

In The House of Lords

ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL
(CIVIL DIVISION)

Court of Appeal ref: CA 2006/1465
Neutral citation of judgment appealed against: [2007] EWCA Civ 498

BETWEEN: -

THE QUEEN
-on the application of-

LOUIS OLIVIER BANCOULT

Respondent

-and-

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

Appellant

CASE FOR THE RESPONDENT

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A. INTRODUCTION AND BACKGROUND

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1. In 1965 the islands of the Chagos Archipelago in the Indian Ocean were separated from the then colony of Mauritius and were by an Order in Council designated a separate British Colony, to be known as the British Indian Ocean Territory ("BIOT"). The principal islands of the Archipelago are Diego Garcia, Peros Banhos and Salomon Island.

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2. There were, at the time, at least several hundred and probably well over a thousand inhabitants of the islands, known as Ilois. Many had been born in the islands, as had their parents and, in some cases, remoter ancestors. The Claimant, Louis Olivier Bancoult, is an Ilois, born of Ilois parents on Peros Banhos in 1964. As "belongers" to BIOT, the Ilois (who now prefer to be referred to as Chagossians) were citizens of the United Kingdom and Colonies.¹

App Pt. III(a)
p. 1339

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3. The separating of BIOT from Mauritius followed an agreement in principle between the governments of the United Kingdom and the United States of America under which an American military base was to be established on Diego Garcia. The United States desired that Diego Garcia and any other island on which American military facilities were established, be cleared of their population, and the

App Pt. IV
p. 2130

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- App Pt. IV
p. 2129
- App Pt. III(a)
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p. 1469
- App Pt. I(a)
p. 161
- the British Government was prepared to accede to its wishes. A formal Exchange of Notes occurred on 30 December 1966, together with a confidential Agreed Minute which confirmed the earlier agreement. In fact, the American base was confined to Diego Garcia and only that island has been "required" for military use by the United States.² The population of Diego Garcia was removed in 1971. By 1973

¹ Under the British Nationality Act 1981, the Claimant and other Ilois became British Dependent Territories Citizens by reason of their birth in and connection with BIOT. Under the British Overseas Territories Act 2002, they became British citizens.

² See Divisional Court judgment, at paragraphs 36-39.

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the whole Chagossian population had been evacuated, without prior consultation and without their consent. They were removed to Mauritius or the Seychelles and were not permitted to return to the Archipelago.

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- App Pt. I(a)
p. 239
4. A mechanism was devised to give legal force to the decision to exclude the Chagossians from the islands. The British Indian Ocean Territory Order 1965 ("BIOT Order"), which established the new colony, made by Her Majesty in Council under the royal prerogative, had authorised the Commissioner to "make laws for the peace, order and good government of the Territory". Invoking this power the Commissioner in 1971 made an Immigration Ordinance (the "1971 Ordinance"), section 4 of which provided that no person should enter, be present or remain in the Territory save under a permit and empowered the Commissioner to remove from the Territory any person whose presence therein was unlawful in terms of the Ordinance. The result was what Sedley LJ in the Court of Appeal described as "the exiling of the Chagossian population".³ There was no exception in favour of citizens of the United Kingdom and Colonies who were born in and belonged to BIOT.

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App Pt. I(a)
p. 252

- App Pt. I(a)
p. 106
5. The Chagossians who had been removed to Mauritius or the Seychelles did not acquiesce in their removal from BIOT, and significant numbers of them, and their children, continued to regard themselves as Chagossians, and desired to return to the islands. The Claimant, Mr. Bancourt, was among their number and in 1999, with the support of a number of other Chagossians, he brought an application for judicial review in the High Court in London, seeking an order of *certiorari* to quash section 4 of the Ordinance in so far as it related to citizens who were or had been residents of BIOT,

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³ [2007] EWCA Civ 498, at paragraph 3.

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and their children.

6. On 3 November 2000 a Divisional Court (Laws LJ and Gibbs J) made an order quashing section 4 of the 1971 Ordinance.

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The Respondent (the Secretary of State for Foreign and Commonwealth Affairs) was granted permission to appeal but on the same day the Secretary of State (Mr. Robin Cook M.P.) made a public statement, saying that he had decided to accept the Court's ruling and that the Government would not be appealing. He said further that there would be a new Immigration Ordinance for BIOT which would "allow the Ilois to return to the other islands while maintaining our Treaty obligations". He added that the Government did not defend "what was done or said thirty years ago".

App Pt. I(b)
p. 643

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7. The Commissioner immediately promulgated a new Ordinance (the "2000 Immigration Ordinance") containing, save in respect of Diego Garcia, exemptions in favour of persons who were British Dependent Territories citizens by virtue of their connection with BIOT.⁴ As Sedley LJ explained in the Court of Appeal, "in substance, the Chagossians were permitted to return home".⁵

App Pt. I(a)
p. 262

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8. The exception of Diego Garcia in the 2000 Immigration Ordinance is not, and has not been, the subject of any legal challenge by the Respondent and those Chagossians associated with him.

App Pt. I(a)
p. 109

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By the time the proceedings in the Divisional Court were commenced, the naval and air base on Diego Garcia had long been established. The Respondent and his associates have no wish to intrude on it or to interfere with it. The present proceedings relate only to their right of return to the outer islands.

⁴ A person was defined as having the necessary connection if "he or one of his parents or one of his grandparents was born in the Chagos Archipelago". Such persons have been referred to generally, even if not in the Ordinance, as "belongers" to BIOT.

⁵ Court of Appeal judgment, at paragraph 9.

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9. The position of the Chagos Archipelago in the Indian Ocean and the position of Diego Garcia and the other islands within the Archipelago are shown on two maps which are to be found at the front of Part IV of the Appendix.

App Pt. IV
pp. 2113-14

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10. The decision of the Divisional Court is reported as *R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*.⁶ The judgments turned on the extent of the Commissioner's powers to make laws for the "peace, order and good government of the Territory". Those words had been said by the Privy Council to "connote, in British constitutional language, the widest law-making powers appropriate to a sovereign".⁷

App Pt. I(b)
p. 286

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11. The Divisional Court held, nonetheless, that these words did not confer a wholly unlimited authority. The issue was whether the law in question could truly be described as being for the peace, order and good government of the territory concerned. The Court held that a law for the wholesale removal of the subjects of the Crown from the land where they belonged could not possibly be a law for the peace, order and good government of the people of the territory concerned. Nor could the law be justified by "pressing consideration of military security".⁸ The Divisional Court judgment is herein referred to as "*Bancoult (1)*".

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12. Even before the judgment in *Bancoult (1)*, the British government had commissioned a study into the feasibility of resettlement of the Chagossians in Peros Banhos and Salomon Island. This study will be referred to below.
13. In 2001 a number of Chagossians including Mr. Bancoult instituted an action for damages against the United Kingdom

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App Pt. I(b)
pp. 309-10, 312

⁶ [2001] QB 1067.

⁷ *Ibralebbe v. The Queen* [1964] AC 900, at 923.

⁸ See Laws LJ at paragraphs 55-59 and Gibbs J at paragraphs 69-71.

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government in the High Court. Their claims sounded in tort, alleging *inter alia* torts of wrongful exile, malfeasance in public office and deceit. After a protracted preliminary hearing, on 9 October 2003 Ouseley J struck out all of the claims as disclosing no cause of action. He held that the claims were in any event barred by the Statute of Limitations. During the 1980s some of the Chagossians then in Mauritius (but not those in the Seychelles) had accepted monetary compensation from the British government and had signed releases. Ouseley J held that actions brought by such persons constituted an abuse of process. We refer to the judgment of Ouseley J as "*The Chagos Islanders*".

App Pt. I(b)
p. 314

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14. An application to the Court of Appeal for permission to appeal, heard on 17 June 2004, was dismissed by the Court of Appeal on 22 July 2004, in a reserved judgment in which the issues were succinctly summarised.

App Pt. I(b)
p. 630

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15. In section 19 of the BIOT Order (as in the later Order of 1976) Her Majesty had reserved her own legislative power in the customary terms, namely "full powers to make laws from time to time for the peace, order and good government of the British Indian Ocean Territory (including ... laws amending or revoking this Order)."

App Pt. I(a)
p. 241

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16. On 10 June 2004, Her Majesty in Council made the British Indian Ocean Territory (Constitution) Order 2004 (the "2004 Constitution Order"). This Order revoked previous Orders. Section 9 of the Order provides:

App Pt. I(a)
p. 272

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- (a) *"Whereas the Territory was constituted and is set aside to be available for the defence purposes of the Government of the United Kingdom and the Government of the United States of America, no person has the right of abode in the Territory."*
- (b) *Accordingly, no person is entitled to enter or be present in the Territory except as authorised by or under this Order or any other law for the time being*

App. Pt. I(a)
p. 274

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in force in the Territory."

17. Section 15 of the Order provides:

App Pt. I(a)
p. 276

- (a) *"There is hereby reserved to Her Majesty full power to make laws for the peace, order and good government of the Territory, and it is hereby declared, without prejudice to the generality of that expression but for the avoidance of doubt, that –*
- (i) *any laws made by Her Majesty in the exercise of that power may make any such provision as Her Majesty considers expedient for or in connection with the administration of the Territory; and*
- (ii) *no such provision shall be deemed to be invalid except to the extent that it is inconsistent with the status of the Territory as a British overseas territory or otherwise as provided by the Colonial Laws Validity Act 1865.*
- (b) *Without prejudice to the generality of the power to make laws reserved to Her Majesty by subsection (1), any such law may make such provision as Her Majesty considers expedient for the purposes for which the Territory was constituted and is set aside, and accordingly and in particular, to give effect to section 9(1) and to secure compliance with section 9(2), including provision for the prohibition and punishment of unauthorised entry into, or unauthorised presence in, the Territory, for the prevention of such unauthorised entry and the removal from the Territory of persons whose presence in the Territory is unauthorised, and for empowering public officers to effect such prevention or, as the case may be, such removal (including by the use of such force as is reasonable in the circumstances)."*
18. Section 15(a)(ii) of the Order purported to limit judicial review in respect of laws made by Her Majesty, but the Appellant has not founded any argument on that provision.

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19. On the same day Her Majesty in Council made the British Indian Ocean Territory (Immigration) Order, 2004 (the "2004 Immigration Order") which repealed the Immigration Ordinance of 3 November 2000, and by section 5 restored the provisions of section 4 of 1971 Ordinance, which had been quashed by *Bancoult* (1).

App Pt. I(a)
p. 278

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20. As the 2004 Orders were not statutory instruments they were not subject to any Parliamentary approval. They were made

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without any consultation with the Ilois or their representatives. They were intended to reverse the judgment of the Divisional Court in *Bancoult* (1), notwithstanding the statement of the Secretary of State referred to above.

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21. On 5 October 2004, the Respondent was given leave by Sullivan J to bring judicial review proceedings against the Appellant seeking a declaration that the provisions of the 2004 Orders referred to above (the "2004 Orders") were unlawful and invalid, as being beyond the powers of Her Majesty in Council and an unlawful exercise of her powers.

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On 13 July 2005, Sullivan J gave a Directions Order reserving certain issues for later consideration if necessary.

App Pt. I(a)
p. 198

22. On 16 May 2006, the Divisional Court (Hooper LJ and Cresswell J) found in favour of the present Respondent and,

App Pt. I(a)
p. 151

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together with other relief, quashed Section 9 of the 2004 Constitution Order.⁹ The Court of Appeal (Sir Anthony Clarke MR, Waller and Sedley LLJ) upheld the Divisional Court's Order on 23 May 2007, and it is against the Court of Appeal's judgments that the Appellant has petitioned your Lordships.

App Pt. I(a)
p. 106

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⁹ *The Queen on the application of Louis Olivier Bancoult v The Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (Admin).

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B. THE CLEARANCE OF THE ISLANDS

23. As stated above, after *Bancoult (1)* the then Secretary of State did not attempt to defend "what was done or said thirty years ago". In a statement in the House of Commons on 7 July 2004, in the course of a debate on the Orders in Council of 10 June 2004, the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs similarly disavowed any intention to justify what had been done to depopulate the islands in the 1960s and 1970s.¹⁰ Nonetheless, and notwithstanding the contemporary record, the Appellant in the

App Pt. I(b)
p. 655

App Pt. I(a)
p. 171

App Pt. I(a)
p. 164

Court of Appeal (through different counsel) not only disputed that the Chagossians had ever had any right of abode in BIOT but even suggested that they left the islands "voluntarily", a travesty of the facts.¹¹

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24. The latter suggestion no longer forms any part of the Appellant's submissions. The Appellant does, however, continue to submit that none of the Ilois had any right of abode in BIOT. He emphasises that none of them has any right of property in the islands, that all land in the islands became Crown Land in 1983. In consequence, it is said, the Chagossians would be trespassers should they exercise their right to return to any of the islands.¹² The Appellant also suggests that any rights the Chagossians may have had could not have survived their long absence from the islands.¹³

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25. Neither in *Bancoult (1)* nor in either of the courts below were the Crown's rights in private law considered relevant. The issue throughout has been the rights of the Chagossians in public law. In so far as the Appellant now seeks to rely on the

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¹⁰ See Divisional Court judgment, at paragraph 94.

¹¹ An example of what the Divisional Court (at paragraph 61) characterised as a disappointing "attempt to obfuscate the history."

¹² Appellant's Case, paragraphs 11 and 52 ("The Chagossians ... are ... claiming a right to commit trespass.")

¹³ Appellant's Case, paragraph 12.

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fact of the Chagossians' dispossession and long exile, the Appellant is seeking to take advantage of its own unlawful conduct.

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26. The plain fact is that the British Government in the period 1965 to 1973 achieved the depopulation of the islands by stratagems¹⁴ which included deception and concealment. In particular, the Government concealed from the United Nations¹⁵ and from the British public the fact that there were permanent inhabitants of BIOT who were to be removed from or excluded from the islands without consultation or consent. Indeed, it even attempted to conceal as far as possible the promulgation of the 1971 Ordinance.¹⁶

App Pt. I(b)
p. 319

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27. The policy of depopulation of BIOT, although desired by the United States, was not required by any treaty or agreement between the United Kingdom and the United States and was held in *Bancoult* (1) to be illegal. This policy as executed by successive United Kingdom governments was described by Laws LJ in *Bancoult* (1) as "an abject legal failure".¹⁷ In *The Chagos Islanders*, Ouseley J (who wholly dismissed the Chagossians' action), nonetheless said at paragraph 154:

App Pt. IV
p. 2172

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App Pt. I(b)
pp. 310-1

"It does appear that, in the absence of unexpectedly compelling evidence to the contrary, at least some Claimant Chagossians could show that they were treated shamefully by successive U.K. Governments. Whatever view might be taken of the importance of the strategic defence aims underlying the creation of BIOT, the evacuation of the islands and the establishment of the base on Diego Garcia, some who had lived there for generations were uprooted from the only way of life which they knew and were taken to Mauritius and the Seychelles where little or

App Pt. I(b)
p. 336

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¹⁴ The stratagems included the purchase of the plantations on which the Chagossians worked and lived, and then allowing the plantations to be run down, so as to deprive the Chagossians of their livelihoods.

¹⁵ The object was to evade the obligation to report on the progress of the inhabitants and to treat the interests of the Chagossians as paramount, under Article 73(e) of the UN Charter. Divisional Court judgment at paragraphs 28-34.

¹⁶ See *Bancoult* (1) at paragraph 19.

¹⁷ See *Bancoult* (1) at paragraph 59.

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no provision for their reception, accommodation, future employment and well-being had been made. Ill-suited to their surroundings, poverty and misery became their common lot for years. The Chagossians alone were made to pay a personal price for the defence establishment on Diego Garcia, which was regarded by the U.K. and US Governments as necessary for the defence of the West and its values. Many were given nothing for years but a callous separation from their homes, belongings and way of life and a terrible journey to privation and hardship."

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28. The Court of Appeal in the judgment refusing permission to appeal in *The Chagos Islanders* case referred to above said:¹⁸

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"The political history of the removals and of the endeavours to secure redress can be found in compelling detail, first in the judgment of Laws LJ in Bancoult (below) and secondly in the judgment of Ouseley J in the present proceedings. In the light of it, it would be wrong of us to move on to the legal issues without acknowledging, as Ouseley J went out of his way to do in a judgment to the comprehensiveness of which we pay tribute, the shameful treatment to which the islanders were apparently subjected. The deliberate misrepresentations of the Ilois' history and status, designed to deflect any investigation by the United Nations; the use of legal powers designed for the governance of the islands for the illicit purpose of depopulating them; the uprooting of scores of families from the only way of life and means of subsistence that they knew; the want of anything like adequate provision for their resettlement: all of this and more is now part of the historical record. It is difficult to ignore the parallel with the Highland clearances of the second quarter of the nineteenth century. Defence may have replaced agricultural improvement as the reason, but the pauperisation and expulsion of the weak in the interests of the powerful still gives little to be proud of."

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29. The plan for the clearance of the islands and the manner in which it was accomplished appear from documents obtained from the Public Records Office or from others which were disclosed by the Appellant. These are set out or summarised

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App Pt. I(b)
p. 290

¹⁸ At paragraph 6.

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in *Bancoult (1)*, at paragraphs 6 to 20, and in the Divisional Court judgment, at paragraphs 22 to 74.¹⁹ Your Lordships are respectfully invited to read those passages.

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¹⁹ Referred to in the Court of Appeal judgment by Sedley LJ, at paragraph 3.

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C. THE HISTORY AND LEGAL STATUS OF CHAGOS AND THE CHAGOSSIANS

30. From 1715, France occupied and claimed Mauritius (then Ile de France). In 1810, during the Napoleonic wars, Britain captured Mauritius. In 1814, by the Treaty of Paris, the King of France ceded Mauritius and its dependencies to His Britannic Majesty. These dependencies included the Chagos Archipelago. In *Bancoult* (1) it was held that BIOT was accordingly to be classified as a "ceded" rather than a "settled" colony.²⁰ It will be submitted, however, that there is now little significance in the classification chosen.
31. After the cession of Mauritius to the Crown, French citizens present there were permitted under the Treaty of Paris to retain their French citizenship and to return to France within a given period. Those who did not choose to do so, together with any other inhabitants, became British subjects.
32. In *Campbell v. Hall*²¹, Lord Mansfield said:

"A country conquered by the British arms becomes a dominion of the King in the rights of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.

[Secondly] the conquered inhabitants once received under the King's protection, become subjects, and are to be universally received in that light, not as enemies and aliens".

33. As to the law thereafter in force in Mauritius see Forsyth, *Cases and Opinions on Constitutional Law* (1869).²²

"As British subjects they owed allegiance to the Crown, and the Crown owed them a reciprocal duty of

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App Pt. I(b)
p. 316

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²⁰ Roberts-Wray, *Commonwealth and Colonial Law* p. 727.

²¹ (1774) 1 Cowl. 204, 208.

²² Pp. 326-8, Joint opinion of Sir John Campbell A.G. and Sir R.M. Rolfe S.G, pp. 326-8. See also Roberts-Wray, *op.cit.*, pp. 729-30.

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protection.²³ In accordance with English constitutional law the existing law of Mauritius (French law) remained in force until the Sovereign chose to alter it."

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34. That rule does not, however, extend to that part of constitutional law which governs the relationship between the subject and the Crown. Those matters are governed by the common law of England.²⁴ While private law in Mauritius was French, public law was English. Thus the supreme legislative power over the ceded (or conquered) colony is not the monarch, but the Parliament of the United Kingdom.²⁵

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35. In accordance with these principles the extent of the royal prerogative in a ceded or conquered colony, as in a settled colony, is a matter of English law which applies throughout the Queen's dominions.²⁶ These principles applied to the Chagos Archipelago, as part of Mauritius, and to BIOT since its inception.

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36. On 26 February 1964, i.e., while the Chagos Archipelago was part of Mauritius, the Queen in Council gave a new Constitution to Mauritius. Chapter 1 of the Constitution recognised and declared that certain fundamental rights and freedoms "have existed and shall continue to exist" in Mauritius. Section 12, "Protection of Freedom of Movement", included "the right to reside in any part of Mauritius, the right to enter Mauritius, the right to leave Mauritius and immunity from expulsion from Mauritius." These rights, accorded to all persons who belonged to Mauritius, were subject to restrictions "reasonably required in the interest of defence,

App Pt. III(a)
p. 1158
App Pt. III(a)
p. 1161
App Pt. III(a)
p. 1165

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²³ This reciprocal duty is undoubtedly, albeit unenforceable judicially. *Joyce v. DPP* [1946] AC 347; *Mutasu v. A-G* [1980] QB 114.

²⁴ *Madzimbamuto v. Lardner-Burke* [1969] 1 AC 645, 721. *Kodeeswaran v. A-G Ceylon* [1970] AC 1111, 1118.

²⁵ *Campbell v. Hall*, *ubi supra*; *Madzimbamuto v. Lardner-Burke*, *supra* at 722.

²⁶ *Sammut v. Strickland* [1938] AC 678, 697; *Roberts-Wray*, *op.cit.* p. 561; *Maritime Bank of Canada v. Receiver-General of New Brunswick* [1892] AC 437, 441.

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public safety, public order ...". Any such restriction had to be "reasonably justifiable in a democratic society."

App Pt. 1(a) 37. On 8 November 1965, Her Majesty in Council, acting both p. 243 under the prerogative and under powers conferred by the

Colonial Boundaries Act 1895, ordered that the Chagos Archipelago, together with certain other islands, should from the date of the Order form the separate colony of BIOT. Section 15 of the Order provided for the continuation of any laws in force at the date of the Order in any of the islands comprised in the Territory. Section 12 of the Constitution of Mauritius was such a law.

38. The later history of BIOT has been summarised above.

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D. SOME CONSTITUTIONAL FUNDAMENTALS

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39. The Appellant attempts to equate the powers of the Queen in Council to legislate for colonies with the legislative powers of the Queen in Parliament. That is a false equation.²⁷ As stated above, the Queen in Parliament has the supreme and unquestionable legislative power over all British colonies or dependencies. That has never (or at least not since the 18th century) been true of Her Majesty in Council. The Appellant says on more than one occasion²⁸ that the Respondent "concedes" the supremacy of Parliament and that the result aimed at by the 2004 Orders could have been achieved by Parliament. The Respondent did not "concede" this: he asserted it.

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40. The Appellant derives from the accepted supremacy of Parliament the proposition that because an Act of Parliament could have validly achieved the same object as the 2004 Orders, the latter must be "inherently lawful", so that its purposes must be lawful, whichever body enacted them. This proposition is, with respect, meaningless. It would imply that no subordinate legislation and no decision of a tribunal or administrator could ever be "inherently unlawful" because Parliament could always validate it, *Q.E.A.*

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41. The Appellant also asserts, for example at paragraph 139.4 of its Case, that because an Order in Council in respect of a ceded colony is primary legislation "it is no more susceptible to judicial review by reference to allegations of irrationality or procedural impropriety than is the enactment of primary legislation in Parliament". The power to legislate for a ceded

²⁷ The Appellant's Case at paragraph 107 includes a truncated quotation from A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed) at p.67. The full quotation entirely contradicts the proposition for which the Appellant cites it.

²⁸ See for example Appellant's Case at paragraphs 21.2, 115 and 225.

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colony exercised by the Queen in Council is indeed "primary", in that it is not derived from a statute. Parliamentary legislation is, however, immune from judicial review on any grounds not because it is primary, but because the common law as applied by the courts recognises the supremacy of Parliament. In *R (Jackson) v. Attorney General*,²⁹ Lord Steyn said at paragraph 102:

"The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle."

42. In the same case at paragraph 177, Lord Carswell quoted the following passage from the judgment of Lord Reid in *Madzimbamuto v. Lardner-Burke (supra)* as expressing the accepted principle governing the powers of Parliament:³⁰

"It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid."

43. None of this applies to Orders in Council, either in ceded or in settled colonies.³¹

44. The Appellant constantly refers to the purpose as underlying purpose for which a colony is "constituted" (see paragraphs 81.27 and 103-5 of the Appellant's Case). Thus it is said at paragraph 5 of the Appellant's Case that BIOT was "originally constituted and set aside exclusively for defence

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²⁹ [2006] 1 AC 263.

³⁰ The possible qualifications to this general principle referred to by some of their Lordships in *R (Jackson) v Attorney General (supra)*, particularly with regard to the Act of Union 1707, need not be considered in this context.

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purposes". This is an echo of the preamble to section 9 of the 2004 Constitution Order. This purpose is not stated in the original BIOT Order of 8 November 1965, made under the Colonial Boundaries Act 1895, and under the prerogative. Whatever the 2004 Orders do or do not say, the terms "constituted" and "set aside" are, as used by the Appellant, seriously misleading.

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45. Her Majesty in Council in the exercise of the prerogative has, and has long had, the power to constitute as colonies territories acquired by British settlement, by conquest or cession, or simply by annexation.³² The BIOT Order, detaching BIOT from Mauritius and declaring it to be a separate colony, did not "constitute" it in the above sense. It was already a colonial territory with a permanent population of British citizens. Nor is it understood what is meant by saying that the colony was "set aside" for a particular purpose. The Crown may have a variety of legitimate purposes for the acquisition or continued governance of a colony, but if the colony has a population of the Crown's subjects there is no legal basis, it is submitted, for "setting aside" the colony "exclusively for defence purposes". That or any other purpose, however legitimate, cannot exclude or override the rights and interests of the citizen population.

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³¹ See also Waller LJ in the Court of Appeal judgment at paragraph 106, on why an Order in Council should not be equated with primary legislation passed through Parliament. "So far as legislation passed in Parliament is concerned there is an opportunity for debate and scrutiny. So far as subsidiary legislation in the form of regulations is concerned there is little opportunity for debate but at least there is the negative resolution procedure. So far as Orders in Council are concerned there is simply no opportunity for debate at all and no opportunity for scrutiny. It involves a minister acting without any constraint." It should be pointed out that following the British Settlements Act 1887, Orders in Council for settled colonies cannot be regarded as primary legislation.

³² Roberts-Wray, *op cit* pp. 99-108.

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Fundamental Rights

46. In *Liyanage v. The Queen*, Lord Pearce in a passage cited by the Appellant³³ referred to the vagueness and uncertainty of the concept of "fundamental principles of English law".³⁴ Be that as it may, in more recent times English courts have recognised that certain common law rights may be recognised as "fundamental rights", with legal consequences in various contexts. Examples are *R v. Lord Chancellor, Ex parte Witham*,³⁵ *R v. Secretary of State for the Home Department, Ex parte Simms*,³⁶ *R v. Ministry of Defence, Ex parte Smith*³⁷ (and the cases referred to at pages 554-5 of that judgment) and *International Transport Roth GmbH v. Home Secretary*.³⁸
47. It will be submitted that a citizen's right of abode in, and return to, the territory of his citizenship is such a right.
48. In *Council of Civil Service Unions and others v. Minister for the Civil Service*,³⁹ the scope of judicial review of the royal prerogative was extended beyond *ultra vires* in the narrow sense (the existence and limits of power) to include review of the exercise of prerogative power on such grounds as unreasonableness, abuse of power, procedural impropriety and breach of legitimate expectations. The present claim is concerned both with review of the limits of the prerogative, and also on grounds of judicial review now available following CCSU. Prerogative acts being in reality acts of the executive may be subject to judicial review if they directly

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³³ Appellant's Case, paragraph 279.

³⁴ [1967] 1 AC 259 (PC), 271.

³⁵ [1998] QB 575.

³⁶ [2000] 2 AC 115.

³⁷ [1996] QB 517.

³⁸ [2003] QB 728, 259-760.

³⁹ [1985] AC 374 ("CCSU").

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affect the rights or legitimate expectations of citizens or, in some cases, inhabitants generally.⁴⁰ In this case the 2004 Orders fall into that category.

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⁴⁰ See *CCSU*, Lord Diplock at 407, Lord Roskill at 417; *Operation Dismantle Inc. v. The Queen* (1985) 18 DLR (4th) 481 (S.C. of Canada) Wilson J at 504; *Black v. Canada (Prime Minister)* (2001) 54 OR (3rd) 215 (C.A. of Ontario) Laskin JA at 230-231; *R (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2003] UK HRR 76.

E. THE RESPONDENT'S CASE IN SUMMARY

49. As a citizen of the United Kingdom and Colonies, by reason of his birth in and connection with BIOT, the Respondent acquired and has retained the right of abode in BIOT, including the right not to be excluded or exiled from BIOT. This is a fundamental right of citizenship.
50. The Respondent's principal submission is that the 2004 Orders are beyond the powers of Her Majesty in Council. While the Queen has the undoubted power under the royal prerogative to grant a constitution to BIOT and make laws for BIOT, the prerogative has never included the power to remove or exclude British subjects from the territory to which they belong, let alone a whole population of British subjects. The Crown has never before claimed such a power over the colonies under its legislative prerogative. It is submitted that the prerogative power of legislation for the colony is not an unlimited power and in particular does not include the power to abolish the right of abode of the Respondent and others in his position whatever form the order may take.
51. More narrowly, the Queen's prerogative power of legislation for territories such as BIOT is not broader than the power to make laws "for the peace, order and good government of the territory". The Crown has never asserted any broader power. That power is limited in accordance with the interpretation placed on those words by *Bancoult* (1): i.e. the power is a power to make laws for the peace, order and good government of the inhabitants of the territory, and a law for the removal and exclusion of a whole population from the territory to which they belong is outside the category of such laws.

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52. Further, the Colonial Laws Validity Act 1865 (the "1865 Act") does not prevent the validity of the 2004 Orders from being challenged.

App Pt. I(a)
p. 201

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The Appellant has misread the 1865 Act as excluding any legal challenge to an Order in Council except on grounds of repugnancy to an Act of Parliament. In fact the 1865 Act simply declares the extent to which a colonial law shall be declared void in the extent of repugnancy to an Act of Parliament, and accordingly presents no bar to these proceedings. The Respondent's case is not based on repugnancy to any English law, but on the limits of Her Majesty's law-making powers.

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53. Further or alternatively, the Orders in Council of 10 June

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2004 are amenable to judicial review because they are justiciable acts of executive government. The fact that prerogative Orders in Council may be described as "primary legislation" does not exempt them from judicial review.

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54. Further, it is submitted that the 2004 Orders must be subject

to a rigorous scrutiny of their validity because they interfere so extensively and gravely with the fundamental rights of the Chagossians.

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55. It is submitted that the 2004 Orders are unreasonable, irrational, conspicuously unfair, disproportionate, and an abuse of power in that:

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(a) The Appellant gave undue weight to what he conceived to be the defence interests of the United States and the United Kingdom, without any, or any adequate, regard to the rights and interests of the Chagossians, and in particular their existing right of abode in the outer islands;

(b) The Crown ignored its duty of protection owed to its subjects, and ignored its international obligations to respect their fundamental rights;

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- (c) The 2004 Orders remove the right of abode from all Chagossians in respect of the entire archipelago, including the outer islands over a hundred miles from Diego Garcia, with no convincing reason. The defence consideration and treaty obligations raised by the Appellant (even if relevant) do not justify such an Order. The feasibility study (even if a legitimate consideration) does not require removal of the right of abode from all Chagossians from the entire archipelago; and
- (d) Their defiance of logic or accepted moral standards is such that no sensible authority acting with due appreciation of its responsibilities would have decided to make them.

56. Further or alternatively, the public statement of the Secretary of State on 3 November 2000 created a legitimate expectation on the part of the Respondent and other Chagossians that their legal right to return to the islands would be accepted and respected and that the Appellant would right the wrong exposed in *Bancourt* (1), and that this would not be conditional in any way. There is no evidence of any change in circumstances between 2000 and 2004 on the single question relevant to the 2004 Orders, namely whether the Chagossians should be allowed to retain the right to return to the outer islands. Accordingly the making of the 2004 Orders was an unjustifiable frustration of that expectation.

App Pt. I(a)
p. 209

57. Further or alternatively, the European Convention on Human Rights (the "ECHR") applies to BIOT. The 2004 Orders violate the Appellant's obligations under the ECHR and the Human Rights Act 1998 (the "HRA"), to respect the Chagossians' fundamental rights of the Respondent and

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other Chagossians, in particular the protection of their private family life and home.⁴¹ The Queen may not assert prerogative powers in conflict with those obligations.

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58. Further or alternatively, under customary international law which forms part of the domestic law of the United Kingdom and colonies as well as by treaty obligations, the United Kingdom is obliged to recognise the right of self-determination of peoples, and has recognised it. The Queen may not assert prerogative powers in conflict with that obligation.
59. The Respondent accepts that the 2004 Orders were made by Her Majesty in right of the United Kingdom as well as of BIOT, but submits that that does not in any way detract from its above submissions.

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⁴¹ The scope of the Respondent's submission under this and the following head is limited by the Directions Order of Sullivan J of 13 July 2005.

F. SUMMARIES OF PREVIOUS JUDGMENTS

Bancoult (1)

60. *Bancoult (1)* was an application to the Divisional Court (Laws LJ and Gibbs J) to quash section 4 of the 1971 Ordinance which removed the right of abode for all Chagossians. It was made by the Commissioner for BIOT, who had power under the BIOT Order to make laws "for the peace, order and good government of the Territory". Laws LJ gave the principal judgment and Gibbs J agreed with all of his conclusions and analysis. Their rulings are here summarised only in so far as they are here relevant:

App Pt. I(b)
p. 304

(a) 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".⁴²

App Pt. I(b)
p. 309
App Pt. I(b)
p. 304
App Pt. I(b)
p. 310

(b) BIOT is a ceded colony⁴³ and has "belongers".⁴⁴ The Chagossians are "subjects of the Crown, in right of their British nationality as belongers in the Chagos archipelago".⁴⁵

App Pt. I(b)
p. 307

(c) The Appellant's original argument is that the effect of the 1865 Act was that the 1971 Ordinance could not be challenged as *ultra vires* on any ground save that it offended a British statute, was rejected.⁴⁶

(d) The authorities establish that a colonial legislature empowered to make laws "for the peace, order and

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⁴² Laws LJ at paragraph 39. Gibbs J stated at paragraph 70, that "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".

⁴³ Laws LJ at paragraph 52, Gibbs J at paragraph 68.

⁴⁴ Laws LJ at paragraph 39.

⁴⁵ Laws LJ at paragraph 57.

⁴⁶ Laws LJ at paragraph 47, observing that the argument would mean that "if there were no such statute the Commissioner's powers would presumably be untrammelled; and again we are in the badlands, to us John Wyndham's expression, where there is no rule of law". Counsel for the Appellant had abandoned that argument.

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good government" of its territory "had the widest law-making powers" but its authority "is not unrestrained. Peace, order and good government may be a very large tapestry, but every tapestry has a border".⁴⁷ The question was "whether a particular measure ... can be described as conducing to the territory's peace, order and good government", to be answered by considering whether a reasonable legislator could consider that the measure was conducive to those aims.⁴⁸

App Pt. I(b)
p. 309

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App Pt. I(b)
p. 312

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(e) The "peace, order and good government" of a territory "means nothing "save by reference to the territory's population. They are to be governed not removed". Short of a catastrophe of some kind in which "the land had become toxic and uninhabitable", the Court could not 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".⁴⁹

App Pt. I(b)
p. 310

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(f) Their exclusion was done for reasons which Laws LJ described as "high political" and "good reasons, certainly, dictated by pressing considerations of military security, but not reasons which may reasonably be said to touch the peace, order and good government of BIOT".⁵⁰ As Gibbs J explained, "their detention, removal and exclusion from the territory are inconsistent with all of any of those

App Pt. I(b)
p. 310

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App Pt. I(b)
p. 311

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⁴⁷ Laws LJ at paragraph 55.

⁴⁸ Laws LJ at paragraph 56; Gibbs J at paragraph 69, rejecting the idea that the words "peace, order and good government" were "a mere formula conferring unfettered powers on the Commissioner". Each of those words in relation to a territory "necessarily carries with it the implication that citizens of the territory are there to take the benefits" (paragraph 71).

⁴⁹ Laws LJ at paragraph 57.

⁵⁰ Laws LJ at paragraph 57.

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words".⁵¹

- (g) Section 4 of the 1971 Ordinance had "no colour of lawful authority" because there is "no principled basis" upon which it could be justified as having been empowered by the power to make laws for peace order and good government of BIOT, and it had "no other conceivable source of lawful authority".⁵²

App Pt. I(b)
p. 310

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- (h) The fact that the Chagossians owned no real estate on the islands could not affect "the position in public or constitutional law" and nor could "the making of any monetary compensation".⁵³

App Pt. I(b)
p. 310

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- (i) Laws LJ stated that he had "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".⁵⁴

App Pt. II(b)
p. 311

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The Divisional Court

61. Lord Justice Hooper (sitting with Cresswell J) gave the judgment of the Divisional Court, which was in summary as follows:

App Pt. II(a)
p. 152

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- (a) The Claimant, the Chagossians and their ancestors had the right to live on the islands of the archipelago⁵⁵ until they were "effectively exiled" by the 2004 Orders.⁵⁶

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⁵¹ Gibbs J at paragraph 71.

⁵² Laws LJ at paragraph 57 - paragraph 58.

⁵³ Laws LJ at paragraph paragraph 58.

⁵⁴ Laws LJ at paragraph 61.

⁵⁵ Divisional Court judgment, at paragraphs 1-2.

⁵⁶ At paragraph 3.

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- (b) The Orders made by the Queen in the right of the Government of BIOT.⁵⁷ App Pt. I(a)
p. 117

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- (c) The 2004 Constitution Order is clear that the only justification offered for removing the right of abode was that BIOT was constituted for defence purposes.⁵⁸ App Pt. I(a)
p. 117

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- (d) The 2004 Orders were irrational because it did not refer at all to the interests of BIOT.⁵⁹ App Pt. I(a)
p. 117

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- (e) The additional reason now given by the Appellant for the 2004 Orders, namely the unfeasibility of resettlement, was not a reason given in those Order and therefore should not be considered as justifying them. If it had been given as a reason, the Court would have seen force in the Respondent's argument that the Orders were unlawful because it violated the Chagossians' legitimate expectations.⁶⁰ App Pt. I(a)
p. 178

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- (f) The power to legislate for the "peace, order and good government" of a territory has never been used to exile a whole population. The Court was minded to follow the judgment in *Bancoult* (1) on this point (that the exile of the Chagossians could not reasonably be said to touch the peace, order and good government of BIOT) but did not need to do so given its judgment on irrationality.⁶¹ App Pt. I(a)
p. 183

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⁵⁷ Divisional Court judgment, at paragraph 115.

⁵⁸ At paragraph 121.

⁵⁹ At paragraphs 121 - 122.

⁶⁰ At paragraph 123.

⁶¹ At paragraph 143.

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- App Pt. I(a)
p. 186
- (g) The Court rejected the Appellant's principal argument that the Orders are immune from judicial review. The matters identified by Lord Diplock in *CCSU* which might make a prerogative power unreviewable did not apply here, nor did the irrationality challenge involve matters on which the Court could not properly adjudicate.⁶²

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App Pt. I(a)
p. 152

- (h) The Orders were in reality the orders of the Appellant Secretary of State, and neither Her Majesty nor the members of the Privy Council present on the day they were made considered their merits.⁶³ They were subject to judicial review as an act of the executive.⁶⁴

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App Pt. I(a)
p. 186

- (i) The Court rejected the Appellant's argument that the 1865 Act precluded the challenge because the issue here was not one of repugnancy.⁶⁵

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The Court Of Appeal

62. The Court of Appeal was unanimous in holding that the appeal should be dismissed. The three judgments can be summarised as follows.

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The Master of the Rolls

63. Sir Anthony Clarke MR held as follows:

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App Pt. I(a)
p. 141

- (a) All exercises of the royal prerogative, including all Orders in Council, come within the principle stated by Lord Scarman in *CCSU*.⁶⁶ The prerogative is only unreviewable if the subject matter is non-

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⁶² Divisional Court judgment, at 162.

⁶³ At paragraph 5.

⁶⁴ At paragraph 163.

⁶⁵ Court of Appeal judgment, at paragraph 169.

⁶⁶ At paragraphs 111 - 112.

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justiciable, but the Appellant does not contend that the subject matter of the 2004 Orders made the claims unjusticiable, or that the claim involved issues of national security.⁶⁷

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- (b) The Queen does not have unfettered powers to legislate by Order in Council.⁶⁸ App Pt. I(a)
p. 142

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- (c) The 2004 Orders were acts of the executive, made without consulting the Chagossians and without informing Parliament, and are subject to judicial review.⁶⁹ App Pt. I(a)
p. 143

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- (d) The 1865 Act does not preclude this challenge.⁷⁰ App Pt. I(a)
p. 143
- (e) The 2004 Orders should be quashed because they violated the Chagossians' legitimate expectations created by Mr. Robin Cook's statement.⁷¹ App Pt. I(a)
p. 144

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- (f) Further, the 2004 Orders were irrational and an abuse of power for a further reason, namely that they did not have proper regard for the interests of the Chagossians.⁷² App Pt. I(a)
p. 144

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- (g) Although it is not necessary to decide the appeal, the Appellant's argument about what was meant by "peace, order and good government" gave it too wide a meaning.⁷³ App Pt. I(a)
p. 141

⁶⁷ At paragraphs 117-8.

⁶⁸At paragraph 113.

⁶⁹ At paragraphs 115-6 and 119.

⁷⁰ At paragraph 117.

⁷¹ At paragraphs 119-121.

⁷² At paragraph 123.

⁷³ At paragraph 110.

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- App Pt. I(a)
p. 144
- (h) The Crown, i.e. the executive, in making its decision was entitled to have regard to the interests of the United Kingdom as well as to those of the Chagossians.⁷⁴

Waller LJ

64. Waller LJ's held as follows:

- App Pt. I(a)
p. 131
- (a) The 1865 Act does not preclude this challenge.⁷⁵

- App Pt. I(a)
p. 139
- (b) The 2004 Orders are susceptible to judicial review because:⁷⁶

- (i) this is not one of the unreviewable subject areas identified in CCSU;
- (ii) they are executive acts;
- (iii) Orders in Council are not scrutinised in Parliament and therefore they should not be categorised with primary legislation; and
- (iv) prerogative Orders are even more clearly reviewable than statutory Orders in Council, since their power derives from the common law and not from Parliament.

- App Pt. I(a)
p. 131
- (c) The 2004 Orders should be quashed because they violate the Chagossians' legitimate expectations created by Mr. Robin Cook's statement.⁷⁷

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⁷⁴ At paragraph 122.

⁷⁵ At paragraph 80.

⁷⁶ At paragraphs 101-107.

⁷⁷ At paragraph 80.

A**Sedley LJ**

65. Sedley LJ held as follows:

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|----------|--|--|
| B | (a) The 1865 Act does not preclude this challenge. ⁷⁸ | App Pt. I(a)
p. 110 |
| C | (b) The 2004 Orders are acts of the executive. ⁷⁹ | App Pt. I(a)
p. 115 |
| | (c) They are susceptible to judicial review. ⁸⁰ | App Pt. I(a)
p. 117
App Pt. I(a)
p. 127 |
| D | (d) The Appellant's argument about what was meant by "peace, order and good government" was too broad, and the judgment in <i>Bancoult</i> (1) was correct on this point. ⁸¹ | App Pt. I(a)
p. 122 |
| E | (e) Colonial governance is not one of the unreviewable subject areas identified in <i>CCSU</i> , and the Appellant was rightly not seeking to argue that there were national security interests which prevented judicial review. ⁸² | App Pt. I(a)
p. 120 |
| F | (f) The 2004 Orders negated one of the most fundamental liberties known to human beings, for reasons unconnected with the well-being of the people affected, and require overwhelming justification. ⁸³ | App Pt. I(a)
p. 125 |
| G | (g) The permanent exclusion of an entire population from its homeland for reasons unconnected with their collective well-being is not an act of | |

⁷⁸ At paragraphs 15 – 30.

⁷⁹ At paragraphs 31 - 36.

⁸⁰ At paragraphs 37 – 43 and 64-5.

⁸¹ At paragraphs 50 – 56.

⁸² At paragraphs 44 – 47 and 58.

⁸³ At paragraphs 59 and 71.

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App Pt. I(a)
p. 128

governance.⁸⁴ The only reason given in the 2004 Orders is that BIOT was constituted for defence interests. This ignores, and is in direct conflict, with the interests of the Chagossians, and accordingly the reason given in the Order fails to justify the 2004 Orders.⁸⁵

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App Pt. I(a)
p. 129

(h) The other reason now given, namely the difficulties of resettlement, cannot justify the Orders either because "it is the bolting of the door of the Chagossians' home, not the failure to provide transport there or to refurbish it, which is an issue".⁸⁶

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App Pt. I(a)
p. 129

(i) The Orders were an unlawful frustration of the Chagossians' legitimate expectations.⁸⁷

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Analysis of the Court of Appeal judgment

66. Accordingly, contrary to the Appellant's assertion that the Court of Appeal was unanimous only on legitimate expectation, in fact the Court of Appeal was unanimous on all of the following points:

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App Pt. I(a)
pp. 141, 116

(a) The Orders are amenable to judicial review;⁸⁸

App Pt. I(a)
p. 142

(b) The prerogative power to legislate by Order in Council is not unlimited;⁸⁹

App Pt. I(a)
pp. 143, 116,
135

(c) The Orders are acts of the executive;⁹⁰

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⁸⁴ At paragraph 67.

⁸⁵ At paragraph 69.

⁸⁶ At paragraph 71.

⁸⁷ At paragraphs 72 – 77.

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⁸⁸ Sir Anthony Clarke MR at paragraph 111, Sedley LJ at paragraph 34, Waller LJ at paragraph 107.

⁸⁹ Court of Appeal judgment at paragraph 113 records the unanimity on this point.

⁹⁰ Sir Anthony Clarke MR at paragraph 115, Sedley LJ at 33, Waller LJ at paragraph 92.

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- (d) The 1865 Act does not preclude this challenge,⁹¹ and App Pt. I(a)
pp. 143, 112,
131

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- (e) The 2004 Orders were an unlawful frustration of the Chagossians' legitimate expectations.⁹² App Pt. I(a)
pp. 143, 109,
129, 131,
135

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67. Furthermore, and again contrary to the Appellant's assertion to the contrary, a majority of the Court of Appeal upheld the Divisional Court's judgment that the 2004 Orders are irrational because they did not have proper regard for the interests of the Chagossians.⁹³ App Pt. I(a)
pp. 144, 129

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68. A majority of the Court of Appeal also held that the Appellant's argument about what was meant by "peace, order and good government" was too broad.⁹⁴ App Pt. I(a)
pp. 141, 122

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69. The only issue on which Waller LJ and the Master of the Rolls decided that they would not go as far as Sedley LJ was in relation to the question of whether the prerogative extended to removing a whole population from a ceded country.⁹⁵ App Pt. I(a)
pp. 131, 138,
141, 144

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⁹¹ Sir Anthony Clarke MR at paragraphs 116-7, Sedley LJ at paragraphs 22-30, Waller LJ at paragraph 80.

⁹² Sir Anthony Clarke MR at paragraphs 119-121, Sedley LJ at paragraph 10 and paragraphs 72 – 76, Waller LJ at paragraphs 80 and 91-100.

⁹³ Sir Anthony Clarke MR at paragraph 123, Sedley LJ at paragraph 71.

⁹⁴ Sir Anthony Clarke MR at paragraph 110, Sedley LJ at paragraph 53.

⁹⁵ Waller LJ at paragraphs 80 and 100, Sir Anthony Clarke MR at paragraphs 109 and 123.

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G. THE RIGHT OF ABODE

70. The Appellant asserts that a right of entry and abode in relation to any part of Her Majesty's dominion may exist only by virtue of express enactment, and forms no part of the common law of England.⁹⁶ The authorities, it is submitted, are all the other way.

71. In *Bancoult* (1), at paragraph 39, Laws LJ said:

*"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. Sir William Blackstone says in *Commentaries on the Laws of England*, 15th ed (1809), Vol 1, 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, *A Treatise on the law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (1820), pp 18, 21. Plender, *International Migration Law*, 2nd ed (1988), ch 4, p 133 states: 'The principle that every state must admit its own nationals to its territory is accepted so widely that its existence as a rule of law is virtually beyond dispute'"*

72. The right is an ancient one. Chapter 29 of the Magna Carta provides:

"No freeman shall be taken or imprisoned ... or exiled, or any otherwise destroyed ... but by lawful judgment of his peers, or by the law of the land."

Holdsworth, *A History of English Law*, Vol X, p. 393, states:

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⁹⁶ See Appellant's Case, paragraph 31.

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"The Crown had never had a prerogative power to prevent its subjects from entering the kingdom, or to expel them from it."

In *DPP v. Bhagwan*⁹⁷ Lord Diplock at page 74 said:

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"Prior to the passing of the Commonwealth Immigrants Act 1962, Mr. Bhagwan as a British subject had the right at common law to enter the United Kingdom without let or hindrance when and where he pleased and to remain here as long as he listed."

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73. This right, as part of the common law, obtained throughout the British dominions. In relation to specific territories within the Empire or Commonwealth laws might be passed controlling the entry of British subjects from other British territories.

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- There is, however, no example known to us of any law prohibiting a British subject or citizen who belonged⁹⁸ to a particular territory from entering or remaining in that territory, with the exception of the uninhabited Antarctic Territory and the BIOT legislation so far held to be invalid. See Plender,

App Pt. I(b)
p. 305

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- International Migration Law*, 2nd ed, pp 142-3 (cited by Laws LJ in *Bancoult (1)* at 39).

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74. The case of *Thornton v. The Police*,⁹⁹ cited by the Appellant is authority for no more than the proposition stated in the first sentence of paragraph 29 of his Case. The appellant in Thornton was not a "belonger" to Fiji.

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⁹⁷ [1972] AC 60

App Pt. I(b) p. 499
App Pt. I(b) p. 506
App Pt. I(b) p. 513
App Pt. I(b) p. 522
see App Pt. IV
p. 2200, p. 2219,
p. 2235, p. 2238,
p. 2249, p. 2259.

⁹⁸ Throughout these proceedings the Appellant has been peculiarly sensitive to the word "belonger" contending that it is "a creature of legislation" only, without any meaning. The term is, however, in common use, not least by officials of the Foreign and Commonwealth Office. See for example reference to the documents by Ouseley J, at pages 174, 202, 228, 259 of Appendix to Judgment. For present purposes the definition of "necessary connection" in the Immigration Ordinance 2000 may be taken to define "belonger". For examples where the term "belonger" is used in official documents,

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75. The Appellant¹⁰⁰ founds an argument on the Crown's ownership of all the land on BIOT. It is submitted that Laws LJ was right to hold that the fact that the Chagossians owned no real estate on the island cannot affect the position in public or constitutional law – *Bancoult (1)* paragraph 58.¹⁰¹

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76. In *The Chagos Islanders* in the Court of Appeal the Court said, at paragraph 8:

App Pt. I(b)
p. 632

"It cannot be supposed that the United Kingdom, having bought the Chagos freeholds, was as much at liberty as any other landowner to evict the occupants for any or no reason. Unlike the landowners and tenant farmers who cleared the Highlands of their labouring population, the state is not at liberty to act arbitrarily or unjustly: it is the task of the courts, which are part of the state, to see that it does not. It cannot lie in the mouth of the United Kingdom government, having enacted powers for the governance of the islands, to contend that its officials can ignore the limits on those powers and act outwith them."

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77. The above submissions are directed to the Respondent's common law right of abode,¹⁰² which we submit is a fundamental right, and to its recognition in the 2000 Immigration Ordinance. In the following sections the Respondent submit that the 2004 Orders were not valid in so far as they purported to remove that right.

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App Pt. I(a)
pp 263-264

78. The Respondent does not suggest that he and other Chagossian belongings should be entirely exempt from immigration control. The controls provided for in

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⁹⁹ [1962] AC 339.

¹⁰⁰ Appellant's Case, paragraph 52.

¹⁰¹ Cf. the exchange of minutes between the BIOT Commissioner and the Officer Administering the Government of Mauritius, *Bancoult (1)*, at p. 1084, paragraph 14. (App Pt. I(b) pp. 294-5)

¹⁰² It was also recognised in the constitution of Mauritius – see paragraph 36 above.

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section 4 of the 2000 Immigration Ordinance are not
the subject of attack or criticism.

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H. THE ROYAL PREROGATIVE

79. The only authority claimed by the Appellant for the two Orders in Council of 10th June 2004 is the royal prerogative. The prerogative has been described by Dicey as "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown".¹⁰³

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80. It is trite law that it is for the courts to determine whether a particular prerogative exists, and if it does exist, what its extent is.¹⁰⁴

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81. There is some difference of opinion on whether a prerogative power may disappear through *desuetude* alone, but its extent may be reduced over time, with changing conditions.¹⁰⁵ What is clear beyond question is that no new prerogative power can be recognised: "It is 350 years and a civil war too late for the Queen's courts to broaden the prerogative", per Diplock LJ, *BBC v. Johns*.¹⁰⁶ Nor can the state necessity justify the recognition of new prerogative powers: "If it is law it will be found in our books. If it is not found there, it is not law".¹⁰⁷ The approach of the courts to prerogative power has been motivated by the historical object of limiting the powers of the Crown, and in modern times of guarding the rule of law under a system of democratic government.

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¹⁰³ *Law of the Constitution* 8th ed. (1915) p. 421.

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¹⁰⁴ *CCSU v. Minister for the Civil Service* [1985] AC 374, 398 C-F; *R v. Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513.

¹⁰⁵ Wade & Forsyth, *Administrative Law*, 8th ed. (2000) p. 221; Bradley & Ewing, *Constitutional and Administrative Law*, 13th ed. (2003) p. 254; Maitland, *Constitutional History of England*, pp. 418-9; *Burmah Oil Co. Ltd. v. Lord Advocate* [1965] AC 75, 99F-100B, per Lord Reid.

¹⁰⁶ [1965] Ch. 32, 79.

¹⁰⁷ per Lord Camden CJ, *Entick v. Carrington* (1765) 19 State Trials 1030, 1036.

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82. When a new question concerning the limits of the royal prerogative arises for decision, the court must examine the extent to which the prerogative has previously been used: there must be precedents evidencing the power claimed.

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For example, in *A-G v. De Keyser's Hotel Co*,¹⁰⁸ no evidence was found that the Crown had in practice ever exercised the alleged right of the Crown to take a subject's property for defence purposes without paying compensation for it.¹⁰⁹

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83. This historical approach was endorsed in *Burmah Oil Co v. Lord Advocate, supra*:

*"So I would think the proper approach is a historical one: how was it [i.e. the prerogative] used in former times and how has it been used in modern times?"*¹¹⁰

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App Pt. I(a)
pp. 131, 141,
120

The Court of Appeal in this case has followed the same approach.¹¹¹

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84. This approach has particular force when the prerogative power claimed is so strongly at odds with the current and evolving standards of humanity and decency which prevail in Great Britain and the Commonwealth, and pursues a course which the former Secretary of State, speaking for the Government, refused to defend. It is submitted that even if earlier precedents could have been found they would not necessarily be binding today.

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85. As stated above, it is firmly established there is no prerogative power to banish or remove a British subject from

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¹⁰⁸ [1920] AC 508

¹⁰⁹ [1920] AC 508 Lord Dunedin at 524, at 538-9 Lord Atkinson, at 552 Lord Moulton, at 563 Lord Sumner and at 573 Lord Parmoor.

¹¹⁰ Lord Reid at 101

¹¹¹ Waller LJ at paragraph 82 and Sir Anthony Clarke MR at paragraphs 111 - 113. Sedley LJ at paragraph 43 described the Orders in Council as "an unprecedented use, or purported use, of the power of colonial governance."

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British territory, or to prevent him from returning thereto¹¹². The Respondent knows of no precedent for the lawful use of prerogative powers to remove or exclude an entire population of British subjects from their homes and place of birth, and none has been cited by the Appellant. The Queen undoubtedly has the prerogative to legislate for a British colony or possession acquired by cession of conquest. It is submitted, however, that an exercise of executive power which would be plainly unlawful as being beyond the prerogatives of Her Majesty does not become lawful by being put into the form of legislation. It is necessary to examine historically the scope of Her Majesty's legislative powers.

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86. In the hundreds of years that British colonies and possessions have existed, no precedent has been found for the use of the prerogative of legislation to achieve what the two orders in Council seek to achieve. The absence of such precedents should be decisive.
87. Her Majesty in Council undoubtedly has the power of legislating for British colonies, whether settled, or ceded or conquered, but the prerogative of legislation has never been unfettered. The authorities at least since *Campbell v. Hall*, *supra*, have distinguished between the constituent power and the power to make ordinary laws. In the case of settled colonies the Crown was acknowledged to have the formal power (i.e. the power to grant a constitution to the colony) but not the power to make other laws.¹¹³ In ceded or conquered colonies the prerogative power includes both classes of legislation, but here too the power has not been

¹¹² Magna Carta, chapter 29/39; Blackstone, *Commentaries* Vol 1, pp. 134, 137-8; Chitty, *Prerogatives of the Crown* pp. 18, 21; Holdsworth, *History of English Law*, Vol 10, p. 393; *DPP v. Bhagwan* [1972] AC 60, 74; *Bancoult* (1) at paragraph 39.

¹¹³ Until the British Settlements Act 1887.

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unlimited.

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88. Thus in *Sammut v. Strickland*,¹¹⁴ a case concerning the ceded colony of Malta, the Privy Council held that when Letters Patent enacted a constitution for the Colony, including a representative assembly, the King in Council could not revoke it as long as it was functioning, unless he had expressly reserved the power to do so. In *re Colenso, Bishop of Natal*,¹¹⁵ an appeal to the Privy Council from the Cape Colony (also a ceded colony with a legislature), it was held that the prerogative did not give the Queen the power to establish ecclesiastical courts in the colony.

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89. It is submitted, therefore, that in respect of the prerogative of colonial legislation the courts scrutinise the claims to prerogative power just as they do other claims to prerogative power: the Crown must establish that the power claimed has a recognised historical basis. It is not sufficient to show that there is a recognised prerogative of legislation. It must be shown that that prerogative has extended to legislation such as that contained in sections 9 and 15 of the 2004 Constitution Order.

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90. It will have been observed that the Appellant constantly asserts that this case is concerned only with the Constitution of BIOT, i.e. with the "constituent" power.¹¹⁶ The Appellant indeed seems to base much of his case on the fact that the Order in Council which the Courts below have reviewed is the 2004 Constitution Order.

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91. There is, it is respectfully submitted, a fundamental error in the Appellant's approach. The constituent power is the power to grant or impose a constitution on the colony. A

App Pt. I(a)
p. 274

¹¹⁴ [1938] AC 678.

¹¹⁵ (1864) 3 Moo. PC (N.S.) 115.

¹¹⁶ See for example Appellant's Case paragraphs 24, 81.3, 139.3, 178, 192, 214, 273.

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constitution enacted under this power historically deals with such matters as the appointment of a Governor or Commissioner, a legislature (which may or may not be representative), the judicial power and the Queen's powers, such as the power to disallow laws enacted in the colony.¹¹⁷ The exercise of this constituent power would as the Appellant says not ordinarily be a subject of judicial review. The Appellant's error is to suppose that section 9 of the 2004 Constitution Order or a law made by Her Majesty under section 15(b) is an exercise of the constituent power simply because it is inserted in the Constitutional document.

92. It is submitted that the provisions which were quashed by the courts below had no special or superior status and were beyond the law-making powers of Her Majesty.

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93. The Appellant¹¹⁸ argues that in the absence of Parliamentary legislation cutting it down "the prerogative remains in its pristine condition". It is submitted that this is too narrow a view of the constitutional development of the United Kingdom. The prerogative may, it is submitted, be changed by such developments as the expansion in the Commonwealth of representative democracy, the evolution of judicial review in its modern form and the recognition of the rule of law and the principle of legality as a governing principle of public administration. A part of this process has been the judicial recognition that some rights are fundamental. Thus the courts read even the most general words in a statute as being "subject to the basic rights of the individual".¹¹⁹

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94. It is submitted that the same principles should be applied to

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¹¹⁷ See *Chenard v. Arisso* [1949] AC 127; *Roberts-Wray op cit* at pp. 151-3, 158-9, on the distinctive nature of the constituent power.

¹¹⁸ Appellant's Case. Paragraph 108.

¹¹⁹ *Ex parte Simms* [2000] 2 AC 115, 131, per Lord Hoffmann.

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define the scope of prerogative powers, including the powers of legislation, in the absence at least of evidence that there is an accepted precedent for the claimed exercise.

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95. Similarly, the recent signs of judicial willingness to examine governmental action by reference to unincorporated human rights treaties to which this country is a party suggest that the time has come to examine the vires of Orders in Council (which are now accepted to be acts of the executive) in the light of this country's international obligations.¹²⁰

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96. In the Court of Appeal Waller LJ said (at paragraph 86):

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"I am disinclined to get into the argument as to the extent of the prerogative because I confess to feeling that the power originally was likely to be very wide indeed in so far as it related to a "conquered or ceded colony" but, more importantly, because, however wide that power, the duty of the court is to examine what happened in this case through modern eyes and have regard to reality in the present age".

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Sedley LJ (at paragraph 29) endorsed this statement and further said, after referring to *Liyanage v. The Queen, supra*:

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*"But it may also be that Lord Mansfield was right before his time when he held in *Campbell v. Hall* 1 Cowp 204, 209, that the colonial prerogative power was such that the monarch 'cannot make any new change contrary to fundamental principles'".*

97. It should be borne in mind that should there be some compelling reason of state for removing the fundamental rights of the inhabitants of a Dependent Territory that could be legally enacted by the Westminster Parliament.

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¹²⁰ See *Re McKerr* [2004] 1 WLR 807, per Lord Steyn; *R (European Roma Rights Centre v. Immigration Officer* [2005] [2005] 2 AC 1; *A v. Home Secretary* [2006] 2 AC 221.

I. PEACE, ORDER AND GOOD GOVERNMENT

98. The Queen in Council has never in modern times claimed under the prerogative of colonial legislation a power of legislation as wide and unlimited as that of Parliament. The Queen's prerogative of legislation for conquered or ceded colonies is a power to make laws for the peace, order and good government of the territory concerned. Those are the terms in which the monarch's legislative powers have always been reserved.¹²¹ No wider powers have previously been claimed by Her Majesty.

App Pt. I(a)
p. 237, 257,
272

99. In conferring legislative powers on a colonial legislature Her Majesty in Council has customarily used the same terms, whether the legislature is a fully representative assembly or a single individual, such as a governor. In relation to colonial legislatures, courts, in particular the Judicial Committee of the Privy Council, have often said that powers conferred in those terms are very broad powers, sometimes described as "plenary powers" or as "the widest law-making powers appropriate to a sovereign" – *Ibralebbe v. R*¹²² per Lord Radcliffe.

100. The Appellant argues that Her Majesty in Council, as the source of those powers, can have no lesser powers. That is no doubt a logical inference. But the wide judicial statements quoted above must be examined in their factual contexts. In no case was the colonial law under consideration in any of those cases remotely comparable to the purported laws exiling the Chagossians. Some of those cases will be referred to below.

101. Thus the Appellant's submission that the phrase confers

¹²¹ See for example the BIOT Order, the 1976 Constitution Order and the 2004 Constitution Order.

¹²² [1964] AC 900, 923.

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wholly unlimited powers cannot stand with a line of cases that show that the power to make laws for the peace, order and good government of a territory is not without limits. Those cases largely concern attempts at extra-territorial legislation, but they illustrate a more general principle.

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102. It is accepted that "laws for the peace, order and good government" of a territory are not words of limitation, in the sense that such laws are not limited to laws which can be shown to be in fact conducive to peace, order and good government. That is not an enquiry into which a court may enter. But the laws must be of a nature capable of conducting to those ends. That is the general principle. In *Bancoult (1)* Laws LJ¹²³ and Gibbs J¹²⁴ held that a law excluding or exiling the whole of the permanent population of BIOT was incapable of being a law for the peace, order and good government of BIOT. They cited the principle stated by Evatt J in the High Court of Australia in *Trustees Executors and Agency Co. v. Federal Commissioner of Taxation*.¹²⁵ The correct principle, he said, was "whether the

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law in question can truly be described or regarded as being for the peace, order and good government of the Dominion concerned".¹²⁶

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App Pt. I(b)
p. 309
App Pt. I(b)
p. 312

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103. In *Bancoult (1)* Laws LJ said, at paragraph 55 "peace, order and good government may be a very large tapestry, but every tapestry has a border". He held further (at paragraph 57) that those words "meant nothing, surely, save by reference to the territory's population. They are to be governed not removed". Gibbs J (at paragraph 70) said that

App Pt. I(b)
p. 309

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App Pt. I(b)
p. 310

App Pt. I(b)
p.312

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¹²³ At paragraphs 55-57.

¹²⁴ At paragraphs 69-71.

¹²⁵ (1933) 49 CLR 200, 234-5, 240, a case concerning estate duty on property outside Australia.

¹²⁶ See also *Ashbury v. Ellis, supra*; *MacLeod v. A-G New South Wales* [1891] AC 455; *Croft v. Dunphy* [1933] AC 136, 164, where the Privy Council left open the question whether legislation of the Canadian Parliament might be *ultra vires* if contrary to the principles of international law.

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each of the words – peace, order and good government "necessarily carries within it the implication that citizens of the territory are there to take the benefits".

104. The validity of this interpretation of "peace, order and good government" is corroborated by the terms of the British Settlements Act 1887, which, in relation to settled colonies, conferred on the Queen in Council power to make such laws as appear to her to be "necessary for the peace, order and good government of Her Majesty's subjects and others within any British settlement" (emphasis added). The Act does not, of course, apply to ceded colonies, but the object of the Act was to extend the powers of the Queen in Council in British settlements so as to equate them with Her Majesty's powers over ceded colonies, not to reduce them.¹²⁷

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- App Pt. I(a)
p. 121
105. In the Court of Appeal Sedley LJ fully endorsed the judgments in *Bancoult* (1) in this respect.¹²⁸ The Master of the Rolls was, however, not prepared to "go so far as to say ... that the Crown's common law powers do not extend to exiling a whole population" (at paragraph 122). It was not necessary for the Master of the Rolls to indicate in what circumstances the Queen in Council might justifiably remove the whole population of a colony. Laws LJ¹²⁹ gave the example of a natural disaster making the land uninhabitable.¹³⁰ It may be possible to envisage other justifiable circumstances, but it is submitted that they do not include the circumstances of the depopulation of BIOT.

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- App Pt. I(a)
p. 144

- App Pt. I(a)
p. 310

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¹²⁷ See Roberts-Wray op cit pp. 166-8.

¹²⁸ At paragraphs 46-51.

¹²⁹ At paragraph 57.

¹³⁰ This occurred after a damaging volcanic eruption in Tristan da Cunha in 1961. The whole population (nearly 300) was evacuated to the United Kingdom. In 1963 the Colonial Office, following a ballot of the islanders, repatriated them.

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106. Sedley LJ¹³¹ referred to the following passage in the judgment of Street CJ in *Building Construction Employees and Builders' Labourers Federation of NSW v. Minister of Industrial Relations*¹³² in relation to peace, order and good government.

App Pt.I(a)
p.122

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"It appears to be generally assumed that these words confer unlimited legislative power, comparable with that vested in the English Parliament itself. I can find no satisfactory basis for that assumption. The words, by their very terms, confine the powers conferred to peace, welfare and good government of the body politic in respect of which the legislature is being established. Assertions that these words convey plenary, or sovereign, power are to be found frequently in cases in which it has been felt necessary to reject any suggestion that the legislature in question is a mere delegate of the English Parliament and thus is not able to delegate further the law-making powers vested in it. Such suggestions have been uniformly rejected. But the rejection of such suggestions on the basis that the words convey plenary or sovereign power does not necessarily import that the power is unlimited in scope."

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107. The Appellant refers to more recent Australian cases such as *Union Steamship of Australia Ltd v. King*¹³³ and *Durham Holdings Pty Ltd v. New South Wales*¹³⁴ which state that "peace, order and good government" in the Constitution of the Commonwealth and the States are not words of limitation. They reject the approach of Street CJ. These cases, however, do not overrule or depart from the judgment of Evatt J, indeed his judgment is cited. Further, the Appellant fails to note the stage in their constitutional

¹³¹ At paragraph 53.

¹³² (1986) 7 NSWLR 372, 383.

¹³³ (1988) 166 CLR 1.

¹³⁴ [2001] HCA 7.

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development reached by the Commonwealth and the States. They are fully independent political entities, with fully representative legislature, subject only to their own constitutions. It is submitted that the test applied in *Bancoult (1)* was proper in the present context and was not precluded by any relevant authority.¹³⁵

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108. The numerous cases in which the power of a colonial legislature to make laws for the peace, order and good government of a colony were held by the Privy Council and other courts to be "plenary" should, as suggested above, be examined with reference to the law under scrutiny in each of them. It will be seen that most, if not all, of those cases concerned such matters as the power of delegation, property law or administrative or judicial procedures. Cases relied on by the Appellant here or below include the following:

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*Hodge v. Queen*¹³⁶ (regulation of taverns).

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*Powell v. Apollo Candle Co*¹³⁷ (delegation of power to impose customs duties and to prohibit certain imports).

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*Riel v. The Queen*¹³⁸ (trial without jury).

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*R v. The Earl of Crewe ex. Parte Sekgome*¹³⁹ (detention of a contender for the chieftainship in the Bechuanaland Protectorate).

*A-G for Ontario v. A-G for Canada*¹⁴⁰ (Dominion statute authorising Governor-General to put questions of law to the

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¹³⁵ The Appellant is wrong to state (p. 49, footnote 96) that the HCA in *Durham Holdings* declined to follow *Bancoult (1)*. Kirby J (at paragraph 55) said only that it did not apply "in the context of the Parliament of a State".

¹³⁶ (1883) 9 App. Cas. 117, 132.

¹³⁷ (1885) 10 App. Cas. 282, 287-8.

¹³⁸ (1885) 10 App. Cas. 675, 678.

¹³⁹ [1910] 2 KB 576. This is a case from a bygone era in which a despotism over the native population was justified (reluctantly) by reason of the inhabitants being "semi-savage or barbarous or semi-barbarous".

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Supreme Court).

B *Li Hong Mi v. A-G for Hong Kong*¹⁴¹ (deportation of a British subject not apparently a Hong Kong belonger on grounds that he had committed criminal offences).

C *Croft v. Dunphy*¹⁴² (Parliament of Dominion of Canada enacted statute providing for seizure of vessels "hovering within 12 miles of Canadian coast").

D *Winfat Enterprises v. A-G of Hong Kong*¹⁴³ (land tenure in the New Territories).

E 109. None of those cases dealt with a colonial law in any way comparable to the laws in issue here. Moreover, the passages cited by the Appellant suggest that the colonial legislature will have plenary powers "only within the limits which circumscribe these powers". Those words are taken from the passage in the judgment in *R v. Burah* set out in

F *Bancoult (1)*, at paragraph 46, and in the Appellant's Case, at paragraph 87, and in the next section of the case.

G 110. A helpful approach, consonant with the historical approach to the scope of prerogative powers, is suggested by Lord Macmillan in *Croft v. Dunphy* *supra* at page 165:

"When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power. Thus in considering what might be appropriately and legitimately enacted by the Dominion Parliament under its power to legislate in relation to "bankruptcy and insolvency," it was considered relevant to

App Pt. I(b)
p. 307

¹⁴⁰ [1912] AC 571, 581.

¹⁴¹ [1920] AC 735, 737.

¹⁴² [1933] AC 156, 163-4.

¹⁴³ [1985] AC 733, 747.

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discuss the usual contents of bankruptcy statutes".

As noted above, in the same judgment the Privy Council left open the question whether legislation of the Canadian Parliament might be *ultra vires* if contrary to international law – a question which could not arise in relation to the Westminster Parliament.

111. In the courts below it was argued that the interpretation placed on the words "peace, order and good government" in *Bancoult (1)* created an issue estoppel against the Crown. For the reasons given by Sedley LJ,¹⁴⁴ this submission is no longer made.

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¹⁴⁴ Court of Appeal judgment, at paragraph 56.

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J. THE COLONIAL LAWS VALIDITY ACT 1865

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112. The Appellant placed considerable reliance on this statute in both courts below, and does so again in your Lordships' House. The Appellant's submission is that no legal challenge may be made to the validity of any colonial law, including the 2004 Constitution Order, save on the ground of repugnancy in terms of the Act.¹⁴⁵ This submission was rejected in *Bancoult (1)*¹⁴⁶ (where indeed the then counsel for the Appellant resiled from it) and by both courts below, which accepted that the question of validity (or vires) was anterior to any question of repugnancy.¹⁴⁷

App Pt. I(b)
p. 307
App Pt. I(a)
p. 143

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113. The Appellant's arguments are, with respect, entirely fallacious. This, it is submitted, is demonstrable:

(a) by reference to the terms of the 1865 Act; and

(a) by reference to the many cases decided after 1865 in which the validity of a colonial law was debated and decided without any reference to the 1865 Act.

App Pt. I(a)
pp. 131, 112

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114. The Appellant (stressing the words "but not otherwise" in section 2)¹⁴⁸ reads this Act as excluding any legal challenge to a colonial law (a term which includes an Order of Her Majesty in Council) save on the ground that it is repugnant to an enactment of the Westminster Parliament. This is simply a misreading of the 1865 Act. Section 2 of the Act and in particular the underlined words declare only the extent to which a colonial law shall be declared void in the event of repugnancy. This is confirmed by section 3, as it is provided that:

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¹⁴⁵ See Appellant's Case paragraphs 268-9.

¹⁴⁶ At paragraph 47.

¹⁴⁷ See Sir Anthony Clarke MR 117, Waller LJ at 80, Sedley LJ, at 22-30.

¹⁴⁸ Appellant's Skeleton, paragraph 28.

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"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, Order or Regulation as aforesaid" (emphasis added).

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The Appellant's argument fails to give effect to the emphasised words. It amounts to rewriting section 3 as if it provided that "No Colonial Law shall be or be deemed to have been void or inoperative on any ground, save that of repugnancy to the law of England (as defined in this Act)".

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115. The genesis and object of the 1865 Act are explained in *R v. Marais*¹⁴⁹ and *Liyanage v. The Queen*.¹⁵⁰ The question whether a colonial law is otherwise within the powers conferred on a colonial legislature or of the Queen in Council is not answered by the Act. It depends on the terms in which the power is conferred, or, in the latter case, the extent of Her Majesty's legislative power. See for example *R v. Burah*:¹⁵¹

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"The Indian Parliament 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" (emphasis added).

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Thus the prior question in relation to any colonial legislature is one of limits on power, i.e. *vires*. Repugnancy is a different question. *Ashbury v. Ellis*¹⁵² is an illustration of this distinction.

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¹⁴⁹ [1902] AC 51, 54.

¹⁵⁰ [1967] 1 AC, 259.

¹⁵¹ (1878) 3 App. Cas. 889, 904.

¹⁵² [1893] AC 339.

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116. In addition to *Ashbury v. Ellis, supra*, one may point to numerous cases which considered whether legislation was *intra vires* or *ultra vires* the colonial legislature without reference to the 1865 Act. If the Appellant's arguments were correct, they should have been summarily disposed of by reference to that Act. See for example:

*MacLeod v. A-G New South Wales*¹⁵³

*A-G for Canada v. Cain*¹⁵⁴

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and most of the cases referred to in the previous section of this Case.

117. The Appellant has a parallel argument, to the effect that in contending that the 2004 Orders are susceptible and

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vulnerable to judicial review, the Respondent is invoking the common law of England, namely the English principles of judicial review. This, according to the Appellant, amounts to impugning the Orders on the basis of repugnancy to the law of England, which the 1865 Act prohibits.¹⁵⁵

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118. This, with respect, is a radical misunderstanding of the meaning of repugnant – a term which means "inconsistent" or "incompatible". When a law (or a regulation or an executive decision) is judicially reviewed and held to be invalid it would be a distortion of language to say that it is invalid because it is incompatible with the principles of judicial review. As in this case, the principles of judicial review and the subject matter of the impugned law or decision are not in *pari materia*.

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119. The second fallacy in the Appellant's argument is that the

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¹⁵³ [1891] AC 455.

¹⁵⁴ [1906] AC 542, where the question, as stated by the Privy Council, was whether a Canadian statute for the deportation of aliens was *ultra vires*.

¹⁵⁵ Appellant's Case, paragraphs 270, 292.2.

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law governing the extent of the prerogative and the common law of judicial review are part of the law of BIOT as much as they are part of the law of the United Kingdom.

120. The Appellant puts at the forefront of his argument on the 1865 Act a research paper by Professor John Finnis, which in the Appellant's Case (at paragraph 266) is described as authoritative. The paper contains interesting material on the provenance of the 1865 Act, and constructs an elaborate argument on the basis of that research. The paper is, however, tendentious rather than authoritative. Professor Finnis disagrees, it seems, with the Divisional Court in *Bancoult (1)*, and strongly attacks the decisions of the courts below in this litigation. He also considers that the decision of your Lordships' House in the *Quark Fishing Case*¹⁵⁶ was wholly misguided and, for good measure, throws in uncalled for gibes at the expense of counsel in that case. Professor Finnis is, of course, entitled to his opinions, and to express them strongly. But his opinions are hardly authoritative.¹⁵⁷

121. The particular weakness of Professor Finnis's paper is that he avoids any close examination of the test of the 1865 Act. Nor does he take account of the many cases, referred to above, in which the Privy Council over the years decided cases on the validity of colonial laws without referring to the 1865 Act.

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¹⁵⁶ [2006] 1 AC 529.

¹⁵⁷ For example, he appears to have found no contemporary explanation of why Orders in Council were included in the Act, but Letters Patent were not.

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122. It is also submitted, with some regret, that the objectivity of the paper is undermined by what appears to be the author's view of the Chagossians and their legal proceedings - perhaps most clearly apparent in the final two paragraphs of the paper.

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K. UNLAWFULNESS/UNREASONABLENESS/IRRATIONALITY

App Pt. I(a)
pp. 186, 141.
142, 139.
117, 127.
120, 125
App Pt. I(a)
pp. 177-8

123. The Divisional Court and Court of Appeal held unanimously that the 2004 Orders are amenable to judicial review, on the grounds that none of the areas of subject-matter identified by Lord Diplock and Lord Scarman in *CCSU* which might make a prerogative power unreviewable or non-justiciable applied here.¹⁵⁸ The Appellant had not sought to argue that the subject matter related to "national security" and was therefore non-justiciable.¹⁵⁹
124. The Divisional Court and Court of Appeal both quashed the 2004 Orders because the reasons put forward by the Appellant did not justify the 2004 Orders, and because the 2004 Orders failed to have regard to the interests of the Chagossians.

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The Divisional Court

125. The Divisional Court's reasoning was that the Constitution Order itself makes clear the reason for removing the Chagossians' right of abode, namely that BIOT was "constituted and set aside to be available for the defence purposes of the Government of the United Kingdom and the Government of the United States of America". This reason was insufficient to justify removing the right of abode because it ignored the interests of the Chagossians; the Divisional Court did not agree with the Appellant "that the interests of those who left the islands can be so easily ignored".¹⁶⁰ The Divisional Court held that it was unreasonable to ignore "conspicuously" the interests of the Chagossians.¹⁶¹

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¹⁵⁸ Divisional Court judgment at paragraph 162, Court of Appeal judgment, Sir Anthony Clarke MR at paragraphs 111-112 and 117-118. Waller LJ, at paragraphs 101-107, 37-43 and 64-5. As noted by Sedley LJ at paragraphs 44 - 47 and 58.

¹⁵⁹ At paragraph 44 - 47 and 58.

¹⁶⁰ At paragraph 120.

¹⁶¹ At paragraph 122.

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126. The Divisional Court did not consider that the Appellant could now add an additional justification for the making of the 2004 Orders, namely the unfeasibility of resettlement, because the 2004 Orders made clear the reason for which they had been

App Pt. I(a)
p. 178

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made, and this was not the reason. In any event, Hooper LJ stated that the Court would have rejected this as a reason in any event given the Respondent's argument on legitimate expectation.¹⁶²

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127. The Appellant misstates the reasoning of the Divisional Court. That Court did not state (and nor did the Respondent) that the United Kingdom's defence interests were "an illegitimate consideration in constituting a ceded colony".¹⁶³ The question is not what may be taken into account in constituting a colony, but rather whether the reasons given for the 2004 Orders justify removing the right of abode from all Chagossians from all of the Chagos Islands. The Respondent's submission, which was upheld by both Courts, was that the 2004 Orders conspicuously ignored the interests of the Chagossians, which should have been taken into account.

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128. Properly read, the Divisional Court judgment on this point is not a "surprising conclusion", as the Appellant suggests.¹⁶⁴ Nor is there any "conceptual" difficulty in a court determining that the Chagossians' interests were ignored when their right of abode was removed.¹⁶⁵

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The Court of Appeal

129. The Court of Appeal upheld the Divisional Court judgment.

130. Sir Anthony Clarke MR found that it was irrational for the Appellant to have removed the Chagossians' freedom to return

¹⁶² At paragraph 123.

¹⁶³ At paragraph 219.2 of the Appellant's Case.

¹⁶⁴ At paragraph 219.3 of the Appellant's Case.

¹⁶⁵ As suggested in paragraph 219.5 of the Appellant's Case.

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App Pt. I(a)
p. 178

to their home territory in the circumstances, and that the 2004 Orders failed to have proper regard to the interests of the Chagossians.¹⁶⁶

131. Likewise, Sedley LJ noted that the only reason given in the Orders was the fact that BIOT had been constituted and set aside for the defence purposes of the United Kingdom and United States. This reason could not justify removing the right of abode because it was in direct conflict with the interests of the Chagossians.¹⁶⁷

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App Pt. I(a)
p. 128

App Pt. I(a)
p. 129

"*the point is that the two Orders in Council negate one of the most fundamental liberties known to human beings, the freedom to return to one's homeland, however poor and barren the conditions of life ... and they do this for reasons unconnected with the wellbeing of the people affected*".¹⁶⁸

App Pt. I(a)
p. 129

132. Both judges held that the second reason put forward by the Appellant, namely the unfeasibility of resettlement, could not justify the Orders either because "it is the bolting of the door to the Chagossians' home, not the failure to provide transport there or to furnish it, which is in issue".¹⁶⁹ In other words, it is a *non-sequitur* to say that their right of abode was removed because of the perceived difficulties of resettlement.
133. The Appellant misstates the judgments of the Court of Appeal on irrationality:

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App Pt. I(a)
p. 129

- (a) The Appellant wrongly states that no-one in the Court of Appeal upheld the Divisional Court's reasons.¹⁷⁰ In fact the Master of the Rolls and Sedley LJ both upheld the central point made by the Divisional Court, namely that it was irrational for the 2004 Orders to have ignored

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¹⁶⁶ Court of Appeal judgment at paragraph 123.

¹⁶⁷ At paragraph 69.

¹⁶⁸ At paragraph 71.

¹⁶⁹ At paragraph 71, with which Sir Anthony Clarke MR agreed at paragraph 123.

¹⁷⁰ Appellant's Case paragraphs 3.2, 32 and 232.1.

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entirely the interests of the Chagossians.

- (b) The Appellant wrongly states (at paragraph 232.3 of its Case) that only the Master of the Rolls found the 2004 Orders to have been irrational. This is incorrect. Sedley LJ and the Master of the Rolls both did.

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The point made by Sedley LJ at paragraphs 57 to 61 was that the grounds of review frequently run into each other, and whether one classifies a ground of review as irrationality, *ultra vires*, illegality, and so on are "difficulties of taxonomy, not of substance" because "what modern public law focuses upon are wrongs – that is to say, unlawful acts of public administration", however they are classified.

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- (c) At paragraphs 225-226 and 232.3 of its Case, the Appellant suggests that Sedley LJ confused his findings on *ultra vires* with those on irrationality, and that he therefore should not have even considered the justification for the 2004 Orders. This is not correct.

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Sedley LJ's finding on rationality was based on (i) the fact that the reasons given in the 2004 Orders were in direct conflict with the interests of the Chagossians, and was unconnected with their wellbeing, and therefore the Appellant could not justify the negation of the Chagossians' fundamental liberty, and (ii) the fact that feasibility of resettlement could not justify removing the right of abode. Those are separate points from the *vires* to make the 2004 Orders.

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134. The Appellant misrepresents the Court of Appeal judgment on a number of other occasions too: at paragraphs 23 and 301 of its Case the Appellant states that there was no majority view on any issue in the Court of Appeal other than legitimate expectation. In fact the position is that:

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- (a) The Court of Appeal was unanimous on the following

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points, in addition to legitimate expectation:

App Pt. I(a)
pp. 141, 116,
141

- (i) the 2004 Orders in Council are amenable to judicial review;¹⁷¹

App Pt. I(a)
pp. 143, 116,
136

- (ii) the Orders in Council are acts of the executive;¹⁷²

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App Pt. I(a)
p. 142

- (iii) the prerogative power to legislate by Order in Council is not unlimited;¹⁷³ and

App Pt. I(a)
pp. 143, 112,
131

- (iv) the Colonial Laws Validity Act 1865 does not preclude this challenge.¹⁷⁴

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App Pt. I(a)
pp. 145, 129

(b) A majority of the Court of Appeal held that:

- (i) the Orders did not have proper regard for the interests of the Chagossians;¹⁷⁵ and

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App Pt. I(a)
pp. 141, 122

- (ii) the Appellant's argument gave a meaning to "peace, order and good government" which was too broad.¹⁷⁶

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¹⁷¹ Sir Anthony Clarke MR at paragraph 111, Sedley LJ at 34, Waller LJ at paragraph 107.

¹⁷² Sir Anthony Clarke MR at paragraph 115, Sedley LJ at paragraph 33, Waller LJ at paragraph 92.

¹⁷³ Court of Appeal judgment at paragraph 113 records the unanimity on this point.

¹⁷⁴ Sir Anthony Clarke MR at paragraphs 116-7, Sedley LJ at paragraphs 22-30, Waller LJ at paragraph 80.

¹⁷⁵ Sir Anthony Clarke MR at paragraph 123, Sedley LJ at paragraph 71.

¹⁷⁶ Sir Anthony Clarke MR at paragraph 110, Sedley LJ at paragraph 53.

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Amenability to judicial review

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135. The Respondent submits that all of the judges below were plainly right to hold that the subject matter of the Orders in Council is not one of the "subject areas" of the royal prerogative that is not amenable to judicial review within the principles set out in *CCSU*. The Orders in Council were reviewable as executive acts directly affecting the subject.¹⁷⁷

App Pt. I(a)
pp. 141, 122

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136. The Appellant's argument is that if Ministerial action in making the 2004 Orders is amenable to judicial review (which it denies, on the grounds that this is "primary legislation", a point dealt with above), it would be "inapt" for Your Lordships to subject the making of the Orders to judicial scrutiny on the grounds of irrationality, and that the decision to make the Orders demands a "light touch" approach to judicial review,¹⁷⁸ in which irrationality must amount to a finding that the decision-maker "must have taken leave of his senses".¹⁷⁹ The Respondent submits that

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Your Lordships should adopt the opposite approach to the "light touch" urged by the Appellant in assessing the reasonableness of the Orders.

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137. Where a measure affects fundamental rights, or has profoundly intrusive effects, the courts will employ an "anxious" degree of scrutiny in requiring the public body in question to demonstrate that the most compelling of justifications existed for such measure:

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"The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in

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¹⁷⁷ Per Lord Scarman [1985] AC at 407, Lord Diplock at 408, 410-411, Lord Roskill at 416-418, 420-1, 423.

¹⁷⁸ Appellant's Case paragraph 247.

¹⁷⁹ Appellant's Case paragraph 236.5.

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judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above".¹⁸⁰

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"The minister on judicial review will need to show that there is an important competing interest which he could reasonable judge sufficient to justify the restriction and he must expect his reasons to be closely scrutinised... when a fundamental right ... is engaged, the options available to a reasonable decision-maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinise the strength of the countervailing circumstances and the degree of the interference with the human right involved and then apply the [test in ex parte Smith]".¹⁸¹

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138. Further, where a right under the ECHR is in play or a fundamental constitutional right recognised by the common law, the proportionality approach summarised in *Daly* is appropriate, namely: (i) whether the objective sufficiently important to justify limiting a right; (ii) whether the measure is rationally connected to that objective; and (iii) whether the means used impair the right in a manner that is no more than is necessary.¹⁸²

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¹⁸⁰ Per Sir Thomas Bingham MR in *ex parte Smith* [1996] QB 517 at 554E.

¹⁸¹ *R v Lord Saville of Newdigate, ex parte A* [2000] 1 WLR 1855 at paragraph 37 (per Lord Woolf MR at paragraph 34 and Simon Brown LJ at paragraphs 36-37:). This approach has been taken in numerous other cases. See e.g. *Bugdaycay* [1987] AC 514 (at 531 per Lord Bridge at paragraph 437 per Lord Templeman); *Ex parte Launder* [1997] 1 WLR 839, 867 "the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required"; *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 (per Lord Phillips MR at paragraph 37 and Laws LJ at paragraphs 18-19: "the intensity of review in a public law case will depend on the subject matter in hand; and so in particular any interference by the action of a public body with a fundamental right will require a substantial objective justification ... the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable"); *R v Secretary of State ex parte Simms* [2000] 2 AC 115 at 125-131 (per Lord Steyn); *R v Secretary of State ex parte Turgut* [2001] 1 All ER 719, (at 729 per Simon Brown LJ); *R (Razgar) v Secretary of State* [2004] [2004] 2 AC 368 (at paragraph 16 per Lord Bingham and paragraph 69 per Lord Carswell).

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¹⁸² *R v Secretary of State ex parte Daly* [2001] 2 AC 532 (per Lord Bingham at paragraph 21, see also 28 per Lord Steyn, 35 per Lord Hutton, 36 per Lord Scott). The "anxious scrutiny" approach applies not just to interferences with rights under the

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139. The Respondent submits that the Appellants are required to demonstrate an overwhelming justification for the 2004 Orders in this case, given their profound effect on the Chagossians' fundamental right of abode. The effects of the Orders on the

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Respondent are profound. The Orders remove entirely the legal right of abode of every Chagossian not only from Diego Garcia but from all of the outer islands as well.¹⁸³ It may not be necessary to decide whether one calls this approach "proportionality", or a "heightened" approach to reasonableness employing an anxious degree of scrutiny,¹⁸⁴ but what is required is a careful consideration of whether the reasons put forward by the Appellant are sufficient to justify the effects of the 2004 Orders in all the circumstances.

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140. Both courts below were careful to consider the effect of the Orders, and whether the justifications put forward by the Appellant were sufficient. Both courts had regard to the extreme effect of the Orders in Council on the Chagossians' fundamental right to a home. The Orders have the effect of barring the door to the Chagossians' home. Sedley LJ noted that counsel for the Appellant had been "careful not to dismiss the idea of return as mere nostalgia... Few things are more important to a social group than its sense of belonging, not only to each other but to a place", "however remote or inaccessible" the Chagossians' right of abode may be for the present.¹⁸⁵ Since the Orders had such a profound effect on the most fundamental of rights, it was "an act requiring overwhelming justification".¹⁸⁶

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App Pt. I(a)
p. 125

ECHR; see e.g. *R (Q) v Secretary of State* [2004] QB 36 (at paragraph 115) in the context of the right to asylum in the UN Declaration of Rights.

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¹⁸³As Lord Justice Sedley recorded at paragraph 4 of his judgment, there has been no attempt to question in these proceedings the strategic significance of the military base of Diego Garcia.

¹⁸⁴*R v Department for Education and Employment, ex parte Begbie* [2000] 1 WLR 115, 1130B (per Laws LJ): "It is now well established that the Wednesbury principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake".

¹⁸⁵Court of Appeal judgment, paragraph 58.

¹⁸⁶Sedley LJ at paragraph 58.

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141. The Appellant's three arguments in favour of a "light touch" are self-serving and unconvincing:¹⁸⁷
142. First, the Appellant asserts that the Chagossians' right of abode was removed by a document entitled a "Constitution Order", and that "the subject matter of colonial constitutions does not lend itself to judicial scrutiny by reference to allegations of irrationality" because it is a matter of "pure policy" and "there are no legal principles by reference to which competing policy considerations can be tested". This would be "beyond the natural territory of judicial expertise" and the courts can "have no informed role to play"¹⁸⁸ since it is an area of "macro-policy".¹⁸⁹
143. The suggestion that it is inappropriate for the courts to review the impugned provisions because they have been inserted into an Order entitled "constitution" is entirely artificial, and designed to avoid judicial review. The Appellant was not exercising its "constituent powers" in making the Orders. The subject matter of sections 9 and 15 of the Constitution Order is not a "colonial constitution" but the removal of the right of abode of a group of islanders from the territory to which they belong.
144. Second, the Appellant argues that because "the constitution of BIOT was driven by defence interests", therefore the courts should not "second-guess the informed assessment of government".¹⁹⁰ But the assertion that BIOT was "constituted" for defence purposes cannot assist the Appellant, since: (i) this assertion appears nowhere in the BIOT Order, and nowhere in the 1976 Constitution Order; (ii) whatever the Appellant's intentions may have been in 1965, they cannot justify a judicial "light touch" in considering the reasonableness of and

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¹⁸⁷ Appellant's Case, paragraph 190.

¹⁸⁸ Appellant's Case, paragraphs 192 and 195.

¹⁸⁹ Appellant's Case, paragraph at 356.2.

¹⁹⁰ Appellant's Case, paragraph at 192.5.

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justifications for action undertaken in 2004.

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145. Third, the Appellant says that the decision to make the Orders involved considerations of "defence", "national security", "foreign affairs", "issues concerning the appropriate distribution of public funds", and "competing societal interests".¹⁹¹ It is notable that this is a change of approach by the Appellant.¹⁹² As the analysis below of the various reasons given for the 2004 Orders make clear, none of these considerations prevent Your Lordships from being able to assess the reasonableness and proportionality of the Orders in this case:

App Pt. I(a)
pp. 125, 143

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(a) The Respondent has never doubted that the United Kingdom's "defence interests" are matters that the Appellant could lawfully take into account. The cogency of those reasons in the present context is something on which Your Lordships are able to adjudicate.

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(b) In the courts below, (as the Court of Appeal noted) the Appellant did not identify any national security concerns as a reason for the courts to abstain from judicial review in this case, although this is now cited as a reason for a "light touch" approach to judicial review. The Appellant has not (and never has in this litigation) put forward a single document or statement from someone in the British Government suggesting that resettlement of the outer islands causes national security concerns for the United Kingdom. In 2000 and 2001 when Mr. Robin Cook and Mr. Battle made their statements to Parliament, they certainly did not express any such concern. The national security threats at issue in *CCSU* were of a wholly different order from the issues arising here.

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App Pt. I(a)
p. 643

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App Pt. IV
p. 2335

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¹⁹¹ Appellant's Case, paragraph 236.

¹⁹² See Court of Appeal judgment at paragraphs 58 and 118.

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- (c) Nor does the label "foreign affairs" provide any reason why the legality of the Orders in Council should not be reviewed. This Case does not concern the conduct of "foreign affairs". The Orders were made by the British Government removing the right of abode of British Citizens in a United Kingdom overseas territory.
- (d) The decision under review is the decision to remove the right of abode of the Chagossians, not a decision to refuse to fund their resettlement, and accordingly Your Lordships are not being asked to scrutinise policy decisions about the distribution of funds.
- (e) The Respondent's case is that the Appellant did not weigh up "competing societal interests" in making the Orders of Council; the interests of the Chagossians were substantially ignored.

146. The Respondent will now consider the Appellant's justification for the Orders.

The Appellant's Case

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147. The Appellant argues that the Courts should have taken into account the "actual reasons" for removing the right of abode.¹⁹³ According to the Appellant's Case, those actual reasons were as follows:

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- (a) First, what is described as an "imminent threat of an unauthorised landing" is now said by the Appellant to have been "the single most important precipitating factor that prompted the making of the 2004 Constitution Order" and "the single most immediate stimulus". The Appellant expressed "some considerable disappointment and surprise" that none of the judges who have heard this case before have mentioned this

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¹⁹³ Appellant's Case, paragraph 220.

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factor.¹⁹⁴

- (b) Second, the "cost of resettlement" is said to have been "a major underlying factor", on the basis that "demands would be made for the United Kingdom (i.e. taxpayers) to meet the costs of putting place and maintaining the basic infrastructure necessary to support modern life".¹⁹⁵

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- (c) A third "central consideration" is now said to have been "the opposition of the United States authorities to any settlements on the outer islands... consistently expressed over the years".¹⁹⁶ The Appellant asserts at paragraph 247 of its Case that the "highly strategic defence facility ... would be compromised by the establishment of a civilian population in the BIOT".

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D 148. The Appellant also now states that:

- (a) Its decision involved "a balancing operation" between wishes of the exiled population to return to BIOT, the defence interests of the United Kingdom and United States, and matters of public cost;¹⁹⁷ and

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- (b) It is "manifest" that the interests of the Chagossians were taken properly into account" because the Minister in 2004 stated that anything other than short-term subsistence resettlement would be precarious, and stated that the decision had been taken after long and careful consideration.¹⁹⁸

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¹⁹⁴ Appellant's Case, paragraphs 238 – 241 and 257.

¹⁹⁵ Appellant's Case, paragraphs 242 – 245.

¹⁹⁶ Appellant's Case, paragraph 246.

¹⁹⁷ Appellant's Case, paragraph 247.

¹⁹⁸ Appellant's Case, paragraph 247.

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The Respondent's Case

Landings on the islands

149. The Respondent understands that the Appellant is putting its case generally in a number of respects in a different manner from in the courts below. The Appellant is no longer, for example, pursuing points it made below such as: there is no such thing as a "Chagossian", there were fewer people living on the islands than the Respondent suggests, many of the islanders left voluntarily, and so on.¹⁹⁹ However, what the Respondent has done in seeking to defend the rationality and proportionality of the Orders is to assert an entirely new reason why the Orders were made, and to promote it to being the "single most precipitating factor" and "most immediate stimulus" in making the Orders in early June 2004.
150. The suggestion of a planned landing on the islands at some time later in 2004 is:
- (a) not given as a reason in the 2004 Orders themselves. The only reason given in the Orders is the fact that BIOT was apparently "constituted and set aside" for the defence purposes of the United Kingdom and allies.
 - (b) not given as a reason for the Orders in the statement to Parliament by Mr. Rammell on 15 June 2004 which stated only that the reasons for the making of the Orders were the feasibility study, and "defence" interests.

App Pt. III(b)
p. 1764

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¹⁹⁹ See for example the Appellant's "Note on Background Matters in the Divisional Court's Judgment" and "Further Note on the Background".

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- (c) not given as a reason for the Orders in the statement to Parliament by Mr. Rammell on 7 July 2004, which rightly states that the relevant question in asking what led to the Orders was what had changed since 2000. The only answer he gave was the feasibility study.
- App Pt. III(b)
p. 1769

B

- (d) not given as a reason for the Orders in the letter of Mr. Jack Straw on 22 June 2004 to Mr. Jeremy Corbyn MP.
- App Pt. III(b)
p. 1766

C

- (e) not given as a reason for the Orders in any contemporaneous document, or any document before or after the Orders were made.

- (f) not given as a reason for the Orders in any previous argument of the Appellant. The reasons for the making of the Orders in the Appellant's grounds for resisting the claim (at paragraph 31) and skeleton arguments in both courts below (and the Appellant's written reply in the Court of Appeal) mention only feasibility and defence interests as reasons for the Orders, without any mention of the planned landings.

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- (g) not given as a reason for the Orders in the evidence submitted by the Appellant in this litigation. Indeed Mr. Culshaw's evidence is clear (at paragraph 110 of his first statement); the reasons for the Orders according to Mr. Culshaw were the feasibility of resettlement and defence.
- App Pt. II
p. 874

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151. The fact that there was a planned landing on the islands has been mentioned before by the Appellant, but never as a reason for making the Orders. It was mentioned as a reason why the Orders in Council were kept secret, and why the Appellant did not follow the usual procedure of laying the draft Orders before the Foreign Affairs Select Committee of Parliament. This is the only context in which those landings were mentioned (see for example Culshaw's first statement at paragraphs 110 and 122,

App Pt. III(b)
p. 1779

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Mr. Rammell's statement of 7 July 2004).

152. Accordingly, the Appellant need not be surprised or disappointed that the judges below did not mention this point in their judgments. They did not mention it because it was simply never put forward as a reason why the 2004 Orders were made,

App Pt. II
p. 763

App Pt. III(b)
p. 1962

and it was entirely clear to the judges below from paragraphs 15 to 17 of the Respondent's witness statement dated 31 March 2005, that so far as the Respondent was aware, no Chagossian is a member of the "Lalit" group or supports its aims of removing the United States' air base from Diego Garcia.

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153. In any event these "planned landings" cannot conceivably be said to justify the removal of the right of abode of all Chagossians from the outer islands as well as Diego Garcia, when the Appellant could instead have prevented the landings using powers of immigration control. A clearer example of a sledgehammer being used to crack a nut may be hard to find. If the "threat" of unauthorised landings at Diego Garcia or on the outer islands was indeed taken seriously, the naval forces of the United Kingdom and United States would presumably have taken the necessary defensive measures. The 2004 Orders would hardly have stopped or deterred any serious attempt at landing. Yet once again it was the Chagossians as a group who were targeted by the Orders. The Appellant has given no information to suggest that any attempt at a landing actually took place. In so far as the Chagossians were concerned, the Orders were unnecessary, unreasonable and disproportionate.

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154. The Appellant states at paragraph 240 of its Case that it would have been "irresponsible for the United Kingdom not to take appropriate measures to forestall the threatened landings". It is submitted that the particular measure embodied in the 2004 Orders was entirely inappropriate.

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Defence reasons

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155. The courts below were correct to hold that the reasons given in the Constitution Order, namely the fact that BIOT was set aside for defence purposes, cannot justify making them. The reasons why BIOT may have been separated from Mauritius cannot in themselves justify removing the right of abode from all of the Chagossians from all of the islands. The only other "defence" justification that has ever been put forward by the Appellant, is that the United States considers that it would be preferable if there were no people on any of the outer islands because of the war on terror, and its concern that Chagossians might use surveillance techniques to spy on Diego Garcia.
156. Indeed when the Appellant was asked by the Divisional Court to disclose all documents explaining why the 2004 Orders were necessary in 2004 when they had not been in 2000, the Appellant sought only to support the importance of its defence interests by producing letters dated 16 November 2004 and 19 January 2006 (some months after these proceedings were issued) written by an official of the United States State Department to assist the Appellant in these proceedings. They echoed a similar letter dated 21 June 2000, written for the purposes of *Bancoult* (1).
157. The Respondent submits that these letters from the United States Government cannot justify removing the right of abode from the outer islands in circumstances where:
- (a) The principal outer islands are all at least 120 miles from Diego Garcia.²⁰⁰ All visitors to the islands are closely monitored.²⁰¹ Yachtsmen freely pass by the outer islands and have a right of innocent passage.

App Pt. IV
pp. 2368-77

App Pt. IV
pp. 2368-77

App Pt. II
p.767

App Pt. IV
pp. 2113-4

²⁰⁰ Witness statements of Richard Gifford dated 31 March 2005, paragraph 5.1. See also the maps at the front of Appendix Part IV.

²⁰¹ Divisional Court judgment at 98.

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App Pt. IV
p. 2187
App Pt. IV
p. 2196

- (b) The agreement between the United States and the United Kingdom does not oblige the United Kingdom to depopulate the outer islands unless and until the United States requires them for its military purposes.²⁰² The United States has to date only required Diego Garcia for its military activities, not the outer islands.

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- (c) The fears expressed in the letters of the United States State Department appear on the face of them to be exaggerated, given the nature of the islands and the limited numbers who might be able to exercise their right of return. It is notable that no British military or naval officer has ever expressed similar concerns. The only relevant statement is the affidavit of Martin Howard, a senior civil servant in the Ministry of Defence, prepared for *Bancoult (1)*, which relates only to Diego Garcia. The only defence interests relied upon are, it seems, those of the United States as expressed in those letters.

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App Pt. III(b)
pp. 1782 - 88

- (d) These interests or fears, even if wholly genuine, cannot justify the 2004 Orders because they are not connected with the governance of the Chagos Islands and are in direct conflict with the interests of the Chagossians.²⁰³

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App Pt. I(a)
p. 128

- (e) No document has been put forward to suggest that, during the period between the 2000 Immigration Ordinance and the promulgation of the 2004 Orders, either defence or resettlement concerns were incompatible with maintaining a legal right of abode on the outer islands.

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- (f) In 2000, defence considerations were plainly regarded as compatible with a right of abode in the outer islands,

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²⁰² 1966 Exchange of Notes from 2(a) and "Agreed Minute", paragraph 2.

²⁰³ Sedley LJ at paragraph 69.

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as appears *inter alia* from Mr. Robin Cook's statement.

- (g) In January 2001, defence considerations did not prevent Mr. Battle from stating to Parliament that the Appellant was not appealing against *Bancoult* (1) because it did not wish to continue to contest the Chagossians' claim to return to the outer islands where that was feasible, that the United States had agreed to resettlement on the outer islands, and that the Chagossians resettling would not "imperil" the base on Diego Garcia.
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- (h) During the feasibility study, it was never said that defence considerations, military issues or treaty obligations precluded return to the outer islands.
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- (i) No document has been produced showing that less intrusive means of achieving the Appellant's aims were even considered.
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App Pt. IV
p. 2337

Feasibility of Resettlement

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158. Potential difficulties with resettling the Chagossians on the outer islands were never given as a reason for the 2004 Orders before they were made, or in the Orders themselves. The Appellant's "feasibility study" provides no better justification for the Orders than the reasons considered above. The Appellant's decision to discontinue further consideration of the feasibility of resettling the Chagossians within BIOT is an inadequate or insufficient reason for abolishing their right of abode. No explanation is given as to why, even if the Appellant considered it unfeasible to resettle the Chagossians, that meant that their legal right of abode had to be removed:
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- (a) It is a *non-sequitur* to suggest that resettlement difficulties would justify removing the Chagossians' right of abode. Several times the Appellant stated in

App Pt. IV
pp. 2347-
2348

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App Pt. III(b)
p. 1779

App Pt. I(a)
p. 129

Parliament that resettlement is difficult therefore we have legislated to prevent it.²⁰⁴ This is illogical. The most this could justify is a decision not to fund the Chagossians' return. As Sedley LJ put it, the feasibility of resettlement cannot justify "bolting the door to the Chagossians' home".²⁰⁵

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App Pt. II
p. 795-800

App Pt. II
p. 763

- (b) There is in any event a serious dispute between the parties as to the true findings of the "feasibility study" and the way in which it was conducted. The Appellant relies on the study for its view that anything other than short-term subsistence resettlement is impossible. The Respondent considers that this is a misrepresentation of the true findings of the study and that the study was not properly conducted.²⁰⁶
- (c) As the courts below recognised, Mr. Robin Cook's statement was not conditional on the feasibility of return (or conditional in any other way).

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159. Further, the Respondent contends that none of the Appellant's reasons could have justified the 2004 Orders in circumstances in which the interests of the Chagossians were ignored, as both courts below found that they were. There is no evidence that the interests of the Chagossians were ever taken into account.
160. There is no evidence of a weighing of considerations, no debate in Parliament and no consultation at all with the Chagossians. If their interests had been seriously considered, they would surely have been consulted. Even if the Appellant had feared

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²⁰⁴ See for example Mr. Bill Rammell's statement to Parliament on 15 June 2004 and on 7 July 2004.

²⁰⁵ Court of Appeal judgment at paragraph 71.

²⁰⁶ See for example the Respondent's witness statement of 31 March 2005 paragraphs 18-19, and Richard Gifford's witness statement paragraphs 14-15.

See App Pt. IV pp. 2348-9, App Pt. 111(b) p. 1779

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unauthorised landings on the islands, surely the Chagossians' representatives would have been asked for information, or this issue would have been discussed with them. Instead the Appellant relies on press reports about those landings. Nor is there any evidence that the Appellant gave any consideration to the continuing effect of Mr. Robin Cook's statement so far as the legitimate expectations of the Chagossians were concerned.

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161. At paragraph 248 of its Case, the Appellant asserts that the interests of the Chagossians were taken into account. There is no evidence whatsoever to support this assertion, and no evidence of the interests of the Chagossians being considered at all, nor of alternative solutions being considered. The highest the Appellants can put it was that there was reference to the unfeasibility of resettlement in Parliament, and an assertion that the decision was taken after long and careful consideration. The Appellant has missed the point – taking into account the interests of the Chagossians means taking into account their interests before deciding whether to remove their right of abode, not in deciding whether to fund resettlement.

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162. The Respondent submits that Your Lordships should uphold the judgments below in finding that it was unreasonable and disproportionate for the Appellant to have failed to take into account the interests of the Chagossians in the circumstances outlined in this section. The Appellant has fallen far short of

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providing "compelling justifications" for removing as important, indeed fundamental, a human right, in particular given that:

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- (a) the 2004 Orders remove completely their right of abode on *all* the islands, including the outer islands, in the circumstances outlined above;
- (b) the Chagossians were exiled in circumstances which Laws LJ described as an "abject legal failure";
- (c) the Respondent succeeded in *Bancoult (1)* and the

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Chagossians' right of abode was restored in the outer islands in 2000; and

- (d) the Foreign Secretary led them to believe that that right would continue to exist, and there has been no significant change of circumstances since then.

App Pt. IV
p. 2163

App Pt. IV
p. 2168

App Pt. IV
p. 2172

App Pt. IV
p. 2176

App Pt. IV
p. 2179

App Pt. I(b)
p. 297

App Pt. IV
p. 2231,
p. 2237,
p. 2254,
p. 2266,
p. 2267,
p. 2268,
p. 2282,

163. Further, the Respondent submits that the Appellant should have had regard in this context to the fact that its international obligations require it to treat the interests of the Chagossians as paramount and to promote them to the utmost. Indeed the Appellant has undertaken this obligation to non-self governing territories including BIOT as a "sacred trust" in Article 73 of the Charter of the United Nations. The United Kingdom has always recognised this sacred trust, and its obligation to treat the interests of the Chagossians as paramount. It was for that reason that it was agreed internally to conceal from the United Nations the fact that there were permanent inhabitants on the islands at the time of their clearance.²⁰⁷

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Conclusion

164. For these reasons, the findings of the courts below that the 2004 Orders are unlawful should be upheld. The Respondent submits that it does not make any difference whether this is said to be on the grounds of illegality, irrationality, proportionality, unreasonableness, "conspicuous unfairness", or an abuse of power. The unlawfulness lies (as recognised below) in the fact that the Appellant is unable to justify the 2004 Orders, and is unable to show that the interests of the Chagossians were properly taken into account.
165. In the Respondent's submission, the making of the Orders in the

²⁰⁷See the Divisional Court judgment at paragraphs 22-35 summarising these documents.

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factual circumstances outlined above was conduct which "no sensible authority acting with due appreciation of its responsibilities would have decided to adopt" or "a decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the questions to be decided could have arrived at it" (*CCSU*). Moreover, it is submitted that this is one of the unusual cases which could truly be described as so "conspicuously unfair" as to amount to an abuse of power.²⁰⁸

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²⁰⁸ *R v IRC, ex parte Unilever* [1996] STC 681. As Simon Brown LJ put it in *R (International Transport Roth GmbH v Secretary of State* [2003] QB 728 at paragraph 26: "ultimately one single question arises for determination by the Court: is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted?" Laws LJ in *R (Naharajah) v Secretary of State* [2004] INLR 139 at 67 described abuse of power as "the root concept which governs and conditions our general principles of public law" which "catches the moral impetus of the rule of law" (paragraph 67).

L. LEGITIMATE EXPECTATIONS

166. The Court of Appeal held that the Appellant had abused its power by frustrating the Respondent's legitimate expectations. A full analysis of this issue was made by Waller LJ (paragraphs 90-100); Sedley LJ (paragraphs 72-76) agreed with Waller LJ; Clarke MR (paragraphs 119-121) agreed with both Waller and Sedley LJ.

The Secretary of State's statement

App Pt. I(a)
p. 135

167. This unanimous decision was founded on the statement made by the Secretary of State, Mr. Robin Cook (set out by Waller LJ at paragraph 90):

- (a) that he had decided to accept the ruling of the court in *Bancoult (1)* and that the Government would not be appealing;
 - (b) that the work being done on the feasibility of resettling the Ilois "now takes on a new importance";
 - (c) that the Government would put in place a new Immigration Ordinance "which will allow the Ilois to return to the outer islands while observing our Treaty obligations"; and
 - (d) that the Government had not "defended what was done or said thirty years ago" and, as recognised by Laws LJ, had "made no attempt to conceal the gravity of what happened".
168. This was a public assurance or undertaking by the Appellant in November 2000, made in response to the ruling in *Bancoult (1)*, that the Chagossians would be allowed to return to the outer islands. This promise created a legitimate expectation on the part of Chagossians, that was strengthened by the immediate enactment of the 2000

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immigration Ordinance. As Waller LJ said in the Court of Appeal, the Foreign Secretary had "made a statement holding out to a certain body of people, the Ilois, that they would be allowed to return to the outer islands. No justification or reason has been provided as to why that promise should now be withdrawn" (paragraph 99).

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The decision of the Court of Appeal

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169. As Waller LJ said, the Appellant's statement "does not suggest that a decision was conditional on any further Feasibility Study or indeed that the decision was in any way conditional". The statement "gave the clear impression that any dispute was over" and that the Chagossians would be able to return long-term, "or at the very least that they would be allowed to return until there was some radical change in circumstances unforeseeable at that time" (paragraph 91).

App Pt. I(a)

p. 135

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And the statement reflected "the reality that the Government, i.e. the executive, had decided to put in place a new Ordinance" (paragraph 92).

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170. Sedley LJ observed that the case for a legitimate expectation was "a particularly strong one", because the public promise was immediately implemented by the enactment of the right of return (paragraph 74). The statement "made it clear that their return to the outer islands was consistent with the United Kingdom's treaty obligations and was not conditional on feasibility" (*ibid*).

App Pt. I(a)

p. 129

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171. The effect of the 2004 Orders was that the Chagossians were no longer allowed to return to the outer islands without a permit, in breach of the assurance given by the Foreign

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Secretary in November 2000. The Court of Appeal applied the analysis made in *R v. North and East Devon Health Authority, ex parte Coughlan*²¹⁰ (hereafter *Coughlan*): a

App Pt. I(c)

²¹⁰ [2001] QB 213.

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p. 139

lawful promise had induced a legitimate expectation of a substantive benefit; "to frustrate the expectation would be so unfair, that to take a new and different course would amount to an abuse of power, unless there is an overriding interest to justify a departure from what has previously been promised" (Waller LJ, paragraph 100; Clarke MR, paragraph 120; Sedley LJ, paragraph 73). The court further held that there was no evidence that anything had changed between 2000, when there was no defence problem about the return of the Chagossians to the outer islands, and 2004. Nor was there evidence of an "over-riding interest" to justify a departure from the promise.

App Pt. I(a)

p. 143

App Pt. I(a)

p. 129

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172. The Respondent respectfully requests your Lordships to uphold this analysis in its entirety. It is wholly consistent with existing case-law on legitimate expectations:

- (a) The Appellant's statement was "clear, unambiguous and devoid of relevant qualifications": *R v. IRC, ex parte MFK Underwriting Agency*.²¹¹
- (b) The statement gave rise to reasonable and legitimate expectations – *AG Hong Kong v. Ng Yuen Shiu*.²¹² See also the well-known passage from Lord Diplock in *CCSU*.²¹³
- (c) The Appellant's statement was an assurance or promise that cannot today be ignored: *Coughlan*.²¹⁴

The duty of the court in light of *Coughlan*

173. Where a legitimate expectation arises as a result of an assurance or promise, the court must decide whether this affects the legality of subsequent action by the authority that

²¹¹ [1990] 1 WLR 1545, at 1569 (Bingham LJ).

²¹² [1982] 2 AC 629, 636F (Lord Fraser).

²¹³ See paragraph 408G.

²¹⁴ [2001] QB 213, [55].

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gave the assurance or promise. Depending on the circumstances, the court must (as in *Coughlan* [56]) decide between "at least" three possible outcomes:

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(a) The court may decide that the authority is only required to bear in mind its previous policy or representation, "giving it the weight it thinks fit, but no more"; and the court is restricted to reviewing the decision on *Wednesbury* grounds.

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(b) The court may decide that the promise or practice induces a legitimate expectation of, for instance, being consulted before a particular decision is taken. In this case, the opportunity for consultation must be given unless there is an overriding reason to resile from it; and the court will itself judge the adequacy of the reason advanced for the change of policy, "taking into account what fairness requires".

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(c) If the court considers that a lawful promise has induced a legitimate expectation of a *substantive benefit*, not simply procedural, the court will "in a proper case" decide whether to frustrate the expectation is "so unfair that to take a new and different course will amount to an abuse of power".

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The Court of Appeal held that the present circumstances fell within category (C), and that the making of the Orders was so unfair as to amount to an abuse of power.

Rationale for the protection of legitimate expectations

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174. Although the concept of substantive legitimate expectations is a recent and evolving area of public law, it has developed from earlier cases dealing with procedural protection of such expectations.

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(a) In 1972, Lord Denning MR referred to the principle that a public body cannot enter into any contract or take any action incompatible with the due exercise of its powers or the discharge of its duties.

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"But that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it. ... The public interest may be better served by honouring their undertaking than by breaking it." (*R v. Liverpool Council, ex parte Liverpool Taxi Association.*)²¹⁵

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- (b) Approving this approach, in *AG of Hong Kong v. Ng Yuen Shiu*²¹⁶ Lord Fraser said that the justification for it:

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"is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty".

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- (c) In CCSU²¹⁷ Lord Fraser said:

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"[Even] where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law".

175. The giving of substantive protection in cases of legitimate expectation has not been limited to *Coughlan*: see *R v. Inland Revenue Commissioners, ex parte Unilever plc*²¹⁸ and *R v. Secretary of State, ex part Oloniluyi*.²¹⁹ See also the extensive examination of the law in *Rowland v. Environment Agency*.²²⁰ In *R (Reprotech (Pebsham) Ltd)*

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²¹⁵ [1975] 1 WLR 701.

²¹⁶ [1983] 2 AC 629.

²¹⁷ At p. 401.

²¹⁸ [1996] STC 681. ("Unilever")

²¹⁹ [1989] Imm AR 135.

²²⁰ [2005] Ch 1.

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v. *East Sussex CC*,²²¹ Lord Hoffmann drew a distinction between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power, because of the significance of the public interest.

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176. In a recent decision, *R (Bapio Action Ltd) v. Secretary of State*,²²² Lord Rodger and Lord Mance applied the principle of substantive legitimate expectation, holding that certain guidance given by the Health Secretary to NHS bodies as to the employment of doctors who had trained outside the United Kingdom was unlawful in that it infringed their legitimate expectations. Lord Bingham and Lord Carswell decided the case in favour of the claimants on other grounds.

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177. In *R (Bibi) v. Newham London Borough Council*,²²³ at paragraph 19, Schiemann LJ, speaking for the court, said:

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"In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposed to act unlawfully in relation to its commitment; the third is what the court should do."

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In the present appeal, these questions must be answered in favour of the Respondent:

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- (a) By his statement of November 2000, made in response to Bancoult (1), the Appellant undertook commitments that included accepting the ruling of the court, carrying forward with renewed urgency the feasibility study, making a new Ordinance to

²²¹ [2003] 1 WLR 348 at 34.

²²² [2008] U.K.HL 27.

²²³ [2002] 1 WLR 237.

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grant the Chagossians the right to return to the outer islands, and recognising that the previous conduct of the Government in relation to the Chagossians would not be defended.

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- (b) In June 2004, the Appellant acted unlawfully in relation to its commitment, by causing Orders in Council to be made the terms of which were in breach of the undertaking given in November 2000.
- (c) The appropriate remedy is that the court should quash the relevant provisions of the Orders in Council.

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178. In *Abdi & Nadarajah v. Secretary of State*,²²⁴ in an extensive review of the developing case-law, (see paragraphs 46-57, 66-70) Laws LJ examined the principles underlying legitimate expectations. He observed that while the law of legitimate expectations was founded on fairness, it could be expressed more broadly

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"as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public..... the principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances." (paragraph 68)

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The Appellant's approach to legitimate expectations

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179. The Appellant states that he reserves the right on behalf of the Government to argue "in an appropriate case" that *Coughlan* was not correctly decided (paragraph 302.1). It follows that for the purposes of this appeal, he accepts that *Coughlan* was correctly decided. On this basis, he advances two alternative submissions:

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- (a) that the facts of the case provide no "realistic basis"

²²⁴ [2005] EWCA Civ 1363.

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for any breach of substantive legitimate expectation, assuming that such a doctrine exists in public law; and

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(b) that the case should be decided "on principle". The argument is that, assuming that the doctrine of substantive legitimate expectation applies to administrative decision-making, it either has no application at all in the context of primary legislation, or applies only in "most exceptional circumstances akin to private law estoppels" (paragraph 302.2).

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180. This approach risks uprooting substantive legitimate expectation from the general context of legitimate expectation. It omits the underlying rationale, namely that the public interest may be better served by holding a public authority to its word than by permitting the authority to break it. Moreover, as noted by Laws LJ in *Abdi & Nadarajah*, there is not always a hard-and-fast distinction between substantive and procedural legitimate expectation.
181. The Respondent does not agree that all the Appellant's "outline propositions" set out in paragraph 311 are uncontroversial.

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(a) The generalisation in paragraph 311.1 that "a public authority is lawfully entitled to change its policy" is wrong. It should read: "a public authority is entitled to change its policy when it may do so lawfully".

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This qualification is inherent in our system of public law. In some circumstances, a change of policy may be unlawful; these circumstances may go to procedure or to substance, and may include departing from an invariable or long-standing practice that the decision-maker has followed (as in *CCSU* and *Unilever*). Further, while discretion "may not be fettered", discretion exists to be exercised: a decision-maker's lawful discretion may be affected by prior acts and decisions or by other events. Any claim that a decision-maker has absolute or unfettered discretion must be tested

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against principles of public law.

(b) The propositions summarised in paragraphs 311.3 and 311.4 derive from *Coughlan*; but the Appellant's summary does not make clear what a case of legitimate expectations may require of the court.

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(c) In paragraph 311.5, the citation of *R v. Devon County Council, ex p Baker* at footnote 207 is misplaced, since the case did not involve substantive legitimate expectation.

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(d) The summary of the evolving law in paragraphs 311.5-10 includes statements that are too categorical: in particular, the requirement that the representation must have been made in favour of an individual or a small determinate group of persons (paragraph 311.5(2)) and the requirement of detrimental reliance, apart from exceptional circumstances (paragraph 311.5(4)). (And see paragraph 218 below.)

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The relevant factual context

182. In paragraphs 313-329, by a lengthy account of events between 1998 and June 2004, the Appellant seeks to show that the Secretary of State's statement of 3 November 2000 did not mean what the Court of Appeal held it to mean, and that it was not "clear, unambiguous and devoid of relevant qualification". Certainly, the November statement must be read in context, but key elements of the context are:

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- (a) the decision in *Bancoult (1)*, marking the culmination of the campaign by the Chagossians to have their right of abode and right to return recognised in law;
- (b) the Secretary of State's decision to accept the ruling of the court;
- (c) the making of the 2000 Immigration Ordinance;
- (d) the steps taken to proceed with the study into the

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feasibility of resettlement of the outer islands; and

- (e) the series of meetings and other exchanges App Pt. II
between the Chagossians' representatives and pp. 791-800

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Foreign & Commonwealth Office ("FCO") ministers
and officials, that all took place on the basis that the
FCO still honoured the statement of 3 November
2000.

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183. The evidence from Mr. Culshaw, a senior official in the FCO,
contains the text of the Secretary of State's statement and
gives this explanation:

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*"Mr. Cook thus gave an undertaking that a feasibility
study would be conducted and that in the meantime
the 2000 Ordinance would be adopted so as to
allow entry to the outer islands of the Archipelago.
These statements were true and have not been
challenged in these proceedings" (emphasis
added).²²⁵*

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If this was how the witness understood the statement, this App Pt. II
was not how it was understood by the Respondent and the p. 881
Court of Appeal.

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184. Events between 2000 and June 2004 reinforced the App Pt. IV
significance of the undertakings given by the Secretary of
State in November 2000. In a House of Commons debate
on 9 January 2001, Mr. John Battle, Minister of State in the
FCO, said of the decision not to appeal against *Bancoult* (1):

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*"We took this decision not because we decided that
our legal case was unsustainable, but because the
Government had no wish to contest the claim of the
Ilois to return to parts of the Chagos archipelago
where such a return might be feasible".²²⁶*

²²⁵ First witness statement of Mr. Robert N. Culshaw dated 7 December 2004, paragraph 146.

²²⁶ Appendix Pt. IV, p 2336.

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App Pt. IV
pp. 2326,
2325, 2329

Similar statements in Parliament had been made by Mr. Battle on 13 November 2000 and 30 November 2000, and by the Secretary of State, Mr. Robin Cook, on 12 December 2000.

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App Pt. II
p. 798

185. Compared with the Appellant's Case in the courts below, this part of the Appellant's Case relies to a much greater extent on circumstances relating to the feasibility study, even though the Respondent has not challenged the Government's entitlement to terminate the study.²²⁷ The evidence of Mr. Gifford, the Chagossians' legal representative in London, gives a different view of the conduct of the feasibility study. In particular, his evidence shows that one key part of the study's terms of reference was never completed and the originally projected stages of the feasibility study were not carried through; and after July 2002 no steps were taken to proceed with the study, although one recommendation in the report on Phase 2B in July 2002 was that "*a full economic analysis of the development options was required to determine their financial viability*". It was not known until 15 June 2004 that the FCO had decided that resettlement was not possible or "feasible".²²⁸ A lengthy response to this evidence was given by Mr. Culshaw,²²⁹ and there are clearly unresolved factual issues as to the conduct of the feasibility study.

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App Pt. II
p. 800

App Pt. II
p. 917

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186. Certainly, in the period from 2000 to 2004, the Chagossians were doing all that they could to carry forward resettlement of the outer islands. During this time, they relied on the Secretary of State's acceptance in November 2000 that there would be no attempt through immigration control to

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²²⁷ Sedley LJ, at paragraph 75.

²²⁸ Witness statement of Mr Gifford dated 31 March 2005, paragraphs 14-18.

²²⁹ Second witness statement of Mr. Robert N. Culshaw dated 30 September 2005, paragraphs 49-143.

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restrict their right of abode in the islands.

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187. It was never said by the FCO that continuance of their right of abode depended on the outcome of the feasibility study and on the Government's willingness to finance resettlement. Indeed, Baroness Amos explained in a letter dated 28 April 2003,²³⁰ that the 2000 Immigration Ordinance "signified no more than that there was no longer any legal impediment to individual Chagossians visiting or returning to the outer islands if they wished and without needing a permit to do so". This is confirmation of the Respondent's legitimate expectation.

App Pt. III(a)
p. 1108

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188. The Appellant's summary of events between November 2000 and June 2004 attributes to the Respondent the expectation that the outcome of the feasibility study would be favourable and that the Government would then support resettlement. This was not the basis on which the Court of Appeal found for the Respondent.²³¹

App Pt.I (a)
p. 135
App Pt. I(a)
p. 129

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189. At paragraphs 330-340, the Appellant submits that the Foreign Secretary's statement raised no legitimate expectation that was violated by the 2004 Orders and that there was no abuse of power. The Respondent's reply, in so far as it is necessary to reply to the detailed submissions here, is as follows:

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- (a) Paragraph 331.1 The Secretary of State's acceptance of *Bancoult* (1) was by its nature an act that must have effect for the future, if it was not to be meaningless.

²³⁰ See Appellant's Case, paragraph 325.4.

²³¹ See Waller LJ, at paragraph 91; and Sedley LJ, at paragraphs 72-77.

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(b) Paragraphs 331.3, 331.4 The Respondent does not contend that the Secretary of State was promising that the Chagossians would be assisted to settle, but that there would be no legal impediment to their visiting or returning to the outer islands if they wished to do so.

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(c) Paragraph 331.7 The class of persons to whom the Secretary of State's assurance was addressed was not "wholly uncertain". It was given a specific meaning by the Immigration Ordinance 2000. This is also the answer to the point made in paragraph 334.4 that the Chagossians did not form a finite or readily identifiable category. Moreover, "a general policy which affects the applicant as a member of a class is sufficient".²³²

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(d) Paragraph 332.1 The Appellant comments that the statement made by the Secretary of State "had no more formality than a press release". The Appellant does not contend that the statement did not accurately reflect the position taken by the Secretary of State. If it did not, it could and should have been corrected without delay. (On the effect of prompt correction of mistaken statements, see *R v. Secretary of State for Education, ex parte Begbie.*)²³³

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(e) Paragraph 333.1 In the circumstances, the prerogative power in question could not be regarded as unaffected by the legitimate expectation created by the Secretary of State.

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(f) Paragraph 333.2 The subject-matter may have

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²³² See *De Smith's Judicial Review*, 6th edn, 2007, by Woolf, Jowell and Le Sueur, p. 618.

²³³ [2000] 1 WLR 1115, 1127 (Peter Gibson LJ).

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involved policy issues, but it also affected the rights of the Chagossians that had led to *Bancoult (1)*.

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(g) Paragraph 334.1 Both the press-release and the 2000 Immigration Ordinance were in response to the decision in *Bancoult (1)*.

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(h) Paragraph 334.2 It is not the Respondent's case that the Ordinance is permanently irrevocable, but this would require a justification which is not present in this case

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(i) Paragraph 334.3 The representation was made to the Respondent and to other Chagossians in like case to himself.

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190. The Court of Appeal unanimously found that there had been no significant change of circumstances between November 2000 and June 2004 that would justify frustrating the Respondent's legitimate expectation. The matters now relied on by the Appellant are not of sufficient weight to support a different decision.

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191. At paragraph 336.4 of its case, the Appellant claims that there is no evidence before the court that any individual relied to his detriment on any supposed representation. This is not a requirement in the law of legitimate expectation, which differs in this respect from the law of estoppel. In *R (Bibi) v. Newham London Borough Council* at 31, the court said:

"In a strong case, no doubt, there will be both reliance and detriment: but it does not follow that reliance (that is, credence) without measurable detriment cannot render it unfair to thwart a

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legitimate expectation".

See also comments on this matter by Peter Gibson LJ in *R v. Secretary of State for Education and Employment, ex parte Begbie*.²³⁴ Certainly the Respondent and many other Chagossians were aware of the Secretary of State's statement. It was the basis of the subsequent exchanges between the Chagossians and the FCO in relation to the feasibility study. Given the subject-matter of the expectation, there was in any event a very high degree of moral reliance upon it.

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192. As regards paragraph 336.6, the Respondent has never argued that the making of the 2004 Orders could be regarded as a breach of contract, and relies on the unanimous decision of the Court of Appeal that this was an abuse of power.
193. As regards paragraph 336.7, the court is not assuming the functions of the executive when it quashes an unlawful measure promulgated by the executive.
194. Other matters raised by the Appellant in paragraphs 337-338 have already been addressed and do not call for a further response.

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The Appellant's alternative submission

195. In the alternative, the Appellant submits that either substantive legitimate expectation is wholly inapplicable to prerogative legislation or that it applies in such an attenuated form that it does not apply in this case.
196. The Appellant's argument is tantamount to suggesting that judicial review is limited to administrative action, and does not extend to the review of legislative measures taken under

²³⁴ [2000] 1 WLR 1115 at 1124.

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the prerogative. The Appellant will surely be aware that the scope of judicial review has broadened since the first edition of De Smith's *Judicial Review of Administrative Action* was published in 1959. The sixth edition (2007) is now for that reason entitled *De Smith's Judicial Review*. In paragraph 343, the Appellant relies on the statement in *Bates v. Lord Hailsham*²³⁵ that considerations of fairness do not affect the process of legislation, whether primary or delegated. In *R (Bapio Action Ltd) v. Secretary of State*²³⁶ Sedley LJ said of this passage in *Bates v. Hailsham*:

"As Megarry J's taxonomy reminds us, these [1972] were early days in modern public law. What he says about primary legislation of course holds true: the preparation of Bills and the enactment of statutes carry no justiciable obligations of fairness to those affected or to the public at large. The controls are administrative and political. But, for reasons I have touched on above, there is no necessary or logical extension of this immunity to delegated legislation, much less to the Immigration Rules, and good reasons of constitutional principle for not extending it."

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In speaking of primary legislation, Sedley LJ makes clear that he has in mind legislation by Parliament. In referring to the judge's taxonomy, Sedley LJ will have had in mind the former belief that judicial review, together with the duty to observe natural justice, was only appropriate to decisions that could be regarded as "judicial" or "quasi-judicial". It is now well established that judicial review does not depend on the labelling of public functions as quasi-judicial, administrative, legislative, quasi-legislative and so on.

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197. In the case of legislation by Parliament, even if a breach of

²³⁵ [1972] 1 WLR 1373, 1378.

²³⁶ [2007] EWCA Civ 1139, at [33].

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legitimate expectation could be said to occur when a Minister introduces a Bill that is inconsistent with an earlier assurance that he or she has given, no court could provide a remedy for this, since this is a matter between Parliament and the Minister. Moreover, intervention by the court would breach Article 9 of the Bill of Rights 1689. If injustice has been done by the Minister's action, this matter may be raised in Parliament as the Bill proceeds. As already explained, prerogative Orders in Council may be classed as "primary legislation" in only one sense, namely that the authority under which they are made is not derived from other legislation. If lawful, they have legislative effect. However, such Orders in Council are not made with the benefit of anything that today would be regarded as a "legislative process", but solely as a result of an internal and often secret process that is properly described as an executive process.

198. In the present case, the breach of legitimate expectation occurred when the Appellant caused the Orders in Council to be drafted and submitted to the Privy Council for formal endorsement. The Appellant's action was an executive act. The judicial citations relied on by the Appellant in paragraphs 344 and 347 are all concerned with statutory functions and the over-riding effect of statute. They are simply not on point. As has been argued above, the analysis of this matter made by Waller LJ was correct.
199. In paragraphs 350-355 of its case, the Appellant advances propositions that seek to establish on constitutional grounds that there is no place for judicial review of prerogative Orders in Council. These matters have for the most part already been addressed. When primary legislation in certain terms has been made by Parliament, or subordinate

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legislation has been made by Ministers under their statutory powers, those who benefit from the legislation do not have a "legitimate expectation" that the legislation will not be changed, even if they may reasonably hope that this will not happen. (See e.g *In re Findlay*²³⁷ and *Hughes v. DHSS*²³⁸). But the present case is far removed from such a situation, given the terms of the statement made by the Secretary of State in response to *Bancoult* (1).

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²³⁷ [1985] AC 318.

²³⁸ [1985] AC 776.

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M. APPLICATION OF ECHR AND HRA IN BIOT

App Pt. I
p. 209

200. The Respondents' submissions in Part N and Part O are advanced in the alternative, if their other submissions are rejected.

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The ECHR applied to the Chagos Islands at all material times. Article 1 imposes on Contracting States an obligation to secure to "everyone within their jurisdiction" the rights and freedoms defined in section 1. Article 56 (previously Article 63) sets out the territorial application of the ECHR as regards territories for whose international relations a Contracting State is responsible. It provides that:

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"any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall ... extend to all or any of the territories for whose international relations it is responsible."

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App Pt. III (a)
p. 1364-1366
App Pt. I(a)
p. 154
App Pt. III (a)
p. 1140
App Pt. I(a)
p.237

201. On 23 October, 1953, a declaration under Article 56 (ex 63) was made extending the Convention to Mauritius at a time when the Chagos Islands were a dependency of Mauritius. That declaration was confirmed on 9 June 1964 by letter sent to the Secretary-General of the Council of Europe. The Chagos Islands were excised from Mauritius only on 8 November, 1965.²³⁹

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App Pt. I(a)
p. 225

202. Article 58 (ex 65) provides the mechanism by which States can denounce the Convention in respect of any territory to which it has been declared to extend under the terms of Article 56 (ex 63). There has never been any denunciation of the extension of the Convention to the Chagos Islands under Article 58, and accordingly no reason to doubt the application of the Convention here. The BIOT Order creating BIOT cannot be read as

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²³⁹ Protocol 1 was not extended to BIOT, and is not relied on.

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diminishing the rights of its inhabitants.

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203. Accordingly, it is submitted that the Crown, on behalf of the United Kingdom, having conferred these rights on the inhabitants of BIOT, having entered into an international obligation under the ECHR to respect their rights and having refrained from withdrawing those rights under the machinery of the ECHR, is obliged by the Convention to secure those rights to the Chagossians.

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204. Further, before BIOT was created in 1965, the law of the Chagos Islands was the law of Mauritius. The BIOT Order empowered the Commissioner for BIOT to legislate by ordinance, but existing laws continued in force, subject to (1) such ordinances as the Commissioner might make and (2) such adaptations, modifications and exceptions as were necessary in the existing laws to comply with the BIOT Order. By the 1976 Order, made when certain islands were returned to Seychelles, existing laws were deemed to have been made under the 1976 Order and were to be construed with necessary adaptations to bring them into conformity with the 1976 Order.

App Pt. I
p. 257

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205. Acting under the 1976 Order, the Commissioner made the Courts Ordinance 1983, in operation on 1 February 1984. By section 2, the courts in BIOT were continued in existence. By section 3(1), the laws to be applied by them were changed to

App Pt. III (a)
P. 1201

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"the law of England as from time to time in force in England and the rules of equity as from time to time applied in England.

Provided that the said law of England shall apply in the Territory only so far as it is applicable and suitable to local circumstances, and shall be construed with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary".

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206. The change of law was declared to be subject to "specific laws" in force in BIOT, namely (a) BIOT Ordinances (or laws made thereunder); (b) Acts of Parliament which apply or extend to BIOT; and (c) statutory instruments or prerogative Orders in

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Council which apply or extend to BIOT.

207. By section 4, the Commissioner may declare that any United Kingdom statute, statutory instrument or prerogative Order in Council "does or does not" form part of the law of BIOT. When such declaration is published, it has a conclusive effect in determining whether the measure in question was or was not part of the law of BIOT in respect of any right acquired or liability incurred after such publication; but the declaration does not affect (a) any court decision given before such publication (b) any right or liability arising before such publication (c) any proceedings commenced before such publication. No such declaration has been made by the Commissioner.
208. The very broad phrasing of section 3 of the Courts Ordinance – "the law of England as from time to time in force in England" – enables the law of BIOT to be kept in line with changes in the general law occurring in England from time to time. The Respondent submits that the application to BIOT of changes in the law made by Parliament does not depend (a) on the geographical extent of the statute as enacted; nor (b) on any express intention or implication being found in the statute as enacted. Nor does the section 3 formula require that a statute be "of general application", as some narrower formulae do.²⁴⁰
209. In the absence of a declaration by the Commissioner applying or disapplying a statute that alters the law in England, it is for the court to determine whether the statute is received into the law of BIOT by section 3 of the Courts Ordinance.²⁴¹ The Respondent submits that the HRA has had effect in BIOT since 2 October 2000, when it came into force in England. It was thus in force when the Orders in Council under review were made in June 2004. The Respondent accepts that the HRA may need in

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²⁴⁰ A full discussion of the reception of English law into overseas territories by various formulae is in Roberts-Wray, *Commonwealth and Colonial Law*, chapter 11, pp. 544-557.

²⁴¹ *Ibid* pp. 544-545.

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some respects to be modified or adapted to take account of local circumstances in BIOT.²⁴² However, any such modifications would not be so extensive as to require that the HRA should not be applied to BIOT.

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210. Her Majesty in Council, in making laws for BIOT, whether acting in right of the United Kingdom or of BIOT, acted as a "public authority" under the HRA as applied to BIOT.

211. It follows it is submitted, that Her Majesty in Council could not have power under the prerogative to make laws for BIOT in conflict with the ECHR. The 2004 Orders may be impugned on that ground.

212. That is as far as this issue may at this stage be taken in terms of the order of Sullivan J.

App Pt. I(a)
p. 119

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²⁴² The Appellant cited a number of cases in the Court of Appeal which demonstrate that the HRA is capable of applying a number of other countries, for example St Helena.

N. INTERNATIONAL LAW

213. Further, the Respondent submits that the power of the Queen in Council to legislate for the Territory is limited by the United Kingdom's obligations under treaties, including the UN Charter, and under customary international law, to respect the rights of the Chagossian people to self-determination. The Respondent's case is that excluding an entire population from its traditional home is an obvious infringement of that right.

214. It is further an obvious infringement of the duties of the United Kingdom under Chapter 11, and especially Article 73, of the UN Charter whereby Her Majesty's Government recognized "the principle that the interests of the inhabitants ... are paramount, and [accepted] as a sacred trust the obligation to promote to the utmost ... the well-being of the inhabitants".

App Pt. I(a)
p. 199

215. In granting permission for review on this ground, Sullivan J reserved for a further hearing if relevant, the question of whether the United Kingdom was or is under any obligation under (a) any treaty; or (b) customary international law to respect any right of self-determination which the Chagossian people (if it existed or exists) is alleged to have or to have had and what the effect of any such obligation might be international law.

216. The Respondent considers that the matters reserved by Sullivan J for further hearing include the following:

- (a) whether the Chagossian people existed or exists for the purposes of considering the right of self-determination at international law;
- (b) if so, whether they enjoy the right of self-determination;
- (c) whether this right has been violated; and

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(d) if so, the legal consequences.

217. The Respondent submits that the issue of whether the exercise of the Crown's prerogative power to legislate for an Overseas Territory is limited by an obligation of the United Kingdom under international law to respect and promote the right of self-determination of peoples can properly be considered without it being necessary for the Court to rule on the full extent of the right of self-determination in international law.

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218. As a matter of public international law, certain fundamental rules – the rules of *ius cogens* – have a peremptory quality and are absolutely binding upon all States. Article 53 of the 1969 Vienna Convention on the Law of Treaties defines a peremptory norm as one "accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm having the same character".

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219. Thus the rule against torture has been held to be a peremptory norm; see *Pinochet Ugarte (no 3)*²⁴³ and *Al-Adsani v. U.K.*²⁴⁴. The effect of a holding that a rule of international law is a "peremptory norm" or *ius cogens* will depend on the context.

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220. It is submitted that:

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(a) the extent of the prerogative may, as a matter of English constitutional law, be limited by a clearly established principle of customary international law; and

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(b) that is the case a fortiori where as here the rule of international law is *ius cogens*.

²⁴³ [2000] 1 AC 147, at 197-8.

²⁴⁴ (2002) 34 EHRR 11, at 60-61.

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221. When a court is determining a question as to the limits of the royal prerogative, it must consider whether the prerogative extends to the exercise of powers that are clearly inconsistent with established rules of international law that bind the United Kingdom. It is submitted that it does not.

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222. The rules of international law change over time, and this is bound to affect conceptions of what would be an excess of governmental power at any particular period. Powers that may once have been within the realm of government, such as the power to enslave persons, cease to be acceptable as international law evolves.

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223. The common law has long recognised that customary international law is part of the law of England. Changes in international law may thus have direct consequences for national law.²⁴⁵

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224. As a matter of public international law, there is powerful authority that all "peoples" have the right to self-determination, and that this is *jus cogens*. There are innumerable authoritative declarations and statements to this effect, for example:

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(a) UN Charter, arts 2/2, 55, 73-74.

(b) *Oppenheim's International Law* (9th edn, Jennings and Watts) pp. 282-295.

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(c) *Principles of Public International Law* (6th edn, Brownlie 2003) pp 553-555.

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(d) East Timor ICJ Reports 1995, paragraph 29 ("The right of people to self-determination ... has an *erga omnes* character ... it is one of the essential principles of contemporary international law.")

²⁴⁵ Blackstone, *Commentaries*, IV 67; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 553-4, 568-9; Brownlie, *Principles of Public International Law*, 6th edn, 2003, chapter 2, esp pp. 40-47.

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(e) Supreme Court of Canada: Re Reference concerning certain questions relating to the secession of Quebec from Canada (1998) 161 DLR (4th) 385, paragraphs [109]-[139], in particular, at paragraph [114]: "The

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existence of the right of a people to self-determination is now so widely recognised in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law".

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(f) Declarations by the United Kingdom Government

FCO statement on 29 June 2006 explaining the U.K. vote on the draft UN Declaration on the Rights of Indigenous Peoples at the First Session of the Human Rights Council, stating: "With the exception of the right to self-determination we ... do not accept the concept of collective human rights in international law.

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Like others, the U.K. understands article 3 of the Declaration as promoting the development of a new and distinct right of self-determination, specific to indigenous peoples. We therefore understand the "right" set out in Article 3 of this Declaration to be separate and different from the existing right of all peoples to self-determination in international law, as recognised in common article 1 of the two International Covenants (emphasis added).

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Brownlie, *Principles*, pp 488-490; note 122 on p. 555, listing United Kingdom statements supporting right to self-determination.

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225. The international instruments contain no definition of "people" but the population of a non-self-governing overseas territory will in general qualify as a "people".²⁴⁶ For the purposes of the present argument your Lordships are asked to assume that the

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²⁴⁶ *Oppenheim's International Law* (9th edn, Jennings and Watts, p 281).

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right to self-determination is established in international law, and is thus part of the law of the United Kingdom; and to assume that the Chagossians are a people entitled to the right of self-determination.

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226. On the assumption that the population of a non-self-governing overseas territory constitute a people entitled to self-determination, the prerogative at the present day should not be recognised as including a power to legislate in a manner that is in direct contradiction to this right, accepted as it has been by the United Kingdom.
227. It is therefore submitted that the limited question for the present hearing set out above should be answered in the affirmative.

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O. COSTS

228. The Appellant has undertaken to pay the Respondent's costs of this appeal in any event. Given the complexity of the issues it is submitted that these costs should include the costs of three counsel.

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Sir Sydney Kentridge QC

Anthony Bradley

Maya Lester

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For the Respondent

Instructed by Clifford Chance LLP

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11 June 2008

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IN THE HOUSE OF LORDS

ON APPEAL

**FROM HER MAJESTY'S COURT
OF APPEAL (CIVIL DIVISION)**

Court of Appeal ref: C1/2006/1465
Neutral citation of judgment appealed against: [2007]
EWCA Civ 498

BETWEEN:

REGINA

-on the application of-

LOUIS OLIVIER BANCOULT

Respondent

-AND-

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

Appellant

CASE FOR THE RESPONDENT

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