Neutral Citation Number: [2020] EWCA Civ 1010

Case Nos: C1/2019/0472 & C1/2019/0479

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, DIVISIONAL COURT
(SINGH LJ & CARR J)
[2019] EWHC 221 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2020

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE GREEN
and
LORD JUSTICE DINGEMANS

- -

Between :

THE QUEEN (on the application of **(1) SOLANGE HOAREAU** **(2) LOUIS OLIVIER BANCOULT**	**Claimants/ Appellants**
- and -	
THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS	**Defendant/ Respondent**

- -

Ben Jaffey QC, Paul Luckhurst and Admas Habteslassie (instructed by **Leigh Day**) for the **First Claimant/Appellant**

Phillippa Kaufmann QC, Paul Harris SC and Robert McCorquodale (instructed by **Clifford Chance LLP**) for the **Second Claimant/Appellant**
Sir James Eadie QC, Kieron Beal QC, John Bethell and Philippa Webb (instructed by **Government Legal Department**) for the **Defendant/Respondent**
Hearing dates : 12, 13, 14 & 15 May 2020

- -

Approved Judgment

Sir Terence Etherton MR, Lord Justice Green and Lord Justice Dingemans:

Introduction

1. Solange Hoareau and Louis Bancoult appeal against the judgment of the Divisional Court (Singh LJ and Carr J) [2019] EWHC 221 (Admin); [2019] 1 WLR 4105 dated 8 February 2019. The Divisional Court dismissed the claims for judicial review made by Ms Hoareau and Mr Bancoult to quash the decision announced by written ministerial statement made by the Minister of State for Foreign and Commonwealth Affairs dated 16 November 2016 ("the decision"). This decision was made after a review led by the Foreign and Commonwealth Office ("FCO"). The Secretary of State for Foreign and Commonwealth Affairs ("the Secretary of State") is the defendant to the claim. The decision was that the Government of the United Kingdom ("the Government") would not support resettlement of the Chagossians to the Chagos Islands, which are part of the British Indian Ocean Territory ("BIOT"), but would provide a financial support package of approximately £40 million for Chagossians over a period of ten years.

2. The appeal raises issues about whether the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), now scheduled to the Human Rights Act 1998, extends to the Chagos Islands, and the intensity of the review carried out by the Divisional Court. It also addresses the implications of a recent opinion of the International Court of Justice of 25 February 2019 ("*the Advisory Opinion*") and a consequential resolution of the General Assembly of the UN of 22 May 2019 which was adopted to give effect to the Advisory Opinion ("*the UN Resolution*").

The Background

3. In order to understand the issues in this appeal it is necessary to set out some background relating to the Chagos Islands, the Chagossians and the actions of the Government. Given the amount of litigation which has been generated in the past it is also necessary to set out a short summary of previous claims, settlements, judgments and determinations to explain the process which led up to the decision.

The Chagos Islands

4. This short summary is based on the impressive 748 paragraph judgment of Ouseley J. in *Chagos Islanders v The Attorney General and HM BIOT Commissioner* [2003] EWHC 2222 (QB). There was an appendix containing more detail running to a further 795 paragraphs. The judgment of Ouseley J. records what was described by the Court of Appeal in the same case [2004] EWCA Civ 997 as "*the shameful treatment*" of the Chagossians which included "*the use of legal powers designed for the governance of the islands for the illicit purpose of depopulating them*". Lord Hoffmann in *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Bancoult (No.2)* [2008] UKHL 61; [2009] 1 AC 453 ("*Bancoult (No.2)"*) recorded that it was accepted by the Secretary of State *"… that the removal and resettlement of the Chagossians was accomplished with callous disregard of their interests"*. In the written ministerial statement, the Minister of State stated: "*Parliament will be aware of the Government's review and consultation over the resettlement of the Chagossian people to BIOT. The manner in which the Chagossian community was removed from*

the Territory in the 1960s and 1970s, and the way they were treated, was wrong and we look back with deep regret."

5. The Chagos Islands, also referred to as the Chagos Archipelago, are situated in the Indian Ocean. They lie about 2,300 kilometres from Mauritius, 1,800 km from the Seychelles, 1,650 km from Sri Lanka and 535 km from the Maldives. The main island is Diego Garcia, but there are 65 outer islands ("the Outer Oslands"). The distance from one of the larger Outer Islands, Peros Banhos, to Diego Garcia is about 300 km. The other larger Outer Island is Salomon. Other Outer Islands include Ile du Coin and Boddam. It is about a 5-hour boat trip from Diego Garcia to the Outer Islands.

6. The first recorded visitors to the islands, which were previously uninhabited by humans, were Malaysians, Arabs and Portuguese in 1743. Settlers, said to be probably French, subsequently started coconut plantations. In the Napoleonic Wars Britain captured Mauritius and Reunion from France. By the Treaty of Paris in 1814 Mauritius and its dependencies, which included the Chagos Islands, were ceded by France to the Crown and Reunion was returned to the French.

7. The coconut plantations on the Chagos Islands produced copra (the white flesh of a coconut) from which coconut oil is derived. Various companies employed workers on coconut plantations. The workers were employed on short term contracts renewed annually but some of the workers settled and had families on what was Crown land in the Chagos Islands. Their descendants continued to work on the plantations.

8. By the 1960s the population of the Chagos Islands was in decline. This was because recruitment to the plantations proved difficult and there was a lack of investment. In 1962 Chagos Agalega Company Limited ("CAC") was formed in Seychelles, and it acquired all the coconut plantations and hoped to revive the economy of the islands.

9. In 1964, when the total population of the Chagos Islands was 1364 persons, of whom 483 persons were on Diego Garcia, the United States ("US") and the Government started discussions about the possible establishment of defence facilities in the Chagos Islands. The Government decided that, if such facilities were to be established, it would be necessary to detach the Chagos Islands from Mauritius and resettle the population.

10. At the time Mauritius was a Crown colony but had self-government. The Government of Mauritius was led by Sir Seewoosagar Ramgoolam from 1961. Sir Seewoosagar Ramgoolam remained Prime Minister after independence up until 1982. The Government agreed with Mauritius, through the Mauritian Council of Ministers (and separately with the Seychelles Executive Council), to detach the Chagos Islands from Mauritius, pay compensation of £3 million to Mauritius, pay compensation to CAC, and to resettle the local population. The Government undertook to Mauritius to cede the Chagos Islands if it was decided that they were no longer required for defence purposes.

11. On 8 November 1965, the British Indian Ocean Territory Order in Council, SI 1965/1920, was made, and the colony of the BIOT was established. By an exchange of notes dated 30 December 1966, the Government and the US Government agreed

that the BIOT should be available for the needs of both governments for defence for a 50-year period and then a further 20-year period unless notice to terminate was given.

12. Ordinances were made providing for the acquisition of land from CAC so that a defence facility could be established. CAC was paid £660,000 for the land. A lease was granted to CAC, which was later taken over by individual managers of CAC.

13. On 12 March 1968, Mauritius became independent. Mauritian citizenship was conferred on the Chagossians, and they also remained citizens of the United Kingdom and the colonies.

14. By this time some of the Chagossians, who had also been referred to as the Ilois, had lived on the Chagos Islands for about eight generations. Their interests were ignored and overlooked because they did not have any formal ownership or equivalent rights to possession of the land. It was estimated that there were 37 Chagossian families on Diego Garcia, with the balance of the population containing workers from Seychelles. The process of removal of the inhabitants started when Chagossians who had gone to Mauritius on leave were prevented from returning when shipping links were suspended. In January 1971 the Administrator of the BIOT announced to the assembled inhabitants of Diego Garcia that the island would be closed in July.

15. On 16 April 1971 the BIOT Commissioner enacted the Immigration Ordinance 1971 ("the 1971 Immigration Ordinance"). This removed the right to enter or remain in the Chagos Islands without a permit. In July and October 1971, the Chagossians were removed from Diego Garcia. Some were moved to the Outer Islands, and others to Seychelles and then on to Mauritius. The conditions on the move were very poor. The remaining Chagossians were concentrated on Peros Banhos. Conditions on the Outer Islands deteriorated and some others moved to Mauritius. The remaining Chagossians were moved in 1973 to Mauritius.

16. Ms Hoareau was born on Diego Garcia in 1953 and her mother and grandparents had also been born there. She was removed to the Seychelles with her parents and seven of her siblings. Mr Bancoult was born on Peros Banhos in 1964. He and his family were prevented from returning in 1968 after visiting Mauritius for hospital treatment.

17. The living conditions in Mauritius for the Chagossians were very bad. This was because their working experience was limited to coconut plantations, they had no formal education, and no means of support. A sum of £650,000 which had been paid to assist in the resettlement of the Chagossians was not expended until 1977 to 1978, by which time inflation had eroded its value. The living conditions in Seychelles for the Chagossians were no better, and there were no monies for their resettlement.

A summary of relevant litigation relating to the Chagos Islands

18. Michel Vencatessen, a Chagossian who had been removed from Diego Garcia and taken to Mauritius, sought legal advice in London about the forced removal of the Chagossians. In February 1975 a writ was issued in his name against the Attorney General, the Secretary of State for Defence and the Secretary of State. The writ claimed damages, including aggravated and exemplary damages, for intimidation, deprivation of liberty and assault in connection with his forced removal from Diego Garcia.

19. Although it was not group litigation it came to be considered as a form of such litigation on both sides. The solicitors acting for Mr Vencatessen stated that they had obtained instructions "*on behalf of all the Ilois*" although that followed a visit to Mauritius alone. Various attempts were made to settle the action for payment of the sum of £1.25 million, but at different times different groups became involved and claims were made for a sum of £8 million. In the final event, following negotiations with representatives of the Chagossians and the Mauritius government, an agreement was signed on 7 July 1982 providing for payment of £4 million for the Chagossians. Renunciation of claims forms were signed by either 1332 or 1344 of the Chagossians which provided that "*… all claims, present or future, that I may have against the government of the United Kingdom, the Crown … their servants of agents*" were renounced. The Ilois Trust Fund Act 1982 was enacted by the legislature in Mauritius. A cheque for £4 million was handed over at a ceremony at which Ilois representatives were present. Some attempts were made to claim monies from the US Government by Chagossians but these were not pursued.

20. By mid-1985 Mr Bancoult had become a leader of the Chagos Refugee Group. He sought advice on a right to return to the Chagos Islands. By 1993 matters progressed. Permits were applied for and refused, but an appeal against the refusal was successful. In the event no visit took place.

21. In 1998 Mr Bancoult instructed lawyers to bring proceedings for judicial review to quash the 1971 Immigration Ordinance on the basis that it was not a valid Ordinance because it could not have been made for the "*peace, order and good government*" of the BIOT as it provided for the removal of the population of the BIOT.

22. Posford Haskoning, an engineering consultancy, was commissioned by the Government to carry out a feasibility study to examine the possibility of resettlement.

23. On 3 November 2000, the Divisional Court quashed section 4 of the 1971 Immigration Ordinance in *R(Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 *("Bancoult (No.1)")*. After judgment had been delivered, the Secretary of State announced that there would be no appeal against the decision stating "*… this Government has not defended what was done or said 30 years ago … we made no attempt to conceal the gravity of what had happened*". It was recognised that the feasibility study which had been commissioned took on a new importance.

24. The Immigration Ordinance 2000 was enacted to permit Chagossians to return to the Outer Islands, including Peros Banhos and Salomon, without a permit. Entry to Diego Garcia still required a permit. In the event there was no return to live there. Some islanders made visits to the Chagos Islands to tend family graves or see former homes, and these visits were funded by the BIOT.

25. Following *Bancoult (No.1)* proceedings for compensation were prepared on behalf of the Chagossians bringing claims for, among other claims, misfeasance, deceit, the alleged tort of unlawful exile, and infringement of property rights and negligence. Proceedings in *Chagos Islanders v The Attorney General* were issued in April 2002. Both Mr Bancoult and Ms Hoareau were Claimants in that action. The Attorney General applied to strike out the proceedings and for summary judgment. Submissions and evidence were heard in November and December 2002, and the

hearings concluded in January 2003. Judgment was given for the defendants in October 2003. Ouseley J. dismissed the claims in the judgment referred to in paragraph 4 above and found that the proceedings were statute barred by the Limitation Act 1980 and were an abuse of process because of the compromise of the earlier proceedings and the renunciation forms.

26. Permission to appeal to the Court of Appeal was refused after a hearing, see *Chagos Islanders v Attorney General* [2004] EWCA Civ 997. Having disposed of the legal issues, the Court of Appeal concluded that "*it may not be too late to make return possible, but such an outcome is a function of economic resources and political will, not adjudication*".

27. In the meantime, the independent report on the feasibility of a return to the Chagos Islands was finalised. On 10 July 2002, the feasibility report was published. For detailed reasons the 2002 feasibility report concluded that return to coconut production would be uncommercial, fishing offered some opportunities and tourism could be encouraged but there was no airport. The rising sea levels were noted and the need for sea defences was identified.

28. Following newspaper articles in Mauritius, there was concern that there would be direct landings on the Chagos Islands by various groups with various aims, some of which were thought to be competing aims in relation to the closure of the US base.

29. On 10 June 2004, the BIOT (Constitution) Order 2004 ("the 2004 Constitution Order") and the BIOT (Immigration) Order 2004 ("the 2004 Immigration Order") were made. Section 9 of the Constitution Order provided that no person might enter or be present in the BIOT except as authorised by the order or any other law. The 2004 Immigration Order imposed a permit system for any return. This order therefore removed the unrestricted right of return to the Outer Islands of the Chagos Islands although, as the Secretary of State pointed out, as the land was Crown land any return might have raised issues of trespass.

30. The Government issued a statement on 15 June 2004 reporting the effect of the feasibility study. The statement noted that life would be difficult for a resettled population because of flooding from storms and climate change. Human interference would exacerbate stress on the marine and terrestrial environment. The statement noted that "… *anything other than short-term resettlement on a subsistence basis would be highly precarious*" requiring expensive underwriting by the Government for an open-ended period. The Government therefore decided not to commission any further report into the feasibility of resettlement and legislated to prevent it. The area was later declared to be an environmental zone.

31. Mr Bancoult brought judicial review proceedings to challenge the 2004 orders in proceedings commenced in August 2004.

32. In the meantime by letter dated 9 December 2004 and a petition dated 14 April 2005, following the judgment of the Court of Appeal in *Chagos Islanders v Attorney General* on appeal from Mr Justice Ouseley, Mr Bancoult and others petitioned the European Court of Human Rights ("the ECtHR") on 14 April 2005 alleging violations of Article 3 relating to the conditions in which they left the Chagos Islands, Article 8 relating to their removal and continuing inability to return to their homes, and Article

1 of the first protocol ("A1P1") by depriving them of their possessions. The Government submitted that the proceedings were inadmissible on the bases that: they were out of time being more than 6 months after the judgment of the Court of Appeal; the ECHR had not been extended to the BIOT by virtue of any declaration under Article 56(1) ECHR or Article 4 A1P1; the applicants were not "*victims*" within the meaning of Article 34 ECHR because they had been compensated or had not pursued proceedings within the limitation period; and so that there was a failure to exhaust domestic remedies under Article 35 ECHR.

33. In the judicial review proceedings in respect of the 2004 Orders, the Divisional Court [2006] EWHC 1038 (Admin) and Court of Appeal [2008] QB 365 allowed Mr Bancoult's claims and quashed the 2004 Orders. This was on the basis that there was no power to make the 2004 Orders because they were not in the interests of the Chagossians and because the Secretary of State's statement after the judgment in *Bancoult No.1* had created a legitimate expectation of a right of entry and abode. The House of Lords, however, by a majority, allowed the Secretary of State's appeal and upheld the validity of the 2004 Orders in *Bancoult (No.2).* Lord Hoffmann gave the leading judgment. We return to this judgment when examining legal issues about the rights engaged in this case and the common law right of abode.

34. On 1 April 2010 the UK announced the creation of a Marine Protected Area ("MPA") in and around the Chagos Islands. On 20 December 2010 Mauritius instituted proceedings against the UK pursuant to Article 287 of the United Nations Convention on the Law of the Sea ("UNCLOS") before an arbitral Tribunal ("the UNCLOS Arbitral Tribunal").

35. In a decision dated 11 December 2012 reported as *Chagos Islanders v The United Kingdom* (2013) 56 EHRR SE15, the Fourth Section of the ECtHR held that the petition was inadmissible. We address this judgment in greater detail when considering the legal issues relating to whether the ECHR extends to the Chagos Islands (see paragraphs 103 – 107 below).

36. On 20 December 2012 the Secretary of State announced a review of BIOT policy, in which the Government would consider again the possibility of resettling the Chagossians. As part of the review an independent feasibility study was commissioned from KPMG. A report was produced ("*the KPMG report*"). The National Security Council ("NSC") reviewed the KPMG report in March 2015 and asked for a consultation and other further work to be undertaken. A report was commissioned from WhiteBridge Hospitality Limited ("*the WhiteBridge report*") to consider tourism and yachting opportunities. The relevant decision was announced on 16 December 2016. The Government did not support resettlement, leaving section 9 of the Constitution Order 2004 in place. Support of about £40 million would be offered to the Chagossians.

37. In the meantime, Mr Bancoult had commenced proceedings to challenge the creation of a marine protection area in BIOT. These proceedings were not successful, and the judgment of the Court of Appeal is set out in *R(Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 708 *("Bancoult (No.3)").* In the course of those proceedings, documents were disclosed which included an earlier draft of the 2002 feasibility study. Those documents ought to have been disclosed in *Bancoult (No.2).* The existence of these documents formed the basis of an application

made to the Supreme Court to set aside the judgment of the House of Lords in *Bancoult (No.2)* on the grounds that the documents might have had a decisive effect on the judgment.

38. On 18 March 2015 the UNCLOS Arbitral Tribunal held, in "*The matter of the Chagos Marine Protected Area*", that it had jurisdiction to consider one of the complaints made by Mauritius and found that the UK had breached its obligations under UNCLOS in establishing the marine protected area. It held the UK's undertaking to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes was legally binding.

39. On 29 June 2016, the Supreme Court gave judgment in *R(Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 35; [2017] AC 300 *("Bancoult (No.4)")* refusing to set aside the House of Lords decision in *Bancoult (No.2)*. It was noted that it would be open to Mr Bancoult to challenge in subsequent proceedings any future refusal of the Government to permit or support resettlement as irrational, unreasonable or disproportionate.

40. On 12 August 2016, a renewed application for permission to apply for judicial review of the consultation process undertaken following the March 2015 NSC review of the KPMG report and complaining about refusal not to pay direct support to those who were not resettled was refused in *R(Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 2102 (Admin).

41. The claims for judicial review in this action were commenced by claim form dated 22 February 2017 on behalf of Ms Hoareau, particularly on behalf of Chagossians who had settled in Seychelles after they had been removed from the BIOT, and by Mr Bancoult, particularly on behalf of the Chagossians who had settled in Mauritius after their removal.

42. On 22 June 2017 resolution 71/292 was adopted by the General Assembly of the United Nations. This requested an advisory opinion from the International Court of Justice ("ICJ") on two questions relating to the law on partial decolonisation in the context of Mauritius and, second on the consequences of any conclusion that the UK was in breach of international law in failing to ensure full decolonisation. The text of the two questions are set out at paragraph 111 below.

43. On 25 February 2019 the Advisory Opinion was produced by the ICJ on the "*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*". The Court held that the process of decolonisation of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968 following the separation of the Chagos Archipelago and that "… *as regards the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, this is an issue relating to the protection of the human rights of those concerned, which should be addressed by the General Assembly during the completion of the decolonisation of Mauritius*". We consider the Advisory Opinion and the UN Resolution further below because they are relied on in support of the submission that, properly analysed, they compel the conclusion that the ECHR does extend to the Chagos Islands and that the earlier case law to the contrary effect must be taken to have been superseded by the law as clarified by the ICJ and the position now adopted by the General Assembly.

44. Visits for Chagossians to the Chagos Islands have been organised and funded by the BIOT in 2006, 2008, 2009, 2010, 2011, 2013, 2015, 2017, 2018 and 2019. The Chagossians are now citizens primarily of Mauritius, Seychelles and/or the UK.

45. A number of matters appear from the review of the past litigation above. First, no one now contends that the expulsion of the Chagossians between 1966 and 1973 was anything other than wrongful. Secondly, claims that were made or could have been made by the Chagossians for their wrongful removal from the Chagos Islands have been compromised and paid. Thirdly, those past compromises have not removed the desire of at least some Chagossians to live on the Chagos Islands.

The review of policy towards resettlement and the KPMG report

46. On 20 December 2012, which was the date on which the ECtHR declared the challenge in *Chagos Islanders v The United Kingdom* to be inadmissible, the Secretary of State announced that the Government would take stock of its policy towards resettlement of the BIOT, noting that, whilst there were fundamental difficulties with resettlement, the Government would be as positive as possible in its engagement with interested parties. This policy review was undertaken at the request of the Prime Minister to see "what could be done". This was on the basis that the Government recognised that a "historic wrong had been committed". The decision-making process is set out in the first witness statement of Dr Peter Hayes of the Overseas Territories Directorate of the FCO and is summarised in the judgment of the Divisional Court from paragraphs 52 to 84 of the judgment. Given the care taken to set out the relevant facts in the judgment of the Divisional Court it is not necessary to repeat them but it is necessary to give a short summary for the purposes of dealing with the grounds of appeal.

47. On 5 March 2013 there was a meeting of the Prime Minister, Deputy Prime Minister, the Secretary of State, the Secretary of State for International Development and the National Security Adviser. The question posed for the meeting was whether the Government's policy of non-resettlement should be continued. It was decided to obtain a feasibility study, which led to the commissioning of the report from KPMG. All options, including partial resettlement of the Outer Islands, were to be presented for ministerial consideration with nothing ruled out in advance.

48. The design of the study to be carried out by KPMG was consulted on and carried through from March 2013 to October 2013. A recommendation was made in October 2013 that the feasibility study should be broader in scope than the 2002 study and that it should include Diego Garcia. The US Government was updated. By letter dated 25 October 2013, the US State Department noted that a proposal for resettlement not only on the Outer Islands but also Diego Garcia would "potentially raise greater security concerns". In November 2013, the Prime Minister was briefed by the FCO that it was ready to commission the study which would enable Ministers to show that they had considered the issue "equitably and with sympathy".

49. KPMG was selected in March 2014 and commissioned to produce the report. The Prime Minister was briefed on progress to date in November 2014. The brief reminded the PM about the decision to commission the feasibility study to review policy looking at all options, making it clear that "*we took our responsibility towards the Chagossians seriously…*". The study would not recommend an option, but

decisions would be made by means of a write-round to Ministers who were members of the NSC. The Prime Minister responded to the brief noting that his memory of the meeting was more positive, namely "*we decided, historically, to commission the study to see what could be done*".

50. The KPMG report was based on the work of a multi-disciplinary team over a 10-month period between April 2014 and January 2015. The KPMG team visited Diego Garcia and 13 of the Outer Islands. Draft conclusions from the KPMG report were circulated from late November 2014 and relevant departments were asked for advice, which was provided.

51. The KPMG report was published on 31 January 2015 and it was announced by written ministerial statement dated 10 February 2015. Relevant parts of the KPMG report are summarised in paragraphs 24 and 25, and analysed from paragraphs 36 to 51, of the judgment of the Divisional Court.

52. The KPMG report assessed three resettlement options, each of which required use of the infrastructure on the US base on Diego Garcia and one of which required infrastructure on the Outer Islands. It noted defence and security concerns, environmental considerations and social and economic concerns about establishing a remote community. Mauritius' assertion of sovereignty over the Chagos Islands was noted, which raised political issues to be navigated. It noted that the Outer Islands were remote, demanding environments and the infrastructure which would have to be built would be "invasive and cause major environmental damage to the coral reefs, fish and other marine life".

53. The KPMG report noted that a key focus was the lack of an airport or landing strip in the Outer Islands. Questionnaire surveys from Chagossians indicated that the Outer Islands would not be suitable for resettlement. Estimated capital and continuing costs for the three options were given, but they were noted to be subject to "extremely large uncertainties". The KPMG report raised serious concerns about resettlement but noted that there was some scope for supported resettlement and therefore resettlement was feasible. At paragraph 51 the Divisional Court considered whether the KPMG report had identified that the resettlement was feasible and said:

> "In conclusion, whilst it can be said that the KPMG report identified that resettlement was feasible, such a statement without more would be over simplistic. Whilst physically feasible, any resettlement would present significant challenges and raise substantial concerns, including political, defence and environmental, before even addressing questions such as cost. As KPMG put it: "The issues and challenges facing the potential resettlement of selected islands in the Chagos Archipelago are very significant. They include: human, physical (infrastructure), political, environmental, financial and economic". These were all matters requiring evaluative judgments by the ultimate decision-makers in 2016."

54. The report recommended a series of next steps including investigating potential opportunities for access to the facilities of the US naval facility. The Government sought the policy position of the US Government on the viability of resettling the

BIOT. By letter dated 13 February 2015, the US Government replied saying that the United States had serious concerns about the implementation plan for the potential resettlement of Diego Garcia. The letter reported that one of the most significant concerns with the KPMG report was the proposed development of certain industries on Diego Garcia and that "*as a result of security concerns, the United States strongly opposes the development of any form of tourism on Diego Garcia. Additionally, our government will not permit the US military airfield on Diego Garcia to transport tourists*". The letter noted that there would be no objection to tourism in the Outer Islands that was not dependent on transport through Diego Garcia. The letter recorded that the US would not participate in any indirect payments supporting resettlement or direct payments to the Chagossians, and that planning for resettlement on Diego Garcia should include the requirement to obtain all services and infrastructure independently of the US base. The US confirmed its continuing support for visits by Chagossians to the BIOT and a commitment to hiring qualified candidates from the Chagossians from Mauritius and Seychelles to work on the US base.

55. There was a meeting on 25 February 2015 of what is called the NSC(O) (senior officials meeting in preparation for the full meeting of the NSC). Serious obstacles to resettlement were identified. No official was in favour of the resettlement option. A write-round of departments was carried out.

56. A briefing on 27 February 2015 to the Prime Minister identified three options which were: no change; increased support but no resettlement; and resettlement options. The briefing recorded "*this really does come down to the balance between righting what was unquestionably a serious historic wrong, and the on-going costs and liabilities"*. It was noted that it was easy to imagine "*… the whole thing escalating and our getting involved in building runways and harbours and accommodation blocks, while struggling to attract hotels and tourism, and finding ourselves committed to indefinite social security support because of lack of job opportunities*". It was noted that it could be done but it would be more expensive than even the highest estimates in the feasibility study. This last comment about cost appears to have been based on the fact that the feasibility study had assumed access to the infrastructure on the US base. The briefing noted "*… if you want to push a resettlement option through, I think you will have some opposition to overcome – you will need strong support from the DPM and the Leader of the House …*".

10 March 2015 NSC meeting

57. On 10 March 2015, the NSC considered the KPMG report and were advised to read the report in full. In the event the NSC did not feel in a position to make a final decision and identified further work to be done. On 24 March 2015, the Parliamentary Under-Secretary for the FCO informed the House of Commons that Ministers had agreed further work to address the uncertainties identified in the KPMG report. A report was commissioned from WhiteBridge, an expert travel consultancy, on the practicality and economics of high end tourism on Peros Banhos and Salomon. The WhiteBridge report was produced on 12 November 2015.

58. On 4 August 2015 the Government launched a consultation to understand, among other matters, the demand for resettlement from Chagossians and the alternative

options to resettlement. Further inquiries were made with the Department for International Development ("DfID") and FCO who refined previous estimates.

59. On 28 September 2015, the Chagos Refugee Group had a meeting with the BIOT Deputy Commissioner as part of the consultation process. Responses to the 2015 consultation were summarised in a document dated 27 January 2016. There had been 832 responses from a global diaspora of 9,000 Chagossians (9.2 per cent); 98 per cent of those responding expressed a desire to resettle, although 60 per cent of those were second generation Chagossians who had never lived, or apart from the period between 2000 and 2004 been permitted to live, on the Chagos Islands; and 25 per cent of the respondents (some 208 persons) expressed themselves content to live on the Chagos Islands with the likely conditions of life if they were to resettle.

60. It recorded that the vast majority of Chagossians were in favour of resettlement in principle but there were more nuanced views about the scenarios presented as the most realistic description of how it might work.

15 March 2016 NSC meeting

61. The Prime Minister decided that he wanted a further meeting of the NSC to make a decision, rather than making a decision by way of write-round. A meeting of the NSC(O) took place on 9 March 2016. The Prime Minister was briefed on 11 March 2016. It was noted that the option of resettlement on the Outer Islands was "*effectively discounted as too risky*" by the KPMG report. The issues identified included the fact that the islands were low lying and small, with no existing infrastructure, vulnerable to rising sea levels. There would be modest employment from niche tourism but no guarantee of western standards of education, healthcare and governance, and a high risk of social problems.

62. A briefing paper was prepared with a slide pack, the KPMG report, a summary of responses to the consultation, and slides from the 2015 NSC meeting. There were three options being: (i) resettlement including Diego Garcia; (ii) resettlement on the Outer Islands, excluding Diego Garcia; and (iii) no resettlement with a financial package.

63. The full NSC meeting took place on 15 March 2016. The Prime Minister attended with the Secretary of State, and there was also the Secretary of State for Defence, the Chancellor of the Duchy of Lancaster, the Home Secretary, the Secretary of State for Energy and Climate Change, the Attorney General and the Minister for DfID. The Permanent Under Secretary at the FCO addressed the three main options, and it is necessary to set out what he said because it is relevant to the grounds of appeal. He noted that the Outer Islands were a 5-hour boat trip from the US air base. He said that "*The largest was the size of Hyde Park, which ruled out building a landing strip, and the highest point was only 6 feet above sea level. This would be an even more challenging location for resettlement than Option A.*"

64. The NSC decided that the resettlement options would be ruled out. There would be a review of the financial package to see whether it could be enhanced. It was agreed that there would be no announcement until after the visit of the President of the US to the UK in April 2016.

65. In April 2016 the US President made a state visit to the UK and discussed the policy review with the Prime Minister and Leader of the Opposition. As noted above a legal challenge to the consultation process was dismissed.

66. Work on the financial package continued. An assessment of a programme to benefit Chagossians in the UK was produced. The High Commissions were to advise on health and education systems in Mauritius. The US Government confirmed that they would not support a development assistance package for Chagossians. On 23 June 2016 a new Government was formed following the resignation of the former Prime Minister following the EU referendum.

67. The new Prime Minister was briefed on 25 August 2016 and given details of the financial package based on the best assessment of the Chagossians' needs over a 10-year period. New healthcare facilities, private tuition places, vocational training places and funding for degrees would be £21 million over 10 years. Heritage visits would be £5.5 million; restoration of cultural sites would be £4.2 million; scientific conservation projects, with volunteering opportunities for the Chagossians would be £4 million, and a training package for UK Chagossians would be £4.6 million (a total of £39.3 million). It was noted that this was a reduction of the £55 million package agreed in March 2016. The main risk to the delivery of the package would be the need for the consent and co-operation of the Mauritian government. In this respect in May 2016 the Mauritian Prime Minister had announced that, unless the UK provided a date to return sovereignty over the BIOT to Mauritius, he would seek referral by the UN General Assembly to the ICJ.

68. On 31 August 2016 the Prime Minister approved the announcement of the rollover of the Exchange of Notes together with the announcement of a financial package worth about £40 million. On 26 October 2016 the Secretary of State conducted a write-round seeking responses from the NSC members by 7 November 2016 for the proposal that the Government would not support the resettlement of the Chagos Islands but would provide a support package worth about £40 million over 10 years, noting that the decisions had been provisionally agreed by the NSC on 15 March 2016 and recording that the financial package was, following further policy work, now suggested to amount to £40 million. Responses were received supporting the decisions.

69. A further briefing to the Prime Minister was prepared on 9 November 2016. The Prime Minister responded on 15 November 2016 approving the making of the announcements.

70. A final financial package decision was approved by the Prime Minister in November 2016. On 16 November 2016 Baroness Anelay, the Minister of State for Foreign and Commonwealth Affairs, issued the written Ministerial statement containing the decision, part of which is set out in paragraph 4 of this judgment. Other material parts of the statement were:

> "… We have taken care in coming to our final decision on resettlement, noting the community's emotional ties to BIOT and their desire to go back to their former way of life.
>
> …

> I am today announcing that the Government has decided against resettlement of the Chagossian people to the British Indian Ocean Territory on the grounds of feasibility, defence and security interests, and cost to the British taxpayer. In coming to this decision, the Government has considered carefully the practicalities of setting up a small remote community on low-lying islands and the challenges that any community would face. These are significant, and include the challenge of effectively establishing modern public services, the limited healthcare and education that it would be possible to provide, and the lack of economic opportunities, particularly job prospects. The Government has also considered the interaction of any potential community with the US Naval Support Facility – a vital part of our defence relationship.
>
> The Government will instead seek to support improvements to the livelihoods of Chagossians in the communities where they now live. I can today announce that we have agreed to fund a package of approximately £40 million over the next ten years to achieve this goal. This money addresses the most pressing needs of the community by improving access to health and social care and to improved education and employment opportunities. Moreover, this fund will support a significantly expanded programme of visits to BIOT for native Chagossians.
>
> The Government will work closely with Chagossian communities in the UK and overseas to develop cost-effective programmes which will make the biggest improvement in the life chances of those Chagossians who need it most.
>
> …"

The present proceedings and the hearing before the Divisional Court

71. There were various interlocutory hearings before the Divisional Court in February, April, May, June, July, September and November 2018 leading up to the substantive 5-day hearing. That hearing in the Divisional Court took place from 10th to 14th December 2018. There were 16 trial bundles, and 2 further bundles of closed materials.

72. Mr Bancoult and Ms Hoareau adduced statements from: Ms Hoareau; Mr Pierre Prosper (chair of the Chagossian Committee Seychelles ("CCS")); Mrs Gladyel Sakir (who was born on Peros Banhos and a member of the CCS); Ms Marie Piron (who was born on Diego Garcia); Ms Jessy Marcelin (who was born on Peros Banhos); Ms Edwina Cupidon; Mr Richard Gifford (who is Mr Bancoult's solicitor); and Mr Richard Dunne (who considers the Summary of Responses).

73. The Secretary of State adduced witness statements from: Dr Hayes (Director for Overseas Territories from October 2012 to December 2016); Ms Bryony Mathew (Head of the BIOT Policy Team from July 2013 to July 2016); and Mr Tom Moody (head of the BIOT from July 2013 to July 2016).

74. Some of the evidence and submissions were received in a confidentiality ring which included counsel for both parties. Part of the hearing was closed. The Divisional Court, however, did not need to refer to the confidential materials in its judgment. We have also been provided with confidential materials and submissions within a confidentiality ring. We have taken account of those materials and submissions but, like the Divisional Court, have not considered it necessary to produce a closed judgment.

The Divisional Court judgment

75. The Divisional Court set out the relevant background before turning to an overview of the review and the relevant decision which is set out from paragraphs 20 to 35 of the judgment. The Divisional Court set out the details of the KPMG report and the chronology leading up to the making of the relevant decisions up to paragraph 84 of the judgment. The respective cases were summarised from paragraphs 85 to 94 before the Divisional Court turned to general principles and observations.

76. In paragraph 95 the Divisional Court noted that "*the test for judicial review is irrationality*" noting that it was not proportionality and that below the level of the Supreme Court it was not possible for the Courts to change the law in this respect. The Divisional Court relied on the judgment in *Browne v Parole Board of England and Wales* [2018] EWCA Civ 2024 where Coulson LJ had noted that, while there was some support for adopting a proportionality test in particular cases concerned with fundamental rights, there was recognition that more widespread change would require review by the Supreme Court.

77. The Divisional Court considered *R v Ministry of Defence ex parte Smith* [1996] QB 517 in relation to the intensity of review in a human rights context but held that there was in this case no human rights context. This was because any fundamental rights to return had been extinguished, at the latest, by the 2004 Orders which were upheld in *Bancoult No.2*. The Divisional Court also noted that the decisions were taken at the highest levels of Government including the Prime Minister, they concerned decisions about the allocation of financial resources, they concerned decisions about defence, and they concerned decisions about international relations. The Divisional Court said in paragraph 107 of its judgment that in such circumstances *"... a wide margin of judgment is afforded by the law to the executive in this context*".

78. The Divisional Court then turned to deal with the right of abode challenge and the failure to consider the right of return separately from the issue of resettlement. The Court held (paragraph 113) that the ground of challenge was "*both unrealistic and wrong*". This was because the legal right of abode was linked to the practicalities of resettlement in the Chagos Islands, as illustrated by the fact that between 2000 and 2004 no one had chosen to take up the right to go and live in the Chagos Islands noting that the reality was that "… *there would need to be established an entirely new society in the Chagos Islands* …".

79. The Divisional Court recorded that reliance was placed upon *Bancoult No.4* where Lord Mance, with whom Lords Neuberger and Clarke agreed, noted that counsel for the Secretary of State accepted that it was open to any Chagossian to challenge the failure to abrogate the 2004 Order. The Divisional Court concluded that Lord Mance was simply setting out the factual position as had been summarised by counsel in

argument and was not laying down any rule suggesting that there was a legal obligation to revisit what had been upheld in *Bancoult No.2*.

80. The Divisional Court considered the Human Rights Act challenge from paragraph 129 of its judgment but held that the ECHR did not extend to the BIOT because the UK had not made any declaration under Article 56 (formerly 63) of the ECHR, the Divisional Court was bound by *Bancoult No.2* and the arguments relying on UK control of the Chagos Islands had not been accepted by the European Court in *Chagos Islanders v UK* (ibid).

81. The Divisional Court considered and rejected a challenge under section 149 of the Equality Act relating to the Public Sector Equality Duty. Permission to appeal was refused on that issue. The issue has not been renewed before us.

82. In paragraph 194 of its judgment the Divisional Court considered the challenge to the rationality of the resettlement decision. The Court noted that the KPMG report had made assumptions about use of the airport on Diego Garcia that had proved undeliverable because of restrictions imposed by the US Government, holding (paragraph 203) that the resettlement decision was based on a "*consideration of interweaving strands in areas paradigmatically for the government to determine* …". The Divisional Court noted the Government attempts to get funding from the US and private sector, and that "… *it was a matter for the Government whether it required more investigation or further detail before taking the in-principle decisions … It was entitled to rely on the KPMG figures … as indicative, updated by DfID advice on costings …*". The Divisional Court noted (paragraph 205) that it was not for the court to take a view on, nor could it properly determine, what level of costs would be prohibitive.

83. The Court also held that the decision whether to press the US Government on the use of the base facilities "… *were all matters for Government to decide, and not for the Courts to go behind*". As to other risks the Divisional Court found (paragraph 208) that *"… the risks of setting up a community without proper economic opportunities, for example, are obvious and would all fall within governmental responsibility*". The Government was entitled to take into account the significant environmental concerns. In relation to Outer Island only development the KPMG report had stated "… *in theory an option could be development which was based only on outer island settlement, but this has been discounted on environmental and practical grounds*". The Court rejected the suggestion that the court should intervene on the basis that inadequate weight had been given to moral obligation and the Claimants' historic right of abode stating that "… *the appreciation of the opportunity to right a grave historic wrong which removed the Chagossians from their homeland was at the heart of the debate, led by the Prime Minister, and the driver behind what was a voluntary exercise*". The Divisional Court concluded that "… *there is no proper basis for us to interfere with what was a multifactorial and multidimensional decision taken at the highest level, particularly in circumstances where the factors and dimensions involved included matters of political sensitivity, defence and security concerns*."

84. The Divisional Court turned to the challenges based on the provision of incorrect information in relation to the construction of an airstrip on the Outer Islands (paragraphs 214 to 243). The Court considered briefings dated February and March 2016 in the light of the competing submissions about their accuracy and criticisms of

descriptions of the airstrip, costs and characterisation of the KPMG report. The Divisional Court found that there were no material misdescriptions.

85. The Divisional Court rejected criticisms about the non-deliverability of the support package (paragraphs 244 to 254). The Court noted that risks had been identified and reported on, and that there were no material errors of fact.

86. Next the Divisional Court turned to the challenge about the 2015 consultation process which was analysed and rejected (paragraphs 255 to 299). The consultation challenge was not renewed before us.

87. Finally, the Divisional Court considered the support package challenge, which was made by Ms Hoareau alone because Mr Bancoult did not accept the support package as an alternative to resettlement. This issue was addressed in paragraphs 300 to 324 of the judgment. It was common ground that a financial scheme which the Government had no legal obligation to establish could be the subject of challenge. The complaint was that Ministers were not given a fair presentation of material facts. The Court considered the way in which the financial package had been constructed and held that the figures had been indicative only and subject to further work.

88. The Divisional Court dismissed the claims and noted that judicial review was not an appeal against government decisions on their merits, but served to correct unlawful conduct.

The Grounds of Appeal, the Respondent's Notice and a short Summary of the Submissions

89. Mr Bancoult and Ms Hoareau were granted permission to appeal against the judgment of the Divisional Court, and the Government filed a Respondent's Notice.

90. In short Ms Hoareau and Mr Bancoult contend that: (1) the Divisional Court erred in finding that the decision did not breach rights protected by Article 8 and A1P1 ECHR; particular reliance is placed on the Advisory Opinion of the ICJ and the UN Resolution which post-dated the judgment of the Divisional Court; (2) the Secretary of State failed to apply "*anxious scrutiny*" in making the decision and the Divisional Court failed to apply "*anxious scrutiny*" to the review of the decision, and this standard of review was required because the decision related to the fundamental right of Mr Bancoult and Ms Hoareau to live on the Chagos Islands; and (3), the decision making was irrational because there was a failure to consider restoring the right of abode for the Chagossians separately from the issue of supported resettlement; and because material misstatements were made to Ministers about the ability to construct a runway on the Outer Islands, about whether the financial package was deliverable, and about what was covered by the financial package.

91. The Secretary of State contends that the challenges to the decision were rightly rejected by the Divisional Court for the reasons that it gave, and by a Respondent's Notice contends that: (1) to the extent that the Advisory Opinion is relevant it did not state that the ECHR extended to the Chagos Islands and any right to self-determination confirmed by the Advisory Opinion was a right which was for the Mauritian people, not a right which the Chagossians could exercise against the UK; (2) the test of "*anxious scrutiny*" did not apply either to the decision maker or the

Court, but that in any event applying such a test would have made no difference because particular care was taken both by the Divisional Court and by the decision maker in relation to the decision making in this case which involved the Prime Minister; and (3), the decision, which involved consideration of issues of national security, international relations, expenditure of public funds, environmental concerns, and how best to right a historic wrong, was rational. The right of abode had been properly considered and was not severable from issues of resettlement. There had been no material misdescription about the runway which could not feasibly be built on the Outer Islands. Ministers had been told that there were risks that the financial package might not be delivered, and there was no material misdescription about the way in which the package was calculated.

92. We are very grateful to Mr Jaffey QC, Ms Kaufmann QC and Sir James Eadie QC and their respective legal teams for their assistance and helpful written and oral submissions. By the conclusion of the hearing it became clear that the following matters were central to the appeal: (1) whether, in the light of the Advisory Opinion and the UN Resolution, the ECHR extended to the Chagos Islands, and, if so, whether there had been an interference with the Article 8 and A1P1 rights of Mr Bancoult and Ms Hoareau; (2) whether anxious scrutiny was to be applied by the decision maker or by the Divisional Court because the decision related to the right to abode, and if so, whether the decision should be quashed or whether, whatever standard was applied, the decisions were rational; and (3) whether the decision was irrational because: (a) the right of return should have been considered separately from issues of resettlement; (b) there had been any material misdescription about the runway; (c) there had been any material misdescription about the deliverability of the financial package; and (d) there had been a material misdescription about the way in which the package was calculated.

Issue I: Whether the ECHR extended to the Chagos Islands, and if so whether there had been a breach of Article 8 and A1P1

The Issue

93. We turn now to the first issue which concerns the application of the ECHR to the Chagos Islands and the Appellants.

94. The Appellants argue that by virtue of the Advisory Opinion and the UN Resolution the legal position in relation to the applicability of the ECHR has fundamentally changed since the judgment of the Divisional Court.

95. Article 8 and A1P1 ECHR do apply to the position of the Chagossians and neither have been taken into account. This amounts to an error of law and the Government must now be required to reconsider its position in the light of the applicability of the ECHR. Those provisions apply because, in the light of the Advisory Opinion and the UN Resolution, it is evident that a right of resettlement amounts to a human right which sounds in international law as, at the least, a customary rule of law. This in due turn shapes the common law which must be properly considered in the light of the position set out in international law. It also follows, crucially, that applying the legal reasoning as declared in the Advisory Opinion and as applied in the UN Resolution the exclusionary obstacle to the application of the ECHR found in Article 56 now disappears. In consequence the broader basis for the application of the ECHR under

Article 1 applies. It is said that there can be no real doubt that, under Article 1, the Government would be bound to apply the ECHR to the Chagossians and, this being so, then Article 8 and A1P1 both apply which embody, in substance, the right of resettlement.

96. In order to place this submission into its context it is necessary to refer to both the relevant legislative material and to the principal case law.

97. Article 1 sets out the jurisdictional basis upon which the ECHR applies. As we explain below an expanded meaning is accorded to the expression "*their jurisdiction*" with the consequence that the Convention applies not only to the acts of states upon their own territory but also to certain acts performed extraterritoriality. It provides:

> "Obligation to respect Human Rights"
>
> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

98. In relation to the colonies of contracting states the ECHR did not apply from the outset, but under Article 56 a mechanism was provided whereby a contracting state could extend its protection to their colonies. The provision does not use the word "*colonies*" but it is evident from case law, and the *travaux preparatoire* to the ECHR, that it was introduced for historical reasons to cater for the existence of colonies attached to signatory states i.e. "*territories for whose international relations*" a contracting state was "r*esponsible*". Article 56 provides:

> "1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
>
> 2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
>
> 3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
>
> 4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention."

99. The scope of Article 1 and its relationship to Article 56 was considered by a Grand Chamber of the ECtHR in *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, concerning the conduct of the United Kingdom in parts of Iraq during armed conflict in Iraq. The ECtHR described the bases upon which the jurisdiction of the Convention could apply. The first basis was the territorial principle (paragraph 131) under which a state's jurisdiction was normally exercised throughout that state's territory. Acts performed or producing effects "*outside*" the territory would constitute an exercise of jurisdiction only in exceptional cases. The Court then identified the exceptional situations where extraterritorial acts could engage Article 1. It is not necessary to go into detail. In short, the Court referred to the acts of diplomatic and consular agents, (paragraphs 133 – 135), to acts of force by a state's agents (paragraph136) – for example where an individual was transferred into the custody of a foreign state's representatives by the local authorities, and to cases where a foreign state exercised "*effective control over an area*" due to lawful or unlawful military action (paragraphs 138 – 140).

100. In *Al-Skeini* the ECtHR also considered the relationship between Article 1 and Article 56 and concluded that, in essence, the two were mutually exclusive. In paragraph 140 the Court stated:

> "140. The "effective control" principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, "with due regard ... to local requirements," to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term "jurisdiction" in Article 1. The situations covered by the "effective control" principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible (see Loizidou (preliminary objections), cited above, §§ 86-89 and Quark Fishing Ltd v. the United Kingdom (dec.), no. 15305/06, ECHR 2006-...)."

101. In *Bancoult (No 2)* the Appellant argued that, because the Government had made a declaration under Article 56 in relation to Mauritius which had not been renounced then it continued post-independence in relation to those parts of the (former) Mauritius which now formed the BIOT (cf (ibid) page 471D). The argument was rejected. At paragraph 64 Lord Hoffmann, for the majority, observed that in 1953 the Government had made a declaration under Article 56 extending the application of the Convention to Mauritius as a territory "*for whose international relations it is responsible*". That declaration lapsed when Mauritius became independent. Declarations under Article 56 apply to a political entity and not to the land which is

from time to time comprised in its territory. The BIOT was, as from 1965, a new political entity to which the Convention had never been extended. It is worth stating the obvious: the *mere* fact that a state is "*responsible*" for the foreign relations of another territory as that term is understood in Article 56 does not, thereby, result in the application of the ECHR.

102. The Appellants now say that, in the light of the Advisory Opinion and the UN Resolution (considered in detail below), the analysis in *Bancoult (No 2)*, followed by the Divisional Court, must be considered to have been superseded.

103. They argue in addition that the same must be said of the admissibility judgment of the Fourth Section of the ECtHR in *Chagos Islanders v United Kingdom* (ibid) which rejected the application of the Chagossians for relief. The applicants in that case are described in paragraph 1 of the judgment and included Chagossians from Mauritius, Seychelles and those resident in the UK:

> "The applicants are natives of, or descendants of natives of the Chagos Islands, sometimes referred to as "Ilois" or "Chagossians". They are resident largely in Mauritius, the Seychelles and the United Kingdom. Letters of authority have been received from 1,786 applicants and are contained in the file."

104. The applicants advanced complaints under five different heads under the Convention. The three of most relevance to the present case were: (1) under Article 3 concerning the decision-making process leading to removal from the islands, the removal itself and the manner in which it was carried out, the reception conditions on their arrival in Mauritius and the Seychelles, the prohibition on their return, the refusal to facilitate return once the prohibition had been declared unlawful and the refusal to compensate them for the violations which had occurred; (2) under Article 8 alleging violations of their right to respect for private life and home upon the basis that the original removal was not "*in accordance with the law*" and the subsequent interferences were either not lawful or were disproportionate in that they prohibited return and amounted to a continuing unjustifiable interference with their right to respect for their home; and (3), under A1P1 by virtue of the deprivation of their possessions and/or the controlling of their usage and that such interferences were unlawful both as a matter of English and international law.

105. The ECtHR held that the applications were inadmissible. The main points of relevance to the present appeal are as follows. First, the Court (echoing the reasoning of the majority of the House of Lords in *Bancoult (No2)*) held that Article 56 did not apply to the BIOT and that the declaration in relation to Mauritius did not, upon the independence of Mauritius, carry over to the BIOT (see paragraphs 47, 61 and 62). Secondly, the mere fact that many of the applicants resided in the UK did not bring their complaint within the jurisdiction of the ECHR since an applicant's place of residence was irrelevant: "… *the Court's competence cannot become justiciable in Strasbourg merely because an applicant moved address*" (paragraph 63). Thirdly, in relation to the argument that, even if the UK has not made a declaration in relation to the BIOT the Convention still applied because of Article 1, the Court observed that it had to have "… *regard to the most recent and authoritative statement of principles as regards jurisdiction under Article 1 pronounced by the Grand Chamber in Al-Skeini*

and Others" (paragraph 70). The Court cited paragraph 140 of that judgment (set out above) and applied it to the BIOT. It rejected the argument that Article 1 and the principles laid down in *Al-Skeini* judgment "… *must take precedence over Article 56 on the ground that it should be set aside as an objectionable colonial relic and to prevent a vacuum in protection offered by the Convention*". The ECtHR responded:

> "73. … Anachronistic as colonial remnants may be, the meaning of Article 56 is plain on its face and it cannot be ignored merely because of a perceived need to right an injustice. Article 56 remains a provision of the Convention which is in force and cannot be abrogated at will by the Court in order to reach a purportedly desirable result."

106. We should set out paragraphs 75 and 76 of the Judgment since they, seemingly, posed a question which the Appellants say is relevant to the present case and which the Court left unanswered:

> "75. The question remains as to whether the passage from *Al-Skeini* cited above indicates that there must now be considered to be alternative bases of jurisdiction which may apply even where a Contracting State has not extended application of the Convention to the overseas territory in issue, namely, that the United Kingdom can be held responsible for its acts and omissions in relation to the Chagos Islands, despite its exercise of its choice not to make a declaration under Article 56, if it nonetheless exercised "State agent authority and control" or "effective control" in the sense covered by the Grand Chamber judgment. This interpretation is strongly rejected by the respondent Government and would indeed render Article 56 largely purposeless and devoid of content since Contracting States generally did, and do, exercise authority and control over their overseas territories."
>
> 76. However, even accepting the above interpretation, the Court finds it unnecessary to rule on this particular argument since, in any event, the applicants' complaints fail for the reasons set out below."

The issue identified as not needing to be answered was, on one view, the very point which the Court did answer in paragraphs 72 - 74 when referring to *Al-Skeini* (ibid) and to its earlier judgment in *Quark Fishing Ltd v United Kingdom* (2007) 44 EHRR SE4; and in paragraph 75 the Court observed that, if the argument of the Applicants was correct, it would render Article 56 "… *largely purposeless and devoid of content since Contracting States generally did, and do, exercise authority and control over their overseas territories*." At all events, the Court proceeded to identify additional grounds for rejecting the application which rendered the Applicant's arguments about Article 56 superfluous. The Court held (paragraphs 77 - 81) that the applicants fell into two camps. They had either (a) been compensated by the UK for what was an accepted violation of their rights; or (b), been afforded a proper opportunity under domestic law to bring claims for vindication of their substantive rights and/or for compensation. Accordingly, they were either (in the case of (a)) no longer "*victims*"

within the meaning of Article 34 ECHR or (in the case of (b)) no longer "*victims*" because they had failed to exhaust their local remedies under Article 35 ECHR, and in either case they had no subsisting rights under the Convention which entitled them to proceed before the Court.

107. In relation to this judgment the Appellants contend that had the ECtHR been aware of the Advisory Opinion and the UN Resolution then it would have taken, and been bound to take, a quite different approach. The assumed premise upon which the ECtHR had proceeded was that the BIOT was *lawfully* a territory for which the UK had responsibility. Had the ECtHR been aware of the view of the ICJ and the General Assembly then it would, under the international law principle that the right to self-determination was customary law and applied *erga omnes* (i.e. applies to all states and international organisations and bodies including courts), have been compelled to adopt a legal position which supported the UN Resolution calling upon international bodies, such as the Court, to cooperate to ensure that the process of partial decolonisation was completed and the rights of the Chagossians to resettlement respected. It is argued that the fact that the ECtHR left open an issue surrounding the nexus between Article 1 and 56 is in this connection relevant.

108. We turn now to our analysis. For reasons we set out below we do not accept these submissions, attractively advanced though they were by Mr Jaffey QC.

The Advisory Opinion of the ICJ and the Resolution of the General Assembly of the United Nations

109. The starting point is the Advisory Opinion and the UN Resolution. Properly analysed they do not, in our judgment, provide support for the Appellants' submissions. To demonstrate this, it is necessary to set out carefully what the ICJ and the General Assembly both did, and did not, conclude.

110. Before embarking upon this we should record the formal position of the United Kingdom which has made its position clear in a detailed and full response to the request from the Secretary General of the UN for information about the implementation of the UN Resolution. The responses of all states responding are now published in a Report of the Secretary General dated 18 May 2020. It suffices to record that the United Kingdom, whilst expressing committed support for the institutions of the United Nations, has also expressed its disagreement with the Advisory Opinion and the UN Resolution and points out that they are non-binding in law. We do not go into detail. We confine ourselves to the narrow issue arising which relates essentially to the implications of the Advisory Opinion and the UN Resolution for the applicability of the ECHR and we express no views on the wider issues being aired at the level of the UN.

111. We turn to the Advisory Opinion. By a letter dated 23 June 2017 the Secretary-General of the United Nations officially communicated to the ICJ a decision taken by the General Assembly to submit two questions to the Court for an Advisory Opinion as set forth in General Assembly Resolution 71/292. This provided that in accordance with Article 96 of the Charter of the United Nations, the ICJ was requested, under Article 65 of the Statute of the Court, to render an advisory opinion on the following questions:

> "(a) Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967? ;
>
> (b) What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"

112. The first question focused upon whether the "*process of decolonization of Mauritius [was] lawfully completed*" upon the grant of independence to Mauritius in 1968; the second question focused upon the "*consequences*" of the continued administration of the islands, including in relation to the resettlement of the Chagos islanders by Mauritius.

113. The Advisory Opinion delivered by the ICJ on 25 February 2019 is not a judgment in the traditional sense of determining a dispute as between parties where the judgment has binding effect; rather it is an Opinion provided to the organ of the UN which requested it, here the General Assembly which then had the task of determining what steps were needed to secure its implementation. Whilst it is accordingly correct to say that it sets out the view of the ICJ upon the law it is not intended to have binding effect. It is for the requesting organ of the UN, here the General Assembly, to set out what it considers to be the consequences of the law as expressed in the Advisory Opinion, assuming of course that the General Assembly accepts that opinion. The Advisory Opinion and the Resolution must thus be read and understood together.

114. Before considering the first question there are two points to make by way of preface.

115. First, the Opinion was expressly confined to the issue of <u>partial</u> decolonisation i.e. the existence of the right of self-determination in the context of a process voluntarily commenced by a former colonial power. In paragraph 144 the ICJ thus observed that whilst the "*right to self-determination, as a fundamental human right, has a broad scope of application*", nonetheless the Court would confine itself "*to analysing the right to self-determination in the context of decolonization*".

116. Second, the Court rejected an argument advanced by the United Kingdom that it should decline jurisdiction upon the basis that the issue had already been decided in binding bilateral proceedings under the auspices of the UNCLOS Arbitral Tribunal (see paragraphs 34-38 above). The ICJ concluded (paragraph 81) that that its opinion would be given "…*not to States, but to the organ which is entitled to request it*" citing

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71. The "*principle of res judicata [did] not preclude it from rendering an advisory opinion"*. The issues in the arbitral proceedings were in any event different. The Award in those proceedings was before us. The dispute concerned the right of the United Kingdom to impose a MPA around the Chagos Islands; the Panel refrained from expressing views about the issue of partial decolonisation or the right of self-determination.

117. The Advisory Opinion of the ICJ on the first question concerning the law relating to partial decolonisation can be summarised as follows.

118. The relevant point in time at which to assess the law was the period of the process of decolonisation of Mauritius (1965-1968) but since international law was not "*frozen in time*" the Court would address the evolution of customary law from that date up until the present date (paragraphs 140-142). The analysis which followed enabled the Court to conclude that the breach was a continuing one.

119. The right of self-determination had to be viewed in the context of the process of decolonisation (paragraph 144). The right was normative and amounted to customary international law (paragraphs 146-156). At paragraph 160 the Court stated that the right of self-determination of a people was defined by reference to the entirety of a self-governing territory:

> "160. … Both State practice and *opinio juris* at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination. No example has been brought to the attention of the Court in which, following the adoption of resolution 1514 (XV), the General Assembly or any other organ of the United Nations has considered as lawful the detachment by the administering Power of part of a non-self-governing territory, for the purpose of maintaining it under its colonial rule. States have consistently emphasized that respect for the territorial integrity of a non-self-governing territory is a key element of the exercise of the right to self-determination under international law. The Court considers that the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power. It follows that any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination."

120. Although the Government of Mauritius had, upon independence, agreed to the severance of the Chagos Islands, this detachment was not based upon the free and genuine expression of the will of the people of Mauritius, and the decolonisation of Mauritius has not therefore been lawfully completed (see in relation to the facts paragraphs 98-112 and in relation to the legal conclusions paragraphs 170-172). The Chagos Archipelago thus still formed an integral part of the territory of Mauritius.

121. The conclusion, that the failure to complete the process was unlawful, which is heavily relied upon by the Appellants, was set out in paragraph 174:

> "174. The Court concludes that, as a result of the Chagos Archipelago's unlawful detachment and its incorporation into a new colony, known as the BIOT, the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968."

122. In relation to the second question, consequences, the Court stated that it would express its opinion "*in the present tense, on the basis of the international law applicable at the time its opinion is given*" (paragraph 175).

123. The Court observed (paragraph 157), citing its own earlier Advisory Opinion in *Western Sahara* (I.C.J. Reports 1975, page 36 paragraph 71), that the issue of practical steps to be taken lay within the remit of the General Assembly which had "*a measure of discretion with respect to the forms and procedures by which that right is to be realized*". The General Assembly played a "*crucial role*" in relation to implementation and had "*oversight*" of Member States and others in relation to decolonisation (paragraph 163).

124. At paragraphs 177-181 the Court set out a series of relevant points of principle which can be summarised as follows: (1) that the breach by the United Kingdom was "*an unlawful act of a continuing character*"; (2) that the United Kingdom was under an obligation to bring its administration of the BIOT to an end as soon as possible; (3) that the "*modalities*" necessary to ensuring "*completion*" of the process of decolonisation fell within the remit of the General Assembly (and not the Court); (4) that since respect for the right to self-determination was an obligation *erga omnes*, all Member States had a legal interest in protecting that right; (5) that all Member States "*must co-operate with the United Nations*" to put those modalities into effect; and (6), that the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, was an issue relating to the protection of the human rights of those concerned which should be addressed by the General Assembly during the completion of the decolonisation process.

125. We turn now to the Resolution of the General Assembly of 22 May 2019. This starts by affirming the "*inalienable right of self-determination of peoples*" and then (paragraph 2) proceeds to record the history of the proceedings before the ICJ and welcomes and "*affirms*" the Advisory Opinion. In paragraph 3 the General Assembly:

> "Demands that the United Kingdom of Great Britain and Northern Ireland withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months from the adoption of the present resolution, thereby enabling Mauritius to complete the decolonization of its territory as rapidly as possible".

126. In paragraph 4 the General Assembly "*urges*" the United Kingdom to cooperate with Mauritius in facilitating the resettlement of Mauritian nationals, including those of Chagossian origin, in the Chagos Archipelago and to refrain from impeding such

resettlement. In paragraph 5 the Resolution "*calls upon*" all Member States to cooperate with the United Nations to ensure the completion of the decolonization of Mauritius as rapidly as possible, and "*to refrain from any action that will impede or delay the completion of the process of decolonization of Mauritius in accordance with the advisory opinion of the Court and the present resolution*". In paragraph 6 the Resolution "*calls upon*" the United Nations and all its specialized agencies to recognize that the Chagos Archipelago forms an integral part of the territory of Mauritius, to support the decolonization of Mauritius as rapidly as possible, and to refrain from impeding that process by recognizing, or giving effect to any measure taken by or on behalf of, the "*British Indian Ocean Territory*"; and in paragraph 7 the Resolution "c*alls upon*" all other international, regional and intergovernmental organizations, including those established by treaty, to recognize that the Chagos Archipelago forms an integral part of the territory of Mauritius, to support the decolonization of Mauritius as rapidly as possible, and to refrain from impeding that process by recognizing, or giving effect to any measure taken by or on behalf of, the BIOT.

Conclusions on the impact of the Advisory Opinion and UN Resolution on the application of the ECHR

127. We now set out our reasons for rejecting the analysis of the Appellants which concern both the scope of the Advisory Opinion and UN Resolution and their relationship to the rights sought to be enforced by the Appellants and as to their impact upon the scope and effect of Article 1 and 56 ECHR.

128. First, properly interpreted, whilst recognising that there was a human right relating to resettlement, neither the Advisory Opinion nor the UN Resolution actually decided anything about that right which is the substance of the Appellants' case under Article 8 and A1P1.

129. The Advisory Opinion remitted the issue of resettlement to the General Assembly (see paragraph 181); the Court stated that the issue was an issue relating to human rights which should be addressed by the General Assembly during the completion of the decolonisation process. The General Assembly, for its part, equally did not decide the issue and further remitted it to be addressed later "*during*" the completion of the process of decolonisation. Paragraph 2(f) of the UN Resolution "*affirms*" in accordance with the Advisory the Opinion that: "*The resettlement of Mauritian nationals, including those of Chagossian origin, must be addressed as a matter of urgency during the completion of the decolonisation process*". Paragraph 4 "*urges*" the UK to cooperate with Mauritius to facilitate resettlement, but it imposes no obligation of resettlement upon Mauritius, as the state that would, on the basis of the conclusions of law arrived at, have the power to secure such resettlement.

130. Second, there are problems with the submission in relation to the power of the domestic courts to grant relief under the ECHR even assuming that the Appellants are correct. As we have set out above, the concern of the Appellants is to secure resettlement, whereas the focus of the Advisory Opinion and the UN Resolution was upon completion of a process of decolonisation as part of the right of self-determination of Mauritius. The issue of resettlement was identified (in the second question posed to the Court, see paragraph 111 above) but only as one possible incident of the consequences of a finding that there had been a breach of the right to

self-determination. We accept that the right to self-determination and the right of resettlement are, by their natures, related concepts but they are not legally synonymous. The right to full decolonisation is conferred upon a state or Government as proxy for the individual citizens. As the Court explained, the right to self-determination is one granted to "*peoples*" and is a right to "*self-government"* (see e.g. paragraphs 177 and 178). Under the Advisory Opinion and under the UN Resolution the right to self-determination is conferred upon Mauritius as a State and Government; it is not a right for every single one of those "*peoples*" to express a different and divergent view as to where they would wish to live *within* the decolonised, self-determining, state. A decision by the Government of Mauritius whether to permit resettlement in the islands would be an *internal* matter for the Mauritian Government. If the Government of Mauritius refused to allow resettlement or did so in a manner falling short of the full aspirations of the Appellants, then that would be an internal matter governed by the law of Mauritius, not international law. Nothing in the Advisory Opinion or UN Resolution compels Mauritius to grant resettlement rights. It must therefore follow that if the Appellants are correct in their analysis, then the relief that is sought under the ECHR does not lie in the hands of the UK Government to grant nor could it therefore be for the domestic courts to enforce.

131. Third, and perhaps most fundamentally, neither the Advisory Opinion nor the UN Resolution support the proposition that the UK does not have *responsibility* for the foreign relations of the BIOT, at least pending full decolonisation, within the context of Article 56 ECHR. We see the force in the argument that, properly construed, the concept of responsibility in Article 56 assumes, and is predicated upon, *lawful* responsibility. The Appellants' argument, however, wrongly assumes that in expressing the opinion that the failure to complete the process of decolonisation was unlawful the ICJ intended the *added* consequence of rendering void all of the (myriad) acts taken by the UK in pursuance of being responsible for the foreign relations of the BIOT, for instance all actions relating to the military presence of the US on Diego Garcia. The Appellants' argument, in our judgment, elides and confuses two different points. It is well established in domestic law, in the case law of the ECtHR under the ECHR and in international law that a finding of unlawfulness may have prospective effects only. When a court finds and declares that some act of a state or Government is unlawful it may then need to proceed to determine what the effects of that declaration are. In many cases the impugned act might be quashed along with its past, antecedent, effects; but in other cases, the Court might conclude that the declaration should have prospective effects only and should leave the prior legal position unchanged.

132. In our judgment in this case both the ICJ and the General Assembly were careful to fashion a remedy which was prospective and which entailed the UK in completing an ongoing (albeit long interrupted) complex "*process*". The Court was at pains to emphasise that practical implementation was a matter for the General Assembly and not for it, and the thrust of the UN Resolution is resolutely forward looking. It demands completion of the "*process*" of decolonisation within 6 months, which assumes that all sorts of future legally binding steps would need to be completed during that time frame and, one assumes, this could well involve legally binding acts in the field of foreign relations in connection with the US presence on Diego Garcia. It also calls for cooperation and facilitation of that "*process*" of completion which also presupposes the possible entering into of a variety of legally binding agreements

between the UK and foreign states. The repeated use of the phrase "*process*" in the Opinion (eg paras 167, 174, 178, 179 and 180) and in the UN Resolution (e.g. recitals (a) and paragraph 3) all recognise the reality which is that the process of decolonisation cannot be achieved overnight and may involve a series of binding commercial, practical and legal steps and actions by the decolonising power and equivalent and commensurate steps by the transferee state, for instance in setting up its own governmental institutions, authorities and agencies, so that it is ready to assume and exercise sovereign control and power. We therefore conclude that both the Advisory Opinion and the UN Resolution are intended to be forward looking and not to put into legal jeopardy all acts of the UK in relation to the foreign relations of the BIOT. In our view neither the Advisory Opinion nor the UN resolution support the contention that at all material times the UK was not responsible for the foreign relations of the BIOT for the purposes of Article 56.

133. We are strengthened in this conclusion by the fact that there was clearly a lively debate as between the judges as to how far the Court should go in the Advisory Opinion. This can be seen from the contents of the separate declarations and opinions of several judges that wished the Court to go beyond the finding that the breach by the United Kingdom was of customary law. These judges wished the Court to express the opinion that the violation was of a "*peremptory norm*" i.e. of a higher and more serious nature. One reason for this was that, if the Court had expressed the view that the breach by the UK was of a peremptory norm, this could then have had a profound effect upon the validity of all of the legal acts taken by the UK in the exercise of its responsibility for the foreign relations of the BIOT; and, of course, the prime instance of this would have been the agreements between the UK and the US over the installation of military bases.

134. The omission from the Advisory Opinion of a conclusion that the failure by the UK was of a peremptory norm or that there were consequences of voidness for prior acts is in our view significant. By way of illustration, in her separate Opinion, Judge Sebutinde strongly criticised the Court for <u>not</u> finding a peremptory breach not least because this act of self-restraint would fail to render void the agreement between the UK and the US over Diego Garcia. At paragraph 45 she stated:

> "45. Having failed to recognize the peremptory status of the territorial integrity rule in the context of decolonization, the Court has failed to properly articulate the consequences of the United Kingdom's internationally wrongful conduct. Any treaty that conflicts with the right of the Mauritian people to exercise their right to self-determination with respect to the Chagos Archipelago is void. This has clear implications for the agreement between the United Kingdom/United States. Further consequences flow from the serious nature of the United Kingdom's internationally wrongful conduct. All States are under an obligation to co-operate to bring an end to the United Kingdom's unlawful administration of the Chagos Archipelago. Moreover, all States are under an obligation not to recognize as lawful the situation created by the United Kingdom's continued administration of the Chagos Archipelago and not to render aid or assistance in maintaining the illegal situation.

135. Judge Cancado Trindade was even more trenchant and forthright in his criticism of the failure of the Court to find a breach of a peremptory norm and to address the "*legal consequences*" of such a conclusion. He pointed out that the issues had been fully canvassed in written and oral submissions before the Court (see the summary at paragraphs 129-150) and he describes the failure of the Court to find a breach of a peremptory norm as "*most regrettable*" and for "*reasons which escape my comprehension*". He says of the Advisory Opinion that it adopts an approach which "*does not make sense to me*" (paragraphs 168 and 169).

136. We rely upon all of this to support our reading of the ICJ Opinion and the affirmation of that opinion in the UN Resolution as deliberately not seeking to cast into legal doubt acts taken by the UK in the field of foreign relations. The concern of the General Assembly was practical and prospective – to see completion of the process; that result could be put into jeopardy if all prior acts of foreign relations pending complete decolonisation were rendered void and if in the completion of the process the UK was unable to enter into legally binding acts of foreign relations on behalf of the BIOT.

137. Mr Jaffey QC referred us to certain words (italicised below) in paragraph 7 of the UN Resolution which provides:

> "7. Calls upon all other international, regional and intergovernmental organizations, including those established by treaty, to recognize that the Chagos Archipelago forms an integral part of the territory of Mauritius, to support the decolonization of Mauritius as rapidly as possible, *and to refrain from impeding that process by recognizing, or giving effect to any measure taken by or on behalf of, the "British Indian Ocean Territory*"
>
> (emphasis added)

138. As the language makes clear paragraph 7 is concerned with the actions of other international, regional and intergovernmental organisations in the context of the *future* process of decolonisation. It "*calls*" upon such organisations to "*refrain from impeding*" the process of continued decolonisation by "*recognising or giving effect to*" measures taken by or on behalf of the BIOT. It is not addressing the far broader issue of voidness. There is no equivalent wording in Paragraph 5 which is the call made to Member States to cooperate with the UN to ensure completion of the decolonisation process. We do not consider that the language used in these paragraphs of the UN Resolution supports the Appellants' argument.

139. We reiterate that we make these points only because they shed light on the implications of the Advisory Opinion and the UN Resolution for the phrase "*responsible*" in Article 56 ECHR and for the application of the ECHR more generally. We do not enter the debate which arises at the international level. The inference that we draw from this is that at all material times the UK has remained "*responsible*" for the foreign relations of the BIOT and that the Advisory Opinion and the UN Resolution do not disturb that conclusion. It follows that Article 56 applies and Article 1 is excluded. The fact that the UK has not made a declaration in relation to the BIOT does not serve to open the door to Article 1 as the ECtHR confirmed in

Quark Fishing (ibid), *Al Skeini* (ibid) and in *Chagos Islanders v United Kingdom* (ibid) which we consider to be clear in their reasoning.

140. There is a yet further difficulty confronting the Appellants. Even if this Court had been free to conclude that Article 56 was not a bar to the applicability of the ECHR (and that Article 1 applied and brought Article 8 and A1P1 into play), it is by no means clear that this would have had any, or any material, effect upon the outcome of *Bancoult (No 2)*. There it was accepted that there was an "*important*" common law right of abode (paragraph 45), even though the argument advanced that the right was absolute and indefeasible was rejected. The way in which the House of Lords described and applied that important right is analogous to the manner in which rights conferred under A1P1 and Article 8 would have been addressed: it was accepted that the Chagossians had a right of abode and that it was "*important*"; it was held that the right was not absolute; it was accepted that there had nonetheless been a serious historical violation of that right; it was held that in determining the relief to be granted the asserted right to actual resettlement had to be weighed against competing interests including the practicability of observing the right; and, it was accepted that, absent enforcement of a right of resettlement, reparation or compensation was due for the serious violation of the right (and had been paid). We detect no real difference between the approach that the House of Lords applied to the right of abode and the way in which A1P1 and Article 8 would have been dealt with had they been applicable. Our conclusion is supported by the approach of the ECtHR in *Chagos Islanders v United Kingdom* (ibid), where the Applicants were seeking vindication of rights under the ECHR (see paragraphs 105ff above). The Court (in paragraph 81) expressly rejected the admissibility of the applications of the Chagos islanders upon the basis that they had either been compensated or that the applicants had been accorded a fair chance to seek redress in the domestic courts. In so finding the Court was aware that the right that had been breached, and for which a remedy by way of compensation had been paid in the domestic courts, was the *different* common law right of abode, and not Article 8 or A1P1. In describing the basis upon which compensation had been paid or offered the Court nonetheless referred to "*damages flowing from the expulsion and exclusion from their homes*" and clearly treated this as a sufficient proxy for compensation payable more directly under the ECHR itself.

141. There is one final matter to address. In written submissions the Appellants strongly argued that the right of self-determination and resettlement were identical and that, as customary international law (as established in the Advisory Opinion and UN Resolution), they shaped the common law and that the common law so shaped was not inconsistent with any domestic statute, and should hence be given effect to. In oral argument Mr Jaffey QC for the Appellants did accept that neither the Advisory Opinion nor the UN Resolution sounded in law independently from the ECHR; Ms Kaufmann QC in her submissions did though equate customary international law with domestic common law and the Advisory Opinion and the UN Resolution did creep into an oral argument that the common law should recognise a right of resettlement, as had been forcibly argued in written submissions. We have already addressed arguments about the scope and effect of the Advisory Opinion and UN Resolution and do not accept the submission that the right of self-determination and any right to resettlement are the same. We address now the argument that, even if there is a right in customary international law which shapes the common law, it is not inconsistent with any domestic statute.

142. The Appellants relied upon the judgment of the Court of Appeal in *R (Freedom and Justice Party) v Foreign Secretary* [2018] EWCA Civ 1719 at paragraphs 113-117 as an accurate summary of the present state of the law concerning the relevance of customary international law in the domestic context. There it was held: "… *that customary international law is a source of common law rules but will only be received into the common law if such reception is compatible with general principles of domestic constitutional law*". At paragraph 117 the Court explained what was meant by constitutional law:

> "The presumption is that a rule of customary international law will be taken to shape the common law unless there is some positive reason based on constitutional principle, statute law or common law that it should not (for ease of reference, we refer to these together as reasons of constitutional principle). The presumption reflects the policy of the common law that it should be in alignment with the common customary law applicable between nations. The position is different from that in relation to unincorporated treaty obligations, which do not in general alter domestic law. In part, since the making of treaties is a matter for the executive, this reflects the principle that the Crown has no power to alter domestic law by its unilateral action: see *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499-500 (Lord Oliver) and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [2017] 2 WLR 583. The common law is more receptive to the adoption of rules of customary international law because of the very demanding nature of the test to establish whether a rule of customary international law exists: see above. That is not something that the Crown can achieve by its own unilateral action by simple agreement with one other state. Accordingly, in the case of a rule of customary international law the presumption is that it will be treated as incorporated into the common law unless there is some reason of constitutional principle why it should not be. In the case of an obligation in an unincorporated treaty the relevant rule is the opposite of this, namely that it will not be recognised in the common law."

143. The Court endorsed as "*correct*" the statement by Lord Mance JSC in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355 at paragraph 150:

> "Speaking generally, in my opinion, the presumption when considering any such policy issue is that [customary international law], once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration."

We treat this statement of principle as expressing the present law. Applying these principles to the present case any presumption that customary law shapes the common law such as to give rise to a common law right of resettlement confronts the obstacle that there is statute law in the form of legislation (the Constitution Order – see paragraph 29 above) which prohibits return to the Chagos Islands, in other words there is a statutory block on the right of resettlement. This was held by the majority of the House of Lords in *Bancoult (No 2)* to prevent the application of any otherwise inconsistent international law rule (see Lord Hoffmann at paragraph 66). It has not been argued upon this appeal that this particular conclusion of the House of Lords was not binding upon us.

144. In short, for the reasons given the Advisory Opinion and UN Resolution do not serve to engage the ECHR and do not enlarge the common law right of abode.

145. The Grounds of Appeal based upon the ICJ Advisory Opinion and UN Resolution do not succeed.

Issue II: Whether anxious scrutiny was to be applied by the Divisional Court and the Decision Maker

Anxious scrutiny

146. Ms Kaufmann QC, whose submissions on this point were adopted by Mr Jaffey QC, submitted that the Divisional Court should have applied "*anxious scrutiny*" when reviewing the decision, and also that the Divisional Court should itself have required the decision maker to apply "*anxious scrutiny*", since it was an obligation imposed not only on courts but also upon decision makers. The decision called for "*anxious scrutiny*" because there is a well-recognised right of abode in the common law, which existed in the BIOT before 2004. Its removal in 2004 by the 2004 Immigration Ordinance did not remove the need for "*anxious scrutiny*", particularly in circumstances where it was clear that the Chagossians had a right to self-determination as identified by the ICJ in the Advisory Opinion at paragraph 181 and therefore a right to return.

147. Sir James Eadie QC, for the Respondent, submitted that there was no requirement to apply anxious scrutiny to this decision, because no human or fundamental rights were engaged; *Bancoult (No.2)* was binding authority to the effect that the right of abode had been removed. If, however, the obligation to give anxious scrutiny did apply, it was a doctrine concerning judicial supervision and did not apply to the decision maker as well as to the Court. In any event the evidence showed that the matter had been given the most careful consideration or "scrutiny" by civil servants at the highest level and by Ministers, including the Prime Minister. The evidence showed that the Ministers had asked for further information because earlier costings provided by KPMG had not looked robust. The decision was rational.

148. In this case it was common ground between the parties that this was a rationality challenge, and not a proportionality challenge. This was not a case where the court was deciding for itself whether rights protected by either the ECHR or by EU law had been infringed, when a proportionality review might be appropriate, compare Lord Neuberger in paragraphs 131-133 of *R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs*.

149. The phrase "*anxious scrutiny*" in the context of a rationality challenge was first used in *R v Home Secretary ex parte Bugdaycay* [1987] AC 514 at 531. The issue in that case related to the risk that the appellant, whose claim for asylum had been rejected, might find, if returned to a third country, that he would be sent from there to the country where the appellant feared persecution. Lord Bridge noted that the decision was for the Secretary of State subject to the court's power of review. He continued:

> "The limitations on the scope of that power are well known and need not be restated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

150. This approach was followed in later cases and in particular in *ex parte Smith* [1996] QB 517 at page 554E-F where Sir Thomas Bingham MR set out the following approach to a rationality challenge:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

151. Sir Thomas Bingham MR also stated at page 556:

> "The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations."

152. The particular phrase "*anxious scrutiny*" has attracted both supporters and critics. Nonetheless, *ex parte Smith* remains good law, and the Appellants submit that the Divisional Court should have applied a standard of review of "*anxious scrutiny*". On this point we agree with the Divisional Court that this was not a decision which should be subjected to "*anxious scrutiny*" within the meaning of the test set out in *ex parte Smith.* This is because there was no "*interference with human rights*". As the House of Lords observed in *Bancoult (No.2),* the "*important*" right of abode had been

satisfied by the payment of compensation. Mr Bancoult had been prevented from returning to the Chagos Islands in 1968 after his family had travelled to Mauritius for hospital treatment and Ms Hoareau had been removed from Diego Garcia to the Seychelles in about 1971. Thereafter, as Lord Rodger had noted in *Bancoult (No.2)* at paragraph 112 "… *the economic conditions and infrastructure which had once supported the Chagossian way of life has ceased to exist* …". The removal of the right to remain and return in the case of both Mr Bancoult and Ms Hoareau was wrongful. Compensation was offered to those who were victims of the wrongful removal. Any further right to return to the Chagos Islands had been removed by the 2004 Orders, the legality of which was upheld in *Bancoult (No.2).* The decision in *Bancoult (No.4),* which affirmed the decision in *Bancoult (No.2),* did not alter this conclusion. It is right that reference was made in *Bancoult (No.4)* to the 2012 review and that this might give rise to a decision the legality of which might be reviewed by the Court. Nothing was said, however, to show that any future review would be in the context of human rights for the purposes of "*anxious scrutiny*".

153. We should record that this point is, in our judgment, a narrow one. It appears to proceed upon the premise that, unless a claim relates to an interference with human rights as set out in *ex parte Smith,* the Courts will not examine the issue closely nor "*anxiously*". We consider that this premise is flawed. As we set out above, the Divisional Court was correct to find that there was no extant human rights issue. This does not mean, however, that a court will refrain from considering a matter closely if it raises issues of real importance to individuals. The Courts do not maintain any rigid classification or taxonomy of rights which is then used to govern the intensity of the scrutiny. In recent years the Courts have accepted that the more important the right the greater the care that will be taken by the courts to examine the reasoning behind the challenged decision. This was the approach of the House of Lords in *Bancoult (No 2)* where Lord Hoffmann stated that it did not "*assist*" to classify the right of abode as a "*constitutional right*" but that it was nonetheless correct to describe it as an "*important right*" (see paragraph 45).

154. As is apparent from the decision in *Bugdaycay,* the court is entitled "*to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines*". The approach in *Bugdaycay* is reflected in the judgment of Lord Reed in *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39, [2014] AC 700, at paragraphs 69-70 and Lord Sumption in *R (Lord Carlile of Berriew QC) v SSHD* [2014] UKSC 60, [2015] AC 945, at paragraph 20 where Lord Reed's statement that "… *the intensity [of review] – that is to say, the degree of weight or respect given to the assessment of the primary decision-maker – depends on the context*" was said to cover "… *both the legal context (the nature of the right asserted), and the factual context (the subject matter impugned)*".

155. We also consider that the recognition of a right as "*important*" does not answer the question about the extent to which a Court, in the absence of any applicable statutory duties or statutory limitations on the decision maker, will recognise that the evaluative judgment involved is a matter for the decision maker. This might be most relevant in cases involving national security, foreign relations and allocation of resources, all of which were engaged in this case. This is because the Courts recognise that in such areas the executive may be best placed to undertake such multi-factorial balancing:

see *R (Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6; [2015] 3 All ER 1 at paragraphs [62] and [65]. Nevertheless, it remains the constitutional duty of the court to ensure that the decision is lawful. The fact that the decision is in an area where the decision maker might be best placed to make the assessment is not a bar to a finding of irrationality: compare *R(DSD) v Parole Board* [2018] EWHC 694 (Admin); [2019] QB 285.

156. We confirm that, in any event, we do not consider that the adoption of a formal standard of "*anxious scrutiny*" would have made any difference to the result in the Divisional Court or in this Court. This is because, for the reasons given above, a finding that the standard of review is not technically one subject to "*anxious scrutiny*" does not mean that the Court will not look long and hard at the decision challenged in the case. It is apparent that the Divisional Court looked hard at the decision-making process and the decision in this case.

Anxious scrutiny as applied to the Decision Maker

157. Our conclusion on "*anxious scrutiny*" means that it is not strictly necessary to determine whether that standard applies to the decision maker as well as the Court. As the point was argued, however, we will express our view on it. The Appellants rely upon the statement of Buxton LJ in *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495, [2007] Imm AR 337, which addressed whether further materials amounted to a "*fresh claim*" for the purposes of rule 353 of the Immigration Rules. Rule 353 required the Secretary of State to assess whether further materials were significantly different from the materials relied on in an earlier application to the Secretary of State and, if so, whether the further materials created "*a realistic prospect of success in a further asylum claim*". This meant that the Secretary of State had to consider the approach to be taken by the adjudicator (now the First-Tier Tribunal Judge in the Immigration and Asylum Chamber). It was in this context that Buxton LJ said that "… *since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the appellant's exposure to persecution*." Reference was then made to *Bugdaycay*.

158. In our view Buxton LJ was right in that case to note that "*anxious scrutiny*" was required by the adjudicator and court because of the dicta in *Bugdaycay* and the fact that it was an asylum claim and therefore a decision taken in a human rights context. Further, the judge was right to extend the requirement of anxious scrutiny to the Secretary of State because the Secretary of State was required to assess the prospect of success of the asylum claim before the adjudicator and Courts. We do not consider, however, that Buxton LJ's statement is support for the wider proposition that every decision maker has to apply "*anxious scrutiny*" or some equivalent heightened process of evaluation to any decision made in a human rights context, let alone comply with procedural requirements suggested by Ms Kaufmann QC, such as to list points for and against those with an interest in the decision. Such an approach would lead to an elevation of form over the substance of the decision.

159. Again, this is a narrow point. The principle of anxious scrutiny, and more generally the principle that the greater the intrusion into the rights of individuals the more closely the court will examine the reasoning behind the intrusion, are essentially

descriptions of a judicial process. On the other hand, logically the more important the decision the more care is likely to be required to be taken by the decision maker to produce a rational decision. If a court applies a heightened level of scrutiny to a decision because of its deep importance and impact upon the lives of citizens and finds fault with the decision and remits it to be taken again, it must follow that the decision maker must apply greater care than before to reflect the judgment and its recognition of the importance of the decision. We find it artificial to talk in such a context of the decision maker acting with "*anxious scrutiny*".

160. In any event, in this case the decision was taken at the highest level of Government and involved the Prime Minister, the NSC, the Secretary of State and the FCO. A report was obtained from KPMG. The NSC in March 2015 required further work to be undertaken before the decisions made in March and October 2016 were taken. This was a decision which was, on the evidence, taken with conspicuous care and consideration, even if the process led to a decision which Mr Bancoult and Ms Hoareau consider to be wrong.

161. In conclusion we reject this Ground of Appeal.

Issue III: The rationality of the decision

162. We now turn to the third issue, which involved specific challenges made on the bases that: (1) a right of return should have been considered separately from issues of resettlement; (2) there had been a material misdescription about the feasibility of constructing a runway on certain of the islands; (3) there had been a material misdescription about the deliverability of the financial package; and (4), there had been a material misdescription about the way in which the package was calculated.

163. Ms Kaufmann QC submitted that there were important errors made in the decision-making process. First, it was submitted that there was a failure to address the question of whether the right of return should be dealt with as a free-standing issue. Secondly, it was submitted that the decision makers were misled about whether the Outer Islands were too small to enable the construction of an airport. Thirdly, it was said that there was a mistake about the deliverability of the compensation package in Mauritius, or the failure to take account of the high risk of non-deliverability of the compensation package. Fourthly, it was said that there was a miscalculation of the amount of monies which would be provided to the Chagossians (this latter point was addressed by Mr Jaffey QC) and was not pursued on behalf of Mr Bancoult).

164. Sir James Eadie QC submitted that these claims had been rightly dismissed by the Divisional Court, and that they amounted to factual matters raised and determined at first instance, and that the appellate court should not interfere with the Divisional Court's judgment. He further submitted that the issue of an unsupported return had been considered in the decision-making process, and this case had never been about the formal existence of a permit system. He submitted that the report to the decision makers was accurate because it was not feasible to construct an airport on the Outer Islands and this point was made clear in the reports supplied to the decision makers. There had been no error in calculation because all figures used were estimates to be finalised at a later point in time.

165. The law about the effect of a failure of a decision maker to take into account relevant information, and the law about the effect of a misstatement about fact, was not in dispute. There will sometimes be information which is so relevant that it has to be taken into account by the decision maker: see *R (National Association of Health Stores and another) v Secretary of State for Health and another* [2005] EWCA Civ 154 at paragraphs 62 and 63. Further, a mistake made about a fact might give rise to such unfairness as to be a basis for quashing a decision if it is a mistake as to an existing fact, which was established (in the sense that the fact was uncontentious and objectively verifiable), which mistake was not created by the applicant, and which mistake must have played a material part in the reasoning, see *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044, at paragraph 66.

166. It also relevant to note that this is an appeal by way of review and not re-hearing, see CPR 52.21(1). This Court can only overturn a finding of fact made by the court below if we conclude that it was wrong: see CPR 52.21(3). In proceedings for judicial review the facts are often not in dispute, and they are often adduced to illustrate the context and effect of the decision. Where, however, findings of fact have been made in judicial review proceedings, including evaluative findings about whether mistakes of facts were made, or whether certain facts were material, the approach by an appellate court to reviewing findings of fact in judicial review cases should and does mirror the approach by appellate courts to findings of fact generally. In such cases it is established that appellate courts should be cautious in overturning findings of fact made by first instance judges. This is because first instance judges will have taken into account the whole "*sea of the evidence*" rather than indulged in impermissible "*island hopping*" to parts only of the evidence: compare *Fage v Chobani UK Ltd* [2014] EWCA Civ 5. In this case at first instance the claim proceeded over five full days, whereas the appeal lasted three full days. Further there were 16 open bundles of documents and two closed bundles of documents before the Divisional Court, whereas the parties on appeal had managed to reduce the documents to one core bundle and two supplementary appeal bundles, and small bundles of closed materials.

167. It is for these reasons that Judges hearing appeals on facts only interfere if a finding of fact was made which had no basis in the evidence, or where there was a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence so that the decision could not reasonably be explained or justified. This approach applies even where, as here, there was no live witness evidence at first instance and the proceedings were by way of judicial review: see *R (BT) v HM Treasury* [2020] EWCA Civ 1, [2020] Pens LR 12, at paragraphs 45-47 adopting the approach set out in *Smech Properties Ltd v Runnymede Borough Council* [2016] EWCA Civ 42 at paragraph 27. The test in *Smech* was summarised as being "*whether the first instance judge had legitimate and proper grounds for reaching the decision*".

Consideration of right of return

168. We are satisfied that the Secretary of State was entitled to consider the right of resettlement in the way he did. First, it was up to the Secretary of State to approach the decisions to be made in the order that was chosen. There was no legal duty to approach the decision in any set way or to consider revoking the 2004 Orders as a freestanding issue.

169. Secondly, the policy review for the NSC meeting in March 2015, attached to the email dated 27 February 2015, shows that one option highlighted was "*no resettlement but right of return (not residence)" before considering "resettlement"*". The review noted on page 2 under A "*If ministers decide against resettlement, we could implement Option B: there are range of potential measures to mitigate discontent in the Chagossian community. These range from a straightforward lifting of the ban on the right of return with more facilitated visits but not residence, through more funding support for community projects …"*. This shows that lifting the ban on the right to return was specifically highlighted as a possibility and was considered in the process leading to the decision.

170. Finally, removing the need to obtain a permit would not have altered anything on the ground, given that the Chagos Islands remained Crown land and those landing would have had no legal right to enter onto the land, regardless of the need for a permit. The only practical way to resettle the islands would be with Government support. We consider that the Divisional Court was right to say at paragraph [208] of its judgment that "*the risks of setting up a community without proper economic opportunities, for example, are obvious and would all fall within governmental responsibility*". A right of return without any Government support would still engage Government responsibilities.

The runway

171. The specific complaint is made that the Permanent Under Secretary of State at the FCO was recorded in the minutes of the NSC meeting in March 2016 as saying: "*Option B was resettlement on the Outer Islands excluding Diego Garcia. These islands were a five-hour boat trip from the US airbase. The largest was the size of Hyde Park which ruled out building a landing strip and the highest point was only 6 feet above sea level*." Ms Kaufmann QC placed specific reliance on the WhiteBridge report which had referred to "*Possible Runway Options*" and set out diagrams of the Outer Islands with superimposed runways showing that it was physically possible to fit a runway on to an Outer Island. The WhiteBridge report stated:

> "The maps overleaf plot the approximate lengths of a selected number of islands within Peros Banhos and Salomon Islands, such islands perhaps offering sufficient length and appropriate topography for a landing strip that could be serviced by either longer range jets or short haul propeller aircraft.
>
> The table below provides a quick summary of our high-level assessment of the various options.
>
> Clearly all of the lengths and assessments summarised below would need to be verified by appropriately skilled and technically competent specialists in the aviation sector."

172. It was submitted by Ms Kaufmann that the PUS had made a fundamental mistake of fact about whether building a runway in the Outer Islands was possible because he had effectively said that the largest of the islands was too small to build a runway, but the WhiteBridge report had shown that a runway would fit on to the island. The Divisional Court set out the relevant background about the runway in paragraphs 214

to 243 of its judgment and found that there were no material misdescriptions. This was because the Divisional Court made a specific finding at paragraph 227 that "*when seen in context, what was being represented [by the PUS] was that in real terms the building of an airstrip on the Outer Islands was not feasible*." We were not shown any material to undermine the legitimacy of the Divisional Court's assessment. This is sufficient to dispose of this ground of appeal because there is no basis to set aside their finding of fact.

173. We also note, however, that, while WhiteBridge did show that a runway could be physically superimposed on islands, WhiteBridge never asserted that it could be built. They noted that "*Clearly all of the lengths and assessments summarised below would need to be verified by appropriately skilled and technically competent specialists in the aviation sector*". This was not a particularly surprising statement given that WhiteBridge were not engineering consultants and had not contacted any such consultants; their brief as tourism specialists had been to consider the opportunities for high end tourism to the Chagos Islands. The PUS was effectively saying that the islands were too small for a runway. In this particular respect, he was entitled to come to this view. This is because the KPMG report ruled out resettlement only on the Outer Islands saying, "*in theory an option could be developed which was based only on outer island settlement but this has been ruled out on environmental and practical grounds*", and further details and analysis were set out in section 5 of the KPMG report.

The deliverability and calculation of the support package

174. It is necessary to set out some further details to consider this challenge. In March 2016 the National Security Adviser had identified a figure of £55 million as the cost of the support package in slides produced for the NSC March 2016 meeting. It was stated that this would be eligible for Official Development Assistance ("*ODA*"). At the meeting on 15 March 2016 it was agreed that the package of assistance would be explored.

175. A meeting was then set up with a Minister who asked where the figure of £55 million had come from. He was told that it was based on a cursory analysis provided by the diplomatic missions to Mauritius and Seychelles, and he asked for a proper needs assessment to build up a picture of what was needed, how it might be implemented and what it would cost. Subsequent communications confirmed that the work should aim to produce a figure.

176. On 28 April 2016 DfID officials produced figures showing an allocation of £20.5 million for Mauritius and £6.6 million for Seychelles (a total of £27.1 million). The ODA component was £27.1 million and a separate package from the FCO was shown at £19 million. Following this DfID realised that Seychelles might not be eligible for ODA beyond 2017 because of their national wealth and Gross Domestic Product. DfID was allowed to reduce its budget contribution from £27.1 million to £21 million at a Cabinet Office meeting the week before as recorded in an email dated 30 August 2016.

177. On 12 August the British High Commissioner in Mauritius had noted that the support package in Mauritius would need to be administered by Mauritius, that the Commissioner could not see how "*we could get the Mauritian govt to do this*", and

that it was therefore not feasible to separate the support package from the wider sovereignty dispute.

178. On 25 August 2016 the Prime Minister was told that the proposed joint FCO-DfID development package, now reduced from £55 million to £40 million, was based on a "*current assessment of Chagossians' needs*". The Prime Minister was given details of the financial package based on the best assessment of the Chagossians' needs over a 10-year period. New healthcare facilities, private tuition places, vocational training places and funding for degrees would be £21 million over 10 years. Heritage visits would be £5.5 million; restoration of cultural sites would be £4.2 million; scientific conservation projects, with volunteering opportunities for the Chagossians would be £4 million; and a training package for UK Chagossians would be £4.6 million (a total of £39.3 million). It was noted that this was a reduction of the £55 million package agreed in March 2016. The main risk to the delivery of the package would be the consent and co-operation of the Mauritian government. In this respect in May 2016 the Mauritian Prime Minister had announced that, unless the UK provided a date to return sovereignty over the BIOT to Mauritius, he would seek referral by the UN General Assembly to the ICJ.

179. In a letter from the Secretary of State to the Prime Minister in October 2016 the Secretary of State referred to "*a support package which – following further policy work – is now suggested to amount to around £40 million*". It was stated that officials would liaise with Chagossian communities and work closely with the Governments of Mauritius and Seychelles to develop cost-effective programmes that would make big improvements to the life chances of Chagossians most in need. A final briefing to the Prime Minister dated 9 November 2016 noted that the co-operation of the Governments of Mauritius and Seychelles would be required to deliver the financial support package.

180. The main complaints of Ms Kaufmann QC and Mr Jaffey QC on appeal about the financial package, as they had been to the Divisional Court, are that Ministers were not fairly warned about the risks of non-delivery, and that having carried out a needs assessment showing a £6.6 million financial need in Seychelles, the sum of £6.6 million was then removed without explanation to the Ministers, and the Prime Minister was wrongly told that the financial package was based on a current assessment of Chagossians' needs.

181. As to the complaint about non-deliverability this was addressed from paragraph 244 of the judgment of the Divisional Court. The Divisional Court found at paragraph 251 of its judgment that "*the Government was well aware of the risks to the delivery of the support package through non-cooperation from the Mauritian government*". There is nothing to suggest that this finding was wrong. Indeed, it was clearly founded on the documents which highlighted the need for the cooperation of the Mauritian government in the delivery of part of the support package.

182. As to the complaint about the missing £6.6 million the Divisional Court carried out a full evaluation of the relevant documents from paragraph 303 of its judgment and addressed the specific complaint about the reduction of £6.6 million from the figure. It held in paragraph 312 of its judgment that the figure of £40 million was always approximate and indicative only. It was never a finalised amount as appeared from the documents. In paragraph 318 the Divisional Court found that Ministers were not

materially misled and specifically noted that there had never been a suggestion that the Chagossians in the Seychelles would be excluded from support. We can see no basis from any of the materials which are before us to show that the conclusion of the Divisional Court was wrong. This is because the figure of £40 million was to cover all of the Chagossians, including those in Seychelles, and was understood to be approximate. This was part proved by the DfID submission to Ministers on 24 August 2016 in which it was noted that DfID was preparing the outline of a combined DfID/FCO package. The briefing to the Prime Minister on which so much reliance was placed was one document in the whole process, which concluded with a write-round before the final decision. If there had previously been any misstatement, it was put right before the final decision because the final write-round referred accurately to "*a support package which – following further policy work – is now suggested to amount to around £40 million*". The Divisional Court was entitled, and right, to consider that there was no material misstatement which justified a review of the decision making.

183. For the reasons set out above we find that the challenges based on misstatements about the financial support package do not succeed.

Conclusion

184. For the detailed reasons set out above the appeal is dismissed.