JUDICIARY OF
ENGLAND AND WALES

PRESS SUMMARY

The Queen (on the application of Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2019] EWHC

8 February 2019

Judges sitting in the Divisional Court: Singh LJ and Carr J

BACKGROUND:

The Chagos Archipelago lies in the middle of the Indian Ocean. The largest of its Islands ("the Islands") is Diego Garcia. The Islands are part of the British Indian Ocean Territory ("the BIOT"). The Defendant is the principal Secretary of State with responsibility for the oversight of the British Overseas Territories, including the BIOT. However, the BIOT itself is a separate constitutional entity from the Foreign and Commonwealth Office ("FCO") and the United Kingdom Government ("the Government"). It has its own legislature, executive and judiciary, established by its own constitution. The FCO discharges its functions in respect of the BIOT on behalf of the Crown in right of the BIOT.

These claims have their roots in the forced exile of the entire population of the Chagossians, formerly known as "Ilois", between 1966 and 1972 from their homeland on the Islands. No Chagossian has lived on any of the Islands since 1973. Today the Chagossians live in Mauritius, the Seychelles, the United Kingdom ("UK") and elsewhere. The Chagossians are denied the right of abode in the Islands by virtue of the BIOT (Constitution) Order 2004 ("the Constitution Order"), section 9 of which imposes immigration controls in the BIOT, and the BIOT (Immigration) Order 2004 ("the Immigration Order"), (together "the 2004 Orders"). There is no settled civilian population in the BIOT, or any infrastructure to support human occupation in any of the islands other than Diego Garcia, which serves as a staging area for US military operations. All of the land on the BIOT is Crown land.

On 20 December 2012 the Defendant announced a review of BIOT policy, as a result of which the Government would consider afresh the possibility of resettling the Chagossians ("the Review"). As part of the Review the Government commissioned an independent feasibility study from KPMG ("the KMPG Report"). A consultation exercise followed publication of the KPMG Report in 2015 ("the 2015 Consultation"). By written ministerial statement of 16 November 2016 ("the WMS") the Defendant stated that the Government would not support resettlement of Chagossians to the BIOT; it would provide a support package of approximately £40 million over ten years for Chagossians living outside the BIOT ("the Decision", separated as necessary into "the Resettlement Decision" and "the Support Package Decision").

The First Claimant, Ms Hoareau, is a native Chagossian who was born on Diego Garcia in 1953. Her mother and grandparents were also born there. She was, together with her parents

and seven of her siblings, relocated to the Seychelles without consent. The Second Claimant, Mr Bancoult was born on Peros Banhos in 1964. He and his family were prevented from returning in 1968 after visiting Mauritius for hospital treatment. He was a founder and is the current chair of the Chagos Refugee Group ("the CRG"). He has been involved in a representative capacity either directly or indirectly in all of the extensive litigation that has flowed over the years since the Chagossians' removal from the Islands.

By these conjoined judicial review claims:

i) Both Claimants challenge the lawfulness of the Resettlement Decision;

ii) Ms Hoareau challenges the lawfulness of the Support Package Decision;

iii) Both Claimants challenge the (implicit) decision by the Defendant not to remove the statutory and constitutional bar on the Chagossians' right of abode in the BIOT ("the Right of Abode Decision").

Grounds

Several pleaded grounds were in the event not pursued by the Claimants. The Court categorised those grounds of challenge which were pursued as follows:

i) Issue 1: the Right of Abode Decision was unlawful, being irrational when set against the background of compulsory exclusion of the Chagossians from their homeland and the fundamental constitutional nature of the right denied. The Defendant erred in law in failing to give separate consideration to the merits of the lifting of the constitutional ban imposed by the 2004 Orders;

ii) Issue 2: the Defendant acted incompatibly with the Claimants' rights under the European Convention on Human Rights ("the Convention"), in that the Decision represented a disproportionate interference with the Claimants' rights under Article 8 and Article 1 of the First Protocol to the Convention, contrary to section 6 of the Human Rights Act 1998 ("the HRA");

iv) Issue 3: the Defendant failed to comply with the public sector equality duty ("the PSED") in section 149 of the Equality Act 2010 ("the Equality Act");

v) Issue 4: the Resettlement Decision was unlawful, being irrational and flawed by specific errors of fact and misrepresentations to Ministers. Particular weight is placed on the decision to rule out resettlement of the Outer Islands and an alleged failure to take into account (or misrepresentation of) evidence contained in the Whitebridge report. Other material misrepresentations are also said to have been made to Ministers. Mr Bancoult also alleges that Ministers were materially misled about the viability of the non-resettlement package in respect of its deliverability in Mauritius for the benefit of Mauritian Chagossians;

vi) Issue 5: the Defendant failed conscientiously to take into account the product of the 2015 Consultation which was misrepresented to Ministers and failed to re-consult once the USG indicated that it would not object to re-settlement on the Outer Islands;

vii) Issue 6 (Ms Hoareau only): the Defendant acted irrationally in failing to undertake any assessment of the needs to which the support package was directed and decision makers were materially misled on the basis for the £40m figure identified for the support package. There was a breach of legitimate expectation of consultation in relation to the standalone exercise to investigate the scope and value of the support package ground.

JUDGMENT:

Singh LJ and Carr J dismissed the judicial review claims on all grounds.

REASONS:

i) Issue 1 [110] to [128]: it is wrong as a matter of law to suggest that the Government was under any legal obligation to consider restoring the right of abode either separately or in advance of its consideration of the practical questions which arose in its consideration of whether resettlement should be permitted. It was entirely rational for the Government to approach its task as it did. The majority in the Supreme Court in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2016] UKSC 35; [2017] AC 300 was not saying that there was some independent or freestanding obligation on the part of the Government to revisit the constitutional bar. The only source of any obligation to consider abrogating the 2004 Orders could be the public law doctrine of irrationality. The Defendant's conduct could not be said to be irrational;

ii) Issue 2 [129] to [149]: it has already been held authoritatively by the House of Lords in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] 1 AC 453 that the Convention/HRA have no application to the BIOT by which decision the Court is bound and which in any event has not been superseded by subsequent decisions of the ECHR or otherwise. Further, the Claimants cannot properly be described as "victims" of the purpose of Article 34 of the Convention and section 7 of the HRA and any Convention Rights which may have existed in any event no longer exist;

iii) Issue 3 [150] to [193]: the PSED applied to both the Resettlement and the Support Package decisions. However, the entire purpose of the Review was to decide how to proceed in relation to the Chagossians as a group. The decision-making process had due regard to the matters required by section 149 of the Equality Act;

iv) Issue 4 [194] to [254]: The Resettlement Decision was not irrational in the wider sense. It was one based on a consideration of interweaving strands in areas paradigmatically for the Government to determine, primarily costs, defence and security interests, the creation of a new remote island community and environmental considerations. The Government had a difficult and complex balancing exercise to carry out, a task it approached with care and sensitivity. Nor was the Resettlement Decision flawed by specific errors of fact and misrepresentations to Ministers. Finally, there was no failure to take into account alleged non-deliverability of the support package in Mauritius, which

in any event was not a basis for undermining the Resettlement Decision (as opposed to the Support Package Decision);

v) Issue 5 [255] to [299]: the Resettlement Decision was not flawed by misinformation as to the true nature of the responses to the 2015 Consultation and underlying errors of fact;

vi) Issue 6 [300] to [324]: the Government's decision to agree to fund a support package was entirely voluntary. A needs assessment was carried out. Ministers were not misled materially as to the basis of a support package worth around £40million. That was always an approximate and indicative only figure which remains under active consideration by the Government. Ministers did not have less information than the law required, nor were they materially misled. Nor was there a breach of legitimate expectation of consultation on the support package.

The Court concluded by emphasising that these are claims for judicial review, not an appeal against governmental decisions on their merits. The wisdom of governmental policy is not a matter for the courts and, in a democratic society, must be a matter for the elected government alone.

Notes:

(1) References in square brackets are references to paragraphs in the judgment.
(2) This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. The full judgment of the Court and a copy of this press summary are available at www.judiciary.uk