Trinity Term
[2016] UKSC 35
On appeal from: [2008] UKHL 61

JUDGMENT

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

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Mance
Lord Kerr
Lord Clarke

JUDGMENT GIVEN ON

29 June 2016

Heard on 22 June 2015

Appellant
Edward Fitzgerald QC
Paul Harris SC
Amal Clooney
(Instructed by Clifford Chance LLP)

Respondent
Steven Kovats QC
Kieron Beal QC
Julian Blake
(Instructed by The Government Legal Department)

LORD MANCE: (with whom Lord Neuberger and Lord Clarke agree)

Introduction

1. In 2008 Lord Bingham of Cornhill and I were the dissenting minority when the majority in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] AC 453 ("*Bancoult No 2*") allowed the Secretary of State's appeal and upheld the validity of section 9 of the British Indian Ocean Territory (Constitution) Order 2004 ("the 2004 Constitution Order"). Section 9 provides that, since the British Indian Ocean Territory ("BIOT") was set aside for defence purposes, no person shall have any right of abode there (section 9(1)) and further that no person shall be entitled to enter or be present there except as authorised by the Order itself or any other law.

2. I have not changed my opinion as to what would have been the appropriate outcome of the appeal to the House of Lords. But that is not the issue before us. The issue before us is whether the majority decision should be set aside, not on the grounds that it was wrong in law, but on grounds that the Secretary of State failed, in breach of his duty of candour in public law proceedings, to disclose relevant documents containing information which it is said would have been likely to have affected the factual basis on which the House proceeded. That was that the Secretary of State, when enacting section 9, could justifiably rely on the stage 2B report prepared by Posford Haskoning Ltd ("Posford") for its conclusion that any long-term resettlement on the outlying Chagos Islands was infeasible, other than at prohibitive cost. In addressing the issue now before us, we are bound by the legal reasoning which led the majority to its conclusion - indeed, strictly bound without possibility of recourse to the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, since this is an application in the same proceedings.

3. The relevant documents are conveniently described as "the Rashid documents", after Ms Rashid, the deponent from the Treasury Solicitor's Department who by witness statement dated 1 May 2012 first produced them. She did this without commentary in Administrative Court proceedings in *Bancoult (No 3)*, regarding the declaration of a Maritime Protected Zone ("MPA") in the high seas around BIOT. Ms Rashid made clear that she had no personal knowledge of events leading to the earlier failure to disclose. That the failure to disclose the Rashid documents in the *Bancoult No 2* proceedings was culpable is not, and could not be, disputed. On the other hand, it is accepted that it was not intentional and did not involve any bad faith. I shall address the circumstances, the contents of the documents and their significance in due course.

4. In addition to relying on the alleged breach of candour, Mr Bancoult also seeks to adduce four heads of new material, put forward as constituting evidence unavailable at the time of the House of Lords decision. All are said to go to the reliability of the stage 2B report, to undermine or invalidate the basis on which the House proceeded and to constitute an independent justification for re-opening the decision. I will revert to this ground of application later in this judgment, and focus in the meanwhile on the alleged breach of candour.

The jurisdiction to set aside in cases of unfair procedure and fresh evidence

5. *Unfair procedure:* There is no doubt that the Supreme Court has inherent jurisdiction to correct any injustice caused by an earlier judgment of itself or its predecessor, the House of Lords, though it is also clear that it "will not re-open any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure" and that "there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong": *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, per Lord Browne-Wilkinson. One party's failure to disclose relevant documentary information is clearly capable of subjecting the other party to an unfair procedure.

6. However, a decision to re-open an appeal also has important evaluative as well as discretionary aspects. The present applicant was, in its application to set aside (paras 109-130), content to express the evaluative aspect in terms used in an analogous context in the Court of Appeal in *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528 and followed by the Privy Council in *Bain v The Queen* [2009] UKPC 4. As the Privy Council said in the latter case at para 6, quoting Lord Woolf CJ at p 547 in the former case:

> "What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy."

7. *Fresh evidence:* That the jurisdiction to set aside also extends to situations where fresh evidence is discovered after a judgment has been rendered which is not susceptible of appeal is also recognised in Court of Appeal authority: *In re U* [2005] EWCA Civ 52; [2005] 1 WLR 2398 *Feakins v Department of Environment, Food and Rural Affairs* [2006] EWCA Civ 699. The latter was a case where it was discovered that a DEFRA official had provided materially incorrect information to the court in a witness statement. In each case, however, it was emphasised that it was not sufficient simply to rely on the principles in *Ladd v Marshall* [1954] 1 WLR

1489, which apply when fresh evidence is sought to be adduced for or on an appeal. Rather, as it was put in *In re U*, para 22,

> "… it must at least be shown, not merely that the fresh evidence demonstrates a real possibility that an erroneous result was arrived at in the earlier proceedings …, but that there exists a powerful probability that such a result *has in fact* been perpetrated."

This statement was quoted from and accepted in the application to set aside, para 121. Further, as to the discretionary aspect, the court noted in *Feakins*:

> "The court [in *In re U*] held that, although that was a necessary condition, it was not sufficient; the court would have also to consider the extent to which the complaining party was author of his own misfortune and that there was no alternative remedy."

8. In oral submissions, Mr Edward Fitzgerald QC did not directly challenge the above principles as stated in *In re U*, stating in his reply that there was nothing between the parties on jurisdiction. However, in his written speaking note, directed specifically to jurisdiction in response to the court's invitation to focus on this, the matter was put differently, and as follows (para 2.4(iv)):

> "As to whether there would now be a different outcome, it is submitted that it is only necessary to show at this threshold stage that there <u>may well be</u> a different outcome on a reconsideration."

See also, eg the submission (para 8.8) that Dr Shepherd "may well have had an 'axe to grind'". For my part, particularly where, as here, a party has failed to disclose the documents which it is now submitted constituted important evidence, I prefer to leave open whether a test of "probability" or, in the context of fresh evidence, "powerful probability" is too inflexible to cater for all possibilities. The egregiousness of a procedural breach and/or the difficulty of assessing the consequences of such a breach or of the significance of fresh evidence might, it seems to me, in some situations militate in favour of a slightly lower test, perhaps even as low as (though I do not decide this) whether the breach "may well have had" a decisive effect of the outcome of the previous decision. I shall consider the present application in that light also, although I do not in the event consider that the outcome of this application depends at any point on the test applied.

The course of events leading to the present application

9. The regrettable facts lying behind these and other proceedings such as *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* and *(No 3)* were outlined by Lord Hoffmann in paras 1-30 of his judgment in *Bancoult No 2*, in terms which both Lord Bingham and I accepted with only a few (presently immaterial) qualifications: see paras 68 and 137-139. BIOT consists of the Chagos Islands, the largest being Diego Garcia. In 1966 the United Kingdom agreed in principle to make BIOT available to the United States for at least 50 years for defence purposes, and with effect from July 1971 the United States took over Diego Garcia as a base. At the same time, by the Immigration Ordinance 1971, the Commissioner of BIOT prohibited any person from entering or being in BIOT without a permit issued by an immigration officer.

10. Mr Bancoult represents Chagossians (or Ilois), indigenous inhabitants of BIOT, whose removal and resettlement the United Kingdom procured between 1968 and 1973 by various non-forceful means with "a callous disregard of their interests" (Lord Hoffmann, para 10). Compensation, initially in the 1970s of £650,000 and then in 1982 of a further £4m in a trust fund set up under a Mauritian statute, was paid and accepted in satisfaction of all claims by most (some 1,340) Chagossians, though a few refused to sign. A challenge to this settlement was later made but struck out as an abuse of process by Ouseley J in *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB), leave to appeal being refused by the Court of Appeal [2004] EWCA Civ 997. Ouseley J's judgment made clear that there was no further economic obligation on the United Kingdom to fund resettlement in BIOT.

11. A challenge to the Immigration Ordinance 1971 was on the other hand successful. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2001] QB 1067, the Divisional Court decided that the Commissioner for BIOT's power to legislate for the "peace, order and good government" of BIOT did not include a power to expel its inhabitants. The then Foreign Secretary, Mr Robin Cook, stated publicly that he accepted this decision, and revoked the 1971 Ordinance by the Immigration Ordinance 2000. This confined the restriction on entry or presence to persons not British Dependent Territories citizens by virtue of their connection with BIOT. Mr Cook also announced that a recently completed feasibility study into the prospects of resettling the Ilois would now proceed to a second stage. This was originally intended to involve two phases, the first (Phase 2A) relating to hydrological monitoring, the second (Phase 2B) to a more general examination, prior to a cost-benefit analysis (Phase 3). The second stage reports were undertaken by Posford as project managers.

12. In the event, the first two phases were amalgamated, leading to a report entitled stage 2B published in July 2002. Its "General Conclusions", para 1.11, stated:

> "To conclude, whilst it may be feasible to resettle the islands in the short-term, the costs of maintaining long-term inhabitation are likely to be prohibitive. Even in the short-term, natural events such as periodic flooding from storms and seismic activity are likely to make life difficult for a resettled population."

13. The Secretary of State in this light decided not to proceed with Phase 3, terminated consideration of re-settlement and on 10 June 2004 introduced a new prohibition on residence in BIOT by section 9 of the 2004 Constitution Order, to the effect set out in para 1 above. A new Immigration Order 2004 was at the same time also enacted, but needs no separate treatment here. The present proceedings were begun for judicial review to quash section 9 of the Constitution Order. They succeeded before the Divisional Court and Court of Appeal, but failed by a majority of three to two before the House of Lords.

14. All members of the House accepted that the 2004 Constitution Order was susceptible to judicial review on ordinary principles of legality, rationality and procedural impropriety. But the majority (Lord Hoffmann, Lord Rodger of Earlsferry and Lord Carswell) held: that, although the Chagossians had had important common law rights of abode, they were not so fundamental that they could not be removed by section 9; that the Secretary of State's decision to remove such rights, to reimpose immigration control and to prevent resettlement was in the circumstances neither unreasonable nor an abuse of power; and that the previous Foreign Secretary's statements in 2000 (para 11 above) did not amount to a clear and unambiguous promise that the Chagossians would be permitted to return and settle permanently creating any legitimate expectation on which they could now rely. Lord Bingham and I took the opposite view on these points, and would have dismissed the Secretary of State's appeal.

15. During the proceedings no challenge was made or suggested to the stage 2B report or its findings. The Secretary of State relied on its findings in para 106 of his skeleton argument before the Administrative Court dated 25 November 2004, stating:

> "… in any event, the defendant submits that it cannot conceivably be said to be irrational for steps to be taken to ensure that the BlOT is not resettled in circumstances where no

> viable long-term resettlement can be supported; where the costs of resettlement would be extensive, prohibitively expensive and potentially open-ended; and where the UK's defence interests and treaty obligations strongly militate against permitting resettlement of the archipelago."

Sir Sydney Kentridge QC expressly disavowed any challenge to the report's conclusions when opening the Chagossian's case before the Divisional Court on 6 December 2005; and amended particulars put before that Court on 13 December 2005 on the issue of irrationality likewise made no such challenge.

16. Before the House of Lords the stage 2B report and its findings were equally uncontentious. All members of the House proceeded on that basis. The argument on behalf of the Chagossians was throughout that the findings did not justify the making of the 2004 Constitution Order. Lord Bingham and I accepted that argument, but the majority rejected it and, to differing extents, deployed the relevant findings in their reasoning. Lord Hoffmann at para 53 said this:

> "53. … I think it is very important that in deciding whether a measure affects fundamental rights or has profoundly intrusive effects, one should consider what those rights and effects actually are. If we were in 1968 and concerned with a proposal to remove the Chagossians from their islands with little or no provision for their future, that would indeed be a profoundly intrusive measure affecting their fundamental rights. But that was many years ago, the deed has been done, the wrong confessed, compensation agreed and paid. The way of life the Chagossians led has been irreparably destroyed. *The practicalities of today are that they would be unable to exercise any right to live in the outer islands without financial support which the British government is unwilling to provide and which does not appear to be forthcoming from any other source.* During the four years that the Immigration Ordinance 2000 was in force, nothing happened. No one went to live on the islands. Thus their right of abode is, as I said earlier, purely symbolic. If it is exercised by setting up some camp on the islands, that will be a symbol, a gesture, aimed at putting pressure on the government. The whole of this litigation is, as I said in *R v Jones (Margaret)* [2007] 1 AC 136, 177, the continuation of protest by other means. No one denies the importance of the right to protest, but when one considers the rights in issue in this case, which have to be weighed in the balance against the defence and diplomatic interests of the state, it should be seen for what it is, as a right to protest in a particular way and not as

a right to the security of one's home or to live in one's homeland. It is of course true that a person does not lose a right because it becomes difficult to exercise or because he will gain no real advantage by doing so. But when a legislative body is considering a change in the law which will deprive him of that right, it cannot be irrational or unfair to consider the practical consequences of doing so. Indeed, it would be irrational not to." (italics added for emphasis)

17. Lord Rodger at paras 110-114 said:

"110. Section 9 of the Constitution Order removes any right of abode on the Chagos Archipelago which the claimant or anyone else may have had. It is a stark provision. But the Secretary of State's decision to have it enacted and the effect of that decision have to be judged against the circumstances at the time it was taken. No-one was then actually living on the outer islands and, even though the islanders had enjoyed a right to return since November 2000, none of them had done so. They were instead 'seeking support from the UK and US governments to financially assist their return or alternatively to provide compensation': *Feasibility Study Phase 2B*, Executive Summary, para 1.1. *More importantly, there was no prospect that anyone would be able to live on the outer islands, except on a subsistence basis, in the foreseeable future: Feasibility Study Phase 2B, Executive Summary, para 1.11. Sir Sydney did not dispute this, but contended that it was irrelevant.* In other words, the position was just the same as if people had actually been living on the islands when the Orders were made. I am unable to accept that submission. The impact of the legislation on the people concerned would be very different in the two situations. In my view, in reviewing the Secretary of State's decision to remove the right of abode, it is relevant that there was actually no prospect of the Chagossians being able to live on the outer islands in the foreseeable future. The government accepts, of course, that they can apply for permits to visit the islands and that an unreasonable refusal could be judicially reviewed. Such visits have taken place in the past.

111. Against that background, can it be said that no reasonable Secretary of State could have decided to have section 9 enacted?

112. On 15 June 2004 a junior minister, Mr Rammell, made a written statement to Parliament. His good faith has not been impugned by the respondent. The statement shows that, in deciding to legislate to prevent people resettling on the outer islands, the government took into account the fact that the economic conditions and infrastructure which had once supported the way of life of the Chagossians had ceased to exist. Something new would have to be devised. *The advice was that the cost of providing the necessary support for permanent resettlement was likely to be prohibitive and that natural events were likely to make life difficult for any resettled population. Human interference within the atolls was likely to exacerbate stress on the marine and terrestrial environment and would accelerate the effects of global warming. Flooding would be likely to become more frequent and would threaten the infrastructure and the freshwater aquifers and agricultural production. Severe events might even threaten life. The minister recorded that, for these reasons, the government had decided to legislate to prevent resettlement.* Although he made no mention of it, the decision to legislate and to introduce immigration controls at that particular time appears to have been prompted by the prospect of protesters attempting to land on the islands. In addition, Mr Rammell said that restoration of full immigration control over the entire territory was necessary to ensure and maintain the availability and effective use of the territory for defence purposes. He referred to recent developments in the international security climate since November 2000 when such controls had been removed.

113. *The ministerial statement indicates that a decision to legislate was taken on the basis of the experts' (second) report on the difficulties and dangers of resettling the islands, these difficulties and dangers being dangers and difficulties which would affect the Chagossians themselves, if they were to try to live on the outer islands. Given the terms of that report alone, it could not, in my view, be said that no reasonable government would have decided to legislate to prevent resettlement. In particular, the advice that the cost of any permanent resettlement would be "prohibitive" was an entirely legitimate factor for the government, which is responsible for the way that tax revenues are spent, to take into account.* In addition, the government had regard to defence considerations, the views of its close ally, the United States, and the changed security situation after 9/11. These additional factors reinforce the view

> that the decision to legislate was neither unreasonable nor irrational.
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> 114. Of course, the decision was adverse to the claim of the Chagossians to return to settle on the outer islands. But that does not mean that their interests had been ignored: a realistic assessment of the long-term position of any potential Chagossian settlers on the outer islands was central to the expert report on which the government relied. In addition, the government considered the overall interests of the United Kingdom. It was entitled to do so. … In the absence of any relevant legal criteria, judges are not well placed to second-guess the balance struck by ministers on such a matter." (italics added)

18. Lord Carswell said (para 120) that he agreed "with very little qualification" with the reasoning of Lord Hoffmann and Lord Rodger, but his specific reasoning focused on the lack of long term feasibility. He said that the Chagossians' expressed wish to return to their homeland was:

> "put on an abstract basis by their counsel, for *it is quite clear that for them to resettle in the islands is wholly impracticable without very substantial and disproportionate expenditure. They are not in a position to meet such a cost.* It could only be shouldered by the British government, which has made it clear that it is willing to permit and fund from time to time short visits to the outlying islands, but not to support a large-scale permanent resettlement. One might ask the question why this campaign is being pursued, for the Chagossians already can pay visits and there is no realistic prospect of resettlement unless it is funded for them at huge expense. I do not find it necessary to seek an answer to that question, but the practical difficulties in the way of resettlement are in my view relevant to the rationality of the government's decision to make the 2004 Orders in Council." (italics added)

19. On the present application, Mr Bancoult submits that, had the Rashid documents been available prior to the hearing before the Divisional Court, the Court of Appeal or the House of Lords, they would have led to a challenge being mounted to stage 2B report, the conclusions drawn in that report would have been discredited, and the majority reasoning in the above extracts would have been impossible. This brings me to a consideration of the Rashid documents.

The Rashid documents:

(a) Circumstances of late disclosure

20. By letter dated 5 December 2005 disclosure had been made on behalf of the Secretary of State to Sheridans, solicitors acting for Mr Bancoult, of a copy letter dated 23 May 2002 sent by Mr Charles Hamilton of BIOT to Ms Alex Holland, the "senior environmental scientist" who was Posford's project manager. This raised questions and made comments on a draft stage 2B report. Between November 2005 and February 2006, requests were made on behalf of Mr Bancoult for disclosure of this draft report as well as any draft of the earlier feasibility study. The Treasury Solicitor, while replying that these requests did not go to any issue in *Bancoult No 2*, made searches, but was in the event only able to locate a draft feasibility study which was disclosed in early December 2005.

21. By letter dated 13 January 2006 (E1472) Mr Bancoult's solicitors, Sheridans, questioned, in relation to the stage 2B report, whether there had been "official input into the work of consultants which undermines its authority". The Treasury Solicitor responded that this was an "extremely serious" allegation and needed to be particularised. It was not particularised and, as stated, no challenge to the stage 2B report was then made. A further allegation that, in the absence of the draft stage 2B report, the General Conclusions must be assumed not to be the unguided advice of independent consultants was made by note dated 13 March 2009. On 7 October 2010 an email dated 29 May 2002 sent by Mr Charles Hamilton to Ms Holland advising that the final draft omit development scenarios (advice not in fact followed: para 40 below) was disclosed on behalf of the Secretary of State in the context of the issues arising in *Bancoult (No 3)*. By letter dated 21 December 2010 Clifford Chance (now acting for Mr Bancoult as a result of the move to that firm of Mr Gifford the individual partner handling Mr Bancoult's affairs) wrote asserting that "the total absence of any records" of meetings in May-June 2000 and June/July 2002 regarding what became respectively the feasibility study and stage 2B report "casts grave doubts on the ability of FCO to explain its conduct or to justify what appears to be serious and concerted influence practised to achieve a conclusion which reflected the views of officials and contradicted the unguided advice of consultants." Clifford Chance referred in this connection to the disclosure of the email dated 29 May 2002 and to statements made to them in a letter dated 11 February 2010 by Mr Stephen Akester, one of the Phase 2B consultants, that resettlement was always feasible within reasonable cost parameters, but that he was not in the committee that drafted the stage 2B report.

22. On 10 October 2011 Clifford Chance wrote in the light of the above urging a yet further search for documents pursuant to the Secretary of State's duty of candour in the context of both *Bancoult (No 2)* and *Bancoult (No 3)*.

23. The further search then made led to the Treasury Solicitor discovering previously undisclosed documents, including the draft stage 2B report, in circumstances described in its letter dated 15 March 2012 to Clifford Chance as follows:

> "In the context of the aforementioned matters, TSol recalled archived files held by a third party document storage company that were generated during the conduct of the *Bancoult (No 2)* litigation. In the course of reviewing these files, it has become apparent that they contain certain documents concerned with the drafting of the Phase 2B report which originate from the FCO but are no longer retained by the FCO on its own files as a result of its document retention."

It was subsequently further explained that

> "there was clearly a point, occurring during 2005, when the FCO no longer held the draft Phase 2B Executive Summary on its files, as it was removed according to the FCO's document retention policies, and yet TSol retained a copy on its *Bancoult (No 2)* files."

The documents so discovered, including the draft stage 2B report, were then disclosed by Ms Rashid's witness statement dated 1 May 2012.

24. The Secretary of State accepts that, in the light of the requests made and despite the absence of any challenge to the stage 2B report, the Rashid documents should have been capable of location and should have been located and disclosed pursuant to his general duty of candour in public law proceedings. The failures in this regard were and are highly regrettable. But there is, as stated previously, no basis for attributing them to any deliberate misconduct. The question is what significance would or might have attached to, and what consequences would or might have flowed from, their disclosure.

(b) Alleged significance of the Rashid documents

25. In Mr Bancoult's written case, it is alleged that the Rashid documents would have been significant under four heads:

(i) As showing that, instead of being independent as understood, the final report was subject to extensive alterations to reflect FCO views. Head (iv) below concerns one particular difference alleged to be "centrally important" to the stage 2B report's conclusions.

(ii) As revealing that Dr Sheppard, the FCO's scientific adviser, had criticised the draft stage 2B report in an email sent to Charles Hamilton on 14 May 2002 and had, after the issue of the final report, also endorsed criticisms of it made by a resettlement anthropologist, Jonathan Jenness, instructed on behalf of Mr Bancoult.

(iii) As revealing evidence of lack of objectivity in Dr Sheppard's input into the stage 2B report before it was finalised. More specifically, it is said that the documents show that Dr Sheppard was the only reviewer of the whole draft, that heavy reliance on only one specialist made the report unsafe and that, as a coral reef specialist well-known to be strongly dedicated to their conservation, there is "concern" whether he could reasonably be regarded as an objective assessor on the issue of reintroducing human settlement.

(iv) As showing alterations between the draft and final version of the stage 2B report in a manner which conflates and distorts the consultants' original finding in relation to storms creating difficulties for resettlement.

26. Taken together, it is submitted that it is certain that, had the Rashid documents been disclosed, they would have caused the applicant's representatives to challenge the reliability of the feasibility study, that it is highly likely that the challenge would have succeeded and that, if the House of Lords' judgment is set aside, a new hearing will reach a different conclusion.

27. The focus of the first and fourth heads of alleged significance of the Rashid documents is alterations alleged to have been made and to have distorted the final stage 2B report. The focus of the second and third heads is Dr Sheppard. The second relies on his criticisms of the draft. The third suggests that his input lacked objectivity and was unreliable.

(c) The first and fourth heads

28. These two heads stand or fall together. They are reproduced in the speaking note which Mr Edward Fitzgerald QC used at the hearing before the Supreme Court. That speaking note refers to "extensive alterations to the original draft in the final draft", which it suggests are likely to have "reflected FCO views and input" and to

have been "unsupported by evidence in the body of the study". According to Clifford Chance's letter dated 10 October 2011, there were 94 revisions over a period when the document was open for editing for a total of seven and a half hours. The speaking note says that "some" of the key changes are summarised in a summary note dated 17 February 2015 prepared by counsel for Mr Bancoult. This was based in turn on a lengthy Analysis Note prepared by Mr Bancoult's solicitor, Mr Gifford, in conjunction with a coral scientist, Mr Dunne. In addition to the change relating to storms and re-settlement identified in head (iv), the summary note identifies three further "key amendments".

29. That alterations would or might be made in the final report following comments by the FCO and BIOT on the draft report cannot come as any surprise to those representing Mr Bancoult, or be regarded as in any way unnatural. The stage 2B report was prepared by Posford under a contract expressed to be between the Commissioner for BIOT and Posford Duvivier Environment dated 10 December 2001. The Terms of Reference set out in section 4 of the contract provided by clause 6 for monthly reporting and further by clause 6.3 that

> "A draft final report, containing an account of the work done, conclusions and recommendations will be submitted within four months of commencing the assignment. Within two weeks of the receipt of comments on the draft from recipients, consultants will submit a Final Report."

30. In this respect clause 6.3 echoed the provisions of clause 17 of the terms of reference for the earlier contract dated 13 April 2000 made with David Crapper for the feasibility study, which, when made was according to its terms intended also to cover stage 2. Clause 17 provided:

> "17. A draft report will be produced for the government of the BIOT. On receiving comments on the draft report from the government of the BIOT, the consultant will finalise the report and provide the text in both paper and electronic form to the government of the BlOT."

Sheridans received a copy of this earlier contract, and in a letter dated 28 November 2005 noted and set out clause 17 specifically, not by way of objection, but in order to ask for the draft report and for any comments on it made by the FCO and the government of BIOT. Whether any of the actual alterations made can be described as "extensive" or "as reflecting FCO views", or be seen to have unbalanced the report as a result, are matters to which I will come.

31. Before doing so, it is convenient to examine events in more detail to identify any overt trace of undue executive influence over the final report. After entry into force of the contract dated 10 December 2001, Posford set about preparing for field studies in BIOT, in particular on the two outlying islands of Ile de Coin and Ile Boddam, as contemplated by its terms. These took place in February 2002, after which Posford submitted a second progress report dated 1 March 2002. This was tabled and discussed at a meeting with the FCO and BIOT on 6 March 2002. There is no suggestion or likelihood that the draft executive summary was available to anyone at this stage, and Ms Holland's letter dated 12 April and Mr Hamilton's email dated 15 April 2002 (E2404) indicate that, once drafted and reviewed, such a draft was only submitted to the FCO in early April 2002.

32. It is convenient at this point to introduce the fourth piece of new evidence on which the applicant seeks to rely. It is a note of the 6 March 2002 meeting made by Posford dated 7 March 2002. It was only obtained by the applicant's advisers, after a chance meeting, from Mr Stephen Akester of MacAlister Elliott & Partners ("MEP"), sub-contractors to Posford who arranged the on-site investigations in the Chagos in early 2002. As such it is not a document which was at any relevant time in the possession of or available to the executive. But it records a meeting at which FCO and BIOT representatives were present, and, taking it as an accurate record of what took place at that meeting, what it records was within their knowledge, and may also throw light on their roles in relation to the re-drafting and finalisation of the stage 2B report. Mr Huckle of the FCO is reported as "reiterating the political importance of the forthcoming feasibility report" which he stressed "had been heightened in recent weeks because the Ilois are currently pursuing legal action against the British and American governments". He went on to point out that "the outcome of the court case will either be compensation, or financial assistance to the Ilois in resettling the islands" and that the questions were "how much, and what forms of livelihood development will the British government permit", which he said was "where the feasibility report comes in".

33. There is nothing here which appears to be anything other than a genuine explanation as to the report's current relevance - couched if anything in terms anticipating that it would accept the possibility of resettlement. The FCO appears a little later as saying that it "had hoped that Phase II would negate the need for Phase III, ie if it concluded that resettlement wasn't feasible, but realistically, that was never likely to be the outcome. The FCO is hoping that the section on Climate Change will resolve its difficulties, but Brian [Little] and I pointed out that a considerable amount of money could be made in 25-100 years, and let's not assume that the Ilios are considering a return to subsistence or reliance on natural resources …". Again this confirms, if anything, that the FCO was resigned to a report accepting the feasibility of some form of resettlement, and that Posford was well capable of standing up for what it believed correct. Indeed, earlier in the note Posford recorded that "allegedly, a number of those whom we competed against in

the bidding process … have been taking pot shots at our approach within earshot of 'important' people. Sounds like sour grapes. That all said, our findings and arguments must be tight and convincing." There is no suggestion that the FCO was inviting changes to bolster any sort of findings or conclusions in either the draft and the final report, and no basis for regarding Posford as susceptible to any such invitation. The express purpose of the 6 March meeting was, as stated, to "provide a de-briefing" on Posford's recent field studies on Ile du Coin and Ile Boddam.

34. In all the circumstances, the 7 March 2002 note provides no real support to a suggestion that the content even of the draft stage 2B report was unduly interfered with or influenced by the FCO or BIOT, still less that any subsequent alterations between the draft submitted in April and the stage 2B report as finalised in June were the result of any such undue interference or influence.

35. The follow-up exchanges after Posford had completed and submitted all sections of the draft report in April 2002 (E2403) are evidenced by the Rashid documents as well as the previously disclosed messages dated 23 and 29 May 2002 from Mr Hamilton to Ms Holland. They are also significant. Dr Sheppard had on 14 May 2002 sent Mr Hamilton very detailed comments on the draft report (E2409 on). In relation to the Executive Summary, he wrote:

> "This important section does not always reflect the content of the volumes very well. This is doubtless due to haste and short deadlines. Several key issues missed out are stated in the text and in the conclusions. I suggest that after a period of reflection this is revisited. Several conclusions are apparently at odds either with each other or with other, known facts. During the rewrite, these apparent contradictions in the text can be resolved. They make parts of the report somewhat vulnerable. One example is the widely varying estimates of numbers of people that could be sustainably supported."

36. Dr Sheppard went on in sections dealing with the body of the draft report to note (a) the risk of water contamination, observing that the draft did not "clearly state how such contamination could be prevented through the thin 'roof' of the aquifers", (b) a contradiction between statements that "Water recharge of aquifers would <u>increase</u> by vegetation clearing (Groundwater resources section) … But: water recharge would <u>decrease</u> with clearance of plants and development (from volume IV)", and (c) under "Other points": "The point about Chagos is that it lies in the most nutrient <u>poor</u> part of the Indian Ocean. The Chagos bank fishery potential is estimated to be half that of other banks" (p 146).

37. Mr Hamilton then wrote to Ms Holland on 23 May 2002, noting that he had studied the drafts of the report in some detail, that it and any recommendations which followed from it would be carefully examined and that "we are particularly anxious therefore that its scientific content is as complete and watertight as possible". He made detailed comments on the draft, drawing heavily on Dr Sheppard's comments, particularly when writing this in relation to the Executive Summary:

> "This important section does not always reflect the content of the volumes very well. Several key points and conclusions in the main text are important and stand out, but are not well reflected in the summary. Further, several conclusions are apparently at odds either with each other or with other known facts. During your revision, I would be grateful if you would resolve these apparent contradictions as they make parts of the report unclear. Examples of issues needing reconciliation include widely varying estimates of numbers of people that could be sustainably supported, issues of water contamination and the balances of water use for different activities, whether plants increase or decrease water recharge, and the Chagos bank fishery potential. Synthesis would doubtless resolve many of these. I understand that different consultants wrote different sections, so I think that this summary may be a suitable place for an overall, concise synthesis, which would also include overall environmental management recommendations. Many of these points are noted in the attachments relating to different sections, but are crucial for the writer of this Executive Summary."

38. As is apparent, Mr Hamilton was here picking up points made by Dr Sheppard as indicated above. In attachment 7, relating to volume III of the draft dealing with resettlement issues, Mr Hamilton discussed three scenarios which had been included, noting various issues and that nothing had been said either on scenario 3 (based partly around expensive tourism), although this appeared to be the only attractive development option for interested parties, or on a possible scenario 4 (non-residential, but settled seasonally for some fishing). The discussion ended "Possibly use of the 'three scenarios' just adds confusing complexity and begs several questions which are not answered". He ended by underlining the importance attaching to "the overall synthesis (Executive Summary) which should clearly highlight the main points which are brought out in the text", and indicated that following the draft's revision he would call a meeting of all concerned to finalise the report.

39. Posford then prepared its own detailed comments on Mr Hamilton's letter which were sent to him by Ms Holland under cover of a faxed letter dated 28 May 2002. Her letter stated:

> "To summarise the attached, we consider that some of the comments are valid and we will revise our report in light of these suggestions. However, we feel that others are somewhat inaccurate and do not reflect the understanding we had with the BlOT Administration on our approach. I should like to discuss these comments with you at your earliest convenience."

In the body of the comments, Posford replied to the points made on the three scenarios as follows:

> "Three scenarios: There was much debate during the drafting of the report as to whether the three scenarios should be included, but several of those involved considered that these helped to develop conclusions about whether certain resettlement activities would be possible, particularly in the drafting of the environmental appraisal. We stopped at three hypothetical scenarios, but recognise that there could be many more combinations of activities. The suggestion of 'scenario 4', which is based on non-residential and non-development, does not actually constitute· resettlement and was therefore not considered as a scenario. However, you will note that Option 1 for fisheries development (p 165) does refer to this form of livelihood activity. We would be grateful if you would give direction as to whether you wish us to include or exclude the development scenarios from the final report."

To this last request, Mr Hamilton simply replied by email on 29 May 2002: "You asked about the inclusion of development scenarios in the final report. Our advice is that it would be better if these are excluded".

40. However, as Mr Gifford's and Mr Dunne's Analysis Note acknowledges, this "advice" was not in fact taken up in the final stage 2B report, "where the Development Scenarios can be seen to be crucial to several parts of the study". Nevertheless, the Analysis Note seeks to portray Mr Hamilton's letter and comments dated 23 May 2002 as an exercise of editorial control, and his email of 29 May 2002 as "yet further attempts to exercise editorial control over the final report". To my mind, there is nothing untoward about them at all. The impression conveyed is one

of independently minded exchanges, passing between people whose genuine concern was to have as thorough, accurate and watertight a final report as possible.

41. Posford's comments dated 28 May 2002 were evidently also sent to Dr Sheppard, since he commented on them by email on 31st May 2002 (E2450-2451). There were further technical exchanges between Brian Little, who had been appointed as FCO Feasibility Study Project Manager under contract dated 29 January 2001, and Posford in late May and early June (E2452-2458 and E2465-2467), and a further set of comments by Tony Falkland of Posford responding on 9th June to Dr Sheppard's comments (E2459-2464) as well as to Brian Little's comments (E2465-2468). Dr Sheppard noted Mr Little's comments on 11 June (E2469), and Mr Little sent an email commenting on Posford's response on 12 June (E2470). A meeting was set up to discuss the final report on Friday 12 June, in relation to which Mr Hamilton invited Dr Sheppard to act as a devil's advocate. This he evidently did (E2476-2477). Some "changes/deletions" were made, leading to the final report.

42. Reading all these exchanges, nothing in them suggests anything but a proper, professionally oriented and independent process, with all involved seeking to arrive at objective and sustainable findings and conclusions.

43. I turn to the alterations which can now be seen to have been made between the original draft and the final report. The General Conclusions, to which Sheridans rightly attached importance in their note dated 13 March 2009 (para 21 above), are now available in both their draft and their final form in the executive summary. A fundamental point which risks being overlooked in discussion about differences elsewhere in the executive summary or body of the text is that the "General Conclusions" can now be seen to have been in identical terms in both their draft and their final versions. Their terms have been set out in para 12 above. They represent the critical conclusions, on which the majority in the House of Lords relied as justifying the Secretary of State's decision to make the 2004 Constitution Order, and they were unaltered between the original draft and final versions.

44. Immediately preceding these General Conclusions also appeared the following section headed "Vulnerability":

> "There appear to be sufficient groundwater, soils, fisheries, and environmental (eg limited tourism) resources to support a small population on a subsistence basis with some commercial opportunity, but there are some more fundamental issues surrounding the feasibility of resettlement. These relate to the vulnerability of a resettled population to current and predicted

> climatic conditions, and the fragility of the environment to human-induced disturbance.
>
> Under the present climate, it is assumed, based on historic meteorological patterns and observations, that the islands are already subject to regular overtopping events, flooding, and erosion of the outer beaches. As global warming develops, these events are likely to increase in severity and regularity. In addition, the area is seismically active, and the possibility of a tsunami is a concern. These events would threaten both the lives and infrastructure of any people living on the islands. Whilst it might be possible to protect the islands to some extent in the short-term through coastal defence measures, it is likely to be cost-prohibitive and non-pragmatic to consider this form of defence in the long-term.
>
> The environment of the Chagos Archipelago is highly diverse and yet very susceptible to human disturbance. Coral reefs, which are one of the most important ecosystems within the Archipelago, are already exhibiting signs of stress from increased sea surface temperatures and other climatic phenomenon. Predictions from climate change experts indicate that mass mortality of reef building corals in the Indian Ocean is likely to occur as global warming increases, may be as soon as within the next 20 years. This will not only have huge implications for the long-term coastal defence of the islands, and hence their very existence, but will also adversely affect livelihoods, particularly fisheries and tourism, which are likely to be the mainstay of any resettled population. Human interference within the atolls, however well managed, is likely to exacerbate stress on the marine and terrestrial environment and will accelerate the effects of global warming. Thus resettlement is likely to become less feasible over time."

Again this passage was in identical form in the draft and final stage 2B report, and, as the Analysis Note acknowledges, it constitutes the basis for the overall negative assessment in the General Conclusions.

45. The identity of these core sections of the Executive Summary in the draft and final reports raises obvious problems for the present application. But it is said that these key sections refer back in turn to section 1.8. It is in section 1.8 that the summary note dated 15 February 2015 identifies in total four "key amendments".

46. The following passages underlined and marked A, B or C in the following extracts from the draft report are passages on which Mr Bancoult relies in support of his case of inappropriately motivated or influenced alteration:

> "**1.8 CLIMATE CHANGE**
>
> The reports of the International Panel on Climate Change were evaluated to determine the latest projections on climate change. Global sea levels are expected to rise by about 38cm between 1990 and the 2080s. Indian and Pacific Ocean islands face the largest relative increase in flood risk. Although there will be regional variation, it is projected that sea level will rise by as much as 5mm per year, with a range of 2-9mm per year, over the next 100 years [B]. With a rise of 0.5 metres in sea level, the implications of climate change on the Chagos Archipelago are considerable, given that mean maximum elevation of the islands is only two metres; the diversity of livelihoods available is limited; and the relative isolation and exposure of the islands to oceanic influences and climatic events. These implications are discussed in the light of biodiversity and resettlement.
>
> **1.8.1 Implications for Biodiversity**
>
> The impacts of climate change on highly diverse and productive coastal ecosystems such as coral reefs and atoll islands will depend upon the rate of sea-level rise relative to growth rates and sediment supply. In addition, space for and obstacles to horizontal migration, changes in the climate-ocean environment such as sea surface temperatures and storminess as well as human pressures will influence the capacity of ecosystems to adapt to the impacts of' climate change.
>
> [Two paragraphs dealing with coral bleaching and reefs]
>
> Species that occupy terrestrial habitats for all or part of their life-cycle, such as birds, turtles and coconut crabs, will also be adversely affected by sea level rise. There is considerable uncertainty about how climate change will affect the natural environment in the Chagos Archipelago, but that the outcome is likely to be an unfavourable shift in biodiversity.

1.8.2 Implications for Resettlement

The most significant and immediate consequences of climate change on a resettled population within the Chagos Archipelago are likely to be related to changes in sea levels, rainfall regimes, fresh water resources, soil moisture budgets, prevailing winds (direction and speed) and short term variation in regional and local patterns of wave action. At present, the Chagos Archipelago lies just north of an active cyclone belt, however, a small northward shift of this belt could lead to frequent cyclones in the area [A]. This would lead to more frequent flooding of the islands, with corresponding risk to life and any infrastructure. It would also reduce agricultural potential and the freshwater contained within the island aquifers would experience higher levels of salinity.

Irrespective of whether the Chagos Archipelago becomes subjected to regular cyclones, the general increase in storminess that may accompany climate change would result in increased wave energies and an increasing frequency of over-topping events [C]. Based on a 0.5m rise in sea level scenario, models of overtopping events demonstrate an increase of between 20-50% of the frequency of severe events. Of further significance is the probability that sea level rise and overtopping events would threaten the characteristics and sustainability of the fresh groundwater lens.

The rate of erosion of the ocean coasts are likely to increase with sea level rise and·increased storminess, and would be accompanied by an increase in sediment transport, which would have implications for shoreline infrastructure. On islands where physical space is limited, as in Chagos, coastal defences are likely to be low key and would need to be developed with a view to sustainability.

It is advised that future settlers on the outer atolls should be made aware of the risks of climate change in terms of their own safety and that of any physical investment. Should people wish to return, it would be prudent to provide specialist assistance in the preparation of appropriate and sustainable land use and coastal defence policies, which would ensure that the vulnerability of the resettled population was minimised as far as possible."

47. In the final stage 2B report, section 1.8 of the executive summary reads as follows. Again, the passages underlined and marked A, B and C are passages on which Mr Bancoult relies in support of his case of inappropriately motivated or influenced alteration:

> "**CLIMATE CHANGE**
>
> According to the International Panel on Climate Change global sea levels are expected to rise by about 38cm between 1990 and the 2080s. Indian and Pacific Ocean islands face the largest relative increase in flood risk. Although there will be regional variation, it is projected that sea level will rise by an average of 5mm per year over the next 100 years [B]. The implications of these predictions for resettlement of the Chagos Archipelago are considerable, given that mean elevation of the islands is only two metres.
>
> The most significant and immediate consequences of climate change for the Chagos Archipelago are likely to be related to changes in sea-level, rainfall regimes, soil moisture budgets, prevailing winds, and short term variation in regional and local patterns of wave action. As a consequence, most islands will experience increased levels of flooding, accelerated erosion, and seawater intrusion into freshwater sources. The extent and severity of storm impacts, including storm surge floods and shore erosion are predicted to increase [A]. Although the risks associated with climate change are not easily established the implications of these issues to resettlement of the outer atolls of the Chagos Archipelago are outlined briefly below.
>
> *Implications for water resources:* Rising sea level would not have a significant effect on island freshwater lenses in the Chagos archipelago unless land is lost by inundation. If rising mean sea level causes land to be permanently inundated, then there will be a consequent loss in fresh groundwater.
>
> *Increased storminess* **[C]***:* The Chagos islands have a small storm surge envelope thus even small changes in sea level and storm surge height implies an increase in the area threatened with inundation. It has been predicted that the flooding severity for a 1 in 50-year storm event with 0.5m of sea level rise is almost as high as the present day 1 in 1000-year event.

Inundation can cause seawater intrusion into freshwater lenses. This not only reduces the availability of water for human consumption, but if salinity concentrations are high enough it can lead to decreased agricultural production.

Biological systems and biodiversity: Climate change is predicted to have a significant impact on the marine and terrestrial environments of the Archipelago. Coral reefs are one of the most important ecosystems likely to be affected, and their ability to cope will depend upon the rate of sea-level rise relative to their growth rate. The Chagos coral reefs were severely affected by the 1998 El Nino event, therefore any future sea surface warming would increase pressure on already stressed coral reefs. The added pressure of human interference within the marine environment would further weaken the ability of these systems to cope with climate change.

Fisheries and aquaculture: It is predicted that climate change may have a severe impact on the abundance and distribution of reef fish populations. In addition, there is strong evidence of a correlation between the annual incidence of ciguatera (fish poisoning) and local warming of the sea surface, which will have an impact on fisheries potential, for subsistence and commercial purposes. Climate change is expected to have both positive and negative impacts on aquaculture; but the implications for seaweed farming (as investigated during this study) is not positive, with increased temperatures leading to reductions in productivity **[D]**.

Human health, settlement and infrastructure: Populations, infrastructure and livelihoods are likely to be highly vulnerable to the impacts of climate change. Sustainability in food and water availability will be among the most pressing issues, together with the vulnerability of infrastructure to flooding and storm surges.

Vulnerability and adaptation: There is a wide range of adaptation strategies that could be employed by a resettled population in response to climate change. Integrated coastal management has been strongly advocated as the key planning framework for adaptation.

Adapting to island instability: There are two issues that need to be taken into account in adapting to island instability: shoreline erosion and sediment inundation of the island surface. Adaptation can fall within three broad categories depending on the level of infrastructure and population density on islands: no response; accommodation (infrastructure and dwellings are replaced at a rate commensurate with island migration); or protection (maintenance of infrastructure through coastal protection measures). The latter is likely to be the most costly strategy, and should be avoided through wise land use planning.

Adaptation to inundation: Response to inundation will vary depending on the level of development on islands. On islands that will have little infrastructure, as is likely to be the case in Chagos, the costs to protect against inundation are likely to be prohibitive. Adaptation measures will include siting of infrastructure in low risk areas and the application of appropriate infrastructure designs, such as revised floor levels and open structures. More robust measures to prevent inundation, such as seawalls, are not recommended as they necessitate costly maintenance and future vertical extension as sea level rises, and they can lead to adverse impacts on coastal habitats.

Adaptation to reef response: Discussion of the possible response of coral reefs to sea-level rise indicates that at worst reef food and sediment resources diminish and at best they are maintained at similar levels or may even increase. The importance of reefs as both natural coastal protection structures and providers of food means that any adaptation measures against climate change, and any human livelihood activities, should not compromise the health of the reef system. Minimising adverse effects on reefs will require robust pollution control measures and effective waste management.

From an examination of projected climate change scenarios, it is likely that the Chagos Archipelago, and any population settled on the outer atolls, will be vulnerable to its effects. The main issue facing a resettled population on the low-lying islands will be flooding events, which are likely to increase in periodicity and intensity, and will not only threaten infrastructure but also the freshwater aquifers and agricultural production. Severe events may even threaten life. Increases in

> sea surface temperatures are likely to have adverse effects on coral reefs and consequently their ability to act as a coastal defence to the islands, and to support fisheries. This will place more pressure on resettled populations to not only counteract the pressures of climate change but also to ensure that their subsistence and income needs are met."

48. The "key amendments" relied upon therefore fall under four heads. It is worth emphasising their limited extent in the overall context of the report, and particularly in the light of the unaltered General Conclusions and Vulnerability sections. Whatever the suggestion - whether it is that the alterations were the product of undue executive influence or that they in some way demonstrate that the final report was unreliable or that the Secretary of State would have reached a different decision regarding the making of the 2004 Constitution Order if he had only been shown the draft rather than the final report - the limited extent of the alterations in the overall context of the report points to my mind sharply against giving it credence or weight.

49. However, I must also examine the amendments more closely. Taking first the change identified at [A] the main criticism is that

> "The effect of this change is to delete from the feasibility study the important fact that the Chagos Islands *are not within the cyclone belt at present*, but to the North of it. There is no information anywhere in the Phase 2B study to indicate that (1) the cyclone belt has moved, either northward or in any other direction, in the past; or (2) that it is likely to move in the future; or (3) that if it were to move it would move closer to the Chagos Islands as opposed to moving further away from them."

This is not however correct. Both the Gifford/Dunne Analysis Note and Mr Jenness's report demonstrate that the passage removed from the draft executive summary remained in the body of the report: see E1330, citing passages from Part III which set out the same information as appeared in the draft about the effect of a small shift north in the cyclone belt.

50. A second criticism addressed to the change at [A] relates to the addition of new sentences stating that "As a consequence [of climate change], most islands will experience increased levels of flooding, accelerated erosion, and seawater intrusion into freshwater sources" and that "The extent and severity of storm impacts, including storm surge floods and shore erosion are predicted to increase". For the latter, it is said, "There is no factual basis and it is not supported by a close reading of the body of the report". As to this, two points arise. First, both the draft and the

final reports start by stating that the "most significant and immediate consequences of climate change for the Chagos Archipelago are likely to be related to changes in sea levels, rainfall regimes, soil moisture budgets, prevailing winds and … wave action". The statements in the final version that "As a consequence most islands will experience increased levels of flooding, accelerated erosion, and seawater intrusion into freshwater sources" and that the extent and severity of storm impacts, including storm surge floods and shore erosion are predicted to increase" follow unsurprisingly from this initial sentence.

51. Second, as to the criticism of lack of evidential support, no basis appears for doubting that these statements were fully endorsed, and if anything regarded as understated, by Dr Sheppard. Dr (now Professor) Sheppard was at the time Head of Biological Sciences at Warwick University, and was (unlike Mr Jenness, who was a resettlement anthropologist) an acknowledged expert on climate change and marine science in general and on BIOT in particular. He supported Posford's conclusions in this area and believed that they were, if anything, understated: see eg E2409, where on 14 May 2002 he commented on the draft report:

> "Oceanographic, climate, groundwater and soils sections are scientifically sound (with some queries and revisions suggested). These broadly show that development in the islands is not sensible, long term nor sustainable (and may even become dangerous) for the first two development scenarios."

See further E2461, where on 31st May Dr Sheppard noted, in relation to rainfall and recharging of the lenses and in view of changes to future rainfall projected by the Hadley Centre's website, that the "consequences to sustainable settlement numbers could be considerable"; and E2519 to E2523 where in October 2002 he responded to Mr Jenness's criticisms of the final version, stating, in particular, that

> "past lack of flooding, lack of erosion, steady temperature, are no guide at all to conditions from now on …"

and that

> "… our climatic entry into the 'unknown' is difficult to accept for those who are unversed in such matters, as seems to be the case with Jenness." (E2519)

52. Dr Sheppard went on (E2520):

> "The climate modelling section, which is the part which most effectively supports the notion that resettlement will be 'hazardous' is the most criticised by Jenness. In fact the model is pretty rigorous and is probably correct. It does miss some detail, but its general tenet is almost certainly, unhappily for the Chagos islands, quite accurate, and fits well with climate modelling and predictions from many other sources. Again, Jenness is unaware just how much change is forecast. (If he *is* aware, he is writing propaganda, not a scientific critique.)"

53. If anything, it is clear that Dr Sheppard thought that Posford should have gone further. Thus at E2463 he is recorded as having advised on 31 May 2002 that "following should be further addressed or resolved in the final report", viz

> "Effects of sea level rise on the boundaries or depths of the lenses, especially in islands whose central parts are near sea level (two islands were 'levelled' and this could be usefully incorporated)."

Posford's response was that "The effects of sea level rise on the groundwater systems was not in the TOR for the groundwater section". As a further example, commenting on Mr Jenness' views at E2522, Dr Sheppard records:

> "Cyclones and Earthquakes
>
> Posford do go on a lot about cyclones and earthquakes, which is validly criticised by Jenness. Whatever weather changes will occur, cyclones (and certainly earthquakes) are not expected to change at all. Jenness is correct to say that Posford went overboard unjustifiably on this. (Posford should - as was recommended to them - have made more on sea level rise and warming, which is touched on, and would have been unassailable.)"

Dr Sheppard's view about cyclones quite probably led to the removal of the reference to cyclones from the executive summary to the body of the text. The final bracketed sentence also speaks against any idea that Posford were engaged in a whitewash, or that the consultants were not acting independently.

54. Dr Sheppard went on (E2522):

"Erosion and overtopping

- Jenness says that 'there is no need to defer any plans (for resettlement) before rates of island erosion are established'. That is plain daft, unless all constructions are moveable.

- Jenness says that lack of overtopping damage in the past means that estimates of increased overtopping in future are exaggerated. The climate is changing, and the past is now no guide to the future in this respect.

- Jenness acknowledges elsewhere that climate change is occurring and that things may get worse. But he says that this is no reason to not develop. All that is needed is that development should use 'careful' land use planning and management with strong components for costal management and reef health. What does he mean? This sweeps a huge issue (*the* issue) under the carpet. The only land which will be above projected flooding is a rim around part of most islands. He says 'it should not preclude resettlement of the Chagos in a prudently planned fashion'. Where?"

55. A final quotation from Dr Sheppard reads (E2524):

> "Jenness has much to say about the omissions on health, economics etc. Some are valid. But he really should go and stand on one of the islands, holding a copy of the island's profile above sea level, before he says "Land loss may be inevitable and should be planned for. Loss of groundwater can be planned for ..." and "... can be managed with modest investment". This may be true for, say 20 years. But beyond that we are talking here not about a little loss of a beach, but possibility of broaching of the rims and flooding of large inland areas."

56. The upshot is in my opinion that there is no basis for regarding as suspicious or actually or potentially significant in any way either (a) the removal in the final version of paragraph 1.8 of the reference to the possibility of a small northward shift of the cyclone belt or (b) the inclusion of (i) a reference to increased levels of

flooding, accelerated erosion and seawater intrusion into freshwater sources or (ii) the predicted increase in severity of storm impacts, including storm surge floods and shore erosion.

57. I can take the other three key amendments, [B], [C] and [D] quite briefly. The first, a change in respect of future sea water level rises from a range of 2-9mm per year to an average of 5mm a year cannot conceivably be sinister or significant, or, if it had been known to or focused on by any decision-maker, have led to a change in any ministerial decision. The second is a complaint that the draft executive summary referred to "the general increase in storminess that may accompany climate change" (E2397) while the final executive summary contained a paragraph starting "Increased storminess" (E2498). The Summary Note does not record that the latter paragraph continues "the Chagos islands have a small storm surge envelope thus even small changes in sea level and storm surge height implies an increase in the area threatened with inundation". To my mind, there is therefore nothing in the difference. But, if there is, it is clear from Dr Sheppard's views, already set out, that he would support the reported threat. The third and last point relates to a new paragraph noting that "it is predicted that climate change may have a severe impact on the abundance and distribution of reef fish populations" (E2499). The complaint is that the body of the report is expressed in more nuanced terms. Again, it is clear that Dr Sheppard took a clear view of the likely effects of climate change, and there is no reason to suspect that the final version represented anything other than a genuine prediction. Any difference in nuance should also have been apparent and, whether or not so, cannot conceivably support an argument that the minister acted irrationally in making the Orders he did on the basis of the final report.

Heads (ii) and (iii)

58. These two heads face in opposite directions. Both aim at undermining the stage 2B report. But head (ii) does so by relying on Dr Sheppard and his alleged endorsement of criticisms by Mr Jenness, the resettlement anthropologist instructed on behalf of Mr Bancoult to consider the stage 2B report in autumn 2002, while head (iii) suggests that Dr Sheppard's input into the stage 2B report lacked objectivity and was unreliable.

59. As to the latter suggestion, the applicant has through his representatives been prepared for a long time to cast wide-ranging aspersions on a large number of people, including Dr Sheppard. But I do not think that they are made good, and that includes the suggestions that Dr Sheppard allowed his interest in preserving coral reefs to influence the advice he gave government. On the contrary, Dr Sheppard comes across in the material as a forthright and very independent character, not hesitating to comment bluntly on those working for government or for the applicant: see eg his email of 14 May at E2406, comments of 14, 30 and 31 May 2002 set out

or reported at E2409-2422, E2450-2451 and E2460-2464 and further comments on Mr Jenness (some cited above) at E2518-2525. I also see no basis for regarding the stage 2B report as unreliable or for treating reliance on it as irrational in 2004, simply because Dr Sheppard had been the sole outside reviewer instructed by the executive, in addition to Mr Little, who had been appointed as FCO Feasibility Study Project Manager.

60. As to the former suggestion, although Dr Sheppard agreed with aspects of Mr Jenness's report, it is apparent from his comments on that report which I have already set out that he disagreed fundamentally with any suggestion that Mr Jenness's report undermined the conclusions in the stage 2B report, and that he would himself have gone, if anything, further in discounting the risks of climate change that underlay those conclusions.

Conclusion relating to the Rashid documents

61. The essential issues, as summarised in Mr Fitzgerald QC's speaking note, are (i) whether due disclosure of the Rashid documents would have led to a challenge by Mr Bancoult's representatives to the stage 2B report in the original judicial review proceedings, and, if so, (ii) whether it is likely that such a challenge would have resulted in a different outcome in the House of Lords on the rationality of the removal by the 2004 Constitution Order of the right of abode. The two questions are of course inter-connected, since any decision whether or not to challenge the stage 2B report would have depended on an assessment of the prospects of such a challenge succeeding.

62. As to the first question, some caution is in my view required before accepting outright the submission that it is "certain" that there would have been such a challenge. Mr Bancoult's advisers had in December 2005 had disclosure of Mr Hamilton's extensive letter dated 23 May 2002 evidencing the nature of the FCO's involvement in and input into the process of re-drafting and finalisation of the report (see paras 20 and 37-38 above). Mr Bancoult's solicitors felt able, from January 2006 onwards, to make serious allegations about lack of independence of the stage 2B report as well as about allegedly significant alterations between the draft and final versions of the preliminary study from January 2006 onwards (see eg E1472 and E1487). Yet, at the same time, the applicant through Sydney Kentridge QC was expressly disclaiming before the Divisional Court any challenge to the study or its outcome: see E1482. Mr Bancoult's advisers did not at that stage think they could or should even try to overcome the first hurdle. Further, they maintained this attitude for years, including after disclosure in October 2010 of the email dated 29 May 2002 (paras 21 and 39-40 above), despite continuing to make serious allegations in correspondence of lack of independence and invalidity.

63. For present purposes, I am however prepared to assume without deciding that a challenge would have been made, and to proceed directly to a consideration of the second. In Mr Fitzgerald's formulation, that is whether it is likely that such a challenge would have resulted in a different outcome - but in my judgment it makes no difference ultimately whether the test should be formulated at the slightly higher level of a requirement to show "a probability" that it would have done so or at the perhaps slightly lower level of whether it "may well have" done so.

64. The second question reduces itself ultimately to a question whether it is probable or likely, or whether it may well be, that the material now available would have led the court (at whichever level the case was being considered) to conclude that it was irrational or unjustified for the Secretary of State to accept and act on the General Conclusions set out in the stage 2B report. Those were the General Conclusions on which the Secretary of State acted when making, and which the majority in the House of Lords regarded as justifying his decision to make, section 9 of the 2004 Constitution Order. In addressing this question, I proceed on the basis that it is necessary and appropriate to treat the Secretary of State, when deciding in June 2004 whether to make section 9 of the 2004 Constitution Order, as having available to him or within his knowledge all the contemporary material which in fact existed in the possession of the executive. That includes the draft report and all the exchanges taking place and advice received in the process of its redrafting and finalisation. Is it either probable or likely, or may it well be, that the court would have concluded that the material now shown to have been within the executive's possession or knowledge at the relevant date in June 2004 undermines the rationality or justifiability of the Secretary of State's decision to rely on such Conclusions?

65. The answer in my opinion is clear. The General Conclusions, and the section on Vulnerability immediately preceding them remained unaltered from the draft to the final stage 2B report. There is no probability, likelihood or prospect (and, for completeness, in my view also no real possibility) that a court would have seen or would see, in the process of preparation, re-drafting and finalisation of the stage 2B report and in the associated material which can now be seen to have existed, anything which could, would or should have caused the Secretary of State to doubt the General Conclusions, or which made it irrational or otherwise unjustifiable to act on them in June 2004. On that basis, the application to set aside the House of Lords' judgment by reference to the Rashid and other documents disclosed late must fail.

Additional evidence

66. The first head consists of the Analysis Note. This, as its name indicates, consists essentially of an analysis of primary material and/or submissions on it. Its development has taken place over years starting originally it seems as early as 2006

and continuing up to at least 2012. We have it in various forms. It is not conceived or presented as evidence, though I have taken its contents into account in considering the parties' respective cases and submissions on the material which is admissible and relevant.

67. The second head consists of information provided by Mr Stephen Akester, who, after their chance meeting, wrote to Mr Gifford a letter dated 11 February 2011 explaining the role of his company, MEP, as a sub-contractor to Posford. MEP was principally concerned with water resources and fisheries, and organised the site visit to the Chagos in early 2001. Mr Akester explains that his own experience was in regional development. In his letter, Mr Akester said that after the site visit, MEP reported and it appears provided Posford with the three development scenarios, after which Posford and he had no further involvement. But he explained:

> "Because I and our team considered that resettlement was feasible, I prepared a draft of the different levels of development that would be appropriate to support such resettlement, given the fragility of the islands and bearing in mind that there had, in contravention of the normal practice of consulting potential settlers, been no consultation with the Chagossians themselves (this was excluded from our terms of reference).
>
> …
>
> After submitting our report via PH to BIOT, I was surprised that we heard nothing further concerning the text of it either from PH or from BIOT. I was not invited to any further meetings with BIOT, did not receive any draft prior to its critique by BIOT on 23 May 2002, and heard nothing more about the terms of the report until the final Executive summary had been approved by BIOT and sent to me. By then, it was of course too late to make any further comments. We were therefore unable to modify the terms of the 'General Conclusion' which I find to be wrong in its claim that resettlement involves obstacles which cannot be overcome by reasonable measures. Such issues are inherent in small island development and are regularly resolved within reasonable cost parameters."

68. That Posford's sub-contractor may have disagreed with conclusions drawn by Posford is a matter outside any conceivable sphere of information or knowledge

that the Secretary of State or executive may be treated as having had at any material time. The material is thus correctly analysed as potential fresh evidence. But fresh evidence going to what issue? The ultimate issue is whether the Secretary of State was justified in acting as he did on the material which was or should have been available to him at the time, not whether his decision could be justified on a revisiting of the whole issue of resettlement in the light of any other material which either party could adduce now. In any event, the views expressed by Mr Akester in the letter dated 11 February 2010 cannot meet the test, however relaxed the terms in which this might be expressed, for setting aside the House of Lords judgment, even if they were material to any issue. I say this quite apart from the fact that, despite complaints regarding suggested lack of independence, no step was taken to set aside that judgment in the years following receipt of such letter, until after the Rashid documents had been disclosed.

69. The third piece of evidence is a further review of the report, prepared for the applicant by Professor Paul Kench of the University of Auckland dated 5 October 2012. According to the applicant's case:

> "He concludes that not only were the findings of the ocean and coastal processes section in the feasibility study unsound, because of lack of specialist understanding and methodological flaws, but also that the relevant summary (section 1.6) in the Executive Summary was not supported by those findings. This conclusion casts grave doubt on the pivotal findings of the feasibility study with regard to increased risk of sea-water flooding, which influenced the decision of the majority in the House of Lords …"

70. Like the information in Mr Akester's letter, this material does not go to any issue relevant to the question whether the Secretary of State acted rationally in the light of the material to be treated as available or within his or the executive's knowledge in June 2004. It would be relevant if the issue were whether the conclusions in the stage 2B report were sustainable today. But that is not the issue. I add for completeness that I am also unpersuaded that any good reason has been shown for not obtaining such an expert's report at any time prior to the disclosure of the Rashid documents, having regard to the serious allegations of inadequacy and lack of independence of the report that were being made at such time, both before and after receipt of Mr Akester's letter dated 11 February 2010.

71. The fourth piece of evidence is Posford's memorandum dated 7 March 2002, the information in which I am, for reasons already explained, prepared to take into account as material within the executive's knowledge, but which does not persuade me that there is any basis for setting aside the House of Lords judgment.

Other relevant considerations

72. There is one other factor, which would have been both relevant and in my opinion decisive, had I reached a conclusion that the threshold test for setting aside was or might otherwise have been satisfied. The applicant submits that nothing other than a reversal of the House of Lords decision (in so far as it proceeded on the basis that the stage 2B report could be relied on) will overturn the constitutional bar on their return to the Chagos. But there has been a new 2104-2015 feasibility study, published by KPMG in March 2015, which assesses the risks differently from the prior report and finds that, at some cost and taking into account (for the first time) the possibility of resettlement on Diego Garcia itself (E925-926), there would be scope for supported resettlement: see E917-918. In practical terms, the background has shifted, and logically the constitutional ban needs to be revisited. As Mr Steven Kovats QC expressly accepted during oral submissions, it is open to any Chagossian now or in the future to challenge the failure to abrogate the 2004 Orders in the light of all the information now available. That is in my opinion a factor militating strongly against the setting aside of the House of Lords' judgment and ordering a rehearing either of the whole appeal or of the limited issue whether it was rational for the Secretary of State to make the 2004 Constitution Order in the light of the material available to him or the executive generally in 2004. Even the latter issue could lead to further lengthy litigation and, quite possibly, a completely fresh hearing at first instance about a factually superseded study report.

73. There has been a yet further development consisting of the declaration by the Secretary of State on 1 April 2010 of the Marine Protected Area ("MPA") in the high seas surrounding the Chagos Islands. That declaration is the subject of a challenge by Mr Bancoult by way of judicial review in *Bancoult (No 3)*. The challenge failed before the Divisional Court on 11 June 2013, [2013] EWHC 1502 (Admin), and before the Court of Appeal on 23 May 2014, [2014] EWCA Civ 708. It is now the subject of a combined application to the Supreme Court for permission to appeal and for a protective costs order without which it is said that it will not be possible to pursue any appeal.

74. The Secretary of State's notice of objection dated 6 February 2015 in respect of this application supports the Court of Appeal's statement that the MPA (the only practical effect of which according to the Divisional Court was to prohibit commercial fishing in BIOT waters) had no meaningful or real effect at all on the economic, cultural or social development of BIOT, basically because there never had been commercial fishing there and there is no resident population in BIOT outside the US naval defence facility. Having said that, the notice goes on to state that:

> "The MPA does not preclude resettlement in the event that Her Majesty's government concludes that it is appropriate to permit and/or support resettlement of the islands. Whilst that decision is being considered in the light of an ongoing Feasibility Study commenced in January 2014 (and expected to be the subject of an imminent report by a panel of experts), the possibility of commercial fishing within the BIOT by a resident population is not realistic without resettlement and without a resident population.
>
> The Court of Appeal was right to note that it was therefore the prohibition on residential settlement on the BIOT which directly impacted upon the economic, social and cultural development of the BIOT. But that was not the decision that was under challenge in *Bancoult (No 3)*. That decision was unsuccessfully challenged in *Bancoult (No 2)*, culminating in a decision of the House of Lords …"

75. These passages confirm that resettlement is not precluded by the MPA, if the outcome of the new KPMG feasibility study of the ensuing public consultation on resettlement options, and of the ongoing governmental policy review persuades the government that it is appropriate to permit and support resettlement. If the outcome of that study, consultation and review does not persuade the government, then Mr Bancoult will be able, in principle, to apply to challenge the government's refusal to permit and/or support resettlement as irrational, unreasonable and/or disproportionate, whichever may in context be the right test, by way of judicial review. If the MPA does prove to prejudice or limit the prospects of resettlement or the nature of any resettlement that may be permitted by the government or on judicial review by the Court, that will be a result of the MPA, which can only be avoided or removed by a successful challenge in the *Bancoult (No 3)* proceedings.

Conclusion

76. For all the reasons I have given, this application to set aside the House of Lords' judgment and to direct a rehearing of the appeal to the House of Lords in *Bancoult (No 2)* fails in my opinion and must be dismissed.

LORD CLARKE:

77. I am in many ways sympathetic to the case advanced by Mr Bancoult. Indeed, I was a member of the Court of Appeal which decided the appeal in his favour. In

these circumstances it is not perhaps surprising that I much prefer the reasoning of the minority to that of the majority in the House of Lords. It is however common ground that the question now before the court is not whether the majority were correct but whether the issue should be re-opened. I have read the judgments of Lord Kerr and Lady Hale on one side and of Lord Mance, supported by Lord Neuberger, on the other. I have reluctantly concluded that Lord Mance's analysis is to be preferred and that the application should be refused for the reasons he gives.

78. One of the factors which has led me to that conclusion is that, as I see it, that is not the end of the road. I agree with Lord Mance's conclusion in para 72 that there is a critical factor which is in any event conclusive. The background to much of the debate between the parties had been the feasibility of the Chagossians returning to the Chagos Islands. The 2014-2015 feasibility study considers, among other things, the possibility of resettlement on Diego Garcia. Given that new factor, the study concludes that there would be scope for supported resettlement. As Lord Mance puts it, the background has now shifted and logically the constitutional ban needs to be revisited. The outcome of the new (and ongoing) feasibility study will no doubt consider the prospects of resettlement.

79. In the light of the results of the study the government will no doubt consider whether it is (as Lord Mance puts it at para 75) appropriate to permit and support resettlement. It was expressly accepted on behalf of the government that it will be open to any Chagossian to challenge the failure to abrogate the 2004 Orders in the light of all the information which is now available or becomes available in the light of the ongoing study. For example, it will, at any rate in principle, be open to Mr Bancoult to institute judicial review proceedings to challenge any future refusal of the government to permit or support resettlement as, in Lord Mance's words "irrational, unreasonable or disproportionate".

80. In all these circumstances I do not think that it would be right now to set aside the judgment of the House of Lords and to direct a rehearing. It would be disproportionate to do so without having regard to the new circumstances taking into account the possibility of resettlement on Diego Garcia.

LORD KERR: (dissenting) (with whom Lady Hale agrees)

Introduction

81. The Chagos Islands are in the middle of the Indian Ocean. Since the early 19th century they had been part of the British colony of Mauritius but they were detached from that country before Mauritius gained its independence in 1968.

82. The islands consist of a group of coral atolls. The largest of these, Diego Garcia, has a land area of approximately thirty square kilometres. To the north of this are Peros Banhos (thirteen square kilometres) and the Salomon Islands (five square kilometres).

83. In 1962 a Seychelles company acquired the coconut plantations on these three islands. The gathering of coconuts and the extraction and sale of the copra or kernel from them was the main form of employment for the inhabitants. After the acquisition of the plantations, it appears that the company exercised a paternalistic, even feudal, control of the islands' affairs. Company officers acted as justices of the peace and generally administered most aspects of civilian life. Partly as a consequence of that, Chagossians had what might be considered to be a simple existence. They were largely illiterate and their skills were confined to those that the activities on the islands required. But it was an existence which they valued and, especially when contrasted with what transpired after 1971, one which was unquestionably worthwhile.

84. Apart from indigenous inhabitants, some workers on the plantations came from Mauritius and the Seychelles. But the settled population of the three islands was some 1,000 in 1962. Many of the families which comprised that population had lived in the islands for generations. Their living conditions, although not at all affluent, were far from deprived. Every family had a house and some land. They grew vegetables on the land and kept poultry or pigs to supplement the imported provisions which the company supplied. Some fishing also took place. All who wanted to have and were capable of employment had a job. This was principally in the copra industry but employment was also to be had in construction, boat building and domestic service. The Chagossians therefore enjoyed what Lord Hoffmann (in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No2)* [2009] AC 453) described as "a rich community life".

85. World affairs were soon to interrupt that simple but rich community life. Events are well described in para 6 of Lord Hoffmann's speech:

> "Into this innocent world there intruded, in the 1960s, the brutal realities of global politics. In the aftermath of the Cuban missile crisis and the early stages of the Vietnam War, the United States felt vulnerable without a land based military presence in the Indian Ocean. A survey of available sites suggested that Diego Garcia would be the most suitable. In 1964 it entered into discussions with Her Majesty's government which agreed to provide the island for use as a base. At that time the independence of Mauritius and the Seychelles was foreseeable and the United States was unwilling that sovereignty over

> Diego Garcia should pass into the hands of an independent, non-aligned government. The United Kingdom therefore made the British Indian Ocean Territories Order 1965 (the BIOT Order) which, under powers contained in the Colonial Boundaries Act 1895 (58 & 59 Vict c 34), detached the Chagos Archipelago (and some other islands) from the colony of Mauritius and constituted them a separate colony known as BIOT …"

86. In 1966, in an exchange of notes between the British and United States' governments, the United Kingdom agreed in principle to make BIOT available to the United States for defence purposes. Later in the same year it was agreed that a military base on Diego Garcia would be established and that the United States would be allowed to occupy the other islands if they wished.

87. In 1967, the UK government bought all the lands held by the Seychelles company. Although the company was granted a lease which allowed it to continue to run the coconut plantations, it was stipulated that this would come to an end whenever the United States needed the islands. In 1970 the US government gave notice that it would need Diego Garcia in July 1971 and, acting under powers granted to him by the British Indian Ocean Territories Order 1965, the Commissioner for BIOT promptly made the Immigration Ordinance 1971. It provided (in section 4(1)) "that no person shall enter the territory or, being in the territory, shall be present or remain in the territory, unless he is in possession of a permit … [issued by an immigration officer]".

88. Even before the making of this Ordinance, the UK authorities were active in preparing for the occupation of Diego Garcia by the United States. Between 1968 and 1971 they secured the removal of the inhabitants of the island, mainly to Mauritius and the Seychelles. A small population remained for a short time on Peros Banhos and the Salomon Islands, but they too were evacuated by the middle of 1973. The islanders were told that the company was closing down its activities and that unless they accepted transportation elsewhere, they would be left without supplies. In effect, therefore, although they were not forcibly removed, they were given no choice but to leave their homes.

89. The Chagossians were resettled mainly in Mauritius. There they were largely left to their own devices. Since that country suffered high unemployment and considerable poverty, the conditions in which the displaced Chagossians were required to live, principally in the slums of St Louis, were miserable and squalid. It is now beyond question that their interests had not been considered by the British authorities to any extent. Indeed, one might say that the removal of the Chagossians from their homes was cynically engineered by ensuring that the Seychelles company

could no longer continue its commercial activities and that the inhabitants' means of livelihood was thereby brought to an inevitable end. As Lord Hoffmann put it (in para 10 of his speech), "the removal and resettlement of the Chagossians was accomplished with a callous disregard of their interests."

Legal proceedings

90. In 1975 proceedings were issued by a former inhabitant of Diego Garcia, Michael Vencatessen, against the Foreign Secretary, the Defence Secretary and the Attorney General. Damages were claimed for intimidation and deprivation of liberty associated with the circumstances in which he had been required to leave Diego Garcia. In negotiations between the UK government and Mr Vencatessen's advisers, the latter were treated as acting on behalf of all the Chagossians.

91. An initial purported settlement of the claim failed to win the approval of the Chagossian community and negotiations resumed in which the Mauritius government was also involved. Finally in July 1982 it was agreed that the UK government would pay £4m into a trust fund for the Chagossians, set up under a Mauritian statute. The agreement was signed by the two governments in the presence of Chagossian representatives. It provided that individual beneficiaries should sign forms renouncing all their claims arising out of their removal from the islands. The vast majority of the displaced persons signed.

92. Matters did not end there. On 30 September 1998 Mr Bancoult applied for judicial review of the Immigration Ordinance 1971 and a declaration that it was void because it purported to authorise the banishment of British Dependent Territory citizens from the Chagos Islands. He also sought a declaration that the policy which prevented him from returning to and residing in the territory was unlawful. The UK government reacted to these proceedings by commissioning an independent feasibility study to examine whether it would be possible to resettle some of the Chagossians on Peros Banhos and the Salomon Islands. Return to Diego Garcia was regarded as unfeasible because, under the arrangements made with the UK government, the United States was entitled to occupy that island until 2016 at least.

93. On 3 November 2000 the Divisional Court (Laws LJ and Gibbs J) gave judgment in favour of Mr Bancoult: *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 *(Bancoult (No 1))*. An order was made quashing section 4 of the Immigration Ordinance 1971 as ultra vires. The government did not appeal this decision. Instead the Foreign Secretary issued a statement in which he referred to the feasibility study, Phase 2 of which was, he said, well under way. As a result of the court's judgment, the statement said, the feasibility

of resettling the Chagossians took on "a new importance" and a new Ordinance allowing them to visit the outer islands would be made.

94. On the same day that the statement was issued, the commissioner revoked the 1971 Immigration Ordinance and made the Immigration Ordinance 2000. This largely repeated the provisions of the previous Ordinance but contained a new section 4(3) which provided that the restrictions on entry or residence imposed by section 4(1) should (with the exception of Diego Garcia) not apply to anyone who was a British Dependent Territories citizen by virtue of his connection with BIOT. Some Chagossians visited the outer islands to tend family graves or to re-familiarise themselves with the lands that they had been forced to leave. No-one attempted to resettle there.

95. Before the feasibility study was published, a group action was begun on behalf of the Chagossians. This claimed compensation and restoration of the property rights of the islanders and declarations of their entitlement to return to all the Chagos Islands and to measures facilitating their return. The action was taken against the Attorney General and other ministers. On 9 October 2003 Ouseley J in *Chagos Islanders v Attorney General* [2003] EWHC 2222 struck out this action on the grounds, inter alia, that the claim to more compensation after the settlement of the *Vencatessen* case was an abuse of process, and that the claims were in any case statute-barred. An application for leave to appeal against that order was refused on 22 July 2004 (Dame Elizabeth Butler-Sloss P, Sedley and Neuberger LJJ) [2004] EWCA Civ 997.

96. The feasibility report was published in June 2002. Its findings were summarised by Lord Hoffmann in para 23 of his speech:

> "… It concluded that 'agroforestal production would be unsuitable for commercial ventures'. So there could be no return to gathering coconuts and selling copra. Fisheries and mariculture offered opportunities although they would require investment. Tourism could be encouraged, although there was nowhere that aircraft could land. It might only be feasible in the short term to resettle the islands, although the water resources were adequate only for domestic rather than agricultural or commercial use. But looming over the whole debate was the effect of global warming which was raising the sea level and already eroding the corals of the low lying atolls. In the long term, the need for sea defences and the like would make the cost of inhabitation prohibitive. On any view, the idyll of the old life on the islands appeared to be beyond recall.

> Even in the short term, the activities of the islanders would have to be very different from what they had been."

97. In light of the feasibility report the government decided that it would not support resettlement of the islands. In any event, in their perception, Diego Garcia would have to be excluded from any resettlement plans because of what was considered to be the UK's treaty obligations to the United States. Added to these considerations were reports of planned direct action by various groups who intended to launch landing expeditions to the islands. These factors combined to prompt the government to restore full immigration control. The British Indian Ocean Territory (Constitution) Order 2004 (the Immigration Order) was made. This included section 9 which provided:

> "(1) Whereas the territory was constituted and is set aside to be available for the defence purposes of the government of the United Kingdom and the government of the United States of America, no person has the right of abode in the territory.
>
> (2) Accordingly, no person is entitled to enter or be present in the territory except as authorised by or under this Order or any other law for the time being in force in the territory."

98. A challenge to the validity of section 9 by way of judicial review was made. The Divisional Court [2006] EWHC 1038 (Admin), paras 120-122 held that it was invalid because its rationality had to be judged by the interests of BIOT. That meant the people who lived or used to live on BIOT. The Court of Appeal (Sir Anthony Clarke MR, Waller and Sedley LJJ) [2008] QB 365 affirmed that decision but on somewhat different grounds. The Master of the Rolls and Sedley LJ held that there had been an abuse of power in enacting the 2004 Order because the interests of the Chagossians had not been taken into account. All three members of the Court of Appeal agreed that the Foreign Secretary's statement after the judgment in *Bancoult (No 1)* and the Immigration Ordinance 2000 constituted promises to the Chagossians which gave rise to a legitimate expectation that, in the absence of a relevant change of circumstances, their rights of entry and abode in the islands would not be revoked and there had been no such change. The Court of Appeal's decision was appealed to the House of Lords and by a majority (Lord Hoffmann, Lord Rodger and Lord Carswell, Lord Bingham and Lord Mance dissenting) *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453 the appeal was allowed and the decision of the Court of Appeal was reversed.

The present application

99. By this application, Mr Bancoult, the respondent in the appeal before the House of Lords, seeks to have its decision set aside on the ground of material non-disclosure. He claims that documents held by the defendant which should have been produced in the course of the earlier proceedings are likely to have made a significant difference to the outcome of those proceedings. Before examining that claim, it is necessary to say something about the various stages and phases that were planned for the feasibility study and how those stages and phases changed in the course of its progress. It will also be necessary to consider the opinions of the House of Lords before assessing whether disclosure of the documents is likely to have affected its decision.

The various stages of the feasibility study and the process of disclosure

100. The report on stage 1 of the feasibility study had been published in June 2000 just before the hearing of *Bancoult (No 1)*. It was, the applicant claims, largely in favour of resettlement. It identified fishing as a major means of subsistence for a resettled population. Shortly after the Foreign Secretary's statement following the decision in *Bancoult (No 1)*, the stages of the feasibility study were re-named. Stage 1 was now referred to as the preliminary study. Phase 2A was to be a technical report on hydrogeological monitoring on the Salomon and Peros Banhos atolls. A more substantial Phase 2B was to be a general examination of some pre-requisites to re-settlement, prior to the full cost benefit analysis that was originally intended to come at stage 2 but which would now be a stage 3 of the report.

101. Phase 2A, the hydrogeological survey, was started in 2001 but was never published as a separate report, its work being subsumed into Phase 2B. The latter phase was begun in late 2001 and completed in mid-2002. A report on it was published in July 2002. The full cost-benefit analysis, contemplated as stage 3 was never carried out. Phase 2B reported that resettlement would be precarious and that its cost would be prohibitive. The government decided not to proceed with the planned stage 3 (the cost-benefit analysis). It terminated consideration of resettlement, and introduced the 2004 Order prohibiting residence on the islands.

102. Richard Gifford was a partner in the firm of solicitors which acted for Mr Bancoult in the litigation which culminated in the decision of the House of Lords. In advance of the hearing before the Divisional Court he sought disclosure of the drafts of the three phases of the feasibility study and of any comments made on these by officials. Correspondence was exchanged with the Treasury Solicitor in which the relevance of some of the material sought was disputed but it is unnecessary to review this. Comments on the draft of the preliminary study could not be located at

first. They were then discovered and supplied. Mr Gifford claims that they revealed "clear evidence of a crude re-writing of the important 'General Conclusion' from an entirely positive statement to a qualified one".

103. It might be thought that since the document which is said to have prompted the 2004 Order was the report on the Phase 2B study, the re-writing of the preliminary report's conclusion is of no particular importance. The fact that it was rewritten, however, when set against the now known position that there was extensive rewriting of the draft Phase 2B report may indicate a greater need for caution in examining the reasons for this rewriting.

104. On 6 December 2005 the Treasury Solicitor had written to Mr Gifford stating that draft reports for the preliminary feasibility study and the Phase 2B study report had been located and were available for inspection. In a letter of 13 December, however, this statement was corrected and it was stated that only a draft of the preliminary study had been found. No draft for the Phase 2B report had been found. This was confirmed in a letter of 23 December 2005.

105. During the hearing before the Divisional Court a number of inquiries were made by the judges of the defendant as to whether all relevant documents had been disclosed. The court was informed that if any further relevant documents were found these would be disclosed. Subsequently, on 3 February 2006, Mr Bancoult's solicitor wrote to the defendant, specifically asking for the disclosure of "all documents and materials which demonstrate and support your counsel's assertion that resettlement of the Chagos Islands is 'not feasible'". This was met with the response that the material was not relevant but, when the appeal against the Divisional Court's decision was pending, the UK Chagos Support Association asked for a copy of the draft of the Phase 2B report, and was informed by letter from the Foreign and Commonwealth Office on 6 October 2006 that no copy of the draft report had been retained on their files. This was confirmed on 9 November 2006, in response to a Freedom of Information request.

106. The applicant claims that, faced with the absence of relevant documentation relating to the production and acceptance of the feasibility study, it was considered that a challenge to the reliability of the study could not be made. Counsel for the claimant in the Court of Appeal therefore stated that the government's entitlement to terminate the feasibility study after the Phase 2B report and to decline to support a return to the islands was not contested. In view of the appellants' knowledge at that time, I do not consider that this was in any sense unreasonable.

107. In any event, the stance taken by counsel did not make the feasibility study irrelevant to the case, however. The report remained relevant as being the alleged

"good reason" relied on for not proceeding with resettlement and for denying Chagossians the right to return.

108. But the challenge to the government's decision would have been, the applicant claims, of a very different stripe, if the existence of highly critical comments on the Phase 2B report had been known. Then the rationality of the decision not only not to fund resettlement but to deny Chagossians the right to return to the islands would have been strongly contested. That challenge would have been founded directly on the lack of reasonableness in relying on a report which was so obviously flawed and open to criticism.

109. The existence of undisclosed documents first became known in the course of the hearing before the High Court of a case called *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2013] EWHC 1502 (Admin). That case concerned the creation of a "no take" marine protected reserve around the Chagos Islands on 1 April 2010. In those proceedings Mr Bancoult challenged the legality of the creation of the reserve. Exhibited to a witness statement filed on behalf of the Foreign Secretary (the defendant in the proceedings) was a bundle of documents. The statement to which the documents were exhibited was that of Zaqia Rashid, a solicitor in the Treasury Solicitor's department. She observed that she produced the documents without comment as to the reasons that they had not been disclosed earlier.

110. Before Ms Rashid's statement in *Bancoult (No 3)* had been received, Mr Bancoult had made a number of freedom of information requests to the Foreign and Commonwealth Office concerning drafts of the feasibility reports. He was not satisfied with the replies that he received and lodged a complaint with Information Commissioner and a subsequent appeal to the First-tier Tribunal General Regulatory Chamber - *Chagos Refugees Group (in Mauritius) v Information Comr* (Case EA/2011/0030). The hearing of the appeal took place after the documents attached to Ms Rashid's statement had been received and was therefore principally concerned with two memoranda which had not been included in those documents. It also touched on explanations given for the failure to disclose the documents, however. The Foreign Office explained that this was due to a combination of factors. There had been a clerical oversight in relation to some of these and a recall of archived material which was more rigorously reviewed in the course of the *Bancoult (No 3)* litigation led to others being disclosed.

111. What have become known as the Rashid documents (ie those exhibited to Ms Rashid statement) contained a draft version of the executive summary of the Phase 2B feasibility study; and a covering letter from Posford (Royal) Haskoning (the consultants appointed to carry out the study) forwarding the remaining draft volumes. They also contained a number of documents generated during the

preparation and finalisation of the feasibility study. These included (1) documents relating to the scope of work to be undertaken both for the first part of the original two stage study, later re-named the preliminary study under the Phase 2A contract and under the Phase 2B contract; (2) a memorandum of a meeting between BIOT officials and the consultants; (3) correspondence between the FCO and an external scientific adviser in relation to the Chagos Archipelago, Dr Charles Sheppard; (4) correspondence between the Foreign Office and the consultants and (5) details of the amendments to the draft Phase 2B report.

The House of Lords decision

112. The appeal to the House of Lords from the Court of Appeal's decision ranged over three principal areas, only one of which is relevant to this application. The first concerned the scope of the courts' power to review the validity of an Order in Council legislating for a colony. What were described as "the extreme positions" adopted by the parties were both rejected by Lord Hoffmann. It had been argued on behalf of the government that no review of the making of an Order in Council was legally legitimate since this involved the exercise of a legislative power. On behalf of the Chagossians it was claimed that the right of abode in one's homeland was so sacred that the Crown did not have power to remove it in any circumstances. Lord Hoffmann decided that there was a power of review and that the main point in the appeal was "the application of the ordinary principles of judicial review" (para 52). The question whether there had been any contravention of those principles was the second principal area involved in the appeal and it is this ground which underpins the current application. I will consider it presently.

113. The other two members of the majority, Lord Rodger and Lord Carswell, agreed with Lord Hoffmann on his rejection of the "extreme positions" of the parties on whether the government had power to make the Order. They also agreed that the courts had power to review the making of the 2004 Order on the normal judicial review grounds (paras 105 and 122).

114. The third area of dispute was whether a legitimate expectation on the part of the Chagossians had been created by the Foreign Secretary's statement and the 2000 Ordinance. Lord Hoffmann held that this argument failed at the first hurdle - that there had to be a promise which was "clear, unambiguous and devoid of relevant qualification" *per* Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. Lord Rodger and Lord Carswell agreed.

115. In powerful dissenting speeches, Lord Bingham and Lord Mance concluded that the government did not have power by Order in Council to exclude the

Chagossians from their homeland - (Lord Bingham at para 71 and Lord Mance at para 160). They also held that the Foreign Secretary's statement and the making of the 2000 Ordinance created a legitimate expectation on the part of the Chagossians that they would be allowed "to return to the outer islands unless or until the United Kingdom's treaty obligations might at some later date forbid it" - Lord Bingham at para 73. These findings and their conflict with the conclusions of the majority are not relevant to this application. The findings of Lord Bingham and Lord Mance in relation to the rationality of the decision to make the 2004 Order most certainly are, however. But before examining their reasons for determining that that decision was irrational, it is necessary to look at the speeches of the majority in order to see precisely why they considered that the charge of irrationality had to fail.

116. The summary of the findings of the feasibility report contained in para 23 of Lord Hoffmann's speech has been set out above (para 16). This provided the backdrop to his examination of the issue of irrationality. Having accepted Sir Thomas Bingham MR's statement of principle in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554, to the effect that where a measure affects fundamental rights or has profoundly intrusive effects, the courts will anxiously scrutinise the decision to introduce it, Lord Hoffmann said this at para 53:

> "… However, I think it is very important that in deciding whether a measure affects fundamental rights or has profoundly intrusive effects, one should consider what those rights and effects actually are. If we were in 1968 and concerned with a proposal to remove the Chagossians from their islands with little or no provision for their future, that would indeed be a profoundly intrusive measure affecting their fundamental rights. But that was many years ago, the deed has been done, the wrong confessed, compensation agreed and paid. The way of life the Chagossians led has been irreparably destroyed. The practicalities of today are that they would be unable to exercise any right to live in the outer islands without financial support which the British government is unwilling to provide and which does not appear to be forthcoming from any other source. During the four years that the Immigration Ordinance 2000 was in force, nothing happened. No one went to live on the islands. Thus their right of abode is, as I said earlier, purely symbolic. If it is exercised by setting up some camp on the islands, that will be a symbol, a gesture, aimed at putting pressure on the government. The whole of this litigation is, as I said in *R v Jones (Margaret)* [2007] 1 AC 136, 177 the continuation of protest by other means. No one denies the importance of the right to protest, but when one considers the rights in issue in this case, which have to be weighed in the

> balance against the defence and diplomatic interests of the state, it should be seen for what it is, as a right to protest in a particular way and not as a right to the security of one's home or to live in one's homeland. It is of course true that a person does not lose a right because it becomes difficult to exercise or because he will gain no real advantage by doing so. But when a legislative body is considering a change in the law which will deprive him of that right, it cannot be irrational or unfair to consider the practical consequences of doing so. Indeed, it would be irrational not to."

117. Some observations can be made about this passage. In the first place it clearly implies that a decision to remove the Chagossians from their homeland with little or no provision for their future would indeed be a profoundly intrusive measure and one for which compelling justification would be required. And, of course, this is precisely what happened between 1968 and 1973. The Chagossians were removed. The islanders' need to accept that removal must have been seen by them as a matter of survival. Whatever one might think of the argument that the evacuation of the islands was necessary (and, therefore, justified) in order to accommodate the American bases, it is impossible to defend the failure to ensure that the Chagossians were adequately housed and provided for in their new surroundings.

118. In accordance with the standard set by Lord Hoffmann, the decision to remove the Chagossians without making adequate provision for them and their subsequent actual removal when that provision was not in place must therefore have been irrational when those events occurred. The fact that their removal, when it in fact occurred, was unreasonable cannot, in my opinion, be left out of account in assessing whether the subsequent decision to perpetuate the Chagossians' exile was rational. I will give my reasons for that conclusion later.

119. Secondly, it appears that Lord Hoffmann considered that the importance of the right to live in the outer islands, because it could not be fulfilled without financial help, was diminished because it was "purely symbolic". This was a view strongly challenged in the speech of Lord Mance. In para 138 he said:

> "… [The wish of the Chagossians] for recognition of their historic connection, and on their case rights of abode, in relation to the Chagos Islands is deep-felt, longstanding and, in my view, understandable. Arguments that any right of abode is symbolic, since it would be impracticable to exercise without expensive government support to which it is accepted that there is no right and which would not be forthcoming, in my view miss the point. If anything, they indicate that the right claimed

> could be recognised without this being likely to have any practical effect on the present state of the Chagos Islands. These islands (apart from Diego Garcia) appear to exist as an unspoilt nature paradise to which an increasing number of long-distance yachtsmen venture to spend periods of months without noticeable disturbance to the operations of the United States base at Diego Garcia many miles away."

120. This passage throws into sharp focus the question whether the practicability of fulfilment of an undeniable right affects its intrinsic worth. It also emphasises the need to look closely at the question whether it was necessary to deny the Chagossians the right to live on the outer islands in order to avoid responsibility for funding such an option. At a theoretical level at least, a clear distinction can be drawn between, on the one hand, a refusal to underwrite the costs of resettlement, and, on the other, depriving the Chagossians of the right to return to their homeland. If all that the British government wanted to avoid was paying for the cost of resettlement, why should it not simply say so? But the riposte to an argument that it was unnecessary to forbid return to the islands and that refusing to fund such a return was enough to achieve the government's aims might be that given by Lord Hoffmann himself. This was that to permit an unfunded return would merely assist in the campaign on which the Chagossians were embarked. In order to frustrate that campaign, it was necessary to remove from the Chagossians their right to return to the place where they and their ancestors were born and had lived.

121. Lord Mance suggested (also in para 138 of his speech) that it had not been shown that "that the Chagossians have been, in *Bancoult (No 1)* or the present proceedings, engaged in a mere campaign to obtain the UK government support for resettlement or to embarrass the United Kingdom and United States governments". Whether or not there was evidence from which to infer that there was such a campaign, it is clear from Lord Hoffmann's speech that the rationality of the decision to enact the 2004 Order depended crucially on its being shown that the conclusion that it was necessary in order to forestall a campaign by the Chagossians was not unreasonable. This is also clear from the speeches of Lord Rodger and Lord Carswell. At para 112, Lord Rodger said that "the decision to legislate and to introduce immigration controls … appears to have been prompted by the prospect of protesters attempting to land on the islands." And at para 132 Lord Carswell expressed his full agreement with Lord Hoffmann and Lord Rodger.

122. Does the decision of the majority on the issue of irrationality preclude any re-examination of the question of whether the right of the Chagossians to go and live where they were born was merely symbolic or, if it was, that its importance was thereby devalued? Is the second question set out above (whether the purpose of the Chagossians' challenge was to advance a campaign to obtain financial support from the UK government and to embarrass the UK and US governments) forever settled

by the decision of the majority? In my opinion, the answer to these questions is a conditional "No". The conclusion that the decision to enact the 2004 Order could withstand the charge of irrationality was multi-factorial. If it now transpires that one of the bases for that conclusion was reliance on information that has now proved to be wrong or incomplete, this inevitably reflects on the cogency of the other grounds on which the conclusion was based. The various reasons for a decision such as this are, of their nature, interlinked. They may also be interdependent. Weight given to one factor may be affected by the discovery that the weight given to another can no longer be sustained. If, therefore, it emerges that the decision on the feasibility of resettlement was reached on information that was plainly wrong or open to serious challenge and that it is at least distinctly possible that a different decision on that question would have been formed had the full picture been known, it seems to me that the rationality of the enactment of the 2004 Order should be re-examined generally.

123. Leaving that debate aside for the present, however, it is necessary to focus directly on the feasibility of a return to the islands and the various views expressed about that.

124. Lord Hoffmann's summary of his conclusions (para 23 of his speech) on this question have already been discussed. He also relied on the written statement to the House of Commons on 15 June 2004 by the Foreign Office Under Secretary of State, Mr Bill Rammell, that in the light of the feasibility report it would be impossible for the government to promote or even permit resettlement to take place.

125. Lord Rodger also relied on the contents of the feasibility report and Mr Rammell's statement. At paras 112 and 113 he said this:

> "112. On 15 June 2004 a junior minister, Mr Rammell, made a written statement to Parliament. His good faith has not been impugned by the respondent. The statement shows that, in deciding to legislate to prevent people resettling on the outer islands, the government took into account the fact that the economic conditions and infrastructure which had once supported the way of life of the Chagossians had ceased to exist. Something new would have to be devised. The advice was that the cost of providing the necessary support for permanent resettlement was likely to be prohibitive and that natural events were likely to make life difficult for any resettled population. Human interference within the atolls was likely to exacerbate stress on the marine and terrestrial environment and would accelerate the effects of global warming. Flooding would be likely to become more frequent and would threaten

> the infrastructure and the freshwater aquifers and agricultural production. Severe events might even threaten life. The minister recorded that, for these reasons, the government had decided to legislate to prevent resettlement. Although he made no mention of it, the decision to legislate and to introduce immigration controls at that particular time appears to have been prompted by the prospect of protesters attempting to land on the islands. In addition, Mr Rammell said that restoration of full immigration control over the entire territory was necessary to ensure and maintain the availability and effective use of the territory for defence purposes. He referred to recent developments in the international security climate since November 2000 when such controls had been removed.
>
> 113. The ministerial statement indicates that a decision to legislate was taken on the basis of the experts' (second) report on the difficulties and dangers of resettling the islands - these difficulties and dangers being dangers and difficulties which would affect the Chagossians themselves, if they were to try to live on the outer islands. Given the terms of that report alone, it could not, in my view, be said that no reasonable government would have decided to legislate to prevent resettlement. In particular, the advice that the cost of any permanent resettlement would be prohibitive was an entirely legitimate factor for the government which is responsible for the way that tax revenues are spent to take into account. In addition, the government had regard to defence considerations, the views of its close ally, the United States, and the changed security situation after 9/11. These additional factors reinforce the view that the decision to legislate was neither unreasonable nor irrational."

126. Although Lord Rodger noted that factors other than those outlined in the experts' second report were in play, it is clear from these paragraphs that he acknowledged that the report was the principal influence in the government's decision. He identified a number of features from it as being of particular importance: 1. the cost of permanent resettlement was likely to be prohibitive; 2. natural events would make life difficult for the inhabitants; 3. stress on the marine and terrestrial environments would be aggravated; 4. the effects of global warming would be increased; 5. flooding was likely to become more frequent and fresh water supplies and agricultural production would be endangered; and 6. severe events might even threaten life. By any standard, these were anticipated consequences of considerable moment.

127. Lord Carswell also relied heavily on the report. At para 121 he said that it was "quite clear" that resettlement was "wholly impracticable without very substantial and disproportionate expenditure". The practical difficulties in the way of resettlement were in his view "relevant to the rationality of the government's decision".

128. The claims made for the rationality of the decision to introduce the 2004 Order were forthrightly rejected in a lucid and strong passage of Lord Bingham's speech. At para 72 he said:

> "… section 9 was irrational in the sense that there was, quite simply, no good reason for making it. (1) It is clear that in November 2000 the re-settlement of the outer islands (let alone sporadic visits by Mr Bancoult and other Chagossians) was not perceived to threaten the security of the base on Diego Garcia or national security more generally. Had it been, time and money would not have been devoted to exploring the feasibility of resettlement. (2) The United States government had not exercised its treaty right to extend its base to the outer islands. (3) Despite highly imaginative letters written by American officials to strengthen the Secretary of State's hand in this litigation, there was no credible reason to apprehend that the security situation had changed. It was not said that the criminal conspiracy headed by Osama bin Laden was, or was planning to be, active in the middle of the Indian Ocean. In 1968 and 1969 American officials had expressly said that they had no objection to occupation of the outer islands for the time being. (4) Little mention was made in the courts below of the rumoured protest landings by LALIT. Even now it is not said that the threatened landings motivated the introduction of section 9, only that they prompted it. Had the British authorities been seriously concerned about the intentions of Mr Bancoult and his fellow Chagossians they could have asked him what they were. (5) Remarkably, in drafting the 2004 Constitution Order, little (if any) consideration appears to have been given to the interests of the Chagossians whose constitution it was to be. (6) Section 9 cannot be justified on the basis that it deprived Mr Bancoult and his fellows of a right of little practical value. It cannot be doubted that the right was of intangible value, and the smaller its practical value the less reason to take it away."

129. Now, it is true that none of the reasons outlined in this paragraph touches on the question of feasibility as such but they provide a powerful and, in my view, unanswered case for rejecting the claim that the decision to introduce the 2004 Order

was rational *unless* it could be shown that the feasibility argument was so strong as to outweigh it. This is crucial. If significant doubt could have been cast on the claims made in relation to feasibility, then the case for the government that its decision was rational would have been thrown into considerable disarray.

130. Lord Mance was unimpressed by the use of the feasibility report as a basis for denying the Chagossians their fundamental right of abode in their homeland. At para 168 he pointed to the central incongruity of using a report published in 2002 to justify the enactment of the 2004 Order, two years later and to the circumstance that the government had been found to be under no legal obligation to fund resettlement:

> "… The report is in fact dated 28 June 2002, so the BIOT Order 2004 was enacted two years after the report, and nine months after Ouseley J's decision that the government had no duty to fund resettlement, although a month before the Court of Appeal finally refused permission to appeal against that decision. In the absence of any legal obligation to fund resettlement, the prospective cost of doing so appears to me (as it did to Sedley LJ in the Court of Appeal: para 71) an unconvincing reason for withdrawing any right of abode and any right to enter or be present in BIOT. The Secretary of State notes in his written case that, even in the absence of any legal obligation to fund resettlement (and although the United Kingdom has made clear its determination to resist any suggestion that it should provide such funds on a voluntary basis), there could be 'public and political pressure claiming that the United Kingdom should provide funding for the cost of resettlement'. That is not a reason articulated at the time or supported by any reference in the written case."

131. The logic of this reasoning is, in my opinion, irresistible. At its height, the feasibility report spoke to the impracticability of resettlement and the inordinate cost of funding any attempt by the Chagossians to resettle in their homeland. But it had been held that the government was under no legal obligation to fund a resettlement. As a justification for denying the fundamental right of abode in the country of one's birth, therefore, the report could be relied on only to forestall "public and political pressure" on the United Kingdom that the government should meet what the feasibility report said was the inordinate cost of resettlement. Quite apart from the consideration that, as Lord Mance pointed out, this was not a reason proffered by the government either by way of explanation of the reason for the 2004 Order or in its written case, this was a heavy burden for the report to bear. It was not enough that it be shown that the cost was exorbitant or that resettlement was impracticable; these had to be so great that *the risk of the government coming under pressure to*

meet the cost and permit resettlement was such that the Chagossians had to be refused the right to return to their traditional home.

132. Against that background, any reservations about the veracity of the claims made in the report assume an unmistakable significance. Unless the report was compelling and irrefutable in its conclusions, its capacity to act as the sole justification for the denial of such an important right was, at least, suspect.

133. Many criticisms of the reliability of the Phase 2B feasibility study have been made on behalf of the applicant. These have included examination of 1. the approach of the consultants to their task; 2. the editorial control exercised by the FCO; 3. the avowedly misleading representation that the consultants acted wholly independently; 4. the alterations to the terms of reference of the preliminary study; 5. the criticisms made of the scientific value of the Phase 2B report; and 6. the changes to the text of the report. Many documents prepared to support the applicant's case have been submitted. While I have read and closely considered all of these, I do not find it necessary or helpful to set all of them out in any detail. What follows is a summary of the principal matters to emerge from all this material which are pertinent to the central issue to be determined *viz* whether this appeal should be re-opened.

The draft preliminary report and some of the changes made to it

134. An examination of the background to the Phase 2B report must begin with the preliminary stage report. As mentioned (para 102 above) Mr Gifford claimed that there had been a crude rewriting of the conclusion of this report from the version in the original draft. In its original conception the feasibility study was intended to comprise two stages, the first of which was to see whether "settlement appears possible and environmentally acceptable" (with an estimate of the numbers who might wish to return to the outlying islands). Consultants delivered a draft report in May 2000. The principal conclusion was contained in para 5.1.1:

> "The conclusion of this preliminary study is that there is no obvious physical reason why one or both of the two atolls should not be repopulated, by the sort of numbers (up to or around one thousand) of Ilois [Chagossians] who are said to have expressed an interest in re-settlement. … Carrying capacity is largely a function of the nature of economic activity which accompanies re-settlement, and its capability of financing the necessary amount of resources to ensure adequate supplies of water and to minimise the environmental impact."

135. It was recognised that further feasibility studies would have to be undertaken and so the draft report continued at para 5.1.13:

> "If a decision is taken to examine further the feasibility of re-settlement, the next stage of the feasibility study should be largely concerned with examining the technical, financial, economic and environmental aspects of specific development proposals put forward by groups of islanders who are serious about re-settlement and who have proper financial and technical backing for their proposed enterprises."

136. When the report reached its final form, there was a notable alteration to the principal conclusion. In the published version it read in para 5.1:

> "The conclusion of this preliminary study is that resettlement of one or both of the two atolls is physically possible, but only if a number of conditions are met. These include confirmation that:
>
> - a sustainable and affordable water resource can be developed;
>
> - the nature and scale of settlement will not damage the environment;
>
> - public money is available to finance infrastructure and basic services;
>
> - and one or more private investors are willing to develop viable enterprises which can generate sufficient incomes to pay for the investment and recurrent costs of re-settlement."

137. Taken on its face, this change may not appear especially significant. But, apart from the difference in language and structure, it had incorporated as essential pre-conditions matters which the draft report had indicated should be the subject of further study and investigation. Again, however, this may betoken no more than a recognition of a need for caution about future planning. It is perhaps on this account that these changes did not feature to any great extent in the presentation of Mr Bancoult's case at any of the stages of the proceedings which ended in the appeal to

the House of Lords. In light of changes to and criticisms of the draft Phase 2B report, it may be that greater importance should be attached to them and that they could be regarded as heralding a reluctance on the part of the government to countenance any return of the Chagossians to Peros Banhos and the Salomon Islands. Certainly, it is not difficult to conclude that such an argument would have been made, had the criticisms of the draft Phase 2B report and the changes made to it been known. What would have been made of such an argument is now perhaps difficult to say but the fact that it could have been - but was not - advanced should weigh in the balance as to whether the decision of the House of Lords should be set aside.

The draft Phase 2B report and the criticisms made of it

138. In his statement to the House of Commons Mr Rammell had said that the government had "commissioned a feasibility study by *independent experts* to examine and report on the prospects for re-establishing a viable community in the outer islands of the territory". While it is strictly true that the consultants were independent, the terms of reference for the study made it clear that the BIOT government (for convenience, in the next sections this will be referred to as 'BIOT') retained the right to see and comment on a draft of the final report. In particular, para 6.3 of the terms of reference for Phase 2B of the study provided that a draft final report, containing a report of the work done, conclusions and recommendations, had to be submitted to BIOT within four months of the assignment starting. After BIOT received the draft, it was then able to make comments on it and it was only after these had been received that the final version of the report would be published. All of this might be regarded as, if not standard government practice, at least not untoward. But the applicant suggests that the way that the procedure in fact operated in this case robbed the final report of any claim to true independence. He claims that when the extent of the widespread changes to the draft originally submitted became known (after the Rashid documents became available) what might have appeared as a wholly independent report took on a very different complexion.

139. It is further suggested that this conclusion is reinforced by a consideration of the contents of a memorandum of a meeting between on 6 March 2002 between Alex Holland of the consultants, Alan Huckle (head of the Overseas Territories Department and BIOT Commissioner), Louise Savill (BIOT Administrator) and Brian Little (FCO Feasibility Study Project Manager). This followed 21 days of field work in Peros Banhos and the Salomon Islands. A progress report covering the period from 25 January to 28 February 2002 was considered at the 6 March meeting. This report laid down the future work programme, with draft reports from individual consultants due at Posford Haskoning by 22 March 2002, followed by submission of the entire first draft to BIOT on 31 March 2002.

140. The memorandum of this meeting was prepared by Ms Holland. In it she recorded Mr Huckle as saying: "The FCO had hoped that Phase II would negate the need for Phase III, ie if it concluded that resettlement wasn't feasible." The comment is then made, "realistically, that was never likely to be the outcome". Lord Mance has stated at para 33 that there is "no suggestion that the FCO was inviting changes to bolster any sort of findings or conclusions in either the draft and the final report, and no basis for regarding Posford as susceptible to any such invitation". It is true that there is no record of an explicit invitation to "bolster" or change findings. But it is telling that the memorandum recorded that "FCO is hoping that the section on climate change will resolve its difficulties." In my view, while these statements might be supposed not to entirely undermine the subsequent findings of the consultants, it is clear that the consultants were being given an unmistakable steer as to what FCO wanted the outcome of the report to be and, inevitably, whatever one might think about Posford's susceptibility to suggestions, this at least raises questions about the independence and impartiality of the judgment that the consultants ultimately made. Those questions in turn play into the validity of the scientific analysis made by the consultants.

141. The Executive Summary of the draft report was received by BIOT in the week beginning 8 April 2002. The remaining sections of the draft arrived on 15 April. On 24 April 2002 Charles Hamilton (who had just succeeded Louise Savill as BIOT Administrator) asked Dr Charles Sheppard (a tropical marine ecologist at Warwick University who had extensive previous work experience in the Chagos) to carry out a peer review of the consultants' report. This was provided on 14 May 2002. Dr Sheppard wrote an email to accompany his report. In this he excoriated some parts of the consultants' work. Some sections of the report were, he said, "quite hopeless". These related principally to the resources section. Importantly, however, Dr Sheppard endorsed the consultants' conclusions on the practicability of resettlement largely on account of anticipated climatic conditions. The consultants' views on this were, Dr Sheppard said, "supported by emerging science connected with tropical science generally". It might therefore be said that on the central issue which influenced the majority in the House of Lords, *viz* whether resettlement was a feasible option, the consultants' assessment was essentially supported by Dr Sheppard.

142. The applicant points to a more general criticism voiced by Dr Sheppard, however. This, he says, is bound to have prompted his advisers to mount a wholesale and direct challenge to the methodology and reliability of the feasibility report generally. In this connection, the applicant relies particularly on a sharp criticism of the report by Dr Sheppard in the following strongly-worded terms:

> "… the present Posford report should not in my view be released in its present form; some of its science would be badly

> savaged by anyone not happy with your conclusions, and so, by implication, could some of the conclusions themselves."

143. The claim that if this comment had been known by the applicant's advisers, it would have led to a more direct challenge to the feasibility report must be approached with caution in light of the fact that the applicant had engaged a resettlement anthropologist, Jonathan Jenness. He was asked to conduct a review of the feasibility report primarily to provide input on the resettlement issues which were excluded from the Phase 2B study, but Mr Jenness also made some strong criticisms of the claimed conclusions of the study, without knowing how those conclusions had been arrived at.

144. Mr Jenness' report was submitted to FCO. The applicant and his advisers were unaware that it had been subjected to a critique by Dr Sheppard until FCO wrote to his solicitors on 2 December 2002 enclosing Dr Sheppard's report. He challenged and criticised a number of Mr Jenness' conclusions but he said that many of his points about the inadequacies and errors in the Posford report were valid. There must be some doubt, however, that Dr Sheppard's acknowledgment that parts of Mr Jenness' criticisms of the feasibility study were sound would have led to a markedly different strategy on the part of Mr Bancoult's advisers, not least because of the astringency of Dr Sheppard's other observations on Mr Jenness' report.

145. Whether disclosure of Dr Sheppard's critique of Mr Jenness would have led to a different conclusion by the majority in the House of Lords calls for rather more subtle consideration, however. As I have said, the essential issue for the House of Lords was whether the cost of resettlement was *so* exorbitant or that resettlement was *so* impracticable that the risk of the government *coming under pressure* to meet the cost and permit resettlement was such that the Chagossians had to be refused the right to return to their traditional home. It seems to me that, in light of Dr Sheppard's general criticisms of the consultants' report and his endorsement of some of Mr Jenness' disparagement of it, it is at least questionable that such heavy reliance would have been placed by the majority on its conclusions.

Alterations made to the draft Phase 2B report

146. The draft report contained a supremely important passage at the second part of para 1.8, which was originally included in the section on resettlement. It reads:

> "… the most significant and immediate consequences of climate change on a resettled population within the Chagos Archipelago are likely to be related to changes in sea levels,

> rainfall regimes, fresh water resources, soil moisture budgets, prevailing winds (direction and speed) and short term variation in regional and local patterns of wave action. At present the Chagos archipelago lies *just north of an active cyclone belt*, however, a small northward shift of this belt *could* lead to frequent cyclones in the area. This *would* lead to more frequent flooding of the islands, with corresponding risk to life and any infrastructure. It *would* also reduce agricultural potential and the freshwater contained within the island aquifers *would* experience higher levels of salinity". (emphasis added)

147. The final version of the report in the equivalent section was in the following terms:

> "The most significant and immediate consequences of climate change for the Chagos Archipelago are likely to be related to changes in sea levels, rainfall regimes, soil moisture budgets, prevailing winds and short term variation in regional and local patterns of wave action. As a consequence most islands *will* experience increased levels of flooding, accelerated erosion, and seawater intrusion into freshwater sources. *The extent and severity of storm impacts, including storm surge floods and shore erosion are predicted to increase.* Although the risks associated with climate change are not easily established the implications of these issues to resettlement in the outer atolls of the Chagos Archipelago are outlined briefly below" (emphasis added).

148. The most obvious and significant points to be made about these two passages is in (i) the transformation of a conditional forecast of frequent flooding etc, predicated on a possible northward shift of the active cyclone belt, into a firm prediction that these and other consequences *will* occur; (ii) the omission of any reference to the cyclone belt in the final version; and (iii) the new wording in the final version predicting an increase in storm surge floods and shore erosion unconnected with cyclones. A new sentence has been added stating that "[t]he extent and severity of storm impacts, including storm surge floods and shore erosion are predicted to increase". No evidence was provided to support the assertion contained in this sentence.

149. The significance of translating the prediction of possible consequences of climate changes into a positive statement that these *will* occur lies, of course, in the impetus that it gives to the notion that there really was no practical means of resettling the islands. As it happens, there is no evidence that these consequences

have begun to materialise even now, although that may not be taken into account on the issue of whether the application to re-open the appeal should be allowed. But the essential message of the final report that these consequences *would* occur cannot but have influenced the decision of the majority of the House of Lords that the perceived need to enact the 2004 Order was not irrational. It is one thing to say that it is rational to forbid Chagossians to return to their homeland if the dire consequences that were spoken of were going to occur. It is quite another to say that it was reasonable if it was merely possible that they might happen.

The jurisdiction to set aside a decision of the House of Lords and the test to be applied

150. It is possible, at least theoretically, to distinguish between the question whether this court has jurisdiction to set aside a decision of its predecessor and the test to be applied in deciding whether to do so. In practice, however, these concepts overlap because the jurisdiction tends to be defined in terms of the conditions which justify its invocation.

151. In *R v Bow Street Metropolitan Stipendiary Magistrates, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 132D, Lord Browne-Wilkinson said:

> "In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Broome v Cassell & Co Ltd (No 2)* [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point."

152. There is likewise no relevant statutory limitation on the jurisdiction of this court. And its inherent jurisdiction must comprehend the right to correct an injustice caused by an earlier order made by it or however such injustice arises. This point was made by Lord Hope, delivering the judgment of the panel in *R (Edwards) v Environment Agency (No 2)* [2011] 1 WLR 79 where he said at para 35:

> "The Supreme Court is a creature of statute. But it has inherited all the powers that were vested in the House of Lords as the ultimate court of appeal. So it has the same powers as the House had to correct any injustice caused by an earlier order of the

> House or this court. It would however be more consistent with the principle which Lord Browne-Wilkinson described to say that the power is available to correct any injustice, however it may have arisen …"

153. Of course, in this context, what is meant by injustice is the critical issue. Providing a comprehensive definition of the circumstances in which it would be appropriate to exercise this jurisdiction is impossible but one can begin with the uncontroversial statement that it must be sparingly invoked. Lord Browne-Wilkinson was careful to make that point in emphatic terms. At 132E of *Pinochet* he said:

> "… it should be made clear that the House will not re-open any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong."

154. By "wrong" in this connection one may safely assume that Lord Browne-Wilkinson had in mind a conclusion that the earlier court's decision was, in the minds of the subsequent panel, one which should not have been reached on the particular facts and legal issues before it. So it is not sufficient to show that the earlier decision was wrong in that sense. But is it necessary to show that, not only was a party "subjected to an unfair procedure" but that a "wrong" decision was thereby procured? On one view, the statement in the earlier passage quoted above, that the jurisdiction should be invoked to "correct any injustice" might indicate this, for how could an injustice occur if the outcome of the proceedings would have been the same in any event? But Lord Browne-Wilkinson's later reference to *Broome v Cassell (No 2)* suggests that the jurisdiction is not so confined. This appears to indicate that where parties have not had a fair opportunity to address argument on a relevant point, an injustice, sufficient to animate the jurisdiction, is present.

155. The question remains, however, whether it is a necessary prerequisite that the earlier decision would not have been, or is likely not to have been, reached, if the defect in procedure or other irregularity had not occurred. The applicant has accepted that "it must be shown that the non-disclosure probably had, or may well have had, a decisive effect on the outcome". This concession was based largely on Court of Appeal jurisprudence. The respondent agreed with the applicant's formulation of the appropriate test.

156. In *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528, it was held that the Court of Appeal could re-open proceedings which it had already heard and determined if it was "clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy". It is apparent that "significant injustice" in that case connoted an actual injustice (in the form of an adverse result which should not have occurred), although, as it happens, no such injustice was held to have happened there. A tangible injustice in the form of the probably wrong outcome was considered to be necessary. This approach was followed in *Feakins v Department of the Environment, Food and Rural Affairs* [2006] EWCA Civ 699.

157. After *Taylor v Lawrence* was decided, CPR 52.17 headed "Re-opening of Final Appeals" was promulgated on 6 October 2003. It provided:

> "The Court of Appeal ... will not re-open a final determination of any appeal unless -
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to re-open the appeal; and
>
> (c) there is no alternative effective remedy."

158. No such provision exists in the Supreme Court Rules. Obviously, there will customarily be no alternative effective remedy where the decision that is sought to be re-opened is one of the Supreme Court. Should the approach of this court be the same as that otherwise indicated in this provision? For reasons earlier given, the power to re-open should be invoked sparingly and the need for exceptional circumstances is unobjectionable. The requirement that the circumstances are such as to make it appropriate to re-open the appeal is somewhat general and rather begs the question, when is it appropriate that the appeal should be re-opened. This is an issue on which, I think, it is quite impossible to be prospectively prescriptive. It seems to me, therefore, that the truly important condition in CPR 52.17 is that the re-opening of an appeal should be necessary in order to avoid injustice and that this is the touchstone which this court should adopt as a guide to when this exceptional course should be followed.

159. Does real injustice involve a conclusion that the circumstance which prompts the application to re-open the appeal probably had, or may well have had, a decisive

effect on the outcome? I am content to say that this should normally be required. But I enter two caveats to that proposition. In the first place, it may not always be possible to forecast that such a decisive effect would probably or might well accrue. In that event, I would not preclude in every circumstance the possibility of a re-opening of the appeal. The second possible exception to the general rule might arise where the behaviour of the party whose failure to place before the court relevant material was so egregious that, even if it was not considered likely that the outcome of the appeal would be affected, it would nevertheless be appropriate that the appeal be re-opened in order to demonstrate that all pertinent information had been fully considered and that due process had been followed.

160. Neither situation arises here. I am satisfied, therefore, that it is incumbent on the applicant to show that if the material in the Rashid documents had been available to the House of Lords they would have had, or may well have had, a decisive effect on the outcome of the appeal. I am entirely satisfied, however, that it is enough that it be established that there is a real possibility that a different outcome would have occurred had the information been available at the time of the original hearing. How could it be otherwise? If it is shown that it is distinctly possible that a party might have achieved a different result had relevant material been available to it, I cannot understand how it could be said that that party has not suffered an injustice by being denied the material and thereby being denied the opportunity of securing the outcome that they sought. If I might have persuaded the court that it should reach a different view if I had material that could have influenced that view, have I not suffered an injustice by being deprived of that chance? Of course I have. To the extent that *Taylor v Lawrence* and *Feakins v Department of the Environment, Food and Rural Affairs* suggest otherwise I emphatically disagree with them.

161. It is, therefore, my firm belief that it is not necessary to show that it was probable that a different outcome would have been brought about; it is enough that there exists a distinct possibility that this would be so. Furthermore, the formulation whether "it was irrational or unjustified for the Secretary of State to accept and act on the General Conclusions" does not focus on the essential issue here. It was not simply a question of the Secretary of State accepting the conclusions; it was a matter of using those conclusions as a basis for denying a right of abode to the Chagossians *solely in order to deter a campaign by the Chagossians to be allowed to return to their homeland.* The House of Lords was not addressing in the abstract the question of the "rationality or justifiability of the Secretary of State's decision to rely on such conclusions" (Lord Mance in the final sentence of para 64). What it was about was an examination of the sufficiency of his reliance on those reasons as a basis for denying the Chagos Islanders' entitlement to return to live in their homeland, when there was no question of any legal obligation on the part of the government to fund that return.

162. It is therefore, I am afraid, not enough to say that there was nothing in "the re-drafting and finalisation of the stage 2B report … which could, would or should have caused the Secretary of State to doubt the General Conclusions or which made it irrational or otherwise unjustifiable to act on them in June 2004" - Lord Mance para 65. The critical issues were the nature of the action taken and the background against which it occurred. It might not be irrational to accept the conclusions of the report but that, with respect, is simply not the point. The question is whether it was rational to deny these islanders their fundamental right to live where they and their ancestors were born for the sole reason of seeking to avoid a potentially embarrassing campaign that the British government should put right the callous disregard that had been shown them when they were effectively forced from the islands between 1968 and 1973.

163. The House of Lords was not merely considering whether it was reasonable for the Secretary of State to accept the report's findings. The rationality challenge was to the action that he took, having accepted those findings. In the knowledge that the British government was not under any legal obligation to fund resettlement and that the most it had to fear was a campaign by the islanders that they be allowed to return home and that the government should facilitate that, the minister decided that they should be denied their right of abode in their homeland. That is the true nature of the rationality challenge. And that is why (as I explain at para 165 below) that it is necessary to recognise how severe the challenge to justify the 2004 Order truly was. When that central truth is confronted, it becomes clear how *any* doubt on the authority of the report was likely to or certainly should have caused the majority of the panel to question the rationality of the decision. And that is why there is, at the very least, a distinct possibility that there would have been a different outcome.

Would the Rashid documents have had, or may they well have had a decisive effect?

164. In my view the principal relevant documents exhibited to Ms Rashid's statement were: 1. the memorandum of the meeting of 6 March 2002 in which the government's hopes for the outcome of the feasibility study were made clear; 2. Dr Sheppard's critique of the draft Phase 2B report; 3. Dr Sheppard's endorsement of some of Mr Jenness' criticism of the feasibility study; 4. The draft Phase 2B report which, 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.

165. In deciding whether the disclosure of these documents before the appeal was heard by the House of Lords would or might well have had a decisive effect on the outcome, one must keep closely in mind the real issue on rationality. This was whether it was rational to deny the Chagossians the right to return to their homeland

in order to deflect or prevent a campaign that the UK government should fund resettlement costs. The issue *was not* whether it would be reasonable for the government to meet those costs. It had been decided that there was no legal obligation on them to do so. It could not, therefore, be sought to justify the decision to introduce the 2004 Order on the basis that it was not reasonable that the UK government should have to fund the resettlement costs. The government did not need to defend a decision that it would not pay for resettlement. It had been told by a court that it was not legally obliged to do so.

166. What motivated the decision to categorically forbid the Chagossians the right to go back to live in their homeland was an anticipated campaign that might have been politically embarrassing for the government. When this apprehended harm is pitted against the importance of the right to be denied, it is not difficult to recognise how severe the challenge to justify the 2004 Order truly was. People were told that they could not go back to 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. When the decision came to be made in 2004 whether they should be allowed to return to live in the outlying islands, the fact that their removal from them had been organised with "callous disregard of their interests" was a plainly relevant circumstance. It could not have been properly left out of account by a conscientious decision-maker. There is no evidence that regard was had to that factor. Irrespective of whether it was or not, however, the circumstances in which the Chagossians were originally removed from their homeland rendered any subsequent decision to refuse to allow them to return all the more difficult to justify.

167. If the Rashid documents had been before the House of Lords, the following matters would have had to be squarely confronted:

(i) despite the claims for their independence, the consultants had been told in unequivocal terms what the government hoped would be the outcome of their report;

(ii) the draft report had to be submitted to BIOT officials who had the opportunity to approve or require amendment of its contents;

(iii) much of the science of the report (although not that relating to climatic changes) had been severely criticised by Dr Sheppard;

(iv) many of the criticisms of the report by Mr Jenness had been endorsed by Dr Sheppard (even though he was also extremely critical of Mr Jenness);

(v) most importantly, the draft report's central findings in relation to climate change, couched in conditional terms, had been altered to provide a firm prediction that such changes *would* take place.

168. In my view, the collective effect of these revelations is that the appeal might well have been decided differently. The passages from the speeches of the majority which have been quoted earlier, for perfectly understandable reasons, bear no trace of reservation or doubt as to the anticipated consequences of any attempt to resettle the islands. If the members of the House of Lords knew that much of the science of the report was considered to be suspect by the scientist retained by the FCO; that the consultants had been given a clear indication of what the government hoped the report would deliver; that the changes to the conclusions of the preliminary study (which were known) proved to be a mild herald of the more radical changes to the Phase 2B report; that the Chagos Islands were not in an active cyclone belt and that this had a direct bearing on the predictions contained in the report, is it likely that the speeches of the majority concerning the anticipated consequences of an attempt to resettle would have been expressed in such emphatic terms? In my judgment it is not. And if the majority felt compelled, as it surely would, to recognise the lack of certainty in some of the central predictions, is it likely that they would have been prepared to hold as rational a decision to completely deny the Chagossians the right to return to their homeland, simply because a failure to do so would give rise to a campaign that the government should fund resettlement, when it had already been held that they were under no obligation to do so? In my opinion, it is at least distinctly possible that a different view would have been taken by the majority and that the outcome of the appeal would have been different. I would therefore grant the application to re-open the appeal.

Other matters

(i) New evidence

169. The applicant sought to introduce new evidence which, he claimed, would show that the dire consequences which the feasibility study predicted have not in fact materialised and were, in any event, highly suspect from the start. Four species of evidence were involved:

(i) a "comprehensive analysis of the Phase 2 feasibility study based … on a comparison of the original draft disclosed in the Rashid documents … with the final published version of the study" and on other information contained in the documents. This was prepared by Richard Gifford and by a coral reef scientist, Richard Dunne;

(ii) information provided to the applicant by Stephen Akester, who was one of the members of the team which prepared the feasibility study. Mr Akester stated that he did not agree with the conclusion of the feasibility study that resettlement was not feasible, and that he was not consulted about the finalisation of the original draft of the study. It is claimed that he was the only member of the team of consultants the only person with direct experience of re-settlement on small coral atolls;

(iii) a review of the feasibility study, prepared by Professor Paul Kench, of the University of Auckland, New Zealand, dated 5 October 2012. He concluded that not only were the findings of the ocean and coastal processes section in the feasibility study unsound, because of lack of specialist understanding and methodological flaws, but also that the relevant summary in the executive summary was not supported by those findings. This conclusion, it was claimed, cast grave doubt on the pivotal findings of the feasibility study especially in relation to increased risk of sea-water flooding;

(iv) the written note of 6 March 2002, referred to in para 138 above.

170. It is not open to an applicant for a re-opening of an appeal to adduce evidence solely for the purpose of retrospectively impeaching the decision of the court whose judgment he seeks to have reviewed. This would, in effect, allow an appeal against the decision based on information acquired for the purpose of undermining the judgment. An application to re-open an appeal must be based on the contention that if the original appeal had been conducted in the way that it ought to have been, it is probable or at least distinctly possible that there would have been a different outcome.

171. On this account, much of the material which the applicant seeks to introduce is not admissible, irrespective of whether it complies with the conditions which should be met, based on the principles of *Ladd v Marshall* [1954] 1 WLR 1489, for the introduction of fresh evidence. In truth, an application to re-open an appeal will rarely, if ever, be the occasion for an application to introduce fresh evidence in the conventional meaning of that term. The essence of an application to re-open an appeal, in so far as it relates to evidence, is that evidence which *should have been before the original court* was not. For this reason, I consider that none of the so-called items of evidence in the first three categories above is admissible.

172. The memorandum of 6 March 2002, by contrast constitutes material which ought to have been disclosed before the Divisional Court hearing. If it had been, I consider that it would unquestionably have featured in that and subsequent proceedings in the case, bearing, as it undoubtedly did, on not only the independence

of the consultants but also on the result that the Foreign Office hoped to obtain from the feasibility study.

(ii) The paucity of the peer review of the feasibility study and Dr Sheppard's impartiality

173. It was argued on behalf of the applicant that, in light of the range of subjects covered by the feasibility study, a professional peer review of the draft study, carried out by up to six specialists was essential. Unique reliance on the expertise of Dr Sheppard, whose specialism is coral reef ecology, was insufficient to give the report the authority that it required. There is nothing in this point. If the rationality of deciding to introduce the 2004 Order depended at all on the robustness of the peer review of the feasibility study, this point could have been made during the earlier proceedings. But, in any event, while it may be good practice to have a comprehensive peer review of a report such as the feasibility study, that is a very far cry from saying that it was irrational to rely on the study in the absence of such a review.

174. It was suggested that Dr Sheppard's input into the revision of the draft of the feasibility study was mainly composed of criticisms of those parts of the study which tended to suggest that resettlement was feasible. Thus in his input to the final version he described the natural resources sections, which suggested a variety of ways in which natural resources could be exploited to provide a livelihood for the islands as "dismal", while stating that the oceanographic, climate, groundwater and soils sections were scientifically sound. This, it was claimed, reflected the fact that Dr Sheppard was "well-known to be strongly dedicated to [the] conservation … [of coral reefs]" and it was therefore questionable whether he could "reasonably be regarded as an objective assessor of a study on the issue of reintroducing human settlement to the pristine and now deserted environment which he was so committed to protecting".

175. Even if one was prepared to take these highly contentious and untested claims at their height, they fall very far short of showing that taking Dr Sheppard's views into account in deciding to introduce the 2004 Order was irrational. The applicant does not dispute that Dr Sheppard was a well-recognised expert in his field. The suggestion that he might have allowed his interest in preserving coral reefs to influence the advice that he gave to the government is, at best, speculative. I consider that this argument is without merit.

Is the application moot?

176. The respondent has argued that events occurring since the decision of the House of Lords and a further review of the feasibility of resettlement render this application unnecessary. In July 2013 the respondent announced that a new feasibility study would be carried out. The terms of reference for this study were published on 31 January 2014. The new study was to consider a range of options for the re-settlement of BIOT, including not just the outer Chagos Islands but also Diego Garcia where the United States military base is located.

177. These developments do not render the re-opening of the appeal of merely academic interest. If the original judgment of the House of Lords is not set aside, the starting point for all future consideration of the resettlement issue will be that section 9 of the Constitution Order is valid, and that the removal of the Chagos Islanders' right of abode was lawful. If it proves that there would have been a different outcome in the appeal before the House of Lords if the material from the Rashid documents had been before their Lordships, it would obviously not be right that the position concerning the Chagossians' right to return to their homeland, recognised first by the Divisional Court, should not be retrospectively vindicated, with whatever legal consequences that this might entail.

178. Lord Mance in para 72 and Lord Clarke in para 78 of their judgments have characterised as "conclusive" the consideration that the 2014/5 feasibility study takes into account the possibility of resettlement on the islands, including Diego Garcia. They both suggest that "the background has now shifted" and that "the constitutional ban needs to be revisited". With respect, whatever the outcome of the 2014/5 feasibility study, it cannot be right to suggest that this is relevant to a decision whether the appeal should be re-opened, much less that it is conclusive of that issue.

179. The fallacy of the suggestion can be demonstrated in this way: let us suppose that timeous disclosure of the Rashid documents would have led the House of Lords to a different conclusion on the question of the rationality of the decision to make the 2004 Orders. Could it seriously be suggested that the appeal should not be re-opened because of the *possibility* that the Chagos Islanders might be allowed to resettle in entirely different circumstances and for completely different reasons than those which underlay the original decision? What is the juridical basis on which such a conclusion might be made? Is it an instance of the exercise of judicial discretion to deny a remedy to which the applicant is otherwise plainly entitled? For such a result, it would be necessary to demonstrate that the applicant *would* achieve the *same result* as would accrue on the successful re-opening of the appeal.

180. Alternatively, it might be suggested that there are occasions where it is appropriate for a court to take a pragmatic view and dispose of a case in a particular way because of a new factual context. Quite apart from the unfortunate imprecision of such an approach, it must surely only be permissible when the particular disposal allows the court to achieve justice in the changed circumstances. Given the narrowness of the issue before the Supreme Court on this appeal, taking account of changed circumstances in the Chagos Islands does not achieve justice. We are not in a position to make an order that vindicates the applicant's right to resettle on Diego Garcia or elsewhere on the archipelago. The suggestion that we need not re-open this appeal because of the possibility that the 2014/5 feasibility study would permit resettlement depends on (a) the government changing its stance as a result of the study; failing which (b) the applicant or others of like mind having the appetite to bring forward yet further litigation, despite the unhappy previous experience of past proceedings; (c) their being able to secure the services of lawyers prepared to work for them pro bono or on some other uncertain basis; and (d) the courts deciding in favour of the Chagossians in that speculative litigation. Even if it could be said that a favourable outcome of the 2014/5 feasibility study is possible, the Chagossians' ability to obtain the result that the original appeal, if successful before the House of Lords, would have achieved is remote in the extreme. That this should provide a basis for denying them an outcome to which they were otherwise entitled is in my view inconceivable.

Delay

181. The respondent has claimed that there was undue delay in making the application to re-open the appeal. I do not consider that there is any merit in that claim. The Rashid documents were disclosed on 1 May 2012, in the course of the *Bancoult (No 3)* proceedings. The applicant sought to raise the issue of their non-disclosure in those proceedings. He was not permitted to do so. It was held that the feasibility study had not played a part in the decision to create a marine protected area - paras 81 to 93 of judgment given on 11 June 2013. That decision was appealed to the Court of Appeal, and judgment was given in the Court of Appeal on 23 May 2014 ([2014] EWCA Civ 708; [2014] 1 WLR 2921).

182. The applicant then sought to resolve the matter by inviting the respondent to agree that the judgment in the present action should be set aside by consent. This request was made in a letter dated 5 December 2013. It was refused on 5 January 2014. Counsel's opinion was obtained on 26 January 2014 and legal aid was applied for immediately. It was eventually granted on 29 September 2014. There is no suggestion that the applicant was in any way responsible for delay between the submission of the application for legal aid and its grant. The application form was filed on 9 January 2015. There was no culpable delay on the part of the applicant.

Duty of candour

183. A respondent's duty of candour in judicial review proceedings is summarised at p 125 of *Fordham's Judicial Review Handbook* (Sixth Edition 2012):

> "A defendant public authority and its lawyers owe a vital duty to make full and fair disclosure of relevant material. That should include (1) due diligence in investigating what material is available; (2) disclosure which is relevant or assists the claimant, including on some as yet unpleaded ground; and (3) disclosure at the permission stage if permission is resisted. … A main reason why disclosure is not ordered in judicial review is because courts trust public authorities to discharge this self-policing duty, which is why such anxious concern is expressed where it transpires that they have not done so."

184. In *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at para 50 Laws LJ said, "There is a … very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue which the court must decide." The duty extends to disclosure of "materials which are reasonably required for the court to arrive at an accurate decision" - *Graham v Police Service Commission* [2011] UKPC 46 at para 18. The purpose of disclosure is to "explain the full facts and reasoning underlying the decision challenged, and to disclose relevant documents, unless, in the particular circumstances of the case, other factors, including those which may fall short of public interest immunity, may exclude their disclosure - *R (AHK) v Secretary of State for Home Department (No 2)* [2012] EWHC 1117 at para 22.

185. The Rashid documents should have been disclosed. That is accepted by the respondent. They contained material that was obviously germane to the issues between the parties. The fact that they were not disclosed, despite numerous pointed requests for their production and the circumstance that, in some instances, their very existence was denied are deeply disturbing. The failure to locate the documents throughout the proceedings before the Divisional Court, the Court of Appeal and the House of Lords is not merely unfortunate, it is plainly reprehensible.

186. But I am not persuaded that the non-production of the documents until the hearing in *Bancoult (No 3)* was deliberate. The applicant has accepted as much, having said in his written case that the non-disclosure of the documents may "conceivably" have been due to an oversight. I believe that the preponderance of evidence suggests that this is the most likely explanation, although it was a grievous

oversight and one which, it is to be hoped, will be so regarded by the relevant authorities. An omission by government to disclose such material as was contained in the Rashid documents and its failure thereby to discharge its duty of candour was wholly unacceptable when such a fundamental right was at stake.

187. The applicant has suggested that, in light of the seriousness of the failure to disclose these documents and in view of their high relevance, judicial criticism will not suffice and that the decision of the House of Lords should be set aside on account only of their non-disclosure. I do not agree. If there are circumstances in which a failure to disclose documents would alone be cause for setting aside a judgment, they are not present here. For the reasons earlier given, however, I consider that the decision should be set aside and the appeal re-opened.

LADY HALE: (dissenting)

188. This is another chapter in the epic saga of the Chagossians, their expulsion from their homeland and their persistent attempts to secure, if not their actual return, then at least the recognition of their right to do so. It is a saga which shows "how the imperial common good is riven by competing theoretical justifications for empire: one, based in liberal imperialism, emphasises the civilising nature of empire and focuses on the good governance of colonies; the other, based in a utilitarian imperialism, instead focuses on how best to appropriate colonial possessions for the benefit of the imperial power" (T Frost and CRG Murray, "The Chagos Island cases: the empire strikes back" (2015) 66 NILQ 263, 266). Thus far, it is the latter which has not only driven the actions of government but has also triumphed in the courts: "Lord Hoffmann acknowledged that a choice between the liberal and utilitarian faces of imperialism did rest with the court, and decisively affirmed the utilitarian importance of the imperial interests at stake …" (*Ibid*, 287).

189. Courts have, of course, to do justice according to law. Any doubts about whether it is legally possible for the imperial power to exile a people from their homeland have to be rigorously suppressed. That question of law has been finally resolved in these proceedings by the decision of the majority in *Bancoult (No 2)*. Nevertheless, the decision to exile a people has to be taken in accordance with the law; and the people to whom it is of such momentous importance are entitled to expect the highest standards of decision-making and the most scrupulous standards of fairness from the institutions of imperial government. The challenge in the main proceedings is to the rationality of the decision in 2004 to *re-impose* the denial of the Chagossians' right of abode in their homeland, the first denial in 1971 having been declared unlawful in *Bancoult (No 1)*, a decision which was accepted by the government of the day. The challenge in this application is to the decision of the majority in *Bancoult (No 2)* that the government's decision was rational. The question for the appellate committee, as Lord Kerr has explained, was not whether

it was rational to accept the conclusions of the feasibility study, but whether, on the basis of that report, it was rational to take the drastic decision to re-impose the denial of the right of abode.

190. The question for us is not whether the majority got the answer to that question wrong. We could no more set that decision aside on that basis than we could set aside their decision that the imperial government had the power to do this. The basis upon which this court could set aside the earlier decision is that explained by Lord Browne-Wilkinson in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 132D:

> "In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. … However, it should be made clear that the House will not re-open any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. When an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong."

191. The previous decision in that case was set aside because of Lord Hoffmann's connection with an intervener in the case. He should not have decided the case without that connection being disclosed to the other parties. The House did not therefore have to consider whether his participation made any difference to the result (although, given that the earlier decision had been reached by a majority of three to two and that at the re-hearing a rather different decision was reached, there was surely a very real possibility that it did). I accept that, even if it has power to do so, this court should not set aside a decision reached after an unfair procedure if the result would inevitably have been the same had the procedure been fair. However, if it is clear that the procedure was unfair, this court should not struggle too hard to discover that the result would have been the same. It is for the court which rehears the case to reach its own conclusions. The parties are entitled to procedural as well as substantive justice.

192. It is a proud feature of the law of judicial review of administrative action in this country that the public authority whose actions or decisions are under challenge has a duty to make full and fair disclosure of all the relevant material. Only if this is done can the court perform its vital role of deciding whether or not those actions or decisions were lawful. There is no doubt in this case that the Rashid documents should have been disclosed. They were obviously relevant to the issues in the case. Not only that, the government was asked for them many times and denied their

existence. This is scarcely a good advertisement for the quality of government record keeping. No doubt files are sometimes transferred to the Treasury Solicitor for litigation purposes and their existence forgotten. But this should not happen in any well-regulated system of file-keeping. It was deeply unfair to the applicant, and to the court, that these documents were not disclosed. This was all the more unfair, given the sorry treatment of the Chagossians in the past and the importance of what was at stake for them.

193. Given that context, this court should not take much convincing that their disclosure might have made a difference to the decision in the case. What light they do cast upon the rationality of the decision under challenge will be a matter for the court which does reconsider the case. To my mind, it is quite obvious that they 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 question whether this might have made a difference has to be answered objectively rather than by reference to the particular judges who were then sitting on the case.

194. Ultimately, this is a case about justice. While I deeply admire the industry and intellectual honesty of Lord Mance, which has led him to the conclusion that the decision with which he disagreed at the time should not be set aside, for the reasons given by Lord Kerr, with which I agree, I would grant this application. Justice to my mind demands that the applicant be given a fair chance to satisfy this court that the decision to re-impose the denial of the islanders' right of abode was not a rational one.