Neutral Citation Number: [2016] EWHC 954 (Admin)

Case No: CO/879/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2016

Before:

MR JUSTICE FOSKETT

- -

Between:

R on the application of **TAG ELDIN RAMADAN BASHIR & others**	**Claimants**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
and	
SOVEREIGN BASE AREA AUTHORITY	**Interested Party**

- -
- -

Raza Husain QC, Tom Hickman and Jason Pobjoy (instructed by **Leigh Day**) for the **Claimants**
Thomas Roe QC and Penelope Nevill (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 2, 3, 4, 7, 9 and 10 March 2016

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Approved Judgment

MR JUSTICE FOSKETT:

Introduction

1. The geographical location of Cyprus in the Mediterranean Sea represents the effective reason for the human, legal and diplomatic story that lies behind this case. Cyprus has been described as "at an important cross-roads between the Middle East and Europe" (see paragraph 316 below).

2. So far as the human story is concerned, a boat leaving the coast of Lebanon with the intention of travelling to Italy is likely to pass close to Cyprus. One such fishing boat ("a 40 foot clinker built open-decked vessel in poor condition", according to a report dated 9 October 1998) left Telebibi near the Lebanese Tripoli at about midnight on 6 October 1998 carrying 75 people who were trying to escape from their home countries for a variety of reasons. The boat (described by one observer as "barely a floating coffin") was operated by people smugglers who charged $2000 for each person for the proposed journey. After two days at sea the boat's engine failed and the "crew" abandoned the boat in an inflatable with an outboard motor leaving the "passengers" behind. Some of the men on board succeeded in restarting the engine and, having sighted land, managed to steer the vessel towards what turned out to be a rocky shore line at the base of some cliffs near to Akrotiri on the south-west coast of Cyprus. (The sketch map in the Appendix demonstrates the position of Akrotiri.) The boat arrived there at about 17.00 on Thursday, 8 October 1998.

3. It was the good fortune of those on board, a group which included 10 adult women and 24 children (one of whom was only 2 days old), that British servicemen at the nearby RAF base became alerted to their plight. They were all airlifted by helicopter from the boat and taken initially to Episkopi within the Akrotiri Sovereign Base Area. Happily, unlike many who have attempted a similar journey, all survived.

4. The existence of the Akrotiri Sovereign Base Area (and also the Dhekelia Sovereign Base Area) on the island of Cyprus is a reflection of the geographical importance of Cyprus from the UK's strategic military point of view (see paragraph 58 below).

5. Amongst those rescued were the six claimants in this action and various members of their respective families. As will appear, in the ensuing years various other children were born within those families (and certain other family members joined the claimants' families) and this claim for judicial review is effectively brought on behalf of the whole group. What distinguishes the individual claimants and their families from some others who were on the boat is that the claimants have been recognised as "refugees" for the purposes of the 1951 Convention Relating to the Status of Refugees ('the Refugee Convention').

6. It is that Convention and the subsequent Protocol Relating to the Status of Refugees ('the 1967 Protocol') that represents the beginning of the legal story in this case. That legal story is set against the background of Cyprus ceasing to be a British colony and becoming a Republic in 1960 when at the same time two areas (Akrotiri and Dhekelia) were retained under UK sovereignty to enable them to continue to be used as military bases reflecting the strategic importance to which reference has been made above.

7. The claimants and their families have essentially been permanently resident in the Dhekelia military base since their recognition as refugees. In the absence of what they say is any appropriate alternative, they wish to come to the UK. The Secretary of State says that they cannot do so.

8. The court is being invited to say whether the Secretary of State's position is lawful.

The legal issues in a nutshell and the nature of the judicial review claim

9. As indicated above, the Secretary of State has denied the claimants the option of entry to the UK. In essence the claimants assert that this breaches their rights under the Convention and the Protocol which they say apply to the military bases and thus apply to them, or, if that is wrong, that both have at least been expressly treated by the UK Government as applying to them and they should, therefore, be permitted entry to the UK. They also say that the Secretary of State's decision means that they are discriminated against by reason of their status as refugees currently resident in one of the military bases and it thus infringes their rights under Article 14 of the European Convention on Human Rights ('the ECHR'). They seek an order from the court quashing the decision to deny them entry to the UK.

10. The claimants seek to challenge the Secretary of State's position by challenging a decision said to be contained in a letter dated 25 November 2014.

11. The Secretary of State contends that the Convention and the Protocol do not apply to the military bases as a matter of international law and, accordingly, the obligations asserted to exist by the claimants towards them do not arise. Alternatively, if contrary to that contention the UK owes obligations to the claimants under the Convention (or by virtue of treating them as entitled to the protection of the Convention), those obligations were discharged when in 2005 arrangements were made with the Republic of Cyprus ('RoC') by virtue of which the RoC recognised the claimants' refugee status and agreed to accept the claimants as RoC residents with (a) access to its social services and welfare system and (b) the opportunity to apply for RoC (and thus EU) citizenship. The claim based upon unlawful discrimination is denied.

12. The Secretary of State also contends that the challenge to the letter of 25 November 2014 represents an attempt to bring the judicial review claim within time by challenging "an ancillary or consequential action when the claimants have been told on several occasions throughout the years that the UK would not admit them". It is contended that the claim is out of time and should not be entertained.

13. Whilst maintaining the argument based on delay, Mr Thomas Roe QC, for the Secretary of State, sensibly and realistically acknowledged that where the future of recognised refugees (including their children) is concerned, the court will want to consider carefully the substance of the case advanced irrespective of any delay. I will, of course, return to it, but my essential focus will be upon the merits or otherwise of the competing arguments on the substantive issues.

14. The judicial review proceedings were issued on 24 February 2015, and thus just within 3 months of the letter of 25 November 2014. The parties agreed various extensions of time thereafter and William Davis J on 22 September 2015 ordered a

"rolled-up hearing" which is the procedural form in which the matter was listed before me.

15. Whatever conclusions I may come to, it would be idle to pretend that the claimants' submissions do not cross the threshold of arguability and, accordingly, I grant permission to apply for judicial review.

16. Before moving to the substance of the arguments I should record this: leaving aside the witness statements on each side (which total 13), the Amended Statement of Facts and Grounds runs to 32 pages with 33 footnotes, the Detailed Grounds of Defence runs to 48 pages with over 100 footnotes (some of the footnotes in each document containing extensive citations and cross-references) and the claimants' Skeleton Argument (including two Annexes) runs to 51 pages (with footnotes), all of those documents being single-spaced. The agreed bundles of statutory material, authorities and the like consist of 5 tightly-packed lever arch files with 138 divisions. Further material was added during the hearing. I make no complaints because the issues raised are important, but it needs to be appreciated that it has been quite impossible for me to follow every avenue that the text of these documents might suggest is there to be followed. I have focused principally on the matters that Mr Raza Husain QC, for the claimants, and Mr Roe advanced in the course of several days of oral argument.

Anonymity order

17. Early in the hearing before me, Mr Husain applied for an anonymity order in relation to the claimants because of the children involved.

18. I invited the view of those representatives of the media in court and no objection was taken to the proposed order save that my attention was drawn to the fact that Mr Bashir's name was already in the public domain. I granted an anonymity order with the exception of reference to Mr Bashir so that nothing would be reported that would lead to the identification of the children involved. I propose to refer to the six claimants as A (which is Mr Bashir), B, C, D, E and F and their respective families as "Family A", "Family B" and so on.

19. If other representatives of the media consider that the order should not have been made or that it needs modification, I will, of course, consider any representations after this judgment has been handed down. Until any such representations have been received and considered, the order I have made will remain in force.

Some general preliminary observations

20. This case comes before the court at a time when, as everyone knows, there is a "migrant crisis" in Europe. The crisis engages all affected States and territories (including, of course, the island of Cyprus) and has involved (and continues to involve) political discussions at the highest level. It will emerge in the course of considering various aspects of the background facts to the present case that political considerations have entered into some features of the decision-making.

21. It is important that anyone reading or considering the implications of this judgment should appreciate that its focus is <u>solely</u> upon the legal issues, international and

domestic, that arise and that that focus is wholly unaffected by any political context, whether past, present or future.

22. Equally, it should be noted that the case is directed solely to the cases of the six claimants and their families. Whether its outcome affects (or is thought to affect) the position of others is an irrelevant consideration from the court's point of view. It is not a decision relating to a more recent arrival of migrants in the Akrotiri Sovereign Base Area in October 2015 whose position is being considered under agreed arrangements with the RoC (see paragraph 100 below) which were not in place when the claimants arrived.

23. Finally, it should be understood that whilst there is a debate between the parties to the present case about where the claimants and their families would be "better off" in the long term, that debate is of no relevance to the legal analysis. There is no dispute at all that the present position of the claimants is unsatisfactory and cannot continue. I will be describing aspects of that position later in the judgment. The Secretary of State suggests that the 17 or so years that the claimants have spent on the island of Cyprus means that they would be better off settling there. The claimants disagree and wish to come to the UK. Doubtless the question of where they might better be settled is an issue upon the merits of which views may reasonably differ. As I have said, it is no part of the court's function to express any view, one way or other, upon it or be influenced by it other than to note its existence as part of the background. Indeed, lest there be any doubt about it, it should be emphasised that it is not the court's task to decide what ultimately should be done about the position of the claimants and their families: its task is simply to determine whether the Secretary of State's currently expressed decision was arrived at lawfully.

24. Before turning to the background in more detail, both relating to the military bases and their relationship with the RoC and to the position of the six families, it would be as well to recall the relevant parts of the Refugee Convention and the 1967 Protocol and of the Vienna Convention on the Law of Treaties 1969 ('the VCLT') that may, it is argued, impact upon its interpretation.

The 1951 Refugee Convention and the 1967 Protocol and the VCLT

25. Whilst the issues surrounding what should happen to "refugees" had been a familiar topic for consideration in the period after the First World War, the aftermath of the Second World War formed the backdrop to the 1951 Convention. The Convention is a United Nations ('UN') treaty to which individual States may accede. The Office of the United Nations High Commissioner for Refugees ('UNHCR') has the responsibility of leading and co-ordinating international action to protect refugees and to resolve refugee problems wherever they arise. Under Article 35 of the Convention and Article II of the Protocol, States that have acceded to the Convention undertake to cooperate with the Office of the UNHCR "in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of" the Convention and the Protocol.

26. Mr Husain has drawn attention to the following two provisions of the Preamble to the Convention:

> "CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,
>
> CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms …."

27. Article 1 contains the definition of a "refugee" which, so far as is material, is as follows:

> "For the purposes of the present Convention, the term "refugee" shall apply to any person who … [as] a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

28. It was further provided that the words "events occurring before 1 January 1951" either meant "events occurring in Europe before 1 January 1951" or "events occurring in Europe or elsewhere before 1 January 1951" and each Contracting State was required to make a declaration "at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention" and, if it originally adopted the first alternative it could subsequently extend its obligations by adopting the second alternative "by means of a notification addressed to the Secretary-General of the United Nations".

29. It is evident that this Convention was not prospective in the sense that it was not applicable to those who fulfilled the definition of "refugee" as the result of events occurring after 1 January 1951. It was this issue that was addressed by the 1967 Protocol. The Preamble of the Protocol provided as follows:

> "THE STATES PARTIES TO THE PRESENT PROTOCOL
>
> CONSIDERING that the Convention … covers only those persons who have become refugees as a result of events occurring before 1 January 1951,
>
> CONSIDERING that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

> CONSIDERING that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,
>
> have agreed as follows …."

30. The new definition of "refugee" (set out in Article I, paragraph 2 of the Protocol) omitted the time limits set out in the Convention and Article I, paragraph 1 provided as follows:

> "The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as [newly] defined."

31. Article V provides thus:

> "The present Protocol shall be open for accession on behalf of all States Parties to the Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General Assembly of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations."

32. Article VII, which provides for "reservations" and "declarations", is as follows:

> "1. At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16 (1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.
>
> 2. Reservations made by States Parties to the Convention in accordance with article 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the present Protocol.
>
> 3. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw such reservation by a communication to that effect addressed to the Secretary-General of the United Nations.
>
> 4. Declarations made under article 40, paragraphs 1 and 2, of the Convention by a State Party thereto which accedes to the present Protocol shall be deemed to apply in respect of the present Protocol, unless upon accession a notification to the contrary is addressed by the State Party concerned to the

> Secretary-General of the United Nations. The provisions of article 40, paragraphs 2 and 3, and of article 44, paragraph 3, of the Convention shall be deemed to apply *mutatis mutandis* to the present Protocol."

33. Article 40 of the Convention is set out in paragraph 37 below.

34. The Protocol has a denunciation provision as follows:

> "Article IX
>
> Denunciation
>
> 1. Any State Party hereto may denounce this Protocol at any time by a notification addressed to the Secretary-General of the United Nations.
>
> 2. Such denunciation shall take effect for the State Party concerned one year from the date on which it is received by the Secretary-General of the United Nations."

35. The provisions of the Convention (thus applied by those States bound to it by the Protocol) which are said to be particularly relevant to the present case are Articles 26, 32 and 34 which are as follows:

> "Article 26
>
> FREEDOM OF MOVEMENT
>
> Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances."

> "Article 32
>
> EXPULSION
>
> 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
>
> 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into

> another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."
>
> "Article 34
>
> NATURALIZATION
>
> The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

36. Article 28 has been referred to and it would be helpful to record its terms:

> "Article 28
>
> TRAVEL DOCUMENTS
>
> 1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.
>
> 2. Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article."

37. Article 40 is a "Territorial Application Clause" which is said to be of importance in the context of the arguments in this case:

> "Article 40
>
> TERRITORIAL APPLICATION CLAUSE
>
> 1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
>
> 2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United

> Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
>
> 3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories."

38. There are two other provisions to which particular reference has been made in the course of argument to which I draw attention:

> "Article 42
>
> RESERVATIONS
>
> 1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive.
>
> 2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations."

> "Article 44
>
> DENUNCIATION
>
> 1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.
>
> 2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.
>
> 3. Any State which has made a declaration or notification under article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General."

39. The VCLT contains a number of provisions that Mr Husain has suggested are relevant to the consideration of the issues in this case. I will set them out without, at this stage, comment.

40. The first is part of Article 2:

> "Article 2.
>
> USE OF TERMS
>
> 1. For the purposes of the present Convention:
>
> …
>
> (b) "Ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty …."

41. Although not referred to by Mr Husain or Mr Roe, I should note Article 4:

> "Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."

42. The UK acceded to the VCLT on 27 June 1971.

43. The next is Article 27 which is as follows:

> "Article 27.
>
> INTERNAL LAW AND OBSERVANCE OF TREATIES
>
> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty…."

44. Article 29 is as follows:

> "Article 29.
>
> TERRITORIAL SCOPE OF TREATIES
>
> Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

45. Finally, Article 31:

> "Article 31
>
> GENERAL RULE OF INTERPRETATION
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

…"

46. I will have to return in due course to these provisions, the Convention and the Protocol and the extent to which they do or do not have application as a matter of international law to the claimants, but I will now turn to the constitutional settlement as between Cyprus and the UK as it was concluded in 1960.

The constitutional settlement between Cyprus and the UK

47. Historically, Cyprus was until the mid-19th century ruled as part of the Ottoman Empire. In the circumstances prevailing at the time and when Benjamin Disraeli was Prime Minister, its governance was ceded to Great Britain in 1878. Between then and 1914 it was "occupied and administered" by Great Britain under a treaty with the Sultan of Turkey (*British Overseas Territory Law*, I. Hendry and S. Dickson, p. 340). In November 1914, following the outbreak of the First World War, it was annexed as a colony of Great Britain. The Colony of Cyprus was in due course recognised in the Treaty of Lausanne. It retained that status until the constitutional settlement of 1960.

48. As indicated previously (see paragraph 6), when Cyprus became an independent republic in 1960, part of the settlement concluded between the governments of Greece, Turkey and the UK resulted in the retention by the UK of two areas where there were existing military bases, namely, in Akrotiri and Dhekelia. A description of the bases appears below (paragraphs 55 - 57), but the constitutional provisions are to be found in various sources.

49. Article 1 of the Treaty of Establishment of the RoC ('ToE') provided as follows:

> "The territory of the Republic of Cyprus shall comprise the Island of Cyprus, together with the islands lying off its coast, with the exception of the two areas defined in Annex A to this Treaty, which areas shall remain under the sovereignty of the United Kingdom. These areas are in this Treaty and its Annexes referred to as the Akrotiri Sovereign Base Area and the Dhekelia Sovereign Base Area."

50. It is at this time that the expression Sovereign Base Area ('SBA') came into being in relation to each location.

51. Article 8 of the ToE provides as follows:

> Article 8
>
> "(1) All international obligations and responsibilities of the Government of the United Kingdom shall henceforth, in so far as they may be held to have application to the Republic of Cyprus, be assumed by the Government of the Republic of Cyprus …."

52. The ToE also contained an "Exchange of Notes (with Declaration) between the United Kingdom of Great Britain and Northern Ireland and Cyprus of the same date concerning the administration of the Sovereign Base Areas" which was referred to in

Article 1. The Note to which the UK government subscribed recorded that the UK was "determined to stand by that declaration and thereby to create a continuous and lasting system of administration in the Sovereign Base Areas founded on close co-operation between the authorities of those areas and the authorities of the Republic of Cyprus." The declaration appeared in Appendix O and was in the following terms:

> "Her Majesty's Government declare that the main objects to be achieved are:-
>
> (1) Effective use of the Sovereign Base Areas as military bases.
>
> (2) Full co-operation with the Republic of Cyprus.
>
> (3) Protection of the interests of those resident or working in the Sovereign Base Areas.
>
> 2. Her Majesty's Government further declare that their intention accordingly will be -
>
> (I) Not to develop the Sovereign Base Areas for other than military purposes.
>
> (II) Not to set up and administer "colonies".
>
> (III) Not to create customs posts or other frontier barriers between the Sovereign Base Areas and the Republic.
>
> (IV) Not to set up or permit the establishment of civilian commercial or industrial enterprises except in so far as these are connected with military requirements, and not otherwise to impair the economic commercial or industrial unity and life of the Island.
>
> (V) Not to establish commercial or civilian seaports or airports.
>
> (VI) Not to allow new settlement of people in the Sovereign Base Areas other than for temporary purposes.
>
> 3. With these purposes in mind, and subject to their military requirements and security needs, Her Majesty's Government make the following declaration of intention -
>
> (1) Freedom of Access
>
> Cypriots (and others resident in the Republic) will have freedom of access and communications to and through the Sovereign Base Areas, and of employment and cultivation in the Sovereign Base Areas and freedom of navigation and fishing in the territorial waters thereof.
>
> (2) Legislation

> The laws applicable to the Cypriot population of the Sovereign Base Areas will be as far as possible the same as the laws of the Republic."

53. The UK legislation giving effect to the ToE was the Cyprus Act 1960. This provides as follows:

> "1. Her Majesty may by Order in Council (to be laid before Parliament after being made) declare that the constitution designated in the Order as the Constitution of the Republic of Cyprus shall come into force on such day as may be specified in the Order; and on that day there shall be established in the Island of Cyprus an independent sovereign Republic of Cyprus, and Her Majesty shall have no sovereignty or jurisdiction over the Republic of Cyprus.
>
> 2.(1) The Republic of Cyprus shall comprise the entirety of the Island of Cyprus with the exception of the two areas defined as mentioned in the following subsection, and -
>
> (a) nothing in the foregoing section shall affect Her Majesty's sovereignty or jurisdiction over those areas;
>
> (b) the power of Her Majesty to make or provide for the making of laws for the said areas shall include power to make such laws (relating to persons or things either within or outside the areas) and such provisions for the making of laws (relating as aforesaid) as appear to Her Majesty requisite for giving effect to arrangements with the authorities of the Republic of Cyprus …."

54. The Sovereign Base Areas of Akrotiri and Dhekelia Order in Council 1960 (SI 1960 No 1369 - as amended), which came into force on 16 August 1960, provides for the way in which the SBAs were to be administered. The relevant provisions are as follows:

> 1 **Administrator**
>
> (1) There shall be an Administrator of the Sovereign Base Areas who shall be a serving officer of Her Majesty's Forces.
>
> (2) Appointments to the office of Administrator shall be made by Commission under Her Majesty's Sign Manual and Signet and a person appointed to the office shall hold the office during Her Majesty's pleasure.
>
> (3) The Administrator shall have such powers and duties as are conferred upon him by or under this Order or any other law and such other powers and duties as Her Majesty may from time to time be pleased to assign to him and subject to the provisions of this Order and of any other law by which such powers and

> duties are conferred, shall do or execute all things that belong to the office of Administrator according to such Instructions as Her Majesty may from time to time see fit to give him:
>
> Provided that whether or not the Administrator has in any matter complied with such Instructions shall not be enquired into in any Court.
>
> …
>
> 5 **Existing Law to continue to have effect**
>
> (1) The existing law shall, save in so far as it is in its application to the Sovereign Base Areas or any part thereof repealed or amended by, or by virtue of, any law enacted under this Order continue to have effect, but shall be construed subject to such modifications and adaptations as may be necessary to bring it into conformity with the provision of this Order.
>
> (2) In this section "existing law" means any law enacted by any authority established for the Island of Cyprus, and Instrument made under such a law, and any rule of law, which is in force in the Sovereign Base Areas or any part thereof immediately before the date of commencement of this Order or which, in the case of such a law or Instrument, has been made, but has not yet come into force, before that date.

55. For a relatively recent description of both areas, the Government's White Paper on the overseas territories entitled "The Overseas Territories: Security, Success and Sustainability" (June 2012) contains the following passage:

> "The SBAs cover around 256 square kilometres. Most of this land (some 60%) is privately owned by Cypriot nationals. The British population of the SBAs is around 7,500 and includes Service personnel, UK-based civilians and their families. In addition there is a population of around 10,000 Cypriots. The Cypriots living in the areas are recognised residents of the SBA but are European Union (EU) and RoC citizens. There are two locations: the Western Sovereign Base Area (or WSBA), which consists of Episkopi and Akrotiri stations, and the Eastern Sovereign Base Area (or ESBA), which consists of Dhekelia station and Ayios Nikolaos."

56. The SBA Authority ('SBAA') website contains the following information:

> "… the SBAs … cover 3% of the land area of Cyprus, a total of 98 square miles (47.5 at Akrotiri and 50.5 at Dhekelia). However, HMG does not own most of the land. About 60% is privately owned; some 20% is UK MOD-owned or leased land; with the remaining 20% being Crown land held by the

> Administration (including forests, roads, rivers and Akrotiri Salt Lake)."

57. Ms Tessa Gregory, the claimants' solicitor in the present proceedings, has made three witness statements, the second of which contained a descriptive analysis of the SBAs about which I think there is no dispute. The following extracts help to create the picture of what each comprises:

> "In the WSBA, the UK service personnel and their families are permanently stationed at Episkopi (where the headquarters of the British Forces Cyprus is based) or RAF Akrotiri. In the ESBA, the UK service personnel and their families are permanently stationed at Dhekelia Garrison or about a 20 minutes' drive away at Ayios Nikolaos. Each of these four main stations has numerous health, educational and recreational facilities which military personnel and their families can enjoy. Each station has a library, fully equipped gymnasium, a swimming pool, squash courts and outdoor sports pitches. The Service Children's Education, an agency of the [MoD] operates four primary schools and two secondary schools on the SBAs. Each station has fully equipped medical centres but hospital care since the closure of Princess Margaret Hospital in Akrotiri in 2012 is delivered through a contract with a Cypriot private hospital, the Ygia Polyclinic based in Limassol."
>
> "… Within or partially within the WSBA are also the RoC settlements of Trachoni, Kolossi and Paramali which were established following the events of 1963-1974 to provide homes to displaced Greek-Cypriot families."
>
> "The ESBA of Dhekelia … includes the military station of Dhekelia Garrison which is the headquarters for the ESBA and houses a resident infantry battalion, an engineer squadron, and various logistic units, as well as UK-based civilians and dependents - making a total British population of just over 1,500 people …. Within Dhekelia are two RoC villages or "enclaves", Xylotymbou (population circa 3,655) and Ormideia (population circa 4,189) both of which existed prior to the RoC becoming independent in 1960 and are under RoC sovereignty."
>
> "Xylotoumbou is the nearest residential area which the Claimants can access … this is where the children of Richmond Village now attend school. It is about a 10-minute drive from Richmond Village and the children are picked up and dropped off by a school bus every day."
>
> "About a five-minute walk from Richmond village is Dhekelia Garrison [which] is surrounded by high wire fencing and the general public are not allowed "behind the wire" without permission. Aside from housing for service personnel there is a

> large range of amenities "behind the wire" …. For the service children there is a pre-school, Dhekelia Primary School and King Richard School which is a mixed comprehensive secondary school which also takes a small number of fee paying students from the local Cypriot and ex-pat community.
>
> None of [the] amenities are accessible to the Claimants or their families. In earlier years … they were on occasion allowed to go "behind the wire" when their children used to play football tournaments against British service children on the astro-turf football pitches or when the Claimants visited the medical centre for routine treatment. However, since 2005 no access has been permitted."

58. So far as the military significance of the SBAs is concerned, the Cyprus Review in 2011 recorded the continued perception of the Ministry of Defence in the strategic importance of the SBAs:

> "The Strategic Defence and Security Review (SDSR) 2010 emphasised the fundamental importance of the MOD's "ability to remain adaptable for the future" – and the Sovereign Base Areas provide the UK with a unique contribution to our ability to achieve this goal. In May 2011, and in order to implement the SDSR conclusions, the Defence Secretary announced that a separate review of the British SBAs in Cyprus would be undertaken. On announcing its completion in December 2011, the Defence Secretary confirmed Her Majesty's Government's enduring commitment to the SBAs in Cyprus. The key considerations in affirming this commitment were:
>
> • The SBAs, situated in a region of geo-political importance, remain high priority for the UK's long-term national security interests.
>
> • The SBAs provide an adaptable and capable Forward Mounting Base, the utility of which has been amply demonstrated: for example, the basing of RAF aircraft that participated in operations over Libya, the regular deployment

> of Cyprus-based military personnel to Afghanistan, and the key
>
> role played as a logistic hub for operations in Afghanistan.
>
> • In addition, the SBAs are expected to make a significant contribution to the logistic drawdown from Afghanistan, as well as to wider humanitarian and conflict prevention activities in the region. They also continue to provide excellent training opportunities for the Armed Forces.
>
> This announcement offered a timely opportunity to put the necessary financial support for the SBAs – and access to wider Government expertise – in place. The MOD will continue to work closely with Other Government Departments to ensure we have sustainable plans to support the SBAs, including by means of ensuring that the SBAs are treated equitably with other Overseas Territories."

The detailed factual background

59. Given the argument concerning delay, and in any event, there is a considerable background to the letter the subject of challenge in these proceedings which it is necessary to set out in some detail to gain an appreciation of how matters have developed and why the present situation is as it is.

60. As previously indicated (see paragraph 2), the boat came ashore on 8 October 1998 and those on the boat were rescued during the evening/night of 8/9 October 1998.

61. There was, of course, an immediate problem of giving those rescued shelter and food, but also a longer term issue for the SBAA of what to do. Initially, it appears that the representatives of the SBAA asked the Cypriot police to take over responsibility, but that was not met with a favourable response because the boat had come ashore in an SBA and the problem was thus perceived to be a UK problem. Accordingly, the UK's High Commissioner was asked by the SBAA to discuss the position with a Minister of the RoC.

62. The position remained unclear for some while. The Cyprus office of the UNHCR became involved in the process and there is a lengthy letter from the Associate Protection Officer of the UNHCR addressed to the SBAA dated 15 October 1998 which contains the following passage:

> "As I understood from our discussion, the Sovereign Base Areas (SBA) is a UK dependent territory following the 1960 Treaty of Establishment, but is not part of the Council of Europe or European Union. Furthermore, I understood you to be saying that the 1951 Convention is binding upon the SBA but that the 1967 Protocol was never extended to the SBA by the UK.

> I would like to thank you for your assurances that even if the SBA has no treaty obligation of non-refoulement towards non-European nationals you would like to apply humanitarian principles and proceed as though it does, bearing in mind also that the principle of non-refoulement is arguably a customary norm of public international law.
>
> While I understand from you that the SBA has reached an agreement in principle with the Republic of Cyprus for joint responsibility towards the boatpeople, at least insofar as any *démarches*[1] regarding deportations to Lebanon or other countries are concerned, it would seem to me that, as a UK dependent territory, the SBA has the responsibility for upholding the principle of non-refoulement in relation to any deportations from the base."

63. On the following day a Minute was submitted to the Minister of State for the Armed Forces with two recommendations:

> "- our objective should be to persuade the Lebanese authorities to take back the illegal immigrants and to persuade the Cypriot authorities to accept long term responsibility for any that achieve refugee status;
>
> - that, notwithstanding the probable inapplicability to the SBA's of the UN Refugee Convention of 1951, we should act in the spirit of it."

64. The Minute also contained the following passages:

> "We clearly need to investigate properly any claims to refugee status. The UK's accession to the 1951 UN Convention on Refugees extends to some of our Overseas Territories, but does not appear to do so to the SBAs. The position is not entirely clear, since UK accession in 1957 extended to the then colony of Cyprus. The [RoC] succeeded to this in 1963, but the position of the SBA's appears not to have been clarified. <u>However, it has always been HMG's practice to act in the spirit of the Convention; a prime example is the past handling of asylum seekers in Hong Kong, to which the Convention had not been extended</u>."
>
> "Any deemed to qualify as refugees could not sensibly be offered settlement in the SBAs, given the limitations imposed by our declaration regarding the administration of the SBAs made at the time of the 1960 Treaty of Establishment not to develop them for other than military purposes and not to set up or administer "colonies"."

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[1] A formal diplomatic communication from one government to another.

> "Any immigrants who fail to claim or qualify for refugee status and for whom the Lebanese refuse to accept responsibility, would be liable to deportation to their country of origin. Of course, this may prove problematic – I understand from the Home Office that it is not HMG policy to return any Iraqis, for example. There can be no question of granting refuge in the UK; Home Office policy in respect of other Overseas Territories has always been to resist this at all costs, not least for fear of creating an apparently easy back-door route into the UK. If we reach a point where we may need to consider deportation other than to Lebanon, Ministers will be consulted further." (Emphasis added.)

65. This was, of course, an internal document, but the underlined passages indicate respectively the way the individuals concerned were recommended to be treated in the context of the Refugee Convention and the position that was likely to be maintained if the suggestion was made that any of those rescued from the boat who were assessed to be "refugees" should be permitted entry to the UK.

66. In a paragraph headed "Presentation" the following was recommended to the Minister:

> "For the time being, we should only confirm that 75 illegal immigrants are being held at RAF Akrotiri whilst their future status is determined, emphasising the care they are receiving, the cooperation of the ROC authorities, and our intention to act fully in accordance with the 1951 UN Convention …."

67. A few days later a Minute was prepared indicating that the Minister accepted the recommendations that efforts should be made to persuade the Lebanese authorities to take back the "illegal immigrants" and to persuade the Cypriot authorities "to accept long term responsibility for any that achieve refugee status and that, notwithstanding the probable inapplicability to the SBAs of [the Convention], we should act within the spirit of it." The added Ministerial comment was that if any further incidents of a similar nature occurred the Minister was "inclined to the view that no action should be taken to process any claims and that we should aim to remove the immigrants as soon as possible – to send a clear message that we will be resolute in dealing with illegal immigrants in future". A handwritten note to the side suggests that this "would need thinking through – where are you going to send them to?"

68. It appears that officials within the Ministry of Defence raised this issue with Home Office officials in a letter dated 10 November 1998 which contained the following paragraph:

> "I would also be grateful for your advice regarding an issue our Ministers have raised. Whilst approving our plans for processing this particular group of boat people in accordance with the 1951 UN Convention, they expressed concern that our Sovereign Base Areas might seem a soft touch to other would-be immigrants. They have asked whether, in future such cases, we could withhold processing any claims for refugee status and

> aim to remove the immigrants as soon as possible. Leaving aside the issue of precisely to where such individuals might be moved, my understanding is that we simply could not do so and remain within the spirit of the 1951 Convention and within established policy for handling illegal immigrants in Overseas Territories. Am I correct?"

69. I have not seen any written response to that letter, but I note a handwritten tick by the side of the question "Am I correct?".

70. At that stage, of course, the status of those on the boat, particularly whether or not they should be treated as "refugees", was unknown and the need to determine this resulted in the SBAA asking the Home Office to provide an official or officials to conduct the appropriate interviews because this was not expertise or experience possessed by the administrators of the SBAs. This process took some time and the claimants were kept in detention in the Akrotiri base whilst it ran its course. I need not give further details because this is quite distant "history" for present purposes, but by a series of decisions made (including, in some cases, made following an appeal process) between July 1999 and March 2000 each of the claimants was declared to be "entitled to refugee status" in orders made by the Chief Control Officer of the SBAs that read as follows:

> "Now I [name] Chief Control Officer of the Sovereign Base Areas, being satisfied that [name] is no longer a prohibited immigrant by virtue of being entitled to refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, hereby revoke the Order [for deportation and detention] made under section 11 and order [his] immediate release."

71. The countries from which each family was treated as seeking refuge were as follows:

FAMILY	COUNTRY
A	Sudan
B	Iraq
C	Iraq
D	Iraq
E	Ethiopia
F	Syria

72. All those of Iraqi extraction were Kurds and 'F' was a Syrian Kurd.

73. Those accorded refugee status were indeed released from detention as the orders referred to above provided. Upon release all the former detainees were taken to the Dhekelia base and over a period of time all moved into accommodation (previously occupied by married military personnel) in what is called Richmond Village. There is little doubt that this was intended as a relatively temporary expedient whilst efforts were being made to resettle them in other countries – one possibility apparently being canvassed at the time was Canada, another being the USA (see paragraph 77 below). One reason why there was no intention on the part of the SBAA for Richmond Village to be a permanent home was paragraph 2(VI) of Appendix O (see paragraph 52 above and the middle paragraph quoted in paragraph 64 above). In short, however, any efforts undertaken to obtain the agreement of other countries to take those accorded refugee status came to naught.

74. In the meantime the claimants and their families remained in Richmond Village. As will emerge below (see paragraphs 146, 163, 309 and 386), the "temporary" accommodation in which most, if not all, of the present claimants and their families still live is no longer regarded as truly habitable even if it was justifiably considered habitable in those early days (and there is evidence in the papers before the court that there were concerns about the "living conditions" even at that time). That represents the contemporary reason for the urgent need for a move of location to take place.

75. It was during 1999 (after July) that it became clear that some of those who had been on the boat were to be treated as refugees. Against that background discussions took place between officials of the British High Commission and representatives of the

RoC with a view to concluding a Memorandum of Understanding ('MoU') relating to the provision of temporary work permits because Appendix O prevented the refugees from being offered work within the SBA. It does not appear that those discussions were successful at that time although an MoU on this issue was signed in April/May 2000.

76. The following paragraph in a letter from a Ministry of Defence official to a counterpart at the Home Office dated 22 December 1999 contained the following paragraph:

> "We have exhausted all the options that we thought were open to us. The refugees are the responsibility of the UK Government, but we have no means of discharging that responsibility while they remain in the Sovereign Base Areas. We frankly see no realistic alternative to their resettlement in the UK. There is the question of precedent to consider, as you pointed out to me when we spoke, but I think we should be careful not to make too much of this. The Sovereign Base Areas are very different, legally and constitutionally, from the other UK overseas territories. This was recognised in the FCO's recent review of the overseas territories, from which the Sovereign Base Areas were specifically excluded. The overseas territories are run by autonomous civil governments that have the facilities, in the last resort, to accommodate refugees that cannot be resettled elsewhere. So there is no overwhelming pressure for them to be admitted to the UK. The MOD administration in the Sovereign Base Areas has no such facilities and we cannot, because of our Treaty obligations, accommodate refugees on any sort of permanent basis. Hence we do not believe that we would be opening the floodgates were we to admit this handful of people into the UK. Nor would we expect the Sovereign Base Areas to become targeted by asylum seekers. Anyone attempting to reach the island by sea would be far more likely to end up in the Republic of Cyprus, and the Republic's approach to illegal immigrants can be expected to deter all but the most desperate. Any arriving on our territory by land would simply be handed back to the Cypriots under well-established procedures." (Emphasis added.)

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

78. The writer of that letter returned to the same theme in a letter to the Home Office dated 24 March 2000 which referred to the view expressed in the previous letter and contained the following passage:

> "I have to tell you that our Ministers are not at the moment persuaded that the refugees' ultimate destination should be the UK. We need to work up further advice for them to consider. As part of the exercise, it would be helpful if you could let me have … an authoritative statement setting out your understanding of HMG's responsibilities towards these people, [given] that:
>
> (a) it has been determined that they are entitled to refugee status;
>
> (b) they are currently residing in UK sovereign territory;
>
> (c) there is no prospect of them being allowed to reside in the Republic;
>
> (d) any concession on work permits within the republic will be of limited duration;
>
> and
>
> (e) there is no scope within the SBAs for them to be employed or self-employed even if their settlement there was possible."

79. It appears that in or about April or May 2000 a number of those living in Richmond Village, including two of the present claimants, had (with the assistance of solicitors, Winstanley-Burgess) applied formally for leave to enter the United Kingdom. The documentary material is scant, but it seems that these applications were refused by the Entry Clearance Officer at the High Commission in Nicosia on 16 January 2001. Those affected, including two of the present claimants, applied in the UK for leave to apply for judicial review on the basis that the wrong statutory provisions were applied, that (wrongfully) no right of appeal was granted and that no adequate reasons had been given for the decisions. The judicial review proceedings were issued in April 2001. I will return to what happened in respect of those proceedings below (see paragraph 84), but the chronology is such that the events set out in paragraphs 80 - 83 should be noted first.

80. The recognition of some of the claimants as refugees resulted in certain consequences for them normally associated with refugee status. Mr B was one of the first to be recognised as a refugee (in July 1999). His wife and children were still in Syria and he raised the possibility of their joining him which, he says, SBA officials told him was not possible. He made a formal application to the same effect in March 2000, but the response was that "it was not possible within the [SBAs] … [where] there are restrictions on both temporary visits and permanent settlement." Reference was made in the reply to trying to find "a solution to your permanent settlement." In late October or early November his wife and two children arrived illegally in the Republic. It appears that a lawyer in the Attorney-General's Office asked that they be reunited with Mr B "in accordance with the principle of family unity enshrined in [the Refugee Convention and Protocol]." The then Fiscal Officer, Mr Livingstone, replied

on 2 November 2000 saying that "the authorities of the [SBAs] are prepared to allow family re-unification in this case."

81. Furthermore, Mr Bashir and indeed others were issued with the blue Travel Document issued to refugees. This would have been in accordance with Article 28 (see paragraph 36 above).

82. Discussions with the RoC about the long term solution for the refugees had been continuing and they were complicated by the arrival in January and February 2001 in the Dhekelia SBA of a further 41 Iraqi asylum-seekers via the Turkish-controlled part of Cyprus to the north. (A number of other migrants, who apparently entered via this route, were found in the Dhekelia SBA in April 2001.)

83. In March 2001 the Minister of State for the Armed Forces raised the question, via one of his officials, of whether the fact that the SBA could only be used for the defence purposes of the UK meant that there was an ability in law to refuse to accept responsibility for immigrants. The answer to that was provided in a Minute which contained the following paragraph:

> "Neither [Appendix O] nor the [Treaty of Establishment] directly address the issue of illegal immigration, nor do they provide any legal basis for denying that we have a responsibility to deal with illegal immigrants who arrive in the SBAs. New settlement … is prohibited by Appendix O and we have pointed out to the [RoC] that we cannot meet our obligations (to them) if they refuse to take immigrants that we cannot deport or resettle off our hands. The [RoC] are not interested in that line of argument. Rather, they have repeatedly made the point that if we claim sovereignty, with all the benefits that implies, we cannot shrug off responsibilities for the illegals."

84. So far as the judicial review proceedings were concerned (see paragraph 79 above), it appears that relatively early agreement was reached that the various decisions of the Entry Clearance Officer should be quashed on the basis that they were inadequately reasoned and were defective in that the claimants were wrongly notified that there was no entitlement to appeal. The intention was that fresh decisions should be made on the basis of further consideration of the applications. Agreement to this effect appears to have been reached in June 2001 although there is correspondence that suggests that it was not until April 2002 that a final settlement of the proceedings on that basis was achieved and a consent order was apparently made on 17 April 2002.

85. There is a lengthy letter from Winstanley-Burgess dated 26 January 2003 which contains further representations in support of entry clearance, but thereafter the paper trail runs dry. It is well known that that firm ceased to practise in August 2003 (having gone into liquidation in March/April 2003) and there is agreement between the parties to the present proceedings that no fresh decision was ever made. The witness statement of Mr Anthony Gale, Asylum Policy Adviser in the Immigration and Border Policy Directorate of the Home Office, indicates that no one has "been able to find any evidence of renewed consideration of the entry clearance applications by the [British High Commission] or the Home Office."

86. Returning to the chronology in 2001, there is a memorandum to the Minister for Europe dated 28 June 2001 which set out the situation to date and indicated that "[a] solution needs to be found given the asylum seekers cannot remain on the SBAs indefinitely". It recorded that relocating them to the UK was not "attractive to the Home Office and MoD Ministers have already objected to this approach." However, it said that re-settlement in a third country was unlikely to be realistic and "[the] Cyprus government will not take them on." The "preferred option" advanced to the Minister suggests that "relocation to the UK [is] the most realistic option." In a handwritten note the Minister said:

> "I will not support relocation to UK. This is not on politically."

87. A further note (not Ministerial) on the same memorandum reads as follows:

> "Only for information at this stage. An eventual offer of asylum in the UK seems inevitable (but will mean a battle with the Home Office). But we and the MOD have a joint interest in keeping the group in Cyprus for a bit longer to reduce the impression of automatic transfer to the UK, and the 'pull' effect that this will probably have."

88. I should add that in the same memorandum the following was recorded about the attitude of the Government of Cyprus ('GoC') to the position of asylum seekers entering the Dhekelia SBA from Northern Cyprus:

> "… we had hoped to persuade the Government of Cyprus … to take responsibility for all asylum seekers who land outside the SBAs. This would include those who land in the north and from there cross into the eastern SBA, on the basis that the GoC claims this territory as its own. However, the GoC have now said that they will not accept responsibility for those who land in the north, as they have no authority there. But they have agreed to carry on taking responsibility for those that land in the GoC-controlled area."

89. It appears from the same memorandum that heightened border security by the SBAA along the border with Northern Cyprus had acted as a deterrent to further migrant movements into the SBA from the north.

90. The difficulty in reaching agreement about what to do generally is reflected in the fact that the UNHCR's Director of the Bureau for Europe in Geneva wrote a lengthy letter to the Permanent Representatives of Cyprus and the UK dated 13 June 2001 reiterating the UNHCR's concern about "the situation of the asylum seekers and refugees in the SBA." It expressed the view that the issue needed to be revisited "and a solution agreed upon to avoid further harm on persons of concern to UNHCR." The letter contained the following paragraph:

> "UNHCR herewith requests that the authorities of the United Kingdom and the Government of Cyprus reconvene their negotiations regarding the situation of asylum seekers and refugees in the SBA with a view to apportioning clear

> responsibilities for examining asylum claims and finding appropriate solutions for both recognised refugees and asylum seekers, ensuring that they enjoy the full spectrum of their human rights. With a view to resuming this dialogue on the ground, a preliminary meeting in Geneva may be useful. UNHCR places itself at your disposal to facilitate such a meeting and later to moderate further talks through its liaison office in Cyprus." (Emphasis added.)

91. It was not until November 2001 that a meeting of the Permanent Representatives and the UNHCR took place. A representative of the Foreign and Commonwealth Office ('FCO'), sensitive to the fact that the UK might be criticised "over the continuing presence in the SBAs of those who we have accepted responsibility for (in particular, those who have been assessed as genuine refugees)" expressed the hope that the UK representative would not be drawn on this issue, but that if so the line to adopt was as follows:

> "Ministers decided in early 1999 that asylum seekers arriving in the SBAs should be treated in accordance with the UN Convention on Refugees, even though the Convention does not apply in the SBAs. This has been done with roughly half of the asylum seekers passing a refugee status determination (conducted with the Home Office and UNHCR).
>
> But strong reasons for the UK not allowing either the refugees or those that failed RSD permission to settle in the UK. Doing so would increase the attractiveness of the SBAs as a destination for asylum seekers (a short cut to the UK avoiding Sangatte) and it would be politically untenable given continuing public concern at the number of asylum seekers entering the UK."

92. That meeting took place on 2 November. A few days earlier (on 31 October) the Chief Officer of the SBAA and the UK Deputy High Commissioner spoke to the director of the Cyprus Question Division of the Ministry of Foreign Affairs of the RoC. The purpose was to discuss the position, in particular, of those in the SBAs who had arrived from the north. However, the issue of the refugees was also raised. It appears that the UK representatives emphasised that it was not possible for the UK, within the context of the SBAs, to afford the refugees the benefits (e.g. of employment and education) "that they would get elsewhere."

93. This meeting did not resolve matters save that further consideration would be given to the position in due course. A letter from the FCO to a Private Secretary of 6 November 2001 recorded the resistance of Ministers to the "transit to the UK" of those treated as refugees.

94. In February 2002 a letter from the SBAA to the MOD sought "formal Whitehall guidance on the policy to be adopted towards our asylum seekers." The letter was essentially addressed to the issue of "asylum seekers" in general rather than to the refugees in particular, but the writer suggested the possibility of a "deal" involving the UK "exceptionally [allowing] some or all of the current Richmond village population

to enter the UK in return for the [RoC] accepting the responsibility for any future arrivals."

95. A handwritten note in response to this suggestion (presumably written by an MOD official) contained the following:

> "We know this cannot – should not – drift but no answer is at hand. Yes they should be let into the UK, but Ministers have said "no" …."

96. On 8 April 2002, a further letter from the SBAA to the MOD focused in some direct language on what were perceived from the SBAA's point of view to be the key issues.

> "2. It is worth reiterating why the status quo is unacceptable. The critical issue is the inability of the SBA Administration to support the UK's commitment to delivering the refugee's Geneva Convention rights. This stems from three factors. First, there is no SBA society or economy into which the Administration can integrate the refugees. Second, the SBAA simply does not have the executive arms or resources which a normal civil government would be able to bring to bear on the problem. Third, the legal and Treaty framework within which the SBAs operate, including Appendix O, creates additional problems, not least because of the prohibition on settlement.
>
> 3. Residents of the SBAs are either British personnel and families or Cypriots who operate within the economy and society of the Republic. There are no practical employment opportunities in the SBAs. Education, medical, dental and social services are all provided to Cypriot residents by the Republic (and to UK personnel by the MOD). Our existing asylum seeker community cannot obtain legitimate work. Their children go to a special 'school' which has no proper curriculum, teaches only in English and prepares them for precisely nothing (just as well, since that is all they have to look forward to). Medical and dental cover is essentially for emergencies only. We give them limited financial benefits, but there are no social services and, for example, no mechanisms for dealing with children at risk or dysfunctional families (at the moment we are wondering what to do with an Iraqi who is threatening to kill himself and in the UK might well need to be sectioned). Ex-BFC[2] housing is, by chance, available for the existing group. Rationalisation of the BFC estate means, however, that there is now no more available and the arrival of another half dozen families would leave us unable to cope without spending significant sums on new build units.

[2] British Forces Cyprus.

> 4. The current situation is not just unfair to the refugees and asylum seekers and costly and problematic for the MOD. It also leaves HMG vulnerable to legal challenge. We know, for example, that Winstanley-Burgess will press on with their attempt to secure entry clearance to the UK for their clients. If these claims get to an appeals tribunal or, under judicial review, to a UK court, it will be argued that HMG is responsible for delivering the rights of these people, that this cannot be done in the SBAs, and so they must be allowed to go to the UK. I am no lawyer, but I would guess that this basic case, no doubt put in more elegant terms, would eventually prevail. If we do not seize our chance to get a deal while the Commission is engaged we may find our hand is forced in the not too distant future by our own courts.
>
> 5. The overall problems outlined in paragraphs 2 to 4 above are not, in my view surmountable. The only viable long term solution for our refugees must be either integration into Cypriot society, which means their recognition and acceptance by the Republic, or resettlement off the Island. Any alternative that left us holding the babies (literally) for the current group or future arrivals should not be acceptable to MOD nor, I would hope, to OGDs[3]."

97. On 22 April 2002 there was a Cabinet Office discussion attended (some participants by telephone link) by all interested UK Government Departments including the SBAA. It took place in the knowledge of the wish of the RoC to join the EU. The position that was agreed by those present to be taken (subject to Ministerial approval) was that the RoC should be persuaded to accept responsibility for all asylum seekers, current and future, in the SBAs in return for which the UK should be ready to offer financial inducements to the RoC to help meet the costs of processing the claims. The Home Office legal advisers were to convene an urgent meeting with the legal advisers of the FCO and the Cabinet Office "to examine whether it would set a precedent in law for the UK to agree to take those asylum seekers currently in the SBAs."

98. On 29 April 2002 Sir Teddy Taylor MP tabled a written question to the Secretary of State for Defence asking how many asylum seekers had entered the SBAs in the last 12 months, how many remained and what the policy of the government was on this issue. In May 2002 the Minster replied that the SBAA "applies the principles of the Refugee Convention when dealing with asylum seekers and acts in close cooperation with the [GoC]." The reply said that discussions between the government and the GoC "regarding the long term future of the … refugees … are continuing."

99. Further Cabinet Office memoranda arising from this period have been disclosed in this action which, in summary, demonstrate that the UK Government was hoping that the desire of Cyprus to become a member of the EU (an objective that the UK Government welcomed) would enable some "leverage" to be utilised to secure an acceptable agreement on the asylum seeker issue. Negotiations with a view to agreeing an MoU took place over the succeeding months, the apparent deadline being

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[3] Other Government Departments.

4 October 2002. Drafts of the MoU prepared by the UK Government Departments included provisions designed to pass responsibility for those in the SBAs granted refugee status to the RoC. However, it appeared that the RoC was adamant that "existing asylum seekers in the SBAs" should be treated "separately from future arrivals". It is clear from a telegram dated 16 October 2002 from the British High Commission to all the interested UK government departments that there was a political element to this position because of some impending elections in the RoC. According to the e-mail, the position at Ministerial level within the RoC was that in the then pre-election period there would be a "negative impact of [the refugees] moving from the SBAs to the Republic" and that something was required from the UK "to counter-balance this."

100. The final form of the MoU was signed on 20 February 2003. It is plain that it was prospective – in other words, it related to future asylum seekers. Since it is the Defendant's case that it was extended to the existing refugees in 2005 and that this fact is of central importance to the case, it is important to note the relevant provisions of the MoU:

> "8. Asylum seekers arriving directly in the [SBAs] may move freely throughout the Island of Cyprus and have the right to opt to stay outside the [SBAs], subject to any requirements imposed upon aliens by the relevant laws of the Republic. The Government of the Republic of Cyprus reserves the right to refuse entry to, or return, an asylum seeker for reasons of national security or on grounds of public policy[4].
>
> 9. Subject to paragraph 13, the Government of the Republic of Cyprus will grant the following benefits to asylum seekers arriving directly in the [SBAs]:
>
> (a) Free medical care in case they lack the necessary means;
>
> (b) Welfare benefits equivalent to those given to the citizens of the Republic of Cyprus;
>
> (c) The right to apply for a work permit in accordance with the relevant laws of the Republic of Cyprus;
>
> (d) Access to education.
>
> 10. Subject to paragraph 13, during their stay on the Island of Cyprus persons recognised as refugees or granted any other form of international protection under the procedures determined in this Memorandum, will be treated so far as the authorities of the Republic of Cyprus are concerned as if such persons had been recognised as refugees or granted another form of international protection by the [RoC].

[4] The word "policy" is used in the MoU. The expression in Article 32 is "on grounds of national security or public order" (emphasis added): see paragraph 35.

> …
>
> 13. The United Kingdom will indemnify the [RoC] for the net costs incurred in giving effect to paragraphs 7, 8, 9 and 10 excluding costs in respect of those who first entered the Island of Cyprus other than directly by the [SBAs].
>
> …
>
> 18. This Memorandum of Understanding may be terminated at any time by the mutual written consent of both participants or by either participant giving not less than three [3] months prior notice to the other participant."

101. It was provided expressly in the MoU that the provisions including paragraphs 8, 9, 10 and 13 would not come into effect until the date of accession of Cyprus to the EU. That was not to occur until 1 May 2004. I will be returning to the MoU below from time to time, but its effect in the above form was implemented in the SBAs by the Refugees Ordinance 2003.

102. It is, of course, plain that nothing was resolved at that time concerning the claimants and their families. It would seem that this period in 2003 was the period when Winstanley-Burgess were ceasing to represent those from Richmond Village they had been representing (see paragraph 85 above). It was also in the period from March to May of 2003 that the invasion of Iraq took place and it appears from internal documents disclosed in these proceedings that some of those (not necessarily any of the claimants) in Richmond Village were prepared against that background to contemplate returning to Iraq at some stage. There were certainly some discussions to this end.

103. The Treaty of Accession 2003, by virtue of which Cyprus and 9 other countries were to become members of the EU, was signed on 16 April 2003 and (as indicated above) was to take effect on 1 May 2004.

104. The next event of arguable significance chronologically during 2003 was the agreement of the terms of Protocol No. 3 on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus to be annexed to the Treaty of Accession to the EU 2003 on 23 September 2003. My attention has been drawn to a number of features of that Protocol (to which it will be necessary to return in due course: see paragraphs 107 – 112 and 277 - 282).

105. In the first place, it needs to be noted that in the UK's Treaty of Accession to the European Economic Communities, Article 227(5) (later Article 299(6)(b) of the Treaty Establishing the European Community) it was provided that the "Treaty shall not apply to the Sovereign Base Areas of the United Kingdom in Cyprus". However, the Treaty of Accession also annexed a "Joint Declaration on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus", which was adopted by the Plenipotentiaries and the Council, which provided as follows:

> "The arrangements applicable to relations between the European Economic Community and the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus will be defined in the context of any agreement between that Community and the Republic of Cyprus."

106. It follows that until the accession of Cyprus to the EU, the SBAs were not part of the EU.

107. In Protocol No. 3 the Preamble recalls the above provision and certain other provisions of the ToE (the rights and obligations under which, the Preamble confirmed, would not be affected) and Article 1 is as follows:

> "Article 299(6)(b) of the Treaty establishing the European Community shall be replaced by the following:
>
> '(b) This Treaty shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol … and in accordance with the terms of that Protocol.'"

108. Article 2(1) provides as follows:

> "The Sovereign Base Areas shall be included within the customs territory of the Community and, for this purpose, the customs and common commercial policy acts listed in Part One of the Annex to this Protocol shall apply to the Sovereign Base Areas with the amendments set out in the Annex."

109. Article 5 is as follows:

> "1. The Republic of Cyprus shall not be required to carry out checks on persons crossing their land and sea boundaries with the Sovereign Base Areas and any Community restrictions on the crossing of external borders shall not apply in relation to such persons.
>
> 2. The United Kingdom shall exercise controls on persons crossing the external borders of the Sovereign Base Areas in accordance with the undertakings set out in Part Four of the Annex to this Protocol."

110. Article 6 provides thus:

> "The Council[5], acting unanimously on a proposal from the Commission, may, in order to ensure effective implementation of the objectives of this Protocol, amend Articles 2 to 5 above, including the Annex, or apply other provisions of the EC Treaty and related Community legislation to the Sovereign

[5] The Council of Ministers.

> Base Areas on such terms and subject to such conditions as it may specify. The Commission shall consult the United Kingdom and the Republic of Cyprus before bringing forward a proposal."

111. Article 7 provides as follows:

> "1. Subject to paragraph 2, the United Kingdom shall be responsible for the implementation of this Protocol in the Sovereign Base Areas. In particular:
>
> (a) the United Kingdom shall be responsible for the application of the Community measures specified in this Protocol in the fields of customs, indirect taxation and the common commercial policy in relation to goods entering or leaving the island of Cyprus through a port or airport within the Sovereign Base Areas;
>
> (b) customs controls on goods imported into or exported from the island of Cyprus by the forces of the United Kingdom through a port or airport in the Republic of Cyprus may be carried out within the Sovereign Base Areas;
>
> (c) the United Kingdom shall be responsible for issuing any licences, authorisations or certificates which may be required under any applicable Community measure in respect of goods imported into or exported from the island of Cyprus by the forces of the United Kingdom.
>
> 2. The Republic of Cyprus shall be responsible for the administration and payment of any Community funds to which persons in the Sovereign Base Areas may be entitled pursuant to the application of the common agricultural policy in the Sovereign Base Areas under Article 3 of this Protocol and the Republic of Cyprus shall be accountable to the Commission for such expenditure.
>
> 3. Without prejudice to paragraphs 1 and 2, the United Kingdom may delegate to the competent authorities of the Republic of Cyprus, in accordance with arrangements made pursuant to the Treaty of Establishment, the performance of any functions imposed on a Member State by or under any provision referred to in Articles 2 to 5 above."

112. Part Four of the Annex to the Protocol (which is referred to in Article 5(2)) contains definitions of "external borders" of the SBAs and "crossing points" and the following two provisions:

> "4. The United Kingdom shall carry out checks on persons crossing the external borders of the Sovereign Base Areas. These checks shall include the verification of travel documents.

> All persons shall undergo at least one such check in order to establish their identity.
>
> …
>
> 7. (a) An applicant for asylum who first entered the island of Cyprus from outside the European Community by one of the Sovereign Base Areas shall be taken back or readmitted to the Sovereign Base Areas at the request of the Member State of the European Community in whose territory the applicant is present.
>
> (b) The Republic of Cyprus, bearing in mind humanitarian considerations, shall work with the United Kingdom with a view to devising practical ways and means of respecting the rights and satisfying the needs of asylum seekers and illegal migrants in the Sovereign Base Areas, in accordance with the relevant Sovereign Base Area Administration legislation."

113. In the papers and material before the court, little appears to have happened concerning the claimants during 2004. Mr Bashir recalls that he applied to the British High Commission in the RoC for a visa to enter the UK, but this was rejected. None of the other claimants mentioned any specific events of significance during 2004. However, it was in the latter part of 2004 that the foundation for what has been known as "2005 agreement" were laid.

114. The 2005 agreement is a fundamental part of the Defendant's substantive response to this claim and it will be necessary to return to it. In essence, what is said is that the RoC agreed to treat the 2003 MoU (see paragraph 100 above) as applying to the recognised refugees in the SBAs – in other words, all the claimants could obtain the benefits of the MoU. However, the claimants say that it is important to note that there has never been any written confirmation of the existence of the agreement although, as will appear below, there is strong evidence from which it can be inferred that such an agreement was indeed discussed and implemented, at least to a degree. The claimants emphasise what they say is the fragility of this agreement, an alleged fragility to which I will return (see paragraph 349 *et seq*.). However, for the purposes of continuing with the chronology, it should be noted that a meeting took place on 27 September 2004 between the Director of the Civil Registry and Migration Department of the RoC (together with some of her officials) and the Administrative Secretary of the SBAA, Mr John Stainton, and Mr Jim Smart, the then Fiscal Officer of the SBAA.

115. Mr Stainton wrote a letter to the Director dated 17 November 2004 referring to the meeting. His letter referred to the resolution of the "higher level political issues" and records that they discussed "the procedures and processes for the handling of future illegal immigrants and asylum seekers who enter the "Dhekelia SBA" and also "the existing illegal immigrants and refugees held within" the same SBA (emphasis added). In relation to the latter group, the letter concluded with the following paragraphs:

> "For the 89 refugees, asylum seekers and illegal immigrants we currently house within the ESBA it was agreed that you would

> also assume responsibility for the 66 individuals who had entered the SBAs directly. Where our investigations had upheld asylum applications for 24 of these individuals you agreed to honour that refugee status and where our investigations either resulting in the rejection of the application (mainly Iraqis) or where the process had not yet been completed you agreed to begin the process again. I undertook to make the necessary arrangements for this transfer to take place. Although we have begun this process and have informed the individuals these arrangements are not yet complete, but I shall be writing to you again shortly on this matter.
>
> Finally I can confirm that we are content to pay the costs you have identified and which you provided me at the meeting on 27 September. For ease of reference and the record these are attached as Annex A to this letter. Although we did not discuss it at the time I am assuming that where there are families with one child or three or more children the costs will be adjusted appropriately. I can also confirm what I said at the meeting that we are content to make this as a one off payment at the time of hand over to the relevant RoC authorities. I note that the costs have been assessed on the assumption that social security payments will be made for four months and that education and medical costs will be made for a year. We agreed that the bureaucratic burden required to establish a process to identify the exact time that the RoC retained a financial liability outweighed any advantage that might accrue from having an exact cost. On that basis therefore I am content that the payment should be a one off per capita payment.
>
> Once you have had the opportunity to consider the content of this letter, I should be most grateful for a reply confirming that you too are content with the arrangements set out above." (Emphasis added.)

116. There was no reply to that letter.

117. However, there was a further meeting between officials of the SBAA (including Mr Smart) and officials of the RoC asylum service (including the Head of Department) on 28 January 2005. According to the note made, the SBAA officials thought that the RoC side had modified the position previously taken in regard to compensation payments to be made by the SBAA and in relation to the need for a fresh assessment of those residents of Richmond village who would be "handed over". It appears from the note that the perception of the SBAA representatives was that the cases of even those already granted refugee status would be subject to review "in the light of possibly changed circumstances". This was noted to have been agreed as meeting the intention of the MoU.

118. The note also indicates that the Head of the Department of the RoC asylum service would be "the focal point of all communications" and that information would be

provided to all Richmond village residents in relation to welfare payments, medical matters, education, housing, work and residents. These were noted as follows:

> "(a) Welfare – Standard rules will apply dependent on need. Assistance will be given regards claims.
>
> (b) Medical – As above.
>
> (c) Education – Students will be eligible to attend RoC state schools. There will be no entitlement to 'UK' education.
>
> (d) Housing – Welfare assistance where entitled. Assistance in finding accommodation in RoC.
>
> (e) Work – Free to find employment in RoC.
>
> (f) Residence – Permits will be issued, for residence in RoC."

119. Finally, the note indicates that it was the intention to "agree a fixed transfer date … at the earliest possible opportunity" with a 3-month transition period, the intention behind which being that the RoC would be responsible for all the residents from the beginning of that period. It was recorded that the SBAA would continue to provide housing and schooling "only on a wind down basis" and that welfare payments and access to medical care in the SBA would "cease at the beginning of the transition period".

120. I will return to other documentary reference to the "2005 agreement" below, but there is evidence in most of the claimants' witness statements that they were told about this during 2005 and it mirrors the approach foreshadowed in the note of the meeting on 28 January 2005. I will simply pick one (Mr Bashir's) for this purpose:

> "In 2005, following discussions between the Cypriot and UK authorities which were subsequent to the Republic of Cyprus' accession to the European Union on 1 May 2004, we were informed that we could apply to get temporary status in the Republic of Cyprus enabling us to work there. The SBAA made it plain that they wanted us to move to the Republic of Cyprus.
>
> In 2005 we had a meeting with the UNHCR and the SBA fiscal officer Mr Jim Smart who came to visit us at Richmond Village. Mr Smart told us that they had a new agreement which would change our situation and that we could be recognised as refugees in the Republic of Cyprus if we made an application to the Cypriot authorities. We asked why we had to make an application when we had already been recognized as refugees. They said that they had assurances that the Republic of Cyprus would recognise us and give us rights. We asked if we would be entitled to citizenship and they said that we wouldn't. They told us we would need to reside in the Republic of Cyprus for a

> further seven years to be able to apply for citizenship. The years we had already spent living in the SBAs would not count. There were a number of these meetings held in 2005 and 2006." (Emphasis added.)

121. A flavour of the attitude of the claimants to the implications of this agreement can be obtained from the following paragraphs in Mr Bashir's witness statement (which are reflected in all the other witness statements):

> "All of the Claimants, including me, told the SBA officials that we did not want to make an application to the Cypriot authorities and that we would not move to Republic of Cyprus. There were various reasons why. First of all, we were aware that the Cypriot Government had denied responsibility for us in 1998: The Minister at the time made a public statement that we were the responsibility of the SBA and the UK. Secondly, for all the years we had lived in the SBA most of us at one time or another had been subjected to ill treatment from the Cypriot Police and the Cypriot Immigration Authorities …. Thirdly many of us were, and still are, afraid that we would be deported back to our countries of origin if we agreed to become the responsibility of the Republic of Cyprus …. Fourthly, we had already been living in limbo since our arrival on the SBAs and we were not the responsibility of the Republic of Cyprus, we were and are the responsibility of the UK who should have done more to assist us.
>
> The SBA officials told us that we had the right to reside in either the SBA or Republic of Cyprus but that they would prefer us to live in Republic of Cyprus. They began to put pressure on us to leave."

122. In the documentary material there is a letter dated 21 July 2005, presumably addressed to each of the residents in Richmond Village, referring to the "arrangements … now in hand for the transfer of responsibility for you and your family to the [RoC]." This is said to include "the provision of medical services" with the result that the current access that they had to the medical facilities in Dhekelia and Akrotiri would cease on 1 September 2005. The families were advised that in order to ensure that their medical needs were provided for in the future they should contact the "Asylum Service of the [RoC] in order to regularise your status with the appropriate authorities."

123. Mr Bashir, in his written statement, speaks of the closure of the school in September 2005 with the destruction of the playground. This appears to be confirmed in a memorandum from the then Fiscal Officer, Mr Pitts, dated 23 September 2005 when he indicates that "schooling facilities for the children … has not been provided for the new academic term commencing September 2005" and that residents were being encouraged to obtain placements for their children "at local schools within the [RoC]." The memorandum also indicates that the "previously provided medical facilities" are no longer available and that the facility had been "withdrawn to encourage claimants to seek transfer to the RoC and thus use the medical facilities

within the Republic." It also indicated that the Health Visitor facility for children in Richmond Village had been withdrawn and that no further such service would be provided from within the SBAA, but the service would be available from the RoC when the claimants applied to transfer to the Republic.

124. That same memorandum records that social welfare payments would continue to be paid until the provision of similar payments was undertaken by the RoC, but that reductions in the SBAA payments were being considered. Those reductions were said to be "commensurate with the value of utilities and accommodation … provided at Richmond village" which at present were being provided without charge whereas the social welfare payments being made included monetary amounts for those facilities. It was recorded that the SBAA was awaiting legal advice before the decision was made to reduce the weekly amounts payable.

125. The foregoing actions were said to have been put in place "to facilitate the process of the Richmond Villagers transfers to the RoC".

126. It is not difficult to see why the residents of Richmond village saw all these steps as pressure being imposed upon them to leave the village and resettle in the RoC. Mr Bashir says that he was told by Mr Smart that unless he applied to the RoC he would not obtain a travel document. In his witness statement, 'Mr B' says that during 2005 the SBAA stopped fixing the sewers and the water supply and that the street lights and the roads ceased being repaired. If anything went wrong with the accommodation the responsibility and cost of repairs lay with the residents.

127. Although the residents felt under pressure, there was general resistance to what was being proposed. I will return to the reasons for this later in this judgment (see paragraphs 388 - 392).

128. However, notwithstanding this resistance to any transfer to the RoC, a number of the claimants did seek some of the paperwork from the RoC promised under the agreement. I will simply quote from Mr Bashir again:

> "… I decided to go ahead and apply for papers in the Republic of Cyprus but I never agreed to move there. I agreed to get the papers because we were told that the acquisition of recognition papers and residence permits from the Republic of Cyprus would not change our legal status in the SBA and our right to reside in the SBA. It was explained that we would remain the responsibility of the SBA."

129. He also said this:

> "On 19 September 2005 I went with Jim Smart, Jeff Brown[6] and another five refugees to the immigration and asylum service in Nicosia to get paperwork from the Republic of Cyprus. At that meeting they gave me the letter … which states that they have considered my application for asylum filed on 1 February 1999 and have recognised me as a refugee. It was

[6] An SBAA official.

> following this meeting that I was issued Cypriot documentation which included an Alien Registration Certificate, a temporary residence permit, a medical card (for me, my son and [my former partner, 'E']), a travel document and later a work permit. In order to get all the documents I had to have a temporary address in the Republic of Cyprus for some time."

130. He also said that "most of the refugee families did obtain paperwork from the Cypriot authorities though I know ['F'] only got Cypriot documentation much later."

131. Although the claimants raise questions about whether the paperwork issued measured up to the assurances contained in the MoU (or to what they were led to believe were the assurances given), questions to which I will return (see paragraphs 393 - 396), the fact that documentation was provided suggests that the RoC authorities recognised that they had obligations towards the claimants which hitherto had been denied. Indeed there is evidence from some of the claimants who went to obtain Cypriot residence permits that, certainly if accompanied by an SBAA official, they were taken to the front of the queue and issued with the documents without question.

132. Further evidence of what was happening at this time emerges from a newsletter promulgated in October 2005 by the SBA and distributed at a meeting with the residents of Richmond Village. It was addressed to "All residents of Richmond Village". It began by reminding them that they "had been living within the SBA for a number of years" and that "as [had] been explained at a number of previous meetings, it is not possible for you to remain here indefinitely and transfer to the UK is not possible." Two options were presented: to apply to transfer to the RoC or apply to be repatriated to their country of nationality.

133. The newsletter indicated that the " future action" was to be as follows:

> "To rationalise the terms and provisions of support the SBAA provide and to ensure that they are consistent with the terms provided by the RoC, a number of measures will also be introduced for residents of Richmond village in the forthcoming weeks.
>
> **From 01 November 2005**
>
> - To qualify for social welfare payments, the head of family will be required to present himself/herself at Richmond village at 0930hrs on Monday, Wednesday and Friday each week. Claimants who do not attend at that time on each of those days each week will not receive the social welfare payment the following week. If a person is working, he/she is not entitled to receive social welfare payments. This requirement is being introduced to establish that persons are not working as well as receiving social welfare.
>
> - As families depart from Richmond village, either by transfer to the RoC or repatriation to their home

> country, the dwelling houses that they occupied will be made uninhabitable. We are very aware that the standard of accommodation in Richmond village has very limited life and were only originally provided as a short-term solution. There is no intention for the housing to be renovated or provided to other residents for occupation.
>
> **After 31 December 2005**
>
> It is the intention that by 31 December 2005 all individual cases will be resolved.
>
> If there are any outstanding cases – particularly those who have not submitted an application for asylum with the RoC, they will be given very careful consideration. If it has not been established that the remaining individuals have a legitimate right to remain in the Republic of Cyprus [and similarly the SBA] action will be taken to deport the individuals."

134. It was also said that the RoC and the UNHCR were "fully appraised of the measures detailed in [the] newsletter and are fully supportive of the opportunities offered and intended actions."

135. It is clear that, notwithstanding messages of this nature, whether expressed in written or oral form, there was no general exodus to the RoC as had been hoped for by the SBAA. The following documents evidence that proposition and also that further steps to encourage departure from Richmond Village were in contemplation.

136. In a letter to the UNHCR representative in Cyprus dated 12 September 2006 Mr Stainton said this:

> "Geoff Pitts[7] updated us on the number of refugees and asylum seekers remaining at Richmond village and we recognised that since the initial flow of those wanting to apply for asylum in the Republic or to be repatriated to their home country some 59 individuals remained at Richmond village and that many of them were still being paid social welfare payments by the SBAA. It is now a year since the agreement was reached with the Republic that they would assume administrative responsibility for the refugees and asylum seekers at Richmond village. It is the view of the SBAA that we need to do something to encourage those that remain to transfer. As a consequence, therefore we proposed to give those who claim and receive social welfare payments from the SBAA two months' notice that this practice will cease. They will be told that they need to transfer administratively to the RoC in order to continue to receive payments. The two months' notice is sufficient time for the refugees and asylum seekers to register

[7] The then Fiscal Officer.

> with the RoC and to have their initial claim assessed and then to receive payments before the payments from the SBAA cease."

137. The letter also reverted to the issue of payment for the accommodation (see paragraph 124 above) and referred to evictions:

> "We will therefore be serving eviction notices in October requiring people to leave the houses they are occupying by the end of the year. You were concerned that the right of refugees and asylum seekers outlined in paragraph 8 of the SBAA/RoC Memorandum of Understanding were protected. This states that after transfer to the RoC the refugees and asylum seekers have the "right to opt to stay outside the SBAs" which you understand to mean they also have the right to opt to live in the SBAs. This provision was intended to ensure that the RoC could not force the SBAA to let recognised refugees and asylum seekers … live in the SBAs instead of in the RoC. This also reflects an assumption that the SBAs could not force the RoC to let refugees and asylum seekers live in the RoC if they were our responsibility. This remains the case and I can confirm that should any of the refugees and asylum seekers be successful in finding suitable accommodation within the SBAs we would not curtail the immigration permits currently held."

138. There was a meeting with the Richmond Villagers on 20 October 2006 with a "pre-meeting" attended by the UNCHR and RoC representatives on 18 October. Mr Stainton made a lengthy record of both meetings dated 23 October 2006 which was widely circulated locally within the administration of the SBAs. The following are extracts from it:

> "At the pre-meeting on 18 October the Asylum Service confirmed that they would honour their commitments under the MOU (in which they undertake to process asylum applications on our behalf for those asylum seekers who have arrived on the island directly through the SBAs after 1 May 2004) and more importantly that they will apply it retrospectively to those who arrived in Cyprus via Akrotiri in 1998 when their boat proved incapable of the journey from Syria to Italy. This willingness to apply the MOU is important because there is no written agreement that they will other than an exchange of letters agreeing the sum of money the SBAA will pay for each applicant and family member. When these asylum seekers first arrived in 1998 no agreement with the RoC existed - indeed the RoC itself had no organisation to process applications - and so applications were begun in the SBAs and then the paperwork was sent to the UK for adjudication. Under this process some were accorded refugee status …" (Emphasis added.)
>
> …

> "One complicating factor, which the UNHCR underlined once more, is that for those who are a SBA legal responsibility (those who arrived directly into the SBAs) the MOU states that they have the right to opt to move into the Republic. The UNHCR continue to state that this also means they have a right to opt to stay in the SBAs. In the past we have always thought this meant the UNHCR would be opposed to any move to evict refugees and asylum seekers from Richmond village, but at a meeting in August the UNHCR have clarified their view that the right to opt to stay applies to the SBAs in general and not Richmond village in particular. This means we can evict from Richmond village, although if they were able to find somewhere else to live the Administrator would need to maintain their temporary right to remain within the SBAs."
>
> …
>
> "The second group would be those who were recognised as refugees by the SBAA but who had not registered with the RoC and so were without full work permits and medical cards etc. The RoC has agreed to recognise that refugee status. The UNHCR do not support the transfer of their papers without consent as their legal status is clear …."

139. Mr Stainton recorded in the memorandum that he intended to cease welfare payments for those who had registered with the RoC and that, after giving them notice, he would cease such payments from 31 January 2007 (his then proposed date) for those who had not registered. He also recorded that "once the legal status of all those who live at Richmond Village has been regularised I then intend to begin eviction proceedings", not from the SBAs, but from Richmond Village.

140. This intention was carried into effect. On 13 February 2007 the Richmond Villagers were issued with letters from the SBAA informing them that their welfare payments would cease on 26 February 2007 and requiring vacation of their homes by 31 May 2007. This provoked a demonstration which Mr Bashir has described in terms that "the whole village protested and began a demonstration at Dhekelia roundabout". Apparently, according to the witness statement of Mr John Macmillan, the then SBA Fiscal Officer, submitted in the SBA court proceedings (see paragraphs 160, 185 – 187, 192, 197 – 203 and 249 below), the UNHCR objected to certain matters in the notices. Mr Bashir's statement says that the "demonstrations went on for weeks but around March 2007 the SBAA backed down [and] stated that they were not going to evict us or cut our weekly payments. They also agreed to issue us new travel documents …."

141. It appears that matters stood there for the time being. However, in early 2008 there was a change in the position of the RoC. Mr Macmillan says this in the foregoing witness statement:

> "However, in February 2008 there seems to have been a sudden change of position on the part of the RoC when the Ministry of Foreign Affairs (MFA) notified the SBAA that they were not

> willing to apply the MOU to the Richmond village cases because it was not retrospective and that they would refund the payments previously made by the SBAA in respect of those individuals. The then Administrative Secretary referred the MFA to the previous agreement reached in 2005 and discussions with the RoC continued over the next few months with a view to reinstating that agreement. The matter was then taken up by James Gondelle on his appointment as Administrative Secretary ….” (Emphasis added.)

142. Mr Gondelle became Administrative Secretary of the SBAA on 30 August 2008, presumably taking over from Mr Stainton. In a witness statement he prepared for the SBA court proceedings he said this:

> “The MOU does not technically apply to the refugees living in Richmond Village as their arrival in the SBAs and their recognition as refugees pre-date it, but I understand that in 2005 my predecessor reached a verbal agreement with the RoC that they would be treated as if it did (“the 2005 Agreement”). I have never seen documentary evidence from the RoC confirming this but [it has been confirmed by a UNHCR representative present at the 2005 meeting] …. SBAA records show, that pursuant to the 2005 Agreement, payments were made to the RoC in respect of those families recognised as refugees at that time …. These payments were intended to cover the administrative costs incurred by the RoC and any ongoing expenditure they may incur, such as welfare benefits. To the best of my knowledge, the RoC has not yet given full practical effect to the 2005 Agreement by making welfare payments to some Claimants ….
>
> It is fair to say that the implementation of the 2005 Agreement in practice has not been straightforward. By the time of my involvement in 2008, it was uncertain whether the RoC were still willing in principle to abide by the Agreement. In addition the SBAA were aware that there were also practical and possibly legal difficulties arising out of the fact that the Claimants would be seeking to claim welfare benefits in the RoC without actually residing there (since they were living in the SBAs).” (Emphasis added.)

143. The evidence before the court does not demonstrate why there was this “sudden change of position” and whether, for example, there were political, diplomatic or wider issues in play at the time. No documents have been revealed concerning it. There is some slight concern that, but for its revelation in the previous proceedings, this application might have proceeded in ignorance of it. Ms Lisa Young, the current Policy Secretary[8] of the SBAA, said this in her first witness statement in response to this claim:

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[8] Which is the same as Administrative Secretary.

> "Mr Bashir at paragraph 51 of his statement refers to the RoC Ministry of Foreign Affairs notifying the SBAA in February 2008 that it was not in fact willing to apply the provisions of the MoU to Richmond Villagers, and that it would refund the money already paid. I am not aware of this notification and cannot find any evidence of this from correspondence with the RoC MFA. There is nothing in the affidavit made by James Gondelle prepared for the SBA court proceedings referring to this, which is where I would expect this would have been mentioned …."

144. The apparent oversight of the material supporting Mr Bashir's evidence has not been fully explained, but there can be little doubt that there was a clear indication from the RoC during 2008 that it was not prepared to adhere to the informal understanding reached that the 2003 MoU would be applied to the refugees.

145. As I understand it, the residents of Richmond Village were unaware at the time of the apparently changed attitude of the RoC. It was only in the context of the SBA court proceedings that they learned about this. Mr Bashir says that he was not surprised when he discovered this because it demonstrated "how precarious our situation is and the fact that we have no security or any real guarantee of our status in the [RoC]." I will have to return to this aspect of the case at a later stage (see paragraph 349 *et seq*.).

146. The next event chronologically appears to have been the discovery of asbestos in some or all of the properties occupied by the families in Richmond Village. According to a Minute prepared by Mr Gondelle dated 13 February 2009, asbestos in "potentially harmful quantities and form" had recently been discovered. Mr Bashir says that in "around October 2008 we were told by James Gondelle … that there was asbestos in our homes and that our health was at risk." His Minute records the following:

> "Whilst some of this may be attributed to the general state of disrepair of the accommodation it is possible that this may have been worsened as a result of action taken by the Administration in January 2008 to render a number of empty houses uninhabitable. This action was taken to prevent further individuals from joining Richmond village and to deny those who had left the ability to return. This work involved the rough removal of door and window frames. Although temporary alternative accommodation has been offered, the current occupants of the village refused to leave to allow the necessary work to take place to render the site safe. We have therefore only been able to erect temporary fencing to restrict access to the worst affected areas. If the Administration is left with an ongoing responsibility for these families, alternative accommodation will have to be found. Due to the "military nature" of the SBAs there is no rental accommodation available, and the option of using empty married quarters – all of which are now in close proximity to other service quarters, which would present unacceptable security constraints. The SBA has identified only one viable option for alternative

> accommodation, which would be the erection of mobile homes costs approximately £500,000."

147. The Minute was prepared with a view to inviting Ministerial approval to permitting all existing residents in Richmond Village (refugees and others) to move to the UK. Various options were considered including the eviction of those recognised (presumably as refugees) by the RoC, relocation to the RoC with financial assistance in purchasing properties or repatriation, but the following sub-paragraph appeared in that list of options:

> "d. Entry to the UK. The families have all indicated a desire to move to the UK. We have discussed this with the UK Borders Agency who are sympathetic to our position. They believe it is at least feasible that leave could be granted although there would be political and presentational difficulties. HO Officials are currently assessing how such a decision might be implemented. One of their concerns is whether this case might open any floodgates. However the existence of the MOU will deal with any similar future situations[9]."

148. The recommendations of Mr Gondelle appear from the following paragraphs:

> "Conclusion
>
> 13. This is not an easy issue. However the option for moving the villagers to the UK offers the best chance of a permanent solution. Implementation would be a challenge. The villages have a record of irrational behaviour and we will need to persuade them of our good intentions. We will also need to have a plan in place to demolish the housing to ensure none returns to the SBAs having seen what others have received.
>
> 14. The next step is to gain approval from the Home Office in principle to allow the villages to enter the UK. HO officials have indicated their support. A letter to the Minister for Boarders and Immigration is attached.
>
> …
>
> 16. If Ministers agree to the families' removal to the UK, we anticipate media and parliamentary interest and we could expect criticism of both the time taken to resolve this issue, and the ultimate solution. A robust media brief would need to be prepared. Ultimately our position would have to be that the UK has an obligation towards these whether within the SBA or UK."

[9] That appears to be so: see paragraphs 169-173.

149. Accompanying the Minute was a draft letter to the Minister of State for Borders and Immigration inviting his "agreement in principle that we can draw up plans to move the villagers to the UK."

150. A history given in an Annex to the Minute says that those recognised as refugees "could leave the SBA at any time to live in the RoC", but "[all] have refused to do so, quoting mistrust of the Cypriot authorities and a desire to hold out for entry into the UK." The same paragraph records that they have "encountered difficulties in their attempts to establish entitlements for welfare payments within the RoC – who will not make payments unless they are living in the [RoC]."

151. Interestingly, whilst the Minute refers to the MoU agreed in 2003, it makes no reference to the informal agreement reached in 2005. It is, however, noted that the RoC "is reluctant to provide assistance of any nature to the SBA as the RoC considers that the British military should end their presence in the SBAs and return the land to the RoC."

152. It appears from a Joint Submission prepared by Mr Gondelle and an official of the UKBA involved in Immigration Policy some months later dated 14 December 2009 that there was a meeting of the Minister of State for Borders and Immigration and the then Minister of State for the Armed Forces in June 2009 to discuss the foregoing recommendation. The joint view, according to this document, was that "bringing them to the UK was not a desirable option". "Them" for this purpose were 64 individuals who were rescued from the boat (plus children born subsequently) of whom 30 were "recognised as refugees".

153. What that Joint Submission sought was authorisation to put into effect in relation to those "recognised as refugees" a "carrot and stick approach whereby the SBA pays for rented accommodation in [the RoC] for an initial period while simultaneously refugees are evicted from their current housing."

154. In an e-mail two days later on 16 December 2009 to the Private Secretary in the Ministry for the Armed Forces Mr Gondelle emphasised the SBA position:

> "For some time, our position has been that the only quick, pain free, solution to this problem would be to bring the families to the UK. Our position has not changed, but this is something that the Home Office initially refused to accept as an option. Having visited the SBAs[10], Home Office officials have acknowledged the complexities of the situation and now accept that we may ultimately need to consider entry to the UK. The submission does acknowledge this but the Home Office will not consider this without first exploring the alternatives as to do so would represent a significant departure from Home Office Policy. We have had to accept their position on this.
>
> However, we remain convinced that entry to the UK will ultimately prove to be the only solution …."

[10] In September 2009.

155. Ministerial authorisation was given for the "carrot and stick approach" (see paragraph 153 above) and, according to Mr Bashir, in January 2010 "the SBAA held a meeting where all the Claimants were given a notice which informed us that our welfare payments would be stopped after 26 March." The relevant part of the notice dated 28 January 2010 and signed by Mr Pitts was as follows:

> "You have been recognised as a refugee by the Republic of Cyprus and you have the right to reside, work and claim benefits from the Republic of Cyprus. You no longer have the right to reside in the Sovereign Base Areas. Your initial entitlement to a temporary permit has now expired and the SBAA does not consider it appropriate to grant any further permit when you have a right of residence in the Republic.
>
> Following receipt of this notice you will be served with a notice of eviction from your property which will require you to leave Richmond Village by 31 March 2010 and move to accommodation in [the RoC].
>
> …
>
> You cannot continue to live in Richmond Village on a long term basis and as a recognised refugee you now have the opportunity to move to the Republic of Cyprus and you should take immediate steps to do so.
>
> The position has now been reached where [the RoC] will now provide the necessary support to you as recognised refugees …."

156. This prompted an immediate question from the UNHCR in an e-mail dated 29 January 2010 concerning the obligation to move away physically from Richmond Village, an obligation that the UNHCR felt did not arise under the MoU which, the UNHCR said, had been "confirmed at all times" (cf. the second extract from the note quoted at paragraph 138 above). The UNHCR asked for the legal basis for the position taken in the notice.

157. Mr Gondelle replied on 2 February and challenged the UNCHR's understanding of paragraph 8 of the MoU. He said that that paragraph "relates to asylum seekers, not recognised refugees; to freedom of movement, not housing." Accordingly, it had "no relevance to the housing of recognised refugees" and "certainly [did] not give them any right to remain in the particular properties in Richmond village." He said that since the RoC had recognised them as refugees and had accepted responsibility for their welfare, this was consistent with paragraph 10 of the MoU and that making this arrangement resulted in "the UK responsibility for endeavouring to resettle recognised refugees in a country willing to accept them (paragraph 12)" as having been discharged. Paragraph 12 reads as follows:

> "The United Kingdom, through the sovereign based areas administration, will endeavour to resettle persons recognised as refugees or granted any other form of international protection

> in countries willing to accept those persons, but later than one year after the decision granting the relevant status has been taken …."

158. Mr Bashir says that he and the other claimants contacted a local NGO, KISA ('Action for Equality, Support, Antiracism'), and were introduced to Nicoletta Charalambidou, a Cypriot lawyer. With, it would appear, her assistance they wrote a letter to Mr Gondelle and the Minister of the Interior of the RoC asserting, in summary, that being required to move from the SBAs was a violation of all the assurances they had previously received about being able to stay within the SBAA areas. They questioned the legal basis for this and said they were seeking a legal opinion.

159. On 14 March 2010 Mr Gondelle conceded that the refugee families "have the right to reside in the SBAs until they are able to resettle elsewhere", but with the caveat that "whilst we are prepared to concede the right to reside, we do not believe we have a responsibility to provide indefinite access to free accommodation". As such, he said that "we are not willing to withdraw the decision to cease providing such accommodation at Richmond Village."

160. Whatever that concession meant (and it is not entirely clear), the claimants were not satisfied and their lawyers in Cyprus commenced judicial review proceedings with the objective of quashing the eviction notices and the decision to stop welfare payments. The proceedings were commenced by a Claim Form dated 27 April 2010. I will have to say more about those proceedings later (see paragraphs 185 – 187, 192, 197 – 203 and 249), but suffice it to say for present purposes that in due course the claim failed, both before the Senior Judges' Court and before the Senior Judges' Appeal Court. The Appeal Court decision was given on 13 September 2011. Whilst the proceedings were pending, none of the claimants was evicted and the welfare payments were maintained. Indeed no steps were taken subsequently to proceed towards eviction.

161. In the context of her inquiries, Ms Charalambidou wrote to the Ministry of Foreign affairs of the RoC in a letter dated 17 June 2010 translated as follows:

> "I also wanted to inform you that the above mentioned families have submitted a judicial review request against the decisions of the SBAA authorities. The SBA authorities submitted in their written observations that the families of refugees concerned, in agreement with the authorities of the Republic, have been resettled in the Republic of Cyprus, therefore the United Kingdom does not have any obligation of resettling them neither in the United Kingdom nor in a third country that is willing to accept them.
>
> Given that neither the applicants, nor I as their advocate am aware of such an agreement to resettle, I would appreciate it if you could inform me immediately as to the existence of such an agreement and its content."

162. The reply, which appears to be the only document emanating from the RoC in which the existence of the 2005 understanding is mentioned, as translated, said this:

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

163. As I have indicated, nothing changed as a result of the failure of the claimants' claim. Following a meeting on 29 September 2011, the UKBA agreed to give the UNHCR an up-date on its view of the position which was conveyed in a letter dated 8 November 2011 as follows:

> "In summary, 12 families, originally believed to be Iraqi, sought asylum on the Sovereign British Bases (SBAs) in Cyprus when their boat came ashore at Akrotiri in 1998. Refugee status determination was carried out by the SBA Administration (SBAA) in 1999/2000, with the assistance of UK Border Agency staff who interviewed the applicants and made individual recommendations. Over time these individuals were joined by family members and other asylum seekers (via the Turkish Controlled Area). Numbers peaked at 183 in April 2004 but have now reduced to 31 recognised refugees (in seven family groups) and 34 asylum seekers (five family groups), including a substantial proportion of women and 31 children under 18, some of whom have been born in the SBAs.
>
> There now remain seven families (of 31 individuals), whose refugee status is accepted, and five families (of 34 individuals) who are not considered to be refugees. Many of the latter group are now believed to be Syrian in origin. The Republic of Cyprus (RoC) has agreed to accept and resettle the refugee families, but due to their distrust of the RoC, the refugee families have refused to move from their current accommodation in 'Richmond Village' (former Service family accommodation) on the SBA.
>
> A Memorandum of Understanding (MoU) was signed with the RoC in 2003 to prevent this situation occurring again. Under this MoU the RoC handles all asylum seekers that enter the SBA. This has worked well. But the original applicants remain the responsibility of the SBAA.
>
> In 2007 (sic), an informal agreement was reached between the SBAA and the RoC, under which the RoC agreed to honour any decisions made by the SBAA in respect of the families and take responsibility for them. The UK Border Agency again provided assistance and sent caseworkers to the base to interview 25 of the individuals. Unfortunately, the families failed to cooperate and the interviews never took place.

UK Border Agency officials and Home Office Ministers have consistently made it clear that there should be no question of the families on the SBA being admitted to the UK. It would be contrary to UK policy to accept the transfer of refugees who have no close connection to the UK and it would also be inconsistent with our policy on asylum applicants who arrive in British Overseas Territories or Crown Dependencies. UK Border Agency involvement to date has been purely in an advisory capacity because SBAA have no expertise in handling asylum claims or removing failed asylum seekers.

Efforts to resolve the situation were re-energised in 2008 as the living conditions in Richmond Village deteriorated and became increasingly squalid; Exposed asbestos was discovered in the properties in late 2008 but the refugees refused to vacate the properties. While the Administration has been advised that the asbestos does not pose an immediate health risk unless disturbed and the empty properties affected have been fenced, the accommodation is unsuitable for the refugees and their families, and is beyond economic repair. Contractors also refuse to enter the site to carry out maintenance due to the presence of asbestos.

Since the families have the right to reside in the Republic of Cyprus, and receive all appropriate benefits from the Republic, the SBAA decided to seek to terminate welfare payments to them. On 28 January 2010 the recognised refugees were served notice that the SBAA planned to evict them from Richmond Village, withdraw the right to reside in the SBAs, and they were given notice to vacate the properties by 31 March. The refugees did not comply with this notice nor did they take up the opportunity of assistance in claiming RoC benefits. The SBAA was given notice that an application would be made for Judicial Review and, pending the outcome, did not seek to enforce the action plan.

Lawyers acting for the recognised refugees served Judicial Review papers on 30 April 2010. The judicial review failed and the decisions to terminate welfare payments and to evict the refugees were held to be lawful. The refugees appealed on a number of grounds, all of which have now been rejected, by a unanimous decision of the SBA's Senior Judges' Court.

I understand the refugee families have one more possible tier of appeal, under SBA law, to the Privy Council in London. While it is of course open to them to pursue all avenues of appeal, we believe their best interest would be served by moving to Cyprus where they have the right of residence. We therefore continue to support the SBAA's efforts to provide a durable solution for the refugee families, including their offer of financial

> assistance. Any encouragement or assistance the UNHCR can provide towards that objective would be very welcome."

164. The conditions in which the claimants and their families continued to live were deteriorating and on 16 September 2013 a meeting was held at the UNHCR offices in Nicosia with a representative from the UNHCR (Mr Nasr Ishak) and the SBAA (Ms Lisa Young) present, attended also by Ms Charalambidou and the claimants. Mr Bashir says that Ms Charalambidou explained at the meeting that the claimants were seeking resettlement in the UK. Following the meeting the UNHCR representative and Ms Charalambidou sent a joint letter on 30 September 2013 on behalf of the claimants to Ms Young which confirmed their wish to be resettled in the UK and asking her to convey this to the home Office. The letter was in the following terms:

> "Further to our meeting of 16 September 2013 … would like to sum up the main points of view made at the said meeting:
>
> As the history of this matter is well known to all participants, there was no need to once again go through the facts or discuss the numerous attempts made to resolve this situation. However, it is just reminded that the persons concerned are six families who first arrived in the SBAs in 1998, and were eventually recognized as refugees under the 1951 Convention Relating to the Status of Refugees. Since then, they have been residing in the SBAs with the hope to have access to a durable solution of their choice.
>
> It was acknowledged by all participants at the meeting that the situation of those recognized refugee families in the SBAs is a protracted one; and finding a durable solution for them has become a matter of urgency.
>
> For its part, UNHCR had been seriously concerned about the apparently precarious mental health and has therefore commissioned a psychological assessment of each one of the members of those families. It is obvious from the final reports submitted recently to UNHCR that each one of them, including children, suffer severe psychological problems and stress, some of them suffering severe depression, a situation that is detrimental to their well-being, and any decision taken on their future against their will, might jeopardize further their psychological situation.
>
> It is also well known that the proposed relocation of those refugees to the Republic of Cyprus (after an oral agreement was made to this effect between the SBAs and the Government of the Republic of Cyprus sometime in 2005) was rejected from the beginning as the refugees did not consider this to be as an option, based on their own experiences and for reasons that need not be discussed in detail as was agreed by all participants at the meeting. <u>However, UNHCR wished to add that, even if at a certain moment in time, relocation to the Republic of</u>

Cyprus, may have been seen as the most desirable or practical option, this is not the case anymore because of the financial crisis prevalent in the Republic of Cyprus, whose Government has officially stated that it cannot take any more refugees, and is appealing for solidarity of other Member States to take even those refugees recognized by their own authorities.

Recalling that those refugees have persistently considered resettlement to a third country (and in particular the UK), as the only option for durable solution, and given their current psychological situation, UNHCR would be hesitant to attempt to sway them towards other options. UNHCR, through the years, has made various efforts to find resettlement opportunities for those families, but was invariably asked why the UK was not the first country to be approached.

It was also recalled that the UK Home Office has been against the option of resettlement of those refugees to the UK due to concerns that such an action could create a "pull factor" for other persons who find this to be an easy way to reach the UK. We, however, consider that the above concerns are not valid. Firstly, those families have already been recognized as refugees prior to the MOU signed between the SBAs and the Republic of Cyprus. A decision to resettle them to the UK would not set a precedent for any other person seeking asylum or has been recognized after the entry into force of the MOU. Secondly, the number of persons to be accepted in the UK in this "one off" case, is only 35 persons and their resettlement to the UK will be seen as part of the UK's responsibility for the international obligations of the SBAs, and not as part of the UK's general resettlement programmes. In other words, it cannot be said that if these families are resettled to the UK, they would take away opportunities from other refugees currently in more need for protection and durable solutions.

In conclusion, we considered that resettlement of these families to the UK seems to be the only conceivable option in the current circumstances and should be urgently pursued at this point in time not only for the benefit of the persons concerned but also for the SBAs and eventually for the UK Government as well.

We would therefore be grateful for your effort to convey these points of view to the UK Home Office; and for any other support you could extend to resolve this protracted refugee situation. We remain at your disposal for any further clarifications or information you may require." (Emphasis added: see further at paragraphs 349 - 358 below.)

165. This letter certainly appears clearly to invite a decision on the admission of the claimants to the UK and is, in effect, addressed to the Department of State with responsibility for such a decision through the SBAA.

166. The reply did not emerge until 25 November 2014. It was from Mr Rob Jones, Head of Asylum and Family Policy, in the Immigration and Border Policy Directorate. It was in these terms:

> "I am sorry you did not receive a reply to the letter of 30 September 2013 addressed to the Sovereign Base Area Administration and jointly signed by you as the Representative of the UNHCR in Cyprus and the legal representative of the recognised refugee families living on the Sovereign Base (SBA) in the Republic of Cyprus.
>
> As was explained in a letter of 8 November 2011 to the London representative of the UNHCR [a copy of which was enclosed: see paragraph 164 above] Home Office Ministers and officials have consistently made it clear that there could be no question of the families on the SBA being admitted to the UK. The families have at no time been given any encouragement to believe that they could be. It would be contrary to UK policy to accept the transfer of refugees who have no close connection to the UK and it would also be inconsistent with our policy on asylum applicants who arrive in British Overseas Territories or Crown Dependencies.
>
> Although their presence on the Base has been tolerated by the SBA, their stay gives the families no claim to admission to the UK. The UK's policy on the admission of refugees is in accordance with the 1951 Refugee Convention and the UK accepts no responsibility for the consideration of applications for asylum or transfer of refugee status other than those made on UK territory, namely the mainland territory of the UK and excluding the UK's Overseas Territories, Crown Dependencies, or Sovereign Bases such as the ones in the Republic of Cyprus.
>
> Our position, therefore, is that none of the refugee families on the SBA will be considered for admission to the UK. They have no family or residential ties with the UK and there are no reasons for treating them exceptionally. The families have the right to reside in the Republic of Cyprus and have strong ties with the Republic. We do not believe that their preference for the UK should be allowed to override what is demonstrably a durable and suitable solution for their long-term residence."

167. This letter has been treated by the claimants as the effective "decision letter" for the purposes of challenging the Secretary of State's position in relation to their desire to be admitted to the UK. As I have said previously (see paragraph 13), I propose to address the merits of the substantive argument first and will return to the submissions on delay and/or an extension of time thereafter.

168. As will emerge in due course (see paragraphs 362 - 371), other discussions took place thereafter concerning the position of the claimants, but it is at that point that the claim for judicial review (if not out of time) crystallised.

169. As mentioned above (paragraph 22), on 21 October 2015 a group of 115 migrants arrived in the Akrotiri SBA by boat either from Lebanon (according to Ms Young) or Turkey (according to a press report to which Ms Gregory draws attention in her witness statement dated 12 February 2016). In her witness statement of 15 January 2016 Ms Young said this:

> "Cyprus has not seen large numbers of migrants from the near Middle-East Region, including Syria compared to other countries, but there have been at least three instances of migrants arriving on the Island in large numbers in the last year. The current migrant arrival has been taking up most of the SBAA's staff time and resources in the last 10 weeks."

170. Ms Gregory says this in the above witness statement:

> "These 115 individuals were initially detained on Akrotiri but then moved to tented accommodation also on Dhekelia not far from the SBA courts. As I understand it around 40 persons remain in the tented accommodation after most were transferred to the RoC and a handful of others left illegally. The remaining 40 or so are not allowed to enter the RoC even though the Cypriot authorities are processing their asylum claims on behalf of the SBA. It is not clear what is going to happen to these individuals in the longer term and during my last trip in early January SBA officials informed me that they were hoping to rehouse these asylum seekers in empty buildings situated behind the tented accommodation which will provide a more permanent base."

171. I should, perhaps, say that the press report to which I have referred contained a quotation from the MOD indicating that, in its view, the 2003 agreement (see paragraph 100) with the RoC covered this situation. It says this:

> "We have had an agreement in place with the Republic of Cyprus since 2003 to ensure that the Cypriot authorities take responsibility in circumstances like this."

172. The same press report contains the following passage:

> "A Cypriot government official said cooperation on the matter would be dictated by the memorandum of understanding between the Republic of Cyprus and the British-run bases."

173. Ms Gregory's witness statement appears to confirm that the procedures set out in this agreement are being, or have been, implemented. There is no evidence before me as to how many, if any, of those who arrived in this manner have been accorded refugee status by the RoC.

The essential criticisms of the decision letter

174. I have already foreshadowed the essential legal arguments deployed to challenge the decision reflected in the letter (see paragraph 9 above), but it would be helpful at this stage to highlight those parts of the decision letter that are the focus of the criticisms made by the claimants.

175. Although the letter says nothing about whether, as a matter of international law, the Refugee Convention applies to the SBAs, it is at least implicit from the third paragraph of the letter that the decision reflected in it is not considered by the Secretary of State to conflict with any obligation that the UK has towards the claimants as refugees under the Convention. Although there has been a debate before me about whether, as a matter of law, the Refugee Convention applies, it seems clear that it was the intention of the Secretary of State, when reaching the conclusion expressed in the letter, to act in accordance with the spirit of the Convention. She said she was applying the policy on "asylum applicants who arrive on British Overseas Territories or Crown Dependencies", a policy which precludes consideration of "applications for … transfer of refugee status" from anyone who is not "on … the mainland territory of the UK" which, for this purpose, excludes "the UK's Overseas Territories, Crown Dependencies, or Sovereign Bases such as the ones in the Republic of Cyprus", a policy, it is asserted, that is in accordance with the Convention.

176. The letter would appear to recognise the possibility of an exception being made to this policy if sufficient reason was shown, but no such reason, it was said, arose in this case. It seems clear that one reason for not making an exception to the policy was that the refugees "have the right to reside in the Republic of Cyprus and have strong links with the Republic." Although not said expressly, this is presumably an implicit reference to the 2005 agreement which, the letter argues, provides "a durable and suitable solution for their long term residence."

177. The letter also treats the lack of consent on the part of the claimants to making their future in the RoC as something that does not govern the decision of the Secretary of State, but is merely a "preference" expressed by the claimants that can be weighed in the balance and which, in the circumstances, does not outweigh the advantages of what might be labelled "the local solution".

178. The letter does refer to what is said to have been the consistent position adopted by "Home Office ministers and officials" that "there can be no question of the families on the SBA being admitted to the UK", repeating what was said in the letter of 8 November 2011 (see paragraph 163 above). The review of the history set out above demonstrates that the consistent position taken at Ministerial level within the Home Office is that to admit this group could be seen as setting a precedent which would encourage other migrants to try to use the SBAs as a route to the UK. However, it is also clear that at times officials in the Home Office (see paragraphs 147 and 154), the FCO (see paragraphs 86 - 87), the Ministry of Defence (see paragraphs 76 and 95) and the SBAA (see paragraphs 94, 96, 146 – 149 and 154) were of the view that there was no realistic alternative but to allow the refugees to come to the UK.

179. Any Ministerial view to the effect referred to in the letter may be seen either as a political judgment or as decision-making of a "poly-centric character … [which includes] policy and public interest considerations which are not susceptible to

judicial review" (see, e.g. *per* Lord Bingham of Cornhill in *R (Corner House Research) v SFO* [2009] 1 AC 756, 841 [31]). Whilst Mr Husain has sought to characterise the decisions to this effect made at various times in the past as "political decisions", he has not sought to base the claimants' case to quash the Secretary of State's decision because it is, or may have been, influenced by these "political" or "policy" issues. He asserts that the decision has been taken having overlooked the full legal implications of the situation, including the need, as he contends, for the full complement of obligations that the UK owes to the claimants given their status as recognised refugees to be met. He also contends that reliance upon the 2005 agreement is misplaced (a) as a matter of principle and, in any event (b) because of the demonstrable fragility of the agreement.

180. I will turn now to the principal arguments of law.

Does the Refugee Convention apply to the SBAs as a matter of law?

(i) Introduction

181. The position taken on behalf of the UK government has progressed from a position of "probable inapplicability" (see paragraphs 63 and 67) to definite inapplicability (see paragraph 91). It is possible that the legal advisers to each of the Departments of State that has an interest in this issue have taken differing views. These views are, in any event, irrelevant since ultimately it is a matter for the court to determine. Nonetheless, the case advanced on behalf of the Secretary of State for Defence (and thus the UK Government) in the hearings before the Senior Judges' Courts (see paragraph 160 above) was that the Refugee Convention did not, as a matter of law, apply to the SBAs and that submission was upheld. It is acknowledged by Mr Roe that I am not bound by that decision, although he submits it is of persuasive value. I will return to the decisions of the Senior Judges' Courts below (see paragraphs 185 – 187, 192, 197 – 203 and 249), but it is necessary to note the formal history of the adoption of the Refugee Convention and the 1967 Protocol so far as it affects the Island of Cyprus in general.

182. On 28 July 1951 the UK signed the Refugee Convention. On 11 March 1954 it was ratified by the UK and a declaration made that it extended to the Channel Islands and the Isle of Man. On 24 October 1956, when Cyprus was still a British colony, the UK declared that the Refugee Convention extended to Cyprus pursuant to Article 40(1) of the Convention (see paragraph 37 above). The formal record within the UN records is as follows:

> "EXTENSION of the Convention to the territories listed below for the conduct of whose international relations the Government of the United Kingdom of Great Britain and Northern Ireland are responsible.
>
> …
>
> (To take effect on 23 January 1957.)
>
> (a) British Solomon Islands Protectorate, Cyprus, Dominica, Falkland Islands, Fiji, Gambia,' Gilbert and Ellice

> Islands, Grenada, Jamaica, Kenya, Mauritius, St. Vincent, Seychelles and the Somaliland Protectorate subject to the following reservations made under the terms of article 42, paragraph 1, of the Convention ….
>
> [the reservations are then set out]"

183. As will be clear, the extension was to the territory of Cyprus. Mr Husain places emphasis on the fact that no declaration under Article 44(3) of the Refugee Convention to the effect that it shall "cease to extend to such territory" (see paragraph 37 above) has ever been made by the UK government.

184. There can, of course, be no doubt that the Convention applied to the Colony of Cyprus from 1956 and consequently applied until 1960 to the territory that now comprises the SBAs. The issue is whether matters changed when the constitutional settlement of 1960 (see paragraphs 47 - 54 above) was implemented. At that time, of course, the 1967 Protocol was not in existence.

(ii) continuity of applicability of Convention?

185. The primary position taken by Mr Husain is that the applicability of the Convention to the SBAs continued following the constitutional settlement and that it was not necessary for there to be an express recognition by the UK that the 1967 Protocol applied because of the operation of Article VII.4 (see paragraph 32 above). This, as I understand it, was conceded on behalf of the SBAA and the Secretary of State for Defence (and thus on behalf of the UK government) in the proceedings in the Senior Judges' Courts in the SBA: *Bashir & Ors v Administrator of the Sovereign Base Areas of Akrotiri and Dhekelia and Secretary of State for Defence*, Judicial Review No. 1 of 2010, 23 March 2011, and *Bashir & Ors v Administrator of the Sovereign Base Areas of Akrotiri and Dhekelia and Secretary of State for Defence*, Appeal No. 1 of 2011, 13 September 2011.

186. At the first instance level, Mr Justice Collender QC recorded the position thus, having referred (a) to the fact that the UK acceded to the 1967 Protocol on 4 September 1958 and (b) to the terms of Article VII.4:

> "It is accepted by the parties that by virtue of this Article, the … Convention as amended by the 1967 Protocol, has the same geographical reach as before the UK acceded to the Protocol."

187. At the appellate level, Mr Justice J.J. Teare, giving the judgment of the court (comprising also Mr Justice R.G. Chapple and Mr Justice G. Risius CB) said the position was as follows:

> "If the SBAs are effectively the surviving parts of the colony of Cyprus, then it is agreed that the … Convention applies (the 25 October 1956 notification still applying to the remaining part of the colony – the [government's] concession that if that be the situation, the 1967 protocol also applies."

188. As I understood Mr Roe's argument, he challenged the validity of this concession. This was foreshadowed in his Skeleton Argument when he said this:

> "… a reader in 1968 who, wanting to know the extent of the Protocol's applicability, looked up the United Kingdom's 1956 notification in respect of 'Cyprus' would understand at once that the United Kingdom should not be deemed in 1968 to be trying to extend the Protocol to its former colony. The 1956 reference to 'Cyprus' was obviously spent and fell to be ignored (as did similar references to Kenya, Gambia and several colonies which by 1968 were states in their own right)."

189. He drew on the terms of the instrument of accession to the 1967 Protocol in support of this position. The instrument contained the following declarations and reservations:

> '(a) In accordance with the provisions of the first sentence of Article VII.4 of the Protocol, the United Kingdom hereby excludes from the application of the Protocol the following territories for the international relations of which it is responsible: Jersey, Southern Rhodesia, Swaziland.
>
> (b) In accordance with the provisions of the second sentence of Article VII.4 of the said Protocol, the United Kingdom hereby extends the application of the Protocol to the following territories for the international relations of which it is responsible: St. Lucia, Montserrat [to which, on the same day the United Kingdom notified the Secretary-General (for the first time) that the Refugee Convention itself extended]'

190. His argument was that this conveyed the position of the UK at that time, which was, in effect, non-existent so far as the SBAs were concerned in relation to the Refugee Convention. He submitted that to understand 'Cyprus' as it was used in 1956 in the context of the Convention in the same way in 1968 would be "an absurd interpretation of what the United Kingdom meant in 1968 by acceding to the Refugee Protocol without mentioning the SBAs." At that stage all that the UK retained on the island of Cyprus were "those small parts … retained … for purely military purposes, whose indigenous population comprised nationals of a friendly foreign state to which the [UK] had made solemn promises not to permit new settlement of people other than for temporary purposes."

191. I am not really sure that, as thus articulated, this argument advances Mr Roe's case. The concession made in the earlier proceedings was premised on the basis that the Refugee Convention *per se* applied to the SBAs from the moment they came into existence and that the Protocol simply confirmed the position henceforth after it was ratified, that confirmation deriving from the "deeming provision" constituted by Article VII.4. If he is right that the Convention did not apply to the SBAs as from the time they were created, this argument does not arise at all. The Detailed Grounds of Defence asserted that "[contemporaneous] documents suggest that officials considering whether to make a notification in respect of overseas territories when ratifying the Protocol … did not consider the SBAs at all, either to extend the … Convention to a territory to which it had not previously extended or withdraw its

application from a territory to which [it] had been extended." The inference, it was suggested, was "that they were not considered as part of this process because, given the limitations on the government of the SBAs and military purpose, the 1951 Convention did not, or ought not apply in any event to them, with the result that a decision did not need to be made either way." I will return to this argument, but Mr Husain's response is that if the Convention was not considered to be applicable to the SBAs for the reasons given, the easiest course would have been expressly to exclude them when the 1967 Protocol was being considered.

(iii) application of Convention to SBAs from inception?

192. At all events, the more fundamental question is whether the Convention applied to the SBAs from their inception. The Senior Judges' Court, both at first instance and on appeal, concluded that it did not having applied the decision of the House of Lords in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 ('*Bancoult No 2*'). The Senior Judges' Court was bound by the principle established in that case as indeed am I. Whilst Mr Husain reserves his position concerning *Bancoult No 2* and seeks to distinguish it, the principle it establishes for present purposes is clear and, as I have said, is binding upon me. If the principle applies to the facts of this case, then that is the end of the matter so far as this court is concerned.

193. *Bancoult No 2* was one of a number of cases concerning the islands of the Chagos Archipelago in the Indian Ocean. The islands were a dependency of Mauritius when it was ceded to the United Kingdom by France in 1814 through the Treaty of Paris. The islands (Diego Garcia, Peros Banhos and the Salomon Islands) were administered as part of the colony of Mauritius until 1965. The story is well-known (and is set out in summary form, in particular, in the speech of Lord Hoffmann at paragraphs 3-15): the United States wanted a land-based military presence in the Indian Ocean and Diego Garcia was the most suitable candidate if it could be made available. Following discussions in 1964 the UK Government agreed to provide the island for use as a base and made the British Indian Ocean Territories Order 1965 which detached the Chagos Archipelago (and some other islands) from the colony of Mauritius and constituted them a separate colony known as 'BIOT'. In due course virtually all the islanders were removed from the BIOT mainly to Mauritius. In 2004 two Orders in Council were made by the UK government ('the Constitution Order' and 'the Immigration Order') which removed any right of abode and disentitled the islanders from entry or presence on the islands without specific permission. The claimant, a Chagossian by birth and a representative of the Chagossians, issued judicial review proceedings seeking *inter alia* a declaration that the Orders in Council were unlawful.

194. The House of Lords (by a majority) rejected the challenge on various grounds many of which are not directly relevant to the issue in this case. However, the House was invited to express its opinion on an issue that is arguably relevant to this case, but which had not been dealt with in the courts below. Lord Hoffmann, at paragraph 64, articulated the issue and the answer to it thus:

> "That leaves [a point] which [was] not considered by the Divisional Court or the Court of Appeal and which [was] lightly touched upon in argument but upon which the House is invited to rule. [It is] whether, in principle, the validity of the

> Constitution Order may be affected by the Human Rights Act 1998 …. I do not think that the Human Rights Act 1998 has any application to BIOT. In 1953 the United Kingdom made a declaration under article 56[11] of the European Convention on Human Rights extending the application of the Convention to Mauritius as one of the "territories for whose international relations it is responsible". That declaration lapsed when Mauritius became independent. No such declaration has ever been made in respect of BIOT. It is true that the territory of BIOT was, until the creation of the colony in 1965, part of Mauritius. But a declaration, as appears from the words "for whose international relations it is responsible" applies to a political entity and not to the land which is from time to time comprised in its territory. BIOT has since 1965 been a new political entity to which the Convention has never been extended."

195. Lord Rodger of Earlsferry (at paragraph 116), Lord Carswell (at paragraph 120) and Lord Mance (at paragraph 142) expressly agreed with Lord Hoffmann on this issue. Lord Bingham of Cornhill did not address it expressly.

196. The principle thus established was that a treaty previously declared by the UK to be applicable to a territory "for whose international relations it is responsible" is not automatically extended once the territory becomes a "new political entity" and a fresh declaration is necessary.

197. The Defendant submits that it is clear that the SBAs became new political entities on the establishment of the RoC and, accordingly, an express declaration that the Refugee Convention applied to them would have been required for that to be so after their creation. This was the conclusion of the Senior Judges' Courts in the SBAs and I am invited to follow that approach, albeit that it is recognised that I am not, strictly speaking, bound to follow it.

198. I should summarise the conclusion of the Senior Judges' Appeal Court. The First Instance Court, by a majority, concluded that this was so, Mr Justice Collender QC dissenting on the point.

199. The Appeal Court identified the issue in this passage of the judgment:

> "In 1960, the Republic of Cyprus was created. The vast majority of the island became the newly formed republic. Two areas of land became the Sovereign Base Areas of Akrotiri and Dhekelia – situated within each of the SBAs were military establishments. Undoubtedly, as the respondents put it, this was, as a matter of fact, a fundamental change in the affairs and situation of the island of Cyprus. The status and nature of the

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[11] Formerly Article 63: "Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall … extend to all or any of the territories for whose international relations it is responsible." Cf. Article 40(1) of the Refugee Convention: see paragraph 37.

> SBAs lies at the heart of the appellants' first ground of appeal. The question for determination here, it is agreed, was correctly identified by the court below (the test applied deriving from [*Bancoult*] …) as whether the SBAs were:
>
> > a. Relics of the old colony of Cyprus or, as Collender J in the court below put it "what was left as the rump of the British colony of Cyprus after the RoC was created as a newly independent state out of the balance of the colony"; or
> >
> > b. A newly created political entity."

200. It is to be noted that this was an "agreed issue". The arguments to which I will refer below (see paragraphs 205 – 225, 226 – 261, 262 – 284 and 285 - 306) were not addressed to the court.

201. The judgment continued thus:

> "If the SBAs are effectively the surviving parts of the colony of Cyprus, then it is agreed that the Geneva Convention applies (the 25 October 1956 notification still applying to the remaining part of the colony – and the respondent's concession that if that be the situation, the 1967 protocol also applies). That of course is the … case [of the Richmond Village refugees], it being contended that the majority decision at first instance was wrong and that the dissenting view of Collender J is to be preferred. The … case [of the SBAA and the Ministry of Defence], here and below, is that in 1960, the colony of Cyprus ceased to exist. Two new political entities were created: the RoC and the SBAs. If that be right, it must follow that the Geneva Convention does not apply to the SBAs. The application of the Geneva Convention to the colony of Cyprus came to an end with the break up and death of the colony in 1960. It is common ground that there has been no notification from the UK that the 1951 Convention or 1967 protocol applies to the SBAs."

202. The Appeal Court considered the right approach to be "to look at all the circumstances surrounding the creation of the RoC and the SBAs so as to come to a proper conclusion as to whether these were in reality newly created entities or what was left of the pre-1960 colony". The court took the view that no one feature would be decisive and that matters would have to be looked at in the round with a view to assessing the cumulative effect of the available material. Logically, it was said, the first port of call was the documentation raised at the time. The court referred to the Treaty of Establishment and, in particular, to Appendix O (see paragraph 52 above) which, the court observed, "placed considerable limitation upon the use to which SBA land could be put – the SBAs' primary function was undoubtedly military." However, the substantive conclusion can be discerned from the following passages in the judgment:

> "The respondents ask us to consider the raft of new appointments made at the time the SBAs came in to being, as evidenced by the first few editions of the SBA Gazette …. This is new material – in the sense that it was not made available to the court below. By way of example, an Administrator, Chief Officer, Resident Judge, Senior Judge, Administrator's Advisory Board and Legal Adviser were all appointed at the outset. We also look at the new legislation enacted at the time by the Administrator, as appears in the first SBA Ordinances. One of the first steps was to provide for the continuation of existing law – altogether unnecessary, say the respondents, if this were merely the continuing of a colony. The Sovereign Base Areas of Akrotiri and Dhekelia Order in Council 1960 provided a constitution for the SBAs. All this taken together, in our judgment, points strongly towards the creation of a new regime and entity, the establishment of something new rather than the continuation of the old regime …. [It] seems to us impossible to dismiss this raft of new appointments and positions as mere changes in nomenclature.
>
> We also think it a useful exercise to take a step back from the specific and look at the situation as we divine it to have been in 1960 – the people of Cyprus were being given their independence. No longer was the island a colony of an overseas power. The creation of the RoC was, beyond peradventure, a new political entity – an independent state. It is perhaps difficult to see, from the points of view of either the newly emerging RoC or the UK, what the point or advantage would be of retaining two small colonial appendages to a new independent state. What surely was needed was the best arrangement by which two powers who would be geographically and ideologically side by side could best co-exist in peaceful harmony, to their mutual benefit. That would surely be by two new independent political entities. We are driven not only by this but by all the material in the case to the firm and unanimous conclusion that the majority decision of the court below was right – that is to say, that the SBAs were a new creation – a new political entity, rather than what was left of a colony after the creation of the RoC. We thus endorse and uphold the decision of the court below that the provisions of the Geneva Convention do not, as a matter of international law, apply to these appellants."

203. The appellants in those proceedings had a right of appeal to the Judicial Committee of the Privy Council, but did not exercise that right.

204. Mr Roe invites me to come to the same conclusion as the Appeal Court and the majority in the First Instance Court. (He reserves his position on the question of whether the decision of the Senior Judges' Court on the non-applicability of the Refugee Convention created an *estoppel per rem judicatam* on this issue.) I will return

to his invitation when I have considered Mr Husain's arguments concerning the ambit and relevance of the decision in *Bancoult No 2*.

205. He invites me to give the principle it establishes a narrow construction. This approach is, he submits, dictated by (1) the fact that the issue was "lightly touched upon in argument" in the House of Lords and (2) that "State practice" suggests a different approach to what constitutes a new political entity than does the approach adopted in that case. He also says that a narrow approach is justified given the context, namely, of deciding whether the Refugee Convention, with its avowed humanitarian intent, is applicable.

206. As to the first of these points, I do not consider that I should do anything other than take the decision of the House of Lords as I find it. I do not think it is for me to give it a wide or narrow meaning. If any elucidation of the approach is called for, it must be given by the Supreme Court.

207. As to the second factor upon which Mr Husain relies, it is necessary to identify what he means by "State practice". In essence, as I understood him, he is referring to the FCO (then the FO) practice in relation to the Refugee Convention when applied to what he argues was the analogous position of the Turks and Caicos and Cayman Islands when they were "retained" from the former colony of Jamaica. The general argument as to State practice that he advances is, however, broader than that: he argues that, on analysis of the history of FCO practice concerning conventions, as recognised internationally, that practice is consistent with the proposition that no fresh declaration of adherence to the Refugee Convention was necessary in the circumstances of the creation of the SBAs. However, that argument, as I perceived it to have been presented, is a different argument from simply saying that the principle established by *Bancoult No 2* should be construed narrowly: it is a separate way of submitting that the Refugee Convention applies to the SBAs as a matter of international law.

208. Since no submissions were made in *Bancoult No 2* concerning State practice, I am unable to see how the existence or otherwise of a State practice in relation to the adoption of a convention when a new political entity is created can have any direct bearing upon how the expression "new political entity" as used in that case is interpreted. If what Mr Husain was truly relying upon was what he contends is the analogy of the Turks and Caicos Islands and the Cayman Islands, then as a starting point I find it difficult to accept that the approach of the FCO to one example of "decolonisation" can amount to a "practice", even leaving out of account the usual requirement that the practice should receive broad international recognition. Nonetheless, I will consider what happened in relation to the Turks and Caicos Islands and the Cayman Islands to see if this throws light on whether the SBAs should be treated as new political entities or effectively the continuation of the pre-independence arrangements for the purposes of the Convention.

(iv) <u>the Turks and Caicos and Cayman Islands</u>

209. It is common ground that the Refugee Convention was extended to Jamaica on 25 October 1956 (the same day upon which it was extended to Cyprus). As at that date, the Turks and Caicos and Cayman Islands were part of the British colony of Jamaica. In relation to the Turks and Caicos Islands this status was recognised expressly by

section 1 of the Cayman Islands and Turks and Caicos Islands Act 1958. The precise constitutional position of the Cayman Islands was not expressly identified in the Act, but, as with the Turks and Caicos Islands, the islands were considered formally to be Dependencies of Jamaica.

210. The purpose of the 1958 Act was to "separate the Turks and Caicos Islands from the colony of Jamaica and to make fresh provision for the government of those Islands and of the Cayman Islands". This appears to have been part of the process involved in the formation of the Federation of the West Indies, a federation which history demonstrates lasted only from the end of 1958 until 1962. Nonetheless, pursuant to the 1958 Act separate Orders in Council were made on the same day (13 May 1959) making provision for the government of each of these two groups of islands with effect from 4 July 1959. Each Order in Council appears to be in identical terms and provides for a separate Governor for each group of islands who in fact was the person who held the office of "Captain-General and Governor-in-Chief of Jamaica". Each Order in Council provided for the appointment of an "Administrator" of the islands who was to be appointed by the Governor "with the approval of a Secretary of State" (see paragraph 8(1) of each order). Each Order in Council provided for an Executive Council and a Legislative Assembly. The Legislative Assembly had the capacity to debate and pass Bills subject to the assent of the Governor and/or the Secretary of State. The Legislature of Jamaica could make laws "for the peace, order and good government of the Islands" which could prevail over the laws enacted by the relevant Legislative Assembly.

211. These new arrangements, which, as indicated above, were expressly designed to separate the Turks and Caicos Islands from the colony of Jamaica and to make fresh provision for the government of the Cayman Islands, took effect three years before Jamaica itself ceased to be a British colony and gained its own independence. Mr Roe was, I think, justified in saying that the arrangements reflected in the Orders in Council devolved a very considerable degree of autonomy to each group of islands well before Jamaica ceased to be a British colony and each group of islands ceased to have any form of constitutional connection with Jamaica. In 1962 both groups of islands became British colonies (now British Overseas Territories: see paragraph 314 below).

212. However, Mr Husain relies upon the proposition, deduced from the official online FCO "Treaty Record" relating to the Refugee Convention and a letter to which I will refer shortly (see paragraph 213), that because the FCO regarded the Convention as applicable to the newly-formed colonies of the Turks and Caicos Islands and the Cayman Islands in 1962 as a result of the extension of the Convention to Jamaica (of which they were then a part) in 1956, so too should the same apply to the SBAs. On his argument, they were a part of Cyprus at the time of the extension relating to Cyprus and their subsequent translation into a different status should be seen as analogous to the position of the Turks and Caicos Islands and the Cayman Islands.

213. The online Treaty Record does indeed record that the Convention applied to each group of islands by "extension" on 25 October 1956 with effect from 23 January 1957 although it should, perhaps, be noted that it contains a disclaimer to the effect that the information provided is "for guidance only". The letter to which reference has been made is a letter between the then Commonwealth Office and the Foreign Office dated 25 August 1966 (and thus well after the arrangements referred to in paragraph 210

above). It appears to be an internal government communication generated in the run-up to the implementation of the 1967 Protocol which was in a draft form at that stage having been approved for consideration by States Parties by the UN General Assembly in 1966. The letter was in reply to one asking about "the effect of the Protocol upon overseas territories", a matter which the reply says "raises questions of some difficulty". The writer begins by listing the territories "to which the Convention applies, and those to which is does not." Listed amongst those to which it does apply are the Turks and Caicos Islands and the Cayman Islands and the reason given in parenthesis is "As a result of extension of the Convention to Jamaica." It is to be noted that the SBAs are not mentioned in either list.

214. The position in relation to the Turks and Caicos Islands and the Cayman Islands was referred to again in a Circular dated 5 May 1967 from the Secretary of State for Commonwealth Affairs to the Governors of a number of British overseas territories (including the Turks and Caicos Islands and the Cayman Islands, but not including the SBAs). It referred to Article VII. 4 of the Protocol (see paragraph 32 above) and says that "in effect [it] will be deemed to apply to those territories to which the Convention was extended, under Article 40 of that Convention, unless upon [UK] accession a notification to the contrary is addressed to the [UN]." It then contained the following paragraph:

> "The [UK] agrees with the purposes of the Protocol, which it regards as strengthening the position of the [UNHC] in his work for refugees, and a strengthening the right of refugees to legal protection. [HMG] is therefore anxious to accede to the Protocol at an early date. I would be grateful therefore if governments to which this circular has been addressed would inform me by 15th June whether they are prepared to accept the Protocol (the Convention extends to their territory in all instances; in the case of the Turks and Caicos Islands, and the Cayman Islands, by virtue of the extension of the Convention to Jamaica). I would be grateful if any government which sees difficulty in doing so would tell me the reasons."

215. In a communication from the Commonwealth Office to the Foreign Office dated 26 March 1968 it was recorded that amongst the territories that "agreed without comment to accept the Protocol" were the Turks and Caicos Islands and the Cayman Islands. On 4 September 1968 the UK Government informed the Secretary-General of the United Nations that three territories for the international relations of which it was responsible (Jersey, Southern Rhodesia and Swaziland) were excluded from the application of the Protocol, but that two such territories (St Lucia and Montserrat) which had previously been unable to accept the Convention were henceforth expressly included (see paragraph 189 above) Presumably, the intention was that all other such territories would be covered by the deeming provision in Article VII.4.

216. As foreshadowed above, Mr Husain's argument is that if the extension of the Convention to Jamaica in 1956 was enough without fresh notification to make the Convention apply to the Turks and Caicos Islands and the Cayman Islands when they became independent of Jamaica and British colonies in their own right, that ought also to be sufficient for the SBAs which should, therefore, not be regarded as new political entities within the *Bancoult No 2* meaning. He challenges Mr Roe's contention that

by the time the UK acceded to the 1967 Protocol in 1968 the use of the word "Cyprus" could not possibly refer to Cyprus as it was in 1956 and was "obviously spent and fell to be ignored" (see paragraph 188 above).

217. I will turn below to the issue of whether this analysis supports the conclusion that the SBAs were not new political entities on their creation. However, as already foreshadowed, I do not consider that one example of how the UK Government approached the question of the applicability of the Convention would necessarily provide a secure foundation for determining its applicability in another situation. The approach itself was taken against the background of "questions of some difficulty" arising and there is no clear indication in the material before the court about the precise legal approach being adopted. Since the matters were being considered well before *Bancoult No 2* was decided, there is no express reference to what was or was not to be regarded as a "new political entity" in that material. The inference I draw from the material I have seen is that pragmatic solutions were often adopted to areas where there was potential uncertainty without the close analysis to which the issues would be subjected in a court of law. So far as the various overseas territories were concerned, acceptance of the applicability of the Convention plainly depended very much upon whether the territory (for which, in the *Bancoult No 2* sense, one must read as "the political entity responsible for the territory") was willing and able to deliver to a refugee the full complement of the obligations provided for under the Convention. If it could not do so, it would be unwise and impolitic to accept the responsibilities under it.

218. It seems clear that both the Turks and Caicos Islands and the Cayman Islands have always been seen as "territories" to which the Convention applies because the social and physical infrastructure was accepted to be sufficiently robust to meet the obligations under the Convention. This was seen to be so when each group of islands was part of the colony of Jamaica. In what would appear to have been largely a *de facto* severance of ties with Jamaica in the run-up to Jamaican independence, the islands were still seen to be capable of accepting the obligations under the Convention in their own right and in the virtually autonomous status that each acquired in 1958. Although that new status could arguably be seen as constituting a "new political entity", the reality was that each group of islands was just as able as each had been hitherto to meet the obligations undertaken under the Convention. Since that was the position, there was no need for any new notification and certainly none when Jamaica became independent.

219. Because no documentation concerning the decisions, if any, made about this issue in 1958 is before the court, it is impossible to know to what extent a deliberate decision was made to the effect I have indicated. It is, of course, possible that the position of the Convention was simply overlooked and what appeared in the letter referred to in paragraph 213 above was an *ex post facto* rationalisation of the position. Whatever the position may have been, I do not consider that what occurred in relation to the Turks and Caicos Islands and the Cayman Islands is capable of being applied by analogy to the SBAs.

220. In the first place, it is clear that in 1966 the position of these groups of islands <u>was</u> considered expressly. There is no evidence that any consideration was given to the SBAs. They were not mentioned in either list in the letter referred to above and were not referred to in any subsequent written material placed before me. Mr Husain says

that because they were not regarded expressly by the FCO as territories to which the Convention did or did not apply, "the field is open and the question becomes an issue of law to be decided." His essential position is that in the absence of a denunciation under Article IX (see paragraph 34 above) the proper conclusion is that the Convention continued to apply.

221. I have to say that, however the principles of public international law are to be deduced and/or applied, it makes no sense, in my judgment, to conclude that a Convention as significant as the Refugee Convention (with its substantive humanitarian obligations) can be applied to a territory which does not make an informed decision about whether it is willing and able to accept those obligations. This was the approach of the Secretary of State in the Circular referred to in paragraph 214 above and the need to adopt it is obviously sound. Whilst it is quite possible to see why a "deeming provision" could be applied to acceptance of the Protocol, such a provision would clearly be inapplicable to the Convention itself.

222. It is at this point and in this context that the argument in the Detailed Grounds of Defence (see paragraph 191 above) concerning the limited nature of what the SBAs comprised at their inception has effect. These areas totalling 98 square miles and 3% of the land mass of the island of Cyprus were, it was argued, to be military bases in respect of which there was a clear understanding and commitment by the UK Government not to populate them other than with necessary military and administrative personnel. Those who lived and worked there would ordinarily be there on a relatively temporary basis to serve in the military forces or to render such educational and health support to those forces as was necessary. There would be a significant local Cypriot population living in the SBAs (albeit not in the military establishments *per se*) and their needs were to be provided for by the RoC. If anyone within the UK Government had addressed specifically the role which the Convention might have in the context of such a geopolitical unit, the conclusion must surely have been that it lacked the social and legal infrastructure to be able to sustain fully the obligations to which adherence to the Convention would give rise.

223. Whilst those considering the matter may well not have addressed the issue on the basis of whether the SBAs constituted new political entities, it is not inconceivable that the prevailing view (if the issue was addressed at all) was that the question simply did not arise as there was no realistic way in which the obligations under the Convention could be fully met. On that basis there was nothing to do, either positively or negatively, so far as the Convention was concerned. I agree with Mr Husain that, for the avoidance of doubt, the UK Government could have made a decision in 1966/67 formally to exclude the SBAs from the Protocol under Article IX (see paragraph 34 above). However, that would have involved a recognition that the Convention had applied to the SBAs prior thereto and, if I am right, the UK Government did not consider that it did apply – or at least thought that it probably did not apply.

224. This is, of course, speculative to a degree as there is no clear contemporaneous material to suggest that the matter was given express consideration. However, that itself adds weight to the proposition that no one considered that the Convention applied to the SBAs. If the position had been considered in 1960, it is unlikely that the scenario that has occurred in the present case (and, it appears, subsequently),

namely, of a boat full of migrants from across the waters landing on the shore of one of the SBAs and seeking refuge, would have been foreseen as a real possibility.

225. Subject to the further arguments that Mr Husain advances concerning the direct application of the Convention to the SBAs to which I will refer below, I do not consider that the suggested analogy of the Turks and Caicos and Cayman Islands supports his argument and, in my view, the conclusion of the Senior Judges Court that the SBAs did indeed constitute new political entities (and very different from the new RoC) at the time of their inception was correct. If that is the test I must apply, then it means that my conclusion must be that the Convention does not apply to the SBAs.

(v) a wider State practice relating to Treaties?

226. Although I have focused on the alleged analogy between the position of the Turks and Caicos Islands and the Cayman Islands and the SBAs, this was merely part of Mr Husain's case that under public international law the Convention and Protocol should be held to apply to the SBAs. His submission is that the practice adopted in relation to those islands was merely a reflection of an established and wider FCO practice that considered the SBAs to continue to be bound by treaties that had previously been extended to the colony of Cyprus.

227. He submits that the evidence demonstrates that the FCO's practice has been to recognise that international treaties that had previously been extended to Cyprus by the UK Government continued to apply to the SBAs after their inception. It follows, he submits, that the same should be taken to apply to the Refugee Convention. This contention did not count amongst the matters raised in the Statement of Facts and Grounds, but emerged following disclosure of documentary material by the Defendant. The treaties involved are mutual legal assistance ('MLA') treaties.

228. Mr Husain first makes reference to a convention that was concluded between the UK and Finland in relation to 'Legal Proceedings in Civil and Commercial Matters' which was signed in London on 11 August 1933 and extended to Cyprus with effect from 4 June 1935. The provisions to which Mr Husain draws attention are Articles 1 and 14.

229. Article 1 provides as follows:

> "(a) This Convention applies only to civil and commercial matters, including non-contentious matters.
>
> (b) In this Convention the words:
>
> (1) "territory of one (or of the other) High Contracting Party" shall be interpreted (a) in relation to the Republic of Finland as meaning Finland and (b) in relation to His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India — England and Wales and all territories in respect of which the Convention is in force by reason of extensions under Article 14 or accessions under Article 15 …."

230. Article 14 provides as follows:

> "(a) This Convention shall not apply *ipso facto* to Scotland or Northern Ireland, nor to any of the Colonies or Protectorates of His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, nor to any territories under His suzerainty, nor to any Mandated territories in respect of which the mandate is exercised by His Government in the United Kingdom, but His Majesty may at any time, while this Convention is in force under Article 13, by a notification given through His Minister at Helsingfors, extend the operation of this Convention to any of the above-named territories.
>
> (b) Such notification shall state the authorities in the territory concerned to whom requests for service under Article 3 or Letters of Request under Article 7 are to be transmitted, and the language in which communications and translations are to be made. The date of the coming into force of any such extension shall be one month from the date of such notification …."

231. On 28 December 1961, following the formation of the RoC, the following letter was sent by the British Ambassador in Helsinki to the Finnish Minister of Foreign Affairs:

> "I have the honour to refer to the Convention concluded between the UK and Finland regarding Legal Proceedings in Civil and Commercial Matters which was signed in London on the 11th of August, 1933 and was subsequently extended to the Colony of Cyprus in accordance with Article 14 of the convention with effect from the 4th of June, 1935.
>
> Under the provisions of the Treaty, concerning the Establishment of the Republic of Cyprus, signed at Nicosia on the 16th of August, 1960, the base areas of Akrotiri and Dhekelia remain under the sovereignty of the United Kingdom, I now have the honour therefore to inform Your Excellency, on instructions from Her Majesty's Principal Secretary of State for Foreign Affairs, that for the purposes of the above Convention the authority in the United Kingdom Sovereign Base Areas of Aktrotiri and Dhekelia to whom requests for service or for the taking of evidence should be transmitted is the Registrar, Senior Judge's Court, Episkopi, Sovereign Base Areas of Akrotiri and Dhekelia, Cyprus and that the language to be used in communications is English."

232. This was acknowledged on behalf of the Minister of Foreign Affairs in a letter dated 8 January 1962. In the papers before the court there is the 'Treaty Record' (see paragraphs 212 - 213 above) of this particular Convention which records the "extension" of the Treaty to the SBAs on 4 June 1935, some 25 years before the SBAs existed as separate entities.

233. Mr Husain says that there was no new extension of this Convention at the time of the creation of the SBAs, but the utilisation of Article 14(b) of the Convention. It shows,

he submits, that the prior extension of the Treaty to Cyprus sufficed in law to extend it to the SBAs after they were created.

234. Next he draws attention to a Treaty with France concerning the same subject-matter as the Finnish Treaty. It was signed in London on 2 February 1922 and ratified on 2 May 1922 and subsequently extended to the Lebanon. Whilst the terms were slightly different, it contained a similar territorial clause to that referred to in paragraph 37 above.

235. Although the letter from the Foreign Office to the Lebanese Government is not in the court papers, it is to be assumed that on 29 December 1962 a Note was sent to that government to similar effect as that sent to the Finnish Ministry of Foreign Affairs (see paragraph 231 above) because it prompted the following response (as translated) dated 17 October 1963:

> "The Ministry of Foreign Affairs extends its compliments to Her Majesty's British Embassy and, in response to its note No.283 dated 29 December 1962 regarding the application of the London Convention of 2 February 1922 to the British bases in Cyprus, has the honour to inform it that, given that Article 1 of the Treaty on the establishment of the Republic of Cyprus provides that the zones where the British bases of Dhekelia and Akrotiri are located shall remain under the sovereignty of the United Kingdom of Great Britain, and, equally, given that the final provisions of the London Convention of 2 February 1922 provide that it shall only apply to dominions, colonies, Possessions or Protectorates of Contracting Powers if notification is given by one of them to the other, with a view to extending its effects to such a dominion, colony or possession, it follows that the two bases in question appear to fall under the notion of "possessions" of the United Kingdom of Great Britain under the London Convention; the question of knowing whether they can be included in the scope of application of this convention only arises, for the Lebanese government, when the government of the United Kingdom of Great Britain expresses formally and beforehand its desire to include them."

236. The British Embassy in Beirut sought the further assistance of the Foreign Office in a letter dated 6 January 1964:

> "… We have now received a reply from the Ministry of Foreign Affairs and enclose two copies of their Note.
>
> You will see that, even after a two-year delay, the matter is not yet settled. Basing themselves on an argument of Byzantine subtlety, the Lebanese authorities now claim entitlement to prior and formal notification of H.M.G's desire to apply the Convention to these bases. We should be grateful for your instructions on the reply we should send to the Ministry."

237. The reply from the Foreign Office (Treaty and Nationality Department) dated 12 February 1964 was as follows:

> "… The Lebanese appear to relish argument for its own sake! We see their point but we are not disposed to concede it when nearly all the other countries with which we have civil procedure conventions have tacitly accepted our contention … that treaties which had applied to the Colony of Cyprus continued automatically to apply to the two pieces of territory now known as the Sovereign Base Areas.
>
> Will you therefore please address to the Ministry of Foreign Affairs a Note incorporating the following wording?
>
> > 'It is the view of Her Majesty's Principal Secretary of State for Foreign Affairs that no fresh notification by Her Majesty's Government is required for the provisions of the Convention concluded between the United Kingdom and France regarding Legal Proceedings in Civil and Commercial matters, signed at Paris on the 2nd of February, 1922, to continue to have effect in the United Kingdom Sovereign Base Areas in Cyprus. The Treaty concerning the Establishment of the Republic of Cyprus, and the Cyprus Treaty of Guarantee, signed at Nicosia on the 16th of August, 1960, effected no change in the international status of these areas. The words in Article I of the Treaty concerning the Establishment of the Republic of Cyprus, and in Article III of the Cyprus Treaty of Guarantee imply a recognition by the Contracting Parties that the areas remained at all times under the United Kingdom and were not included in the transfer'"

238. Mr Husain highlights the underlined sentences. The first, he asserts, represents the UK Government's position in 1964 and that it mirrors exactly the position for which he contends in the present case. The key point is the use of the word "automatically", which he equates to "by action of law", and that no fresh notification is required for the Convention to continue to have effect in the SBAs having previously been extended to the RoC. He contrasted the second underlined sentence with the contention that the SBAs became new political units upon their inception.

239. I will deal with Mr Roe's response to this overall argument in due course, but I would observe that, contrary to Mr Husain's implicit suggestion that the Foreign Office's informed view of the position taken by the Lebanese Government was that it was one of one of "Byzantine subtlety" (a view expressed, I infer, by a non-lawyer), the official in the Treaty and Nationality Department said that the Department could "see their point", but were not prepared to concede it given its tacit acceptance by "nearly all" the other countries with which the UK had civil procedure conventions.

240. Given that "nearly all" other relevant countries tacitly accepted the position, it is not surprising that included in the papers before the court were similar examples in relation to Spain, Poland, Greece and the Netherlands.

241. Although it post-dates the new arrangements concerning the MLA treaties referred to in the preceding paragraphs, Mr Husain also relies upon the way the UN Convention on the Nationality of Married Women (signed on 20 February 1957) was dealt with in relation to the SBAs. The Convention came into force on 11 August 1958. It was deposited by the UK on 28 August 1957 and by notification to the UN received on 18 March 1958, it was extended to a number of British overseas territories (in other words, "non-metropolitan territories") including Cyprus. It was not expressly extended to the SBAs after their inception.

242. Article 7.1 provided as follows:

> "The present Convention shall apply to all non-self-governing, trust, colonial and other non-metropolitan territories for the international relations of which any Contracting State is responsible; the Contracting State concerned shall, subject to the provisions of paragraph 2 of the present article, at the time of signature, ratification or accession, declare the non-metropolitan territory or territories to which the Convention shall apply *ipso facto* as a result of such signature, ratification or accession …."

243. Article 9.1 is as follows:

> "Any Contracting State may denounce the present Convention by written notification to the Secretary-General …. Denunciation shall take effect one year after the date or receipt of the notification by the Secretary-General."

244. On 24 December 1981 the Secretary-General received from the UK Government a notification of denunciation of the Convention on behalf of the UK itself and various territories "for the international relations of which [it] is responsible and to which the Convention was extended in accordance with … article 7". Those territories were listed and included, for example, Jersey, Guernsey, the Isle of Man, the Cayman Islands, the Turks and Caicos Islands and "the United Kingdom Sovereign Bases Areas of Akrotiri and Dhekelia in the Island of Cyprus".

245. Mr Husain argues that this confirms, in a different context from the MLA treaties, that treaty extension by the UK to the colony of Cyprus was for the Foreign Office sufficient in law for the continued applicability of this multilateral UN Convention to the SBAs: the Convention would not need to have been denounced by the UK on behalf of the SBAs if it had not applied to them prior to the denunciation.

246. It is plainly possible to make forensic points about Foreign Office practice and perceptions of what was required in law to deal with particular issues concerning particular treaties at particular times, but the real issue is whether a State practice of the nature contended for by Mr Husain has been established in public international law terms such that it is clear that the Refugee Convention applied to the SBAs from the beginning.

247. This judgment will be quite long enough without extending it further with a detailed, and doubtless inadequate, exegesis on the principles of public international law. The

Claimant's Skeleton Argument and the Detailed Grounds of Defence are replete with footnoted references to many learned texts, to very few of which was reference made during the hearing. Mr Roe referred me to 'Sources of International Law: An Introduction' by Professor Christopher Greenwood (2008). When dealing with "Customary international law derived from the practice of States" Professor Greenwood says this:

> "It is convenient to start with customary law as this is both the oldest source and the one which generates rules binding on all States.
>
> Customary law is not a written source. A rule of customary law, e.g., requiring States to grant immunity to a visiting Head of State, is said to have two elements. First, there must be widespread and consistent State practice – ie States must, in general, have a practice of according immunity to a visiting Head of State. Secondly, there has to be what is called "opinio juris", usually translated as "a belief in legal obligation; ie States must accord immunity because they believe they have a legal duty to do so. As the ICJ has put it:-
>
> > 'Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. … The States concerned must feel that they are conforming to what amounts to a legal obligation.' (*North Sea Continental Shelf* cases, ICJ Reps, 1969, p. 3 at 44)
>
> A new rule of customary international law cannot be created unless both of these elements are present. Practice alone is not enough – see, e.g., the *Case of the SS Lotus* (1927). Nor can a rule be created by opinio juris without actual practice – see, e.g., the *Advisory Opinion on Nuclear Weapons* (1996).
>
> But these elements require closer examination. So far as practice is concerned, this includes not just the practice of the government of a State but also of its courts and parliament. It includes what States say as well as what they do. Also practice needs to be carefully examined for what it actually says about law. The fact that some (perhaps many) States practise torture does not mean that there is not a sufficient practice outlawing it. To quote from the ICJ's decision in the *Nicaragua* case:
>
> > 'In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should in general be consistent with such a rule; and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.' (ICJ in *Nicaragua* ICJ Reps, 1986, p. 3 at 98.)

> Regarding opinio juris, the normal definition of a belief in obligation (see, e.g., the *North Sea Continental Shelf* cases (1969) above) is not entirely satisfactory. First, it ignores the fact that many rules are permissive (eg regarding sovereignty over the continental shelf), for which the real opinio juris is a belief not in obligation but in right. Secondly, and more fundamentally, there is something artificial in talking of the beliefs of a State. It might be better to consider opinio juris as the assertion of a legal right or the acknowledgment of a legal obligation …."

248. I have to say that nothing that Mr Husain has relied upon, in my judgment, meets the threshold of constituting a "widespread and consistent State practice" which States in general follow. There is some evidence that the UK has followed a particular approach in relation to the applicability of some conventions to the SBAs, but there is little, if any, evidence that it reflects a widespread, internationally accepted practice or that the UK Government regarded the practice adopted as obligatory. The letter dated 12 February 1964 (referred to at paragraph 237 above) has all the hallmarks of an implicit recognition that the practice adopted in relation to the MLAs was at least debateable and was adopted by the UK as a pragmatic course. Whilst recognised as valid by "nearly all" other relevant States, it appears that acceptance of the practice was not universal. Without minimising the importance of the objective or indeed of the treaty itself, in essence what was required was a means by which an acknowledgement by all other treaty States of the correct destination for "requests for service or for the taking of evidence" was achieved. The means adopted required a recognition that the relevant convention applied to the SBAs from the outset. Whilst, of course, consistency of practice is desirable, I consider that treating the Refugee Convention in the same manner would devalue the significant issues that would need to be considered before that Convention was adopted (see paragraph 221 above).

249. Mr Roe drew attention to the express declaration by the UK on 1 April 2004 that the ECHR applied to the SBAs as possible evidence that this was the kind of convention that required an express notification in contradistinction to conventions such as those concerning the MLAs. (The ECHR had been extended to the Colony of Cyprus by a declaration made on 23 October 1953.) The 2004 notification had been referred to in the court proceedings in the SBAs, but the Senior Judges' Appeal Court was not impressed with the way the argument had been advanced because, in its view, it merely evidenced the thinking of the UK's legal advisers at the time:

> "… We are not assisted by what the Foreign and Commonwealth Office thinks the situation to be. By the same token, we do not regard the fact that the European Convention of Human Rights was extended to the SBAs in 2004 as of any great significance to the question this court has to resolve under this heading. The respondents argue that the extension of the ECHR to the SBAs would have been unnecessary had the SBAs been merely a surviving part of a colony, since it would have automatically applied. But the specific application of the ECHR is but evidence of what UK legal advisers thought in 2004 – and again, is not something which assists us."

250. I respectfully agree with the thrust of that observation, but no material has been advanced to show why that position was taken by the UK Government at the time. Nonetheless, it is, in my view, looked at objectively, supportive of the proposition that a convention involving something as fundamental as the ECHR requires express notification.

251. Mr Roe also submitted that what constitutes State practice is also informed by the decisions of its courts (see paragraph 247 above) and the position adopted by the House of Lords in *Bancoult No 2* is a relevant feature of that dimension.

252. Apart from maintaining the correctness of his submissions on the matters to which I have referred, Mr Husain's riposte to all this is that a proper application of international law dictates the conclusion that the Convention applies to the SBAs.

253. The argument starts with Article 29 of the VCLT (see paragraph 44 above) and that the expression "their entire territory" includes any overseas territories. This interpretation is supported in the 9th edition of *Oppenheim's International Law* (Jennings and Watts) where it is said that the "entire territory … probably includes overseas territories (such as colonies) which are under the sovereignty of the state …." Although the VCLT was not operative in 1960, it was a largely a codifying treaty and I will assume that the principle it established was generally accepted at the time. As recorded above (see paragraph 209), on 25 October 1956 the UK declared that the Refugee Convention extended to Cyprus. In 1960 part of the territory of Cyprus became an independent sovereign State for which the UK was not responsible in international law. However, as the argument continues, the ToE defined the "territory of the Republic of Cyprus" as the Island of Cyprus excluding the SBAs which were to "remain under the sovereignty of the United Kingdom". As a matter of international law, the UK thus remained responsible for the part of the territory of Cyprus that remained part of the UK's sovereign territory over which the 1956 extension operated. However, the UK Government has never exercised its right of notification under Article 44(3) of the Convention (see paragraph 38 above) in respect of the SBAs. It is contended, therefore, that the proposition that the Convention continued to apply to the territory occupied by the SBAs is also demonstrated by the fact that it continued to apply to the RoC without the need for the RoC to accede to the Convention: the RoC notified the UN on 11 June 1963 that it considered itself "bound by the Convention … the application of which had been extended to its territory before the attainment of independence." It is argued that if no notification or accession was necessary in the case of the RoC, the position of the SBAs "must be *a fortiori* because the sovereignty of the UK remained unaltered."

254. This argument appears, at least in part, to be a contention relied upon in the Statement of Facts and Grounds at paragraph 106 where the four propositions relied upon were as follows:

> "1. Pursuant to Article 8 of the TEO [see paragraph 51 above] the RC assumed all of the UK's international obligations relating to the territory of the RC. The RC notified its succession to the Refugee Convention in 1963. This was an act of notification of succession, rather than an act of accession. The effect of this was to confirm that the obligations had been assumed and continued in respect of the RC in an uninterrupted

> fashion. It is for this reason that Cyprus did not accede to the Refugee Convention but merely notified its succession.
>
> 2. Furthermore, when the RC notified its succession to the Refugee Convention it expressly stated that the UK's reservations continued to apply, which also reflected the uninterrupted application of the Refugee Convention to the RC.
>
> 3. There is therefore no doubt that the Refugee Convention remained in effect between 1960 and 1963 in the RC.
>
> 4. If the Refugee Convention continued uninterrupted in its application to the territory of the RC, the position of the SBA must be the same. The only difference between the two parts of the Island of Cyprus is that the RC did not assume the obligations from the UK in respect of the SBA. This cannot conceivably make any difference."

255. Article 2(1)(b) of the Vienna Convention on Succession of States in Respect of Treaties defines "succession of States" to mean "the replacement of one State by another in the responsibility for the international relations of territory".

256. Added to this, as indeed reflected in Mr Husain's oral submissions, was the proposition that there is no basis in international law by which the UK's obligations under the Convention in respect of the SBAs could have come to an end. Reference was made to Article 54 of the VCLT which provides that termination of treaty obligations can only take place in two circumstances: with the consent of all the parties or "in conformity with the provisions of the treaty". Since the UK did not exercise the right provided for in in Article 44(3) of the Convention (see paragraph 38 above), it is said that that it cannot be excused from compliance with its treaty obligations. (Indeed it is for this reason that, at an appropriate level, the claimants will submit that Lord Hoffmann's observations in *Bancoult No 2* were wrong.)

257. I regret to say that I do not follow the logic of the proposition that if the Convention continued "uninterrupted" in its application to the territory of the RoC, "the position of the [SBAs] must be the same." It was a matter for the RoC to determine how, if at all, it recognised its obligations under the Convention, a reflection doubtless of the "clean slate" principle (see, e.g., *The British Commonwealth in International Law*, Fawcett, 1963, at p. 220, and *Modern Treaty Law and Practice*, 3rd ed. 2013, Aust, at p. 325). "A new state will not normally succeed automatically to multilateral treaties; a successor state is usually free to choose": Aust, *op cit*, at p. 323. But I cannot see how that decision could impact on the position of the SBAs which, for this purpose, might well be treated as a third party: see *The Oxford Guide to Treaties*, Hollis, 2014, at pp. 408-409. One thing that does seem to be clear from the relevant academic writing, both in the 1960s and more recently, is that the effect of some of the succession instruments concluded in that earlier period was "uncertain and controversial": e.g., Aust, *op cit*, at p. 322. If I were free to decide this issue without reference to the principle in *Bancoult No 2*, I have to say that I would not regard the international law dimension as so clear and settled that I could accede to Mr Husain's invitation to reach the conclusion for which he contends.

258. Whilst I can see the force of the argument that the SBAs remained part of the "entire territory" of the UK, their very unusual nature required something positive to be done for the Convention to apply for the future. For my part, I would see "a different intention" from the general proposition in Article 29 of the VCLT being "otherwise established" by virtue of the very unusual status of the SBAs and their intrinsic inability to discharge the full complement of obligations required by the Convention. That may have required careful consideration to be given to the requirements of any existing refugees who happened to be living in the territory that became an SBA for whom existing obligations would undoubtedly have been required to be honoured. But Mr Husain's colourful suggestion that the converse position from that for which he contends could lead to an overnight "turning off of the lights" is somewhat fanciful.

259. At all events, I am not free to ignore the principle in *Bancoult No 2* and, whilst it is not for me either to agree with it or disagree with it, I respectfully think that it reflects what would be regarded generally as at least a workable, pragmatic principle to apply to conventions dealing with fundamental human rights and humanitarian issues in contemporary times. I do not consider that *Bancoult No 2* is properly distinguishable from the present case.

260. For the reasons I have given, I do not consider that the route to the applicability of the Convention to the SBAs as a matter of international law reflected in the foregoing paragraphs in this judgment is one that can be followed to the destination contended for. In my judgment, on the arguments thus addressed, when the SBAs came into existence, they did so as new political entities and a fresh declaration as to the applicability of the Convention was required. No such declaration was made.

261. Mr Husain does, however, suggest two other alternative routes to which I must now turn. Since the first argument is another argument which, if it succeeds, results in the applicability of the Convention to the SBAs as a matter of law, logically it falls to be considered first.

(vi) <u>does the Convention apply to the SBAs via the EU Charter?</u>

262. The Charter of Fundamental Rights of the European Union ('the EU Charter') was proclaimed by the European Parliament, Council and Commission on 7 December 2000 and became legally binding on the EU with the entry into force of the Treaty of Lisbon on 1 December 2009.

263. Its preamble contains the following passage:

> "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice."

264. Mr Husain draws attention to the word "area".

265. The foundation for the submission that the Refugee Convention applies in the SBAs by virtue of the EU Charter is Article 18 which provides as follows:

> "Right to asylum
>
> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."

266. Article 19 contains the following provision:

> "Protection in the event of removal, expulsion or extradition
>
> …
>
> 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

267. The "field of application" of the Charter is set out in Article 51:

> "1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
>
> 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

268. The underlined words are of importance to the argument.

269. Article 52 deals with the scope and interpretation of the rights and principles set out in the Charter and paragraph 7 provides thus in relation to the "explanations" of the Charter:

> "The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States."

270. The explanation relating to Article 18 is as follows:

> "The text of the Article has been based on TEC Article 63, now replaced by Article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention on refugees. Reference should be made to the Protocols relating to the United Kingdom and Ireland,

> annexed to the Treaties, and to Denmark, to determine the extent to which those Member States implement Union law in this area and the extent to which this Article is applicable to them. This Article is in line with the Protocol on Asylum annexed to the Treaties."

271. The explanation to Article 19(2) (which corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights) is as follows:

> "Paragraph 2 incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR (see Ahmed v. Austria, judgment of 17 December 1996, 1996-VI, p. 2206, and Soering, judgment of 7 July 1989)."

272. The explanation to Article 51(1) is in these terms:

> "The aim of Article 51 is to determine the scope of the Charter. It seeks to establish clearly that the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity. This provision was drafted in keeping with Article 6(2) of the Treaty on European Union, which required the Union to respect fundamental rights, and with the mandate issued by the Cologne European Council. The term 'institutions' is enshrined in the Treaties. The expression 'bodies, offices and agencies' is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation (see, e.g., Articles 15 or 16 of the Treaty on the Functioning of the European Union).
>
> As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act <u>in the scope of Union law</u> …. The Court of Justice confirmed this case-law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ....' Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law." (Emphasis added.)

273. In *Rugby Football Union v Viagogo Ltd* [2012] UKSC 55 at [28] Lord Kerr of Tonaghmore (with whom all the other JSCs agreed) said this:

> "Although the Charter thus has direct effect in national law, it only binds member states when they are implementing EU law— article 51(1). But the rubric, "implementing EU law" is to be interpreted broadly and, in effect, means whenever a member state is acting "within the material scope of EU law"

> …. Moreover, article 6(1) … of the EU Treaty requires that the Charter must be interpreted with "due regard" to the explanations that it contains."

274. In *R (on the application of Lumsdon) v Legal Services Board* [2015] UKSC 41 at [25] Lords Reed and Toulson JJSC (with whom all the other JSCs agreed) recorded this when referring to the principle of proportionality as it applied in European Union law:

> "The principle applies generally to legislative and administrative measures adopted by EU institutions. It also applies to national measures falling within the scope of EU law, as explained by Advocate General Sharpston in her opinion in *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* … para 69:
>
> "For that to be the case, the provision of national law at issue must in general fall into one of three categories. It must implement EC law (irrespective of the degree of the discretion the member state enjoys and whether the national measure goes beyond what is strictly necessary for implementation). It must invoke some permitted derogation under EC law. Or it must otherwise fall within the scope of Community law because some specific substantive rule of EC law is applicable to the situation."

275. Mr Husain draws attention to *N. S. (C‑411/10) v Secretary of State for the Home Department*, 21 December 2011, where the Grand Chamber said this:

> "75. The Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted. Article 18 of the Charter and Article 78 TFEU provide that the rules of the Geneva Convention and the 1967 Protocol are to be respected ….
>
> …
>
> 78. Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard."

> 79. It is precisely because of that principle of mutual confidence that the European Union legislature adopted Regulation No 343/2003 and the conventions referred to in paragraphs 24 to 26 of the present judgment in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.
>
> 80 In those circumstances, it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR."

276. Mr Husain accepts that, in order for his argument to succeed, he must demonstrate that some relevant actions of the UK constitute the implementation of EU law or are within the scope of EU law. How does he suggest that this is established?

277. He draws attention to the provisions of the Treaty of Accession of the RoC to the EU and the terms of Protocol No 3 which were highlighted in paragraphs 104-112 above. He makes the following points. First, he says that since Article 5(2) of Protocol No 3 requires the UK to exercise controls on persons crossing the external borders of the SBAs, any decision involving the control of individuals who have crossed the borders of the SBAs (which would include the claimants) would constitute implementation of EU law and/or would fall within the material scope of EU law. Second, since the UK must work with the RoC to make arrangements for "respecting the rights" of asylum seekers under paragraph 7(b) of Part Four of the Annex to the Protocol, he submits that self-evidently such arrangements that the UK implements must not infringe the EU Charter and in consequence must not breach the Refugee Convention. Third, he submits that paragraph 7(a) of Part Four of the Annex to the Protocol (a "critical provision", he says) mirrors the *Dublin* provisions permitting asylum-seekers to be returned to their first point of entry to the EU, the fundamental premise being that the rights of asylum seekers under the Refugee Convention are secured within all Member States in the EU. It follows from this (and [80] of *N.S.* – see paragraph 275 above), he contends, that it is implicit in paragraph 7(a) that the UK is subject to the requirements of the Refugee Convention in the territory of the SBAs.

278. Mr Husain submits that it is "very obvious" that this route establishes that the Convention applies as a matter of law to the SBAs. Mr Roe dissents and makes what seems to me to be the compelling point that if the intention behind Protocol No 3 was to place upon the SBAs the significant obligations arising from the Refugee Convention and Protocol (having decided not to do so in 1960), the objective would reasonably be expected to have been achieved by some express declaration rather than, as he described it, a "paper chase". He observes that the Contracting Parties expressly applied the provisions of the EC Treaty concerning agriculture (see Article

3 of the Protocol No 3) and asks rhetorically 'why not include the Refugee Convention and Protocol if that was intended?'

279. That is a broad focus submission that does seem to me to have considerable force. If I am right that the intention in 1960 was not to apply the Refugee Convention to the SBAs (or at least there was no positive intention to do so), it would be very surprising if the UK (a) changed its mind in 2003/2004 (when doubts as to the applicability of the Convention had already surfaced) and (b) if it did decide positively to make the SBAs subject to the Convention and Protocol, it would have done so via this very circuitous route. (I accept, of course, that determining the subjective intention of the UK Government, to the extent that it can be said to exist, is difficult and, as in many contexts, an objective analysis of what was done could lead to the conclusion that the Convention was applied to the SBAs via this route. However, I do not consider that any such analysis does lead to that conclusion.)

280. In my judgment, as I have indicated, that broad argument is sufficient to dispose of the attempt to fix the SBAs by law with the obligations under the Refugee Convention and Protocol.

281. Mr Roe does, in any event, emphasise that the express terms of the ToE provided that the EU Treaty should not apply to the SBAs save to the extent necessary to ensure the implementation of the arrangements set out in Protocol No. 3 and in accordance with the protocol (see paragraph 107 above). He does draw attention to the fact that Article 5(2), whilst requiring the UK to exercise controls over certain persons crossing the external borders of the SBAs, does not purport to apply any of the EU Treaties to the SBAs (apart from the specific and limited aspects referred to in Articles 2(1), 3 and 4). He says that the power conferred by Article 6 has never been implemented. All this, he submits, emphasises the limited applicability of EU law to the SBAs.

282. Mr Roe has also submitted that the matters relied upon by Mr Hussain do not support the proposition that, in refusing the claimants entry to the UK, the Secretary of State was acting to implement EU law or was acting within the field of EU law. There is no doubt that the letter of 25 November 2014 did not purport to be implementing EU law. That would not, in my view, be conclusive. However, although not ventilated in oral argument, reference was made in the Detailed Grounds of Defence to Article 1 of Protocol No. 20 to the Treaty of Lisbon which provides an exception to Articles 26 and 77 of Treaty on the Functioning of the European Union. Its terms are these:

> "The United Kingdom shall be entitled, notwithstanding Articles 26 and 77 of the Treaty on the Functioning of the European Union, any other provision of this Treaty or of the Treaty on European Union, any measure adopted under those Treaties, or any international agreement concluded by the Union or by the Union and its Member States with one or more third States, to exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it may consider necessary for the purpose:
>
> (a) of verifying the right to enter the United Kingdom of citizens of Member States and of their dependants exercising rights conferred by Union law, as well as citizens of other

> States on whom such rights have been conferred by an agreement to which the United Kingdom is bound; and
>
> (b) of determining whether or not to grant other persons permission to enter the United Kingdom.
>
> Nothing in Articles 26 and 77 of the Treaty on the Functioning of the European Union or in any other provision of that Treaty or the Treaty on European Union or in any measure adopted under them shall prejudice the right of the United Kingdom to adopt or exercise any such controls. References to the United Kingdom in this Article shall include territories for whose external relations the United Kingdom is responsible."

283. This does appear to give the UK a dispensation from EU law to determine whether or not to grant permission to enter the UK to "other persons", in other words, nationals from a non-EU country who are not dependents of citizens of Member States. The Secretary of State would appear to have been exercising that power and, accordingly, was not purporting to act within EU law because she was permitted by that law to act in that way.

284. As indicated in paragraph 280, the broad argument addressed by Mr Roe above is, in my view, sufficient to dispose of this argument. However, should that not be sufficient, I do not consider that the decision letter was purporting to be implementing EU law which would be essential for this argument to succeed.

(vii) <u>the extra-territorial applicability of Article 34 of the Convention</u>

285. The final argument advanced in support of the effective application of Article 34 of the Convention is that even if the Convention does not apply as a matter of law to the SBAs, then since (a) Article 34 is extra-territorial in its ambit and (b) the UK Government exercises effective control over the SBAs and/or exercises in respect of the SBAs all or some public powers normally exercised by government, the UK must act in accordance with Article 34 and if it does not do so it acts in violation of that Article.

286. Article 34 is set out in paragraph 35 above and requires the Contracting State "as far as possible [to] facilitate the assimilation and naturalization of refugees." What is being said in this context is that as soon as a refugee is within the effective control of the host State, the duty to facilitate assimilation arises. The concept of "assimilation" was somewhat controversial, but in essence it means "integration into the economic, social and cultural life of the country" (see *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary,* Zimmerman, (2011), pp. 1447-1449, citing *Convention Relating to the Status of Refugees. Its History, Contents and Interpretation: A Commentary,* N. Robinson, (1953) 167). The decision of the Secretary of State not to admit the claimants to the UK is said to be a breach of this obligation.

287. The foundation for this argument is the well-known case of *Al-Skeini v UK* (2011) 53 EHRR 18, a case concerning the applicability of the ECHR to the post-combat situation in Iraq. Article 1 of the ECHR, of course, provides that the High

Contracting Parties shall secure to everyone "within their jurisdiction" the rights afforded by the Convention. I need do no more than quote the paragraphs of the judgment of the European Court of Human Rights where the extra-territorial ambit of the ECHR was said to arise. At [135] the following was said:

> "… the Court has recognised the exercise of extra-territorial jurisdiction by a contracting state when, through the consent, invitation or acquiescence of the government of that territory, it exercises all or some of the public powers normally to be exercised by that government. Thus where, in accordance with custom, treaty or other agreement, authorities of the contracting state carry out executive or judicial functions on the territory of another state, the contracting state may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial state."

288. At [137] the possibility of "dividing and tailoring" was mentioned:

> "It is clear that, whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under art.1 to secure to that individual the rights and freedoms under s.1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored"."

289. At [138-139] the following was said:

> "Another exception to the principle that jurisdiction under art.1 is limited to a state's own territory occurs when, as a consequence of lawful or unlawful military action, a contracting state exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting state's own armed forces, or through a subordinate local administration. Where the fact of such domination over the territory is established, it is not necessary to determine whether the contracting state exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the contracting state's military and other support entails that state's responsibility for its policies and actions. The controlling state has the responsibility under art.1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.
>
> It is a question of fact whether a contracting state exercises effective control over an area outside its own territory. In

> determining whether effective control exists, the Court will primarily have reference to the strength of the state's military presence in the area. Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region."

290. Mr Husain's argument, in summary, is that (i) both elements of "control" are exercised by the UK Government in the SBAs by virtue of the fact that the Administrator of the SBA is a Member of Her Majesty's Forces (see paragraph 54 above) and the Secretary of State for Defence retains ultimate control over the SBAs and (ii) as a result, as soon as someone within an SBA is accorded "refugee" status, Article 34 is engaged with the consequence that steps towards "assimilation and naturalization" for that person must be commenced "so far as possible". He suggested that the obligation to assimilate is the stronger where a refugee has been in what is acknowledged to have been an unsustainable situation for nearly 18 years. He recognises that the decision in *Al-Skeini* related to the ECHR, but says that, by analogy, the approach to the Refugee Convention should be the same.

291. On closer analysis the suggested analogy is, with respect, very slender. The position in *Al-Skeini* (helpfully and thoroughly analysed by Leggatt J in *R (Al-Saadoon and ors) v Secretary of State for Defence* [2015] 3 WLR 503) was very different from the position in this case. That case concerned the human rights of those individuals over whom, in the immediate post-conflict situation in Iraq, the UK assumed effective control. In those circumstances, the European Court of Human Rights held that the UK owed certain obligations towards those individuals under the ECHR. However, the nature of the effective complete (coercive) control over those individuals arising from the aftermath of military action was very different from the kind of control that exists over the claimants in the SBAs. Undoubtedly, the UK exercises <u>some degree of control</u> over the lives of the claimants in its own sovereign territory, but in part of its territory where (in this scenario) the UK Government has declined to accept that the Refugee Convention applies. To say that as a result of this partial control steps must be taken to assimilate and naturalise them in the metropolitan territory is, in my judgment, taking the analogy at least one step too far. For my part, the lack of a declaration under Article 40(1) is important. Mr Husain says that it is not.

292. As already established (see paragraph 37), a Contracting State has the ability positively to declare that the Convention applies to a territory for whose international relations it is responsible, as indeed does a Contracting State for the purposes of the ECHR (see footnote 11). In *Al-Skeini* the European Court rejected the argument of the UK Government that the lack of such a declaration meant that the ECHR did not apply in relation to the actions undertaken in Iraq. Paragraph 140 contains the court's view:

> "The "effective control" principle of jurisdiction … does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, "with due regard ... to

> local requirements," to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term "jurisdiction" in Article 1. The situations covered by the "effective control" principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible …."

293. The way in which the House of Lords dealt with a comparable issue in the Chagos islanders' case is demonstrated in Lord Hoffmann's opinion set out at paragraph 194 above. When the issue was taken to the European Court, *Al-Skeini* had been decided and reliance was placed by the applicants on the above paragraph as support for the proposition that Article 1 jurisdiction may apply even in respect of overseas territories for which a Contracting Party has not accepted the ECHR. The response of the court was expressed in the following paragraphs:

> "74. [The court cannot] agree with the applicants' contention that any possible basis of jurisdiction under Article 1 such as set in the *Al-Skeini* judgment … must take precedence over Article 56 on the ground that it should be set aside as an objectionable colonial relic and to prevent a vacuum in protection offered by the Convention. Anachronistic as colonial remnants may be, the meaning of Article 56 is plain on its face and it cannot be ignored merely because of a perceived need to right an injustice. Article 56 remains a provision of the Convention which is in force and cannot be abrogated at will by the Court in order to reach a purportedly desirable result.
>
> 75. The question remains as to whether the passage from *Al-Skeini* … indicates that there must now be considered to be alternative bases of jurisdiction which may apply even where a Contracting State has not extended application of the Convention to the overseas territory in issue, namely, that the United Kingdom can be held responsible for its acts and omissions in relation to the Chagos Islands, despite its exercise of its choice not to make a declaration under Article 56, if it nonetheless exercised "State agent authority and control" or "effective control" in the sense covered by the Grand Chamber judgment. This interpretation is strongly rejected by the respondent Government and would indeed render Article 56 largely purposeless and devoid of content since Contracting States generally did, and do, exercise authority and control over their overseas territories.
>
> 76. However, even accepting the above interpretation, the Court finds it unnecessary to rule on this particular argument

> since, in any event, the applicants' complaints fail for the reasons set out below."

294. The continued availability of Article 56 was thus recognised by the court. There is, of course, no equivalent decision in relation to Article 40 of the Refugee Convention, but it too still exists and within the jurisdiction I have to exercise its non-invocation is a factor to which I must pay due regard.

295. Those reasons would, in my view, be sufficient to dispose of this strand of Mr Husain's submissions. However, Mr Roe took the matter a stage further and I will highlight the nature of the extended argument.

296. As Mr Roe rightly points out, the logic of the proposition upon which the claimants rely is that even though they are in a territory (the SBAs) where (in this scenario) the Convention does not apply, they must be accorded the rights to which Article 34 gives rise because the UK has effective control over them as part of the control which it has over the SBAs. Given that it is common ground that "assimilation" and eventual "naturalisation" is not possible in the SBAs because no permanent British society exists there, the consequence of the proposition for which the claimants contend is that they must be assimilated in the metropolitan territory – in other words, within mainland UK.

297. Taking a wider view, he says that if the claimants' proposition is accepted, anyone accorded the status of "refugee" in any overseas territory for the international relations of which a Contracting State is responsible would acquire a presumptive right to assimilation and naturalisation in any other territory over which the Contracting State had control, including its own metropolitan territory. That, he submits, could not possibly have been intended because each Contracting State must be taken to be able to facilitate the assimilation and naturalization of a refugee wherever within its overall territory the refugee may be and wherever within its overall territory the Contracting State places such a person for the purposes of assimilation and naturalization. In other words, Article 34 cannot become a restricting influence on the process.

298. In this connection he relies upon the distinction drawn within the Convention between the "territory" of a Contracting State that is relevant for the purposes of certain obligations that arise under it (e.g., Articles 26 and 32) and the concept of "territories for the international relations of which [they are] responsible." That distinction is brought into relief by Article 40 itself and by Article 19.

299. As to Article 40 (see paragraph 37 above), its phraseology is predicated on the basis that there is territory of a State other than its metropolitan territory. If the State chooses to bring within the Convention such territory "for the international relations of which it is responsible" it "may" make a declaration to that effect. Mr Roe has drawn attention to certain features of the *travaux préparatoires* which reflect the debate about the inclusion of an article to this effect at all. Albeit in paternalistic language that would not find favour in contemporary times, the thinking of those supporting the inclusion of such an article (whose views prevailed) is revealed in a number of passages which are summarised below:

"The representative of Brazil … in favour of including a clause on the application of the covenant to the non-self-governing territories … stated that not all the non-self-governing territories had reached the same stage of development and the principles of the covenant could not therefore be made effective immediately. The administering powers nevertheless should do everything possible to stimulate their development and it was incumbent on the administering authorities to apply the covenant with due regard the degree of development in each territory on the basis of a realistic approach both to the problems of the non-self-governing populations and to the needs of the minority of settlers living among them.

The Delegate of the United Kingdom emphasized that the question before the Committee was not whether it was right or wrong that a colonial system should still exist in the 20th Century but merely whether, with such system in existence a colonial clause should be incorporated in the Covenant …. As a rule the U.K. Government undertook no obligations on behalf of the colonies under any convention or treaty without consulting the local Governments. If the colonial clause were omitted, the participation of colonies in an international convention would become automatic and those territories would thus find themselves deprived of the right to decide for themselves. The opponents of the colonial clause would therefore seem to be illogical since they demanded autonomy for the peoples of the non-self-governing territories while at the same time denying them the right to decide for themselves. In his opinion the only correct and democratic solution was to incorporate in the covenant an article allowing a colonial power to accede immediately to the covenant for its metropolitan territory and subsequently, after consultation with the colonial territories, for each of the colonies when they had declared their willingness to have the covenant extended to them. If the colonial clause were not incorporated in the covenant the metropolitan Governments would be obliged to consult all their colonial territories before ratifying the covenant. In the case of the U.K., that would not prevent the Government from applying the covenant but would delay its accession to it.

The representative of France … warned … against omitting a territorial clause, which would represent a double disadvantage. It might subject countries inhabited by different peoples to uniform obligations and the standards that they adopted for their legislation would be those applicable to peoples still in the lowest stage of development; or in the case, for example, of a convention on the rights of the family, it would involve transformations that might require several months in metropolitan France but could only be carried out in the overseas territories after a long period of time and then under

> conditions that might endanger public orders since the peoples would not be ready for such changes. In either case, such measures would run the risk of retarding human progress.
>
> …
>
> The representative of Australia … was in favour of including a colonial clause … [Referring to] Chapters XI and XII of the United Nations Charter, concerning non-self-governing territories and the International Trusteeship System [he said] both chapters make clear that the Administering Powers must allow for the particular circumstances of each territory and its peoples and their varying stages of development …. He agreed with the argument of the United Kingdom to the effect that administering powers should not accede to international conventions on behalf of colonial or trust territories without having duly consulted the wishes of the peoples governed. That applied particularly where self-governing institutions existed. A vote against the colonial clause would therefore to some extent stultify the development of the practice of self-government in these areas.
>
> The representative of New Zealand considered that the inclusion of the colonial clause … was desirable in the interests of securing the prompt and extensive application of [the] Covenant. Far from promoting the [choice] of the independence of non-self-governing territories, the attitude of the delegations which wished to reject the colonial clause could only serve to delay the application in large part of the world of instruments such as the Covenant which should nevertheless be accepted and implemented by all governments as soon as possible."

300. Article 19 concerns those engaged in one of the "liberal professions":

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

301. Mr Roe's argument is that if "territory" in Article 19(1) embraced all the territory of the Contracting State over which it is sovereign as a matter of international law, including that of the territories for whose international relations it is responsible, there would have been no need to include Article 19(2) because recognised refugees in the

liberal professions could have settled in any part of the metropolitan territory or the overseas territories.

302. If I have understood Mr Husain's response to these submissions correctly, he does not dispute in principle the distinction between the two forms of territory, but contends that when a declaration under Article 40(1) is made in respect of a non-metropolitan territory, any obligation under the Convention that arises within the metropolitan territory must arise equally in the non-metropolitan territory. If that were not so, he argues that refugees in the non-metropolitan territory would be denied the protections otherwise afforded under the Convention.

303. I am reluctant to go further than necessary in expressing a view on this issue, but my approach is somewhat different. If the Convention is extended to a non-metropolitan territory, it is to be anticipated that the infrastructure of that territory is capable of supporting in full the Convention obligations. That means that the refugee can be accommodated within that territory. If the Contracting State wished to permit the refugee to resettle in the metropolitan territory, that would be a course open to it, but would it be mandatory? Mr Hussain appears to be arguing that the refugee would have a right to choose where in the Contracting State's territory he or she would live given the terms of Article 26. This does not seem to me to follow. Provided that the obligations under the Convention can be fulfilled within the non-metropolitan territory where the refugee is lawfully (see paragraphs 336 - 338 below), I do not see the words of Article 26 as giving the refugee the right to choose to live within the metropolitan territory. If that had been intended, Article 26 could have made it clear.

304. I do not consider that the broad humanitarian objective of the Convention is emasculated by this construction.

305. For the reasons I have given, I do not consider that the "Article 34 route" to the effective applicability of the Convention in the SBAs is available.

306. It follows from the preceding analysis that I am not persuaded that the Convention applies to the SBAs as a matter of international law by any of the routes suggested. On that basis, the issue of a direct violation of the Convention does not arise for consideration. There remains, however, the question of whether the application of the *Launder* principle (see paragraphs 322 - 347 below) requires consideration by the Secretary of State of the impact of the Convention and I propose to deal with issues of potential violation in that context. First, though, I must deal with the suggestion that the Secretary of State's refusal to provide the claimants, given their status as refugees resident in the SBAs, any route by which to obtain a permanent form of residence in the UK, either by way of leave to enter or by conferral of citizenship, constitutes unlawful discrimination under Article 14 of the ECHR. The claim is presented on the basis also that Article 21 of the EU Charter and the common law principle of equality are breached, but it was not suggested that either of these routes presented a better case than under Article 14, if it arises, and I propose, therefore, to restrict my analysis to Article 14.

Discrimination under Article 14 of the ECHR?

307. Article 14 is well known, but I set it out for convenience:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status."

308. It is accepted that the claimants need to "establish a link with one or more of the Convention's other articles" or be "within the scope or ambit of, one or other of them" before a claim under Article 14 can be sustained: *per* Lord Wilson JSC in *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3520 at [17]. The Article alleged to be engaged in the present case is Article 8. In *R (A (A Child)) v Secretary of State for Health* [2016] 1 WLR 331, Elias LJ (with whom Moore-Bick and McCombe LJJ agreed) drew attention to the line of authority that demonstrates that a "very broad meaning [is] given to the concept of "the ambit" of an article" ([46]) and that Article 8 itself is broad in its scope [41]:

> "… The scope of Article 8 has been widely defined. In *Connors v UK* (2005) 40 EHRR 9, para. 82, the Strasbourg court observed that it was to protect "rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others, and a settled and secure place in the community."

309. In line with the position taken in the Detailed Grounds of Defence, Mr Roe has argued that Article 8 is not engaged in this case. It is suggested that, whilst it is true that continuing to live in the inadequate conditions of Richmond Village affects the family and private lives of the residents adversely, simply because their current lives as individuals are unhappy is not sufficient to engage Article 8. Attention is also drawn to the fact that they have never resided in the UK and have no family life or private life in the UK that is interfered with or not respected by the decision not to admit them. I do not think this aspect of the argument requires detailed analysis. As with the argument advanced in *R (A (A Child))*, this seems to me to be altogether too narrow an approach to the issue. Given the broad scope of Article 8 and the broad nature of what constitutes a link to it, in my judgment, any decision that, directly or indirectly, has the effect of prolonging the period during which the claimants must continue to occupy their homes in Richmond Village engages Article 8. It is unnecessary to consider the details more closely: Mr Roe says that the court should not proceed on the basis that the report of Mr Horrocks (see paragraph 382) is the last word on the matter and I agree, but there is sufficient agreed evidence concerning the living conditions (e.g. the asbestos) to make it quite plain that any decision that prolongs the period the claimants (including their children) remain there affects their family and private life in the broad sense required for this purpose (see paragraphs 381 - 396 below). That many other refugees around the world may themselves be affected by similar, analogous or worse deprivations is irrelevant to this conclusion.

310. On the basis that Article 8 is engaged, how is the alleged discrimination said to arise? It is said that the claimants are discriminated against by reason of their status as refugees currently resident in the SBAs compared with refugees resident in other British Overseas Territories ('BOTs'). However, the evidence is clear (and it appears to be common ground) that, so far as admission to the UK *per se* (in contradistinction to seeking citizenship) is concerned, there is no difference between the opportunities

to gain admission for those resident in the BOTs and those resident in the SBAs. For completeness I will record the following paragraphs in the statement of Mr Gale (see paragraph 85 above) which deal with this:

> "6. If an asylum seeker arriving in the UK makes a successful application for refugee status, they are granted leave to remain and may thereafter access social services and the welfare system. Anyone with leave to remain may apply for indefinite leave to remain after the qualifying period of lawful residence in the UK. Anyone who meets the continuous residence requirements in schedule 1 of the BNA is entitled to apply for British nationality whether the basis of their residence in the UK is following the grant of refugee status or another immigration route.
>
> 7. The Immigration Rules do not provide for a recognised refugee to seek admission on the basis of the transfer of their refugee status to the UK, whether in a British Overseas Territory ("BOT") or any other state. This is because the Refugee Convention places no obligation on the UK to consider an asylum application made outside the UK. Nor is it bound to facilitate the travel to the UK of someone who wishes to seek asylum, and there is no provision in the UK's Immigration Rules for persons to be granted entry clearance for this purpose. This applies irrespective of whether a person has been recognised as a refugee by another State in accordance with the Refugee Convention.
>
> 8. As a signatory to the European Agreement on the Transfer of Responsibility for Refugees (EATRR), a Council of Europe agreement of 16 October 1980, the UK undertakes to consider, outside the Immigration Rules, applications lodged in the UK for transfers of refugee status. The UK's obligations under the EATRR do not extend to the consideration of applications made abroad, irrespective of whether the country which recognised the individual's refugee status is a signatory to the EATRR, and no application made abroad will be accepted by a UK visa-issuing post. The relevant policy on transfer of refugee status is the Interim Home Office policy on transfer of refugee status of February 2013 (included in the pre-action response at CB/11/200.
>
> 9. If a refugee recognised by and/or resident in another state wishes to come to the UK, he or she must therefore qualify for admission under the Immigration Rules and hold a valid entry clearance issued for the purpose for which he or she seeks admission.
>
> 10. For the purposes of the UK's Immigration Rules, asylum seekers who have arrived in BOT, or have been granted refugee status by a BOT and who seek admission to the UK

> have no additional claim to admission by virtue of their seeking asylum in the BOT or any refugee status determination carried out by the BOT, than they would if seeking admission from another state. This is the "policy on asylum applicants who arrive in British Overseas Territories and Crown Dependencies" referred to in the letter of 25 November 2014. Nor do refugees recognised by BOTs fall within the policy "Transfer of Refugee Status"."

311. This does mean that those resident in a BOT other than one of the SBAs would not be entitled to admission to the UK on any wider or more liberal basis than for those resident in the SBAs. If the residents of other BOTs constitute the appropriate group of comparators, no discrimination on this basis is demonstrated.

312. What, however, appears to be being said on behalf of the claimants is that the Secretary of State by her decision not to admit them to the UK under her general discretion has deprived them of the only possible route to British citizenship (namely, residence in the UK for a relevant period) which places them at a material disadvantage compared with refugees resident in other BOTs who, if granted admission to the UK under the immigration rules, might qualify for citizenship.

313. In order to see how this argument is advanced, it is necessary to note in the first instance how those resident in BOTs may acquire British Citizenship.

314. The British Nationality Act 1981 ('the 1981 Act') created the concept of the British Dependent Territories. The SBAs were named as a British Dependent Territory in Schedule 6 of the 1981 Act. All British Dependant Territories were renamed British Overseas Territories by the British Overseas Territories Act 2002. This Act was passed following the publication of the White Paper (Cm 4264) entitled 'Partnership for Progress and Prosperity – Britain and the Overseas Territories'. There were fourteen British overseas territories: Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn Islands, St Helena and Dependencies, South Georgia and the South Sandwich Islands, the Sovereign Base Areas in Cyprus and the Turks and Caicos Islands. The White Paper excluded the SBAs from consideration for the following reason:

> "The Sovereign Base Areas in Cyprus were excluded from the review because of their specific character as military bases and are therefore not included within the scope of this White Paper."

315. The principal purpose of the Act was to grant British citizenship to everyone who was a British overseas territories citizen at the commencement of the Act except for British overseas territories citizen of the Sovereign Base Areas. The exclusion was for this reason according to the White Paper:

> "… the Government [does not] propose to extend the offer of citizenship to British Dependent Territories citizens who owe their status to their association with the Sovereign Base Areas in Cyprus or with the British Indian Ocean Territory. Both are

> special cases. British usage of these territories is defence-related."

316. The Explanatory Memorandum indicated that "[in] accordance with the White Paper, the Act excludes [British Dependent Territories citizens] connected with the Sovereign Base Areas in Cyprus, because of the special position of this territory as a military base." In fact reference to Hansard suggests that the reasoning went somewhat further, albeit from the same starting-point. At the Committee stage an amendment was proposed deleting the reference in the Bill to the SBAs. In responding to this on 6 December 2001 the Minister said this:

> "The Hon. gentleman asked why the [SBAs] are excluded. I spelled out the reasons on Second Reading, but will try to provide more detail now. The bases are restricted to military purposes under the 1960 Treaty of Establishment, which was signed by the British government and the Government of Cyprus. I will provide … more specific details from the treaty.
>
> In the 1960 Treaty, the United Kingdom gave an undertaking not to set up and administer a wider community, and it would be unwise for us to jeopardise our – not always easy – arrangements with the Government of Cyprus over an important military base by committing what they might consider to be a provocative act that contravened the spirit of the treaty.
>
> It is also important to remember that most civilians who live within the boundaries of the two bases are Cypriot nationals, even though they are, or could qualify as, British dependent territories citizens. Many of them are from the pre-existing village of Akrotiri, which falls partly within the boundaries of one of the bases.
>
> … Cyprus has applied to join the European Union, and when its treaty is finalised … there will be no other benefit to be gained from British citizenship. The Hon. gentleman asked about children of British service personnel who are born in Cyprus. They are British citizens by descent. He also asked about foundlings …. They will automatically become British dependent territories citizens, but neither they nor other residents of bases will become British citizens.
>
> Hon. members should also bear in mind that Cyprus is at an important crossroads between the Middle East and Europe. We have already had difficulties with refugees from the Middle East landing in Cyprus and claiming asylum in the bases. The potential to acquire British citizenship through the back door could be a huge pull factor and make us, and Cyprus, vulnerable to a large influx of asylum seekers. We want to avoid that if we can, because it would also undermine the military integrity of the bases."

317. The legislative purpose was achieved by the insertion with effect from 21 May 2002 of a new section 4A in the 1981 Act as follows:

> "(1) If an application is made to register as a British citizen a person who is a British overseas territories citizen, the Secretary of State may if he thinks fit cause the person to be so registered.
>
> (2) Subsection (1) does not apply in the case of a British overseas territories citizen who—
>
> (a) is such a citizen by virtue only of a connection with the Sovereign Base Areas of Akrotiri and Dhekelia …."

318. The effect of this is that British citizenship is effectively barred to anyone who seeks to obtain it by virtue only of a connection with the SBAs. There is a difference between the position of such a person and someone who is a British overseas territories citizen in a BOT other than the SBAs. (A similar position arises in respect of those resident in the BIOT.) Such a person may qualify for British citizenship by descent as defined in the Act (in, particular, in section 15(1) and (4)) or under the general discretion in section 4A(1), whereas neither avenue is open to someone whose only status is that of a BOT citizen resident in the SBAs.

319. Accordingly, there is an inbuilt statutory disadvantage (authorised, of course, by Parliament for reasons reflected in what the Minister said in the response recorded above) for those resident in the SBAs compared with BOT citizens elsewhere. Since no declaration of incompatibility with the Convention is sought, this provision must be taken for what it is and any "discrimination" to which it may be thought to give rise characterised as lawful. This does mean that any claim based upon alleged discrimination in the context of establishing British citizenship cannot succeed if based upon the different treatment of those in BOTs generally compared with those who are resident in the SBAs.

320. It does seem to me that, however the argument is sought to be formulated, this represents the substantive answer to any claim for relief based upon alleged discrimination arising from the potential difficulties of a resident of an SBA in obtaining British citizenship. I might add also, however, that acquiring British citizenship is the acquisition of a status rather than a means in itself of securing a change of circumstances in which an applicant for citizenship lives. It is being forced to remain in their present circumstances and accommodation that, in my view, constitutes the principal interference with the claimants' Article 8 rights. Removal from that situation by coming to the UK is no less difficult for the claimants than any other resident of another BOT for the reasons already given. To that extent, any discrimination arising from the fact that there is no route to citizenship for an SBA resident is far removed from the actual interference with the Article 8 rights that generate the potential for an Article 14 claim.

321. For the reasons I have given, I do not consider that the claim based on Article 14 can succeed however it is formulated. This now brings me to the claim for relief based on what is called the *Launder* principle and the associated issue of the alleged breach or breaches of the Refugee Convention.

The claim based on the *Launder* principle and issues of breach

322. The foundation for this argument is the well-known case of *R v SSHD, ex parte Launder* [1997] 1 WLR 839 and the passage in the speech of Lord Hope of Craighead set out below (see paragraph 325). This approach was further approved in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326 at p. 367 by Lord Steyn and by Lord Hope at p. 376. The argument was not advanced in the Senior Judges' Courts in the SBAs.

323. I need not recite the facts in *Launder* other than to say it raised the question of whether the applicant, a British national facing extradition to Hong Kong for trial upon charges of corruption, would receive a fair trial which would take place after the transfer of British sovereignty over Hong Kong to the People's Republic of China on 1 July 1997.

324. It was decided at a time when the ECHR had not yet been incorporated into English law. However, the applicant had suggested to the Secretary of State that extraditing him would be a breach of his rights under the ECHR. Lord Hope of Craighead referred (at p. 867) to the background in this way and to why the arguments under the Convention could not be ignored:

> "Indeed, two features of this case seem to me to indicate that the applicant's arguments under the Convention are directly relevant to the remedy which he seeks by way of judicial review. The first is the argument which he presented to the Secretary of State in his representations. This was that the rights which would be put at risk if he were to be returned to Hong Kong were his rights under the Convention—in particular his rights to life and liberty, to a fair trial and not to be subjected to inhuman or degrading treatment or punishment: see articles 2, 3, 5 and 6. The second is that the Secretary of State himself … took account of the applicant's representations that his extradition to Hong Kong would be a breach of the Convention in reaching his decision that he should be extradited."

325. The question that arose was whether, the Secretary of State having said that he took account of the representations concerning the Convention, his decision could be subjected to judicial review even though the Convention did not apply directly. Lord Hope said this:

> "If the applicant is to have an effective remedy against a decision which is flawed because the decision-maker has misdirected himself on the Convention which he himself says he took into account, it must surely be right to examine the substance of the argument. The ordinary principles of judicial review permit this approach because it was to the rationality and legality of the decisions, and not to some independent remedy, that [Counsel for the applicant] directed his argument."

326. It is right to note that in *R (Corner House Research) v DPP* [2009] 1 AC 756 the House of Lords cautioned on the application of this approach where there is a contested issue about the interpretation of an unincorporated convention, particularly where a tenable view of its construction has been taken by the decision-maker. However, Mr Husain submits that no such issue arises in this case and I think he is right.

327. Mr Husain's argument is that from the outset the UK Government has said that it would treat those assessed to be "refugees" in accordance with at least "the spirit of" the Refugee Convention. I will not repeat in detail all the references to this effect, but they include the references recorded in paragraphs 62, 63, 64, 67, 68, 93 and 98 above. I have used the compendious expression "UK Government" because it would be unrealistic to separate the actions for this purpose, for example, of the SBAA and any of the Departments of State with an interest in this matter. The SBAA is subject to the ultimate authority of the Secretary of State for Defence[12], but the evidence demonstrates clearly the co-operation and consultation between the relevant Departments of State – here the FCO, the Home Office, the Defence Department and the Cabinet Office – about the issues raised by the presence of the claimants at Dhekelia. In the Detailed Grounds of Defence the argument was advanced that the recognition of the refugee status of the Claimants was an act of the SBAA and not of the Secretary of State. Mr Roe did not develop this argument in his oral submissions and, in my view, wisely so. It would, in my view, be a wholly unmeritorious argument given the repeated commitment by various officials (with Ministerial sanction) to treat the claimants as refugees even if the Refugee Convention did not apply as a matter of law to the SBAs.

328. Mr Roe did, however, maintain the argument that the letter of 25 November 2014 contained no misdirection in law that would generate an argument based on *Launder*. He submits that the decision letter (assuming it was such) did not contain a self-direction that the claimants were entitled to the benefit of the Convention and Protocol. Such a direction, he submits, would have been necessary for *Launder* to apply.

329. I do not consider this argument to be well-founded. If the letter had made no reference at all to the Convention or the spirit of the Convention then, given the extensive background reference to the Convention to which I have referred (see paragraph 327), the non-reference to it would itself have been a misdirection. However, the letter recognises the "refugee" status of the claimants and seeks to justify the decision not to admit them to the UK at least in part by reference to the general policy concerning the admission of refugees to the UK. Nonetheless, all this seems to me to be dancing on the head of a pin: the short point, in my judgment, is that any decision made in accordance with the policy adopted in respect of the claimants from a very early stage had to acknowledge, or take into account, the implications of the Convention, at least so far as possible. It would be a wholly unacceptable U-turn for the UK Government to maintain to the UNHCR, to others and to the claimants from the time they arrived on the island of Cyprus that the obligations under the Convention would be honoured in spirit and that they would be

[12] Strictly speaking, the Administrator of the SBAs takes instructions from HM the Queen (see paragraph 54), but those instructions will be given on the advice of her Ministers, the Secretary of State for Defence being the relevant Minister for this purpose.

treated as refugees (if they justified the status) only for the decision that they could not be admitted to the UK to ignore that commitment.

330. Mr Roe has argued that the only reason there is reference within the letter to "refugee" status is to emphasise the reason that the claimants are where they are, not to confirm that they were entitled to access "all rights under the Convention". He says that the claimants may have had this impression initially, but that it was dispelled with the passage of time. He says that it was made perfectly clear in the court proceedings in the SBAs that the claimants were not entitled to these rights. It is true that the Summary Grounds of Defence in those proceedings avers that the Convention does not apply to the SBAs (although it is said the SBAs are bound by the principle of non-refoulement) although the alternative contention is advanced, namely, that even if the Convention did apply various rights (e.g. those relating to housing, public assistance and welfare) were not absolute rights.

331. Mr Roe's argument comes perilously close to contending that the Convention had no relevance at all to any decision made about the possible admission of the claimants to the UK. As I have indicated (see paragraph 329), I do not think that such a position would be sustainable in public law terms. However, giving the decision letter the fair reading that is called for in an application such as this, I do not consider that either the Convention or the commitment to treat the claimants as refugees was ignored (see paragraphs 332 - 335 below). In my view, the more difficult issue, to which I will return later (see paragraphs 348 - 374), is whether those matters were considered adequately by the decision-maker.

332. The terms of the letter of 25 November 2014 have to be read against the background of the letter sent to the UNHCR dated 8 November 2011 (see paragraph 163) and the letter sent by Mr Ishak and Ms Charalambidou dated 30 September 2013 (see paragraph 164) to which it was a response. In the letter of 8 November 2011 the refugee status of the Claimants is acknowledged by the UKBA and reference is made to the agreement of the RoC "to accept and resettle the refugee families", a matter explained by reference to the informal agreement between the SBAA and the RoC for the latter "to honour any decisions made by the SBAA in respect of the families and take responsibility for them." Reference is also made to the suggestion that the families "have the right to reside in the [RoC], and receive all appropriate benefits from the [RoC]." The letter concludes with the suggestion that the best interests of the refugees would be to move to Cyprus "where they have the right of residence."

333. Whilst there is no express reference in the letter of 25 November 2014 to "acting within the spirit of the Convention" or "treating the claimants as refugees", the reliance placed upon the arrangements said to have been made with the RoC could only have been based upon a recognition that the UK had to do something in respect of the refugees that, so far as practicable, met its obligations to them under the Convention. If the SBAs could not meet those obligations (which they could not, certainly in full), then the argument would be that arrangements had been made with a third country that (at face value) could do so and was willing to do so. I will return to the question of whether that would operate as a discharge of the UK's obligations to the claimants on the basis that they were to be treated in the spirit of the Convention in due course (see paragraphs 339 – 346 below).

334. Those observations derive from the letter of 8 November 2011 to which express reference is made in the letter of 25 November 2014. Before going to that letter itself, it should be noted that the letter from Mr Ishak and Ms Charalambidou raised expressly the agreement reached with the RoC. The fifth paragraph of that letter (see paragraph 164 above) refers to it. Again, I will return to that in due course because it is, in my view, a very important reference.

335. The decision letter itself refers very briefly to the possible relocation of the Claimants within the RoC. All it says is that "[the] families have the right to reside in the [RoC] and have strong ties with [it]." Nonetheless, this is itself plainly a reference to a factor which the decision-maker thought was relevant to the decision to be made and was, it seems to me, referable to the commitment made to act within the spirit of the Convention. Overall, therefore, given the whole sequence of this correspondence, I consider that this aspect was considered and taken into account. However, Mr Husain's principal argument is that any position taken by the Secretary of State such as that to which I have referred comes nowhere near meeting the spirit of the Convention. I will address this fundamental submission first. If I am satisfied that, in principle, the position taken is a proper response to the commitment given, the final issue will be whether it addresses adequately the alleged fragility of the "understanding" with the RoC so far as the Claimants are concerned.

336. Mr Husain relies for this purposes largely on Article 26 and Article 32 (see paragraph 35 above). Each requires the refugee to be "lawfully in [the] territory" of the Contracting State before the relevant obligation arises. He submits that the claimants are lawfully in the territory of the UK (not just the territory of the SBAs) and he relies for this purpose on the provision of the Travel documents to the claimants under Article 28 (see paragraph 36) as confirmation of this. Mr Roe says that the precise legal status of the claimants is not wholly clear on the evidence and does not wish to concede that they are "lawfully" in whichever is the relevant territory, but equally does not seek to argue that they are present "unlawfully". He submits, however, that if they are lawfully present anywhere, they are lawfully present in the territory of the SBAs and not the metropolitan territory.

337. The foregoing paragraph demonstrates that the issue of whether the claimants are "lawfully" in the SBAs was not even "lightly touched upon in argument" before me (cf. paragraph 194 above). Mr Husain drew my attention to *R (ST) v SSHD* [2012] 2 AC 135 in support of the proposition that Article 32 confers "an entitlement for a recognised refugee to stay indefinitely in the receiving contracting State" which, he submits, means in this context "the UK and its territories". That case certainly establishes that once a refugee's presence within the territory of the Contracting State has been recognised as "lawful", the entitlement to remain in the Contracting State arises. Lord Hope of Craighead said this of Article 32 at [1]:

> "Its effect is that, once a refugee has been admitted or his presence has been legalised and so long as entitlement to refugee status continues, he is entitled to stay indefinitely in the receiving state. He can only forfeit that right by becoming a risk to national security or by disturbing the public order. But he requires to have been accorded a certain degree of attachment to the receiving state before this privilege becomes available."

338. However, the Supreme Court held that "lawfully" in Article 32(1) referred to what was to be treated as lawful according to the domestic law of the Contracting State and that under United Kingdom domestic law the claimant had not been given leave to enter or remain in the UK, was thus not lawfully in the country for the purposes of Article 32 and was not entitled to its protection. As I have said, I have received no argument on this issue, but it is not difficult to see in the light of the observations of the Supreme Court in that case that, notwithstanding the length of time the claimants and their families have been present in the SBAs, their status as being there "lawfully" is not conclusively demonstrated despite being given Travel documents from time to time. However, given the way the matter has been presented to me, I consider that I should approach their case on the basis that they are there lawfully.

339. Nonetheless, that raises another important issue and one that is fundamental to this case. If the obligation of the UK is simply to treat the claimants in the spirit of the Convention (rather than as direct beneficiaries of it), does that mean that the UK must apply the strict letter of the Convention and secure directly for the benefit of the claimants the "full panoply of rights" of a refugee under the Convention (see *ST* above); or may it do so indirectly by arranging for a third country that observes the Convention and recognises their status to do so even if the claimants do not consent to such an arrangement?

340. As I have already indicated (see, for example, paragraphs 76 and 96), it is common ground that the UK cannot in practice provide the claimants with their full Convention rights within the SBAs. The only way in which those rights can be secured in full is either by an arrangement with another country (the obvious "candidate" being the RoC) or by permitting the claimants entry to mainland UK. Mr Husain says that, irrespective of whether the claimants do or do not have legitimate grounds for not consenting to any arrangement with the RoC, the fact that they do not consent to it means that any attempt to force the arrangement upon them would breach their rights under Articles 26 and 32. As to Article 26, Mr Husain submits that it obliges the UK to accord the claimants the right to choose their place of residence within the territory for which it is responsible under the Convention subject only to the restrictions that apply equally to aliens generally in similar circumstances. As to Article 32, he contends that the UK Government (i) cannot require the claimants without their consent to leave the SBAs and (ii) must permit them to reside perpetually in territory for which the UK is responsible in international law. Given that the SBA does not provide a durable or suitable long term location for the claimants, the Secretary of State is bound, he submits, to make arrangements for their re-location within UK territory and it is inconsistent with the UK's duty under the Convention "for the Secretary of State to adopt a policy or make a decision that is premised on the Claimants being removed to a third country". His argument is that this would amount to "a form of constructive removal" which is contrary to the object and purpose of the Convention in general and Article 32 in particular.

341. I should say at the outset that I have not been referred to any other case in which the concept of "constructive removal" has been considered in this context. The word in Article 32(1) is "expel" and it is, of course, easy to envisage the normal method of expulsion employed when a Contracting State feels entitled to remove a failed asylum seeker. Using the same method to remove an acknowledged refugee from the territory of a Contracting State who is otherwise lawfully entitled to be there would amount to

a clear breach of the Convention. But difficult issues arise where the conduct of the Contracting State falls below what constitutes expulsion in the true sense of the expression and into the category of non-fulfilment of many of the Convention obligations with the exception of the obligation of non-refoulement. Mr Roe submits that, on the evidence in this case, the UK is not seeking to "expel" the claimants from the SBAs. They have the right to remain there if they wish although, in the longer term, not in their present accommodation. However, the position would be, on the basis of the agreement with the RoC, that they remained within the SBAs but as the responsibility of the RoC in terms of securing their rights under the Convention. This does not, Mr Roe argues, constitute expulsion from the SBAs and, in any event, the refusal of the Secretary of State to admit them to the metropolitan territory of the UK does not amount to expulsion.

342. Whether an action or series of actions by a Contracting State amounts to expulsion within the Convention is largely a matter of degree and also essentially a matter of impression. If and to the extent that it is said that the effect of the informal agreement with the RoC, if implemented, would amount to the expulsion of the claimants from the SBAs, then I do not accept the submission, essentially for the reasons given by Mr Roe. What seems to me to be the more important part of the argument is whether the UK, which plainly has accepted primary responsibility for the claimants by accepting that they must be treated as refugees (or treated in the spirit of the Convention) can, in principle, make arrangements with a third country to discharge the obligations under the Convention and whether it is entitled to consider the territory of the SBAs as separate from the metropolitan territory. The two issues merge to some extent.

343. If one stands back from the legal aspects and considers the merits of this case, one or two matters emerge: first, it was a matter of chance that the claimants arrived in the SBAs - they were intending to get to Italy. It follows that the UK was not their original choice of place of refuge. Second, the evidence suggests that, certainly in the early stages, they would have accepted transfer to a third country such as Canada or America if it could have been achieved. From their perspective, certainly in the early stages, the UK was not the destination they sought and would have been content for the UK to make arrangements with a country other than the UK to accept them. Indeed in a more recent e-mail from Mr Gondelle to Mr Gale dated 16 December 2011, referring to a meeting between him and the refugees in Richmond Village the day before, he said that "[none] of the families show any real desire for the UK, but if given citizenship would move elsewhere in Europe." Third, in the years that have passed since then, some of the claimants, or some members of the claimants' families, have lived and worked in the RoC although they appear to be united in their resistance to the RoC becoming responsible for them.

344. More importantly for the purposes of the legal analysis, the position taken by the UNHCR has not been such that it has insisted that the UK should relocate the claimants to mainland UK even though latterly it has invited consideration to the fact that the RoC could not take the claimants and that resettlement in the UK appeared the only option (see paragraph 164). At the outset (see paragraph 90 above) it saw the responsibility for deciding what to do for the recognised refugees as a joint one between the UK and the RoC. Furthermore, it appears also that the UNHCR has in the meantime over the years looked for re-settlement opportunities other than in the UK (see the sixth paragraph of the letter referred to in paragraph 164 above).

345. Finally, however, endeavouring to look at the overall position that has arisen in the very unusual circumstances of this case, the important question is whether it would be a breach of the spirit of the Convention for the UK, which cannot give effect to the full panoply of Convention obligations in the SBAs, to try to achieve a situation whereby the claimants are resettled close to where they have lived since their rescue and where they will have the benefits of the discharge of the Convention obligations by a country that accepts that it is bound by the Convention? When the question is asked in that way, it is difficult to see why a negative answer should not follow. Provided that there is no question of *refoulement* and the essential minimum requirements of a Contracting State's obligations to the claimants as refugees are met by the third country, then that, in my judgment, meets the test of applying the spirit of the Convention where the Convention, as a matter of law, does not apply and the obligations to which it gives rise cannot be fully met in practice.

346. Translating that conclusion into the necessary public law dimension for present purposes, the opportunity to proceed in that fashion was a factor that the Secretary of State could reasonably and lawfully have taken into account when deciding whether, as matters stood at the time of the decision letter, the only solution was to admit the claimants to mainland UK. If it becomes necessary to reconsider the decision concerning the admission of the claimants to the UK, it would in principle, in my judgment, be open to the Secretary of State to take into account any offer or arrangement for a third country (including, of course, the RoC) to accept the normal Convention obligations in respect of the claimants in substitution for the obligations that, in spirit, the UK was prepared to accept in respect of the claimants.

347. The next issue to consider is whether there is any significant inadequacy in the reasoning contained in the decision letter such that the decision should be quashed and an opportunity for reconsideration presented.

Was the Secretary of State's decision considered and reasoned adequately?

348. I have already alluded to the brief way in which the agreement between the UK and the RoC was referred to in the decision letter. Mere brevity does not necessarily equate with inadequate consideration, but it does raise the question of the extent to which appropriate attention was paid to the status and efficacy of the "understanding" between the RoC and the UK. As the letter stands, it conveys the impression that the Secretary of State's view was that there were no doubts about the existence of the understanding and its effective implementation if relied upon by the claimants. An issue that arises is the extent to which the Secretary of State needed to satisfy herself of matters that justified that position: should she have given the circumstances "anxious scrutiny" and, if so, is there evidence that she did so? I will return to that issue, but in the first instance a number of features of the background germane to the "understanding" need to be summarised because there is, on the evidence, little doubt that the "understanding" has had a somewhat chequered history and a question-mark exists over whether it is something with which the RoC has always been wholly comfortable.

349. I need not repeat everything previously recorded, but I would highlight the following:

(a) the RoC was not prepared to include the claimants in the 2003 MoU for, it appears, political reasons (see paragraph 99);

(b) the 2005 agreement has never been confirmed in writing and there is evidence that the RoC did not wish to do so (see paragraphs 138 and 162);

(c) there was a "sudden change" in position in 2008 amounting to a reversal of the RoC's stance (see paragraphs 141 - 143);

(d) the attitude of the RoC to the SBAs suggests an inbuilt reluctance to assist (see paragraphs 83 and 151);

(e) the recorded view of the UNHCR in September 2013 was that relocation of the claimants in the RoC was no longer a practical option because of the "financial crisis" of the RoC and its general unwillingness to take other recognised refugees (see the underlined passage in the letter set out in paragraph 164 above).

350. The last of those matters was expressly referred to in the joint letter of Mr Ishak and Ms Charalambidou dated 30 September 2013 to which the decision letter was a direct response. That it was a matter raised directly by the UNHCR seems to me to be a matter of considerable significance. It cannot be characterised simply as a "debating point" advanced by those representing the claimants even though Ms Charalambidou had mentioned the same issue in a letter to Mr Gondelle dated 31 December 2012. It is (or at least was at the time) the considered position of the local representative of the international organisation with responsibility for overseeing the protection of refugees. Although the paragraph in the letter cannot be equated with a UNHCR report (which is often seen as the "litmus test for breaches of refugee obligations": see the submissions of Counsel for the Secretary of State in *Pour and ors v SSHD* [2016] EWHC 401 (Admin) at [88]), it cannot be dismissed as an observation without significance. Notwithstanding that, it is not addressed at all in the decision letter. The only reference to the 2005 agreement is the implicit reference to which I referred in paragraph 176 above.

351. Mr Gale has given some detail in his witness statement (see paragraph 85 above) about the background to the drafting of the letter of 25 November 2014 and has exhibited various e-mail chains both before and after the letter from Mr Ishak and Ms Charalambidou, as indeed does Ms Young in her first witness statement. Mr Gale does make specific reference in his witness statement to the passage highlighted in paragraph 349(e) above, but does not say how, if at all, it was considered by those drafting the letter of 25 November 2014. He simply continues by saying this:

> "However, my understanding, based on emails I received from SBAA officials in January 2015 which Lisa Young attaches to her statement, is that the UNHCR representative in Cyprus in January 2015 recognises that the best solution for the claimants' long term future is assimilation into wider Cypriot society."

That does not answer the point made by the UNHCR: the best interests of the claimants in the future might be thought to lie in the RoC, but it does not address the question of whether the RoC was capable of assimilating them when the decision fell to be made.

352. In e-mails dated 23 May 2014 exhibited to Ms Young's first witness statement (when she was chasing an answer to the letter of 30 September 2013), she said this, emphasising the need to persuade the UNHCR about the UK's position:

> "It would be extremely helpful if you could reply to this letter soon as without this we are unlikely to persuade the UNHCR and the recognised refugees that the UK is not an option for future settlement, and to enlist their assistance in finding a third country willing to take the refugees."

353. Mr Gale's reply was as follows:

> "I'm sorry that the December email seems to have slipped under my radar. In acknowledging this email I said I would consult you before we replied but I didn't anticipate that the letter from the UNHCR and the applicants would change the Home Office position. I said we did of course understand the burden and problems they have caused the SBA (and continue to cause). But I made it clear the UK has no legal obligation to accept the applicants, refugees or not, and there are no close family ties or previous residence in the UK or any compelling humanitarian reasons in their favour. All in all, there would be no appetite to accept this particular group, whose non-cooperation and behaviour would make any country reluctant to take them." (Emphasis added.)

354. That response suggests a closed mind on the part of the Home Office to the question of admission of the refugees to the UK and to anything said in support of it by the UNHCR. I have noted from further e-mail exchanges exhibited to Ms Young's first witness statement that there was a conference call between her, Gillian Deane (the Fiscal Officer) and Dr Philip Rushbrook (the Chief Officer of the SBAA) on 29 August 2014. It appears that it was agreed that Mr Gale and Mr Jones would reply formally to the letter of 30 September 2013. Apparently, Mr Jones agreed to speak to RoC Interior Ministry officials "in the margins of the forthcoming EU Conference in Malta on co-operation with the RoC Government in supporting the re-settlement of recognised refugees from Richmond village into the RoC." There was no response to that e-mail and Ms Deane followed it up on 3 November. Mr Gale replied on 17 November with apologies for the delay and attached to his reply was a draft response to the letter for comment. His intention was to send it to Mr Jones for approval very soon.

355. Neither Ms Young nor Ms Deane had any comments and presumably it went to Mr Jones for approval, signature and subsequent onward transmission. There is nothing in any of the material I have seen to suggest that Mr Jones had seen any RoC officials as planned, although, of course, he may have done. However, there is equally nothing to suggest that the previous concerns of the UNHCR as expressed in the September 2013 letter had been addressed: indeed it seems to have been ignored. It is, of course, usual for the UK (including its courts) to rely initially upon a presumption (albeit rebuttable) that a Contracting State will comply with its international obligations under the Convention, but in the light of the UNHCR's position as expressed in the letter, supplemented by Mr Jones' intention to have what must be assumed to be a

"quiet word" with Interior Ministry officials, there must at that stage have been concerns about whether that presumption could be relied upon if the issue had been addressed.

356. There is nothing in what the UNHCR said in the letter of 30 September 2013 to suggest that there were concerns about the non-refoulement obligation, but the inference to be drawn from the way the highlighted passage was expressed was that the RoC would have difficulty fulfilling the wider obligations (e.g. concerning health, welfare and education) set out in the Convention. Indeed Mr Husain does not suggest that concerns about refoulement arise and the case of *Pour* (see paragraph 350 above) has dealt with that issue in any event.

357. I invited submissions on what test I should apply to my assessment of the effectiveness of the informal agreement upon which the Secretary of State places reliance. Mr Husain says that the "anxious scrutiny" test applies; Mr Roe disagrees and contends for the "standard" *Wednesbury* test given that there is no risk of refoulement. If I had to choose I would say that anxious scrutiny needs to be applied since the situation is equivalent to determining whether the Claimants' human rights will be respected even if expulsion is excluded. However, I do not think it is necessary to decide because there is no evidence that the issue, particularly as highlighted by the UNHCR's strongly-worded assertion in the letter, was ever addressed as part of the decision-making process. The risks of the RoC not complying with the Convention obligations were simply not evaluated at all.

358. Subject to the question of whether the decision would have been the same in any event even if the issue had been addressed properly at the time (and, of course, whether delay defeats this claim), this failure, in my judgment, is sufficient to invalidate the decision that admission of the claimants to the UK was not an available option. On the current evidence, there appear to be only two alternatives that would lead to a durable solution which, it is common ground, needs to be found: (i) effective "re-settlement" in the RoC or in different accommodation within the SBAs, but in either event under the "protection" of the RoC, or (ii) re-settlement in the UK. The failure adequately to consider the first in light of the concerns of the UNHCR as expressed in the letter to which I have referred means that, as of the date of the decision, a conscientious decision eliminating the latter as a possibility was not open to the Secretary of State. I will return to what might need to be addressed if the issue has to be revisited when I have dealt with the question of whether the decision would have been the same even if the issue had been addressed at the time.

359. Because the submissions of each side have been at the opposite ends of a wide spectrum, this issue was not addressed in argument. I have not invited the reopening of the argument because I consider it is a matter on which I can form a conclusion on the material before me and by reference to the well-established approach to such an issue. For this purpose I will assume that the Defendant would wish to argue that the outcome would "inevitably" have been the same even if the issue had been addressed: see, e.g., *R (Shoesmith) v Ofsted & Others* [2011] EWCA Civ 642, [69] – [74]. (The test prescribed by section 21(2A) of the Senior Courts Act 1981 does not apply to this case because the claim was issued in February 2015 and thus not on or after 13 April 2015.)

360. As it seems to me, the only basis upon which this could be argued on the evidence before me is that subsequent to the decision letter (a) the UNHCR appeared to accept the decision and/or proceeded on the basis that re-location in the RoC was the best option and (b) that the RoC confirmed unequivocally that the informal agreement still stood and would be acted upon. The argument would have to be that this information, if known at the time of the decision, would have led inevitably to the same result.

361. I should, perhaps, observe at the outset that the evidence upon which any such argument could successfully be based would need to be compelling to surmount the high "inevitability" threshold required and I need, in any event, to beware of trespassing into the forbidden territory for a court of considering the substantive merits of the decision.

362. Ms Young, in her first witness statement dated 15 January 2016, speaks of a meeting on 11 December 2014 (and thus within a short period after the decision letter was sent) attended by herself, Ms Deane and Dr Rushbrook with "the new UNHCR Cyprus representative", Mr Damtew Dessalegne. (In fact he had been in office since at least May 2014.) She said that he "appeared quite supportive of our efforts to find some kind of resolution in Cyprus with the RoC against the backdrop of the letter of 25 November 2014 clarifying the UK's position." She quotes her follow-up e-mail to Mr Dessalegne of 5 January 2015 "concerning the recognised refugees and failed asylum seekers living in Richmond Village" in which she recorded one of the key actions, namely, for the SBAA to arrange a meeting with the new Head of the RoC Migration Department, with the UNHCR to attend, for the following purpose:

> "The meeting will seek to establish whether the Republic of Cyprus will acknowledge the refugees' residency within the SBAs as counting towards Cypriot residency and will also seek to review the responsibility for the provision of housing, social insurance, healthcare and education for refugee families, or welfare payments towards the provision of these. The objective is to establish mutual agreement on these matters".

363. Ms Young says that her "clear understanding from the meeting was that the UNHCR recognised that the best solution for the refugees long term future is assimilation into wider Cypriot society."

364. The arrival of a new UNHCR representative in Cyprus more or less coincided with the arrival of a new UNCHR representative in London. Disclosed in the papers before the court is a Ministerial briefing paper prepared for a meeting between the Minister and the new representative on 21 January 2015. The UNHCR had indicated that its representative wished to discuss the co-operation between the Home Office and the UNHCR, resettlement (Gateway and the Vulnerable Persons Relocation Scheme for Syrians and "the situation in and around Calais"), but Home Office officials hoped that the Minister might be able to raise the question of the refugees and asylum seekers in the SBAs. One version of the briefing says this:

> "If time permits, you may wish to raise this issue. The Home Office and MoD need UNHCR assistance in encouraging the refugees on the Sovereign Base to accept that they should settle in Cyprus and will not be allowed to come to the UK."

365. Another page contains the following bullet points:

> - We have consistently made it clear to the refugees and other asylum seeking families camped on the Sovereign Base (SBA) that they will not be allowed to come to the UK.
>
> - This has been reinforced in a letter of 24 November … to the refugees' legal representatives in Cyprus and to the UNHCR representative in Cyprus. The SBA are seeking the assistance of the UNHCR to explore all possible Cyprus-based solutions.
>
> - We urge the UNHCR to support the integration of the refugee families within the Republic of Cyprus as the only feasible and durable solution.

366. The background notes referred to the agreement of the RoC "to accept and resettle the refugee families" and the unwillingness of the families to move from their current accommodation because of their "distrust of the RoC", but it does not refer to the view of the UNHCR set out in the letter of 30 September 2013.

367. I have not been told whether the issue was indeed raised at the meeting or whether any progress along the lines hoped for by the Home Office was achieved through that channel.

368. Equally, I have not seen any response to Ms Young's e-mail of 5 January 2015 from Mr Dessalegne or any other representative of the UNHCR, nor anything directly from the UNHCR to confirm the understanding she refers to or, if the understanding is correct, how the solution is to be achieved. She goes on to say this:

> "I do not recall the UNHCR seeking to change the 2005 arrangements. What we and the UNHCR sought was clarity from the RoC on what the current position was. The SBAA got this at our meeting with the RoC on 21 April 2015."

369. She explains that a meeting was held on 21 April 2015 with the RoC Asylum Service without the UNHCR being present "at the RoC's request". She does not explain why the RoC had requested that the UNHCR was not present and the question is thus unresolved. She and Ms Deane attended with Mr Matthew Heydon, the SBAA Legislative Counsel. She does not indicate who the officials from the RoC were or what their status was, but she says this of the meeting:

> "At the meeting RoC confirmed that they remained willing to extend the MoU rights to the recognised refugees. The focus of the meeting … was how to reinvigorate this, because the refugees were not taking up the facilities extended by the RoC. One of the points discussed was whether the RoC could support the SBA in trying to get the refugees engaged in taking up what was offered. The only point on which the RoC officials mentioned any problems in principle was the question of

> whether SBA residency would count towards RoC citizenship requirements. We are still awaiting an answer on that. Obviously, if the claimants had taken up the RoC's offer in 2005, they could have applied for citizenship from around 2012."

370. It follows from the last sentence of that extract that the issue as to the qualification of residency within the SBAs for the purposes of RoC citizenship remained unresolved 9 months after the meeting.

371. In relation to this meeting Ms Young says in an earlier passage in her witness statement the following:

> "Personally I have attended one meeting with RoC officials on 20 April 2015, where RoC officials affirmed the 2005 commitment in response to express questions from SBAA officials, including myself."

372. Although Mr Husain has invited me to regard Ms Young as an unreliable historian (and I accept that one particular aspect of her main witness statement has been demonstrated to be unsatisfactory: see paragraph 144 above), I do not think I can disregard this evidence completely. However, given that the RoC had expressly asked that the international organisation with responsibility for refugees (which 18 months previously had questioned expressly the ability of the RoC to comply with its informal agreement with the UK) should not be present at the meeting, the question arises of how much weight could be placed on any assurance given that the informal agreement would be honoured. There is, of course, no written confirmation either of the position of the RoC (which would presumably need to be sanctioned at Ministerial level) or of the UNHRC as contended for by Ms Young.

373. Given the chequered history of the informal agreement and the strongly expressed written view of the UNHCR in the letter of 30 September 2013 (which on the evidence has not been contradicted either in writing or orally), I do not consider that the Secretary of State, possessed of this further slender material, would "inevitably" have reached the same decision.

374. It follows, therefore, that, subject to the issue of delay, I would quash the decision to refuse the claimants entry to the UK and remit the matter to the Secretary of State for reconsideration, when doubtless all relevant up-to-date factors would be taken into account. The decision to quash the decision is made upon the relatively narrow, but nonetheless significant, basis to which I have referred. I will comment briefly on some of the wider issues canvassed in support of this relief below (see paragraphs 381 - 396). I will deal with the issue of delay first.

Delay

375. The Defendant's argument was foreshadowed in paragraph 12 above, but it is somewhat different from the position advanced in the Detailed Grounds of Defence. There it was contended that in March 2000 at least two of the claimants claimed they were entitled to be admitted to the UK under the Refugee Convention and sought entry clearance. It was presumably intended to be argued that the grounds for

bringing a claim existed then. However, no final decisions concerning those applications were ever made (see paragraph 85 above) and it is, in any event, difficult to see how the other claimants could be shut out as a result. It was also said in the Detailed Grounds of Defence that the claimants had been told on several occasions throughout the years that the UK would not admit them on a discretionary basis, the argument presumably being that there was an opportunity to challenge that position at an earlier stage. There was no reference in the Detailed Grounds of Defence to the letter of 8 November 2011.

376. However, it is that letter upon which Mr Roe sought to place most reliance in this context. In his Skeleton Argument he contended that the Defendant's position was already well settled by 8 November 2011, when her Director of Asylum told the UNHCR that "UK Border Agency officials and Home Office Ministers have consistently made it clear that there should be no question of the families on the SBA being admitted to the UK" (see paragraph 163 above). That letter, he submits, represents in substance a communication to the claimants of the Defendant's position. The grounds to make the claim arose long before the letter of 25 November 2014 which, he says, merely restated the Defendant's position again.

377. I do not accept these arguments. In the first place, the letter of 8 November 2011 was not a response to a request from the claimants for a decision: it was simply an up-date on the UKBA's view of the position in response to a request from the UNHCR to provide one. However, perhaps more importantly, I would accept that, given the indications on behalf of the Secretary of State that re-settlement in the UK was not seen as an option, the claimants might have forced a reasoned decision from the Secretary of State at an earlier stage in the chronology of events. The Secretary of State's position during that period might well be seen as a provisional view (cf. *R (Burkett) v Hammersmith and Fulham LBC & Anor* [2012] 1WLR 1593 at [43]) bearing in mind that, at least internally, there was a debate about whether the claimants might to be permitted to come to the UK (see paragraph 178) and, whilst any decision to that effect would be against established Home Office policy, there existed the overall discretion in the Secretary of State to make an exception to that policy. However, it is tolerably clear from the review of the extensive history undertaken earlier in this judgment that efforts had been made from time to time to secure a practical resolution of the situation and it is possible that the strength of feeling within the group of claimants about the possibility of coming to the UK has varied during that process. Nonetheless, for whatever reason, no attempt was made on behalf of the whole group to obtain a clear decision until the joint letter from Mr Ishak and Ms Charalambidou of 30 September 2013. It was, it should be emphasised, a letter from the claimants' Cypriot legal adviser and the UNHCR. It put forward an articulated case for re-settlement in the UK and undoubtedly was seeking a response. That there was no follow up by the authors of that letter (to which Ms Young refers in her witness statement) does not seem to me to be of relevance. Ms Young herself appreciated that a substantive reply was required which is why she pursued it with Mr Gale and others. The ultimate reply was appropriately apologetic about the delay in responding, but it did amount to a rejection of the arguments advanced in the letter to which it was a reply. In my view, it represented a decision that went sufficiently far to permit a judicial review challenge if the claimants wished to advance one.

378. Mr Husain had also suggested that there is a continuing violation of Convention rights in this case and that that permits this claim to be advanced. In light of my earlier conclusion, it would have to be seen as a continuing breach by the UK of a self-imposed obligation to act within the spirit of the Convention, but I can see that there may be some force in the argument. However, I prefer the analysis set out in paragraph 377 above and, accordingly, I do not think that this claim is out of time. If I was wrong in that analysis I would hold, painting with a broad brush, that the very unusual background to the case demands that, if invited to do so, the court should find a way of adjudicating on the legal submissions made otherwise the human situation that underlies it will never be resolved. If that requires an extension of time, I would be in favour of granting it. However, for the reasons I have given, I do not consider that to be necessary.

379. It follows that there is, in my judgment, no impediment to quashing the decision letter of 25 November 2014 and remitting the issue to the Secretary of State for reconsideration in the light of this judgment and any further up-to-date material that it is relevant to consider. I emphasise strongly that the decision of the court is <u>not</u> that the Claimants have the right to be resettled in the UK: it is simply that the letter setting out the Secretary of State's reasons for saying in effect that this is not regarded as an available option is flawed and, accordingly, unlawful. The ultimate decision on admission to the UK remains with the Secretary of State, subject to any other legal challenge.

380. I have already emphasised the narrow basis upon which I have reached this conclusion (see paragraph 374). Much wider grounds were advanced by Mr Husain. Given my conclusion, it is not necessary for me to express a concluded view on these wider grounds. However, I propose to make a few observations on two particular features of the evidence lest it be thought that I have overlooked some of the material placed before me.

General Observations

(i) <u>the claimants' living conditions</u>

381. A great deal has been made of the conditions in which the claimants and their families are living – and indeed in which they have been living for many years. I have observed (see paragraph 74) that it was recognised at a very early stage in the chronology of events that what the SBAA could provide by way of accommodation for those rescued from the boat and accorded refugee status was inadequate and would become increasingly inadequate. That undoubtedly has proved to be the case and there appears to be a universal consensus that they must move from their present accommodation as soon as possible. I will not extend this judgment further, but Ms Gregory's second witness statement gives a vivid account of the present living conditions in Richmond Village, an account about which there can be little, if any, dispute.

382. I have alluded briefly (see paragraph 309) to the report on the individual claimants and their families prepared by Mr Peter Horrocks, an Independent Social Worker. It is a very thorough report and runs to in excess of 50 pages of text. It was based on a visit to the SBA in early January 2016 and interviews with the families and others.

This report was not, of course, available to the Secretary of State when the decision letter was formulated. I will return to it shortly.

383. The letter of 30 September 2013 refers to psychological assessments of the members of each of the families carried out on behalf of the UNHCR. The fourth paragraph of the letter of 30 September 2013 refers to those assessments. There are reports on 19 individuals each of whom is either a claimant or a member of a claimant's family. They are undated, but it is clear from internal aspects of the reports that the interviews were conducted in about September 2013. The reports were prepared by a number of trainee clinical psychologists at the Centre for Therapy, Training and Research ("KESY") in Nicosia at the behest of the UNHCR. It appears that those who were 18 and over were subjected to tests to determine whether they suffered from depression and anxiety. All showed both these features to a degree, Mr Bashir in particular showing signs of severe clinical depression and severe anxiety. All the children were assessed to have suffered in their "psychological health" because of their living conditions. The reports justified the summary given in the letter of 30 September 2013.

384. In a reply to a letter from Ms Gregory, Mr Gale confirmed that the reports were not considered before the letter of 25 November 2014 was drafted. He added that "[the] Home Office is unaware of having been provided at any stage with any of these … reports." Mr Husain has not made any particular point about this, but it might be observed that there is no evidence that any request was made by or on behalf of the Home Office to see the reports.

385. There can be little doubt that, since nothing material had changed for the better in relation to the living environment of the claimants and their families in the meantime, Mr Horrocks' assessment was likely to be no better. Indeed that is so. It is unnecessary for me to set out his conclusions about each family, but one or two quotations will give a flavour of its contents.

386. The first relates to the living conditions:

> "… all of the relevant families share a range of difficulties and issues, both at a practical and emotional level, which impact significantly on their ability to enjoy family life and to function as caring and protective parents for their children. They feel as if they have been subject to emotional torture at the hands of the SBAA. On a practical level the major concern is the condition of the families' housing, which is generally cramped and overcrowded and unsuitable for the ages and composition of the individual family units. There is a very high degree of anxiety amongst all residents in respect of asbestos in their houses and whilst the families have been advised that the asbestos, when undamaged, poses no risks, in all of the houses visited it is possible to see where the asbestos panels are damaged and broken … and as such will pose a risk to the health and well-being of the family members. Overall the physical conditions of the homes are very poor, in particular since the SBAA have stopped undertaking repair work for the past ten years. There is evidence of major disrepair … and

> evidence of live exposed electrical wires … in the homes, which poses a severe risk to the children of the families in particular."

387. The second relates to the kind of lives led by the children:

> "… None of the children have friends from school to visit as their friends' parents do not allow this because of the reputation and risks associated with Richmond Village. Neither do any of the children from Richmond Village take part in extracurricular clubs or activities, because their parents are unable to afford the associated costs. The lack of access to public transport means that without a car it is necessary to walk thirty minutes to the nearest bus stop in order to undertake shopping, there is a van which visits Richmond Village twice per week and sells some food items. There are also no facilities or opportunities for the adults to meet up or to improve their language or even their basic literacy skills. Most adults have lived in Richmond Village for sixteen years, but are able to speak little or no Greek and a number of the adults are illiterate."

388. Finally, after references to "a shared belief that the Cypriot society and authorities hold racist beliefs and that the refugees as a result are unable to access employment or welfare support", to "the overall sense of hopelessness of the family members" and to the psychological assessments carried out in 2013, Mr Horrocks says this:

> "Without exception the children of these families are greatly loved and are the priority for their parents. Although all of the parents describe their own lives and aspirations as being over, they live in the hope that the lives of their children will be different and that they will have the future which has been denied to them. In the early years of the children's lives, because they live in close tightly knit families where they receive a high degree of emotional and physical affection, the children are less aware that their lives are different in any way from other children or that they are more disadvantaged. However as the children grow and start to go to school and become more aware of their difference, they will experience social exclusion and racism at school. They come home and see how their living conditions are very different to other children in their schools. Of great concern is the accumulative nature of the experiences and lifestyles as well as the children's exposure to the mental health difficulties of the adults, there is no sense of any improvement in their situation and as the children become older the impact of their living situation will have an increasingly negative effect on their overall development."

389. Matters of the kind mentioned in the report are reflected in the witness statements of the claimants.

390. I have already accepted Mr Roe's point that the report is not agreed and that it should not be regarded as the last word on the subject of the situation of the claimants and their families. Ms Young, for example, questions how much of the report is based upon observation rather than what Mr Horrocks has "picked up through conversation with the claimants." She says that the "adults in the families have not sought to integrate outside their community whereas the children as a whole appear to have integrated well through their school attendance." She says that some of the claimants have cars.

391. I am in no position, nor is it my task, to make findings about the true position; neither am I in any position to assess whether the claimants' perception of the attitude of the Cypriot community to them is justified and whether, without good reason, the claimants have failed to co-operate with opportunities presented by the RoC. When it comes to considering the options for dealing with the situation, it will be for the Secretary of State to weigh up conscientiously, as part of the decision-making process, the situation of the claimants and their families. It is almost certainly the case that many refugees throughout the world will feel a sense of isolation no matter how welcoming the environment into which they may have moved. Nonetheless, the report prepared in 2013 and the report based upon Mr Horrocks' visit some two years or so later are very similar and do suggest an endemic problem so far as the psychological health of virtually all the claimants and their family members is concerned. If that is because they feel confined to something of a social no man's land with no escape, then such an effect is hardly surprising. Whether it can be resolved in confirmed arrangements with the RoC or whether there is no alternative but to admit the claimants to the UK is a judgment that the Secretary of State will have to make in the light of all relevant information.

392. I should also say that I am unable also to make specific findings on the question of whether, as they allege, the claimants are actively discriminated against by the Cypriot authorities. All that can be recorded (as, I believe, is common ground) is that at an earlier stage, according to Ms Young, there was a time when the SBAA found "all aspects of interaction with the RoC difficult and slow" and that there was a time when, for example, Mr C said that he would move to the RoC but in order to do so needed welfare benefits from the RoC in accordance with the informal agreement. His applications were rejected, on one occasion simply because he lived in the SBA and not in the RoC. The SBAA took up the matter, but no resolution was achieved. As I understand Ms Young's second witness statement, she expressed understanding as to why there might have been a perception of discrimination at that time, particularly since the other residents of Richmond Village looked on Mr C's case as a test case. However, she says that working arrangements are now much better. This may well be so, but this is a very unspecific and generalised assertion. The crucial factor for the Secretary of State to consider when reconsidering the decision will be the current strength of the informal agreement first entered into in 2005 since that is central to the position adopted on her behalf to date.

(ii) <u>the claimants' other concerns about the informal agreement</u>

393. Again, I emphasise that my decision has been made on the narrow ground referred to above. However, in evaluating the current strength of the informal agreement, the Secretary of State will wish to reflect on a number of other matters about which the claimants have expressed concern.

394. One matter, of course, has been the question of qualification for citizenship which was raised again by the SBAA at the meeting on 21 April 2015 which remains unanswered (see paragraph 370).

395. Another is the efficacy of the temporary residence permits that are issued to the claimants by the RoC. Although each is nominally valid for 3 years, each contains the following provision:

> "This permit is granted to enable the holder to remain in Cyprus temporarily and it may be revoked any time by giving fourteen days' prior notice to the holder".

Mr Bashir says that they have never been "given any guarantee of permanent residence" and this makes them feel insecure if left under the protection of the RoC.

396. Accessing health service provision is another matter about which concerns have been raised. Ms Gregory says this in her second witness statement:

> "… our clients are unable to obtain medical cards to access RoC health services without three years' insurance, which they cannot get without working."

She says that the claimants "cannot access healthcare from the RoC who demand payment, or the SBAA who deny them access to the SBA medical centres."

Principal conclusions

397. In summary, therefore, my principal conclusions are as follows:

1. The Refugee Convention does not, as a matter of international law, apply to the SBAs.

2. The physical and social infrastructure of the SBAs (which are essentially military bases) is incapable of meeting the obligations to a recognised refugee under the Convention that would be expected of the body responsible for governing the SBAs.

3. However, from the outset of its involvement with the claimants and their families, the UK Government, acting in its own right and through the SBAA, adopted the policy of treating them as refugees and acting within the spirit of the Convention.

4. As a matter of domestic public law, the adoption of that policy required the Secretary of State, when making any decision concerning the claimants, to have regard to the spirit of the Convention obligations.

5. Although this policy was only referred to briefly and indirectly in the decision letter, it was referred to sufficiently to enable the conclusion to be drawn that the Convention obligations were considered.

6. In considering the Convention obligations, the Secretary of State was entitled to regard the UK as having discharged those obligations in spirit by entering into an informal agreement with the RoC by virtue of which the RoC recognised the

status of the claimants as refugees and agreed to honour that status pursuant to the MoU of 2003.

7. However, the Secretary of State gave no consideration to the view expressed by the UNHCR in September 2013 that relocation to the RoC was no longer "a desirable or practical option" given the financial circumstances in the RoC and, accordingly, consideration was not given as at the time of the decision letter in November 2014 to the strengths and/or weaknesses of the informal agreement reached in 2005.

8. Accordingly, the decision letter failed to consider and take into account a crucial factor in deciding whether to admit the claimants to the UK within the general discretion available to the Secretary of State.

9. For those reasons, the decision letter falls to be quashed and the matter remitted to the Secretary of State for re-consideration in the light of this judgment and all relevant up-to-date factors.

Concluding observation

398. Those are the conclusions I have reached as a matter of law. I rather doubt that those conclusions will represent the last word on the legal issues in this case and, if the question of what happens to the claimants and their families is not resolved in some other practical way in the meantime, doubtless those conclusions will be considered at a higher level.

399. What I would say, in parting from this case, is that each court that is invited to consider those issues will (as I have done) endeavour to answer them correctly. At the end of the day, however, the solution to this long-standing problem is almost certainly beyond the ability of any court to direct. Indeed, as I have emphasised previously, it is not ultimately for the court to decide what should happen. There are extremely difficult and sensitive issues involved in the resolution of a situation such as this, particularly in current circumstances. However, it is to be hoped that, for the sake of everyone concerned, particularly the young people involved, active and perhaps bold steps will be taken by <u>all</u> relevant parties to seek a solution without further recourse to prolonged legal proceedings. The need to find a permanent solution has been clear for a very long time. It is even more urgent now.

Expression of thanks

400. I am grateful to both legal teams led by Mr Husain and Mr Roe for their assistance. I am grateful to the representatives of each side who provided me with typed versions of the notes they took during the proceedings. It enabled me to have, in addition to my own notes, very nearly a full transcript of each day's proceedings which, in a case involving complicated arguments and the consideration of a large number of documents, was invaluable.

APPENDIX

Derived from Wikipedia

(United States Central Intelligence Agency - CIA World Factbook: Cyprus. 2003.)