

This is a draft of the judgment to be handed down on Friday 3 November 2000 at 9.30 a.m. in Court No 7. It is confidential to Counsel and Solicitors, but the substance may be communicated to clients not more than one hour before the giving of judgment. The official version of the judgment will be available from the shorthand writers once it has been approved by the judge.

The court is likely to wish to hand down its judgment in an approved final form. Counsel should therefore submit any list of typing corrections and other obvious errors in writing (Nil returns are required) to the clerk to Lord Justice Laws, by fax to 010 7947 6804, by 12 noon on Thursday 2 November, so that changes can be incorporated, if the judge accepts them, in the handed down judgment.

Case No: CO 3775798

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE DIVISIONAL COURT
CROWN OFFICE LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 November 2000

Before:

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MAY

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LORD JUSTICE LAWS
MR JUSTICE GIBBS

THE QUEEN

Appellant

SECRETARY OF STATE FOR THE
FOREIGN AND COMMONWEALTH OFFICE

ex parte
BANCOULT

Respondent

Sir Sydney Kentridge QC, Laurie Fransman QC and Anthony Bradley (instructed
by Sheridans for the Appellants)

David Pannick QC, Philip Sales, Cecilia Ivamy (instructed by Treasury Solicitors
for the Respondents)

DRAFT JUDGMENT

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: FRANK H PEREZ
DATE/CASE ID: 10 AUG 2006 200503422

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Court of Appeal Judgment/Judgement
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The Queen's Secretary of State for the FCO & DfBancoult

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R v SECRETARY OF STATE & anor
ex parte BANCOULT

Lord Justice Laws:

Introductory

The Chagos Archipelago is in the middle of the Indian Ocean. Its islands and Mauritius were ceded by France to Great Britain in 1814. From that date until 1965 the Archipelago was governed as part of the British colony of Mauritius, though Mauritius itself is some 1,000 - 1,200 miles distant from the Archipelago. On at least some of the islands there lived in the 1960s a people called the Ilois. They were an indigenous people: they were born there, as were one or both of their parents, in many cases one or more of their grandparents, in some cases (it is said) one or more of their great-grandparents. Some may perhaps have traced an earlier indigenous ancestry. In the 1960s by agreement between the governments of the United Kingdom and the United States of America it was resolved that there be established a major American military base upon the chief island of the Archipelago, Diego Garcia. There is no doubt but that the defence facility which the base provides is of the highest importance. In a letter of 21 June 2000 from the US Department of State it is described as "an all but indispensable platform" for the fulfilment of defence and security responsibilities in the Arabian Gulf, the Middle East, South Asia and East Africa. In order to facilitate the establishment of the base, the Archipelago was first divided from Mauritius and constituted (together with certain other islands) as a separate colony to be known as the "British Indian Ocean Territory" ("BIOT"). That was done by the British Indian Ocean Territory Order 1965 ("the BIOT Order"). Then in 1971 the whole of the Ilois population of BIOT (and other civilians living there) were compulsorily removed to Mauritius. Their removal was effected under a

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measure called the Immigration Ordinance 1971 ("the Ordinance"). The Ordinance was made by the Commissioner for BIOT ("the Commissioner"), who is the second respondent in these proceedings for judicial review. He was an official created by s.4 of the BIOT Order. He made, or purportedly made, the Ordinance under powers conferred by s.11 of the BIOT Order. As a matter of fact he made it as is effectively accepted by Mr David Pannick QC for the respondents, upon the orders of the Queen's Ministers in London. The first respondent is the Secretary of State for the Foreign and Commonwealth Office. The principal issue in the case is whether there was any lawful power to remove the Ilois from BIOT, in the manner in which that was done. There is also a question whether this court has any jurisdiction to entertain the case. The applicant is an Ilois from Peros Banhos in the Archipelago. Leave to seek judicial review was granted by Scott Baker J on 3 March 1999 after a hearing on notice. No point is now or was then taken by either respondent as to time or delay.

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

3 Ss.3 - 5 of the BIOT Order provide:

"3. As from the date of this Order -

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

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

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

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

"The Commissioner, in the name and on behalf of Her Majesty, may constitute such offices for the Territory as may lawfully be constituted by Her Majesty and, subject to the provisions of any law for the time being in force in the Territory and to such instructions as may from time to time be given to him by Her Majesty through a Secretary of State, the Commissioner may likewise -

- (a) make appointments, to be held during Her Majesty's pleasure, to any office so constituted; and
- (b) dismiss any person so appointed or take such other disciplinary action in relation to him as the Commissioner may think fit.

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

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

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

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

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

S.15(1) provides:

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

Ss.16 and 17 deal with the establishment of courts and judicial proceedings. This is important for the purposes of the point taken by the Crown to the effect that this court lacks all jurisdiction to entertain these proceedings, and it is convenient here to summarise what has been done under these provisions. There has been established a Supreme Court for BIOT, designated as a superior court of record. It possesses "unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law and with all powers, privileges and authority which is vested in or capable of being exercised by the High Court of Justice in England" (BIOT Ordinance No. 3 of 1983, s.6). Thus it plainly has power, at least in general terms, to entertain judicial review proceedings against the Commissioner. It may sit in Diego Garcia or in England. An appeal from the Supreme Court lies to the BIOT Court of Appeal, from which a final appeal lies (no doubt only with special leave) to the Privy Council.

4 Lastly, s.19 of the BIOT Order provides:

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

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

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

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

S.9:

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"It shall be unlawful for any person to enter the Territory or to be present or to remain in the Territory in contravention of the provisions of section 4 of this Ordinance..."

S.10 provides in part:

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

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

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

The Background Facts

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

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

The applicant was born in 1964 on Peros Banhos. He is an Ilois, as were his parents before him. In 1967 the family travelled to Mauritius to seek medical treatment for

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the applicant's infant sister, who had been badly injured: a cartwheel had run over her leg. The applicant has never since 1967 returned to Peros Banhos. Though it is suggested that the applicant and his family (and other Ilois) were prevented from returning to the Chagos Archipelago by the British authorities before 1971, that is not accepted, and there is no challenge to any order or decision before the Ordinance. The last inhabitants were removed from Diego Garcia in 1971, from Salomon Island in 1972 and from Peros Banhos in 1973.

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

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

8 I should next describe those features of the history which lay bare the concerns and attitudes of British officials and ministers at the material time, that is from 1964

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

9 Discussions between the governments of the United Kingdom and the United States concerning the establishment of defence facilities in the Indian Ocean were held in February 1964. The agreement ultimately arrived at is contained in a 1966 Exchange of Notes (1/173), which is before us. It is clear that by 11 May 1964, the date of a secret memorandum headed "DEFENCE INTERESTS IN THE INDIAN OCEAN", prospective initiatives relating to the arrangements which would need to be made were well advanced. The document states:

"In his telegram No 977 Sir P[atrick] Dean draws attention to the difficulties we are likely to have to face in the United Nations if these proposals became known at the present time. In connexion with our proposal for placing the various territories concerned under direct UK administration, he draws attention to paragraph 6 of Resolution No 1514 (of December 14, 1960) which reads:-

'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'

He also suggests that we might face demands for separate transmission of information about these territories under Article 73 of the Charter which requires members 'to transmit regularly to the Secretary General... statistical and other information of a technical nature relating to economic, social and educational conditions in the territories for which they are responsible.'"

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10 A revised memorandum of May 1964 refers in terms to "the repatriation or resettlement of persons currently living on the islands selected". In paragraph 9 of the same document:

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

No element of choice was in the event provided.

11 In another 1964 document it is made clear that "[i]t would be unacceptable to both the British and the American defence authorities if facilities of the kind proposed were in any way to be subject to the political control of a newly emergent independent state (Mauritius is expected to become independent some time after 1966)... it is hoped that the Mauritius Government may agree to the islands being detached and directly administered by Britain." In January 1965 the Americans were making plain their view that "detachment proceedings should include the entire Chagos archipelago, primarily in the interest of security, but also to have other sites in this archipelago available for future contingencies." Then in July 1965 the Foreign Office in London was saying:

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

Then on 28 July there is a Foreign Office memorandum which states:

"Our understanding is that the great majority of [those people at present on the islands] are there as contract labourers on the copra plantations on a number of the islands; a small number of people were born there and, in some cases, their parents were born there too. The intention is, however, that none of them should be regarded as being permanent inhabitants of the islands. Islands will be evacuated as and when defence interests require this. Those who remain, whether as workers on those copra plantations which continue to function or as labourers on the construction of defence installations, will be regarded as being there on a

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temporary basis and will continue to look either to Mauritius or to Seychelles as their home territory...

In the absence of permanent inhabitants the obligations of Chapter XI of the United Nations Charter will not apply to the territory and we shall not transmit information on it to the Secretary-General (cf. The British Antarctic Territory)."

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

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

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

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

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

"In this particular case it occurs to me that we do not really want anything as elaborate as the Seychelles Immigration Ordinance but

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something pretty rudimentary which merely allows for entry under permit and grants as few rights with as little formality as possible."

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

"3. Our primary objective in dealing with the people who are at present in the Territory must be to deal with them in the way which will best meet our future administrative and military needs and will at the same time ensure that they are given fair and just treatment..."

4. With these objectives in view we propose to avoid any reference to 'permanent inhabitants', instead, to refer to the people in the islands as Mauritians and Seychellois... We are... taking steps to acquire ownership of the land on the islands and consider that it would be desirable... for the inhabitants to be given some form of temporary residence permit. We could then more effectively take the line in discussion that these people are Mauritians and Seychellois; that they are temporarily resident in BIOT for the purpose of making a living on the basis of contract or day to day employment with the companies engaged in exploiting the islands; and that when the new use of the islands makes it impossible for these operations to continue on the old scale the people concerned will be resettled in Mauritius or Seychelles.

5. We understand from a recent discussion with Mr Robert Newton [who had visited the islands] that, in his opinion, the people on the islands cannot be regarded as permanent inhabitants but are in fact in the category of contract labour employed by the estate owners or commercial concerns...

6. Against this background we assume that there would be unlikely to be any undue difficulty with the inhabitants of BIOT themselves in moving over to a position in which they all held temporary residence permits on the basis of which their presence in the Territory would be allowed...

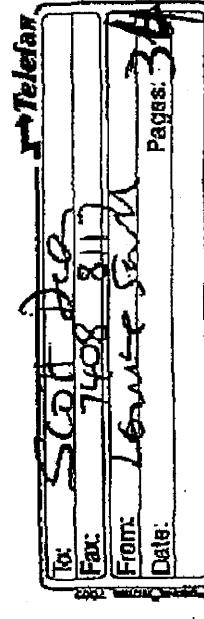
7. Whatever arrangements are made to establish the status of the people in the BIOT as belonging¹ of either Mauritius or Seychelles, there will in any case be a need for the enactment of appropriate immigration legislation for the Territory itself...

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

"They [sc the Colonial Office] wish to avoid using the phrase 'permanent inhabitants' in relation to any of the islands in the territory because to recognise that there are permanent inhabitants will imply that there is a population whose democratic rights will have to be safeguarded and

¹ This inelegant word has become something of a term of art, and I must discuss its meaning when I come to the law.

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which will therefore be deemed by the UN Committee of Twentyfour to come within its purview...

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

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

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

This attracted a comment from another official, a Mr Greenhill, who spoke the same language:

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

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

"10. The primary objective in acquiring these islands from Mauritius and the Seychelles to form the new 'British Indian Ocean Territory' was to ensure that Her Majesty's Government had full title to, and control over, these islands so that they could be used for the construction of defence facilities without hindrance or political agitation and so that when a particular island would be needed for the construction of British or United States defence

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facilities Britain or the United States should be able to clear it of its current population. The Americans in particular attached great importance to this freedom of manoeuvre, divorced from the normal considerations applying to a populated dependent territory. These islands were therefore chosen not only for their strategic location but also because they had, for all practical purposes, no permanent population.

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

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

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

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

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

15 By a detailed minute of 25 July 1968 the Prime Minister was briefed by the Foreign Secretary as to the overall position relating to the defence facility plans for the Chagos. An annex was attached headed "Position of Inhabitants", which in effect

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repeated the argument that the Ilois lived in the Archipelago only on sufferance of the private law owners: "In this sense it can be contended that no one has any right to reside permanently on the islands..." But there was growing anxiety among senior officials who were, so to speak, living close to the problem. On 4 September 1968 a Mr J H Lambert stated:

"We advised the Foreign Secretary that the latter argument might be difficult to sustain in view of the recent discovery that the numbers of second generation 'Ilois' were much greater than originally anticipated... It may be helpful to set out the situation as I understand it:

- (a) all the inhabitants of BIOT (totalling under 1,500) are citizens of the U.K. and Colonies and they are all entitled to a U.K. passport with the colonial endorsement;
- (b) [deals with the Seychellois living in BIOT, who were "unlikely to exceed 1,000"]
- (c) some 500 others (including the 434 second generation 'Ilois') have dual nationality. *If they applied for a U.K. passport, presumably the colonial endorsement could only reveal that they belonged to BIOT since there was no other British colony to which they could belong.*" (my emphasis)

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

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

17 On 21 April 1969 the Foreign Secretary submitted a further detailed minute to the Prime Minister, with copies to the Chancellor of the Exchequer, the Secretary of State for Defence, the Minister of Power and the Cabinet Secretary. Its occasion was the decision of the new US government to proceed with the military project on the Chagos subject to Congressional approval. Its importance is that it demonstrates the direct involvement of the United Kingdom government at the very highest level in the

process of deciding how the Ilois should be dealt with in light of that project. The minute includes these passages:

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

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

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

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

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

Purpose of Immigration Ordinance

- (a) To provide legal power to deport people who will not leave voluntarily;
- (b) to prevent people entering;
- (c) to maintain the fiction that the inhabitants of Chagos are not a permanent or semi-permanent population.

I will consider these separately."

He addresses (c) above by a paragraph headed "Maintaining the fiction":

"As long as only part of BIOT is evacuated the British Government will have to continue to argue that the local people are only a floating population. This may be easier in the case of the non-Chagos part of BIOT... where most of the people are Seychellois labourers and their families. However, the longer that such a population remains, and perhaps increases, the greater the risk of our being accused of setting up a

~~Source of appeal ("Governed Judgment")
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mini-colony about which we would have to report to the United Nations under Article 73 of the Charter. Therefore strict immigration legislation giving such labourers and their families very restricted rights of residence would bolster our arguments that the territory has no indigenous population."

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

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

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

Jurisdiction

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

22 Mr Pannick's two elements are obviously present in the case. But he must show that together they establish that this court has no power to supervise the legality of the Ordinance, else his argument is one of discretion only, whose reach at most would be to persuade us that the BIOT Supreme Court would be a more convenient

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forum for the resolution of the dispute in hand. That was not a position which Mr Pannick pressed with any great vigour - save for this, and it is a factor we must bear carefully in mind: there exists the possibility, theoretical perhaps, of other proceedings before the BIOT Supreme Court, touching the status and rights of the Ilois, in which that court might reach a conclusion inconsistent with that arrived at here. The appeal routes are not the same. From this court, the ultimate court of appeal is their Lordships' House. From the BIOT Supreme Court, the ultimate court of appeal is the Judicial Committee of the Privy Council. There thus exists the possibility of conflicting judicial opinion at the highest level.

23 But the possibility is altogether more apparent than real, and in any case (as I have indicated) this argument was in truth advanced to persuade the court that as a matter of *discretion*, rather than *jurisdiction*, it should not adjudicate upon the Ordinance. In relation to jurisdiction properly so called, I will refer first to Lord Mansfield's dictum in *R v Cowle* (1759) 2 Burr 834. The case concerned the jurisdiction of the Queen's Bench over doings in Berwick-on-Tweed; the details do not assist us. Lord Mansfield's judgment has great learning as to the status of Berwick, but I need only cite this passage at 855-6:

"Writs, not ministerially directed, (sometimes called prerogative writs, because they are supposed to issue on the part of the King), such as writs of mandamus, prohibition, habeas corpus, certiorari, are restrained by no clause in the constitution given to Berwick: upon a proper case, they may issue to every dominion of the Crown of England."

There is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety.

To foreign dominions, which belong to a prince who succeeds to the throne of England, this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland, or to the electorate: but to Ireland, the Isle of Man, the plantations, and, as since the loss of the Duchy of Normandy, they have been considered as annexed to the Crown, in some respects, to Guernsey and Jersey, we may; and formerly, it lay to Calais; which was a conquest, and yielded to the Crown of England by the treaty of Bretigny."

I should cite also a sentence from the judgment of Lord Denning MR in *Sabally v AG* [1965] 1 QB 273, 290B (the case's context, I think, adds nothing): "If the Crown exceeds its jurisdiction over a colony, its conduct can be challenged in these

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courts". Now, the statement of the Lord Chief Justice in *Cowle* was very wide: wider, it may be, than he needed to go to decide the case. Mr Pannick draws attention to *In re Mansergh* (1861) 1 B & S 400. That case concerned an officer's conviction by a court martial in India of an offence of grossly insubordinate conduct. Three years later, the officer, who had been dismissed the service, applied for a rule that the Judge Advocate General show cause why a certiorari should not issue to bring up the record of the conviction so that it might be quashed; it being asserted that the court martial had had no power to try Major Mansergh on the charges brought. The Queen's Bench declined to interfere. In the course of argument Cockburn CJ said of Lord Mansfield's statement in *Cowle* (404): "That must be taken with considerable qualification. Those terms are very general." At 405, also in the argument, he said:

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

Wightman I asked counsel, "Can we issue a certiorari to bring up the proceedings of a court abroad?" Counsel answered (405-406):

"A habeas corpus has been issued to Canada; *In re Anderson* (7 Jur. N.S. 122); and a habeas corpus or certiorari will go to St Helena; *Ex parte Lees* (E. B. & E. 828; 5 Jur. N. S. 333). Besides, the certiorari here would not be directed to the court martial, but to the Judge Advocate General, to bring up a document which is now a record in England."

Giving judgment Cockburn CJ said at 407:

"Then there is the additional fact that these proceedings originated abroad, in a place the tribunals of which are not subject to our jurisdiction. Mr Lush, indeed, contends that because the record of the proceedings is in this country we have jurisdiction over it. Assuming that for a moment, yet when we look at the particular nature of the case before us, we see that the military status of the applicant alone is affected, and consequently, if he had just cause of exception to the act of the tribunal by which he was sentenced, he might have appealed to the Queen to reconsider the matter with the advice of her Judge Advocate.

Court of Appeal's unreported judgment:
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For these reasons I am of opinion that in this case we have no jurisdiction to grant a certiorari; besides which, certiorari being a discretionary writ, we most certainly ought not, in the exercise of our discretion, to grant it if we had the jurisdiction."

Their other Lordships agreed. Crompton J reasoned as follows (409-410):

"... it does not appear that this Court has ever sent a certiorari beyond seas. The case is said to be analogous to that of habeas corpus, and this, perhaps, is the strongest argument in support of the present application. When a person is improperly imprisoned, as in *Lieutenant Allen's Case* (7 Jur. N. S. 234), we have a right to inquire into the cause of the imprisonment; but I am far from saying that a habeas corpus would go in such a case as the present. In *Re Anderson* (7 Jur. N. S. 122), which has been referred to, application was made for a habeas corpus to Canada, and precedents were adduced so expressly in point that, according to the great principle regulating these prerogative writs, the party had a prima facie right to have the writ issued. Besides, if a habeas corpus is improperly issued, it may be questioned on the return to the writ. We did not grant a rule to shew cause in that case, because there was immediate danger to the party. For these reasons that case may not be taken as an authority that a habeas corpus will go to a colony. The only other case mentioned was *The St. Helena Case, Ex parte Lees* (E. B. & E. 828; 5 Jur. N. S. 333); but there, after the Court had refused to interfere, a writ of error had been allowed by the Crown, and the habeas corpus was afterwards issued by a Judge at Chambers merely as an ancillary step. I therefore think that we have no jurisdiction in this case, or at least that, if we have, we ought not, in our discretion, to exercise it.

It is part of our duty to control inferior Courts in this country, but I have yet to learn that that doctrine is applicable to Courts in the colonies."

Blackburn J said this (411):

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

24 In terms of the authorities, though there is some other learning, *Mansergh* is I think the high watermark of Mr Pannick's case, and I have therefore given full citations of its reasoning. His argument on jurisdiction, however, is not unqualified or absolute. He places particular focus on the existence, if that be the fact, of an effective court structure in the colony, dominion or protectorate in relation to which

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the Queen's Bench jurisdiction is sought to be invoked. I have already described the system of courts established for BIOT. Mr Pannick submits that although Mansergh may justify a wider proposition, it is at least the case that where in the territory in question there is, as here, a municipal court of competent jurisdiction, the Queen's Bench for its part lacks or will decline jurisdiction to review any local acts of an administrative or legislative nature. The argument's emphasis on the presence or otherwise of effective domestic courts is to some extent driven by Sir Sydney's reliance on the authority of *Ex p. Mwenya* [1960] 1 QB 241, in which the Court of Appeal held that a writ of habeas corpus might issue to Northern Rhodesia; Mr Pannick was at pains to point out that the court in that case proceeded on the assumption that there was no court in Northern Rhodesia competent to give equivalent relief. Mansergh was cited in *Mwenya* (see 269-270, 285). It is by no means without interest to notice the contrast between the dismissive reasoning of Crompton J (which I have cited) in the former case and the approach of Lord Evershed MR in the latter, relating to the issue of habeas corpus overseas. Lord Evershed said this at 292-293:

"... it is clearly stated in the quotation from Bacon's Abridgement and the Commentaries of Sir William Blackstone... that the writ (of habeas corpus) runs into all parts of the King's dominions: 'for the King is at all times entitled to have an account why the liberty of any of his subjects is restrained wherever that restraint be inflicted' (Blackstone, 1768, vol. 3, p. 131). The Divisional Court [viz. the lower court in *Mwenya* itself] proceeded to refer also to the passages from Lord Mansfield in *Rex v. Cowle*... To these citations I add also the cited passage from Sir Edward Coke's report in *Calvin's Case* [(1609) 7 Co. Rep. 1, 20a])... 'But the other kind of writs that are mandatory and not remedial, are not tied to any place, but do follow subjection and liegeance in what country or nation soever the subject is...' "

These passages from Bacon, Blackstone, Lord Mansfield and Sir Edward Coke were the basis of the decision of Cockburn CJ in *Ex parte Anderson* [(1861) 3 E. & E. 487] that the writ of habeas corpus might be issued to 'all parts of the dominions of the Crown of England'...

Lord Evershed proceeded to cite Lord Cockburn's judgment in *Anderson*, but with respect I need not set out the passage. At 306 Romer LJ said this:

"... there is no authority, so far as I am aware, compelling this court to hold that the writ of habeas corpus will not issue into any British Protectorate. The decisions and judicial utterances relevant to the question have been exhaustively reviewed and considered in the judgment

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of the Divisional Court and by the Master of the Rolls, and I do not propose to consider them again. In Cowle's case Lord Mansfield used language which, if taken at its face value, is inconsistent with the Crown's contention. Vaughan Williams LJ, in *Sekgome's case* ([1910 2 KB 576]), clearly took the view that the writ could, in a proper case, issue into a protectorate, and I agree with that view notwithstanding the contrary opinion entertained by Kennedy LJ on the question."

Then Sellers LJ at 309-311:

"The judges in the earliest cases had not in mind the issue which arises here, but I think it would be difficult to read into any of them (until as late as Kennedy LJ in *Sekgome*) a refutation of the powers of the English court to issue the writ to safeguard a subject's freedom in a territory over which this country had wide powers of jurisdiction and control, wide enough to enforce as a matter of ordinary administration any order the court might make..."

I would have felt that the substance, if not the precise words, of Lord Mansfield's judgment in *Rex v Cowle*, tended to support the argument for the applicant here on the issue of jurisdiction...

I would join Vaughan Williams LJ in this part of his judgment [sc. in *Sekgome* at 605]: 'I ask myself why, if the writ of habeas corpus can be issued to the King's territorial dominions, the writ should not be ordered to go to any country or place under the subjection of the Crown whenever it is suggested to the court in England that a subject of the Crown is illegally imprisoned'."

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

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Farwell LJ at 618, which in their context are obiter, but which possess the clearest resonance for the present case:

"I must not, however, be taken to assent... to the view that the Secretary of State would not be the proper person to make a return to a writ of habeas corpus if there had been no Proclamation of December 5, 1908. Where a man who owes obedience to laws imposed by England is imprisoned and kept imprisoned without trial in a place maintained by England, and placed under the control of an officer of the Crown who acts under the orders of the Colonial Office, and who has acted in the particular case with the assent and approval of and is supported by the Colonial Office, I should be slow to conclude that the Secretary of State could not be called on to make a return to the writ."

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

27 If there is no absolute prohibition upon the court's jurisdiction to issue certiorari to overseas territories subject to the Queen's dominion, might there at least

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be a qualified or partial restriction, having effect in any case where there are established local courts themselves possessing the power to adjudicate upon the complaint put forward? This, as I have indicated, is Mr Pannick's true case. But such a position is in truth a paradigm of a familiar rule of *discretion*, namely that judicial review is a legal recourse of last resort; and an applicant must exhaust any proper alternative remedy open to him before the judicial review court will consider his case. This, surely, is the category to which Mr Pannick's argument on jurisdiction belongs in reality. There is no authority at all - none in *Mansergh* - for the proposition that the existence of effective local courts negatives the *jurisdiction* of the Queen's Bench to issue certiorari extra-territorially. It may be that the reasoning in *Mansergh*, though undoubtedly deploying the language of jurisdiction, is in truth directed to this powerful principle of discretion; at all events one has in mind that in that case their Lordships found very strong reasons why the power to order certiorari, if on the facts they possessed it, should not be exercised.

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

Court of Appeal (Conferred Judgment):
No deviation is granted to court or not in courts

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

Magna Carta

30 I may turn now to the substantive grounds of challenge to the Ordinance. To some extent these run into one another. The first which I will take is the most florid: it is to the effect that s.4 of the Ordinance constitutes an affront to the rights and liberties enshrined in Cap. 29 of Magna Carta (I cite the modernised text given in Halsbury's Statutes):

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

In order to understand this part of the case, it is necessary also to set out ss.2 and 3 of the Colonial Laws Validity Act 1865 ("the 1865 Act"). S.2 bears the cross-heading "Colonial laws, when void for repugnancy"; s.3, "Colonial laws, when not void for repugnancy". S.2 provides:

"Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

S.3:

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

An "Act of Parliament extending to the colony", within s.2, is by s.1 an Act which is "made applicable to such colony by the express words or necessary intendment of any Act of Parliament".

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31 Sir Sydney's argument possesses a beguiling simplicity. It is that s.4 of the Ordinance is repugnant to Cap.29 of Magna Carta: the Bois are by s.4 exiled from their homeland. Accordingly, s. 4 is "absolutely void" within the meaning of s.2 of the 1865 Act.

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

33 It is clear that the Magna Carta is not applied to any colony by express words; it may only be so, therefore, by "necessary intendment". There was much argument at the Bar as to the extent to which the Magna Carta "followed the flag". That expression appeared in a judgment in the Canadian Supreme Court in *Calder v AG of British Columbia* (1973) 34 DLR (3rd) 145, where at 203 it was said that Magna Carta "had always been considered to be law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly discovered or acquired lands or territories." This statement, much pressed by Sir Sydney, was approved by Lord Denning MR in *R v FCO ex p. Indian Association of Alberta* [1982] QB 892, 912. Mr Pannick sought to rely on the decision of the Judicial Committee of the Privy Council in *Staples v R*. Their Lordships' reasoning in that case has come down to us in a curious form. There is no report in the books, in the ordinary way; rather their Lordships issued a Memorandum dated 27 January 1899, stating: "As it has been intimated to their Lordships that their reasons for giving this advice were not in all points sufficiently explained by what fell from them during the argument, they have authorised the Registrar to make the statement following." The question in the case was whether the petitioner, who had upon a charge of theft been tried and convicted by a judge and four assessors in the High Court of Matabeleland, had been unlawfully deprived of the right to trial by jury, vouchsafed (so it was said) by Cap.29 of Magna Carta. Now, Matabeleland was a protectorate,

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not a colony. The Privy Council held that Magna Carta did not extend to such a protectorate, to which s.12 of the Foreign Jurisdiction Act 1890 applied. S.12(1) and (2) of that Act are in substantially the same terms as ss.2 and 3 of the 1865 Act. Their Lordships stated (pp.2-3 of the Memorandum):

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

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

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

35 Indeed, Sir Sydney does not submit that what was purportedly done by s.4 of the Ordinance could not by any means at all have been properly done according to law: his case is that it could only have been done by Act of Parliament of the United Kingdom, or possibly by a legislative measure authorised and made by virtue of the

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Royal Prerogative (a possibility to which I will return). In his skeleton argument he submitted (p.11):

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

With respect this reasoning is a little opaque. If the submission intended is simply that a measure such as s.4 of the Ordinance could not lawfully be done by executive discretion, with no sure foundation in legislation, I would without cavil accept it. Sir Sydney is plainly right to submit that (save in time of war) the executive has no power to abridge the freedoms of the Queen's subjects save by authority of a valid statute or an established common law prerogative; he cites the celebrated decision in *Entick v Carrington* (1765) 19 St. Tr. 1029. But if the submission means that the measure could in no event be done by Order in Council, I have some difficulty. An Order in Council may in the context of the Crown's powers to make law for a colony amount to an act of primary legislation under the Prerogative.

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

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

This describes the enduring significance of the Magna Carta today. So far as it is a proclamation of the rule of law, it may indeed be said to follow the flag - certainly as

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far as BIOT; for unless the removal of the Bois from the Archipelago is shown to have been done according to law, the applicant in these proceedings must succeed; and while in that case there might perhaps be questions as to the appropriate form of relief, it cannot be and is not suggested that any prudential considerations (such as the strategic importance of the military base) should stay the court's hand. The true questions in the case are, what is the form and substance of any such legal authority as would justify what has been done here, and whether s.4 of the Ordinance lies within it. To these questions the Magna Carta does not provide the answer.

The 'Witham' principle

37 *R v Lord Chancellor ex p. Witham* [1998] QB 575 was a case in which a fundamental or constitutional right, there the right of access to the Queen's courts, was effectively withheld from a class of persons (those with no means to pay court fees) by a subordinate instrument whose purported *vires* was a provision in main legislation cast in very general terms. The Divisional Court struck down the relevant part of the subordinate measure, holding that a fundamental or constitutional right could only be abrogated by the executive where that was specifically authorised by Act of Parliament. The first judgment in the case was given by myself at the invitation of Rose LJ. (Perhaps I may be allowed to protest that the case's elevation from a mere authority into a principle only arises from the way Sir Sydney, seductively enough, categorised it in the course of his argument.) The submission was that s.4 of the Ordinance could not lawfully be authorised by the general words of s.11 of the BIOT Order, any more than the Fees (Amendment) Order in *Witham* could be justified by the general words of s.130 of the Supreme Court Act 1981. A British citizen, Sir Sydney submitted, enjoys a constitutional or fundamental right to reside in or return to that part of the Queen's dominions of which he is a citizen - where he is a "belonger": a term used, as I have shown, in some of the documents which trace the history of the case as it was viewed in Whitehall. I need only set out one passage from what I said in *Witham*, as follows:

"In the unwritten legal order of the British State, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose *vires* in main legislation specifically confers the power to abrogate.

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General words will not suffice. And any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it." (581E-F)

Rose LJ said:

"There is nothing in the section (sc. s.150 of the Supreme Court Act 1981), or elsewhere, to suggest that Parliament contemplated, still less conferred, a power for the Lord Chancellor to prescribe fees so as totally to preclude the poor from access to the courts. Clear legislation would, in my view, be necessary to confer such a power and there is none." (587A-B)

I should also cite this passage from Lord Hoffman's speech in *Ex p. Simms* [1999] 3 WLR 328, 341:

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

38 In *Witham* I considered that only express words in main legislation would suffice to abrogate such a constitutional right. There is some controversy as to that: see, with respect, *Ex p. Pierson* [1998] AC 539, 575 per Lord Browne-Wilkinson, and indeed Lord Hoffman's reference to "necessary implication" in the passage from *Simms* just cited. But I conceive it is generally accepted that interference with a constitutional or fundamental right requires at least specific authority given by Parliament; and this is a principle of the common law, independent of our incorporation by the Human Rights Act 1998 of the rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms. At all events the question for present purposes is how far it advances Sir Sydney's cause to the effect that s.4 of the Ordinance is not lawfully authorised.

39 For my part I would certainly accept that a British subject enjoys a constitutional right to reside in or return to that part of the Queen's dominions of which he is a citizen. Blackstone says this (*Commentaries*, vol. I (15th edn) p. 137):

"But no power on earth, except the authority of Parliament, can send any subject of England *out of* the land against his will, no, not even a criminal."

Compare Chitty, *Prerogatives of the Crown* (1820), pp. 18, 21. Plender, *International Migration Law* (revised 2nd edn 1988) states at p. 133 "The principle that every State must admit its own nationals to its territory is so widely accepted that its existence as a rule of law is virtually beyond dispute"; and cites authority of the European Court of Justice in Case 41/74, *Van Duyn v Home Office* in which the court held that "it is a principle of international law... that a State is precluded from refusing its own nationals the right of entry or residence". Plender further observes at p. 135: "A significant number of modern national constitutions characterise the right to enter one's own country as a fundamental or constitutional right", and a long list is given. And I should cite this passage at pp. 142-143:

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

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

40 Now, *Witham* proceeded upon the premise that, adopting what might be called a standard approach to the task of statutory construction, the enabling words in the Act would have sufficed to provide the *vires* for the regulation under assault; the regulation was bad only because its interference with a constitutional right invoked the application of a stricter rule, the requirement of specific authorisation. In the present case the question whether, *Witham* (and indeed Magna Carta) aside, there was any

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

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

"The first argument starts with a judgment of Lord Mansfield LCJ. In *Campbell v Hall* [(1774) 1 Cowp. 204, 209] he laid down as a clear proposition that

'if the King (and when I say the King, I always mean the King without the concurrence of Parliament) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles.'

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Reciting the argument based on Lord Mansfield's statement, their Lordships in *Liyanage continued (284B-285B)*:

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

In view of their Lordships, however, such a contention is not maintainable. Before the passing of the Colonial Laws Validity Act, 1865, considerable difficulties had been caused by the over-insistence of a Colonial judge in South Australia that colonial legislative Acts must not be repugnant to English law ("The Statute of Westminster and Dominion Status" by K. C. Wheare [the 4th edn, pp. 75, 76, 77 are referred to in a footnote to the report. Sir Kenneth Wheare was a distinguished Rector of Exeter College Oxford]). That Act was intended to and did overcome the difficulties. It provided that colonial laws should be void to the extent in which they were repugnant to an Act of the United Kingdom parliament applicable to that colony, 'but not otherwise' (s.2) and that they should not be void or inoperative on the ground of repugnancy to the law of England (s.3).

'The essential feature of this measure is that it abolished once and for all the vague doctrine of repugnancy to the principles of English law as a source of invalidity of any colonial Act... The boon thus secured was enormous; it was now necessary only for the colonial legislator to ascertain that there was no Imperial Act applicable and his field of action and choice of means became unfettered.' ('The Sovereignty of the British Dominions' by Prof. Keith [the footnote refers to an edition of 1929, p. 45])

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

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

43 So approaching the issue, I cannot see that Sir Sydney's appeal to constitutional principle as it was described in *Witham* can withstand the authority of *Liyaganage*. I acknowledge a consequence of this conclusion, namely that as regards fundamental or constitutional rights, there is a difference of approach between the developed law of England and the law applicable in the colonies. Belongers here take the benefit of the constraints which the common law imposes upon the construction of legislation which interferes with such rights; belongers there do not. However I think it plain that in practice, in the post-imperial world as it is, this is a misfit which nearly always will be nothing but theoretical; territories such as Gibraltar possess written constitutions which enshrine fundamental rights based on or akin to the model of the European Convention on Human Rights and Fundamental Freedoms. But BIOT does not; and there is therefore a dissonance, one which may strike real lives, between the richness of the rights which our municipal law today affords and the wintry asperity of authority such as *Liyaganage*. The court's task here is accordingly acute. We should, however, ourselves affront the rule of law if we translated the liberal perceptions of today, even if they have become the warp and weave of our domestic public law, into law binding on established colonial powers in the face of authority that we should do no such thing.

44 I would therefore hold that *Witham* and like decisions do not assist the applicant.

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The Legal Nature of s.4 of the Ordinance

(1) The Commissioner - Agent/Delegate?

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

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

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

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

Court of Appeal's unreported Judgment:
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(2) The Colonial Laws Validity Act 1865

47 Mr Pannick was also disposed at first to submit that the effect of ss.2 and 3 of the Colonial Laws Validity Act 1865 was that the making of a law by the Commissioner, here s.4 of the Ordinance, could not be challenged as *ultra vires* on any ground whatever save that it offended a British statute which extended to BIOT. So if there were no such statute the Commissioner's powers would presumably be untrammelled; and again we are in the badlands, to use John Wyndham's expression, where there is no rule of law. But Mr Pannick resiled from this position. He accepted that it was undermined by the passage from *Burah* which I have already set out. There is also authority of the Exchequer Chamber in *Phillips v Eyre* (1870) LR 6 QB 1, 20:

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

(3) The Commissioner's Powers; S.11 of the BIOT Order

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

(4) The British Settlements Act 1887

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

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1887 (the interpretation provision) defines "British settlement" as "any British possession which has not been acquired by cession or conquest, and is not for the time being within the jurisdiction of the Legislature, constituted otherwise than by virtue of this Act or of any Act repealed by this Act, of any British possession." S.2 provides in part:

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

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

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

51 Whether the Prerogative or the Act of 1887 is the source of the power to legislate for BIOT may, however, matter for another reason. There is a question, arising upon Sir Sydney's argument, whether what was purportedly done by s.4 of the Ordinance could only lawfully have been done by Act of the United Kingdom

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Parliament, or whether it could be done by a legislative act under the Prerogative. If BIOT is a "British settlement" within the meaning of the Act of 1887, the Queen's power of legislation is given and curtailed by s.2; which - like s.11 of the BIOT Order - has the formula "peace, order, and good government". If s.11 does not give the power to make a law like s.4 of the Ordinance, then neither, surely, does s.2 of the Act. In that case it could only be done by fresh main legislation. But if the source of the power to make laws for BIOT is the Royal Prerogative, the position may be different. I have already said (paragraph 55) that I will return to this question.

52 I should say that in my judgment the Act of 1887 has no application to this case. It is beyond question that BIOT was in 1814 part of a ceded colony. When it was split from Mauritius by the BIOT Order, that position cannot have been changed. Sir Sydney submits in his skeleton argument (p. 10) that in 1965 BIOT had a settled population of citizens of the United Kingdom and colonies. Plainly that is so. But the question, ceded or settled, has surely to be determined as at the time when the territory concerned becomes subject to the Queen's dominion.

(S) "Peace, Order, and Good Government"

53 I turn at length to the issue whose resolution, in my judgment, will decide this case. Did s.11 of the BIOT Order empower s.4 of the Ordinance? Mr Pannick marshalled a formidable body of authority to support the proposition that the formula "peace, order, and good government", used so often in measures conferring powers to make colonial law, was to be taken as having the widest possible intendment. *Ex p. Riel* (1885) 10 App Cas 675 concerned an Act of the Imperial Parliament authorising the Canadian Parliament to make laws "for the administration, peace, order, and good government of any territory..." Their Lordships in the Privy Council stated at 678:

"... it appears to be suggested that any provision differing from the provisions which in this country have been made for administration, peace, order, and good government in the territories to which the statute relates, and further that, if a Court of law should come to the conclusion that a particular enactment was not calculated as a matter of fact and policy to secure peace, order, and good government, that [sic] they would be entitled to regard any statute directed to those objects, but which a Court should think likely to fail of that effect, as ultra vires and beyond the competency of the Dominion Parliament to enact."

Court of Appeal's recognized Judgments:
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Their Lordships are of opinion that there is not the least colour for such a contention. The words of the statute are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to."

54 I have already referred (paragraph 40) to what was said in *Ibrelebber* [1964] AC 900, 923: the words peace, order, and good government "connote, in British constitutional language, the widest law-making powers appropriate to a sovereign". This was approved in *Winsor Enterprises* [1985] 1 AC 733, 747 (which shows also that it makes no difference to the power's breadth that the colonial legislature in question is not established on representative principles: cf *Li Hong Mi* [1920] AC 733). *Sekgomo* [1910] 2 KB 576, which I have cited in dealing with the argument as to this court's jurisdiction, is also a case concerned with a "peace, order, and good government" provision, under whose authority the applicant's detention was held to have been plainly justified.

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

"The correct general principle is... whether the law in question can be truly described as being for the peace, order and good government of the dominion concerned."

And at 235:

"The judgment of Lord Macmillan (sc. in *Craft v Dunphy* [1933] AC 156) affirms the broad principle that the powers possessed are to be treated as analogous to those of 'a fully sovereign State', so long as they answer the description of laws for the peace, order, and good government of the constitutional unit in question..."

56 In answering the question whether a particular measure, here s.4 of the Ordinance, can be described as conduced to the territory's peace, order and good

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

The Legality of the Ordinance

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

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has been done for high political reasons: good reasons, certainly, dictated by pressing considerations of military security. But they are not reasons which may reasonably be said to touch the peace, order and good government of BIOT, and in my judgment this is so whether the test is to be found in our domestic public law, exemplified by the *Wedgesbury* doctrine or in a more, or less, intrusive approach. In short, there is no principled basis upon which s.4 of the Ordinance can be justified as having been empowered by s.11 of the BIOT Order. And it has no other conceivable source of lawful authority.

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

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

The Government's Motives

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

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Prerogative or Statute?

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

Conclusion

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

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

Mr Justice Gibbs:

64 I have read the judgment of Laws LJ and respectfully agree with his conclusions as well as the comprehensive and authoritative analysis which led to those

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conclusions. I add a few brief words of my own because of the importance of the case to those involved.

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

66 For the reasons given in paragraph 52 and 59 of his judgment, I agree with Laws LJ that the power to enact these measures does not derive from the British Settlements Act 1887, but rather from the exercise of Royal Prerogative. The measures came into being as the direct result of advice given to the Crown by ministers of the United Kingdom government in order to achieve the purposes referred to in the preceding paragraph. The Commissioner and other officials to be appointed under the Order were effectively agents of the Crown under the control and direction of the Secretary of State.

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

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

basis of this (admittedly in modern context) arcane distinction. I accept the Respondent's submission that the Magna Carta cannot be relied on in support of the application.

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

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

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

72. The Ordinance was, on the other hand, entirely consistent with the purposes mentioned in paragraph 2 above; but that is another matter. It is clear from some of the disclosed documents that, in some quarters, official zeal in implementing those policies went beyond any proper limits. It would be no answer to say that these

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documents reflected the standards of a different period. I venture to think that the impression on right thinking people upon reading them would have been similar, then as now. The Respondent does not seek to excuse them, and is to be commended for that, as well as for the openness with which disclosure of and access to all relevant documents have been afforded. I associate myself expressly with paragraph 60 of my Lord's judgment.

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