29 June 2016 - Press Statement from Clifford Chance LLP and Doughty Street Chambers

R (on the application of Bancoult (No 2)) (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)

Supreme Court's Case Summary for the 22 June 2015 hearing

On 16th April 1971, the British Indian Ocean Territory (BIOT) Commissioner enacted the Immigration Ordinance 1971, No. 1 of 1971. Section 4 of the Ordinance made it unlawful for someone to be in BIOT without a permit, and the Ordinance also empowered the Commissioner to make an order directing that person's removal from BIOT. In 2000 the appellant obtained a High Court order quashing s.4 of the 1971 Immigration Ordinance. The Government did not appeal but announced that work on Phase 2 of a feasibility study into the resettlement of the former inhabitants would continue. The report of this stage of the study was published in 2002, concluding that the costs of long term inhabitation of the outer islands would be prohibitive and life there precarious. In 2004 Her Majesty by Order in Council made the BIOT Constitution Order and the BIOT Immigration Order which would restore full immigration control as a result of the feasibility study and of the need for effective use of BIOT for defence purposes. The appellant's challenge to the 2004 Orders was dismissed by a majority of 3 to 2 in the House of Lords in 2008. The appellant has subsequently been provided with documents relating to the 2002 feasibility study which he contends were not disclosed in the proceedings in breach of the respondent's duty of candour in public law proceedings, and which he alleges would have been highly likely to have affected the outcome of the appeal. The appellant then decided to commission a further expert report on the reliability of the feasibility study. The appellant is applying for an order setting aside the judgment of the House of Lords and, if granted, for permission to rely on fresh evidence at the re-hearing of the appeal.

Today's Judgment

Today, the Supreme Court has found (by a majority of 3 to 2)[1] that a 2008 ruling by the House of Lords that upheld a UK Government ban, made in 2004, on the Chagossian islanders returning to their homeland should not be re-opened, despite a failure by the Government to disclose relevant material during the course of the original case. However, the Supreme Court sent a clear signal to the Government that, in light of current knowledge that the islands could be resettled, the ban needed to be reconsidered.

Mr Bancoult's separate application for permission to appeal to the Supreme Court in relation to his ongoing challenge to the lawfulness of the Government's decision in 2010 to create a Marine Protected Area in BIOT was granted by the Supreme Court (this case is called *R (on the application of Bancoult (No 3)) v Secretary of State for Foreign and Commonwealth Affairs* (UKSC 2015/0022)). There will therefore be a full appeal hearing before the Supreme Court on this separate case, which will likely be held in 2017.

Background to Mr Bancoult's Application

The Chagos Islands, also known as British Indian Ocean Territory or BIOT, are a group of small islands in the Indian Ocean. They were originally part of the British colony of Mauritius but became

[1] Lords Mance, Neuberger and Clarke forming the majority, and Lord Kerr and Lady Hale the minority.

detached from the country before Mauritius became independent in 1968.[2] In the late 1960s the largest island, Diego Garcia, was leased by the British government to the US for use as a military base. To clear the area for the base, the British government removed approximately 1,500 islanders from their homes. Most were resettled in slums in Mauritius and the Seychelles and a small number subsequently moved to the United Kingdom. A ban on the Chagossians returning to the islands was initially imposed by the British government in 1971, and after a short suspension between 2000-2004, re-imposed in 2004 by an exercise of the Crown's royal prerogative powers (without consideration in Parliament).

In its judgment today, the Court again condemned the original removal of the Chagossians from their homeland as done "with 'a callous disregard of their interests'".[3] As Lord Kerr put it, "[p]eople were told that they could not go back and live where they and their ancestors had lived. Moreover, that denial took place against a background that they had been evacuated from the islands in circumstances which were plainly unjustified".[4]

In 2008, the House of Lords considered (along with challenges on other grounds) whether it was rational for the Government to impose the ban denying the Chagossians their fundamental Right of Abode, i.e. the right to live, or even set foot on, the islands where they were born and from which "they were effectively forced".[5] The House of Lords (also by a majority of 3 to 2) held that it was rational.

However, the Government had failed to disclose a number of documents relevant to phase 2B of the feasibility study in 2008, which the House of Lords did not have the benefit of considering in its decision. The documents, disclosed in 2012, comprise (in summary): 1) a memorandum of a meeting in 2002 in which the Government's hopes for a negative outcome of the feasibility study were made clear to the consultants carrying out the feasibility study; 2) the Government's scientific adviser's critique of the draft Phase 2B report; 3) the Government's scientific adviser's endorsement of some of criticism of the final report made by an expert instructed by Mr Bancoult; and 4) the draft Phase 2B report which (according to Lord Kerr in the minority) "when contrasted with the final report, illustrated the distinct change in emphasis in the prediction of climate changes, especially since these bore directly on the question of the feasibility of resettlement".[6] The majority took a different view of the extent and importance of the changes between the draft and the final Phase 2B report.

Supreme Court's Decision

The Court was unanimous in finding that the failure to disclose the relevant material was a breach of the duty of candour, a disclosure obligation held by public authorities in public law proceedings. In the words of Lord Mance, writing for the majority, "the failures in this regard were and are highly regrettable".[7] Lord Kerr described "the failure to locate the documents throughout the proceedings

[2] The circumstances surrounding this detachment are the subject of a decision by a UN arbitral tribunal that the UK breached international law in its creation of a marine protected area without consulting Mauritius.
[3] Para 10 (Lord Mance)
[4] Para 166 (Lord Kerr). See also para 89 (Lord Kerr) ("[i]t is now beyond question that their interests had not been considered by the British authorities to any extent"); para 117 (Lord Kerr) ("it is impossible to defend the failure to ensure that the Chagossians were adequately housed and provided for in their new surroundings").
[5] Para 162 (Lord Kerr)
[6] Para 164 (Lord Kerr)
[7] Para 24

before the Divisional Court, the Court of Appeal and the House of Lords [as]… plainly reprehensible".[8]

The Court also held unanimously that it has the power to reopen its own judgments (and those of the House of Lords).[9] However, no precise threshold for the exercise of this discretion in the case of non-disclosure was established; in particular, Lord Mance for the majority declined to specify whether the threshold for exercising this power required that the non-disclosed documents "may well have" lead to a different outcome or "would have been likely" to do so.[10]

Having established its jurisdiction in this matter, the Court went on to find (by one vote) that disclosure of the documents could not have affected the outcome of the 2008 decision that the ban was rational and therefore lawful.[11] The majority dismissed criticism of the Government's role in the feasibility study process and the relevance of amendments made to the draft to the House of Lords' decision.[12] Lord Kerr and Lady Hale (the minority) disagreed, Lord Kerr stating that "it is quite obvious that [the documents] might have made a difference and we certainly cannot be satisfied that they would not. They showed that the science of the report had been severely criticised both by the government's own expert and by an expert on behalf of the islanders; it matters not in what direction those criticisms had tended; what they did was cast doubt upon the authority of the report. They showed that the government had made it plain to the consultants what it wanted the conclusions to be. They showed that important changes had been made to the conclusion. They showed that the central findings about climate change had been changed. They showed that the islands were not in a cyclone belt."

The majority also viewed the existence of a new feasibility study (concluded in 2015) as an important factor in reaching their decision.[13] Lord Kerr did not agree that this issue could be properly taken into account.[14] The Court therefore ruled by a narrow majority not to exercise its jurisdiction to reopen the original ruling on the information available to the House of Lords in 2008.

Renewed Pressure on the Denial of the Chagossians' Right of Abode

The Court sent a strong signal that a decision by the Government today, in light of all of the new evidence available, to maintain the ban on Chagossians living or visiting their homeland may not be lawful and that the ban should be revisited by the Government.

Lord Mance, writing for the majority, pointed out that a new study "finds that… taking into account (for the first time) the possibility of resettlement on Diego Garcia [the island containing the US military base] itself, there would be scope for supported resettlement" by the Chagossian community on the islands and that, as a result, "logically the constitutional ban [on their return] needs to be revisited".[15] Lord Mance went on to specify that, if the government still does not permit and support resettlement in light of the study, "then Mr Bancoult will be able, in principle, to apply to challenge

[8] Para 185 (Lord Kerr)
[9] Para 5 (Lord Mance)
[10] Para 63 (Lord Mance). At paragraphs 159-160 Lord Kerr for the minority stated that "a real possibility" test applied and found that there were potential exceptions, for example where the non-disclosing party's behaviour was so egregious as to require a reopening of the case to demonstrate that due process had been followed.
[11] See para 65 (Lord Mance)
[12] Para 42, 59 and 65 (Lord Mance)
[13] Para 72 (Lord Mance), Para 78 (Lord Clarke).
[14] Para 178 (Lord Kerr)
[15] Para 72 (Lord Mance).

the government's refusal to permit and/or support resettlement … by way of judicial review".[16] For the same reasons, Lord Clarke stated that today's judgment "is not the end of the road" for the Chagossians.[17]

In the light of this judgment, Mr Bancoult will invite the Government immediately to remove the unjustified ban on the Chagossians' fundamental Right of Abode in their homeland. Our client will also renew his call for the Government to end the delay in taking the long-awaited steps to resettle the islands. Despite the flawed finding by the initial feasibility study that resettlement was not feasible, resettlement has been shown in the 2014-2015 study to be fundamentally feasible and is fervently desired by large numbers of surviving Chagossians, as the community's response to the recent consultation demonstrates.[18]

[16] Para 75 (Lord Mance)
[17] Para 78 (Lord Clarke)
[18] FCO: BIOT Resettlement Policy Review: Summary of Responses to Public Consultation (21 January 2016) (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496877/Summary_of_BIOT_Public_Consultation_Responses.pdf)