29 June 2016

PRESS SUMMARY

R (on the application of Bancoult (No 2)) (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent) [2016] UKSC 35
On appeal from [2008] UKHL 61

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Kerr, Lord Clarke

BACKGROUND TO THE APPEAL

The Chagos Islands are part of the British Indian Ocean Territories ("BIOT"). In 1962 they had a settled population of 1,000. In 1966 the UK Government agreed to allow the USA to use the largest of the Chagos Islands, Diego Garcia, as a military base. Pursuant to this arrangement, the Commissioner for BIOT made the Immigration Ordinance 1971 (the "Ordinance"). Section 4 of the Ordinance made it unlawful for a person to be in the BIOT without a permit and empowered the Commissioner to make an order directing that person's removal. Between 1968 and 1973 the UK Government procured the removal and resettlement of the Chagossians by various non-forceful means.

In 2000 the appellant, Mr Bancoult, obtained a High Court order quashing section 4 of the Ordinance. The then Foreign Secretary announced that he accepted this decision, such that the prohibition on the resettlement of BIOT was lifted. He also announced that work on the second stage of a feasibility study into the resettlement of the former inhabitants would continue.

The second stage of the feasibility study was published in 2002. Part B (the "2B report") concluded that the costs of long term inhabitation of the outer islands would be prohibitive and life there precarious. In 2004 Her Majesty by Order in Council made the BIOT Constitution Order (the "2004 Order") which introduced a new prohibition on residence or presence in BIOT.

In 2008, the appellant's challenge to the 2004 Order by judicial review was dismissed by a majority of 3 (Lord Hoffmann, Lord Rodger and Lord Carswell) to 2 (Lord Bingham and Lord Mance) in the House of Lords (*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61) (the "2008 judgment"). In separate litigation concerning the Government's declaration of a Marine Protected Area ("MPA") around BIOT, the respondent in 2012 disclosed certain documents relating to the drafting of the 2B report (the "Rashid documents"). The appellant seeks to set aside the 2008 Decision on the grounds that (i) the Rashid documents cast doubt on the reliability of the 2B report and should, pursuant to the respondent's duty of candour in public law proceedings, have been disclosed prior to the 2008 judgment, and (ii) four heads of new evidence have come to light, constituting independent justification for setting aside the 2008 judgment.

In 2014-15 a new feasibility study concluded that, assuming for the first time possible re-settlement of Diego Garcia itself, scope existed for supported resettlement of BIOT (the "2014-15 study").

JUDGMENT

The Supreme Court dismisses the appeal by a majority of 3 to 2. Lord Mance gives the majority judgment, with which Lord Neuberger agrees. Lord Clarke gives a separate judgment, concurring with Lord Mance. Lord Kerr gives a dissenting judgment, with which Lady Hale agrees in a separate dissent.

REASONS FOR THE JUDGMENT

The Supreme Court has inherent jurisdiction to correct injustice caused by an unfair procedure which leads to an earlier judgment or is revealed by the discovery of fresh evidence, although a judgment cannot be set aside just because it is thought to have been wrong on points unrelated to such procedure or evidence **[5, 154, 190]**. The authorities indicate as the threshold for setting aside a previous judgment whether a significant injustice has "probably occurred" in case of non-disclosure or whether there is a "powerful probability" of significant injustice in case of fresh evidence. But Lord Mance leaves open the possibility of the egregiousness of the procedural breach and/or the difficulty of assessing its consequences militating in favour of a lower threshold, and considers the application on that basis too **[8]**. An applicant must also show that there is no alternative effective remedy **[6]**.

As to the non-disclosure, the essential questions are (i) whether due disclosure of the Rashid documents would have led to a challenge by Mr Bancoult's representatives to the 2B report in the original judicial review proceedings, and, if so, (ii) whether it is likely that such a challenge would have resulted in a different outcome to the 2008 judgment **[61]**.

Assuming without deciding that (i) was satisfied, Lord Mance concludes as to (ii), after reviewing the 2008 judgment **[16-19]** and the Rashid documents **[20-64]**, that there is no probability, likelihood, prospect or real possibility that a court would have seen, or would now see, anything which could, would or should have caused the respondent to doubt the conclusions of the 2B report, or made it irrational or otherwise unjustifiable to act on them in June 2004 **[65]**. As to the alleged new evidence, the first head consists essentially of analysis and submissions which the majority takes into account, the second and third heads consist of material outside the respondent's knowledge at the relevant times and neither they nor the fourth provide any basis for setting aside the 2008 judgment **[66-71]**.

Even if the threshold for setting aside were crossed, circumstances have changed in the light of the 2014-15 study and/or governmental confirmation that the MPA does not preclude resettlement **[72-75]**. It is now open to any Chagossian to mount a fresh challenge to the failure to abrogate the 2004 orders in the light of the 2014-15 study's findings, as an alternative to further lengthy litigation and quite possibly a fresh first instance hearing about the factually superseded 2B report. **[72-76, 78-79]**.

Lord Kerr, with whom Lady Hale agrees, would have set aside the 2008 Decision. Although the appellant accepted that it must be shown that the non-disclosure probably had, or may well have had, a decisive effect on the outcome **[155]**, Lord Kerr would have held that it is enough for there to be a real possibility that a different outcome would have occurred had the information been available at the time of the original hearing **[160-163]**. The Rashid documents might well have caused the 2008 Decision to be different **[168, 193]**. Lord Kerr disagrees with the majority that the conclusions of the 2014-2015 feasibility study render the present application moot. The mere possibility that the Chagossians might be allowed to resettle is insufficient. It would be necessary to demonstrate that they *would* achieve the *same result* as would accrue on the successful re-opening of the appeal **[179]**. Moreover, there is no question of pragmatic justice being done here as the Supreme Court in this appeal is unable to vindicate the appellant's right to resettle in the BIOT **[180]**.

References in square brackets are to paragraphs in the judgment