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The Chagos Islands – The Land Where Human Rights Hardly Ever Happen

Richard Gifford

Partner,
Sheridan Solicitors,
London, UK

rgifford@sheridans.co.uk

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Editors Note

This paper was presented at the 'Public Interest Litigation Forum', organised by the School of Law, University of Warwick, at the university, on 27 May 2004.

Thank you very much for coming to listen to a talk about the Chagos Islands and I hope to explain some of the fascination of the case which has preoccupied me for the last seven years. But can I first of all apologise to Eliza Dolittle whose elocution exercises in My Fair Lady included practising her vowels: 'The rain in Spain falls mainly on the plain' and practising her 'h's' 'In Hampshire, Hereford and Hertford hurricanes hardly ever happen', because what I think she had in mind was the Chagos Islands since these dicta reflect two prime features of those islands namely the *abundant rainfall* which is essential in a coral island where there is no other source of fresh water and secondly, the *absence of cyclones or hurricanes* which beset that part of the world and tear down your hut if you live in one.

What she was telling us was, that the Chagos Islands have an exceptionally *benign climate*. And that (in a sense), was their downfall because if you add their extreme *remoteness* - they are 1,000 miles from anywhere else and in the middle of the Indian Ocean you can see what a prime asset of enormous geo-political significance they might turn out to be.

Now the tragedy of the Chagos Islanders, is that their homeland was identified as a potential military base in the 1960's and that the population proved to be totally dispensable when the UK and the US got together to plan strategy. I expect that many of you are aware of the basic story: that between 1971 and 1973 the entire population was removed in a deliberate act of policy to make way for a joint UK/US defence base.

After that they lived in squalor in Mauritius, some in the Seychelles, for about 25 years before I first got involved in their case, and I have spent some of the last few years uncovering some of the history and documentary record of what happened to them and how it came about. So let me proceed if I may by setting out some of the facts of the story. Some of them are a little unusual and have been discovered by our researches into bringing the case. Then perhaps, I can give you some idea as to how we set about trying to give a legal diagnosis to the plight of this exiled community.

Until the UK and the US set their sights on the Chagos Islands as a defence base, anybody who had anything to do with the islands was well aware that they had been successfully settled and exploited as coconut plantations for over 200 years since around the 1770's when the French first granted *jouissances*, or leases to enable plantation companies to produce coconut oil and copra. And of course in those days there was slavery and most of the workers were slaves who came from Madagascar and Mozambique and it is their descendants who have become the Chagossians or Ilois as they are known.

In fact, the Islands passed into British hands during the Napoleonic wars and they were formally ceded to UK with the Colony of Mauritius of which they formed part by the Treaty of Paris in 1814. So that means that for a good 150 years Chagos Islands, part of Mauritius, were a British Colony which means in turn that the British were responsible for civil society there. The British Government used to send Magistrates from Mauritius to Chagos to examine the conditions of the workers after the abolition of slavery in 1835 and the Mauritius archives are full of reports from Magistrates describing the population of these remote islands and their way of life. It was very peaceful and idyllic. Work on a coconut plantation is not hard work compared with the sugar plantations in Mauritius which give rise to back-breaking work. It was quite popular work. The land is very fertile and the plantations were very profitable. The Islands exported high quality coconut oil and dried copra and drew in labour from Mauritius and Seychelles. The workers had a fairly simple life, they were given houses, they had their piece of land, they were provided rations by the Company and their wages were often entered into a book since there was no cash economy on the Islands. They spent their wages when they went on trips to Mauritius or the Seychelles. There were boats visiting about every three months and the Company was required to guarantee a free passage there and back. The British colonial power was required to register births, deaths and marriages and of course they did so and there are ample records of that. In the 1950s Governor Scott of Mauritius took a great interest in the Chagos Islands, and personally visited them. He set up schools for children and also made a film of life on the Islands. There is a wonderful Colonial Office film showing the simple life of the islanders who were described by the commentator as having been settled there for generations.

So all of this amounts to the fact that by the 1960s there was a population of around 2,000 living on the islands, most of them born there but some also who were workers from Mauritius and Seychelles who had come on contract. Now the characteristics of the population are of great importance because when the military teams first came to check out the islands, they were only interested in the real estate and they were not concerned to verify the status of the population.

In February 1964 there were meetings between the defence departments of UK and US. In August 1964 there was a joint US/UK military visit, to survey the Islands. The civilian administrator Mr Newton came too. This survey team landed in August 1964 and what did it find? They were very impressed with the depth of the lagoon at Diego Garcia the largest island with its sheltered deep water anchorage which was ideal for aircraft carriers. They loved the length and flatness this island which offered 20 miles of natural air strip with only coconut plantations on it. But there was also a snag-there were villages, graves, churches, hospitals, schools and worst of all there were hundreds if not thousands of natives working fishing, dancing and generally living all over the place. Now this is a problem because the Americans had made it clear all along that they didn't want to have a population problem and they were expecting the islands to be given to them without inhabitants. So what does our intrepid civilian administrator do when he renders his report to his bosses back in Whitehall. Well the solution is obvious, Chagos is part of Mauritius isn't it so if he calls them 'Mauritian' they are already more likely to go back 'home' and disappear. But what about their nationality? Are they not citizens of the United Kingdom and colonies like the rest of the British Commonwealth? And if so what happens when Mauritius becomes independent in four years time? Won't they remain citizens of the United Kingdom and colonies attached to a new colony of Chagos (or BIOT as it became known upon detachment) and won't that give them the right to stay in their own Colony? Well, undeterred by these considerations this public servant boldly describes the population as all Mauritian or Seychellois and refers to a handful of folk who might have been *born* there.

His report contained frequent reference to contract labourers who it was assumed must have somewhere to go home to. As a piece of field work research the British administrator would not have passed his GCSEs given the shallowness of his enquiries. Yet it was just what they wanted to hear in Washington and Whitehall. A wonderful military location where the people whose land it is, can be airbrushed out of the picture.

So this report sowed the seeds of mis-description which eventually gave rise to an outrageous policy. From here on the idea emerged that this long settled population having its own culture and identity was in some way a population of migrants, mere contract workers from Mauritius and Seychelles. But we know, don't we, that when civil servants and those wanting to please political masters write reports they normally don't lie: they become economical with the truth. You find that they have not ignored altogether that Chagossians were born on the islands. It's just that no-one bothers to enquire how many now for how long. Nobody for example went to look for the birth records. I happen to have done that as part of my researches and I found out that between 1895 and 1965 when the islands were detached there were 2,970 births on the islands, so there would have been at least 2,000 native adults up to the age of 70 living there when the military team came along. But in the same breath as conceding that just a handful had their roots on the islands author quickly pointed out that none of them own their own homes and they have no property on the islands. This is of course a highly contentious statement because they were allowed to build their own homes on a plot of land given to them by the plantation company that owned the freehold of the islands and although they didn't have title deeds, they certainly had customary title to their homes and they passed their homes from generation to generation. Therefore what happened was based upon these shallow reports on the population by a military team. Policies were evolved in Washington and Whitehall which pretended the population was not settled or permanent. It was a convenient fiction but it was also made clear at the same time that at least some islanders had their roots there and this gave rise to a dilemma when civil servants came to brief Ministers.

The policy was authorised at the highest level by the Prime Minister Harold Wilson in 1968 and 1969 and it is quite clear from the documents that we now have, that his attention was drawn specifically to the existence of Chagos and to the fact that they might claim the legal right to remain on the islands. But by now the policy of handing vacant possession to the US was unstoppable. When the policy was authorised at the highest level it was known that whatever citizenship rights attached to birth on the islands they were going to be overridden. This seemed to be a small price to pay for obtaining on the cheap the prime military asset of a defence base east of Suez at the height of the Vietnam war.

So may I explain briefly the legislative and practical measures adopted to turn a successful plantation Archipelago into a defence fortress.

First the islands had to be constitutionally detached from Mauritius. The US and UK could not risk having a landlord who was a newly independent African State. This meant getting the consent of the pre-independence Government of Mauritius who were found to be compliant. A price of GDP 3 million

was agreed for Mauritius' loss of the islands when they became independent, and the pre-independence Mauritian Government readily agreed to accept the displaced islanders for a small payment of GDP 650,000. Similar arrangements were made with Seychelles for whom the sweetener (or hush money) was the building of a civilian airport on Seychelles. These were the only two countries who knew anything about the population and might have objected. Their complicity was easily purchased.

So in November 1965 the Queen passed an order in Council detaching the Chagos Islands from Mauritius and constituting a new colony: the British Indian Ocean Territory. Its governor and legislature was to be the Commissioner for BIOT. He has always been an *ex-officio* civil servant in Whitehall who has never lived on the islands and takes his orders from the Foreign Office. He was given the normal legislative power to make laws for the 'Peace, Order and Good Government of the territory', a phrase which has a long history in commonwealth law and means that he can do anything as the legislature of the country. The public announcement of these steps was a master piece of understatement both in Parliament and to the United Nations, where they were described as simple 'administrative measure' involving a different administrative arrangements from those in Mauritius. No hint was given about the defence use or the removal of the population.

The next step was to acquire the freehold of the islands from the plantation company. In 1967 a compulsory purchase order was passed by the Commissioner and later that year he negotiated the purchase of the islands from Chagos Agalega Limited, the plantation company for something like GDP 750,000. However because the Americans were not ready to build the military base and were in fact having difficulty getting a budget approved by Congress there was a delay of four years during which the British, wanting to make a little profit out of their investment, kept on the plantation company to run them, with the population of workers, on the basis of a management contract. From now on the plantation administrator had to get the permission of the BIOT Commissioner for every bag of flour brought to the island, and for every sailing to and from the islands. Strange things began to happen. The population began to complain of lack of food coming to the islands. Many families who left for routine visits or for medical attention in Mauritius or Seychelles failed to return. Those still on the Islands couldn't have known, because there was no communication, but in practice families who turned up in Mauritius to book their return passage to Chagos were told by the shipping company that boats had been cancelled and the Islands sold to the Americans. This tragic news tore apart the families and their homes and built up a pool of displaced islanders in Mauritius totally destitute and without jobs or homes and who could not get back to Chagos. The British Government has never accepted responsibility for this surreptitious exiling of the people.

By January 1971 the Americans had secured Congressional approval and the first US navy personnel arrived with their ships and helicopters.

From now on the writing was on the wall. The plantation administrator, Marcel Moulinie was told to shut up shop and he was obliged to remove the population from Diego Garcia where most of them lived. For a short while he maintained the plantations on other islands that is the Peros Banhos and the Salomon Group which are about 135 miles from Diego Garcia but by September 1973 he was told to close down finally, and the final evacuations took place. These dreadful journeys are written deep in Chagossian folk law. They do not forget the appalling journeys in which they suffered, in boats that were overladen with people, which they were obliged to share with horses in the hold and where bad weather made people vomit, women miscarry and some to jump overboard and commit suicide. On arrival in Seychelles they were housed in the local prison because there was no accommodation, before making the onward journey to Mauritius where they were summarily dumped on the dockside. By now there was a pool of around 2,000 displaced islanders roaming around Mauritius, jobless, homeless and destitute. No money was paid out of the GDP 650,000 compensation because it was too little to do anything effective. Many slept on the beach or built temporary tin shacks living in awful conditions without water. Some shacks were shared between 15 and 20 people. A few were given dockers' flats, some obtained temporary employment but many starved. At this time Mauritius had a 25 percent unemployment rate and such social security as there was, was by no means enough to keep body and soul together. Those who were dumped in Seychelles suffered in the same way, sleeping rough and living on wild fruit.

The British, observing these events sat back and did nothing. They were afraid of accepting any responsibility which they had managed to shuffle onto the new Government of Mauritius. The Ilois

themselves with the help of some concerned Mauritians sent petitions both to the UK Government and the US Government begging for help and asking to return home. Their pleas fell on deaf ears.

After a few years the situation was so bad that it became a serious social problem in Mauritius. This identifiable community did not merge into the population, its skills of the islands were unsuited to the sugar plantations on Mauritius and they had no hope of joining in the gradual industrialisation of that country. They remained marginalised and discriminated against on grounds that they were an inferior almost foreign group. They had been kings of the castle in Chagos where there was full employment, homes and food provided. Now they were at the bottom of the social heap, despised and bewildered. They had no money to pay rent or buy food. Many committed suicide, took to drugs or alcohol or simply died of a broken heart, pining for their beloved islands.

The Mauritian Government was in a difficult position. Having accepted the money and responsibility for the islanders they were in no position to press the British Government for more. The Ilois lacked any proper organisation, but a Mauritius opposition politician managed to arrange for London solicitors to take up the case of one of the leading Chagossians on the island, and with legal help he launched an action in the London Courts seeking compensation. In his private law action, asserted that he had been coerced to leave the islands and had suffered loss. There was no attack on the constitutional illegality of removing the population merely a claimed breach of his private rights. There must have been some guilty minds in Whitehall because the action stirred things up. They used all the tricks in the book to avoid disclosing documents, pleading Public Interest Immunity and then when they were obliged to disclose some documents cutting out great chunks which were incriminating. At the same time they made offers of settlement which caused immense difficulties because this meant taking instructions from all the islanders and the attempts by the solicitors ran a ground in the mine field of trying to explain legal rights and the Government's insistence on a final settlement to those who were desperate for all forms of humanitarian relief.

The solicitor was soon seen as an agent of the British Government and his welcome on the Island of Mann was cut short. No deal was done and the British got the clear message that Ilois were not going to give up their birth right however desperate they were.

A few years later the Mauritius Government became involved, and there was in 1982 a further agreement between the British and Mauritian Governments in which a sum of GBP 4 million was put into a trust fund for the Ilois. This was distributed to 1,344 identified islanders who each received a little over GBP 2,000, some of them managed to get rudimentary housing or a small plot of land but many simply paid off their debts and carried on living in squalor as before. As a condition of receiving the money, they were obliged to sign highly detailed legalistic forms written in English renouncing all rights against the UK Government including the claim to return to their islands. These forms were not explained or translated and when the money was disbursed, the Chagossians were required merely to put their thumb print to a piece of paper which they thought was a mere form a receipt. The islanders vigorously deny that by doing so, they knew they were giving up their rights to return to Chagos or to seek further compensation. They point out that they were desperate for money and were driven by dire necessity to accept anything on offer. Their desperation was taken advantage of. The conduct of the Government in failing to explain the supposed finality of the deal is probably due to an acute sense of shame.

For the next 15 years the Chagossians continued to agitate for compensation and for the right to return home and it was these protests which I noticed when I began to take an interest in the case in 1997. In March of that year I became Chairman of the Anglo Mauritian Association largely because I had done immigration work for Mauritians who had come to settle in London. I noticed in the Mauritian press that there were reports of these islanders demonstrating outside the British High Commission and as a lawyer with some experience of immigration I was fascinated to know by what right they had been removed from the land of their birth. (What I did not realise at that time was that Chagossians are all dual nationals that is to say that they have Mauritian nationality under the Mauritius constitution but because of their birth in a colony which is still British they retain citizenship of the UK and colonies which later became British Dependent Territory Citizenship after 1983. I first thought they were just Mauritian). Knowing little of the history of this group of people I was worried that there was a group of apparent Mauritians who were blaming the UK for their removal from their homeland. What on earth was going on?

So the first thing I did was to speak to the solicitor who had acted in that case, whom I happened to know, and obtained from him the papers and pleadings in the Michel Vencatassen case. The claims were all based in private law, for example trespass to the person, and false imprisonment, which seemed difficult

since there was a denial that any force had been used and expulsion is the antithesis of imprisonment. There was no obvious claim recognised by the law of tort. There was also another strange thing namely that there appeared to be a contested exercise in disclosure, or discovery of documents, but there were no documents on the file so I was not able to read any of the historical record to see how this strange state of affairs had come about. I was told by the solicitor that the Government had pleaded Public Interest Immunity and had refused to produce most of the sensitive documents. From the documents that they did produce, paragraphs were cut out where there had been, presumably, a sensitive passage. Finally, when the case had been withdrawn, all the documents had been destroyed at the insistence of the Government. Well *this* was unfinished business and *here* was a challenge.

The next thing I did was to go to Mauritius in December 1997 and speak to some ~~lawyers~~ and ~~politicians~~. It turned out to be a very sensitive and live issue in Mauritius. All were agreed that a major constitutional outrage had been committed on poor defenceless people but they were all doubtful anything could be done after 25 years.

The third step was to contact the senior government lawyer who had been in charge of the Government's defence to Michel Vencatassen's action. Over lunch I explained to him that I was thinking of reopening the Ilois case and he gave me some mild encouragement because he said that everyone knew that the islanders had been badly treated. He did however take the opportunity to explain that it had all been legally justified because the Government had purchased the freehold of the islands and merely exercised its rights as land owner to remove unwanted persons from it. He said it was just as if campers had been asked to leave the grounds at Buckingham Palace by the Crown. He also pointed out that the British Indian Ocean Territory had its own legal system and there was a specific law of the British Indian Ocean Territory - the Immigration Ordinance of 1971 which prohibited anyone from being on the islands regardless of birth in the Territory only military personnel or those in possession of a permit could enter or remain on the islands. Well I didn't find this a very satisfying explanation but I was still groping for a legal analysis which would identify illegality and a remedy for the islanders.

Soon I received instructions from a colleague in Mauritius on behalf of two Ilois ladies who were his clients so I was formally instructed to look into their plight. The first thing to do was to write to the BIOT Commissioner enquiring whether islanders could be allowed back to the islands and I duly received a letter of refusal and explanation based upon the Immigration Ordinance of 1971. Having little to respond with, my letters in reply suggested that there had been widespread abuse of human rights, disrespect of family life and destruction of cultural life under Article 8 and inhuman and degrading treatment under Article 3. All this, of course, was water off a duck's back, and the Commissioner simply referred again to the Immigration Ordinance I then consulted that excellent nationality Barrister, Lawrens Fransman QC, and together we worked out the nationality position of the islanders. Lawrens advised me that because of their birth on the Chagos Islands which remained a British Dependent Territory, the islanders retained citizenship of the UK and colonies as well as becoming Mauritius citizens under the Mauritius Constitution of 1968. This was something which no lawyer or politician that I spoke to in Mauritius was aware (of, and of course since) Chagossians don't travel they were certainly not going around waving their British Passports. The British of course had taken no steps to inform them of their constitutional tie between subject and sovereign. But here was a breakthrough, Chagossians were all subjects of the Crown by virtue of their connection with a Dependent Territory, although as BDTC's they had no statutory right of abode anywhere in the world. The question was to see what rights they *did* have and here we looked to ordinary principles of English Constitutional law.

So I began to remind myself of some basic principles of constitutional law in what we used to call the Colonies. This leads you directly to the ancient Prerogatives of the Crown because the Crown has Prerogative power to rule throughout the Empire without any reference to the UK Parliament whatsoever. The Queen can if she wants to, exercise her Constituent Power - that is the right to lay down a constitution for a colony. She also has a legislative power, and can make laws directly or appoint a legislature to do so. Over the years the power to legislate as authorised by the Queen became known as the power *to pass laws for the Peace Order and Good Government of the territory* and, as I learnt later, this is sometimes known as 'POGG'. It is a time honoured phrase which the Courts have many times interpreted and in all cases they held it to be sovereign power just like that of the Westminster Parliament who pass laws for the United Kingdom. Of course many Colonial Legislatures have become mature and democratic organisations like the parliament of Australia and Canada but they still legislate for the Peace Order and Good Government of their territories. The strange fact about the Chagos Islands was that the supreme legislature was a single chap: the Commissioner for BIOT, and that was why the immigration

ordinance of 1971 had been signed by a single individual Sir Bruce Greatbatch who happened to be the Commissioner of the territory 1971. He in turn derived his power from the 1965 Order which the Queen passed in Council that is say in the Privy Council. By this instrument the BIOT had been established and the office of commissioner set up with power to legislate for POGG.

It was because of these little known but well worn constitutional authorities that the Commissioner when writing to me had invited me to understand that the Immigration Ordinance 1971 was a good as a Westminster Statute so far as the population of the territory was concerned.

By now I was convinced if there was to be any remedy for the islanders it would lie in the field of Public or Constitutional law rather than in the private law of tort. A little experience has taught me that if you are trying to undermine legislation which is not itself a Westminster Statute the best place to start, is to look at the integrity of the decision making process. Now it was here that the passage of time came to our aid. By January 1998 it was just over 30 years since BIOT had been established in 1965. Surely there would be records at the Public Record Office in London. So before the end of the Christmas vacation, I asked my son Mark who was then a law student, and a young Mauritian Journalist who knew some of the background to the islanders' plight, to go to the PRO and see what they could turn up. After a day's research they came back with about 50 photocopied documents which were very interesting indeed

As we read this material it seemed that an attempt was being made to misrepresent the character of the population to the United Nations in order to avoid the obligations of Article 73 of the UN Charter so here we had identified the reason why this strange fiction had arisen that Chagossians were simply migrant contract workers from elsewhere. This was interesting but how did it help Illois? The UN Charter is an international treaty and as such gives rise to no domestic law rights. It is like a whole raft of other international instruments such as the Universal Declaration of Human Rights or the International Covenant on Civil or Political Rights all of which declare the sanctity of homeland and declare various freedoms from maltreatment. As is well known no domestic law rights are conferred unless and until such a treaty is incorporated into domestic law by an act of Parliament or in this case by the colonial legislature which was the BIOT Commissioner and I can assure you that he had certainly not incorporated any such fundamental freedoms in the law of BIOT. So I went back to consider what if any rights a BDTC has to live in his territory and of course to get an angle, on that one needed to know what was the right of UK citizen to be in the United Kingdom. This is now a statutory provision since the right of abode of those born in the United Kingdom arises under the Immigration Act 1971.

I finally tracked down the original source of this right to Magna Carta that great statement of rights and liberties where at chapter 29 it is provided that:

'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 pass upon him nor condemn him, but by lawful Judgment of his peers or by the law of the land'.

Now Magna Carta is still on the statute book and this famous Chapter 29 is regarded as the origin of trial by jury. It had a tantalising provision that no one shall be 'outlawed but by the law of the land', but its effect was far from conclusive. First of all Magna Carta is generally regarded as a source of law rather than law itself. For example you could not sue to establish trial by jury on Magna Carta alone. You would have to base it on some later enactment or common law rule. Secondly, there was the question of whether Magna Carta applies to the Overseas Territories of the Crown.

By now I was getting advise from Anthony Bradley the Constitutional Law Expert and we turned our attention to the technicalities of Commonwealth Law.

We identified the principle that when a colonial legislature such as the Commissioner is established, that legislature is supreme in its territory and there are only two effective requirements. The first is the power to legislate for the Peace Order and Good Government, and secondly any law passed must not contravene any UK statute applying to the territory. This was the thrust of the Colonial Laws Validity Act 1865. The question of whether Magna Carta applied to the colonies was in portrait since if it did this might invalidate the Immigration Ordinance of BIOT. Here there was a conflict of authority. Lord Denning had said in the Alberta Indians Case that:

'Magna Carta follows the flag'. I.e. that wherever the British Crown is sovereign the rights of the population are underpinned by Magna Carta. But the problem with Lord Denning is there is generally a conflicting line of authority.

I must say that I always regarded this as our strongest argument. I thought that even if Magna Carta does not guarantee specific rights it should at least provide a bulwark of moral and legal authority which a colonial legislature should not be at liberty to contravene. However as we shall see I was wrong about that. I must say I thought it much stronger than the argument based on POGG because there was not a single case in the authorities where a colonial law had been held invalid because it fell outside of POGG, the ambit of which was regarded as more or less infinite.

The third argument which we developed was the good old fashion administrative law principle of ultra vires – that where a subordinate or delegated law maker passes a law he must stay within the law making power which he has been given. But here there was a snag. Was the Commissioner a subordinate or delegated law maker? There was a long line of cases in which it was said that a colonial legislature is not a delegate of the Crown but is supreme in its territory.

Finally there was a new argument that was very promising namely the fundamental right which had been upheld by Lord Justice Laws in *Witham v A-G*. Here you may recall that in a fundraising exercise the Lord Chancellor's Department had raised the fees under the Supreme Court Fees Order so that anyone wanting to issue a High Court Writ had to pay GBP 500. Remission of fees for poor people was abolished, so if there was no Legal Aid a poor person would be unable to issue his proceedings in the High Court. Laws LJ struck down the order as being a bar to the exercise of a fundamental right, namely the right of access to her Majesty's Courts. So when we heard that Lord Justice Laws was appointed to determine the Chagos judicial review I immediately thought that this was a very promising argument. Here again I was to be proved wrong. Now stepping back, you will appreciate that the way our case was developing was to emphasize some sort of fundamental rights which an inferior form of legislature was not at liberty to override. But the problem with a fundamental right is that when you assert it, the Crown will not only deny that it is fundamental, but it will also deny that the right exists at all. So a great deal depends upon the impression which your advocate makes on the Court.

Now here we had a magnificent advantage because there is no advocate of the Bar who is better at arguing fundamental principles of constitutional law than Sir Sydney Kentridge QC. Originating from South Africa he has great experience and knowledge of the application of British Commonwealth law. His penetrating intellect is matched by submissions which are bullet-proof because he somehow manages to draw all the counter argument in putting his point. We were fortunate that he warmed greatly to this case responding immediately to an invitation to lead it into the High Court.

So the case was launched in September 1998. In March 1999 we spent a day before Mr Justice Scott Baker who granted us leave to bring a judicial review. The Judge was impressed with the guilty letters which we had turned up at the PRO commenting that 'someone's trying to pretend the population does not exist' – here was a reward indeed for some careful preparation. The Crown defended the leave application only on the basis of jurisdiction saying that there was a Supreme Court of Judicature in the BIOT and we should all decamp to have the case heard there. This somewhat startling proposition was dismissed by Scott Baker who pointed out that all the strings were being pulled by the Foreign Office in Whitehall so the case should be heard in the London High Court.

So in July 2000 the case was argued in full by Sir Sydney Kentridge and by David Pannick for the Crown before Lord Justice Laws and Gibbs J. Some of you may have seen the celebrated Judgment which they handed down in November 2000 in which they struck-down the Immigration Ordinance 1971. The Judgment shows the legal complexities into which this group of simple folk had been enmeshed and what a task it was to prove a simple injustice.

The Judgment

- On the question of jurisdiction the Divisional Court held that the Queen's Writ of judicial review ran throughout the colonies so her Judges could judicially review any act of the Commissioner in BIOT. Moreover the High Court in London had jurisdiction because all these laws had been prescribed in Whitehall.

- Pear view b/w*
- Seems fit a v...
Provide w/ of POGG this
Appropriate w/ in cto
Laws' wh?*
2. Magna Carta did apply to the colonies, as Lord Denning had said, but its effect was surprisingly limited. What chapter 29 provided was that if such freedoms as exile were to be cut down all that was necessary was for the law of the land to make provision for it. I.e. Magna Carta only guaranteed a procedure not a right. Since the Immigration Ordinance 1971 provided for banishment of the population it was nonetheless the law of the land. The question was – was it a valid law and in order to answer this question you had to look elsewhere.
 3. The principle of *Witham v AG* was not a principle that was available in the colonies since under the colonial laws Validity Act 1865 it was only repugnance to Westminster statute that invalidated a colonial law. Repugnance to Common Law even fundamental rights did not invalidate. In fact the CLVA had been passed expressly to enable colonial legislatures such as that in Australia to be free to depart from slavish adherence to English law principles and if the repugnance derived from undermining a common-law right even a constitutional or fundamental right that was no ground for attacking that law because the CVLA expressly permitted it.
 4. Finally Laws LJ addressed the argument based on POGG. He recognised that there was a long line of cases such as *Riel*, *Sekgome* and *Winfat* saying that a colonial legislature was sovereign in its territory and not an agent of the Crown but nonetheless the phrase POGG must mean something since it was not an infinite power which the Commissioner had to exercise. Although POGG was a ‘large tapestry’, the tapestry nonetheless had borders. In this case POGG required that subjects were to be governed and not removed. This was justified by applying a narrow interpretation which Laws LJ said was justified by the unusual factors of an unrepresentative legislature and the breach of fundamental rights involved.

So he had managed to reflect the unique injustice to an entire population by the narrowest of margins. Despite many authorities saying that POGG was an infinite power Laws LJ limited its ambit. But on all other arguments even Sir Sydney failed.

In giving Judgment against the Crown Laws LJ bent over backwards to compliment the civil servants and politicians who had so stoutly resisted the islanders case. He went so far as to praise them for their historic co-operation with the High Court in making available the historical record. I thought this was a bit rich since it was only because we began to dig them up in the Public Record Office that the Crown felt obliged to put its cards on the table.

Another more remarkable fact was that throughout the entire case the word ‘human rights’ never passed the lips of Sir Sydney, and received the merest of passing mentions in the Judgment – namely that the Human Rights Act 1998 had been enacted but was not yet in force. There was no reference by the Judges to its terms.

On the same day as the Judgment, Robin Cook who was Foreign Secretary announced that he was not going to appeal the decision and instead was going to abide by the Judgment. On the same day he passed a new immigration ordinance which provided that those born on the islands and their descendants had the right to return to all of the islands in the Chagos archipelago *except* Diego Garcia, and there, it was unlawful for them to be present unless they could obtain a permit.

This was the minimum response to the Judgment which, in effect, has prevented Chagossians from exercising any right of return. The outer islands, although there are about 35 of them, and they are about 135 miles from Diego Garcia are completely derelict. There are no houses, no infrastructure, there is no economy and although you might establish a small primitive settlement it certainly is not possible to restore any of the previous facilities of those islands without some major rehabilitation programme, and here of course the Government is sitting on its hands. Most of all, there is no transport.

So this historic victory proved to be one of principle only. The next chapter of the story is the efforts made to turn it into something of value to the Chagossians – but that, I fear, is a story for another day. Thank you for listening to the story of my favourite case – hope you enjoyed it. If time can I show you documentary film.

As Eliza would have said ...