as to its application as between the UK and any dependent territories. In any event, it is not the Applicants' presence in the UK that imposes any restriction on their movement to BIOT: it is a restriction on entry into BIOT, irrespective of where the Applicant might choose to start his journey.

(c) Applicants within the UK:

61. The Applicants' second argument is that many of them are now in the UK. However, that does not alter the analysis derived from the decision in *Bankovic*. The application of the Convention, and the jurisdiction of this Court, does not depend upon an applicant's physical presence within the respondent State when he happens to bring an application before this Court. Rather, it depends upon his physical presence within the jurisdiction of that State when the alleged violation occurred. Thus, the decision in *Bankovic* did not turn on the question whether the applicants in that case were present within any of the High Contracting Parties when the application was lodged at Court. Rather, the decision was determined by the fact that they were outside the jurisdiction of any High Contracting Party when the bombing occurred.
62. In the present case, the position is exactly the same. The Applicants are complaining about acts and omissions occurring in BIOT. As noted above, the continuing restriction on the Applicants' ability to return to the Chagos Islands is a restriction which operates in BIOT, not in the UK. In this context, the Government would add one further point. In §4.3 of their Further Submissions of the 16th November 2005, the Applicants suggest that those who first came to the UK were not entitled to social security on arrival. If they are attempting by this route to suggest that this Application is for that reason concerned with the actions of public authorities within the UK, the Government would respond as follows:
 - 62.1. This Application is not concerned with the entitlement of the Applicants to social security benefits in the UK, or any other aspect of their treatment while resident in the UK. It is concerned with their treatment in being removed from the Chagos Islands. Indeed, the question of their treatment in the UK is not even mentioned in the original Grounds of Alleged Violation.
 - 62.2. Furthermore, the Applicants could not now seek to complain in this Court about their alleged treatment in the UK over the availability of social security. They brought proceedings in the national courts complaining of such matters by means of judicial review in the High Court in *Couironne v. Crawley Borough Council and others* [2006] EWHC 1514 (Admin). The High Court rejected that claim on 30 June 2006. The claimants appealed, and their appeal was rejected by the Court of Appeal on 2 November 2007: [2007] EWCA Civ 1086; [2008] 1 WLR 2762, CA. No application was made to this Court within 6 months thereafter, and accordingly no complaint can now be made of any alleged violation based on this ground.

63. For these reasons, the fact that some of the Applicants are now in the UK cannot confer jurisdiction on this Court.

(d) Effective control:

64. Alternatively, the Applicants contend that the UK is liable for events occurring in BIOT because it exercises ‘effective control’ over the territory. However, that argument is flatly contradicted by a long line of jurisprudence from the Convention institutions,⁴⁸ all of which clearly hold that, in relation to territories for whose international relations a High Contracting Party is responsible, the only means by which the State’s responsibility can be engaged under the Convention is by means of a notification made under Article 56. That line of authority has recently been followed and confirmed by the decision of this Court in *Quark Fishing Limited v. UK*,⁴⁹ where it said this:

“Since there is no dispute as to the status of the SGSSI as a territory for whose international relations the United Kingdom is responsible within the meaning of Article 56, the Court finds that the Convention and Protocols cannot apply unless expressly extended by declaration. The fact that the United Kingdom has extended the Convention itself to the territory gives no ground for finding that Protocol No. 1 must also apply or for the Court to require the United Kingdom somehow to justify its failure to extend that Protocol. There is no obligation under the Convention for any Contracting State to ratify any particular protocol or to give reasons for their decisions in that regard concerning their national jurisdictions. Still less can there be any such obligation as regards the territories falling under the scope of Article 56 of the Convention.”

65. In other words, the authorities on which the Applicants seek to rely dealing with questions of ‘effective control’, such as *Issa v. Turkey*,⁵⁰ *Ilaşcu v. Moldova & Russia*,⁵¹ and *Loizidou v. Turkey*,⁵² are inapplicable to situations where a High Contracting Part is responsible for the international relations of some dependent territory. The concept of ‘effective control’ has been developed by this Court in order to deal with a completely different situation, such as the Turkish occupation of Northern Cyprus, where a High Contracting Party occupies some territory outside its own national boundaries, but where the Convention would otherwise have applied. In order to prevent a gap arising in the protection provided by the Convention, the Court has held that such a State cannot deny its responsibility under the Convention in such circumstances. However, those principles simply do not apply to territories for whose international relations a High Contracting Party is responsible, as is clearly demonstrated by the decision in *Quark*.

⁴⁸ The case-law is cited in the Applicants’ Further Submissions of 16.11.05 at §1.15.

⁴⁹ App No. 15305/06, decision 19.9.06.

⁵⁰ App. No. 31821/96, judgment 16.11.04.

⁵¹ App No. 48787/99, judgment 8.7.04.

⁵² App. No. 15318/89, judgment 18.12.96.

66. Furthermore (and contrary to the Applicants' argument⁵³) the decision in *Quark* does not in any way depend on the extent to which the dependent territory in question has achieved any degree of autonomy. The principle on which that case is based (and all the earlier case-law before it) is hard-edged: where a High Contracting Party is responsible for the international relations of some other territory, the only means by which the State's responsibility under the Convention can be extended to that territory is by means of a notification under Article 56.
67. Moreover, the Applicants' argument in this regard (which is supported by the Interveners in §5 of their Submissions) would if accepted significantly undermine the principle of legal certainty. Any test for State responsibility which depended on the level of autonomy achieved by a dependent territory would be reliant on an evaluative test which would be near impossible to ascertain in advance. Furthermore, it would lead to extreme legal difficulties if the status of the dependent territory varied over the course of time. So, for example, a dependent territory might develop constitutional self-government, but there might be exceptional circumstances in which government from the United Kingdom would have to be re-imposed. The application of the Convention to the territory could not sensibly fluctuate by reference to such changing circumstances. In contrast, the position adopted by this Court in *Quark* has the distinct advantage of adopting a bright-line test that can leave neither the Contracting Parties nor any individual in any doubt as to the scope of application of the Convention.
68. The Interveners assert at §5(2) of their Submissions that the BIOT has "never had . . . anything which could properly be described as a government." That is simply wrong. While it is true that there has never been an elected representative system in BIOT, the territory has at all material times since 1965 been governed and administered by the BIOT Commissioner and his staff in accordance with the BIOT Constitution from time to time in force.
69. Alternatively, even if it were the case that the decision in *Quark* was in some way dependent on the degree of autonomy achieved by the relevant territory in that case ('SGSSI'), there is no relevant difference between the respective levels of independence of SGSSI and BIOT. There was no resident civilian population on SGSSI, the administration of the territory was conducted entirely by officials located elsewhere (in the Falkland Islands) and the Commissioner (who was a Foreign Office official) was under the direct control of the Secretary of State in London, who could issue instructions as to the exercise of his functions in relation to SGSSI. In *R (Quark) v.*

⁵³ See their solicitors' letter of 20.6.07.

Secretary of State for Foreign and Commonwealth Affairs,⁵⁴ the House of Lords (per Lord Bingham at §4) observed that “SGSSI is a remote territory, far to the south of the Falkland Islands, close to the Antarctic Circle, and it has no inhabitants other than a transient population of about 12 scientists. Thus it is no surprise that it lacks the institutions (representative assembly, legislative council, courts and so on) ordinarily to be expected in a British Overseas Territory.” Furthermore, Lord Nicholls at §43 said this:⁵⁵

“In the present case the local government of South Georgia is comparatively undeveloped. It could hardly be otherwise, given there is no indigenous population and the inhabitants are largely confined to a handful of transient research scientists. But there is a genuine if simple form of local government, headed by a Commissioner having legislative and executive authority. He is resident in the Falklands Islands. The territory has its own laws. I can see no reason to suppose the European Court of Human Rights would disregard the existence of this governmental structure when considering the application of the Convention in this case.”

70. For these reasons, the Intervener’s Submissions in §5(3) are based on a factually inaccurate premise that the system of government in BIOT is any different from the system of government applied in SGSSI. There are no material differences between the two. Both are governed by Commissioners who discharged a legislative function. As such, there is no significant difference between the circumstances facing the Court in the *Quark* case and those facing it in this case. Indeed, it is fair to say that in §1.10 of their Further Submissions of the 16th November 2005, the Applicants themselves were seeking to class SGSSI with BIOT in the same category for the purposes of Articles 1 and 56 of the Convention. They were right, to that extent: and, in light of this Court’s decision in relation to SGSSI in *Quark*, the present Application must fail.

71. For these reasons, the concept of ‘effective control’ is inapplicable, and the only means by which the UK’s responsibility under the Convention could arise would be by means of a notification under Article 56 in relation to BIOT. No such notification has been given.

(e) The notification in relation to Mauritius:

72. Fourthly, the Applicants contend that the Convention applies in relation to BIOT because a notification was given by the UK in relation to Mauritius at a time when the Chagos Islands were a dependency of Mauritius and (the Applicants say) that notification continued to have effect in relation to BIOT after its creation, even in the absence of any separate notification in relation to the new territory. In response, the Government submits that –

72.1. the Applicants are wrong as a matter of legal analysis,

⁵⁴ [2005] UKHL 57, [2006] 1 AC 529, HL.

72.2. alternatively, it is does not assist their case even if they are correct.

73. It may be convenient to deal with the second point first, because it is shorter, and it provides a complete answer to the present Application. The Government submits that the Applicants' argument in this regard does not assist them, for two reasons:

73.1. First, it is a matter of record that the right of individual petition under Article 56(4) was never extended to Mauritius. Accordingly, even if it were correct to say that the notification given by the UK under Article 56(1) extending the Convention to Mauritius continued to have effect in relation to the Chagos Islands after they ceased to form part of Mauritius, that would not entitle the Applicants to bring the present Application before this Court.

73.2. Secondly, it is also a matter of record that the First Protocol was never extended to Mauritius pursuant to Article 4. Accordingly, even if the Applicants' argument were correct (which it is not) and even if the right of individual petition under the Convention had been extended to Mauritius (which it has not), the Applicants could not bring a claim under A1.P1.

74. For these reasons, it does not matter whether the Applicants are correct in their analysis of the effect of the notification given under Article 56(1) in relation to Mauritius. However, for the sake of completeness, the Government will deal with that point also.

75. The factual position is not in dispute. The Convention was extended to Mauritius and the Seychelles on the 23rd October 1953 by a notification duly made under what is now Article 56(1). That extension did not in terms refer to the Chagos Islands, which were then a dependency of Mauritius. However, for the avoidance of doubt, the Government accepts that the 1953 notification had the effect of extending the Convention to the whole of Mauritius and its dependencies, including the Chagos Islands.

76. Nevertheless, it is submitted that that notification lapsed in relation to the Chagos Islands when BIOT was created in 1965, and it lapsed in its entirety when Mauritius achieved independence in 1968. No separate extension of the Convention has ever been notified in relation to BIOT. Furthermore, the revised notifications made in January 1966 and thereafter have always excluded

⁵⁵ See also the speech of Baroness Hale at §94.

any reference to BIOT. For these reasons, the UK is not responsible for alleged violations of any rights guaranteed by the Convention in BIOT.

77. The Applicants' argument to the contrary is based on a misunderstanding of the effect of a notification under Article 56(1). They seem to believe that it operates by reference to a specific physical area, which is fixed for all time when the notification is made. That is incorrect. A notification applies to a political entity. That is apparent from the wording of Article 56(1) itself, which refers to "the territories for whose international relations [the High Contracting Party] is responsible". A 'territory' is plainly a political entity. A High Contracting Party cannot be responsible for the international relations of a geographical area, except to the extent that that area constitutes a political entity. Furthermore, the area of land (or sea) falling within any particular political entity may change over time – for example by acquisition, alienation, reclamation or erosion: but the notification continues to apply to the political entity, within its existing frontiers from time to time. If new territory is added to the political entity, a new notification is not required: and if land is removed from the political entity, then the notification lapses in relation to that portion of the land. That was the legal analysis offered by the Government to the House of Lords in *Bancoult 2*, and it was accepted: see §64, §116 & §120.
78. With respect, the House of Lords were plainly correct. One need only consider the hypothetical example of some part of a High Contracting Party becoming autonomous, whether through secession or through the exercise of a recognised right to self-determination. The successor political entity would be obliged to make its own notification to the Council of Europe or, if appropriate, formally to join as a separate Contracting State. Indeed, the article by Menno Kamminga⁵⁶ on which the Applicants themselves seek to rely demonstrates that that is exactly what has happened in practice. For example, when the former Czech and Slovak Federal Republic split, and again when the former Socialist Federal Republic of Yugoslavia split, each of the new States felt compelled to notify the Secretary-General that they would continue to be bound by the Convention. In other words, there was no international consensus that any notifications that had previously been given by a previous State automatically binds a new State. Rather, the Convention applies only by virtue of the notifications given by the new political entity.

⁵⁶ 'State Succession in Respect of Human Rights Treaties' (1996) 6 EJIL 469. The author recognises at p. 471 that some commentators consider that "recent State practice showed a clean slate approach in respect of all new States, not merely in respect of newly independent ones". He cites in this context the views of A. Bos in 'Statenopvolging in het bijzonder met betrekking tot verdragen', 111 *Mededelingen van de Nederlandse Vereniging voor International Recht* (1995) 55.

79. In this case, when the UK made its notification in 1953 in relation to ‘Mauritius’, it had the effect of rendering the UK responsible for any violations of the ECHR in the territory of that colony (including its dependencies). With effect from the 8th November 1965, the Chagos Islands ceased to form part of that colony, and (together with other islands formerly part of the separate colony of the Seychelles) they were instead incorporated as a new and separate legal entity – BIOT. As a result, the Chagos Islands ceased to be part of the legal entity in respect of which the 1953 notification had been made, and that notification ceased to apply to them. BIOT came into being as a new and separate legal entity, in respect of which no notification has ever been made.
80. Furthermore, when Mauritius achieved independence, the UK notified the Council of Europe that it was no longer responsible for the international relations of Mauritius. With effect from the 12th March 1968, the 1953 notification in respect of ‘Mauritius’ accordingly lapsed in its entirety.
81. For these reasons, the Applicants’ arguments based on the notification under Article 56 in relation to Mauritius are wrong. However, even if the Applicants’ analysis of the notification in relation to Mauritius were correct, it would not assist them, because no right of individual petition was ever extended to Mauritius, and also the First Protocol was never extended there (as explained in §73 above).

(f) Other international agreements:

82. Finally, the Applicants contend that the supervisory bodies of the UN human rights instruments consider that those instruments apply to BIOT, and (the Applicants say) it would therefore be ‘anomalous’ if the Convention did not. In response, the Government makes the following submissions:
- 82.1. The question whether the Convention applies is an autonomous one for this Court, to be decided in light of the notifications given by the UK to the Secretary General, in light of the provisions of the Convention itself, and in light of this Court’s previous case-law. The answer is clear, for the reasons outlined above: the Convention does not apply. Nothing is to be gained from considering what the position might be in relation to other international instruments.
- 82.2. As the Applicants rightly recognise in §5.2 of their Further Submissions of the 16th November 2005, the UK does not accept that the ICCPR applies to BIOT, because there is no permanent civilian population there. It would, accordingly, be particularly

inappropriate for this Court to be invited to make a ruling under the Convention by reference to a contested issue under another instrument.

(g) Conclusion:

83. For the reasons outlined above, the Court has no jurisdiction in this case.

(iv) The Applicants are not ‘victims’

84. Alternatively, even if this Court does have jurisdiction, the Government submits that the Applicants are not ‘victims’ for the purposes of Article 34 of the Convention. This Court has recognised that individuals may fail to qualify as ‘victims’ if adequate redress has been afforded by the national authorities, since the Contracting State is thereby treated as having remedied the violation.⁵⁷

“When an individual accepts a sum of compensation in settlement of a civil claim and renounces further use of local remedies, he or she can no longer claim to be a victim of a violation of the Convention (Caraher v. the United Kingdom (dec.), no. 24520/94, ECHR 2000-I; Powell v. the United Kingdom (dec.), no. 45305/99, ECHR 2000-V; and Hay v. the United Kingdom (dec.), no. 41894/98, ECHR 2000-XI. See also, more recently, Calvelli and Ciglio v. Italy, no. 32967/96, § 55, 17 January 2002, unreported).”

85. As noted above, the Government has already provided the following financial compensation to, or for the benefit of the Applicants (in addition to the sums mentioned in §20.7 above):

- 85.1. In 1972, £650,000 was paid to the Mauritian Government to cover the cost of resettlement.⁵⁸ This is worth over £6 million in today’s money.
- 85.2. In 1982, £4 million was paid in settlement of the *Vencatessen* proceedings.⁵⁹ This would now be worth over £10 million. The settlement was reached on the understanding that the *Vencatessen* proceedings would be withdrawn and that the Mauritian Government would take steps to ensure that renunciation forms were signed by individual recipients of compensation awarded by an independent trust fund operated by the Chagossians: *CIL* [A580]. Renunciation forms were subsequently signed by all the relevant Chagossians except 12: *CIL* [A646-647].

⁵⁷ See *Rechachi and Abdelhafid v. UK*, App No. 55554/00, decision 10.06.03.

⁵⁸ *CIL* [J43]. Agreement on the payment was reached between the Governments of the United Kingdom and Mauritius in September 1972. Payment was made in March 1973.

⁵⁹ *CIL* [J71] to [J72].

86. The Applicants thereby received adequate financial compensation, as the domestic court has held.⁶⁰ In particular, the House of Lords in *Bancoult 2* described the decision in the *Chagos Islanders Litigation* as being that “it unequivocally affirmed the validity of the 1982 settlement. The UK government had discharged its obligations to the Chagossians by payment in full and final settlement.”⁶¹ The Applicants have offered no answer to this point.
87. Instead, they now seek to make a tangential complaint in their Grounds, at §63 and §71, that although a payment was made to the Mauritian Government, no equivalent payment was made by the UK to the Government in the Seychelles, which remained a British colony until its independence in 1976. In response, the UK Government would make the following submissions:
- 87.1. The UK Government explained why no payment was made to the Seychelles Government in 1972 (see the Applicant’s Grounds at §71). There is no evidence from the Applicants to suggest that that explanation is in any way incorrect. Indeed, there were no findings made by Ouseley J that the Chagossians who returned to the Seychelles suffered any privation. They were integrated into Seychellois society: *CIL* [J89, 90, 453, 734]; [A537, 773].
- 87.2. Further there were a number of distinctions to be drawn in relation to any claim by Seychellois Chagossians:
- 87.2.1. The UK Government agreed to pay for the construction of an airport in Mahe in compensation for the costs of resettlement of the Seychellois in BIOT: *CIL* [J16].
- 87.2.2. The Seychellois islands which previously formed part of BIOT were returned to the Seychelles upon its independence in 1976.
- 87.2.3. The majority of those people returning to Seychelles in 1971 to 1973 were contract labourers returning home: *CIL* [A771].
- 87.2.4. Only 200 Seychellois Chagossians are said to have had claims against the UK Government: *CIL* [J90].
- 87.3. As noted above, the *Vencatessen* proceedings were treated as a representative action brought generally for the Chagossians, and accordingly the £4 million paid in settlement

⁶⁰ *CIL* [J583]-[J584]; [A570]-[A614].

⁶¹ *Bancoult 2*, at §21.

of those proceedings was paid for the benefit of all Applicants who signed the renunciation forms. The Seychellois Chagossians had been informed of the settlement negotiations before they took place but did not participate in them: *CIL* [J254].

- 87.4. The claims brought by the Seychellois Chagossians (who are far fewer in number) were not struck out by the domestic court on the basis of their having signed renunciation forms. On the contrary, their claims were dismissed on limitation grounds alone: *CIL* [J684, 685, 733]. Ouseley J found that they could have contacted the Mauritian or English lawyers to seek compensation but did not do so: *CIL* [J686].
88. The Applicants have also complained about certain alleged delays in distributing the funds made available by the UK Government (*e.g.* Grounds §63). However, the distribution of those funds were matters entirely outside the UK Government's control. It cannot be held responsible for any alleged shortcomings on the part of the Mauritian Government, or any other party, in applying those monies to the benefit of the Applicants. In the circumstances, the UK Government submits that the national courts have already determined that the Applicants' claims have been settled in full, and there is no credible basis on which the Applicants can now invite this Court to take a different view.
89. Leaving aside the question of financial compensation, by analogy with this Court's approach to the award of just satisfaction under Article 41 of the Convention, it is also appropriate to take into account the other respects in which the Applicants' legal rights have already been protected or vindicated:
- 89.1. In *Bancoult 1* the national court made a declaration that the 1971 Ordinance had been made unlawfully. Declarations are often treated by this Court as providing a sufficient vindication of an applicant's rights.
- 89.2. By virtue of the British Overseas Territories Act 2002, over 1,600 British passports have been issued to Chagossians, and a further 3,400 odd may be eligible for full British citizenship, which carries with it an unconditional right to enter and remain in the UK. The Applicants themselves claim that about 350 of them have taken advantage of that right and are currently resident in the UK.⁶² In fact, the Government believes that over 1,000 Chagossians have taken advantage of this right. In so far as it lies with the UK Government's hands to provide the Applicants with the right to an alternative home to that in Mauritius or the Seychelles, this has been done.

90. For these reasons, the Government submits that the Applicants cannot be regarded as ‘victims’.

(iv) Failure to exhaust domestic remedies

91. Alternatively, the Application is at least partly inadmissible on the ground that the Applicants have failed to exhaust their domestic remedies.

92. In particular, a number of claims now advanced before this Court were simply never articulated before the domestic courts. Thus:

92.1. None of the Applicants complained in the domestic courts that their homes had been destroyed before their own eyes.

92.2. None of the Applicants brought a claim against the United Kingdom Government on the basis of the conditions on any sea voyage from BIOT to either Mauritius or the Seychelles. Ouseley J expressly remarked that no specific cause of action had been raised on the basis of those events: *CIL* [J431]. The Applicants now seek to make them part of their complaint under Article 3. They should have raised the substance of this complaint in the domestic court first.

92.3. No pleaded case was raised by the Applicants about the conditions they claim to have endured on arrival in the Seychelles. Again, it cannot now form part of the Applicants’ Article 3 complaint in this Court.

92.4. No particularised complaint was made about suicide in the domestic proceedings. There was a wholly unparticularised reference to it on a generic basis (without identifying any relevant individual cases) in the Applicants’ pleading, as discussed at *CIL* [J436].

93. In addition, one of the claims made in the *Chagos Islanders Litigation* was for alleged infringements of the Applicants’ property rights: see §174-177 of the Applicants’ Grounds. That claim was rejected by Ouseley J as unarguable. He concluded that no relevant property rights arose under domestic law: *CIL* [J430]. The Applicants did not appeal against that part of his judgment, which is why §174-177 of their Grounds of Alleged Violation before this Court do not refer to any finding by the Court of Appeal in this regard. Having chosen not to pursue their

⁶² See §4.1 of their Further Submissions of 16.11.05.

property claims on appeal in the national court, the Applicants are not now entitled to raise a claim under A1.P1 in this Court.⁶³

Conclusion

94. For the reasons outlined above, the Government respectfully submits that the Application should be dismissed as inadmissible on all or any of the grounds listed in §52 above.

⁶³ The Government does not suggest that an applicant must appeal to the very highest level in all cases, but it is submitted that a deliberate decision not to pursue even a first appeal must mean that there has been a failure to exhaust domestic remedies: see *Leech v. UK*, App. No. 20075/92, decision 31.8.94.

V. ARTICLE 3

(i) Introduction

95. Alternatively, if the complaint is admissible, the Government submits that there has been no violation of the rights guaranteed by Article 3. The Applicants set out their complaints in relation to Article 3 under the following headings in §203 of their Grounds:
- 95.1. the decision making process leading to the removal;
 - 95.2. the removal itself;
 - 95.3. the manner in which it was carried out;
 - 95.4. the reception conditions on their arrival in Mauritius and the Seychelles;
 - 95.5. the prohibition on their return;
 - 95.6. the refusal to facilitate return after *Bancoult I*;
 - 95.7. the subsequent enactment of fresh prohibitions on return.
96. The Government will respond to each in turn, dealing with the 2nd – 4th complaints and the 5th – 8th complaints together.

(ii) The decision making process

97. The Applicants complain in §204-206 of their Grounds about the decision making process in the 1960s. They say that the UK “resolved to lie to the United Nations” and that the decision making process was “inherently demeaning” to the Applicants. They also say that the language used by certain UK officials at the time “was offensive and demeaning”.
98. In response, the Government fully recognises that the language used at the time by some officials was indeed offensive and should never have been used. Nevertheless, it is submitted that none of this amounts to a violation of Article 3.

99. Article 3 prohibits torture and inhuman or degrading treatment or punishment. In order for a violation to occur, the ‘victim’ must accordingly have been directly ‘treated’ by State agents. As this Court said in *Ireland v. UK*,⁶⁴ at §162:

“ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.”

100. In the present case, the decision making process of itself did not involve any treatment of the Applicants at all. The consequences of the decision and its implementation were certainly capable of impacting on the Applicants (by means of their removal from the Islands) – but those are matters about which a separate complaint is made, and will be answered below. Under this heading the Applicants are simply complaining about the decision making process itself. So far as that is concerned, it did not involve any treatment of the Applicants. In particular, there is no evidence before the Court that any of the Applicants was aware of the terms in which they were being described by officials in internal Foreign Office documents, and there is no evidence that any of them was aware of anything being said by UK representatives to the UN.⁶⁵ As such, the decision making process is itself incapable of engaging Article 3. It simply did not involve any treatment of the Applicants, in any relevant sense.⁶⁶

(iii) The removal from the Islands

(a) Introduction:

101. Next, the Applicants complain about their removal from the Chagos Islands (Grounds §207-212). In particular, they make the following specific complaints.

(b) Lack of consultation:

102. First, they say that they were not consulted (Grounds §207). In response, the Government acknowledges that the residents on the Chagos Islands were not consulted in advance. They were presented with a *fait accompli*. Nevertheless, that cannot constitute a violation of Article 3, for the same reason as before – namely, it involved no ‘treatment’ of the Applicants at all. The fact of removal was undoubtedly capable of impacting on the Applicants, but the mere fact that the decision was reached without consultation cannot involve any relevant treatment for the

⁶⁴ App. No. 5310/71, judgment 18.1.78, at §161.

⁶⁵ Indeed, in a separate context it forms part of their complaint that they were kept unaware of such matters at the time: see §264(a) of the Grounds. As such it is inconsistent of them to seek to rely on these matters in relation to Article 3.

purposes of Article 3, let alone treatment which reaches the minimum level of severity to constitute a violation of that provision.

(c) Mass deportation is a 'crime against humanity':

103. Secondly, the Applicants say that mass deportation is a 'crime against humanity' (Grounds §208). A similar suggestion is made in the Interveners' Submissions at §26. In response, the Government submits that, whether that assertion is true or not, it is again irrelevant to the question whether any individual Applicant has suffered a violation of his rights under Article 3. The question under the Convention is whether the actual treatment of individual applicants reached the minimum level of severity required for a violation of that provision. It is an entirely separate question whether (for some other purposes of legal classification) any form of mass deportation can properly be described as a 'crime against humanity'. The only issue for this Court is to consider the actual treatment that was endured by these Applicants.

(d) The manner of removal:

104. Thirdly, the Applicants complain about the manner of their removal (Grounds §213-216). So far as the facts are concerned, the judgment of the national court in the *Chagos Islanders Litigation* provides the only authoritative examination of what happened. As noted above, the Judge held (i) that no coercion was used, (ii) that allegations about intimidation through threats of bombing or being killed were not sustained by the evidence, and (iii) there were no British officers present at the removals. In addition, there was no finding made by Ouseley J that any of the Applicants' houses had been demolished, let alone that this had been done in front of them.⁶⁷ In the circumstances, it is inappropriate for the Applicants to invite this Court to reach any different findings on the facts. It is particularly inappropriate in a case such as this where the complaint has been brought so long after the event, and when so many of the relevant witnesses have died.

⁶⁶ In *Ireland v. UK*, the Court noted at §181 that discreditable and reprehensible conduct did not constitute an infringement of Article 3.

⁶⁷ In fact, the circumstances of the removal of the Chagossians from Diego Garcia were such that the preliminary construction work for the airport runway on Diego Garcia commenced prior to their departure and accordingly did not involve the destruction of any houses prior to October 1971. It involved the construction of a temporary airstrip, but there was no factual finding as to whether that construction led to the demolition of any houses: *CIL* [A359]. The claimants in the *Chagos Islanders Litigation* adduced photographic evidence that showed that a number of dwellings still remain (albeit in a derelict state) on Diego Garcia. The majority of the Chagossians were removed from Diego Garcia to Peros Banhos or the Salomon Islands, where they were re-housed: *CIL* [A304, 305, 323, 332, 335, 345]. No construction works have been undertaken in Peros Banhos or Salomon and so none of the dwellings there have been demolished. There was no finding by Ouseley J that any houses were destroyed in front of the Applicants.

In so far as the Court is willing to consider the matter, it will be recalled from *Ireland v. UK*,⁶⁸ that an allegation under Article 3 must be proved “beyond reasonable doubt”.

105. Turning from the facts to the law, the Applicants contend that the events gave rise to “feelings of fear and anguish and inferiority capable of debasing them”, and they rely by analogy on *Ireland v. UK*,⁶⁹ and *Ilhan v. Turkey*.⁷⁰ In response, the Government submits that neither case provides any analogous support for the present complaint:

105.1. In *Ireland v. UK* the applicants were subject to interrogation techniques which caused “intense physical and mental suffering ... and also led to acute psychiatric disturbances” (*ibid* at §167). The interrogation techniques consisted of (a) forcing detainees to stand for hours in a ‘stress position’, (b) hooding, (c) subjection to noise, (d) sleep deprivation and (e) deprivation of food and drink (*ibid* at §96). None of the Applicants in this case has been subjected to anything remotely approaching such ill-treatment.

105.2. In *Ilhan v. Turkey* the applicant had been kicked, beaten and struck at least once with a rifle (*ibid* §86). None of these Applicants was subject to any such ill-treatment.

106. The references in those cases to techniques which were “degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance” (*Ireland v. UK* at §167) must accordingly be read in the context of what had happened in those cases, as contrasted with the factual findings of the national court in this case. Viewed in that light, they provide no support at all for the suggestion that these Applicants have been subjected to any violation of their rights under Article 3.

107. The Applicants also seek to rely on *Mentes v. Turkey*⁷¹ and *Akdivar v. Turkey*⁷² in support of the allegation that the destruction of their homes on the Chagos Islands constituted a violation of Article 3. In response, the Government makes the following submissions:

107.1. There was no finding before the domestic courts that the Applicants’ homes had been destroyed, let alone that they were destroyed before their eyes. It formed no part of the

⁶⁸ App. No. 5310/71, judgment 18.1.78, at §161.

⁶⁹ App. No. 5310/71, judgment 18.1.78.

⁷⁰ App. No. 22277/93, judgment 27.6.00.

⁷¹ App. No. 23186/94, judgment 28.11.97.

⁷² App. No. 21893/93, judgment 16.9.96.

Applicants' case that they had been so destroyed. The Applicants' case was that they had been removed from their homes and were not able to return.

107.2. In neither *Mentes v. Turkey* nor *Akdivar v. Turkey* did the Court make any finding under Article 3: see *Mentes* at §77 and *Akdivar* at §99. In the circumstances, those decisions cannot be invoked in support of the present complaint.

107.3. No finding of violation is appropriate in this case. The factual premise for the complaint, namely that some of the Applicants witnessed the destruction of houses in which they had previously lived, is in fact inconsistent with the findings of fact, including the chronology of events, made by the Judge.

108. Finally under this heading, the Applicants complain about the conditions they claim to have endured on the sea journey to Mauritius or the Seychelles. So far as the facts are concerned, there was no pleaded cause of action raised by the Applicants in this regard before the domestic courts: *CIL* [J431]. In any event, the only evidence before the national court of any ill-treatment or suffering on any of the voyages related to a specific voyage from Diego Garcia in October 1971 in which horses were carried at the same time as the passengers: *CIL* [J37] and [J38]; [A332]. The voyage was carried out on board a ship operated by Moulinie & Co. In the circumstances, there is insufficient evidence on this issue to support a finding of a violation of Article 3 against the UK Government.

109. So far as the law relating to alleged conditions on the sea journey is concerned, the Applicants seek to rely on 3 decisions – namely, *Peers v. Greece*,⁷³ *Dougoz v. Greece*,⁷⁴ and *Kalashnikov v. Russia*.⁷⁵ The Government makes the following response:

109.1. The applicants in *Peers*, *Dougoz* and *Kalashnikov* were all prisoners in State custody. In the circumstances, the State was directly responsible for the conditions in which they were kept. By contrast, the Applicants in this case were never taken into State custody, and the ships on which they travelled to Mauritius or the Seychelles were neither owned nor operated by the Government. In the circumstances, the Government cannot be held responsible for the conditions in which the Applicants travelled.

⁷³ App. No. 28524/95, judgment 19.4.01.

⁷⁴ App. No. 40907/98, judgment 6.3.01.

⁷⁵ App. No. 47095/99, judgment 5.7.02.

109.2. In assessing whether a person has been subjected to degrading treatment, it is relevant to consider whether there was an intention to humiliate or debase him: see *Peers* at §68. In this case, there was no such intention on the part of the UK Government in relation to the travelling conditions, and none is alleged.

109.3. Even if both of the foregoing submissions were rejected, it is a matter for the Court to determine whether, after such a long lapse of time in which human memories become frail and unreliable, and based on the absence of any relevant allegations in the *Chagos Islanders Litigation*, it is possible now to be satisfied to the appropriate standard of proof that any treatment of the Applicants reached the minimum level of severity required for a violation of Article 3.

(e) Treatment on arrival in the Seychelles / Mauritius:

110. Fourthly, the Applicants complain about their treatment on arrival in the Seychelles and/or Mauritius (Grounds §217-220). Although the grounds refer to both Mauritius and the Seychelles, the ambit of the Court's review should be confined to treatment in Mauritius given that no complaint was made about the treatment of the Chagossians in the Seychelles and no findings of fact were accordingly made about it by the domestic court. In relation to the complaint about treatment in Mauritius, the Applicants rely on a string of expulsion cases: *Soering v. UK*,⁷⁶ *HLR v. France*,⁷⁷ *Ahmed v. Austria*,⁷⁸ and *D v. UK*.⁷⁹ In response, the Government makes the following submissions:

110.1. By definition, the treatment of the Applicants in Mauritius was not the direct responsibility of the UK Government.

110.2. The responsibility of the State under Article 3 in an expulsion case can only be engaged where "substantial grounds" have been shown for believing that the person concerned, if extradited, "faces a real risk" of being subjected to torture or to inhuman or degrading treatment or punishment: see *Soering* at §91. In the present case, the UK Government had no reason to believe that any residents from the Chagos Islands who went to Mauritius would be ill-treated there. Indeed, none is alleged.

⁷⁶ App. No. 14038/88, judgment 7.7.89.

⁷⁷ App. No. 24573/94, judgment 29.4.99.

⁷⁸ App. No. 25964/94, judgment 17.12.96.

⁷⁹ App. No. 30240/96, judgment 2.5.97.

110.3. On the contrary, it is part of the agreed background that many of those who lived or worked on the Chagos Islands regularly visited and/or stayed in Mauritius by choice in any event: *CIL* [J9; J26]. Furthermore, the national court has found that there was reliable evidence at the time that the Mauritian Government had “taken a by no means inconsiderable interest in the welfare of the Ilois” and that “the whole range of social services has been available from the outset to the families concerned”⁸⁰ and that “a commendable attempt has been made to share with the Ilois what housing is available”.⁸¹

110.4. For the avoidance of any doubt, those who went to the Seychelles “were believed to be fully integrated” with the local population within a relatively short space of time.⁸²

111. In the circumstances, there is simply no evidential basis for the assertion (Grounds §220) that the Applicants were “knowingly placed” in “conditions of poverty and degradation”.

(f) Conclusion:

112. In conclusion (Grounds §220) the Applicants draw attention to the vulnerability of some of those who were moved from the Islands, and they say that ‘several’ committed suicide. Citing *Keenan v. UK*,⁸³ they seek to implicate the UK in this regard. In response, the Government makes the following observations:

112.1. There was no particularised complaint about the suicide of any individual before the domestic court. Unsurprisingly there are accordingly no factual findings upon which this complaint is based.

112.2. In any event, the determining factor in *Keenan* was that the person who committed suicide was in prison at the time, and the Court held (*ibid* at §91) that where the State takes people into custody it comes under a duty to protect them, even from themselves. The present case is entirely different, because the UK did not take any of the Applicants into custody, nor (cf *Keenan* at §90) can the Applicants allege that any UK authorities were aware “of the existence of a real and immediate threat to life”.

113. For the reasons outlined above, the Government submits that the removal of the Applicants from the Chagos Islands discloses no violation of Article 3.

⁸⁰ *CIL* [A410].

⁸¹ *CIL* [A411].

⁸² *CIL* [A537].

⁸³ App. No. 27229/95, judgment 3.4.01.

(iv) The refusal to permit a return

114. The Applicants also complain that the UK's refusal to allow them to return to the Chagos Islands and the UK's refusal to facilitate such return after the decision in *Bancoult 1* constitutes a further violation of Article 3 (Grounds §221-222). However, they have identified nothing under this heading that is capable of constituting any treatment of the Applicants which even begins to approach the necessary level of severity required for a violation of Article 3.

(v) Conclusion

115. In conclusion, the Applicants contend (Grounds §223-224) that the UK's failure to acknowledge its own wrongdoing is somehow relevant in this context, citing *Amuur v. France*,⁸⁴ and *Dalban v. Romania*.⁸⁵ However, both of those cases were concerned with the anterior question whether the applicants could still claim to be victims within Article 35 after the respondent State had taken certain remedial steps. That is not the issue in this case under this heading. The only question in the present context is whether the UK's treatment of the Applicants reached the necessary level of severity to constitute a violation of Article 3. For the reasons outlined above, the Government submits that the answer is 'no'.

⁸⁴ App. No. 19776/92, judgment 25.6.96, at §36.

⁸⁵ App. No. 28114/95, judgment 28.9.99, at §44.

VI. ARTICLE 8

(i) Introduction

116. Furthermore, the Government submits that there has been no interference with the rights guaranteed by Article 8, alternatively that any such interference is justified. The Applicants' complaint under Article 8 may be summarised as follows:

116.1. They complain about an interference with the right to respect for 'private life' (Grounds §225-226) and for 'home' (Grounds §227), repeating for these purposes the same factual allegations as they make in relation to Article 3.

116.2. They also say that the UK is in breach of a positive obligation to facilitate a return to the Chagos Islands (Grounds §228-237).

116.3. The Applicants also say (Grounds §225) that any interference with the rights protected by Article 8(1) cannot be justified under Article 8(2) because (they say) the domestic courts "have already ruled that the removal of the applicants from their homes [was] unlawful"⁸⁶ and accordingly the interference cannot have been 'in accordance with the law'.

117. The Government will deal with each allegation in turn.

(ii) Respect for private life and home

118. The factual basis for the Applicants' complaint under Article 8 is essentially identical to that in relation to Article 3 (Grounds §225). On that basis, in so far as the Applicants intend to rely on the decision making process as a violation of Article 8, the Government repeats the submissions made in §97-100 above *mutatis mutandis*. The decision making process of itself had no impact on the Applicants, and as such it cannot have constituted a violation of Article 8.

119. Turning to the actual removal of the Applicants from the Chagos Islands, the relocation of the Chagossians to Mauritius or the Seychelles did not involve any interference with their family life. Spouses were not separated from each other, nor were children separated from their parents, and no complaints in that regard have been made. The family units remained intact and the

⁸⁶ The same allegation is repeated in §227 and again in §241.

Chagossians were able to enjoy their private and family lives in the different geographical locations where full civic rights were afforded to them. Families were able to choose where to relocate within the territories of either Mauritius or the Seychelles. There has been no disruption to those family ties by the UK Government.

120. Furthermore, the UK Government has sponsored the maintenance of ancestral graves in the Chagos Islands and paid for return visits by groups of the Chagossians on a number of occasions. It has also stated that it will allow future trips to the islands to enable graves to be tended.⁸⁷
121. In addition, the removal of the Chagossians to Mauritius was accompanied by the payment of the sum for resettlement that was specifically requested by the Government of Mauritius.
122. Those Chagossians who, following the entry into force of the British Overseas Territories Act 2002, have subsequently sought to enter the United Kingdom have been given full citizenship rights and have access in the United Kingdom to the employment market.

(iii) Positive duty to facilitate a return

123. The Applicants also contend that the UK is under a positive obligation to facilitate their return to the Chagos Islands (Grounds §228-237). They rely in this regard on the decision in *Dogan v. Turkey*.⁸⁸ For the reasons set out above, there has been no interference with the Applicants' Article 8 rights which would give rise to a positive obligation to return them to the Chagos Archipelago. Even if, *quod non*, there has been some interference with aspects of the Applicants' private or family life, that interference is not of such a magnitude as to give rise to the positive obligation contended for by them.

(iv) Justification

(a) Introduction:

124. If, contrary to all the foregoing submissions, there has been any interference with the rights guaranteed by Article 8(1), the Government submits that such interference is justified. This needs to be tested by reference to the three well known requirements – namely that the interference must be shown to have pursued a legitimate objective, in a manner that was in accordance with the law, and that it was proportionate.

⁸⁷ See §24 above and also *Bancoult 2* per Lord Hoffmann at §56.

⁸⁸ App. Nos. 8803-8811/02 & 8815-8819/02, judgment 29.6.04, at §143, §150-156, & §159-160.

(b) Legitimate objective:

125. The original depopulation of the Chagos Islands and the continued maintenance of restrictions on entry pursue a legitimate objective, namely the defence interests of the UK and its allies. So far as that is concerned, there has never been any doubt. The Government relies on the matters set out in §17-18 above.

(c) In accordance with the law:

126. Secondly, any interference is in accordance with the law. This needs to be addressed by reference to two moments in time.
127. First, there was the original removal of the population in the 1960s and 1970s. As noted above, the Applicants have repeatedly asserted in their Grounds that the decision in *Bancoult 1* means that the removal of the Applicants was unlawful. However, (i) that is not what was decided in that case and (ii) the decision has in any event been overtaken by subsequent developments in two respects.
128. Dealing with the first point, the national court in *Bancoult 1* ruled on the legality of s. 4 of the 1971 Ordinance. It held that the BIOT Commissioner had no power under the 1965 Constitution to enact that section because his powers were confined to making laws for the ‘peace, order and good government’ of the territory and (they considered) the 1971 Ordinance did not fall within the scope of that power. That is all that the case decided. This issue is revisited in more detail in relation to Article 6 below.
129. Since it was decided, the decision in *Bancoult 1* has in any event been overtaken by two other developments:
- 129.1. First, in the *Chagos Islanders Litigation*, Ouseley J heard evidence over 37 days and reached the conclusion, already noted above, that the court in *Bancoult 1* had proceeded on a misunderstanding of the facts. They had thought that the 1971 Ordinance had been used as the administrative tool for removing the population from the Chagos Islands. In truth, it had never been used. Accordingly, the legal ruling in *Bancoult 1* as to the validity of the 1971 Ordinance can have no relevance to the legality of the actual depopulation of the Islands. Reliance was never placed on that Ordinance by any UK authorities in order to achieve the depopulation. Accordingly, there is no relevant ruling from the national court to suggest that the actual depopulation was unlawful.

129.2. Secondly, it now emerges that *Bancoult 1* was in any event wrongly decided in relation to the validity of the 1971 Ordinance. It will be recalled that the court based its decision on the view that the legislative power conferred on the Commissioner to make laws for the ‘peace, order and good government’ of the territory was not broad enough to enable him to make a law excluding the resident population. However, the House of Lords in *Bancoult 2* has held that no such limitation can properly be read into the expression ‘peace, order and good government’ as a matter of national law.⁸⁹ Lord Hoffmann said in terms that *Bancoult 1* had been “wrongly decided” on this point.⁹⁰

130. Accordingly, there is no relevant ruling by the national court to suggest that the actual depopulation of the Chagos Islands was unlawful as a matter of domestic law. On the contrary, the decision in *Bancoult 2* shows that it fell within the legislative competence of the UK to remove the population in the defence interests of the UK and its allies.

131. The second point in time at which this issue needs to be addressed is the present day. As things stand, the 2004 Orders remain in place, and the Applicants remain unable to enter the Chagos Islands without a permit. They sought to challenge the legality of the 2004 Orders in *Bancoult 2*, and they failed. As a result, the lawfulness in domestic law of the current legislative measures has been upheld.

132. For these reasons the Applicants are entirely wrong to say that the UK cannot justify the measures in question. On the contrary, the national courts have held, in *Bancoult 2*, that the exclusion of the Applicants is lawful.

(d) Proportionality:

133. Finally there is the question of proportionality. So far as that is concerned, the Government relies again on the findings of the House of Lords in *Bancoult 2*, and on the evidence that led their Lordships to reach the conclusion they did in that case.

134. In short, the whole reason for creating BIOT was in order to provide for a military base which is vital to the defence interests of the UK and its allies. As noted in §17-18 above, not only is the base itself of the highest strategic importance, but also the US security assessment is that the entire Archipelago needs to remain unpopulated. The decision to move the population, and to

⁸⁹ See Lord Hoffmann at §50, Lord Rodger at §108-109 & Lord Carswell at §127-130.

⁹⁰ *Ibid* at §50.

keep the Islands unpopulated, has accordingly been taken on the very highest political, military and diplomatic level.

135. Furthermore, a number of other important factors need to be borne in mind when assessing proportionality:

135.1. In the period between the decision in *Bancoult 1* and the enactment of the 2004 Orders, the Claimant's solicitors had been pressing "for the provision of infrastructure on the islands to permit a return by the Chagossians".⁹¹ In particular, the *Chagos Islanders Litigation* had been issued in April 2002 seeking a declaration of "the steps necessary to make practicable the right of return to the Chagos Archipelago".⁹² In other words, the UK was aware that, if any of the Applicants went to live in the BIOT, they would be demanding significant expenditure of public funds in order to allow them to survive above subsistence level. As noted in §21 above, there are none of the resources necessary to sustain civilized life on the Islands. The House of Lords in *Bancoult 2* accepted this evidence, and they also accepted that, as a matter of domestic law, the Government was entitled to take into account the likely demands on the public purse when making the 2004 Orders.⁹³ Any assessment of the proportionality of the impugned decisions must therefore recognise that the question of allowing the Islands to be repopulated involves (among other things) an assessment to be made as to the application and prioritisation of limited public funds. The State is allowed a wide margin of appreciation in such matters, particularly in light of the very significant sums of money that would be likely to be required (as to which see §22 above), and the fact that such expenditure to sustain a modern population on the Islands would involve an open-ended commitment of indefinite duration.

135.2. The most immediate factor that precipitated the making of the 2004 Orders was the discovery that unauthorised landings on the Islands were being planned.⁹⁴ After October 2003, indications began to emerge, including from the Mauritian media, that members of the Chagossian community were contemplating organising one or more expeditions to BIOT with a view to re-establishing permanent settlements there, without reference to the BIOT authorities, and without reference to the Crown as owner of the land. It also emerged from a number of sources that a political group whose objectives included the

⁹¹ See the Divisional Court judgment in *Bancoult 2*, at §84.

⁹² See the Divisional Court judgment in *Bancoult 2*, at §86.

⁹³ *Ibid* at §54-56, §58, §112-113 & §132.

⁹⁴ See *Bancoult 2* per Lord Hoffmann at §25.

closure of US defence facilities worldwide was supporting the venture, and was intending to facilitate a landing on Diego Garcia in order to provoke a confrontation with the US military. The assessment of UK and US authorities was that these threats had to be taken seriously, and that any landing was most likely to take place in the autumn of 2004. The US authorities made clear to their UK counterparts that they would regard landings in the BIOT, including landings on the outer islands, as entailing a serious threat to the security and effective operation of the defence facility on Diego Garcia.⁹⁵

135.3. In some situations, a government will be faced with a range of options, some of which may be more or less intrusive than others. However, in the present situation the choice is hard-edged. The UK can either allow the Islands to be repopulated, with all the financial and security implications that entails, or not. There is no middle ground.

135.4. All of the Islands are Crown land, and none of the Chagossians owns any land on the Islands.

135.5. Visits to the Islands have been organised and paid for by the BIOT authorities in 2000, 2006 and 2008. As noted above, the Foreign Secretary has given an assurance that the Government will keep in close touch with the Chagossian communities and will consider carefully future requests to visit the territory.

135.6. The UK has over the years paid substantial sums in discharge of any liability in relation to the displacement and resettlement cost of the Applicants.

135.7. The Chagossians are not stateless. Many of them are British citizens, and the rest are either Mauritian or Seychellois. Some will have dual nationality.

(v) Conclusion

136. For the reasons outlined above the Government submits that:

136.1. there has been no interference with the Applicants' rights under Article 8(1), alternatively

136.2. to the extent that there has been any such interference, it is justified under Article 8(2).

⁹⁵ See *Culshaw 1*, at §110-114 (Exhibit IV), & *Culshaw 2*, at §144-148 (Exhibit VI).

VII. ARTICLE 1 OF THE FIRST PROTOCOL

137. Further, the Government submits that there has been no violation of the rights guaranteed by A1.P1. In support of their complaint under A1.P1 (Grounds §238-242) the Applicants seek to rely on essentially the same factual allegations as they do in relation to Article 8. In the circumstances, the Government's response is essentially the same:

137.1. There has been no interference with the Applicants' rights.

137.2. Alternatively, to the extent that there has been any such interference, it is justified.

138. In addition to repeating the submissions made above in relation to Article 8, the Government would also add three further points in relation to A1.P1. First, the right to live in a particular property not owned by the applicant does not as such constitute a 'possession' within the meaning of A1.P1: see *Teteriny v. Russia*.⁹⁶ To the extent that the Applicants are seeking to complain about any interference with their ability to live in houses on the Chagos Islands which they never owned⁹⁷ that is accordingly not a complaint they can make under A1.P1.

139. Secondly, A1.P1 protects rights recognised under domestic law, but in this case any occupational interest that the Applicants might have had in real property had been acquired by the Crown by virtue of the compulsory acquisition of title to the plantations in 1967.⁹⁸ A1.P1 does not guarantee the right to acquire property.⁹⁹

⁹⁶ App. No. 11931/03, judgment 30.6.05, at §46.

⁹⁷ The Chagossians were given permission to build houses on land owned by the plantation owners. The land remained the property of the plantation owner and the occupants of any given house could be changed at the plantation owner's insistence: *CIL* [J219-225]. Furthermore, Ouseley J concluded at [J430] that there was no arguable claim for damages arising in relation to property rights given the legislative regime that had been put in place by which all property rights had been compulsorily acquired in accordance with domestic law.

⁹⁸ *CIL* [J20, 21].

⁹⁹ *Van der Mussele v. Belgium*, judgment of 23 November 1983, Series A no. 70, p. 23, § 48, and *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, § 121, ECHR 2002-I.

140. Thirdly, any property rights that the Applicants may previously have enjoyed before they left the Chagos Islands have long been extinguished by the passage of time. This Court has repeatedly said that:¹⁰⁰

“the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered a ‘possession’ within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition”.

The Government submits that that principle applies in the present case. Any rights which the Applicants may previously have enjoyed in relation to movable or immovable property on the Chagos Islands has not been enjoyed by them for nearly 40 years. In the circumstances, it cannot constitute a ‘possession’ within A1.P1.

141. If, contrary to that submission, the Court holds that the Applicants are entitled to complain of any interference under A1.P1, the Government submits that the nature and extent of any such interference was extremely limited:

141.1. It is apparent from the judgment of Ouseley J that the Chagossians had very little in the way of personal possessions, beyond basic household furniture, garden produce and certain pets. They did not own their houses which were provided by the plantation company: *CIL* [J36; J220-222; A457].

141.2. In the circumstances, those Applicants who left the Chagos Islands will no doubt have been forced to leave behind a limited number of movable chattels, but they owned no immovable property and such rights as they had to occupy houses and/or to use uncultivated land for grazing *etc.* were necessarily impermanent.

142. For these reasons, and also for the reasons outlined above in relation to Article 8, the Government submits that there has been no interference with the Applicants’ rights under A1.P1, alternatively that any such interference is justified.

¹⁰⁰ See for example *Stretch v. UK* App. No. 44277/98, judgment 24.6.03, at §32; *Kopecky v. Slovakia* [GC] No. 44912/98, ECHR 2004-IX, judgment of 28 September 2004 at § 35; *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, § 69, ECHR 2002-VII; and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, §§ 82-83, ECHR 2001-VIII.

VIII. ARTICLE 6

(i) Introduction

143. The Applicants have two complaints under Article 6:

143.1. First, they contend (Grounds §94) that the 2004 Orders were “manifestly designed to overturn the *Bancoult* [1] judicial review judgment” and as such they constitute a form of “unilateral and extrajudicial annulment” of the effect of that judgment (Grounds §243(a) & §244-262).

143.2. Secondly, they seek to complain about “the [national] courts’ refusal to grant the applicants a hearing on their civil right to damages” (Grounds §243(b) & §263-286).

144. The Government will deal with each point in turn.

(ii) The *Bancoult* I judgment

(a) Introduction:

145. As noted above, the issue in *Bancoult* I concerned the scope of the BIOT Commissioner’s law-making power under the 1965 Constitution. As Laws LJ said at §21, “these proceedings are directed against an act (the [1971] Ordinance) of the BIOT legislature (the Commissioner)”.¹⁰¹ That is all the judgment decided.

146. The Applicants have, with respect, misunderstood, and as a result they have misrepresented, the effect of the *Bancoult* I judgment. They say that its “unequivocal purpose” was “to ensure the applicants could return to and remain in” BIOT (Grounds §245). In support of that assertion they rely on a number of matters listed in §245 of the Grounds.

(b) The reasons given for the judgment

147. First, they seek to rely (Grounds §246) on what Laws LJ said at §39 of his judgment:

“For my part I would certainly accept that a British subject enjoys a constitutional right to reside in or return to that part of the Queen’s dominions of which he is a citizen.”

¹⁰¹ In saying this, he was in fact quoting the Government’s analysis of the case, but went on to accept it in §22 of the judgment.

However, properly understood that remark does not assist the Applicants, for a number of reasons:

- 147.1.** First, it was *obiter*. It did not form any part of the court’s reasoning, as is apparent from its opening words: “For my part I would certainly accept” is not the language of a judicial finding. Rather, the judge was making an assumption favourable to the claimant for the purpose of that part of the legal argument. The reason why the judge was prepared to proceed on the basis of such an assumption (rather than making a ruling one way or the other) was that, even on the basis of that favourable assumption, the claimant’s argument under that particular heading failed. The judge was dealing in §37-44 of his judgment with a discrete legal argument – known as ‘the Witham principle’ – pursuant to which the courts presume that Parliament does not intend to allow ‘constitutional rights’ to be overturned by secondary legislation where the enabling provision is expressed only in general language. One of the issues under that heading was whether the alleged right of abode existed as a ‘constitutional right’. The court did not find it necessary to rule on that issue because, even assuming that such a right existed, the court held that the claimant’s argument under that heading was defeated by the Colonial Laws Validity Act 1865: see §44. In other words, the remark upon which the Applicants now seek to rely did not form any part of the judgment in that case. It was an assumption made for the purpose of disposing of an argument that was being rejected by the court.
- 147.2.** Even if Laws LJ could be taken to have expressed a generally applicable principle of English law, it would not assist the Applicants in this case. The judge said that he was prepared to accept that “a British subject” enjoys a constitutional right to reside in or return to “that part of the Queen’s dominions of which he is a citizen”. At the time of their exclusion, the Applicants were CUKCs, not British subjects. Furthermore, there was not and never has been any such thing as ‘citizenship’ of BIOT. Accordingly, even if it were correct, the judge’s analysis would not confer on the Applicants any right to reside in or return to BIOT.
- 147.3.** In any event, so far as the Applicants are now seeking to suggest that they have an overriding constitutional right to reside in or return to BIOT, that is one of the points that was decided against them in *Bancoult 2* by the House of Lords.¹⁰²

¹⁰² See *per* Lord Hoffmann at § 45; *per* Lord Rodger at §110, 117; *per* Lord Carswell at §126.

(c) The reasons given for the chosen order or relief:

148. Secondly, the Applicants allege (Grounds §247) that it was “evident to all parties” in *Bancoult 1* that “the purpose of the quashing order was to give effect to the applicants’ constitutional right to return to and remain in BIOT”. For the reasons given in §147.3 above, no such constitutional right has been established under domestic law. Furthermore, Counsel for the claimant in *Bancoult 1* had asked for a declaration that his client “is entitled to return to and remain in” BIOT. Laws LJ said this in response [Annex A2, p. 29]:

“I notice that your Form 86A ... only challenges the [1971] Immigration Ordinance and the policy by which the applicants were excluded from returning to the Territory under the Immigration Ordinance. That seems to me to confine the matter to all the points about section 4 of the 1971 Ordinance. Whether your client or others amongst the Ilois people might have occasion for some future and separate judicial review is another question, nothing to do with us today.”

When he was asked to respond, Counsel for the Secretary of State objected to the declaration sought. When Counsel for the Secretary of State made this objection, Laws LJ said “I think we are provisionally agreed to that” [Annex A2, p. 30]. Counsel for the claimant then repeated his request for the declaration [Annex A2, p. 31], which the court refused to make [Annex A2, p. 33].

149. In other words, it is entirely clear from the exchanges in court immediately after judgment was given in *Bancoult 1* that –

149.1. the Secretary of State was objecting to the grant of any declaration to the effect that the claimant had a right to return and remain in BIOT;

149.2. the court refused to grant the declaration sought by the claimant in the light of that objection.

150. In any event, for the reasons already discussed, it is entirely apparent from *Bancoult 2* that the Applicants do not have a right to enter and reside in BIOT under national law.

(d) The actions of the Government following judgment:

151. Thirdly the Applicants contend (Grounds §248-250) that, following the judgment in *Bancoult 1*, the 2000 Immigration Ordinance [Annex B7] “expressly acknowledged the rights for which the declaratory relief was sought in *Bancoult 1*”. With respect, it did no such thing. Nothing in the 2000 Immigration Ordinance [Annex B7] is expressed in terms of recognising any legal rights on the part of the Applicants, or any other person. On the contrary, the Ordinance continued to impose immigration controls in relation to BIOT. Those controls were relaxed to

some extent in relation to the Applicants in respect of many of the Chagos Islands, but not in respect of Diego Garcia: see Article 4(3). In other words, even after the 2000 Immigration Ordinance had been made, the Applicants had (i) no right to enter or reside on the principal island in the Chagos Archipelago, and (ii) no right of abode (as opposed to a right of entry) on any of the other Islands.¹⁰³

152. In the circumstances, it cannot properly be suggested that the 2000 Immigration Ordinance represented a recognition of any legal rights on the part of the Applicants.

(e) The 2004 Orders:

153. Finally, the Applicants contend (Grounds §252) that “the UK government responded only with delay and obstruction”. They say that measures for resettlement “were first delayed with reference to the ‘feasibility study’”. With respect, that criticism simply cannot be sustained. The Feasibility Study had been announced in the Secretary of State’s press release on the very same day that judgment was given in *Bancoult 1* (see the Grounds at §250). Far from involving any delay on the part of the Government, the Feasibility Study was a necessary precursor to any possible resettlement. The Islands had not been occupied for about 30 years, and there was no infrastructure there to support a modern population. In the circumstances, it would have been quite irresponsible for the Government to have allowed resettlement without first investigating whether it was feasible, and if so what support would be required. No responsible Government can allow settlement on its own land where there is no habitation, not sanitation, no adequate supply of fresh water and inadequate food resources. Indeed, Counsel for the claimant in *Bancoult 1* rightly recognised that commissioning the Feasibility Study was a step towards resettlement, and not a delaying tactic. He said this when judgment was handed down [Annex A2, p. 29]:

“the present British government, I think I am entitled to say, is by no means unsympathetic to the plight of these people. Your Lordships would have seen from the last set of affidavits that Her Majesty’s Government arranged and financed a feasibility study on the possibility of resettling the Ilois in the island ... We have been informed, my Lord, that the second stage of the feasibility study has now been authorised by the Foreign and Commonwealth Office.”

154. The Applicants’ present attempt to portray the Feasibility Study as a delaying tactic is accordingly misconceived. They then seek to complain that the 2004 Orders “abolished the right of abode in BIOT” (Grounds §55), that in enacting them “the Queen in Council had acted in direct defiance of the judgment in *Bancoult (No. 1)*” (Grounds §258) and thereby “the State

¹⁰³ See *Bancoult 2* per Lord Hoffmann at §18-19, §56 and §58.

violated its fundamental obligation to respect the rule of law” (Grounds §259). Although these allegations are all expressed in vigorous language, they are all entirely mistaken:

154.1. The Applicants have no right of abode in BIOT: see *Bancoult 2*.

154.2. The 2004 Orders do not defy the judgment in *Bancoult 1*, because that judgment was concerned only with the legality of the 1971 Ordinance.

154.3. Far from violating the rule of law, the Government’s respect for the rule of law has been vindicated by the decision of the House of Lords in *Bancoult 2*.

154.4. Lord Hoffmann in *Bancoult 2* (speaking for the majority) recognised at §58 that the decision effectively to re-impose full immigration control over the Chagos Islands could not be characterised as unreasonable or as an abuse of power.

155. The Applicants also say in §260 of the Grounds that the 2004 Orders “were not publicised”. The Government does not understand that complaint, because later in the same paragraph the Applicants recognise that their legal advisers were personally notified that the 2004 Orders had been made.

(f) Conclusion:

156. For the reasons outlined above, the Government submits that the enactment of the 2004 Orders did not involve any attempt to overturn by legislation the judicial decision in *Bancoult 1*. If it had, then the House of Lords could not have decided *Bancoult 2* as they did. The Applicants’ whole complaint under this heading stems from a misunderstanding of the judgment in *Bancoult 1*.

(iii) The right of access to the court

157. The Applicants’ 2nd complaint under Article 6 is that they have been denied access to the court because of “the courts’ refusal to grant the applicants a hearing on their civil right to damages” (Grounds §243(b) & §263-286). The Government’s short answer to this complaint is that it is misconceived, because it disregards (or misrepresents) the nature and significance of the hearing in the *Chagos Islanders Litigation*.

158. The first specific issue under this heading is the Applicants’ attempt to rely on the alleged concealment of documents for more 30 years by the UK Government (Grounds §264(a)). In response, the Government makes the following submissions:

158.1. The Applicants' access to the national courts to pursue complaints against the State based on alleged violations of their rights under Articles 3 and 8 of the Convention and/or under A1.P1 did not depend on the content of any internal memoranda within the Foreign and Commonwealth Office (or certainly not to any significant extent). Rather, their access to the court depended on a cause of action based on the fact of their exclusion from BIOT, a fact of which they were all too well aware from the moment it happened. Ouseley J set out a detailed series of reasons why the relevant facts were or should have been known at all material times to the Applicants: *CIL* [J653]. As Ouseley J put it in *CIL* [J651]:

"Further, the breach, if breach it was, was plain at all times from 1965 onwards, and it is hopeless for the Claimants, or any of them to argue, if that is the point upon which they rely, that the breach could not have been discovered with reasonable diligence at least twenty years ago."

158.2. In so far as any official documents might have been of assistance to the Applicants in the national courts, and were relied on by them, those documents were relevant only to personal claims (e.g. for misfeasance in public office) against individuals officials. The availability of such claims against individuals is irrelevant to the question whether domestic law affords a remedy against the State for any violation of a Convention right. As this Court said in *Zlinsat Spol., S R.O. v. Bulgaria*:¹⁰⁴

"Even assuming that the applicant company could have sued the prosecutors who made the decisions in issue in their personal capacity ... according to the Court's case-law suing a private individual cannot be regarded as a remedy in respect of an act on the part of the State (see Pine Valley Developments Ltd and Others v. Ireland, judgment of 29 November 1991, Series A no. 222, p. 22, § 48; and Iatridis v. Greece [GC], no. 31107/96, § 47 in fine, ECHR 1999-II)."

158.3. Accordingly, if (which the Government denies) the non-availability of the documents hindered the Applicants in bringing any proceedings in the national courts, the Applicants were thereby hindered from bringing personal claims against individual officials, but they were not thereby deprived of access to the national courts for the purpose of vindicating their Convention rights against the State.

158.4. The suggestion that the Applicants were disabled from applying to the national court for any relief for 30 years because certain official documents had not been disclosed to them is, in any event, belied by the fact that the *Vencatessen* proceedings had been brought as long ago as 1975.

¹⁰⁴ App. No. 57785/00, judgment 15.6.06, at §55.

- 158.5. Furthermore, the domestic Court rejected any suggestion that documents had been improperly or deliberately withheld from the Applicants during the course of the *Vencatessen* litigation, this not least because the Applicants themselves disclaimed any suggestion that there had been improper conduct by the Government's legal advisers in the course of that litigation: *CIL* [J639-640].
- 158.6. The Applicants' entire complaint under this heading is predicated on the assumption that the disclosure of official documents by the Government is a necessary constituent for a fair trial under Article 6. There is no basis for such an assumption in the Court's case-law. Furthermore, the Government understands that documentary disclosure is not a universal feature of civil litigation among the High Contracting Parties, and since the Convention must have uniform application throughout the Council of Europe it cannot be inferred that a failure to provide such disclosure would involve a violation of Article 6.
- 158.7. The Government's decision to disclose official documents from the 1960s and 1970s was praised by the national court in *Bancoult 1* as "wholly admirable" (*ibid* at §63).¹⁰⁵ It was prompted by the fact that judicial review proceedings had been brought before the national court, and the Government accordingly owed the court an explanation as to why the 1971 Ordinance had been made.¹⁰⁶ In other words, if (contrary to the foregoing submissions) the Applicants needed to see any internal Government documents in order to have access to the court, they would have obtained sight of the same documents whenever they chose to bring the complaint they did in *Bancoult 1*. The fact that that complaint was not brought until 29 years after the 1971 Ordinance had been made cannot be laid at the Government's door.
159. Secondly, there seems to be an implicit complaint in §265 of the Grounds that the Convention was not incorporated into national law in the UK until the Human Rights Act 1998 came into force in 2000. However, the Convention does not need to be incorporated into national law in order to satisfy the requirements of Articles 6 and 13.¹⁰⁷
160. Thirdly, the Applicants contend in §266 of the Grounds that "the law of tort in England and Wales provides no general right to compensation for damages arising from harm unlawfully

¹⁰⁵ In the same vein, Ouseley J referred to the "evident openness of the Defendants" at [J352].

¹⁰⁶ A public authority's obligation to place its cards "face up on the table" by providing an explanation to the court in judicial review proceedings has been authoritatively set out in the cases of *R v. Lancashire CC, ex parte Huddleston* [1986] 2 All ER 941, at 945c-g, and *R v. Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310, at 315f-j and 316e-f.

¹⁰⁷ App No 5947/72 and others *Silver and others v. United Kingdom* (1983) 5 EHRR 347, at §113.

caused by the fault of another”, and that this “peculiarity of domestic law” (Grounds §268) somehow disabled the Applicants from bringing a successful claim in the national courts. In so far the Government understands this complaint, it is manifestly misconceived. By definition, English law will always provide an award of damages if injury is caused unlawfully by the fault of another.¹⁰⁸ The reason why these Applicants have not obtained any award of damages from the national courts is not because domestic law fails to provide financial compensation for loss caused by unlawful acts. Rather, the Applicants have failed to obtain an award of damages from the national courts because they have failed to show that anything unlawful has happened to them in breach of domestic law. As such, the fact that their actions have failed does not mean that there has been any interference with their right of access to the court.

161. Fourthly, the Applicants make a number of obscure complaints in §267-273 of the Grounds that their various causes of action in the *Chagos Islanders Litigation* failed. However, it is unclear what they seek to gain from these arguments. It is trite law that the right of access to the court under Article 6 does not require that a person should necessarily be guaranteed a successful result in the national court.¹⁰⁹ All that is required is that he should have a proper opportunity to argue his case.¹¹⁰ The Applicants had that opportunity, and they took full advantage of it by bringing 4 sets of proceedings in the national courts. In particular, the hearing in the *Chagos Islanders Litigation* lasted 37 days, and the Applicants called 19 witnesses. They have unquestionably been allowed access to the court. The fact that their claims failed under national law cannot constitute a violation of Article 6. In particular, the fact that part of the claim was ‘struck out’ and that ‘summary judgment’ was given against the Applicants (as noted in the Court’s question 7(ii), quoted in §1 above) does not mean that the domestic court failed to consider the claim on the merits. Indeed, the length of the hearing and the length of the judgment in the *Chagos Islanders Litigation* demonstrate only too clearly that the claim was considered on the merits, and it was found wanting.

162. Finally, the Applicants complain (Grounds §274-286) about the Government’s successful reliance on the defence of limitation. The Government makes the following submissions in response:

¹⁰⁸ In accordance with the principle articulated by Lord Holt CJ in *Ashby v. White* [1703] 92 ER 126, at p. 136: “If the plaintiff has a right, he must of necessity have the means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and indeed it is a vain thing to imagine a right without a remedy, for a want of right and want of remedy are reciprocal.”

¹⁰⁹ *Fayed v. UK*, judgment 21.9.94, Series A no. 294-B, §65-67; *James and Others v. UK*, judgment 21.2.86, Series A no. 98, p. 46, §81.

¹¹⁰ See for example *Z v. UK*, App. No. 29392/95, judgment 10.5.01, at §95-103.

- 162.1. First, as a matter of principle, it is perfectly clear that limitation provisions are not incompatible with the right of access to the court under Article 6: *Stubbings v. United Kingdom*.¹¹¹
- 162.2. Secondly, the requirement for legal certainty and the prevention of stale claims is particularly relevant in a case such as this, where nearly all of the witnesses or potential witnesses for the Government had died by the time that the hearing before Ouseley J commenced, and the Applicants themselves have emphasised the number of their own witnesses who have also died.¹¹²
- 162.3. Thirdly, the Application reads in part (Grounds §282) as if the Applicants were inviting this Court to reach a different conclusion from the national court as to whether the limitation defence ought to have been allowed to succeed as a matter of domestic law. With respect, that is not an invitation this Court should accept. It is for the national court to apply its own national rules of procedure.
- 162.4. Finally, the Applicants appear to complain (Grounds §285) that the necessary effect of a limitation provision is that claims which might otherwise have succeeded are prevented from being pursued. But that is inevitably the result of any limitation provisions, including Article 35(1) of the Convention.
163. In short, the Applicants' complaint that their claims "have never been tried" in the national courts (Grounds §110(a)) is simply incorrect. They were given every opportunity to bring their claims, and to adduce all the evidence they wished in support. They took that opportunity, and they argued their claims fully. Those claims failed in the national courts in the *Chagos Islanders Litigation*, not because the Applicants were denied access to the court, but rather because their claims were unsustainable as a matter of domestic law. That cannot constitute a violation of Article 6.

(iv) Conclusion

164. For the reasons outlined above, the Government submits that there has been no violation of Article 6 in this case.

¹¹¹ App. Nos. 22083/93 & 22095/93, judgment 22.10.96.

¹¹² See the letters from their solicitors dated 24.5.05 and 27.5.05.

IX. ARTICLE 13

165. Finally, the Applicants advance a complaint under Article 13 (Grounds §287-290). However, that complaint is entirely co-extensive with the complaint under Article 6. Accordingly, it adds nothing to the Application, and the Government does not need to lengthen these Observations by making any separate submissions under this heading.

X. CONCLUSION

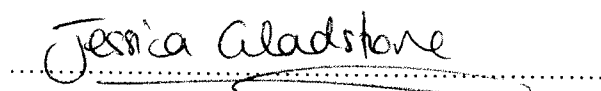
166. For the reasons outlined above, the Government submits that –

166.1. the Application is inadmissible,

166.2. alternatively, there have been no violations of any Convention rights,

166.3. alternatively, any interference with the rights guaranteed by Articles 6 or 8 of the Convention and/or by A1.P1 is justified.

167. In the circumstances, this Court is respectfully invited to dismiss the Application. Finally, the Government would observe that the Applicants' complaints have been deployed in a number of different submissions and letters which have both accumulated and changed their arguments over the years. In the unusual circumstances of this case, if the Court considers that these Observations do not address any particular issue of concern, then the Government would be grateful for an indication to that effect, and an opportunity to supplement these Observations as necessary.



Jessica Gladstone

31 July 2009

Agent for the Government of the United Kingdom