THE COURT ORDERED that no one shall publish or reveal the name or address of the Second to Sixth Respondents who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of them or of any member of their families in connection with these proceedings. This order does not apply to the First Respondent.

Trinity Term
[2018] UKSC 45
On appeal from: [2017] EWCA Civ 397

INTERIM JUDGMENT

R (on the application of Tag Eldin Ramadan Bashir and others) (Respondents) *v* Secretary of State for the Home Department (Appellant)

before
Lady Hale, President
Lord Mance
Lord Kerr
Lord Wilson
Lord Sumption
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

30 July 2018

Heard on 18 and 19 December 2017

Appellant
James Eadie QC
Thomas Roe QC
Penelope Nevill

(Instructed by The Government Legal Department)

Respondents
Raza Husain QC
Tom Hickman
Edward Craven
Jason Pobjoy
(Instructed by Leigh Day)

Intervener
(AIRE Centre)
(Acting pro bono)
Michael Fordham QC
Katie O'Byrne
George Molyneaux
Natasha Simonsen
(Instructed by Allen & Overy LLP)

JOINT INTERIM JUDGMENT OF THE COURT:

Introduction

1. This is an interim judgment dealing with certain threshold issues on this appeal. It is final as to the issues covered, but interim in the sense that other issues will have to be decided before the appeal can be finally determined. The court regrets the delay in reaching a final disposal of this protracted and deeply troubling case. However, as will be explained, it has become apparent that some critical and difficult issues had not been clearly identified in the agreed statement of facts and issues, nor adequately covered by the written or oral submissions. In fairness to the parties, and to enable it to reach a fully informed conclusion, the court sees no alternative to inviting further submissions on the matters to be identified at the end of this judgment. It hopes that by giving its decision on the issues covered by this judgment, it will clear the way for more focussed discussion of the remaining points, and in particular on the interaction of international and domestic law in the context of the present judicial review proceedings against the Secretary of State.

The Main Issue

2. The respondents are six refugees from various countries in North Africa and the Middle East. In October 1998, they boarded a ship in the Lebanon which was bound for Italy but which foundered off the coast of Cyprus. On 8 October, 75 passengers including the respondents were airlifted to safety by RAF helicopters and brought to Akrotiri in south Cyprus. It will be necessary to give a fuller account of the status of Akrotiri below, but for present purposes it is enough to say that Akrotiri in the south of the island, and Dhekelia on the eastern side of the island, are Sovereign Base Areas ("SBAs") retained under United Kingdom sovereignty for the purpose of accommodating military bases, when the former colony of Cyprus was granted independence in 1960. The respondents have lived in highly unsatisfactory conditions in disused service accommodation in Richmond village in the Dhekelia (or eastern) SBA since shortly after their arrival in 1998.

3. The question at issue in this appeal is whether the respondents are entitled, or should be permitted, to be resettled in the United Kingdom. It is clear, and not seriously disputed, that the respondents have no right to entry into the United Kingdom under the Immigration Rules. The Secretary of State has a discretion to admit them outside the Rules, but his policy is not to exercise this discretion in favour of persons such as the respondents who have no existing connection with the United Kingdom. The basis of the respondents' case is that in the circumstances of

the present case they are entitled to entry into the United Kingdom by virtue of their status as refugees protected by the United Nations Convention Relating to the Status of Refugees (1951), as modified by the Protocol Relating to the Status of Refugees (1967), or that in the exceptional circumstances of the case the Secretary of State should exercise his discretion to admit them.

The Refugee Convention

4. As originally drawn, the Refugee Convention applied only to persons who became refugees as a result of events occurring before 1951, ie for the most part those displaced by the persecutions of the Axis powers and by military operations during and in the aftermath of the Second World War. The effect of the 1967 Protocol was to apply the principal provisions of the 1951 Convention to all refugees, irrespective of when the events occurred which caused them to leave their home countries. The United Kingdom was an original signatory of the Refugee Convention and ratified it on 11 March 1954. It acceded to the Protocol on 4 September 1968.

5. The Convention (as amended) confers a number of rights on persons who qualify as refugees in any territory of refuge in which they find themselves. These rights include the right to engage in remunerated work, the right to public services such as housing, public education and social security, generally on the same basis as other aliens lawfully present there, and the right not to be expelled save on grounds of national security or public order. It is not disputed that the respondents are refugees for these purposes. Between July 1999 and March 2000, all of them were declared by the Chief Control Officer of the SBAs to be "entitled to refugee status under the 1951 Convention and the 1967 Protocol".

6. Neither party suggested that the Convention has been incorporated generally into the law of the United Kingdom, and plainly it has not been. The position was stated by Lord Bingham of Cornhill (with whom Lord Carswell agreed) in *R v Asfaw (United Nations High Comr for Refugees intervening)* [2008] AC 1061, para 29:

> "The appellant sought to address this disparity by submitting that the Convention had been incorporated into our domestic law. Reliance was placed on observations of Lord Keith of Kinkel in *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1988] AC 958, 990G; Lord Steyn in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees Intervening)* [2005] 2 AC 1, paras 40-42; section 2 of the Asylum and Immigration Appeals Act 1993; and rule 328 of Statement of Changes in Immigration Rules (1994) (HC 395).

> It is plain from these authorities that the British regime for handling applications for asylum has been closely assimilated to the Convention model. But it is also plain (as I think) that the Convention as a whole has never been formally incorporated or given effect in domestic law …"

Lord Hope of Craighead expressed the same view at para 69. Lord Rodger of Earlsferry and Lord Mance dissented, but not on this point. It follows that the Convention as such confers no rights and imposes no duties as a matter of the domestic law of the United Kingdom.

7. The Convention is however given limited statutory effect in the domestic law of the United Kingdom for certain specific purposes, of which only one is relevant to the present appeal. Section 2 of the Asylum and Immigration Appeals Act 1993 provides that "nothing in the immigration rules … shall lay down any practice which would be contrary to the [Refugee] Convention." It is therefore common ground that any decision regarding the entry of the respondents into the United Kingdom must be consistent with the Convention. Furthermore, as Foskett J recognised in the High Court ([2016] 1 WLR 4613, para 322ff), a failure by the Secretary of State correctly to apply the Convention may have consequences in domestic public law, as under the so-called "*Launder* principle" (following *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839, para 325 per Lord Hope; see also *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756).

Cyprus and the Sovereign Base Areas

8. Britain occupied Cyprus between 1878 and 1960. As with Britain's other Mediterranean colonies, Gibraltar and Malta, the value of Cyprus to Britain was always strategic and military, not economic. The island sits across the main sea routes to the Suez Canal and the Levant. It had been governed for three centuries as part of the Ottoman Empire. After the defeat of Turkey in the Russo-Turkish war of 1877-8, Britain entered into a military alliance with Turkey under which she undertook to defend Turkey by force of arms against any future Russian attack. In return, Turkey, while retaining sovereignty over the island, ceded it to be "occupied and administered" by Britain "in order to enable England to make necessary provision for executing her engagement": article 1 of the Cyprus Convention, 4 June 1878. Under an Order in Council dated 1 October 1878, administration of the island was vested in a High Commissioner, whose functions were to be exercised ex officio by the Commander in Chief of the British forces stationed there. These arrangements subsisted until 1914, when Turkey entered the First World War on the German side, and the Anglo-Turkish Convention lapsed. Cyprus was thereupon annexed to the British Empire by Order in Council: Cyprus (Annexation) Order 1914 SR&O 1914/1629. The annexation was recognised by Turkey after the war by the treaty of Lausanne (1923). The island played a modest part in British military operations in

the middle east in both world wars, but its strategic significance has increased since then. The SBAs are currently the only significant British strategic assets in the eastern Mediterranean.

9. The Refugee Convention contains a "colonial clause" in the following terms:

> "Article 40
>
> TERRITORIAL APPLICATION CLAUSE
>
> 1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
>
> 2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
>
> 3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories."

10. On 24 October 1956 the United Kingdom notified the Secretary-General under article 40(2) that, subject to certain reservations, the Convention would be extended to 16 territories for whose international relations it was responsible, including "Cyprus". It is common ground that the effect was to apply the Convention, as a matter of international law, to the whole island, including those parts of it which later became the SBAs.

11. Cyprus became independent in 1960 as part of an international settlement between the United Kingdom, Turkey and Greece. Under these arrangements, it

became an independent republic, but there were excluded from its territory the two SBAs, together comprising 98 square miles (about 3% of the surface of the island), which were retained under United Kingdom sovereignty. The SBAs comprise a number of important military facilities including, in the western SBA, a major RAF base at Akrotiri, and in the eastern SBA an army base at Dhekelia and a signals station at Ayios Nicolaos. But their geographical area extends well beyond the bases themselves and they support a substantial civilian population. The population of the SBAs currently comprises a transient population of British military personnel and civilian staff employed on defence-related work, who have access to health, educational, recreational and other facilities provided by the Ministry of Defence; and about 10,000 permanent residents, almost all of them Cypriot nationals, who occupy the land outside the bases themselves, pay taxes to the Republic of Cyprus, vote in its elections and are entitled to services from the Republic in the same way as if they resided in its territory.

12. Legally, these changes were achieved by a number of instruments:

i) Section 1 of the Cyprus Act, enacted on 29 July 1960, provided that on a date to be appointed by Order in Council, there should be "established in the Island of Cyprus" an independent sovereign republic. Section 2 provided that its territory should comprise "the entirety of the Island of Cyprus with the exception of [the Sovereign Base Areas]" defined by designated maps with exact boundaries to be fixed by a Boundary Commission. An Order in Council subsequently fixed the appointed day as 16 August 1960: Republic of Cyprus Order (SI 1960/1368).

ii) On 16 August 1960, a treaty was signed between the United Kingdom, Greece, Turkey and the new Republic of Cyprus. Article 1 of the treaty recognised the territory of the Republic as comprising the island with the exception of the SBAs.

iii) On the same date, there was an exchange of notes between the United Kingdom and the Republic of Cyprus, which is annexed to the treaty and known as "Appendix O". The British note transmitted a declaration by the United Kingdom government concerning the administration of the SBAs, and stated the United Kingdom's determination to "create a continuous and lasting system of administration in the Sovereign Base Areas founded on close co-operation between the authorities of those areas and the authorities of the Republic of Cyprus." Article 1 of the declaration declared that the main object to be achieved was the effective use of the SBAs as military bases, full co-operation with the Republic of Cyprus and protection of the interests of those residing or working in the SBAs. By article 2, the United Kingdom government declared its intention to observe certain limits on the non-military use of the SBAs. In particular, its intention was:

> "(I) Not to develop the Sovereign Base Areas for other than military purposes.
>
> (II) Not to set up and administer 'colonies'.
>
> …
>
> (VI) Not to allow new settlement of people in the Sovereign Base Areas other than for temporary purposes."

13. The Cypriot note took "due note" of the above. On the same date (16 August 1960), the Sovereign Base Areas of Akrotiri and Dhekelia Order in Council 1960 (SI 1960/1369) came into force. It made arrangements for the administration of the SBAs by an Administrator, who was to be a serving officer of HM Forces and is in practice the Commander of British Forces Cyprus. The Administrator was to have extensive executive and legislative powers. Subject to any repeal or modification by the Administrator, article 5 provided that any existing law should continue to have effect in the SBAs. For this purpose, an "existing law" meant

> "any law enacted by any authority established for the Island of Cyprus, any Instrument made under such a law, and any rule of law, which is in force in the Sovereign Base Areas or any part thereof immediately before the date of commencement of this Order."

Refugees in Cyprus

14. In 1963 the Republic of Cyprus notified the Secretary-General that it had succeeded to the Convention. In 1968 it acceded to the Protocol. No notification has ever been made by the United Kingdom specifically in relation to the SBAs. The Secretary of State's position in these proceedings has been that the Convention does not apply in the SBAs. But the declared policy of the United Kingdom is that even in those dependent territories where the Refugee Convention does not apply, as in Hong Kong before 1997, it will nevertheless apply the "spirit" of the Convention to genuine refugees. The result is a practical, although not (it is said) a legal consistency of approach between the Republic of Cyprus and the administration of the SBAs.

15. Refugees became a significant issue in Cyprus and the SBAs as a result of disturbances in the Middle East in the 1990s. They began to appear in substantial numbers in the Republic and in more limited numbers in the SBAs. It appears to be

common ground, but is in any event clear, that the facilities currently available within the SBAs do not enable refugees to be supported there. There are few if any prospects of employment, no educational, health or other publicly provided facilities to which refugees have access, and limited and unsatisfactory housing provision.

16. As a result, the arrival of the respondents and other shipwrecked passengers in the SBAs in October 1998, followed by further arrivals in 2000 and 2001, gave rise to argument between the SBA Administration and the authorities in the Republic of Cyprus about which of them was to be responsible for the refugees and asylum-seekers among them. These arguments were apparently resolved, at least for future arrivals, when, on 20 February 2003 the United Kingdom and the Republic entered into a Memorandum of Understanding relating to "illegal migrants and asylum seekers" in the SBAs. The Memorandum recited the following:

> "In view of the full co-operation between the Governments of the Republic of Cyprus and the United Kingdom envisaged in the Exchange of Notes between the Government of the United Kingdom and the Government of the Republic of Cyprus concerning the administration of the Sovereign Base Areas, dated 16 August 1960, and the attached Declaration by the Government of the United Kingdom;
>
> Emphasising the importance of the international obligations of the Governments of the United Kingdom and the Republic of Cyprus with regard to asylum seekers, including the prohibition on indirect refoulement;
>
> Bearing in mind humanitarian considerations, such as those reflected in the 1951 Convention relating to the Status of Refugees, and the need for the Republic of Cyprus and the United Kingdom to work together with a view to devising practical ways and means of respecting the rights and satisfying the needs of asylum seekers and illegal migrants in the Sovereign Base Areas;
>
> In light of the fact that the Government of the United Kingdom has committed itself not to develop the Sovereign Base Areas for other than military purposes and, in particular, not to allow new settlement of people in the Sovereign Base Areas other than for temporary purposes."

17. The agreement which followed provided, in summary, for the full range of governmental services to be provided to refugees by the Republic, but at the expense of the United Kingdom. The relevant provisions are as follows:

> "1. For the purpose of this Memorandum of Understanding an asylum seeker is any person seeking international protection under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, or the European Convention on Human Rights or the United Nations Convention Against Torture 1984.
>
> …
>
> 8. Asylum seekers arriving directly in the Sovereign Base Areas may move freely throughout the island of Cyprus and have the right to opt to stay outside the Sovereign Base Areas, subject to any requirements imposed upon aliens by the relevant laws of the Republic. The government of the Republic of Cyprus reserves the right to refuse entry to, or return, an asylum seeker for reasons of national security or on grounds of public policy.
>
> 9. Subject to paragraph 13, the Government of the Republic of Cyprus will grant the following benefits to asylum seekers arriving directly in the Sovereign Base Areas:
>
> (a) Free medical care in case they lack the necessary means;
>
> (b) Welfare benefits equivalent to those given to the citizens of the Republic of Cyprus;
>
> (c) The right to apply for a work permit in accordance with the relevant laws of the Republic of Cyprus;
>
> (d) Access to education.
>
> 10. Subject to paragraph 13, during their stay on the island of Cyprus persons recognised as refugees or granted any other

> form of international protection under the procedures determined in this Memorandum, will be treated so far as the authorities of the Republic of Cyprus are concerned, as if such persons had been recognised as refugees or granted another form of international protection by the Republic of Cyprus.
>
> …
>
> 12. The United Kingdom, through the [SBA] Administration, will endeavour to resettle persons recognised as refugees … in countries willing to accept those persons, not later than one year after the decision granting the relevant status has been taken. The joint consultative body established in paragraph 16 of this Memorandum will regularly review the progress made with this programme.
>
> 13. The United Kingdom will indemnify the Republic of Cyprus for the net costs incurred in giving effect to paragraphs 7, 8, 9 and 10 excluding costs in respect of those who first entered the island of Cyprus other than directly by the Sovereign Base Areas.
>
> …
>
> 18. This Memorandum of Understanding may be terminated at any time by the mutual written consent of both Participants or by either Participant giving not less than three (3) months prior notice in writing to the other Participant.
>
> 19. Any dispute about the interpretation of this Memorandum will be resolved by consultations between the Participants."

18. Under paragraph 20 of the Memorandum, paras 7-10, 13 and 14 were to come into effect on the date of the accession of Cyprus to the European Union, in the event 1 May 2004. The authorities of the Republic of Cyprus took the position that the Memorandum did not apply to refugees such as the respondents who had already arrived in the SBAs before that date. The Secretary of State's case, however, is that it was agreed between the Cypriot authorities and the SBA Administration in 2005 that it would deal with refugees recognised as such by the SBA Administration in accordance with the Memorandum of Understanding, irrespective of the date of their

arrival in the SBAs. This agreement has never been recorded in writing, but evidence of it is given by Ms Lisa Young, the then Policy Secretary of the SBA Administrator, and there is documentary and other material supporting its existence and the effect claimed for it. We shall consider this further later in this judgment.

19. Shortly after the Memorandum of Understanding of 2003 was agreed, the Administrator of the SBAs enacted the Refugees Ordinance 2003. The Ordinance has been radically amended since it was first enacted, without, however, altering its essential tenor. Section 4 and Part 4 of the Ordinance gave effect within the SBAs to rights substantially corresponding to those conferred on refugees by the Convention, including in particular rights to public relief and assistance, social security, free education and the right to engage in paid employment: see section 23. Section 23(2) provided:

> "The rights given to a refugee or asylum-seeker under this Ordinance shall be treated as having been properly accorded to him whether they are accorded to him by the relevant authorities of the Areas or the Republican authorities and whether they are to be enjoyed in the Areas or in the Republic."

20. In September 2011 in judicial review proceedings between certain refugees in the SBAs (including some of the respondents) and the SBA Administrator and the Secretary of State for Defence, the Senior Judges' Court, which serves as the Court of Appeal for the SBAs, held that the Refugees Ordinance did not apply to those who were recognised as refugees before it was made: *Bashir v Administrator of the Sovereign Base Areas of Akrotiri and Dhekelia and Secretary of State for Defence* Appeal No 1 of 2011, 13 September 2011. The correctness of that view has not been challenged in these proceedings. Appeal lies from the Senior Judges' Court to the Privy Council, but there was no appeal from this decision.

The factual background relating to the respondents

21. Foskett J's judgment contains an extensive narrative of the facts, which provides a valuable starting point for analysis. It must, however, be borne in mind that the issues between the parties have broadened in the course of the proceedings, partly because not all of the legal problems raised by the appeals were appreciated at the time of the trial, and partly because of the much broader basis on which the Secretary of State sought to justify her refusal to admit the respondents to the United Kingdom in her second decision of July 2017. As a result, Foskett J's findings may not constitute a complete statement of the facts relevant to the issues that now separate the parties. It is unnecessary for present purposes to do more than refer to some of the main points in the history. (Where relevant we give paragraph references to the "HC" judgment.)

From 1998-2002

22. We have already mentioned the circumstances in which the respondents and their families arrived in the SBAs in October 1998. Their accommodation since 2000 is described in the agreed statement of facts in the following terms:

> "Since May 2000 the respondents have been housed in disused military accommodation in Richmond Village in the Dhekelia SBA. That accommodation, which was due to be demolished in 1999, 'is no longer regarded as truly habitable' and there is an 'urgent need for a move of location to take place' (HC 74). There are health concerns raised by the fact that asbestos in 'potentially harmful quantities and form' (HC 146) has been discovered in all of the accommodation."

It is common ground, as Irwin LJ said in the Court of Appeal (para 84) that their present conditions are "quite unacceptable". The dispute is as to the extent to which, if at all, the SBA Administration or the UK government bears responsibility for that state of affairs.

23. Between July 1999 and March 2000, each of the respondents was declared to be "entitled to refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees", by orders made by the Chief Control Officer of the SBAs. The judge described in detail the extensive exchanges between the SBA Administration and officials in London as to how they should be dealt with, given the recognised impossibility of meeting the Convention obligations within the SBAs, and the unwillingness of the Republic at that time to assist in any way.

24. At official level, there was a view that resettlement in the UK might be necessary. The judge quoted a letter from a Ministry of Defence official to the Home Office dated 22 December 1999 (HC 76):

> "We have exhausted all the options that we thought were open to us. *The refugees are the responsibility of the UK Government, but we have no means of discharging that responsibility while they remain in the Sovereign Base Areas. We frankly see no realistic alternative to their resettlement in the UK* …" (Judge's emphasis)

The judge added (HC 77):

> "77. That same letter referred to the fact that the RoC was unprepared to accept responsibility for the those who might be assessed as 'refugees', that the UNHCR was not 'prepared to help with resettlement' because its view was that it was 'solely the responsibility of the UK' and that attempts to engage with the Canadian and US resettlement schemes had been rejected also."

25. However, suggestions that they should be allowed to come to the UK met an unsympathetic response from Ministers. Thus, the judge noted (HC 86) a memorandum to the Minister for Europe dated 28 June 2001, which recorded that relocating them to the UK was not "attractive to the Home Office and MoD Ministers have already objected to this approach", but noted that re-settlement in a third country was unlikely to be realistic and that "[the] Cyprus government will not take them on." The "preferred option" proposed to the Minister was relocation to the UK, but the Minister responded in a hand-written note: "I will not support relocation to the UK. This is not on politically" (HC 86). To similar effect, in February 2002 a request from the SBA Authority ("SBAA") seeking formal guidance, attracted a handwritten note, apparently by an MOD official:

> "… no answer is at hand. Yes they should be let into the UK, but ministers have said 'no'." (HC 94-95)

26. Concern about the situation of refugees in the SBAs was expressed by the UNHCR in a letter to the Permanent Representatives of Cyprus and the UK dated 13 June 2001 (HC 90). The then view of the Foreign and Commonwealth Office of the legal merits appears from an internal note (HC 91) prepared for a meeting of the Permanent Representatives and the UNHCR in November 2001, suggesting the line to adopt:

> "Ministers decided in early 1999 that asylum seekers arriving in the SBAs should be treated in accordance with the UN Convention on Refugees, even though the Convention does not apply in the SBAs …
>
> But strong reasons for the UK not allowing either the refugees or those that failed RSD permission to settle in the UK. Doing so would increase the attractiveness of the SBAs as a destination for asylum seekers … and it would be politically

> untenable given continuing public concern at the number of asylum seekers entering the UK."

The involvement of the Republic - 2002-2013

27. Faced with the political objections to resettlement in the UK, the government's strategy in 2002, agreed apparently at Cabinet level, seems to have been to use the desire of Cyprus to become a member of the EU as "leverage" to secure an acceptable agreement on the treatment of all the refugees and other asylum seekers, existing and future (HC 99-101). Early drafts included provision for those already granted refugee status in the SBAs. However, the Republic was "adamant" that existing asylum seekers in the SBAs should be dealt with separately from future arrivals. Accordingly, the final form of the agreement was prospective, applying only to future arrivals. As already discussed, the 2003 Memorandum, concluded on 20 February 2003, was implemented in the SBAs by the Refugees Ordinance 2003, and took effect on 1 May 2004, the date of accession of Cyprus to the EU.

28. So far as appears from the judgment, there is no record of any further consideration at UK government level at that time of those existing refugees excluded from the Memorandum. The only formal statement of the government's position in this period, in the papers before this court (though not mentioned by the judge), is in a letter from the FCO to the UNHCR dated 23 May 2005 [MS 1509]. It confirmed their view that the Convention did not in law apply to the SBA, and that it was inappropriate to extend the Convention to the SBAs because of their "nature and size", and the prohibition on new settlements in the 1960 Treaty of Establishment. The letter referred to the 2003 Memorandum as providing detailed arrangements to ensure "appropriate assistance" by the Republic for refugees arriving directly into the SBAs. There was no reference to those already in the SBAs as refugees, such as the respondents.

29. The next event of substance seems to have been in autumn 2004, when there began discussions between SBA officials and the Migration Department of the Republic (HC114-119). A meeting was held on 27 September 2004, followed by a letter from Mr Stainton, Administrative Secretary of the SBAA, dated 17 November 2004. This recorded that the Republic would "assume responsibility for the 66 individuals who had entered the SBAs directly", and that the SBAA had also agreed to pay the costs as identified at the September meeting. There was no reply to that letter, but there was a further meeting between the SBAA and Republic officials on 28 January 2005, at which there was discussion of arrangements in relation to welfare payments, medical matters, education, housing, work and residence, and a fixed date for the transfer of responsibility.

30. There is no written record of the actual agreement or understanding, nor of its precise content or even of its date. However, from about September 2005, it was treated by the local administration as a basis for stronger action to encourage the remaining refugees to transfer to the Republic. The judge referred to the closure of the school in September 2005 with the destruction of the playground, and the withdrawal of medical facilities, as confirmed in a memorandum from the then Fiscal Officer, Mr Pitts, dated 23 September 2005 (HC 123). Mr Pitts described the agreement as being:

> "… for all residents of Richmond Village … to be transferred to the administration of the RoC and for each person to be provided with the opportunity to have their individual claim considered."

The judge accepted that documentation issued thereafter, to some at least of the refugees, indicated recognition by the Republic authorities "that they had obligations towards the claimants which hitherto had been denied" (HC 131).

31. The judge also described the efforts to draw the agreement to the attention of the refugees, and their immediate response, as recorded in the evidence of Mr Bashir (HC 120-121). He spoke of a meeting on 28 January 2005 at Richmond Village with the UNHCR and the SBAA Fiscal Officer Mr Jim Smart. Mr Smart told them of "a new agreement which would change (their) situation and that (they) could be recognised as refugees in the Republic of Cyprus if (they) made an application to the Cypriot authorities". In response to questions why they had to make new applications when they had already been recognized as refugees, they were told of "assurances" that the Republic "would recognise us and give us rights"; but that they would need to reside in the Republic for a further seven years to be able to apply for citizenship, and that the years spent living in the SBAs would not count.

32. The residents' response was that they did not want to apply to the Republic and they would not move there, for a number of reasons:

> "First of all, we were aware that the Cypriot Government had denied responsibility for us in 1998: The minister at the time made a public statement that we were the responsibility of the SBA and the UK. Secondly, for all the years we had lived in the SBA most of us at one time or another had been subjected to ill treatment from the Cypriot police and the Cypriot immigration authorities. … Thirdly many of us were, and still are, afraid that we would be deported back to our countries of origin if we agreed to become the responsibility of the Republic of Cyprus. … Fourthly, we had already been living in limbo

> since our arrival on the SBAs and we were not the responsibility of the Republic of Cyprus, we were and are the responsibility of the UK who should have done more to assist us."

We would observe that the reasonableness or otherwise of that response has been at the heart of the dispute ever since. Sadly, it evidences the existence of something of a stand-off between the SBA authorities and the refugees which has in some measure continued until today - regarded by the authorities as due to obstinate non-cooperation by the refugees, and by them as legitimate insistence on the discharge of the duties for which the UK, not the Republic, was responsible.

33. However, as the judge recorded (HC 128), notwithstanding this resistance, a number of the claimants did seek paperwork promised under the agreement. In fact, it appears that all but one did this. The Republic registered them as refugees for the purposes of their domestic legislation, thereby recognising their entitlement to the support provided for by the Refugee Convention. The evidence of Mr Gondelle is that the SBAA made payments to the Republic on this basis under paragraph 13 of the Memorandum. Mr Bashir himself says that the Republic gave him and "most of the refugee families" Cypriot documentation, including an alien registration certificate, a temporary residence permit, a medical card for him and his family, a travel document and a work permit. Further, as their witness statements show, the respondents have made extensive use of the facilities provided by the Republic under the MoU. The lead claimant, Mr Bashir, is a good example. He declines to move from the SBA to the RoC, but he met his current wife while working in the RoC; they were married in the RoC and their children were born there and go to school there.

34. The absence of any written record of the agreement was later confirmed by Mr Stainton, the SBA Administrator. The judge (HC 138) referred to a note by him in October 2006 of a meeting earlier that month, attended by representatives of the Republic Asylum Service and the UNHCR, at which the Asylum Service had confirmed their intention to "honour their commitments under the Memorandum" and "more importantly that they will apply it retrospectively to those who arrived in Cyprus via Akrotiri in 1998 …". This was seen by him as important because -

> "… there is no written agreement that they will other than an exchange of letters agreeing the sum of money the SBAA will pay for each applicant and family member." (HC 138)

35. Mr Stainton also recorded that he intended to cease welfare payments for those who had not registered with the RoC from 31 January 2007, followed by eviction proceedings from the village. This intention was carried into effect and led

to a demonstration which went on for some weeks until (in Mr Bashir's words, quoted by the judge) "around March 2007 the SBAA backed down [and] stated that they were not going to evict us or cut our weekly payments. They also agreed to issue us new travel documents …" (HC 140).

36. The subsequent progress of the informal agreement was described by the judge as "chequered" (HC 373). Mr Gondelle, who became the SBAA Administrative Secretary in August 2008, said in evidence to the SBA courts that there were records of payments made to the Republic in respect of families recognised as refugees, but that to the best of his knowledge, the Republic had not yet given "full practical effect" to the agreement, and that its implementation in practice "[had] not been straightforward". By the time of his involvement in 2008, it was "uncertain whether the RoC [was] still willing in principle to abide by the Agreement" (HC 142). The judge went further, finding in the evidence "a clear indication" from the RoC in 2008 that it was not prepared to adhere to the "informal understanding" that the 2003 Memorandum would be applied to the refugees, although the respondents were not aware of this at the time (HC 144-145).

37. The next event of significance came in February 2009, following the discovery of asbestos in some of the properties in Richmond Village. Mr Gondelle prepared a minute with a view to inviting Ministerial approval to permit all existing residents in Richmond Village to move to the UK (HC 147-148). The minute indicated that Home Office officials were supportive, and attached a letter to the relevant Minister. As the judge observed (HC 151), the minute made reference to the 2003 Memorandum, but none to the 2005 agreement; instead it noted that the Republic was "reluctant to provide assistance of any nature to the SBA" because it considered that "the British military should end their presence in the SBAs and return the land to the RoC".

38. The recommendation was not accepted. At a meeting of the relevant Ministers in June 2009, the joint view was that "bringing them to the UK was not a desirable option". Instead authorisation was given for a "carrot and stick approach", which involved the SBA paying for rented accommodation in the Republic for an initial period while simultaneously evicting the refugees from their current housing, and discontinuing welfare payments. In an email dated 16 December 2009 Mr Gondelle noted that the Home Office, while recognising the "complexities of the situation" and that entry to the UK might ultimately be necessary, was unwilling to authorise "a significant departure" from its current policy without "first exploring the alternatives". The SBA Administration remained "convinced that entry to the UK will ultimately prove to be the only solution …" (HC 152-154).

39. Attempts to implement the new "carrot and stick" approach were impeded by judicial review proceedings in the SBA courts, commenced in April 2010 (HC 160). The Senior Judges' Appeal Court, in a judgment given on 13 September 2011, held

that the Convention did not apply to the SBA. As already noted, there was no appeal to the Privy Council.

40. In the course of those proceedings the respondents' solicitor had written to the Republic's Ministry for Foreign Affairs asking about the "agreement to resettle" the refugees, on which the SBA authorities were relying. The reply dated 18 June 2010 stated (as translated from the Greek):

> "… there is no written agreement with the United Kingdom as regards case of your customers. The Republic of Cyprus had merely accepted to implement commensurately the relevant Memorandum of Understanding between the Republic of Cyprus and the United Kingdom in certain cases which concern persons that had arrived in Cyprus before the date of its entry into force."

The judge observed that this appeared to be "the only document emanating from the [Republic] in which the existence of the 2005 understanding is mentioned" (HC 161-162).

41. However, in the course of his evidence put before the Senior Judges' Appeal Court, Mr Gondelle confirmed that since 2008 he and his staff had had many meetings with the Republic's Asylum Service and Ministry of Foreign Affairs, during which it had indicated its willingness to cooperate, even though the effect "appears to have not always reached other departments", that during his last meeting with the Director of the Republic's Civil Registry and Migration Department, in late 2009, she had confirmed arrangements were in place to ensure that recognised refugees would receive welfare benefits from the Republic and that it was only after these assurances that SBA benefits had been withdrawn. Although free transport and the assistance of SBAA officials was offered to the respondents in March 2010 to take up such benefits, this offer was rejected by all of them.

42. The UK government's understanding of the position as at the end of 2011 appears from a letter quoted by the judge from the UK Border Agency to the UNHCR dated 8 November 2011 (HC 163). Having explained the background it stated:

> "… The Republic of Cyprus (RoC) has agreed to accept and resettle the refugee families, but due to their distrust of the RoC, the refugee families have refused to move from their current accommodation in 'Richmond Village' (former Service family accommodation) on the SBA.

> A Memorandum of Understanding (MoU) was signed with the RoC in 2003 to prevent this situation occurring again. Under this MoU the RoC handles all asylum seekers that enter the SBA. This has worked well. But the original applicants remain the responsibility of the SBAA.
>
> In 2007 [sic], an informal agreement was reached between the SBAA and the RoC, under which the RoC agreed to honour any decisions made by the SBAA in respect of the families and take responsibility for them. The UK Border Agency again provided assistance and sent caseworkers to the base to interview 25 of the individuals. Unfortunately, the families failed to co-operate and the interviews never took place …"

Events leading to the present proceedings

43. In the proceedings before the Senior Judges' Appeal Court, the respondents' complaint that the Republic would not honour any commitment to make payments was found to have no evidential foundation [paras 63-69, MS 859-62]. Since those proceedings, there is however evidence of a further consolidation of the respondents' attitudes regarding any cooperative arrangements with the Republic pending the outcome of the present proceedings. Ms Charalambidou, the respondents' legal representative in Cyprus, expressed this very clearly on their behalf in a letter of 31 December 2012:

> "l would finally like to inform you that the refugee families continue to consider themselves as the responsibility of the SBAA and the United Kingdom and therefore they have informed me that they do not intend under any circumstances to be considered as the responsibility of the Republic of Cyprus."

44. On 30 September 2013, following a meeting at the UNHCR offices in Nicosia, Ms Charalambidou, and the local representative of the United Nations High Commissioner for Refugees wrote jointly to the Administrator of the SBAs about the respondents' predicament. They observed that although resettlement in the Republic had at one stage been seen as a desirable and practical option, the respondents "did not consider this to be an option, based on their own experiences and for reasons that need not be discussed". The UNHCR representative added that in any event the Republic was no longer willing to take them because of the after-effects of the financial crisis of 2008 and the number of refugees that it had already accepted. Both signatories expressed the view that resettlement in the United Kingdom was "the only conceivable option".

45. That letter was passed by the SBA Administrator to the Home Office, but there was a delay of more than a year in replying. The judge discussed the evidence about the drafting of the reply (HC 351-354) including an internal response of a Home Office official, apologising that the chasing email from the SBA had "slipped under [his] radar":

> "… the UK has no legal obligation to accept the applicants, refugees or not, and there are no close family ties or previous residence in the UK or any compelling humanitarian reasons in their favour. All in all, there would be no appetite to accept this particular group, whose non-cooperation and behaviour would make any country reluctant to take them."

The judge commented (HC 354) that this response "suggest[ed] a closed mind on the part of the Home Office to the question of admission of the refugees to the UK and to anything said in support of it by the UNHCR".

46. The formal reply eventually came in a letter dated 25 November 2014 in a letter from Mr Rob Jones, the Home Office Head of Asylum and Family Policy. The operative part of Mr Jones' letter read

> "As was explained in a letter of 8 November 2011 to the London representative of the UNHCR (copy enclosed), Home Office Ministers and officials have consistently made it clear that there could be no question of the families on the SBA being admitted to the UK. The families have at no time been given any encouragement to believe that they could be. It would be contrary to UK policy to accept the transfer of refugees who have no close connection to the UK and it would also be inconsistent with our policy on asylum applicants who arrive in British Overseas Territories or Crown Dependencies.
>
> Although their presence on the Base has been tolerated by the SBA, their stay gives the families no claim to admission to the UK. The UK's policy on the admission of refugees is in accordance with the 1951 Refugee Convention and the UK accepts no responsibility for the consideration of applications for asylum or transfer of refugee status other than those made on UK territory, namely the mainland territory of the UK and excluding the UK's Overseas Territories, Crown Dependencies, or Sovereign Bases such as the ones in the Republic of Cyprus. Our position, therefore, is that none of the refugee families on the SBA will be considered for admission to the UK. They have no

> family or residential ties with the UK and there are no reasons for treating them exceptionally. The families have the right to reside in the Republic of Cyprus and have strong ties with the Republic. We do not believe that their preference for the UK should be allowed to override what is demonstrably a durable and suitable solution for their long-term residence."

47. The present proceedings were brought by way of application for judicial review of the decision of the Secretary of State said to have been communicated in that letter.

The High Court

48. The respondents' application came before Foskett J in March 2016. He gave judgment on 28 April 2016. He held that as a matter of international law, the Refugee Convention did not apply to the SBAs because they were indeed a new international entity created in 1960. He went on to deal with the United Kingdom's declared policy of observing the "spirit" of the Convention. He recorded it as common ground (because it was accepted in internal documents passing between the SBA Administration and government departments in London) that the United Kingdom could not in practice provide the respondents with their full Convention rights within the SBAs with the facilities currently available there. Although he made no formal finding of his own to this effect, it is clear from his analysis of the evidence that he agreed.

49. It followed that a level of support consistent with the spirit of the Convention could be achieved only (i) by "effective resettlement" of the respondents in the Republic of Cyprus, either by their moving there or by their remaining resident in the SBAs but relying on facilities provided by the Republic by arrangement with the SBAs; or (ii) by resettlement of the respondents in the United Kingdom. The Judge held that it would be consistent with the spirit of the Convention for the United Kingdom to support the respondents by making arrangements with the Republic of Cyprus to do so. He therefore considered that option (i) would be lawful if it could be achieved.

50. He made no finding as to whether in fact it could be achieved. But he held that Mr Jones's letter had failed to address the view expressed by the UNHCR local representative in UNHCR's letter dated 30 September 2013 that, "even if … relocation to the Republic of Cyprus may have been seen as the most desirable or practical option" in the past, "this is not the case anymore because of the financial crisis prevalent in the Republic"; and that "accordingly, consideration was not given as at the time of the decision letter in November 2014 to the strengths and/or weaknesses of the informal agreement reached in 2005". The decision letter had thus

failed to consider "a crucial factor in deciding whether to admit the claimants to the UK within the general discretion available to the Secretary of State" (HC 397).

51. He therefore quashed the Secretary of State's decision. He left it to the Secretary of State to consider, when taking a fresh decision, whether support through the Republic of Cyprus was a practical proposition.

The Court of Appeal

52. The Secretary of State's appeal was heard by Jackson, Briggs and Irwin LJJ in January 2017. In its unanimous judgment delivered on 25 May 2017, the Court held, overruling the judge, that the SBAs were not a new entity and that the Refugee Convention continued to apply to them by virtue of the United Kingdom's notification of 1956. In those circumstances, the question was no longer what was implied by the United Kingdom's policy of observing the spirit of the Convention. The Court of Appeal did not deal with the question whether the terms of the Convention required the United Kingdom to resettle the respondents in its metropolitan territory, nor with the question whether it was open to the United Kingdom in point of law to support the respondents through arrangements made with the Republic of Cyprus. Instead, they quashed the existing decision and directed that it be remade by 6 July 2017 on the footing that the Convention applied directly.

53. Irwin LJ, delivering the only substantive judgment, said (para 79):

> "In my judgment the outcome of that decision must take into account the history but cannot be determined by this court merely by re-analysing the historic evidence. The decision must be taken in relation to the current facts …"

He also identified "some obvious factors" which he thought "absolutely critical to the decision". They included his view that the obligations of a State with responsibility for refugees could not be "exported" but remained with the Secretary of State (para 80); that the suggestion of counsel for the Secretary of State that they could be permitted to remain where they were was likely to be inconsistent with article 34 of the Convention, given the possibility of their assimilation into the UK or other British Overseas Territories (para 81); and that, while the arrangement with the Republic did not amount to "constructive expulsion" within article 32, a repeat of that approach, absent agreement to resettlement in the Republic, would be "very likely to represent a repeated failure to meet the obligations which I conclude fall upon the UK" (para 83). He added:

> "84. Prominent amongst the relevant factors must be the enormous delay which has affected these claimants and their families. There can be no justification for any future decision which leaves these claimants' position unresolved for any further length of time. As the judge made clear, their present conditions are quite unacceptable. That appears to be common ground …"

54. It followed from the way that the case was put in the courts below and from the somewhat different bases on which Foskett J and the Court of Appeal quashed the Secretary of State's decision that neither of them needed to decide whether or not it was in practice feasible to support the respondents through the facilities provided by the Republic of Cyprus under the Memorandum of Understanding. Foskett J in terms left that matter to be determined in a new decision, in which the Secretary of State would be required to address the misgivings of the UNHCR local representative on that score. The Court of Appeal implicitly did the same, while pointing to a number of factors which she should take into account.

Further exchanges

55. On 16 June 2017, after the decision of the Court of Appeal, the United Nations High Commissioner for Refugees wrote to the Secretary of State asking her to reconsider her decision not to admit the respondents to the United Kingdom. In his letter, the High Commissioner raised doubts about the practical feasibility of supporting them through facilities provided by the Republic of Cyprus, after 19 years and in the absence of any formal agreement or assurances regarding their future in the Republic. He concluded:

> "These refugees find themselves in a state of legal limbo with seriously compromised or no access to welfare, health care, education, and employment. Recently, welfare benefits have been reduced, and these refugees have been unable to renew their medical cards in the Republic of Cyprus, which are required to access health care. They also have not been able to access either tertiary education or employment in the Republic of Cyprus. Of serious concern, these refugees and their families are living in sub-standard housing, which needs to be demolished due to the presence of asbestos."

56. Meanwhile, the Court of Appeal having refused to stay its decision, the Secretary of State was obliged to make a fresh decision in compliance with its order by 6 July 2017. It is unnecessary to set it out in detail at this stage. She declined to allow the respondents entry into the United Kingdom. Her reasons were

substantially the same as those given on 25 November 2014, except that the fresh decision, unlike the original one, directly addressed the options open to the respondents other than resettlement in the United Kingdom. It is apparent that she did not accept the version of events put forward by the UN High Commissioner. She considered that on the footing that the Refugee Convention applied in the SBAs the United Kingdom could comply with its obligations by arranging for the respondents to be supported by the Republic of Cyprus. The reason, she said, why that had not happened was that the respondents had declined to engage with the authorities in the Republic while there was any prospect that the present proceedings might result in their admission to the United Kingdom. While accepting that the 2003 Memorandum itself only applied to persons arriving in the SBAs on or after 1 May 2004, she stated again that "in 2005 the Republic of Cyprus agreed to apply it to those who arrived in 1998". She addressed the concerns of the UNHCR local representative in the following terms:

> "As you are aware, in 2003, the UK and the Republic of Cyprus signed a Memorandum of Understanding under which the Republic agreed to treat persons who arrived directly in the SBAs, and were recognised as refugees under the procedures contained in that Memorandum, as if they had been recognised as refugees by the Republic. Whilst the Memorandum itself only applies to persons arriving in the SBAs on or after 1 May 2004, in 2005 the Republic of Cyprus agreed to apply it to those who arrived in 1998.
>
> I have carefully considered the UNHCR letter of 30 September 2013, in which the UNHCR raised concerns because of the financial crisis in Cyprus at that time and claimed that the Republic of Cyprus had stated they could not take any more refugees. As was explained on the Secretary of State's behalf in the Court of Appeal, the reference appeared to be to a speech by the Interior Minister, but he had actually said that the Republic could not sustain any more asylum seekers, though would still honour all international conventions and agreements on human rights.
>
> In any event, whilst I acknowledge there was a period in 2008 when it appeared that the Republic no longer stood by what it had agreed in 2005, the officials have since confirmed many times, both during the period between 2008 and 2013, and after the UNHCR letter of September 2013 that the Republic is committed to its 2005 agreement and stands by its decision in 2005 (documents in letters to you) to recognise you as refugees and grant you the rights to which you are entitled as a refugee

in the Republic. The Sovereign Base Areas Administration (SBAA) is actively engaged, in cooperation with the Republic's Asylum Service and its Labour Office, in efforts to assist you to access the help which this agreement clearly makes available to you.

I have also carefully considered the UNHCR letter of 16 June 2017 in which concerns were raised about the impact on your health given the need to find a durable solution. However, I note that there is a durable solution available to you but you have been unwilling·to engage with the Republic or take up the offer to obtain support from the Republic of Cyprus until the final outcome of the litigation. This was acknowledged by Chrystalla Katsapaou of UNHCR Cyprus at a recent meeting with the SBAA.

I do not accept that you or your family members are subject to compromised or no access to welfare, health care, education or employment. This is simply not true. You are able to use the health services of the Republic and I am aware that the children already attend schools in the Larnaca district. You are entitled to register with the Labour Office and to claim welfare benefits as if you were nationals of the Republic. You would have to cooperate with the registration process of course, but that would be the same in any country to which you were resettled and I do not accept that your failure to cooperate should lead to a grant of entry clearance to the UK. Depending on the composition of each family, you can expect between 600 Euros and 1,100 Euros per family per month more than the ex gratia payments which were previously provided to you by the SBAA. I consider that there is adequate support available should you decide to take advantage of this.

There is also work available that you could choose to take advantage of. The Labour Office in Larnaca will help you find work if you register with them. I am aware that the Labour Office offered to help you register and provide more information about the Republic's system but you refused to do so.

In addition, the Minister of the Interior has recently indicated that the Republic would look positively at applications you choose to make for naturalisation as Cypriot citizens.

> In the circumstances set out above, and as a result of ongoing discussions between the SBAA, the Foreign and Commonwealth Office and the Republic of Cyprus in order to try to support you, I have concluded that there remains a durable long-term solution available for you to stay in the SBAs should you choose to do so, and look to the Republic's government for public services and provision, as Cypriot nationals living in the SBAs do. Alternatively, there is an option for you to resettle in the Republic of Cyprus. In either case you could apply for Cypriot citizenship.
>
> …
>
> I have also considered whether to grant entry clearance on compassionate grounds, in spite of the absence of any legal obligation to admit you to the UK, either under the Immigration Rules or by virtue of the Refugee Convention. In all the circumstances, I am not willing to do so. I take the view that the solution which has been on offer for many years is one which it is reasonable to expect you to take up."

57. On 7 July 2017 the Secretary of State directly responded to the UNHCR's letter of 16 June 2017 in similar terms to her fresh decision of 6 July. The UNHCR replied to the Secretary of State on 26 October 2017 to clarify and share additional information about its June observations. Additional comments were provided on the Memorandum of Understanding and the precariousness of its application to the SBA refugees and difficulties faced by the SBA refugees regarding access to welfare assistance, access to the labour market, access to health care, access to education, access to long-term residence and access to citizenship in the Republic of Cyprus. At the hearing Mr Eadie indicated that the Secretary of State was preparing a response to the UNHCR's most recent letter. The court received that response on 26 July 2018 from the Government Legal Department in the form of a letter dated 8 January 2018 without further comment from the parties on its contents.

58. Accordingly, the present position is that the decision of 25 November 2014, which is the subject of the respondents' application for judicial review, no longer exists. It has been quashed by the courts below and superseded by the fresh decision which the Secretary of State has now made in accordance with the order of the Court of Appeal. The Secretary of State's current decision has not been quashed and is technically not before this court. The subject-matter of the Secretary of State's two decisions is, however, the same and they raise issues which partly overlap.

The issues in the appeal

59. As noted at the beginning of this judgment, the issues as they have emerged were not clearly identified in the agreed statement or in the pre-hearing exchanges. No purpose would be served at this stage by examining the reasons for that failure. It would be highly unsatisfactory, as we approach the twentieth anniversary of the respondents' arrival in the SBAs, to remit these issues to the High Court or leave them to be determined on a further application for judicial review of the Secretary of State's decision of 6 July 2017. In these circumstances, we think that the least unsatisfactory approach is for us to identify the issues which now appear essential to the resolution of this appeal, to give judgment now on the issues which we are in a position to decide at this stage, and to make proposals for the early resolution of the remainder.

60. In summary the following questions appear now to require decision:

i) Does the Refugee Convention (as extended by the 1967 Protocol) apply to the SBAs?

ii) Does the Convention by its terms entitle the respondents to be resettled in the United Kingdom?

iii) Was the Memorandum of Understanding of 2003 a valid performance of the Convention obligations for those within its scope? In particular:

a) Was the United Kingdom in principle entitled to fulfil its obligations under the Convention by arranging for support to be provided by the Republic of Cyprus?

b) If so, were the terms of the Memorandum of Understanding (including the 2003 Refugee Ordinance) a proper basis on which to do so?

iv) If the answer to (iii) is "yes":

a) Was the United Kingdom entitled in 2005 to make the same arrangements in respect of the respondents without their consent, given their lawful and accepted presence as refugees in the SBAs since 2000?

b) If so, was the 2005 "agreement" with the Republic a legally effective means of doing so, having regard to its informality and the absence of incorporation into SBA law?

c) Has the support of the Republic for the respondents in accordance with the 2005 agreement been available in practice, and can it be assured in the future?

v) If the 2005 agreement, for whatever reason, was not a legally effective means of discharging the United Kingdom's obligations to the respondents under the Convention, or if such support has not been available in practice, what are the consequences, in terms of rights or remedies potentially available in these proceedings, and how should the court give effect to them in its order?

61. Questions (i) and (ii), which are questions of international law, have been fully argued, and will be addressed in this judgment. We will also address issue (iii) in so far as it is relevant to the respondents' case. We will then give a brief provisional view of the matters likely to require consideration under the other heads. We appreciate that Mr (now Sir) James Eadie QC submitted that at any rate points (b) and (c) under issue (iv) fell outside any issues argued below or for which leave to cross-appeal to this Court has been obtained. Any objection of this nature will remain open for consideration, though we would wish to determine any issues which can fairly be determined.

(i) Does the Refugee Convention (as extended by the 1967 Protocol) apply to the SBAs?

62. The respective positions of the parties in summary are as follows. The respondents say that the Convention applies by virtue of the United Kingdom's declaration of 1956 under article 40(2). The Secretary of State says that the SBAs are new entities in international law, created in 1960, in relation to which no such declaration has been made. He accepts that the respondents have been treated as refugees protected by the Convention but contends that this was not a legal entitlement but an ex gratia concession made in accordance with the United Kingdom's policy relating to dependent territories where the Convention does not apply.

63. Given that until 1960 the Convention unquestionably applied to the territory now comprised in the SBAs, the question is whether the political separation of that territory from the rest of the island brought an end to its application there. This is necessarily a question of international law. But while international law may identify

the relevant categories and the principles that apply to them, the question whether a particular territory falls within a relevant category will depend on the facts, and these may include its domestic constitutional law.

64. The only mode of termination expressly provided for in the Convention is denunciation, which is governed by article 44. The Convention has not of course been denounced by the United Kingdom, either generally or with respect to the SBAs. But as between contracting states, there are a number of other circumstances in which treaty obligations may come to an end, so far as they relate to particular territory. In particular, they may come to an end as a result of a sufficiently radical change in the international status of that territory. There is a substantial body of state practice bearing on this question, which is summarised in standard works such as *Oppenheim's International Law*, 9th ed (1992), ed Sir Robert Jennings QC and Sir Arthur Watts, i, paras 62-64 and *McNair, The Law of Treaties* (1961), pp 600-606, 629-638. The ordinary principle is that obligations in international law are owed by international persons, primarily states. As subjects of international law, international persons enjoy rights, duties and powers established in international law and more generally a capacity to act on the international plane. Treaty obligations apply to the international entities which enter into them. Where they have territorial application, they apply to the states responsible internationally for the territory in question. It follows that treaty obligations will cease to apply to a territory where it secedes from the state which entered into the treaty, or where a formerly dependent territory becomes independent of the parent state which entered into the treaty.

65. There is some support in state practice for the application of a broader rule to treaty obligations of a non-political and especially of a humanitarian character. The broader rule would attach treaty obligations to territories rather than to the international persons responsible for them. The International Law Commission of the United Nations, in presenting draft articles on state succession to the General Assembly in 1974 (Document A/9610/Rev.1), expressed the opinion that some legal incidents may attach to an antecedent treaty on the ground that it "establishes a legal nexus between the territory and the treaty" such that a successor state will be bound by it: Yearbook (1974), vol ii(1), p 167, para (49). However, it is clear from the commentary that the circumstances in which the question arises are too varied and state practice on the point is insufficiently uniform and too obviously influenced by pragmatic considerations to give rise to a rule of customary international law: ibid, pp 196-199, 202-207, paras 1-9, 21-48. This is, as the editors of *Brownlie's Principles of Public International Law*, 8th ed (2012), at p 424, note "an area of uncertainty and controversy".

66. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453, the House of Lords had to answer the question whether the European Convention on Human Rights applied in the British Indian Ocean Territory ("BIOT") by virtue of the extension of the Convention to the then colonies

of Mauritius and the Seychelles in 1953 under a similar colonial clause. The BIOT comprised outlying groups of islands formerly part of those colonies, which had been separated from them for defence purposes in 1965 and constituted as a distinct colony by the British Indian Ocean Territory Order 1965 (SI 1965/1920). Section 3 of the Order provided that the islands, "shall together form a separate colony which shall be known as the British Indian Ocean Territory". Mauritius and the Seychelles subsequently became independent in 1968. Lord Hoffmann, with the agreement of the rest of the Appellate Committee, dealt with the question at para 64 as follows:

> "In 1953 the United Kingdom made a declaration under article 56 of the European Convention on Human Rights extending the application of the Convention to Mauritius as one of the 'territories for whose international relations it is responsible'. That declaration lapsed when Mauritius became independent. No such declaration has ever been made in respect of BIOT. It is true that the territory of BIOT was, until the creation of the colony in 1965, part of Mauritius. But a declaration, as appears from the words 'for whose international relations it is responsible' applies to a political entity and not to the land which is from time to time comprised in its territory. BIOT has since 1965 been a new political entity to which the Convention has never been extended."

67. We have been invited to overrule this decision. It is said to be inconsistent with ordinary principles of international law whereby (i) international obligations are owed in respect of specific territory, and (ii) a state's international responsibility is unaffected by changes to the governance or constitutional status of some part of its territory. It will be apparent from what we have already said that we do not accept this criticism. As to proposition (i), it is a truism that a state's international responsibilities are generally owed in respect of particular territory. But it does not follow that the responsibility attaches to the territory as such, rather than the international person responsible for it. Otherwise, where a state assumes treaty obligations in respect of its entire territory, the severance of part of that territory could never result in those obligations ceasing to apply to it. Yet it is accepted that that is not the position. As to proposition (ii), it is correct that a state cannot rely on its domestic law as authorising or excusing a breach of its international obligations: see Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (1932) PCIJ, Series A/B No 44, p 4, at p 24. The proposition is stated as follows in article 3 of the International Law Commission's Articles of Responsibility of States for Internationally Wrongful Acts (2001):

> "The characterisation of an act of State as internationally wrongful is governed by international law. Such characterisation

> is not affected by the characterisation of the same act as lawful by internal law."

68. This, however, assumes that the state in question is subject to the relevant international obligation. Where that obligation is derived from a treaty, the prior question is whether the treaty applies to the particular State in respect of the particular territory. That will necessarily depend on the current constitutional relationship between the state and the territory in question. Thus the international responsibility of the United Kingdom in respect of British Dominions has always depended on the constitutional relationship between them as it stood from time to time, which is a matter for their domestic law. The Statute of Westminster 1931, which confirmed the status of the Dominions as independent sovereign states, was an Act of the United Kingdom Parliament. It would have been absurd to suggest that international law would for that reason have declined to take cognizance of it, or would have treated it as an ineffective attempt by the United Kingdom to avoid the international obligations which it previously had for the Dominions' acts.

69. The decisive point is in our view a different one. The decision in *Bancoult (No 2)* was about the constitutional and international status of the BIOT, which is materially different from that of the SBAs. The Cyprus Act 1960 did not alter the status of the SBAs, but merely excluded them from the transfer of territory to the new Republic of Cyprus. The Sovereign Base Areas of Akrotiri and Dhekelia Order in Council 1960 has no equivalent of section 3 of the British Indian Ocean Territory Order 1965. Indeed, it says nothing at all about the status of the SBAs, but only about the organisation of their internal administration. These differences reflect the very different nature of the changes of which the orders were part. The BIOT was a territory reconstituted from parts of two other colonies to make a third colony. It had a different international status (ie vis-à-vis third countries) from Mauritius and the Seychelles, and the United Kingdom had different international responsibilities in relation to it, notably in regard to the United States. In the case of the SBAs, the only change which occurred in 1960 was that whereas they had previously been part of the UK-dependent territory of Cyprus, they were thereafter the whole of it. The mere fact the United Kingdom lost 97% of the island of Cyprus did not alter the status of the 3% that it retained. The status of the SBAs vis-à-vis the rest of the world did not change, except in relation to the rest of Cyprus, and that was because of a change in the status of the rest of Cyprus and not because of a change in the status of the SBAs.

70. With one exception, we find it difficult to attach much importance to the various instances cited by the respondents in which the United Kingdom has treated the creation of new colonial entities as leaving unaffected the application of treaties which previously applied to them. These instances include the separation of the Cayman Islands and the Turks and Caicos Islands from Jamaica in 1958 and the dissolution into its component territories of the Federation of Rhodesia and Nyasaland in 1963. They do not constitute a sufficient body of state practice to give

rise to a rule of customary international law. At the most they show that the United Kingdom has not been consistent on this question. The exception is the treatment by the United Kingdom of treaties of mutual legal assistance which had been extended to Cyprus under colonial clauses before 1960. The United Kingdom has taken the position in its dealings with other countries party to these treaties that (in the words of a Foreign Office memorandum) "treaties which had applied to the colony of Cyprus continued automatically to apply to the two pieces of territory now known as the Sovereign Base Areas". This has been tacitly accepted by all of them except, briefly, the Lebanon. The Lebanon was told that creation of an independent Republic of Cyprus "effected no change in the international status of these areas" (see HC 237). These exchanges do not suggest a rule of customary international law, any more than the other instances do. But they are, we think, relevant as a statement of the international status of the SBAs by the state responsible for their international relations, which is ultimately in a position to determine what their international status is to be. The position taken by the Foreign Office accords precisely with the law as we conceive it to be as a matter of analysis.

71. We conclude that the Refugee Convention continues to apply to the SBAs by virtue of the declaration of 1956, in the same way as it applied to the whole colony of Cyprus before 1960. Article VII(4) of the 1967 Protocol provides that where a state made a declaration under article 40(1) or (2) of the Convention extending its application to a territory for whose international relations it was responsible, and then acceded to the Protocol, the declaration should apply to the Protocol also, unless that state notified the Secretary-General to the contrary. In other words, no further declaration was required to extend the Protocol to dependent territories where the original Convention applied. The United Kingdom acceded to the Protocol without any reservation relating to the SBAs. It follows, since the Convention continued to apply to the SBAs after 1960, that the Protocol applies there also.

72. That makes it inappropriate to assess the United Kingdom's treatment of the respondents by reference to the "spirit" of the Convention. The United Kingdom is, as a matter of international law, bound by the Convention and the Protocol as such.

(ii) Does the Convention by its terms entitle the respondents to be resettled in the United Kingdom?

73. The respondents say that they have a direct right to entry into the United Kingdom under the terms of the Convention, by virtue of their status as refugees in a territory under the United Kingdom's sovereignty. Specific reference is made to articles 26, 32 and 34. This is a question of great general importance. It may be restated as follows. Is it the effect of the Convention that, once a refugee reaches a dependent territory of a state (such as an SBA) to which the Convention applies, the refugee is entitled without more to move freely to what article 19(2) of the

Convention calls the "metropolitan" territory of that State or to any other dependent territory of the same state to which the Convention has been extended?

74. The territorial application of a treaty is a question of international, not domestic law. It depends, like most aspects of the law of treaties, on the intention of the contracting states. Article 29 of the Vienna Convention on the Law of Treaties (1969) provides that:

> "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

75. Multilateral treaties, however, commonly provide for a different intention. As Sir Humphrey Waldock, Special Rapporteur, demonstrated in his Third Report on the Law of Treaties to the International Law Commission (1964) (A/CN.4/167), at pp 12-15, this is reflected in the practice, which can be dated back to the 1880s, of inserting clauses excluding the application of treaties to parts of the territory of a contracting state, or making their application there subject to conditions, such as local consent or subsequent notification: see, more generally, Fawcett, "Treaty Relations of British Overseas Territories" (1949) 26 BYIL 86, 94-99. The practice originated in the need of imperial powers, and notably the United Kingdom, to consult the governments of dependent territories on whom it had conferred a measure of autonomy, before assuming international obligations affecting them. But it has also been adopted by federal states, in cases where the federal government has exclusive responsibility for international relations but part or all of the subject matter of the treaty is within the exclusive legislative competence of its component territories. These particular concerns are commonly dealt with by "colonial clauses" and "federal clauses". In principle, however, states are at liberty to enter into treaties on terms as to their territorial application for any reason that they see fit.

76. The widespread use of colonial clauses reflects the principle that for certain purposes, including the application of treaties, dependent territories of a state are treated as having a status in international law distinct from that of the parent state's metropolitan territory. More generally, it reflects one of the "basic principles of international law" declared in the United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)) (1970), that:

> "the territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until

> the people of the colony or Non-Self-Governing Territory have exercised their right of self determination in accordance with the Charter, and particularly its purposes and principles."

77. It is true that the purpose of "colonial clauses" is to accommodate the limited autonomy accorded by some imperial powers to the more advanced dependent territories. It is also true that the purpose of this particular part of the United Nations Declaration is to accommodate the principle of self-determination and the trusteeship obligations of colonial powers. These purposes may be said to have limited if any relevance to uninhabited territories or to sui generis cases such as the SBAs, which are military facilities rather than settlements, and whose indigenous inhabitants are citizens of the Republic with all the rights attaching to that status. But while the problems associated with colonial autonomy and trusteeship may have been the occasion for recognising an international status for dependent territories, distinct from that of the metropolitan territory, the principle itself cannot be confined to such cases. It would in any event be practically impossible to do so given the fine questions of degree which would arise if it were necessary to introduce a sub-distinction between different dependent territories depending on the extent of their internal autonomy or the number or status of their indigenous inhabitants.

78. Like many multilateral treaties, the Refugee Convention was so framed as to apply only to a State's "home country" or "metropolitan territory" unless extended under article 40 to other territories for whose international relations the signatory state was responsible. In contrast with the position in some other contexts (see eg *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] AC 453, para 40, and *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355, para 186), the metropolitan and overseas territories of the United Kingdom for whose international relations it has responsibility are not in this context assimilated or treated as one undivided entity. Under article 40, any Contracting State is able to extend the Convention to all or any of the other territories for the international relations of which it is responsible, or to do so on terms specific to each territory.

79. This is what happened when on 24 October 1956 the United Kingdom notified the Secretary General of the United Nations of its extension of the Convention to some 16 territories, including Cyprus. The notification was made subject to reservations, differing between some overseas territories and others, disapplying or varying particular terms of the Convention. By way of example, the right to engage in wage-earning employment after completing "three years' residence in the country" under article 17.2(a) was varied to four years in the case of 14 of the territories, but not in respect of Zanzibar and St Helena; the provisions of article 25.1 and 2 (relating to certain administrative assistance) were not accepted; and the provisions of articles 24.1(b), 24.2 and 25.3 (covering inter alia the provision of social security and certain administrative documentation) were made applicable

only "so far as the [local] law allows". In all these respects, the colonial clause gave effect to the individuality of each overseas territory, including by taking account of the views of any local administration.

80. Article 40 suggests that for the purposes of the Refugee Convention the metropolitan territory and its dependent territories are to be treated as separate units. The different terms on which the Convention may extend to different territories could not be given effect, if all territories fell to be regarded as one. The Convention terminology varies between articles. Article 2 refers, for example, to a refugee's "duties to the country in which he finds himself", with the concomitant obligation to conform to its laws and regulations. The "country in which he finds himself" means whatever territory the refugee reaches. Article 4 provides that "The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion …". The plural is used here because the article is dealing with all Contracting States' territories. Where there are differences in the freedom to practise religion in different territories for the international relations of which a single State is responsible, the article will only work if applied on a territory by territory basis.

81. A similar point applies to other articles requiring a State to accord to refugees in their territory "the most favourable treatment accorded to nationals of a foreign country in the same circumstances" or "not less favourable [treatment] than that accorded to aliens generally in the same circumstances" or "the same treatment as … nationals": see eg articles 15 and 17 to 24. Each territory for the international relations of which the State is responsible must in this context be treated separately.

82. Article 26 is to be read in the same light. Headed "Freedom of Movement", it reads:

> "Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence [and] to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances."

83. The French text confirms that the word "and", inserted in brackets, should be read into the English version. Article 26 is directed to movement by a refugee within whichever territory they may be, whether it be the metropolitan territory, if that is where they are, or any overseas dependent territory, if they are there. The qualification relating to aliens in the same circumstances refers naturally to the possibility of restraints on movements internally, again within either the metropolitan territory or the overseas territory as the case may be. It cannot have been directed to conferring on a refugee a right to move between all or any of a

State's metropolitan and overseas territories, subject only to such constraints as might affect an alien.

84. On this point, Foskett J (para 303) was in our opinion clearly correct. In the Court of Appeal, Irwin LJ (para 82) appears in contrast to have considered that article 26 applied without limitation across all of any State's territories; and further that the limitation by reference to aliens could simply be avoided (or in effect eliminated) on the basis that a refugee's circumstances differ from those of an alien. On both points, he was in our opinion mistaken. The term "in the same circumstances" is used in the Convention to indicate that a refugee should notionally be assimilated with a person who is not a refugee but seeks to enjoy the same right, except in the case of "requirements which by their nature a refugee is incapable of fulfilling": article 6.

85. Article 19 is instructive. It reads:

> "LIBERAL PROFESSIONS
>
> 1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practicing a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.
>
> 2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible."

86. Article 19(1) addresses the position of "liberal professionals" in the territory in which they are (which would in the circumstances in which the Convention was drafted commonly be a metropolitan European territory) while article 19(2) gives them the exceptional privilege of an undertaking that the relevant State will "use its best endeavours" to secure their settlement in another territory for whose international relations that State is responsible. Such a privilege makes no sense if everyone (not just liberal professionals) had the right to move anywhere in any of the territories for whose international relations a State was responsible and to which it had extended the Convention. Each such territory is, on the contrary, to be seen as a separate unit. It is noteworthy that the privilege is only to have the State "use [its] best endeavours". Anything further would risk impinging on the local interests

which constitute one reason for the separate treatment in article 40 of overseas territories for whose international relations a State is responsible.

87. As already noted, the respondents also refer to and rely on articles 32 and 34, which provide

> "Article 32
>
> EXPULSION
>
> 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order …"

> "Article 34
>
> NATURALIZATION
>
> The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

88. Article 32 gives a remedy against forced removal from the relevant "territory" (in this case the SBA), but says nothing about the right to move elsewhere. Although it may be relevant to other issues, it cannot be relied on in itself as providing a right to resettle in the UK. The same applies to article 34. It makes no specific reference to any "territory", and there is room for argument as to how it should be interpreted in the particular circumstances of the SBAs (see, for example, A Grahl-Madsen, *Commentary on the Refugee Convention 1951* (1963, published 1997), Comment No 2 on article 34, on which Mr Husain relies). What however is clear is that article 34 does not seek to override the distinct treatment in the Convention of metropolitan and overseas territories. It provides no basis for submitting that a refugee is entitled to look to the State so far as possible to assimilate and naturalise himself or herself in whichever of those territories he or she may wish to settle in, irrespective of where he or she actually is or of the prevailing circumstances there. In our view, the Court of Appeal was clearly wrong if it intended, at para 81, to treat article 34 as giving any refugee in any territory anywhere, for whose international relations a State is responsible and to which the

Convention has been extended, a right to have that State as far as possible facilitate his or her assimilation and naturalisation in any other of such territories.

89. We conclude that the Convention does not by its terms entitle the respondents to be resettled in the United Kingdom. A State's duties under the Convention to a refugee reaching a particular territory for whose international relations the State is responsible are in principle and in normal circumstances limited to providing and securing the refugee's Convention rights in the context of that territory.

(iii) Was the Memorandum of Understanding of 2003 a valid performance of the Convention obligations for those within its scope? In particular:

(a) Was the United Kingdom in principle entitled to fulfil its obligations to refugees in the SBAs by arranging for support to be provided by the Republic of Cyprus?

(b) If so, were the terms of the Memorandum of Understanding (including the 2003 Refugee Ordinance) a proper basis on which to do so?

90. These issues do not arise directly for decision, since the 2003 Memorandum does not in terms apply to the respondents, and its validity as applied to those within its scope has not as far as we are aware been questioned hitherto. In any event, for the purposes of the domestic law of the SBAs, the 2003 Ordinance provides in terms that the rights under the Convention are to be treated as "having been properly accorded", whether in the SBAs or the Republic: regulation 23(2). The validity of that regulation has not been questioned in these proceedings and would be a matter for the courts of the SBAs, not of the UK.

91. The almost uniquely close practical links between the SBAs and the Republic are apparent from the complex treaty and regulatory framework which we have already summarised in paras 10 to 13 above. In summary, the international status of the SBAs and their relations with the Republic of Cyprus are governed by the Treaty concerning the Establishment of the Republic of Cyprus signed on 16 August 1960 between the United Kingdom, Greece, Turkey and Cyprus, as well as associated exchanges of notes. Annexes A and B to the Treaty of Establishment contain a broad range of mutual obligations, underlining the umbilical cooperation between the United Kingdom in respect of the SBAs and the Republic if the SBAs were to be viable.

92. To take some examples, in addition to sovereignty over the SBAs, the United Kingdom was to have the use of and complete control over a number of Sites

elsewhere in the Republic (Annex B, Part II, sections 1 and 2) and to police these Sites, but on the basis that persons arrested there would be handed over to the Republic save in cases where the United Kingdom had exclusive jurisdiction (Annex B, Part II, section 2, para 3). The Republic undertook to take necessary measures to ensure the security of the Sites, but on the basis that the United Kingdom authorities could take precautionary measures in the immediate and actual vicinity, in the event of an immediate threat, while the United Kingdom enjoyed a general right to take reasonable steps to prevent injury or damage to, or interference with, United Kingdom personnel, their dependents and United Kingdom property (Annex B, Part II, section 2, paras 4 and 5). Under Annex B, Part II, section 3, the authorities of the Republic undertook to arrange for, inter alia, such reasonable control over activities in the vicinity of United Kingdom installations and equipment in the Island of Cyprus as considered necessary by the United Kingdom to ensure their efficient operation and security (para 1); the authorities of the Republic undertook to search nearby villages where the United Kingdom authorities suspected that there might be apparatus likely to interfere with nearby installations in the Dhekelia SBA (para 2); and United Kingdom police and armed forces members were, if absolutely necessary, entitled to take into custody persons obstructing or attempting to obstruct the use or exercise of the facilities and rights accorded to the United Kingdom under the Treaty, or damaging, removing or attempting to damage United Kingdom property (para 3). The Annexes continue in a similar vein, with further mutual arrangements and obligations.

93. The practical implications of the interdependence of the SBAs and the Republic of Cyprus are explained by Lisa Young, Policy Secretary of the SBA Administration, in her witness statement dated 15 January 2016:

> "10. In reality, the odd shaped boundaries of the SBAs and the existence of [Republic of Cyprus] enclaves in the [Eastern] SBA [Dhekelia] make little difference to the everyday life of people living in the SBAs. Although all people in the SBAs are subject to SBA law, the SBA courts and the jurisdiction of the SBA civil administration and SBA police, to many intents and purposes, Cypriots living in the SBAs live as if they were in the Republic. The declarations made on 18 August 1960 … provide that the laws of the SBAs are 'as far as possible the same as the laws of the Republic' and in practice this is largely the case. The SBAs have open borders and a customs union with the RoC. … Residents move freely between the RoC and the SBAs, as provided in Appendix O. … [T]he border is marked with inconspicuous pillars …
>
> 11. RoC nationals and residents living in the SBAs can vote in the Republic. Under functions delegated in the 1960

> arrangements, the RoC provides and pays for the utilities and social services (ie welfare, schools and health care, usually in the Republic) for RoC nationals living in the SBAs …
>
> 13. Since 1960 the SBAs have operated and cooperated with the RoC under the 'principle of delegation', ie that the powers and duties are delegated by SBAs to officers of the RoC to carry out in the SBAs or in relation to the SBAs under the SBA law which is equivalent to the RoC law. The current legislation is the Delegation of Functions to the Republic Ordinance 2007.
>
> 14. The SBAA is a very small administration and the SBAs have limited resources because of their limited military purpose. The SBAs do not have the resources or authority to provide the normal civilian government and services of a modern welfare state to residents in the SBAs. The SBA does not provide any social services in the SBAs. … Nor does the SBA provide any utilities to the general public living in the SBAs. Instead the relevant local RoC authorities provide public utilities (electricity, water, and civilian telecommunications services) to the Cypriot population living in the SBAs and MoD bases, and the MoD and/or SBAA make financial and practical contributions to RoC road construction. Most infrastructure is linked through the Republic. The SBAs have no international port of entry for members of the public. The public must use ports and airports in the RoC …
>
> 15. Officials from the SBAA are in regular contact with their counterpart RoC officials at local government level. … At the higher level, engagement with the RoC is normally through officials in the Ministry of Foreign Affairs, facilitated by the British High Commission in Nicosia …"

94. It is correct that the Convention refers in many places to the appropriate standard of treatment of refugees in a State's territory and the provision of facilities to refugees there. These references are commonly qualified by reference to the rights of or treatment afforded to nationals or aliens in a comparable position in the same territory. But nothing in the Convention, in our opinion, is expressly directed to a situation like that which exists on the island of Cyprus, and nothing in it is expressly inconsistent with the nature of the arrangements which the United Kingdom has made with the Republic of Cyprus.

95. The Refugee Convention falls for interpretation in accordance with the principles laid down in the Vienna Convention on the law of treaties concluded on 23 May 1969 (the "VCLT"). Under article 31(1) of the VCLT:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Both international courts and tribunals will, in an appropriate case, interpret an international treaty "not [as] static" but as "open to adapt to emerging norms of international law": *Case concerning the Gabčíkovo-Nagymaros Project* [1997] ICJ Rep 7, para 112. They will endeavour to place a factual situation as it has developed since the inception of a treaty "within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as that is feasible": ibid, para 133. The former citation was picked up in the award dated 24 May 2005 of a distinguished Arbitral Tribunal chaired by Dame Rosalyn Higgins in the *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (2005) RIAA, vol XXVII, p 35. The tribunal used it in support of the proposition that "an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule": para 80. It also referred to the "principle of effectiveness" in support of a "dynamic and evolutive approach to a treaty": para 84.

96. In view of the above, and subject to issues about the precise interpretation of certain articles, the court finds it hard to see any objection in principle to some or even most or all of the supporting facilities required for refugees being provided by co-operative and effective arrangements with the Republic. The more difficult issues are as to its application to those already accepted as lawful refugees (as discussed under the next group of issues).

97. However, it was part of the respondents' case before this court that the 2003 Memorandum was not itself "fit for purpose", even in respect of those within its scope, so that the Secretary of State could not rely on its purported extension to the respondents. Since the court has reached a clear and unanimous view on that issue, it may help to narrow the remaining areas of dispute if we give our reasons at this stage.

98. Mr Husain QC, who appeared for the respondents, submits that the 2003 Memorandum of Understanding is in terms "unfit for its purpose" even on the assumption that it is applied to the respondents, and that the provision of support to refugees in accordance with its terms would be a breach of the Refugee Convention.

99. Mr Husain's first point is that the Memorandum was not signed on behalf of the SBA Administration but on behalf of the Government of the United Kingdom, and that it contains undertakings by and in favour of the United Kingdom in respect of refugees in the SBAs. We see that as entirely natural and appropriate. The United Kingdom is responsible in international law for the international relations of the SBAs and for ensuring their compliance with the Refugee Convention. The Memorandum starts unsurprisingly by noting that "the United Kingdom through the [SBA] Administration has the responsibility for illegal migrants and asylum seekers that enter the island of Cyprus by the [SBAs]".

100. Mr Husain next refers to paragraph 10 of the Memorandum, which provides that "during their stay on the island of Cyprus persons recognised as refugees … under the procedures determined in the Memorandum, will be treated so far as the authorities of the Republic of Cyprus are concerned, as if such persons had been recognised as refugees … by the Republic of Cyprus …". Mr Husain described this as "very problematic" and as constituting an "obvious breach" of the Convention, in that it relegated the respondents to the standard of treatment set by the Republic. However, the respondents have not suggested that the standard of treatment of refugees applied by the SBAs would be any higher than that applied by the Republic if the Memorandum had never been signed.

101. Mr Husain next points to paragraph 12 of the Memorandum, which requires the United Kingdom to endeavour to resettle refugees within a year in a country willing to accept them, as indicating that it was not its intention or effect to achieve any durable long-term settlement as refugees in the Republic. A similar point is taken in the most recent letter by the United Nations High Commissioner for Refugees, who reads paragraph 12 as limiting the United Kingdom's obligations to refugees to a year. That in our view misreads paragraph 12 and ignores paragraph 10. To suggest that an inter-state undertaking to endeavour to resettle refugees within one year accords them rights which only extend for one year is simply wrong. Next, Mr Husain points to paragraph 19, which he submits gives the respondents "no remedy for breach of the MoU". However, the Memorandum is an international agreement, which would not in itself be expected to provide any rights justiciable in the domestic law of either Cyprus or the SBAs. Such rights as there are in the domestic law of the SBAs are provided by the 2003 Ordinance. (We have no evidence of the status of the Memorandum in the domestic law of the Republic.)

102. Finally, Mr Husain refers to paragraph 18, which he submits makes the Memorandum terminable even as regards refugees accepted as such under its terms. We consider it implausible that paragraph 18 would be interpreted as having this effect on the status of persons already accepted under paragraph 8 prior to any termination and so entitled, subject only to paragraph 13, to the treatment prescribed by paragraphs 8, 9 and 10. In any event, the United Kingdom's obligations to ensure compliance with the Refugee Convention would continue notwithstanding any such

termination, and the United Kingdom would, in one way or another, have to ensure such compliance in that remote event.

103. For these reasons, we reject the respondents' submission that the 2003 Memorandum was not a proper basis for the provision of the support for refugees required by the Convention.

Issues for future determination

104. We turn to the issues on which we have found it necessary to ask for further submissions.

(iv) Assuming the 2003 Memorandum was valid for those within its scope:

(a) Was the United Kingdom entitled in 2005 to make similar arrangements for the provision by the Republic of facilities in respect of the respondents living in the SBAs without their consent, given their lawful and accepted presence as refugees in the SBAs?

105. This question was not in terms identified by the agreed statement of facts and issues. However it emerged as an important part of the respondents' response to the Secretary of State's contention that it was permissible under the Convention to provide the respondents with facilities under arrangements made by the United Kingdom with the Republic of Cyprus. The point was put most clearly by Mr Husain QC in his written submissions (para 153):

> "The first, and fundamental, objection to this response is that it is not open to a Contracting State to 'resettle' lawfully present refugees in the territory of another Contracting State without their consent. There is no provision in the Refugee Convention that allows this. On the contrary, article 32 prevents a State from requiring a refugee to move to another State absent the refugee's consent. Article 32 provides that, 'The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order'."

106. The Secretary of State's case is thus that the United Kingdom's obligations under the Refugee Convention in respect of the respondents living in the SBAs can and should be fulfilled on the island by cooperation between the United Kingdom and the Republic of Cyprus. This, it is submitted, follows from the international arrangements whereby the SBAs were retained under United Kingdom sovereignty

and from the realities on the ground. The respondents' case, by comparison, is that the fulfilment of such obligations in this way is inconsistent with the terms of the Refugee Convention.

107. The respondents' argument that the provision of support through the Republic of Cyprus amounts to an expulsion was rejected by both Foskett J (paras 341-342) and the Court of Appeal (para 83). The Secretary of State now accepts that the respondents cannot, consistently with article 32 of the Convention, be required to live in the Republic of Cyprus, or anywhere else outside the SBAs against their will. There appears at one stage to have been an attempt by the SBA Administration to drive the respondents from the accommodation that they currently occupy with a view to making them leave for the Republic, but the attempt was abandoned and the Secretary of State has made it clear that the respondents are entitled to remain. It remains open to question whether that is sufficient if their only option there is and has been to remain in accommodation which is admittedly seriously deficient.

108. However Mr Husain's point is more fundamental. He refers to comments of Professor Hathaway in *The Rights of Refugees under International Law* (2005), pp 965-966 on the limited "window of opportunity" for any resettlement other than by consent. In the passage in question, Professor Hathaway discusses mandatory resettlement schemes, such as the so called "Pacific Solution" operated by the Australian government. He comments that such schemes can be operated without infringing the Convention -

> "… only if the non-consensual diversion into a resettlement scheme occurs before the refugee concerned is 'lawfully in' a state party and hence entitled to the more elaborate protections against expulsion found in article 32."

The window of opportunity, he says, is "quite short":

> "It ends once lawful presence (not lawful stay) is established, at which point the strict limitations on expulsion set by article 32 apply so as to make enforced resettlement unviable in most cases." (pp 965-966)

That view appears consistent with the UNHCR Resettlement Handbook on which the Secretary of State relies, which indicates that resettlement can only be achieved by "partnership", adding that "of course, refugees are themselves partners in the process …" (Handbook pp 4-5 [MS5046]).

109. Although this issue was raised in the written submissions it was not addressed in any detail in oral submissions. It appears potentially relevant to the legality of the approach adopted by the UK in 2005 and thereafter. There appear to the court to be potential issues as to what may constitute, first, expulsion, second, resettlement without consent and, third, transfer of responsibility; as to whether the Secretary of State's proposed treatment of the respondents amounts to any of these; and as to whether the Secretary of State's proposed treatment is in any event consistent with the Convention, having regard to the unique relationship between the SBAs and the Republic of Cyprus, but bearing in mind that the respondents do not consent to the proposed treatment. The quality of the accommodation presently available to the respondents is also an issue, and the court would invite submissions from both sides as to the significance of that in the context of the issues in this case, and as to any proposals which there may be to address it.

110. The court accordingly now invites submissions on all these points, and in particular as to whether and how the Refugee Convention is capable of operating in the context of the SBAs, and whether it was and is in the circumstances open to the United Kingdom to satisfy its Convention obligations by arranging for facilities to be available through co-operation with the Republic for refugees such as the respondents who do not give their consent that the United Kingdom satisfy its Convention obligations in this way.

(iv)(b) If such transfer of responsibility was permissible, was the 2005 "agreement" with the Republic a legally effective means of doing so, having regard to its informality and the absence of incorporation into SBA law?

111. As indicated above, the court does not accept Mr Husain's primary case that the 2003 Memorandum was not "fit for purpose" even for those within its scope. However, he raised a logically separate point as to the informality and tenuous nature of any agreement to extend it to the respondents (Case paras 191ff). Again this point was not developed in any detail in oral submissions. The court notes in particular the formal and detailed nature of the 2003 Memorandum, which was also incorporated into SBA law by the Refugee Ordinance so creating enforceable rights and obligations under SBA law; and the lack of any equivalent legal formality in respect of the respondents. It invites submissions on the significance of this difference for the legal effectiveness of the 2005 agreement, and its consequences in the present proceedings.

(iv)(c) Has the support of the Republic in accordance with the 2005 agreement been available in practice, and can it be assured in the future?

112. Although this issue was not identified in the agreed statement of facts and issues, it was the subject of detailed and strongly conflicting factual submissions on

both sides, and addressed also in the UNHCR correspondence. There was a disagreement as to whether it was an issue properly before the court, or, if not, how if at all it should be resolved, and in what forum. The court invites further submissions on this point.

(v) If the 2005 agreement, for whatever reason, was not a legally effective means of discharging the United Kingdom's obligations to the respondents under the Convention, or if such support has not been available in practice, what are the consequences, in terms of rights or remedies potentially available in these proceedings, and how should the court give effect to them in its order?

113. The Refugee Convention creates obligations in international law. The Convention is not part of the domestic law of the UK except to the limited extent noted earlier in this judgment. The written and oral submissions of the parties were largely directed to alleged breaches of obligations under the Convention. Mr Husain's argument proceeded on what he took to be the uncontested assumption that "any decision regarding the entry of the respondents to the United Kingdom must be consistent with the Refugee Convention" (Case para 11, relying on Asylum and Immigration Appeals Act 1993 section 2, and *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening)* [2005] 2 AC 1, para 41 per Lord Steyn).

114. However, as noted at the beginning of this judgment, the court considers that the interaction of the Convention and domestic public law is a matter of some importance and difficulty, both in this case and more generally. In particular it seems necessary to consider the possible distinction between the direct application of section 2 of the 1993 Act, and the application of general public law principles (including the *Launder* principle: para 7 above). The court invites further submissions on those matters, and on the remedies potentially available in the present judicial review proceedings, including the matters which can be properly taken into account in the exercise of its discretion.

Concluding comments

115. It may of course be that, with the benefit of this interim judgment, the parties will be able reach agreement without further argument on the position of the respondents, or at least on some of the above questions. So far as they remain in dispute, we propose that the appeal should be relisted as soon as practically possible for the hearing of argument on the further issues identified above. The Court would hope that further evidence will not, at least at this stage, be required. However, if there are matters which one or other party contends cannot fairly be determined by this Court without further evidence, they should, before finalising their written cases for any further hearing, identify to each other any further evidence that they might

wish to adduce on such issues, setting it out in draft supported by affidavit. The parties should in this connection be prepared to address the contents of the United Nations High Commissioner's letter of 16 June 2017, the Secretary of State's decision of 6 July 2017 and the letters of 7 July 2017 and 18 January 2018.