Neutral Citation Number: [2019] EWCA Civ 1254

Case No: C1/2019/0472

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, QBD Divisional Court
Lord Justice Singh and Mrs Justice Carr DBE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division))
and
LORD JUSTICE LEGGATT

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Between :

(1) SOLANGE HOAREAU
(2) MR LOUIS BANCOULT — **Appellants**

- and -

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

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Mr Ben Jaffey QC, **Mr Paul Luckhurst** and **Mr Admas Habteslasie** (instructed by **Leigh Day**) for the **1st Appellant**
Mr Edward Fitzgerald QC and **Mr Paul Harris SC** (instructed by **Clifford Chance LLP**) for the **2nd Appellant**
Sir James Eadie QC, **Kieron Beal QC** and **Sarah Wilkinson** (instructed by **the Treasury Solicitors**) for the **Respondent**

Hearing date: 8th July 2019

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Approved Judgment

Underhill and Leggatt LJJ:

1. This is an application for permission to appeal in the latest round of litigation brought by former inhabitants of the Chagos Islands against the British Government arising out of their expulsion from the Islands nearly 50 years ago, an act which the Government now explicitly recognises to have been shameful and wrong. Since it is only a permission application we will not set out the background, which can readily be found in the decision of the Divisional Court which is the subject of the present appeal. As there appears, separate but closely related claims were brought by Ms Hoareau and Mr Bancoult. Ms Hoareau represents, broadly speaking, Chagossians now settled in the Seychelles and Mr Bancoult Chagossians living in Mauritius. The claims challenge three related decisions made on 16 November 2016 – a decision not to provide financial support to allow Chagossians to resettle in the Islands but instead to provide a support package of approximately £40 million for them in the Seychelles and Mauritius, together with the implicit decision not to rescind two Orders in Council made in 2004 which deny Chagossians a right of abode in the Islands. The Claimants' challenge to all three decisions was dismissed by the Divisional Court (Singh LJ and Carr J) in February this year.

2. Ms Hoareau pleads four grounds of appeal against the Divisional Court's decision and Mr Bancoult two. Ground 2 in both cases is avowedly identical, and although ground 1 is rather differently expressed in the two cases both formulations are also to substantially the same effect. We should make clear that the grounds do not challenge the Divisional Court's conclusions on all the points argued before it.

3. We start with ground 2, which challenges the decision of the Divisional Court that the European Convention on Human Rights has no application to the Claimants' cases: see paras. 129-149 of the judgment. As pleaded, this ground is in both cases expressed in very general terms, but as developed in the skeleton argument on behalf of Ms Hoareau, which is adopted on behalf of Mr Bancoult, and still more in the oral submissions of Mr Ben Jaffey QC on her behalf, it relies to a substantial extent on the advisory opinion of the International Court of Justice in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, which was published on 25 February this year and accordingly post-dates the decision of the Divisional Court. Notwithstanding the cogent submissions to the contrary which we heard from Sir James Eadie QC for the Secretary of State, we consider the arguments based on the decision of the ICJ to have a real prospect of success and that it is appropriate to allow them to be raised on appeal. Those arguments cannot sensibly be split out from the points argued in the Divisional Court about the application of the Convention, and accordingly the permission which we grant under ground 2 covers all the ways in which the challenges are articulated in Ms Hoareau's skeleton argument.

4. We require the grounds as pleaded in the claim form in both cases to be amended so as to incorporate the arguments based on the ICJ decision in order that the Secretary of State and the Court should have the benefit of an authoritative formulation of how the case is being put. For good order's sake, the grounds of appeal should be similarly amended.

5. We turn to ground 1. The Claimants' principal criticism is of the approach taken by the Divisional Court to the appropriate degree of intensity of review of the impugned decisions: see paras. 95-108 of its judgment. There is much attraction in the reasoning

in those paragraphs, but this is a notoriously difficult area of the law, and we are not persuaded that the Claimants have no realistic prospect of success in challenging the Divisional Court's approach. Even if the point were on the borderline, in circumstances where the appeal is to proceed in any event on ground 2 we see value in the issue raised by ground 1 being considered by the Court.

6. Again, we make clear that although the paragraphs in question were the principal focus of the submissions before us, our permission covers the other ways in which this ground is developed in the skeleton arguments filed on behalf both of Ms Hoareau and of Mr Bancoult. It seems to us that there may well be an issue whether, even if the Divisional Court's approach to the intensity of the appropriate review was flawed, any error was in fact material. This is a case in which it will make sense for both Claimants to file revised skeleton arguments, and we would encourage them to identify with particularity the respects in which it is said that adopting a different approach would or might have led to a different outcome.

7. We turn to Ms Hoareau's ground 3, which challenges the Divisional Court's rejection of a contention that Ministers were misled about the basis on which the quantum of the resettlement package was arrived at. Although, again, we see force in the Divisional Court's reasoning, we are not prepared to say that the challenge has no real prospect of success.

8. Finally, we consider Ms Hoareau's ground 4. This concerns her claim under section 149 of the Equality Act 2010 which enacts the public sector equality duty ("the PSED"). It has always been the Government's position that the Chagossians do not constitute a distinct racial group within the meaning of the Act, although it also says that Ministers did in fact treat them as such. The Claimants say that that non-recognition of their racial identity meant that the Government did not properly address the matters required by section 149.

9. The Divisional Court deals with this challenge at paras. 150-193 of its judgment. It sets out numerous passages from the documents that embody the decision-making process and concludes that the decision was made on the basis that the Chagossians were "a group defined by their origins in the Chagos Islands" (para. 181) and "a historic community, defined by reference to their ethnic origins" (para. 191) and that the ministerial statement which embodied the impugned decisions referred to them as "the Chagossian people". At para. 169 it describes the submission that the Government failed to have due regard to the matters required by section 149 as having "an air of unreality", because the entire purpose of the review was to decide how to proceed in relation to the Chagossians as a group.

10. The Claimants contend that the references cited by the Divisional Court cannot be relied on as showing that the Government recognised the Chagossians as an ethnic group, particularly in view of the continuing assertion that they are not such a group within the meaning of the Act. We see no prospect that that argument would succeed on appeal. The Divisional Court was plainly entitled on the material in question to conclude that the Chagossians were treated as an ethnic group, whether or not they met the definition under the Act.

11. The Claimants also contend that the formal PSED analysis was conducted only by reference to potential equality issues arising within the Chagossian community rather

than by reference to their position as a group. But that is fully met by the point that the entire review was directed to the interests of the Chagossians as a group. We see no prospect that the appeal could succeed on this ground.

12. We accordingly refuse permission on ground 4.