Neutral Citation Number: [2019] EWHC 221 (Admin)

Case No: CO/964/2017 and CO/967/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2019

Before :

THE RIGHT HONOURABLE LORD JUSTICE SINGH
THE HONOURABLE MRS JUSTICE CARR DBE

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Between :

THE QUEEN (on the application of
(1) SOLANGE HOAREAU
(2) LOUIS OLIVIER BANCOULT) **Claimants**

- and -

SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS **Defendant**

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Mr Ben Jaffey QC, Mr Toby Fisher and Mr Admas Habteslasie (instructed by **Leigh Day**) for the **First Claimant**
Mr Edward Fitzgerald QC, Mr Paul Harris SC and Ms Angela Patrick (instructed by **Clifford Chance LLP**) for the **Second Claimant**
Sir James Eadie QC, Mr Steven Kovats QC, Mr Kieron Beal QC, Ms Sarah Wilkinson, Ms Penelope Nevill and Mr John Bethell (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 10th – 14th December 2018

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Approved Judgment

Lord Justice Singh and Mrs Justice Carr:

Structure of judgment

1. This is the judgment of the Court and is divided into the following sections:

2. For the purpose of reaching our conclusions we have taken full account of the closed material and submissions within the confidentiality ring established by our order dated 25 September 2018 (as amended) ("the Confidentiality Ring"). It has, however, not proved necessary in order for us to explain our reasoning to set out in this judgment any of the substance of that material. For the avoidance of doubt, nothing that we say is intended to lift the confidentiality attaching to the sensitive materials within the Confidentiality Ring.

Part I : Introduction

3. The Chagos Archipelago lies in the middle of the Indian Ocean. It is approximately 2,200 miles east of Mombasa, Kenya, and approximately 1,000 miles south-west of the southern tip of India. The largest island is Diego Garcia. The group of islands (together "the Islands") includes Salomon, Peros Banhos and a number of smaller islands. The Islands are part of the British Indian Ocean Territory ("the BIOT").

4. The Defendant is the principal Secretary of State with responsibility for the oversight of 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.

5. 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.

6. 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.

7. 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").

8. The First Claimant, Ms Solange Hoareau ("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 Louis Bancoult ("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.

9. 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").

10. As will become apparent the arguments advanced on behalf of the Claimants have been extremely wide-ranging and in places invite detailed scrutiny of past events, presentations and decision-making within government. The approach of the Defendant towards the scope of the allegations he faces has been a permissive one. Thus, even though objection could have been made, he has consented to proposed amendments by the Claimants to expand their claims (and has been prepared to address claims that have not been pleaded at all).

11. There have been numerous and often lengthy interlocutory hearings before us since January 2018 leading up to the full hearing, including on 20 February, 20 April, 16 and 17 May, 28 June, 4 and 5 July, 25 September and 15 November 2018. Many have required the attendance of and representation from public interest immunity advocates, who have spent weeks examining materials both outside and within the Confidentiality Ring. For the purposes of trial we have been provided with 16 open trial bundles, 2 bundles of closed material, 6 bundles of authorities, alongside open and closed skeleton arguments. We have considered all the materials and arguments before us. In summary, the process has been an inclusive and exhaustive one.

Part II: Background

12. The first inhabitants of the Islands arrived in the mid-18th century. By the beginning of the 20th century, there was a settled population of African, Malagasy and Indian origin, working on coconut plantations, fishing, growing small kitchen gardens and rearing chickens and ducks. The Islands, along with Mauritius, were ceded by France to the Crown by the Treaty of Paris in 1814. By the early 1960s the Islands' population was in decline as low wages, monotonous work, the lack of facilities and great travelling distance to Mauritius and the Seychelles discouraged the recruitment and/or retention of labour. The plantations suffered from a lack of investment.

13. In 1964 discussions began in earnest between the Government and the United States ("US") Government ("the USG") over the establishment of US defence facilities in the Indian Ocean. The USG asked for a territory with no inhabitants, and negotiations started for the UK to lease Diego Garcia to the US for this purpose. In November 1965 the UK reached agreement on the detachment of the Islands from Mauritius on terms of payment of £3m plus resettlement costs to the Mauritius Government. The Islands became part of the BIOT, as reflected in the BIOT Order in Council (SI 1965/1920). The motivation for the creation of the BIOT was the provision of a military base without a civilian population for as long as necessary for the defence purposes of the UK and her allies, in particular the US. By exchange of notes dated 30 December 1966 ("the Exchange of Notes"), the Government and the USG agreed that the BIOT should be available "for the needs of both governments for defence" "for an indefinitely long period", comprising 50 years initially, followed by a 20 year period unless notice to terminate was given ("the 1966 Agreement").

14. Between 1966 and 1972 the Government relocated all Chagossians to Mauritius and the Seychelles with a view to facilitating the ability of the USG to establish a naval base on Diego Garcia. It is not necessary for present purposes to set out the full detail surrounding the circumstances of exile which can in any event be found in the judgment of Ouseley J in *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB)

("*Chagos Islanders v AG*"). That was group litigation brought on behalf of the Chagossians in both Mauritius and the Seychelles. The Court of Appeal has described the treatment of the Chagossians by the Government as "shameful", evidencing the "pauperisation and expulsion of the weak in the interests of the powerful" (see *Chagos Islanders v AG* [2004] EWCA Civ 997 at [6]). The House of Lords has stated, and the Defendant accepts, that the exile was achieved with a callous disregard of the interests of Chagossians (see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] 1 AC 453 ("*Bancoult 2*") at [10]).

15. In 1971 the Commissioner of the BIOT, under the instruction of the Government, enacted an Immigration Ordinance ("the 1971 Ordinance") whereby it was unlawful for a person to enter or remain in the BIOT without a permit. Section 4 of the 1971 Ordinance was quashed by the Divisional Court in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2001] QB 1067 ("*Bancoult 1*"). In response the Government commissioned feasibility studies culminating in a 2002 Feasibility Study ("the 2002 Feasibility Study") which concluded that resettlement would not be practically feasible.

16. In June 2004 the Government made the 2004 Orders. A challenge to the *vires* and rationality of the 2004 Orders was rejected by a majority of the House of Lords in *Bancoult 2*. An application to set aside that decision was unsuccessful before the Supreme Court in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2016] UKSC 35; [2017] AC 300 (*"Bancoult 4"*).

17. Following *Bancoult 2* and *Bancoult 4*, it therefore remains prohibited under the 2004 Orders for Chagossians to return to live in the BIOT. Many of the Chagossians have been given British citizenship pursuant to sections 2 and 6 of the British Overseas Territories Act 2002, which gives them a right of abode in the UK if they do not wish to live in countries such as Mauritius or the Seychelles, of one or other of which most are also citizens. Visits by Chagossians have been arranged and funded by the BIOT authorities on several occasions over recent years.

18. In 1972 the Government agreed to pay the resettlement costs of those displaced from the BIOT to the Mauritian Government in the sum of £650,000. In 1982 the Mauritius Parliament established the Ilois Trust Fund, tasked with disbursing government monies to promote the economic and social welfare of the Ilois and of the Ilois community in Mauritius. Following the Chagossians' rejection of the settlement package of £1.25m negotiated between the Government and Mr Vencantessen, a Chagossian from Diego Garcia who in 1975 had brought proceedings against the Foreign and Defence Secretaries, alongside the Attorney-General, the Government went on to pay £4 million to the Ilois Trust Fund Board in full and final settlement of any claims by those who were displaced. This followed arm's length negotiations in which the Chagossians were advised by their own lawyers. It is common ground that the Government has no liability to pay any further compensation (see *Bancoult 2* at [21]).

19. The compensation payment was made to the Chagossians as a whole. However no payments were ever made to the Chagossians in the Seychelles, who have never received any compensation. It would have been open to the Seychellois Chagossians to have participated in the negotiations alongside the other Chagossians (as recorded by Ouseley J in *Chagos Islanders v AG* at [685]). However, factors such as the view of the Seychelles Government that all Seychellois Chagossians were Seychellois and that no

differentiation should be made between its citizens may have played a part in this lack of engagement.

Part III: Overview of the Review and the Decision

20. On 20 December 2012 the Defendant announced the Review. The Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs (Mr Mark Simmonds MP ("Mr Simmonds")) announced on 8 July 2013 the start of consultations to inform the shape of a new feasibility study to examine resettlement with a commitment to fairness, transparency and inclusivity.

21. Initial consultations took place with Chagossians in July and August 2013. Amongst other things, the Chagossians referred to a 1999 document entitled "Chagos Archipelago: Report by Sheridans" ("the Sheridans Report") setting out the Chagossians' desire to resettle the Islands and indicating private sector interest in supporting commercial development in the Islands and to a 2008 document entitled "Returning Home: A Proposal for the Resettlement of the Chagos Islands" which included a costed proposal for resettlement from a former director of the Overseas Development Institute, at approximately £25 million.

22. In September 2013 the Defendant published a "Summary of the Initial Consultation: Taking Stock of the UK Policy towards the Resettlement of the [BIOT]". On 23 September 2013 Mr Simmonds stated that the Government expected to conclude its policy review before any discussions with the USG in relation to any extension of the 1966 Agreement.

23. On 19 November 2013 Mr Simmonds announced the terms of reference for an independent feasibility study on resettlement of the BIOT. It would look at the full range of options for resettlement and would include all of the islands of the BIOT, including Diego Garcia "with its vital military base". Shortly afterwards, on 27 November 2013, the House of Lords held a debate on the announcement and terms of reference.

24. The KPMG Report was published in February 2015. Although its contents will need to be considered in more detail as set out below, it concluded that resettlement was feasible. It assessed three resettlement options, each of which was premised on the use of infrastructure on Diego Garcia:

    i) Large-scale resettlement (population 1,500) with economic activities such as public sector employment, employment on the US Naval Support Facility, tourism and fisheries. This would require infrastructure on Diego Garcia and the outer islands;

    ii) Medium-scale resettlement (population 500) with livelihood options that could be supported in a number of ways such as public sector employment, engagement on the US Naval Support Facility, artisanal fishing and monitoring the marine protected area ("MPA");

iii) Pilot, small-scale resettlement (population 150) with incremental growth over time, and limited infrastructure on Diego Garcia.

25. The KPMG report recommended a series of next steps: establishing how many Chagossians wanted to resettle and on what basis; the conducting of further studies and investigations; the preparation of appropriate constitutional and management structures for potential resettlement; investigating potential opportunities for access to the facilities of the US naval facility and for the provision of services to the US naval facility; investigating and promoting private sector interest in opportunities to support resettlement; investigating and addressing other related issues such as land and accommodation ownership.

26. On 4 August 2015 the Government launched a consultation to understand the demand for resettlement from Chagossians with a paper entitled "[BIOT] Policy Review of Resettlement Consultation with Interested Parties" ("the 2015 Consultation"). Views were sought on how many Chagossians wanted to resettle in the BIOT; on likely costs and liabilities to the UK taxpayer; on alternative options to resettlement.

27. On 28 September 2015 the CRG had a meeting with the BIOT Deputy Commissioner as part of the consultation process. Seychelles Chagossians expressed a unanimous desire to return to the Islands but also concern about the proposed options for resettlement. Proposed restrictions suggesting that the Chagossians would be treated as workers only, rather than belongers with a right of abode, were unacceptable. In relation to alternatives to resettlement, they requested financial support for families in poverty, pensions for the elderly and compensation for their expulsion and exile from the Islands.

28. Responses to the 2015 Consultation were summarised in a document entitled "BIOT Resettlement Policy Review: Summary of Responses to Public Consultation" on 27 January 2016 ("the Summary of Responses"). It recorded that the vast majority of Chagossians were in favour of resettlement in principle but there were more nuanced views about the scenarios presented as the most realistic description of how it might work. It noted that most of those in favour of resettling stated that they would be inclined to seek jobs on the military facility or with the BIOT administration. There was a degree of uncertainty expressed in relation to alternatives to resettlement but around a third would not wish to participate in such options.

29. In April 2016 the US President made a state visit to the UK and discussed the policy review with the Prime Minister and Leader of the Opposition.

30. In the same year Ms Hoareau and other Seychelles Chagossians sought to challenge the consultation process set out above as legally flawed. Permission to seek judicial review was refused (see *R (Hoareau and others) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 2102 (Admin)).

31. Also in the same year, judgment was given in *Bancoult 4*. That was litigation which arose out of the proceedings in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2014] EWCA Civ 708 (*Bancoult 3)*. *Bancoult 3* was a challenge by Mr Bancoult to the Defendant's decision to create the MPA in the BIOT. During the course of those proceedings new documents, including a draft of the 2002 Feasibility Study, emerged from the Treasury Solicitor. Those documents ought to have

been disclosed in *Bancoult 2* and on the basis of this non-disclosure, Mr Bancoult sought to set aside the House of Lords decision in *Bancoult 2*. As set out above, a majority in the Supreme Court in *Bancoult 4* dismissed the application.

32. The Resettlement Decision was taken at a meeting of the National Security Council ("NSC") on 15 March 2016. The NSC was presented with three options:

i) Option A: resettlement including Diego Garcia;

ii) Option B: resettlement on the Outer Islands, excluding Diego Garcia;

iii) Option C: no resettlement with a package of additional support.

33. At the close of the meeting the NSC decided to rule out options A and B and to review option C. The question of a support package was thereafter further investigated.

34. On 16 November 2016 Baroness Anelay, the Minister of State for Foreign and Commonwealth Affairs, issued the WMS:

> "On 24 March 2016 the former Parliamentary Under-Secretary for Foreign and Commonwealth Affairs, the hon. Member for Rochford and Southend East (James Duddridge) informed the House that the Government would be carrying out further work on its review of resettlement policy in the British Indian Ocean Territory (BIOT). I would now like to inform Parliament of two decisions which have been made concerning the future of BIOT.
>
> Parliament will be aware of the Government's review and consultation over the resettlement of the Chagossian people to BIOT. The manner in which the Chagossian community was removed from the Territory in the 1960s and 1970s, and the way they were treated, was wrong and we look back with deep regret. We have taken care in coming to our final decision on resettlement, noting the community's emotional ties to BIOT and their desire to go back to their former way of life.
>
> This comprehensive programme of work included an independent feasibility study followed by a full public consultation in the UK, Mauritius and the Seychelles.
>
> I am today announcing that the Government has decided against resettlement of the Chagossian people to the British Indian Ocean Territory on the grounds of feasibility, defence and security interests, and cost to the British taxpayer. In coming to this decision the Government has considered carefully the practicalities of setting up a small remote community on low-lying islands and the challenges that any community would face. These are significant, and include the challenge of effectively establishing modern public services, the limited healthcare and education that it would be possible to provide, and the lack of economic opportunities, particularly job prospects. The

> Government has also considered the interaction of any potential community with the US Naval Support Facility – a vital part of our defence relationship.
>
> The Government will instead seek to support improvements to the livelihoods of Chagossians in the communities where they now live. I can today announce that we have agreed to fund a package of approximately £40 million over the next ten years to achieve this goal. This money addresses the most pressing needs of the community by improving access to health and social care and to improved education and employment opportunities. Moreover, this fund will support a significantly expanded programme of visits to BIOT for native Chagossians. The Government will work closely with Chagossian communities in the UK and overseas to develop cost-effective programmes which will make the biggest improvement in the life chances of those Chagossians who need it most.
>
> Parliament will also be aware that the agreements underpinning the UK/US defence facility will roll over automatically on 31 December if neither side breaks silence. In an increasingly dangerous world, the defence facility is used by us and our allies to combat some of the most difficult problems of the 21st century including terrorism, international criminality, instability and piracy. I can today confirm that the UK continues to welcome the US presence, and that the agreements will continue as they stand until 30 December 2036."

35. Parliamentary Debates on the WMS took place in both Houses the following day. In answer to the following question from Patrick Grady MP (Glasgow North) of the Scottish National Party:

> "What have the Government actually decided here? They say they will not facilitate resettlement, but do they accept or not that the Chagossians have a right of return or a right of abode? If I won the lottery and decided to spend my winnings on building a paradise retreat for myself on one of the Chagos Islands, would that kind of development be permitted?"

Sir Alan Duncan, Minister of State for the FCO, replied:

> "It would potentially be illegal. In my view, it is quite clear that our decision is that there should not be resettlement or repopulation on these islands."

Part IV: The KPMG Report

36. The KPMG Report was a key document for the purpose of the decision-making process. At a NSC meeting on 10 March 2015 Ministers were told that, if they had not already done so, they should read it in full before decisions were taken. It would not be appropriate for us to be drawn into the full detail of what was a very lengthy document, including Appendices. But given the reliance placed by the Claimants on its conclusion that resettlement was feasible, some further elaboration is necessary.

37. The KPMG study was conducted by a multi-disciplinary team over a ten-month period between April 2014 and January 2015. The team was tasked with preparing a 'neutral' analysis of different options for the resettlement of BIOT. The study considered the following:

    i) The likely cost to the UK Government of establishing and maintaining a settlement;

    ii) Whether such a settlement could be self-sustaining;

    iii) The associated risks, environmental implications and full costs of mitigation of any resettlement.

38. The views from a range of stakeholders were sought in the open consultation phase of the study, including from the Chagossian community. An environmental questionnaire was also developed to seek views from stakeholders on the various environmental issues. In addition, KPMG undertook field research in the BIOT, visiting Diego Garcia and 13 of the Outer Islands, including Ile du Coin and Boddam, which were considered in detail as part of the resettlement option analysis.

39. The analysis focused on three resettlement options as already identified above but repeated for ease of reference as follows:

    i) Option 1: Large-scale resettlement (population 1500). This sort of development would require infrastructure on Diego Garcia and the Outer Islands, such as the Ile du Coin or Boddam;

    ii) Option 2: Medium-scale resettlement (population 500). This option would also involve building on Diego Garcia;

    iii) Option 3: Pilot, small-scale resettlement (population 150), with incremental growth and limited infrastructure on Diego Garcia.

40. Whilst each option was therefore premised on an ability to use Diego Garcia, KPMG noted repeatedly that USG approval to such access was not guaranteed.

41. KPMG's findings were structured under the following headings: legal and political analysis (section 4); environmental analysis (section 5); infrastructure analysis (section 6); and economic and financial analysis (sections 7 and 8).

42. The KPMG Report stated that there were no fundamental legal obstacles that would prevent a resettlement of the BIOT from going ahead, though the legal and constitutional framework would require significant amendment "should resettlement go

ahead". Decisions would be required *inter alia*: a) on whether amendment of the existing constitutional framework including the 2004 Orders, setting out the right of Chagossians to return and live on BIOT (including emotive questions of citizenship), would be needed, or whether a new BIOT constitution should be drafted; b) on the complex issue of land rights in relation to land formerly owned by plantation owners; c) on how BIOT would be governed, and how its laws would be administered and adjudicated; d) the potential extension of Parliamentary and EU oversight, as well as human rights and environmental protections, to the BIOT.

43. The KPMG Report also identified the fact that successive Mauritian governments had asserted sovereignty over the Islands arguing that they were detached illegally, a claim rejected by the Government. This was a political issue that would need to be navigated. There were also separate ongoing arbitration proceedings over the UK's right to establish the MPA. Further, diplomatic and legal issues would arise in light of commitments made by the Government and the USG that the Islands would be available to meet both governments' defence purposes and that each would seek the other's approval were any substantial construction to be built.

44. The KPMG Report's environmental analysis concluded that Diego Garcia would be the "most suitable/least risky location for resettlement". It already had an airport and port. In comparison the Outer Islands were remote, demanding environments, and the building of the required infrastructure would be "invasive and cause major environmental damage to the coral reefs, fish and other marine life". The continued physical existence of the Islands, and the prospect of human inhabitation there, depended on the health of their underlying coral reefs. Maintained reef health was critical for island longevity and the prospects of any resettled population. The report described the question of whether reef growth would outpace sea level rise, coastal erosion and flooding over the coming decades as a "cause for concern". Many factors influence reef health, and therefore growth, making projections uncertain. Available reef growth estimates were not recent and growth might reduce as ocean acidification and other reef disturbances increased. (In a footnote relied upon by the Claimants KPMG noted that coral reef accretion rates in Chagos had not yet been determined; the net coastal change on Diego Garcia was close to zero, with the position on the Outer Islands not yet being clear). In the very long term, the Islands could become uninhabitable or submerged.

45. KPMG assessed that collateral environmental damage from any resettlement, would be unavoidable. For example, if an airport were to be built (which would be "likely required" for Options 2 or 3), the typical approach would be to raise the ground causing significant environmental impact due to the need for rock infill. Option 1 would involve "very substantial" or "massive" construction and environmental impacts, including a serious potential threat to the integrity of the MPA and reef health. Options 2 and 3 would involve "some impacts" on such metrics. Any form of development had the potential to impact the MPA. In short, climate and environmental considerations were "certainly a major constraint, but not necessarily a complete impediment to resettlement".

46. In its conclusion on environmental analysis KPMG identified the emergence of a number of key policy implications with "much significance" to resettlement decisions. These included consideration of whether any early phase of resettlement would include the Outer Islands, all of which lay within the MPA. Even with zoning, impacts from

major infrastructure would likely be very significant and harmful to the MPA. Even relatively light or modest fishing could be harmful to fish populations and coral reef health. Climate change and sea level rise were major issues, though "not necessarily a complete impediment to resettlement" albeit that evacuation in the event of sea level rise, coastal erosion and related impacts could not be precluded.

47. The KPMG Report noted that BIOT infrastructure had become dilapidated and any resettlement would require infrastructure to be built anew to meet modern quality, efficiency and environmental standards. A key focus was the lack of an airport or other landing strip provision on the Outer Islands. Though costs were difficult to estimate, the building of such would be expensive, due to the increased relative costs of resource acquisition and transportation to the BIOT.

48. The study examined livelihood options for a resettlement community, concluding that the main opportunities would be in the public sector (maintaining and operating the infrastructure) and in the US naval facility. The existing infrastructure on Diego Garcia was a major practical and economic advantage, provided that access could be agreed. Diego Garcia was deemed to be the most suitable location for resettlement. The suitability of Diego Garcia over Ile du Coin and Boddam also emerged from the questionnaire surveys completed by Chagossians who in the main did not consider other islands suitable for resettlement. Employment opportunities were identified in the public sector and the US naval facility. There were income opportunities in artisanal fishing and environmental activities related to fishing, and the potential for the development of high-end tourism and eco-tourism. The possibility of European Development Funding and technical assistance was noted.

49. The KPMG Report contained a summary of indicative costs estimates, with the figures at the upper end being based on high standard engineering services. The indicative total capital cost for Option 1 over six years was given at £423.3 million, with indicative annual Operation & Maintenance ("O&M") costs at £21.5 million, through to Option 3 over three years with an indicative total capital cost at £65.4 million with indicative annual O & M costs at £4.7 million per year. A variant on Option 3 reducing the number of settlers was given a capital cost estimate of £32.4 million and annual operating subsidies of £5 million (although the indicative population of 50 people was arguably lower than a reasonable and dynamically sustainable level).

50. KPMG stated that these estimates were "subject to extremely large uncertainties. They represent[ed] a judgment taking into account many factors that could affect the final costs. These include[d] very significant uncertainties inherent in the physical terrain, the environmental protection design implication costs, the contracting scenarios, and the risk appetite for any contractor newcomers on BIOT".

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

Part V: The decision-making process

52. The decision-making process adopted by the Government is set out in full in the first witness statement of Dr Peter Hayes ("Dr Hayes") of the Overseas Territories Directorate of the FCO ("OTD"). What follows is a summary of its main features. Its relevance is to set the context for the challenge by the Claimants on irrationality in particular.

53. On 20 December 2012, the day that the European Court of Human Rights ("the ECHR") handed down its decision in *Chagos Islanders v United Kingdom* (2013) 56 EHRR SE 15 (holding the Chagossians' challenge inadmissible), the Defendant announced that the Government would take stock of its policy towards resettlement of the BIOT, noting that whilst there were fundamental difficulties with resettlement, the Government would be as positive as possible in its engagement with interested parties.

54. On 5 March 2013, upon the Prime Minister's initiative, a meeting took place attended by him, the Deputy Prime Minister, the Defendant and the Secretary of State for Defence and the Secretary of State for International Development, together with the National Security Adviser ("NSA"). A paper had been prepared by FCO officials for the meeting, posing the question of whether or not the Government's policy of non-resettlement should be continued. Other departments had previously put up submissions to their Secretaries of State. At the meeting it was decided that the policy should be reviewed through a feasibility study. The Defendant was invited to propose terms of reference. All options were to be presented for ministerial consultation, including partial resettlement of the Outer Islands and enhanced visiting opportunities, and none ruled out by officials in advance. The possibility of exploring joint UK/US funding was raised, depending on the outcome of the feasibility study.

55. The design of the study was taken forward over the next year, involving a team from the FCO Projects Task Force ("the review team"). During the summer of 2013, meetings took place in the UK and abroad with governmental and non-governmental stakeholders (principally Chagossian groups) to gather views about the scope of the study. On 8 July 2013 the Foreign Office Minister announced that a new feasibility study of BIOT would be conducted. In September 2013 the FCO produced a summary of the initial consultation. In October 2013 the review team produced a report setting out recommended next steps, procurement of the new feasibility study and other administrative specifications. It recommended that the new study be broader in scope and more transparent than the 2002 Feasibility Study. It recorded the finding of the initial consultation, *inter alia*, that most, though not all, Chagossians said that they would like to return or at least have the right to return to the BIOT. Following this submission the Ministry of Defence ("MoD") confirmed its agreement that Diego Garcia should be included for consideration within the study.

56. On 18 October 2013 the Director General for Defence and Intelligence at the FCO wrote to Tom Kelly of the US State Department to give the USG an update. He indicated that the Defendant had agreed that a technical feasibility study would be initiated in the next few months to assess the practical and other factors that might affect any decision to permit resettlement in the BIOT and was minded to include Diego Garcia within the study. Mr Kelly responded by letter on 25 October 2013 stating that the USG would work with FCO officials on the project. He noted the underlying security concerns attaching to any resettlement:

> "The new proposal under study, which will consider resettlement not only on the outer islands but also potentially on Diego Garcia itself, will potentially raise greater security concerns. A resettlement study that includes Diego Garcia as a potential location must also examine infrastructure capacity constraints on the island and the lack of compatibility of that infrastructure's military mission with the provision of life support for permanent civilian residents."

57. In November 2013 the Prime Minister was briefed by the FCO that it was ready formally to commission a team of independent experts with the objective of providing a credible and transparent assessment of the practical and other challenges to resettlement, as well as the likely resource implications of various options, which could then inform a considered decision on future policy. Ministers would want to demonstrate that they had considered the issues "equitably and with sympathy".

58. KPMG was formally commissioned in March 2014. KPMG prepared an inception report in April 2014. Ministers were kept informed of progress; Mr Simmonds and Mr Robert Hannigan of the FCO visited the BIOT.

59. On 11 November 2014 the Prime Minister was briefed by the NSA with a reminder of progress to date, including the meeting on 5 March 2013. The Defendant was to commission a feasibility study to review policy of BIOT, looking at all options and costs and making clear "we took our responsibility towards the Chagossians seriously, but without raising hopes of further substantive concessions". The new study would not put forward a recommended option. Rather decisions would be made after its completion by means of a write-round to Ministers, probably the NSC members.

60. The Prime Minister made a handwritten note to the NSA in response on 13 November 2014:

> "..My memory of the NSC is more positive – we decided, historically, to commission the study to see <u>what could</u> be done….Try and reach some feasible conclusions <u>before</u> the election."

(The reference to the NSC must in fact be a reference to the meeting on 5 March 2013.) The Prime Minister approved the use of a write-round approach. The NSA faithfully passed the Prime Minister's views on to the FCO on 17 November 2014.

61. Key draft conclusions from the KPMG Report were circulated between Ministers, as the draft report was announced by written ministerial statement on 24 November 2014. Interested departments were asked for and provided policy advice.

62. The finalised KPMG Report was announced by written ministerial statement dated 10 February 2015.

63. The Government also sought the policy position of the US on the viability of resettling the BIOT. Rose Gottemoeller, Under Secretary of State of the Arms Control and

International Security, set out the USG's position in writing on 13 February 2015 ("the Gottemoeller letter"), alongside a classified letter from her Department of Defense colleagues to the MoD. In her letter she stated:

> "…The United States has serious concerns about the implementation plan for the potential resettlement of Diego Garcia. On many occasions Diego Garcia served as a critical staging area for military operations and plays a vital support role in our joint national security activities on a daily basis. Maintaining the security of the facility and security of US and UK personnel is paramount…
>
> The United States considers the roll-over of the Exchange of Notes governing our presence on Diego Garcia a matter of national security. We will oppose any action that would put the roll-over of Exchange of Notes in jeopardy….the United States does not believe that resettlement automatically requires cancellation and renegotiation of the Exchange of Notes. However, maintaining the Exchange of Notes may present practical limitations on the scale of resettlement. Our strong preference would be for an outcome that allows for roll-over of the Exchange of Notes.
>
> The United States also takes issue with some of the KPMG resettlement report's assumptions. …
>
> One of our most significant concerns with the KPMG report is the proposed development of certain industries on Diego Garcia. As a result of security concerns, the United States strongly opposes the development of any form of tourism on Diego Garcia. Additionally, our government will not permit the US military airfield on Diego Garcia to transport tourists. The travel of tourists to Diego Garcia represents an unacceptable threat to safe and secure functioning of our military operations on the island, ... We do not object to outer island tourism that is not dependent on transport through Diego Garcia.
>
> The United States will also not participate in any indirect payments supporting resettlement or direct payments to the Chagossians …"

64. The letter went on to state that any planning for resettlement on Diego Garcia should include the requirement to procure all services and infrastructure independently of the naval support facility there. The KPMG Report assumed US financial support when estimating the costs of resettlement and, as such, substantially underestimated the costs that would be involved. The presence of a civilian population on Diego Garcia would require security upgrades to secure sensitive military sites adequately, which the USG would expect the Government wholly to cover. The USG confirmed that it remained committed to support visits by Chagossians to the BIOT and would commit to

supporting increased visits in the future as an alternative to resettlement. It would also continue to commit to hiring qualified candidates from the Chagossians from Mauritius and Seychelles for employment on the naval support facility.

65. Work towards a meeting of the NSC following the KPMG Report had commenced in January 2015. A NSC(O) meeting (where the NSC meets through senior officials alone in preparation for a full NSC meeting) took place on 25 February 2015. In advance a neutral presentation of options had been prepared, including the KPMG Report and the Gottemoeller letter. The meeting was attended by the NSA, officials from No. 10 Downing Street, the Home Office, the FCO, DfID, MoD, the Secret Intelligence Service, the Department for Energy and Climate change, HMT, the National Crime Agency, the Attorney-General's Office, the Department for Business, Innovation and Skills and Economic and Global Issues in the Cabinet Office. Dr Hayes accompanied the Permanent Under Secretary. A number of serious obstacles to resettlement were identified. No NSC(O) member was in favour of the resettlement option.

66. There then followed a write-round procedure with the Secretaries of State for Defence, DfID and the Defendant making submissions to the Prime Minister, followed by a meeting of the NSC on 10 March 2015. The Prime Minister had also received a briefing from the NSA dated 27 February 2015 setting out background and the three options to be identified: no change; increased support but no resettlement; resettlement options. The NSA identified the likely main arguments against resettlement and then went on:

> "As for my advice, this really does come down to the balance between righting what was unquestionably a serious historic wrong, and the on-going costs and liabilities….Where I do think there are significant problems, however, is around costs. It is easy to imagine the whole thing escalating and our getting involved in building runways and harbours accommodation blocks, while struggling to attract hotels and tourism, and finding ourselves committed to indefinite social security support because of lack of job opportunities. In short, it can be done, but it would almost certainly turn out a great deal more expensive than even the highest estimates in the feasibility study.
>
> So, if you want to push a resettlement option through, I think you will have some opposition to overcome – you will need strong support from the DPM and the Leader of the House. ..."

67. No decision was taken at the meeting of 10 March 2015. The NSC did not feel yet in a position to take one, although the meeting had been a useful opportunity to exchange views. Rather, it was decided that further work by officials was required on both resettlement and non-resettlement options.

68. A written ministerial statement confirming future work plans was made on 24 March 2015. As anticipated, further work was then carried out, with all options still on the table, and including work on updated costs assumptions and the carrying out of the 2015 consultation. Additional investigations were also carried out to explore tourism options in the BIOT. In this context a report was commissioned from an expert travel

consultancy, Whitebridge Hospitality Limited ("Whitebridge"), on the practicality and economics of high end tourism on Peros Banhos and Salomon ("the Whitebridge Report"), dated 12 November 2015.

69. The NSA briefed the Prime Minister by memorandum of 22 January 2016 with an update and asking whether he was content to proceed by way of write-round or wanted a meeting of the NSC. The Prime Minister indicated that he wanted an NSC discussion for which a provisional date in March 2016 was then set. Further inter-departmental meetings took place, alongside submissions to Ministers. The Defendant and the Secretary of State for DfID made submissions to the Prime Minister in early March 2016. A NSC(O) meeting took place on 9 March 2016, which included consideration of the responses to the 2015 Consultation, after which the Prime Minister was again briefed by the NSA (by memorandum of 11 March 2016).

70. In that briefing the NSA recorded that from a global diaspora of 9,000 Chagossians, there were only 832 responses (less than 10%). 77% of these were from Mauritius and the Seychelles, only 21% from the UK. Although 98% of the respondents expressed a desire to resettle, 60% were second generation Chagossians with no direct experience of life there, and only 25% expressed themselves content with the likely conditions of life in the BIOT if they were to resettle. The NSA took the Prime Minister to the three main options, none of which were straightforward or risk free. In relation to resettlement on the Outer Islands he said:

> "…This option was effectively discounted as too risky in the independent KPMG study. Two settlements of up to 500 people in total would cost about £326m (non ODA-eligible) over 10 years. The outlying islands are very remote – 240km from Diego Garcia and 840km from the Maldives. They are low lying and very small, with no existing infrastructure, and therefore vulnerable to rising sea levels. Niche tourism could be introduced to provide modest employment, but it would be risky and potentially non-viable, with HMG needing to underwrite any private investment. Provision of western standards of education, healthcare and governance would be impossible to guarantee, and DfID are convinced that there would be a high risk of social problems …"

71. The NSA went on to state:

> "You will want to test these options at the meeting. But, in my view, the two resettlement options are not viable on practical grounds and pursuing them would carry a serious risk of failure/ructions with the US. I therefore recommend that you use this meeting to decide against the resettlement options;…You could then make a final push to: a) Produce the strongest possible non-resettlement package; and work up a robust communications strategy to underpin it; …"

72. The full NSC meeting took place on 15 March 2016. It was attended by the Prime Minister, the Defendant, the Defence Secretary, the Chancellor of the Duchy of Lancaster (Oliver Letwin MP) ("Mr Letwin"), the Home Secretary, the Secretary of State for Energy and Climate Change, the Attorney General and the Minister for DfID. The NSC had a briefing paper, accompanied by an Annex on the public sector equality duty, and also a slide pack, the KPMG report, the Summary of Responses, together with the 2015 Consultation and slides from the 2015 NSC meeting.

73. The Permanent Under Secretary of State at the FCO addressed the three main options. In relation to options B and C, he is recorded as saying that the Outer Islands were a five-hour boat trip from the US air base:

> "The largest was the size of Hyde Park, which ruled out building a landing strip, and the highest point was only 6 feet above sea level. This would be an even more challenging location for resettlement than Option A. Option C would involve a package of ODA-eligible development assistance designed to improve the lives of Chagossians in Mauritius and the Seychelles, and an enhanced programme of heritage visits to the islands. These visits were valued by the Chagossian diaspora, who retained an attachment to the islands. Although only 9% had responded to the latest consultation, 97% of those responding had expressed a desire to resettle, though the consultation had found this was based on an unrealistic view of the conditions they would face."

74. The NSC decided collectively that options A and B (resettlement) were ruled out. Mr Letwin would conduct a review of option C, including the proposed development package and recommend whether it should be enhanced. DfID would fund and help design the package of assistance and, working with the FCO, ensure its delivery, including in Mauritius and the Seychelles. No announcement would be made until after President Obama's visit to the UK in late April 2016.

75. Plans for this further work were put in hand, led by Mr Letwin. The Prime Minister was updated on progress by the NSA on 6 April 2016. An information note dated 14 April 2016 was produced by the FCO with an assessment of a programme that might benefit Chagossians in the UK. A meeting took place on 18 April 2016 between Mr Letwin, the Minister for DfID and officials from DfID, MoD, the FCO and the National Security Secretariat. It was agreed that the British High Commission would advise on the state and costs of the health and education systems in Mauritius and the Seychelles and the FCO and DfID would put forward a proposal for estimated costs of a package, together with the assumptions underpinning such a package.

76. On 22 April 2016 the Prime Minister discussed with the US President the possibility of the US matching the UK's contribution to a non-resettlement package and two days later wrote to him on the same subject. President Obama responded on 6 July 2016 to the effect that the USG would not contribute to a development assistance package for the Chagossians.

77. On 25 May 2016 a meeting took place between Mr Letwin and the Minister for Overseas Territories to discuss the method and manner in which the support package should be funded. Work on the support package continued, and FCO officials prepared a submission to the NSC dated 26 May 2016. The NSA also continued to brief the Prime Minister (on 17 June) including as to the lack of progress with the US on assistance with funding a non-resettlement package.

78. By this time, in May 2016, the Mauritian Prime Minister had announced that if the UK did not provide a date on which it would return sovereignty of the BIOT to Mauritius by the end of June 2016, he would seek a referral by the UN General Assembly to the International Court of Justice. Additionally, following the outcome of the EU referendum on 23 June 2016 and the subsequent resignation of the Prime Minister, a new government was formed. This meant that the NSC decision taken in March 2016 technically had to be re-confirmed by the new Prime Minister and the NSC.

79. Options for the support package continued to be evaluated, and further analysis undertaken. The (new) Prime Minister was briefed by the NSA by memorandum dated 25 August 2016 and given further details of the proposed support package

> "8. The proposed joint FCO-DFID development package, which is based on DFID and FCO's current best assessment of Chagossians' needs, would include:
>
> a) Improved access to healthcare, education and employment for Chagossians on Mauritius and the Seychelles, by providing new primary healthcare facilities, 2000 private tuition places, up to 500 vocational training places, and funding for degree courses for around 50 young Chagossians in the first five years, doubling up to 100 in the second (totalling £21m over ten years).
>
> b) Heritage visits to BIOT for around 100 Chagossians per year for ten years (total £5.5m), the restoration of cultural sites (total £4.2m) and scientific conservation projects, including the opportunity for Chagossians to volunteer in each project (total £4m).
>
> c) A training package in literacy, numeracy and environmental issues for around 70 Chagossians in the UK per year over ten years (total £4.6m).
>
> 9. The activities in a) would be funded by DFID and would be ODA-eligible; the rest would be funded by a combination of the FCO and the Conflict, Stabilisation and Security Fund and would be non-ODA. This is a smaller overall figure than that agreed at the NSC (£55m over the period), but is based on a better understanding of the likely costs and demands. We expect that uptake would be high; the educational status and health of Chagossians on Mauritius is lower than average, and the heritage visits and training package would build on programmes that have been popular in the past.

> 10. There are nonetheless some risks to delivery of this package, the main one being that the programme in Mauritius could only be delivered through the Mauritian government and would therefore require their consent and co-operation, which might not be forthcoming while the sovereignty dispute continues. Given that elements of the package will likely need to be tailored to enhance education and health support in areas where there are high densities of Chagossians, their support will be critical, though it would also deliver broader benefits to Mauritius."

80. On 31 August 2016 the Prime Minister approved the announcement of the rollover of the Exchange of Notes alongside a development package for Chagossians in Mauritius, the Seychelles and the UK worth around £40 million over ten years to be announced to Parliament as soon as possible after its return from recess.

81. On 26 October 2016 the Defendant sent a write-round letter to the Prime Minister seeking responses from NSC members by 7 November 2016 (with their final agreement or a nil return) to the proposal that the Government would not support resettlement of the Chagossian people on the BIOT but would provide a support package for the Chagossians worth around £40 million over 10 years and would allow the agreement governing US use of the BIOT to roll over for a further 20 years from 30 December 2016. The letter recorded that these decisions had been provisionally agreed by the NSC on 15 March 2016. It set out the reasons for that earlier decision. It recorded that the support package, following further policy work, was now suggested to amount to around £40 million.

82. The Chancellor of the Exchequer responded by letter dated 31 October 2016, the Secretaries of State for Exiting the European Union, for International Development and for Defence by letters dated 7 November 2016.

83. Following a further briefing from the NSA on 9 November 2016 the Prime Minister responded on 15 November 2016, agreeing that the Defendant should announce to Parliament the roll over of the 1966 Agreement and the non-resettlement package for Chagossians on 16 November 2016, as then occurred.

84. Against this landscape, the Defendant points to the fact that the decisions now under challenge were taken at the highest level of Government, including the Prime Minister who was actively involved, evidently sympathetic and wanted all avenues explored. They were, it is submitted, taken with conspicuous care, involving a range of Ministers and departments, taking into account independent studies and involving the Chagossians from the outset.

Part VI: Overview of the Claimants' case and grounds of challenge

85. The Claimants contend that the Resettlement Decision was unlawful and Ms Hoareau also contends that the Support Package Decision was unlawful. The history of the Chagossian people and their treatment by the Government is important and troubling.

The Claimants and the rest of the Chagossian people were exiled to make Diego Garcia available for use as a US military base. The aim, which was achieved, was to depopulate the Islands entirely. Following their removal, legislation was passed to ensure that the Chagossians had no right of abode. The Chagossians had a right to enjoy a right of abode which was a material factor to which the Defendant should have had regard. In the light of the change in the factual position on the feasibility of resettlement as between the 2002 Feasibility Study and the KPMG Report, and the change in the position of the USG in terms of settlement on the Outer Islands, the Defendant was obliged to reconsider the constitutional ban on entry to the BIOT and to do so as a prior question before resettlement. The Defendant's failure to do so was a serious error. Further, the Decision was irrational, in breach of Article 8 and Article 1 of the First Protocol to the European Convention on Human Rights ("the Convention") and the public sector equality duty ("PSED"). The Resettlement Decision was based on a briefing to the NSC that was misleading as to material matters relating to outer-island resettlement. The Defendant's consultation process leading up to the Resettlement Decision was flawed. The Defendant failed to take into account the non-deliverability of the non-resettlement support package in Mauritius. Ms Hoareau challenges the Support Package Decision as unlawful on the basis that the NSC was materially misled. There was a breach of a legitimate expectation of consultation on the support package.

86. There have been extensive rounds of pleadings and amendments. Before the commencement of the hearing Ms Hoareau and Mr Bancoult between them raised some 15 separate, albeit sometimes overlapping, grounds of challenge, for which permission had been granted. During the course of the hearing those issues narrowed and condensed. Thus the allegation that the Defendant failed to give adequate reasons for the Resettlement Decision has fallen away, as have allegations that the Defendant unlawfully fettered his discretion by erroneously concluding that his decision not to support resettlement was determinative of the separate question of whether to permit resettlement by lifting the constitutional bar on the Claimants' right of abode; that a failure by the Defendant to take into account certain evidence from the Whitebridge Report was procedurally unfair in the context of the consultation on resettlement; and that the Defendant failed to take into account a relevant consideration, namely the financial benefits already obtained by the Government in removing the Chagossian population from the Islands.

87. We categorise the issues now arising 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' Convention rights, 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");

iii) Issue 3: the Defendant failed to comply with the PSED in section 149 of the Equality Act 2010 ("the Equality Act");

iv) 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;

v) 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;

vi) 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.

88. The Claimants rely on witness statements from Ms Hoareau, Mr Pierre Prosper of the Chagossian Committee Seychelles ("CCS"), Mrs Gladyel Sakir (a member of the CCS), Ms Marie Piron of the Seychelles, Ms Jessy Marcelin of the Seychelles, Ms Edwina Cupidon of the Seychelles, Mr Richard Gifford (who is Mr Bancoult's solicitor) and Mr Richard Dunne (who considers the Summary of Responses).

Part VII: Overview of the Defendant's case

89. The Defendant's position can be summarised as follows. He points to the breadth of the Claimants' attack which criticises almost every aspect of the Government's decision not to support or permit resettlement. That decision, along with the Support Package Decision, was a final decision following an extensive policy review led by the FCO but also engaging a number of other central government departments.

90. The Government engaged in the commissioning and review of the KPMG Report, which was an independent (and expensive) feasibility study examining the possibility of resettlement in the BIOT. Ministers set up a Policy Review with an open mind, to be informed by the KPMG Report. The KPMG Report confirmed that resettlement would be feasible in principle, but with substantial caveats and only at substantial cost. Subsequent work showed that the KPMG figures were a significant underestimate of the likely costs. There were a number of countervailing factors and considerations against supporting or permitting resettlement, including defence and security concerns, environmental considerations and social and economic concerns with concomitant cost exposure for the UK taxpayer. The Government had to weigh up competing factors. The final decision was subject to a policy level review involving a number of central government departments and received a high degree of scrutiny, but was ultimately for Ministers to make. Initial views at ministerial level were not unanimous either for or against resettlement. The first meeting of the NSC in March 2015 wanted all options

left on the table. Further work was done and further costs information sought. A thorough public consultation was carried out. The USG confirmed that it would not provide any financial assistance, nor would it permit the airfield in Diego Garcia to be used for commercial civilian flights. A further set of options was put to the NSC in March 2016. The NSC briefing described the enormous difficulties of establishing a fragile, small island community in a remote location, including exposing the taxpayer to the risk of the substantial costs of providing a societal infrastructure and support which would go with it. At the NSC meeting Ministers reached a final collective decision to rule out resettlement options. Ministers were tasked with investigating non-resettlement options, which options were formulated from March to October 2016, resulting in the support package. The support package provides Chagossians with better life chances in the communities in which they currently live and an increased heritage programme to maintain their connection with the Chagos archipelago.

91. The Resettlement Decision and the Support Package Decision each raises issues of high policy concern for the Government. They involve macro-economic considerations of how the Government should best spend taxpayers' money, questions concerning the defence interests of the UK and her allies and issues bearing on the UK's conduct of international relations with sovereign governments, including Mauritius, Seychelles and the US. A significant margin of discretion vested in the Defendant should be recognised in such sensitive governmental areas.

92. The Defendant submits that the decision-making process was carried out at the highest level, indicating the degree of seriousness being accorded by the Government to the resettlement question. Usual procedures through the NSC were followed, with complementary NSC(O) meetings taking place to refine and filter options. There were briefings to the Prime Minister who was directly involved in the ultimate decision making at full NSC meetings. A wide range of departments was involved. Independent studies were commissioned. The whole exercise was conducted on the basis of the Prime Minister's direction to see what could realistically be done to put right what was a historic wrong. He was active and evidently sympathetic to the Chagossians' position, wanting all avenues to be explored. Officials were being encouraged to find solutions. Options were neutrally presented. The Chagossians were involved from the outset of the review in 2013. Ultimately the Decision was the culmination of a series of judgments about matters which did not admit of "right" or "wrong" answers at every level and were of a kind that should command the maximum degree of respect, involving considerations of security, international relations, macro-economic and societal considerations.

93. The Resettlement Decision was, on the facts of this case, neither irrational nor disproportionate (even if the latter were a relevant legal consideration, which it is not). The Support Package Decision was neither irrational nor otherwise unlawful. The Government was not required to take a fresh independent decision not to reinstate any right of abode, which would only have arisen as an issue if the Government had decided to support resettlement. The consultation was lawfully conducted. The HRA does not apply to the BIOT, no rights under the Convention have been infringed in any event. The Defendant submits that the PSED does not apply but, in any event, he has not acted in breach of that duty.

94. The Defendant relies on witness statements from Dr Hayes, Ms Bryony Mathew (who was head of the BIOT Policy and Deputy Commissioner of BIOT in the OTD) and Mr

Tom Moody of the FCO (who was head of the BIOT Policy Review Team until July 2016 and led the original work on consultation responses).

Part VIII: General principles and observations

95. Putting aside for present purposes the grounds of challenge which are based on procedural unfairness in consultation, the HRA and the Equality Act, insofar as this challenge relates to the *substance* of the decisions reached by the Government, the test for judicial review is irrationality. The test is not proportionality. Below the level of the Supreme Court it is not possible for courts to change the law in this respect.

96. In *Browne v Parole Board of England and Wales* [2018] EWCA Civ 2024 the main judgment was given by Coulson LJ. On behalf of the appellant in that case it was submitted that the test for judicial review of decisions of the Parole Board should now be recognised to be one of proportionality rather than the traditional domestic law test of irrationality. That submission required Coulson LJ, albeit strictly *obiter*, to review the authorities at [45] to [58] of his judgment. Singh LJ agreed with his judgment: see [71]. Arden LJ preferred not to express any view as to whether proportionality is or is not the relevant test but otherwise agreed with the reasons given by Coulson LJ as to why the appeal in that case should be dismissed: see [72].

97. Coulson LJ's conclusion on the relevant issue can be found at [58] in the following terms:

> "… These authorities spell out the simple proposition that, for now at any rate, the common law test for judicial review is based on the underlying principle of rationality. Whilst there is some support for adopting a proportionality test in particular cases concerned with fundamental rights (see for example *Kennedy*), there is a recognition that a more widespread change would require a major review by the Supreme Court and the necessary overruling of *Brind* and *Smith.*"

98. Those were references to *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (a decision of the House of Lords) and *R v Ministry of Defence, ex p. Smith* [1996] QB 517, at 556 (a decision of the Court of Appeal). The reference by Coulson LJ to *Kennedy* was a reference to the decision of the Supreme Court in *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455.

99. As Coulson LJ observed at [55] of his judgment, the position was reviewed at the level of the Court of Appeal in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473; [2003] QB 1397, at [35]. There Dyson LJ, giving the judgment of the Court, said that it is not for the Court of Appeal to perform the "burial rights" of the doctrine of irrationality. At [57] Coulson LJ cited at some length pertinent passages from the judgment of Lord Neuberger PSC in *R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355, at [131] to [133]. It is clear from that passage that it was not

considered to be appropriate for a five-justice panel of the Supreme Court to adjudicate on the profound constitutional question of whether proportionality has superseded the doctrine of irrationality as a matter of domestic administrative law.

100. We respectfully agree with all of that analysis by Coulson LJ. By the end of the hearing before us it did not appear to us that it was suggested that it was open to courts, at least at the level of this Court, to hold otherwise.

101. In *Ex p. Smith*, at p.554, Sir Thomas Bingham MR (as he then was) accepted the following proposition made by counsel as being "an accurate distillation of the principles laid down by the House of Lords" in cases such as *Brind*:

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

102. In the present case both Mr Fitzgerald QC and Mr Jaffey QC on behalf of the Claimants relied upon that statement of principle. They submit that this case also concerns an interference with fundamental human rights at common law. Accordingly, they submit that the way in which the standard of irrationality is applied in the human rights context is as described in *Ex p. Smith*.

103. We do not accept those submissions. We do not consider that the present case concerns fundamental rights at common law. We agree with the submissions which have been made on behalf of the Secretary of State by Sir James Eadie QC in this regard.

104. This is not a case where fundamental rights are affected, unlike *Ex p. Smith*. This is because this Court has to proceed on the basis that the legal rights which existed previously have been extinguished at least by the 2004 Orders. The validity of the Constitution Order was considered and upheld by the House of Lords in *Bancoult 2* and again by the Supreme Court in *Bancoult 4*. There is not (and cannot be) any challenge before this Court in the present proceedings to the 2004 Orders.

105. Furthermore, it is of fundamental importance to bear in mind that the decisions made by the Government in this case had the following features:

i) They were taken at the highest level of Government, including the Prime Minister;

ii) They concern in part decisions about the allocation of financial resources;

iii) They concern in part decisions about the defence interests of the United Kingdom and its allies;

iv) They concern in part the conduct of international relations between the United Kingdom and other states, including the United States and Mauritius.

106. Furthermore, the decisions involved consideration of a variety of matters, which included the aim of righting the wrong which was done historically (which is acknowledged by the Government and for which apology has been made). Other factors included the desirability of establishing the infrastructure required; environmental considerations in a pristine part of the Indian Ocean; security and international interests; and cost.

107. Although it is not impossible for such decisions to be the subject of judicial review, nor for the ground of irrationality to be raised as a matter of principle, the Court should be very slow to interfere with the judgment of the Government in such a context on the ground that it is irrational. A wide margin of judgment is afforded by the law to the executive in this context.

108. In that context, it is important to bear in mind what was said by Sir Thomas Bingham MR in *Ex p. Smith* itself at p.556:

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

109. Many other judicial statements to similar effect could be cited.

Part IX: Issue 1: the right of abode challenge

110. As we have mentioned, there is no challenge in the present proceedings to the 2004 Orders, which were upheld by the House of Lords in *Bancoult (No 2)*.

111. During the course of the hearing before this Court it became clear that the essential complaint which is now made on behalf of the Claimants is that the Defendant unlawfully failed to reconsider the 2004 Orders. In that context, complaint is also made about the order in which the Defendant went about his consideration of matters. It is submitted by Mr Fitzgerald (who took the lead in making oral submissions for the Claimants on this issue) that the Defendant acted unlawfully in not considering that issue separately and independently, appearing to regard it as simply part and parcel of the resettlement question.

112. Complaint is also made that the Government in effect regarded the answer to the question of resettlement as being determinative of the different question of whether to revoke the 2004 Orders. At one time, in the written submissions, this was said to be in breach of the doctrine that a public authority must not fetter its discretion. During the course of the hearing it became clear that this argument was not open to the Claimants:

the Supreme Court held in *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44; [2014] 1 WLR 2697 that the doctrine of fettering a discretion does not apply to a prerogative power. It was thus not pursued, although the point was still advanced as an aspect of irrationality.

113. In our judgment, this ground of challenge is both unrealistic and wrong. In any event, we have come to the clear conclusion that the Defendant's approach was not irrational.

114. It is clear from *Bancoult 2* that the question even then of the legal right of abode was inextricably linked to the practicalities of resettlement in the Chagos Islands. This was illustrated by the fact that, between 2000 and 2004, no one had chosen to take up the legal rights conferred by the 2000 Immigration Ordinance and go and live in the Chagos Islands. This follows from the undoubted reality that there would need to be established an entirely new society in the Chagos Islands, with all the necessary infrastructure that would entail, for example schools, hospitals and a system of government.

115. It is therefore 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.

116. In support of this argument the Claimants placed particular reliance on what was said by various members of the Supreme Court in *Bancoult 4*. In that case an application was made on behalf of the appellants to re-open the decision of the House of Lords in *Bancoult 2* on the ground that there had been material non-disclosure of relevant documents (which became known in the proceedings as the "Rashid documents"). The Supreme Court decided by a majority (Lady Hale DPSC and Lord Kerr JSC dissenting) that the application to set aside the earlier decision should be refused. This was because there was nothing in the fresh evidence and materials to indicate that there was any basis for setting aside the earlier decision.

117. However, emphasis is placed on behalf of the Claimants on various statements in the judgments of the majority which (they submit) lay the foundation for a requirement on the part of the Defendant to reconsider the 2004 Orders in the light of the fact that the new feasibility study was taking place.

118. In order to place that argument in context it is important to start with the way in which the position was summarised on behalf of the Secretary of State by counsel (Mr Kovats QC then being the lead advocate in the Supreme Court) and recorded at p.305 :

> "The application is unnecessary and, in any event, academic. There is currently underway an independent study into the resettlement of the Islands. It is that study, not the 2002 feasibility study, which will inform the Government's decision as to the future. The resettlement of BIOT depends not only on the feasibility of resettlement; the United Kingdom's strategic interests are also highly relevant to any future decision. If the current study were to show that resettlement was not feasible it is of no practical benefit to the applicant to set aside the House of Lords' decision … If resettlement were to be currently

> feasible the House's decision would not preclude it. The point of law decided by the majority [in *Bancoult (No. 2)*] was that the BIOT constitution and Immigration Ordinance were lawful even though they stated there was no right of abode. That question of law is untouched by the factual question of whether resettlement is feasible."

119. We turn to the passages on which Mr Fitzgerald and Mr Jaffey place reliance At [72] Lord Mance JSC said:

> "There is one other factor, which would have been both relevant and in my opinion decisive, had I reached a conclusion that the threshold test for setting aside was or might otherwise have been satisfied. The applicant submits that nothing other than a reversal of the House of Lords decision (insofar as it proceeded on the basis that the stage 2B report could be relied on) will overturn the constitutional bar on their return to the Chagos. But there has been a new 2014-2015 feasibility study, published by KPMG in March 2015, which assesses the risks differently from the prior report and finds that, at some cost and taking into account (for the first time) the possibility of resettlement on Diego Garcia itself, there would be scope for supported resettlement. In practical terms, the background has shifted, and logically the constitutional ban needs to be revisited. As Mr Steven Kovats QC expressly accepted during oral submissions, it is open to any Chagossian now or in the future to challenge the failure to abrogate the 2004 Orders in the light of all the information now available. That is in my opinion a factor militating strongly against the setting aside of the House of Lords' judgment …"

120. Lord Neuberger PSC agreed with Lord Mance but did not give a separate judgment.

121. Lord Clarke of Stone-cum-Ebony JSC "reluctantly" concluded that Lord Mance's analysis was to be preferred and that the application to set aside should be refused for the reasons he gave: see [77]. At [78] Lord Clarke continued:

> "One of the factors which has led me to that conclusion is that, as I see it, that is not the end of the road. I agree with Lord Mance JSC's conclusion in para 72 that there is a critical factor which is in any event conclusive. The background to much of the debate between the parties had been the feasibility of the Chagossians returning to the Chagos Islands. The 2014–2015 feasibility study considers, among other things, the possibility of resettlement on Diego Garcia. Given that new factor, the study concludes that there would be scope for supported resettlement.

> As Lord Mance JSC puts it, the background has now shifted and logically the constitutional ban needs to be revisited. …"

122. At [79] Lord Clarke stated:

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

123. There was some debate before this Court as to whether that part of the reasoning of the majority in *Bancoult 4* is properly to be regarded as a second *ratio* of the decision or whether it is simply *obiter*. As we understood it, Mr Jaffey was prepared to accept that it was simply *obiter*, whereas Mr Fitzgerald maintained that it was part of the *ratio*, albeit a second reason for the outcome in that case. We do not consider that it is necessary to resolve that issue. This is because the argument must fail, in our view, for more fundamental reasons, irrespective of whether this part of the reasoning of the majority forms part of the *ratio* or is simply *obiter*.

124. In our view, Mr Fitzgerald seeks to place too much weight on the words used in the judgments of Lord Mance and Lord Clarke, when it was suggested that the constitutional bar "needs to be revisited". They were simply setting out what the factual position at the time of the hearing before them was, as had been summarised by counsel in argument. They were not laying down any rule of public law to suggest that there would be some legal obligation to revisit what had been upheld in *Bancoult 2*. This is plain, in our view, from the summary of the argument by counsel for the Defendant which we have set out earlier.

125. In any event, it seems to us that the majority was not saying that there was some independent or freestanding obligation on the part of the Government to revisit the constitutional bar. Rather they were saying that it was part and parcel of the review of the feasibility of resettlement. By the time of the hearing in *Bancoult 4* there was already in existence the KPMG report of 2015, which has been the mainstay of much of the argument before this Court also. It is clear therefore that the issue of revisiting the constitutional bar in 2004 was not necessarily to be considered separately and independently from the question of the feasibility of resettlement.

126. Further, and in any event, it is important to be clear what the source of the suggested public law obligation to consider abrogating the constitutional and immigration Orders of 2004 would be. There is no statutory obligation to do so. No authority has been cited to suggest that there is any common law obligation to do so. On correct analysis, in our view, the only source of such an obligation could be the public law doctrine of

irrationality. However, it is impossible to see how it could be said that the Defendant's failure to abrogate (or to consider abrogating) the 2004 Orders could be said to be irrational. This is not least because the Defendant was rationally entitled to take the view that, if resettlement should not take place, there was no need for, or any practical point in, revisiting the 2004 Orders.

127. Furthermore, we would emphasise that the question of whether resettlement should take place was not one that depended solely on the KPMG Report. There was a variety of other interests which the Defendant had to take into account, and was certainly entitled to take into account, including relations with foreign friendly states such as the United States.

128. For all those reasons we have come to the conclusion that there was no breach of any legal obligation as suggested on behalf of the Claimants and this part of the argument must be rejected.

Part X: Issue 2: The Human Rights Act challenge

129. The first and decisive objection to this ground of challenge is that it has already been authoritatively held by the House of Lords in *Bancoult 2* that the Convention/HRA have no application to the BIOT. This is because the UK has made no declaration under Article 56 (formerly Article 63) of the Convention extending its application to the BIOT.

130. Article 56 of the Convention, so far as material, provides:

> "(1) Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the … Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
>
> …
>
> (4) Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, Non-Governmental Organisations or groups of individuals as provided by Article 34 of the Convention."

131. Mr Jaffey (who took the lead for the Claimants on this issue) suggested that *Bancoult 2* is no longer binding on this Court because it has been implicitly overruled by the Supreme Court in more recent decisions, in particular *Smith v Ministry of Defence* [2013] UKSC 41; [2014] AC 52 and *Mohammed (Serdar) v Ministry of Defence (No. 2)* [2017] UKSC 2; [2017] AC 821, which have taken into account and applied the

reasoning of the ECHR in *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 ("*Al-Skeini"*).

132. In *Bancoult 2* it was authoritatively held (as the Claimants accept) that the validity of the Constitution Order could not be affected by the HRA because that Act has no application to BIOT. At [64] Lord Hoffmann said:

> "… In 1953 the United Kingdom made a declaration under Article 56 [then Article 63] 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 no 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."

133. At [65] Lord Hoffmann continued that:

> "If the Convention has no application in BIOT, then the action of the Crown in BIOT cannot infringe the provisions of the Human Rights Act 1998: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529. The applicant points out that section 3 of the BIOT Courts Ordinance 1983 provides that the law of England as enforced from time to time shall apply to the territory. So, they say, the Human Rights Act, when enacted, became part of the law of the territory. So be it. But the Act defines Convention rights (in section 21(1)) as rights under the Convention 'as it has effect for the time being in relation to the United Kingdom'. BIOT is not part of the United Kingdom and the Human Rights Act, though it may be part of the law of England, has no more relevance in BIOT than a local government statute for Birmingham."

134. At [116] Lord Rodger of Earlsferry agreed with Lord Hoffmann on the HRA issue.

135. At [120] Lord Carswell (the last member of the majority in *Bancoult (No. 2)*) agreed with the conclusions and "with very little qualification, with their reasoning" of both Lord Hoffmann and Lord Rodger.

136. That was the position in 2008, as is accepted on behalf of the Claimants. However, Mr Jaffey submits that the legal position has been superseded by subsequent decisions.

137. The first difficulty with that submission is that the courts of this country are bound by decisions of the House of Lords and Supreme Court even if they are subsequently superseded by a decision of the ECHR: see *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465.

138. The second difficulty is that in truth there is no later inconsistent decision from the ECHR. The highest that Mr Jaffey is able to put it is that the point was not decided in *Chagos Islanders v United Kingdom* (2013) 56 EHRR SE 15. In that case the issue about jurisdiction was addressed by the ECHR at [67] to [76]. However, the Court found it unnecessary to rule on this particular issue since the applicants' complaints failed for other reasons set out in its judgment: see [76].

139. The Court considered its own earlier decision in *Quark Fishing Ltd v United Kingdom* App No 15303/06 19 September 2006 in which it had referred to its "constant caselaw to the effect that no jurisdiction arose where a contracting State had not, through a declaration under Article 56 (former Article 63), extended the Convention or any of its protocols to an overseas territory for whose international relations it was responsible" (see [68]). The Court noted that the applicants sought to distinguish those earlier decisions, including *Quark Fishing*, in the light of its subsequent decision in *Al-Skeini*. However, the Court itself observed at [73] that in *Al-Skeini* the Court's judgment not only cited its earlier decision in *Quark* as an authority but in fact adopted the reasoning in that decision. The situations covered by the "effective control" principle were clearly separate and distinct from circumstances falling within the ambit of Article 56. On this point, therefore, the Court concluded that it was "not … persuaded that *Quark* can be regarded as wrongly decided or as having wrongly held that the South Sandwich and South Georgia were outside the jurisdiction of the Convention due to the absence of an Article 56 declaration."

140. Furthermore, at [74] the Court said:

> "Nor can the Court agree with the applicants' contention that any possible basis of jurisdiction under Article 1 such as that 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."

141. At [75] the Court (although it did not finally determine the point) clearly saw force in the argument made by the respondent government in that case to the effect that the applicants' contention "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."

142. We respectfully agree. It is clear that the ECHR itself has had the opportunity to consider the impact (if any) of its decision in *Al-Skeini* on the situation of dependent territories for whose international relations a contracting State is responsible. To date it has not held that such cases can fall within the jurisdiction of a contracting state under Article 1 even where no declaration has extended the scope of the Convention under Article 56. Since the fundamental foundation for Mr Jaffey's submission to this Court rests upon the decision of the ECHR in *Al-Skeini*, and the decisions of the Supreme Court which have applied it in domestic jurisprudence (*Smith* and *Mohamed*), we take the view that his submission that the decision of the House of Lords in *Bancoult 2* has been superseded by subsequent Strasbourg caselaw must be rejected.

143. It is necessary briefly to deal with a submission which was made by Mr Jaffey in response to what he submitted was a concession by Sir James Eadie on behalf of the Defendant. Sir James acknowledged during the course of the hearing before us that there could arise in the future cases in which egregious breaches of the ECHR take place (for example breaches of Article 3, which prohibits torture and inhuman and degrading treatment). The Court heard interesting argument during the course of the hearing about what might happen if the facts of a case like that of Baha Mousa (who was tortured and died in British custody in Basra in 2003 and whose case was one of those considered in *Al-Skeini*), were to take place in a territory to which otherwise an Article 56 declaration would have to be applied. We did not understand Sir James to make a concession but, understandably, not to make absolutist submissions whatever the facts of a future hypothetical case might be. Interesting though that debate may be, in our view, it has no bearing upon the issues in the present case. This is because there has been no such treatment in the present cases.

144. Accordingly, we have come to the conclusion that this Court is bound by the decision of the House of Lords in *Bancoult 2* and the Convention/HRA have no application to the facts of this case.

145. Furthermore, we accept the submission made on behalf of the Defendant that the Claimants in this case cannot properly be described as "victims" for the purpose of Article 34 of the Convention and section 7 of the HRA. In that context we note that the right of individual petition has never been extended to the BIOT under Article 56(4) of the Convention. But there are more fundamental problems.

146. The Claimants are in materially the same situation as the applicants in the *Chagos Islanders v United Kingdom* case. In its judgment in that case, at [82] the ECHR said:

> "… The Court finds that the 2004 Ordinance cannot be said to have amounted to an interference with the applicants' right to respect for their homes. Indeed, it is apparent from the judgments given [in *Bancoult (No. 2)*] that whatever the outcome of those proceedings that the applicants continued to have no legal, or practical, prospect of being able to enter or settle on the islands."

147. The Court continued at [83]:

> "The Court is therefore not persuaded that recent events disclose any developments relevant to the applicants' victim status. The heart of the applicants' claims under the Convention is the callous and shameful treatment which they or their antecedence suffered from 1967-1973, when being expelled from, or barred from return to, their homes on the islands and the hardships which immediately flowed from that. These claims were raised in the domestic courts and settled, definitively. The applicants' attempts to pursue matters further in more recent years must be regarded, as held by the House of Lords, to be part of an overall campaign to bring pressure to bear on Government policy rather than disclosing any new situation giving rise to fresh claims under the Convention. …"

148. Thirdly, and importantly, any Convention Rights which may have existed in any event no longer exist. The present case is not concerned with what happened in the 1960s or 1970s. It is concerned with decisions which were taken in 2016. They did not constitute interferences with any of the rights in the Convention, for example the right to peaceful enjoyment of possessions or the right to respect for the home.

149. For all those reasons, we have come to the clear conclusion that reliance upon the Convention/HRA is impossible on the facts of this case.

Part XI: Issue 3: The public sector equality duty challenge

150. Section 149 of the Equality Act (which has the side note "Public Sector Equality Duty"), so far as material provides:

> "(1) A public authority must, in exercise of its functions, have due regard to the need to –
>
> > (a) Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> >
> > (b) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
> >
> > (c) Foster good relations between persons who share a relative protected characteristic and persons who do not share it.
> >
> > …"

151. The relevant protected characteristic which is relied upon in this case is that of race, which is included among the characteristics set out in subsection (7). "Race" for this purpose includes a group defined by reference to ethnic origins.

152. For the purpose of the present proceedings only, it is conceded on behalf of the Defendant that Chagossians form an ethnic group within the meaning of the Equality Act.

153. At the hearing before us Mr Kovats fairly accepted that the decision in respect of the *support grant* does fall within the scope of the duty in section 149. This is because the decision was taken within the UK (although it affects territory and persons elsewhere in the world). However, Mr Kovats does not accept that the public sector equality duty applies in relation to the *resettlement* decision.

154. It is common ground that the duty in section 149(1)(a) does not apply to the present context. This is because that part of the Equality Act is confined to Great Britain. The issue which arises is whether section 149(b) and (c) do apply.

155. Section 217 of the Equality Act deals with the extent of that Act. Subsection (1) provides that the Act "forms part of the law of England and Wales." Subsection (2) provides that the Act, apart from section 190 and Part 15, forms part of the law of Scotland. Subsection (3) provides that certain specific provisions of the Act also form part of the law of Northern Ireland.

156. However, those provisions do not govern the geographical scope of the functions which may be covered by the Act, in particular the public functions to which reference is made in section 149. A provision as to the *extent* of an Act of Parliament addresses a different question: it merely tells the reader that the relevant provision is (and to what extent) part of the law of one of the constituent parts of the United Kingdom.

157. Subsection (9) of section 149 gives effect to Sch. 18 to the 2010 Act. Sch. 18 provides, in relation to the exercise of immigration functions, that section 149(1)(b) does not apply to nationality.

158. Sch. 18 to the Equality Act includes the following provision. Para. 2 so far as material provides:

> "Immigration
>
> (1) In relation to the exercise of immigration and nationality functions, section 149 has effect as if subsection (1)(b) did not apply to the protected characteristics of age or religion or belief; but for that purpose 'race' means race so far as relating to–
>
> (a) nationality, or
>
> (b) ethnic or national origins.
>
> (2) 'Immigration and nationality functions' means functions exercisable by virtue of–

> (a) the Immigration Acts (excluding sections 28A to 28K of the Immigration Act 1971 so far as they relate to criminal offences),
>
> (b) the British Nationality Act 1981,
>
> (c) the British Nationality (Falkland Islands) Act 1983,
>
> (d) the British Nationality (Hong Kong) Act 1990,
>
> (e) the Hong Kong (War Wives and Widows) Act 1996,
>
> (f) the British Nationality (Hong Kong) Act 1997,
>
> (g) the Special Immigration Appeals Commission Act 1997, or
>
> (h) a provision made under section 2(2) of the European Communities Act 1972, or of [EU law], which relates to the subject matter of an enactment within paragraphs (a) to (g)."

159. In our judgment, the functions with which the present case is concerned do not fall within any of those exceptions. Despite Mr Kovats' valiant attempt to argue that, by way of analogy, an exception should impliedly be read into the legislation to cover the functions in the present context also, there is no warrant for such an interpretation. Parliament has specifically set out those functions which it wished to exclude from the scope of the obligation in section 149. The simple fact is that the functions exercised in the present context do not fall within any of those specific exceptions.

160. Our view derives some support from what was said in *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWHC 1953 (Admin). The main judgment in the Divisional Court was given by Burnett LJ, with whom Irwin J agreed.

161. At [60] Burnett LJ said:

> "The scheme of section 149 is to apply the PSED by reference to the functions of the relevant body. In the formulation of policy it does not matter, in my view, that the policy may have an impact wholly or partly outside Great Britain. The territorial limitations implicit in section 149(1)(a) follow the application of the substantive parts of the Act but otherwise there are no territorial limitations. …"

162. At [61], Burnett LJ continued:

> "It follows that, in the formulation of the Afghan Policy, the defendants should have had due regard to the matters identified in section 149(1)(b) and (c) of the 2010 Act. …"

163. For the sake of completeness it should be noted that the case of *Hottak* went from the Divisional Court to the Court of Appeal: [2016] EWCA Civ 428. The main judgment was given by Sir Colin Rimer. At [91] he noted that there was no cross-appeal by the defendants against the Divisional Court's order that the provisions of section 149(1)(b) and (c) were applicable to the decision taken by the defendants to make the Afghan Scheme. The Court of Appeal did not need to (and did not) comment further on what had been said by Burnett LJ in the Divisional Court, to which we have made reference.

164. In the result, as can be seen from [63] of the judgment, the conclusion reached by the Court in that case was that there had been a breach of the PSED on the facts of that case. A declaration was considered to be the appropriate remedy to reflect that breach of section 149(1)(b) and (c) of the Equality Act. Accordingly we proceed on the basis that the obligation in section 149, so far as material, did apply to the present case.

165. The principles which apply under section 149 of the Equality Act are now familiar and need not be set out here in detail. They can be found in the judgment of McCombe LJ in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, at [26 (1)-(8)].

166. Both Mr Jaffey and Mr Kovats drew our attention to the decision of the Supreme Court in *Hotak v Southwark London Borough Council* [2015] UKSC 30; [2016] AC 811, in particular the judgment of Lord Neuberger PSC, at [74] to [79]. We have that passage well in mind, in particular his approval of earlier judgments (including *Bracking*, at [60]) that the duty in section 149 must be exercised in substance, with rigour, and with an open mind. Lord Neuberger also emphasised, at [78], that there is a risk that such words can lead to "no more than formulaic and high-minded mantras in judgments and in other documents". He continued:

> "It is therefore appropriate to emphasise that the equality duty, in the context of an exercise such as a section 202 [Housing Act] review, does require the reviewing officer to focus very sharply on (i) whether the applicant is under a disability (or has another protected characteristic, (ii) the extent of such disability, (iii) the likely effect of the disability, when taken together with any other features, on the applicant if and when homeless, and (iv) whether the applicant is as a result 'vulnerable'."

167. The concession made by the Defendant for the purposes of this litigation was first recorded in a recital to an order made by this Court on 5 July 2018. It is important to note the precise words of the Defendant's Re-amended Detailed Grounds of Resistance at para. 251:

> "For the avoidance of doubt, the SSFCA does not accept that the Chagossians should be characterised as a distinct racial group for the purposes of section 9 of the EA 2010, although they were treated as such for the purposes of Ministers considering their obligations under the PSED. However, as was stated at the hearing before the Court in July 2018, for the purposes of this litigation only, the SSFCA is prepared to proceed on the

> assumption that the Chagossians do constitute a distinct racial group for the purposes of the present claim brought on the basis of the EA 2010. That concession was predicated on the fact that the SSFCA's consideration of the issue proceeded on the assumption that the PSED was engaged in this case."

Reference is made in footnote 66 to, for example, the NSC Annex covering the PSED at page 2482 (to which we will make reference later).

168. It is also important to note what was said at para. 125 of the Defendant's skeleton argument for the substantive hearing before this Court:

> "As for the Resettlement Decision, the rights and interests of the Chagossians were at the forefront of Ministers' considerations. As a racial group, their interests were explicitly considered at every stage of the decision-making process. In circumstances where the *raison d'étre* of the Policy Review and the Resettlement Decision which followed was to consider the position of the Chagossians and take a decision on resettlement and non-resettlement options in relation to Chagossians, it is wrong to suggest that the SSFCA did not have 'due regard' to Chagossians as distinct from non-Chagossians."

169. We agree. There is an air of unreality about the submission that the Defendant did not have due regard to the matters required by section 149 of the Equality Act in the present case. This is because the entire purpose of the policy review in this case was to decide how to proceed in relation to the Chagossians and no-one else. That was to have due regard to their interests as a group.

170. However, Mr Jaffey submits that that did not suffice, since (he submits) the Government did not have sufficient regard to the interests of the Chagossians as an ethnic group as distinct from some other group of people.

171. The first complaint that Mr Jaffey makes is that the Government has never recognised, at least before the concession made in these proceedings, that Chagossians do indeed constitute an ethnic group. For that reason, he submits, they have regarded them for a long time as being simply a group of people defined by reference to their former employer or employers on the Islands. This is a reference to the history of the Islands which we have outlined earlier in this judgment.

172. Mr Jaffey draws attention to the fact that that amendment to the detailed Grounds of Resistance was only made (and the concession only made before this Court) after the first witness statement of Dr Hayes had already been filed in these proceedings. That statement is dated 1 March 2018. Mr Jaffey complains in particular about what was said at para. 16 of that witness statement:

> "From the beginning of colonisation, the inhabitants of the Islands were only present because they were employed by owners or lessees of the land or were family members of such

> employees. The inhabitants did not own any land or houses and the owners/lessees had legal rights to remove and to refuse the return of those people."

173. Mr Jaffey also complains about what was said in a White Paper (June 2012), 'The Overseas Territories: Security, Success and Sustainability' (CM8374). This White Paper was published by the FCO. An annex to the paper addressed specific territories: the BIOT was considered from pp. 96. At p.96 the White Paper said:

> "The Islands were uninhabited until the late 18th century. The French established coconut plantations using slave labour in 1793. After emancipation, many slaves became contract employees and remained on the Islands. They were then referred to as Ilois but are now usually known as Chagossians."

174. Reference was made on the same page to the events of 1966-1973. It was said there that:

> "… The last of the contract workers and their children left the Territory in 1972/73."

Successive British Governments have expressed regrets about the way resettlement was carried out.

175. We do not find reference to that White Paper to be either persuasive or helpful. The crucial focus, it seems to us, has to be on the process which led up to the decision by Ministers in 2016. By that time, that process (in our view) sufficiently demonstrates that the Defendant did have due regard to the matters required of him in section 149 of the Equality Act. We have set out that decision-making process in more detail above.

176. In support of his argument Mr Jaffey placed reliance on the decision of Silber J in *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin); [2008] ELR 561, in particular at [112] to [114]. That case concerned a school uniform policy which prohibited the wearing of jewellery in such a way that it prevented the claimant (who was a Sikh girl) from wearing the *Kara* at school. Silber J observed at [113] that it was unfortunate that the defendant did not appear to regard the matter set out in section 71 of the Race Relations Act 1976, as amended (the predecessor provision to section 149 of the Equality Act in the context of race). At [114] Silber J concluded that the school had failed to consider properly the exceptional significance for racial and religious reasons to the claimant as a devout Sikh of actually wearing the *Kara*. However, each case must be decided on its own facts.

177. The question is whether, on the facts of the present case, the PSED was complied with by the Defendant and that is an issue of substance rather than labelling. We therefore turn to the evidence in relation to the PSED in the present case.

178. When assessing whether due regard was had to the matters required by the PSED, it is important to consider the decision-making process as a whole and to do so fairly. It would not be appropriate to take one or two documents in isolation and out of context and subject them to a critical analysis with a fine toothcomb. It is clear, when the evidence is assessed fairly and as a whole, that the Government was concerned to correct a historic injustice done to "the Chagossian community", and that this was the case at the highest level, including the Prime Minister.

179. For the purpose of the open hearing in this case (in what is an unprecedented move, we were informed) the parties have, with the assistance of public interest immunity advocates, been able to produce summaries of written contributions to discussions at Ministerial level. These summaries have enabled the Court to do justice in open court while protecting to the extent necessary the identity of particular ministers, so maintaining the constitutional convention of "collective cabinet responsibility". For that reason the summaries were given the acronym "CCR Summary 1" and so on.

180. CCR Summary 1 is a summary of written contributions to the NSC meeting on 10 March 2015. It made numerous references to the "historic injustice" done to "the Chagossian community". In that context it also referred to "young Chagossians in Mauritius and the Seychelles" and expressly noted the need to be careful to design a Scheme which would meet "Chagossian needs and expectations … without discriminating against other groups on Mauritius or Seychelles."

181. CCR Summary 2 is a summary of redacted passages in the minutes of the NSC meeting on 10 March 2015. That summary made express reference to what it described as "first generation Chagossians" and also their children or grandchildren, who had been born in the UK, Mauritius or the Seychelles. It referred to them as "second or third generation Chagossians". Such references, in our view, give the lie to the suggestion that the Government simply regarded the Chagossians as being a group of persons who once had a common employer. Although one might in common parlance speak, for example, of the "mining community", when referring back to events in the 20th century such as the strike of 1984-85, one would not expect to use such language today and include in that community the children or grandchildren of people who were miners. The contrast makes clear the point that the Government did regard the Chagossians as a group defined by their origins in the Chagos Islands.

182. It is also clear from the documents before the Court that the Government was aware of the PSED: see, for example, an email dated 8 July 2015 from a diversity and inclusion policy officer. The advice given was that there was no legal requirement to do an equality impact assessment (which was correct and which is common ground).

183. There is before the Court a document dated 17 February 2016 prepared by the FCO and circulated on 11 March 2016 by the National Security Advisor for the purpose of the NSC meeting on 15 March 2016. At para. 3, so far as material, that said:

> "The Prime Minister directed that Government fully investigates the feasibility and implications of responding to Chagossian aspirations. Chagossians expressed their motivations for seeking resettlement in the recent public consultation as (re) connecting to a place they consider their 'homeland' …"

184. The same paper at para. 15 expressly referred to the PSED:

> "In your consideration of the policy options, you have a duty under the Equality Act 2010 to have due regard to the need to advance equality of opportunity, and to foster good relations between different groups (on the basis of sex, age, race, disability and so on). You will need to take the detail of PSED annex into account, and consider further after a decision when we are at the stage of detailed policy formulation and implementation."

185. The annex on the PSED referred in terms to the requirements of section 149(1)(b) and (c) of the Equality Act. In the context of the latter, the annex said:

> "… The Chagossians tend to present their views and wishes on a fairly united basis (within a few separate personal/political groupings), and officials are not aware of particular tensions or poor relations between persons with protected characteristics and those without."

186. Furthermore, as both the paper and its annex noted, since there had not yet been a decision on resettlement as a matter of principle, there would potentially follow later on the need for detailed policy formulation. The annex put it in this way:

> "If a decision were taken in favour of resettlement, at the stage of detailed policy formulation and implementation there would be an opportunity for more detailed consideration of how these options could advance equality of opportunity and foster good relations between persons who share a protected characteristic and those who do not."

187. The annex also considered the question of "meeting Chagossian aspirations – non-resettlement options". Under that heading it said:

> "At this stage of in principle consideration of the options, consideration has been given to the need to promote equality of opportunity for those with protected characteristics who have been historically disadvantaged in their local societies. This includes the elderly, women, and the disabled. One of the goals of the proposed development programmes is to improve life chances.
>
> If a decision were taken in favour of non-resettlement options, at the stage of detailed policy formulation and implementation there would be an opportunity for more detailed consideration of how these options could advance equality of opportunity between persons who share a protected characteristic and those who do not.

> Consideration could also be given to the need to foster good relations between those Chagossians who have been historically disadvantaged in local societies, and other Mauritians, and between Chagossians and non-Chagossians in other countries too."

188. Mr Jaffey made three particular criticisms of that final paragraph in particular:

i) He complained that the word "could" suggested there was some discretion rather than a duty to comply with section 149;

ii) The passage only referred to the duty to "foster good relations", in other words para. (c) and not para. (b) of section 149(2);

iii) It applied only to non-resettlement options.

189. That latter criticism is not made out, in our view, since the earlier part of the annex clearly did deal with the resettlement option.

190. Furthermore, the passage needs to be read in its proper context. It was dealing with a future possible scenario which had not yet arisen. The paper was making the point that, if it did arise, detailed consideration would need to be given to the PSED at the stage of formulating and implementing a policy. It was in that context that it used the word "could" as it was referring to a future possible scenario. That was not a misdirection of law. In our view, when read fairly and in the context of the evidence as a whole, this document does not demonstrate, as Mr Jaffey submitted, that the Defendant erred in his approach to the PSED.

191. We also note that CCR Summary 3, which was a summary of written contributions to the NSC meeting on 15 March 2016, referred to the "self-declared 9,000-strong diaspora". That language is again consistent with a Governmental view that the Chagossians were a historic community, defined by reference to their ethnic origins, which had spread around the world. The reference to their being "self-declared" is not fairly to be regarded as a disparaging comment. In the context of racial equality, it is frequently regarded as good practice to allow people to make a declaration of how they regard themselves as to their ethnic origins rather than to impose a description on them.

192. It is also to be noted that the WMS, which is the subject of the present judicial review proceedings, itself referred to "the Chagossian people" when announcing that the Government had decided against their resettlement to the BIOT.

193. Accordingly, we have come to the conclusion that, when the evidence before the Court is read fairly and as a whole, the decision-making process did have due regard to the matters required by section 149 of the Equality Act.

Part XII: Issue 4: irrationality of the Resettlement Decision

194. Against the principles identified in Part VIII above we turn to the Claimants' irrationality challenges to the Resettlement Decision. Whilst those challenges focussed ultimately on the decision not to support resettlement on the Outer Islands by reference to alleged mistakes of fact, we deal first with the challenges made by reference to irrationality in the wider sense.

Irrationality in the wider sense: the Claimants' case

195. The Claimants submit that the level of scrutiny should be one of anxious scrutiny; in view of the false starts and disappointments of the past it was incumbent on the Defendant to be scrupulously careful and objective in reaching the decision under review. Their grounds can then be summarised as follows.

196. The reasons given for the Resettlement Decision at the time of its announcement were feasibility, defence and security, and cost. Unlike in 2004-2008, in the light of the KPMG Report, there is no longer any claim by the Defendant that independent evidence supports the conclusion that resettlement was not feasible.

197. With regards to defence and security, it is "doubtful" whether this can be a rational basis for excluding Chagossians from the whole of Diego Garcia. Resettlement on Diego Garcia was not ruled out by the USG. It only objected to tourism or tourist transit via Diego Garcia. Further, whilst the USG had expressed opposition to resettlement on Diego Garcia, it was far from clear that this was an immutable position. It was clearly understood by the Government that the USG's stance represented its opening position with a view to entering into further negotiations. Reference is made to communications from Alex Cameron, at the time head of the Defendant's Falklands and Southern Ocean Department, in February 2015 and from the British Embassy in Washington in June 2015. The UK officials on the BIOT review team were however unwilling to explore the extent of US opposition or "red lines". It was understood that the approaching deadline for roll-over of the Exchange of Notes gave the UK significant bargaining power. Yet the Government acceded to the USG's request that the US position on resettlement should not be connected to the roll-over.

198. In relation to the Outer Islands there are no defence considerations at all. Reference is made to the Prime Minister's interest in resettlement on the Outer Islands. The decision on the Outer Islands needed to be taken with particular care since the only issue in relation to resettlement was cost. The Defendant adopted unreliable and very high costings as to the cost of an airstrip on the Outer Islands and had only minimal discussions with private sector investors about the scope for private sector involvement in resettlement. He gave inadequate weight to the information provided on the significant opportunity for private sector investment through tourism. This failure is said to have been compounded by the mistakes of fact addressed separately below. The Defendant relied on costings from the KPMG Report that were then revised upwards. The figures achieved were no more than estimates and flawed by a failure to have proper regard to the much lower costings achievable by sourcing services and materials within the Indian Ocean region. In view of the significance of the decision to the Chagossians and in the absence of any defence or security concerns, it was not rational

to rule out all resettlement on the Outer Islands based on such inadequate cost estimates or without fuller consideration of alternative sources of funding.

199. In any event, the estimated basic capital costs of between £56 million and £265 million were not prohibitive, given the type of expenditure that had been authorised in respect of other small dependencies (such as the sum of £285 million spent on the construction of an airport in St Helena). The objection that any financial commitment would be open-ended and indefinite is not a good one. Any relationship between the Crown and its dependency and subjects there will be indefinite in nature with open-ended commitments.

200. Had due weight been given to the moral obligation and to the historical right of abode, then the case for resettlement was overwhelming. In any event, had due weight been given to those factors, it cannot be said that the result would have been the same.

Irrationality in the wider sense: analysis

201. We have no hesitation in rejecting the Claimants' broad challenge to the Resettlement Decision on the ground of irrationality either in respect of Diego Garcia and/or the Outer Islands.

202. As a preliminary observation, it is important to set the KPMG Report in context. It was based on the parameters of the 2014/5 study and necessarily at times on untested hypothetical underlying assumptions, for example that the USG would allow the military airport or other infrastructure on Diego Garcia to be used for tourist purposes and that the USG would provide some financial support. These assumptions proved to be undeliverable. Further, even within those parameters and on those assumptions, it is oversimplistic for present purposes to state that KPMG concluded that resettlement was feasible. As set out in Part IV above, whilst KPMG concluded that it was physically possible, any resettlement would present significant challenges and raise substantial concerns, including political, defence and environmental, before even addressing questions such as cost. The issues and challenges facing the potential resettlement of selected islands in the Chagos Archipelago were "very significant". Moreover, there was no legal obligation to fund resettlement. As the Court of Appeal put it in *Chagos Islanders v AG* at [54], whether return was possible was "a function of economic resources and political will and not adjudication".

203. The Resettlement Decision 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.

204. As for costs, these legitimately played a key part in the governmental decision-making process. The Government's attempts to secure financial support from elsewhere, including the USG, had not borne fruit. Private sector funding for an Outer Islands option only was also considered. The costings provided were understood (of necessity) to be estimates only (and subject to significant uncertainties). It was a matter for the Government whether it required more investigation or further detail before taking the in-principle decisions (having postponed a decision on resettlement for further research

and investigation in March 2013 and again in 2015). It was entitled to rely on the KPMG figures (which included detailed comparative costings for airports) as indicative, updated by DfID advice on costings, as sufficient for it to make the necessary overall evaluative judgment on how to proceed. There was also the 2015 Consultation document, containing specific figures and identified assumptions and explanations, which was before the NSC for the purpose of the Resettlement Decision.

205. Fundamentally, it is not for a court to second-guess the costings used or to delve into the details of the various figures adopted and approaches taken in order to determine a rationality challenge to the Resettlement Decision. It is hardly for this court to take a view on (nor would it be in a position properly to determine) what level of costs should or should not have been regarded by the Government as "prohibitive".

206. On any view, the capital and ongoing costs of any form of resettlement would be very substantial indeed, as set out on an indicative estimated basis on the figures available to the NSC. Absent an obvious and fundamental flaw central to the analysis, which we have not identified, that was a rational basis on which to proceed.

207. Turning next to defence and security, the Defendant assessed it vital to UK defence interests to maintain ongoing and smooth relationships with the USG and to maintain Diego Garcia as a military facility in both countries' defence interests. Again, whether or not to press the USG further on its position on use of the military airport at Diego Garcia and whether or not for example to use the impending date for the roll-over of Exchange Notes as a tactical negotiating tool were all matters for Government to decide, and not for the courts to go behind. These were deeply sensitive and nuanced political and security issues being addressed by senior officials and Ministers within Government, alongside wider questions of international relations including those with the Mauritian Government. The Defendant points by way of example to the Defendant's submission to the Prime Minister dated 14 March 2016 in advance of the NSC meeting in March 2016. There can be (and is) no criticism of the statement of the Permanent Under Secretary of State at the FCO in the NSC meeting in March 2016 that resettlement involving Diego Garcia was "strongly opposed across the US government". There is no good basis for a rationality challenge to a decision based on these concerns as key.

208. Turning next to concerns about the creation of a new community in a remote territory and associated social risks, these were highlighted not only in the KPMG Report but also in the documentation leading up to the NSC meeting in 2016. The risks of setting up a community without proper economic opportunities, for example, are obvious and would all fall within governmental responsibility.

209. Finally but importantly, particularly on the challenge to the decision not to permit resettlement on the Outer Islands, the Government was entitled to take into account the significant environmental concerns, again highlighted in the KPMG Report as set out above. These were particularly acute in the context of resettlement in the Outer Islands because of the MPA. Mr Fitzgerald in reply submitted that it was unfair for the Defendant to rely on such concerns when in *Bancoult 3* (as reflected at [28] and [48]) the Government's position was that the establishment of the MPA was without prejudice to and did not preclude resettlement. But that is not to say that its existence might not be a legitimate material consideration when considering whether or not to permit resettlement.

210. More generally on the Outer Islands, the Government was aware of their separate position in that the USG did not oppose resettlement on the Outer Islands *per se*. It consulted on an Outer Islands option only in the 2015 Consultation. However, the USG's position was heavily qualified by its refusal to allow transport to the Outer Islands via Diego Garcia. The fact that there were no defence concerns relating to the Outer Islands did not render irrelevant or less powerful the other obstacles relating to cost, social risks and the environment. The KPMG Report stated in terms that "in theory an option could be developed which was based only on outer island settlement, but this has been discounted on environmental and practical grounds." The Claimants submit that in reality KPMG did not categorically dismiss an Outer Islands only option; rather it discounted it only on a comparative basis, with a resettlement option involving both Diego Garcia and the Outer Islands being preferable. This submission may become relevant later in the context of the Claimants' specific allegations of misrepresentation. For present purposes what matters is that on either interpretation the prospects of resettlement on the Outer Islands were far from being given a ringing endorsement by KPMG.

211. The Government had a difficult and complex balancing exercise to carry out with competing interests and concerns in the scales. The evidence demonstrates that it approached the task with care and sensitivity. The reasons underlying the Resettlement Decision were legitimate considerations. The Claimants self-evidently do not agree with the decision or its reasoning but that does not mean that there are grounds for judicial intervention on public law grounds.

212. The suggestion that this court should intervene on the basis that inadequate weight was given to moral obligation and the Claimants' historic right of abode is misconceived. The appreciation of the opportunity to right a grave historic wrong which removed the Chagossians from their homeland was at the heart of the debate, led by the Prime Minister, and the driver behind what was a voluntary exercise. As the NSA's briefing of the Prime Minister dated 27 February 2015 observed in terms: it came down to a balance between righting "what was unquestionably a serious historic wrong" and other considerations, such as costs and liabilities.

213. In summary, and subject to the specific further challenges raised in relation to the Outer Islands addressed immediately below, the Resettlement Decision was within the range of permissible decisions reasonably and lawfully open to the Defendant. There is no proper basis for us to interfere with what was a multifactorial and multidimensional decision taken at the highest level, particularly in circumstances where the factors and dimensions involved included matters of political sensitivity, defence and security concerns.

Specific challenges to the decision not to resettle on the Outer Islands on the basis of incorrect information

214. As indicated, the Claimants further submit that the decision not to resettle on the Outer Islands was flawed by specific errors of fact and misrepresentations to Ministers. Reliance is placed on *R (National Association of Health Stores and another) v Secretary of State for Health and another* [2005] EWCA Civ 154. There (at [60]) Sedley LJ

identified the familiar public law test: was something relevant left out of account by [the minister] in taking his decision? At [62] and [63] he went on:

> "…a minister who reserves a decision to himself…must know or be told enough to ensure that nothing that it is necessary, because legally relevant, for him to know is left out of account. That is not the same as a requirement that he must know everything that is relevant….in *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 Cooke P drew the distinction…between things which are so relevant that they must be taken into account and things which are not irrelevant and so may legitimately be taken into account. It is axiomatically only a failure to take into account something in the former class that will vitiate a public law decision…."

215. Referring to these principles in *Secretary of State for the Home Department v AT, AW* [2009] EWHC 512 (Admin) Mitting J said (at [17]):

> "Implicit in this statement is the further proposition that the minister must not be given information which is misleading in one or more respects which are critical to his decision. It was always possible for the minister to put in evidence that he was not misled and took the decision on a proper factual basis; but in the absence of such evidence, the reasonable and sufficient inference will be drawn that the decision was made on a basis that was materially erroneous…"

216. The Defendant reminds us that for a mistake of fact to give rise to an error of law, first there must have been a mistake as to an existing fact. Secondly the fact must have been "established" in the sense that it is uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (though not necessarily decisive) part in the decision-maker's reasoning (see *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044 at [66]). The courts have long deprecated the dressing up of errors of fact as errors of law in judicial review cases (see for example the comments of Laws LJ in *R (Abbey Mine Ltd) v The Coal Authority and another* [2008] EWCA Civ 353 at [25]).

217. The Claimants between them raise various allegations of mistakes of fact or misrepresentation said to vitiate the decision not to resettle on the Outer Islands. Heavy reliance is placed on the contents of the Whitebridge Report which was commissioned after the KPMG Report in the context of other investigations to investigate tourism options in the BIOT.

218. The Whitebridge Report focussed on the Outer Islands. It analysed possible income generation from high end resort development and luxury yacht moorings on the Outer Islands, including commercial models, employment opportunities and rights, costs and

a potential "airlift" solution where tourists were transported to the Outer Islands from airports from nearby nations which necessitated consideration of runway construction within the Outer Islands. The report concluded that it would be very expensive to develop an international standard airport facility. It considered the risks of the options and how the eco-lodge tourist sector might be transposed to the Outer Islands.

219. Dr Hayes deposes that the purpose of commissioning the Whitebridge Report was, in the first instance, to inform discussion amongst officials as to how to present resettlement options to Ministers for the next NSC meeting. It was not intended that it would cover the costs of Outer Islands resettlement in any way. What officials wanted to know was whether high end eco-tourism was viable economic activity, in particular on the Outer Islands. It was part of the supporting analysis for the 2016 NSC meeting. Those drafting the NSC(O) and NSC papers distilled its contents into a couple of sentences for the NSC(O) and just one sentence for the NSC. He states:

> "…That approach was, in my view, entirely appropriate for a supplementary piece of evidence of this kind, where officials did not consider that its content materially changed the options that were to be presented to Ministers. Its content was fed into the decision-making process, but our role as officials is to reduce a mass of evidence and data to an easily comprehensible but yet comprehensive format…"

220. Dr Hayes also states that whilst it was clear from the Whitebridge Report that a private investor and/or operator might be interested in such a project, it was also apparent that no private investor would do so on the basis that it would have to establish and maintain the necessary civilian infrastructure on a pristine coral island. The report assumed that a ready-made habitable island would be in place. The fact that any resort developer's investment would have to be entirely or substantially underwritten by the Government made the likely cost of such an option very high indeed, to which would have to be added that very high costs of maintaining an infrastructure for any resident population. Similarly, the costs of building an airstrip were less important in officials' consideration than the overall cost of underwriting infrastructure and the ongoing liabilities for a resident population.

221. The Whitebridge Report informed Mr Moody's briefing to the Defendant dated 17 February 2016 recommending that Ministers should seek NSC agreement to rule out resettlement; the final NSC(O) paper of 17 February 2016 and slide pack for the NSC(O) meeting; the slide pack and NSC paper for the March 2016 meeting including the following paragraph under the heading "Liabilities in any form of resettlement":

> "As important as cost is exposure of HMG to *ongoing* open-ended financial, social and legal liabilities from any resettlement. Even in the most favourable circumstances, it would not be possible to remove HMG responsibility for a new settlement….For the outer islands, there is some prospect of tourism, but it would require new infrastructure, governance and security on remote and low-lying islands…."

222. The Defendant submits that the presentations to the NSC and the briefing of the Prime Minister were accurate, fair and not misleading as to material matters relating to the prospects of settlement on the Outer Islands. The OTD paper for the NSC meeting in March 2016 put option B forward as follows:

> "Resettlement excluding DG: Not ODA eligible. Capital costs of £176m (500 people). Running costs of £14m/yr. US does not cite concerns, though airfield could only be used by HMG chartered flights for Chagossians, not tourists. Possibility of offsetting some costs through tourism. Pitcairn experience shows us inherent social risks in such fragile remote communities; new infrastructure means environmental damage likely."

223. Likewise, as set out above and repeated for ease of reference, the NSA's briefing of the Prime Minister dated 11 March 2016 stated in relation to the option of resettlement on the Outer Islands:

> "This option was effectively discounted as too risky in the independent KPMG study. Two settlements of up to 500 people in total would cost about £326m (non ODA-eligible) over 10 years. The outlying islands are very remote – 240km from Diego Garcia and 840km from the Maldives. They are low lying and very small, with existing infrastructure, and therefore vulnerable to rising sea levels. Niche tourism could be introduced to provide modest employment, but it would be risky and potentially non-viable, with HMG needing to underwrite any private investment. Provision of western standards of education, healthcare and governance would be impossible to guarantee, and DfID are convinced that there would be a high risk of social problems (as in eg Pitcairn)."

224. Against this background, we address each alleged misrepresentation or error of fact in turn.

225. First and as the "most serious mistake of fact", the Claimants point to the statement of the Permanent Under Secretary of State at the FCO recorded in the minutes of the NSC meeting in March 2016 as follows:

> "Option B was resettlement on the Outer Islands excluding Diego Garcia. These islands were a five-hour boat trip from the US airbase. The largest was the size of Hyde Park which ruled out building a landing strip and the highest point was only 6 feet above sea level."

226. The Claimants submit that it was incorrect information that the Outer Islands were too small for an airstrip. Both the Whitebridge Report and the earlier 2002 Feasibility Study

had identified that it was possible to build an airstrip on the Outer Islands. This mistake was central to the decision taken. Whether or not a group of islands in the middle of the Indian Ocean is large enough for an airstrip to be constructed is obviously a major consideration in relation to a decision on resettlement on those islands. It was a serious and material error sufficient in itself to invalidate the Resettlement Decision. It was compounded by the statement that the largest island was only the size of Hyde Park. Whilst it is accepted that that was "technically correct", such an area does not rule out the building of a 2km long airstrip.

227. We are unable to accept that there was a material error of fact as alleged. When seen in context, what was being represented was that in real terms the building of an airstrip on the Outer Islands was not feasible. The Permanent Under Secretary's remarks were by way of introduction for the NSC to a full slidepack from the NSC meeting in 2015 and other documents including the KPMG Report and the 2015 Consultation, all of which considered in terms the costs of building an airport to service the Outer Islands. The NSC had full and accurate information in the slidepack as to the geographical situation of the Outer Islands and the environmental impacts of development on the scale under consideration. In any meaningful sense (by reference to cost, environmental and practical considerations) building an airstrip on the Outer Islands was not practicable.

228. Further, the Whitebridge Report dealt only at a high level with the means by which tourists might be conveyed to the Outer Islands, as a preliminary consideration prior to considering the financial viability of a high-end tourist resort. It contained a desktop analysis of possible runway options for the purpose of the issue of accessibility for tourists. It did not provide any detailed analysis of the costs and challenges of building an airstrip or any environmental or feasibility analysis. Nor could it have done. Whitebridge were travel consultants not aviation construction specialists, as they themselves fairly recognised. Whitebridge's views were therefore expressed in highly provisional and caveated terms:

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

229. In this sense, the statement that the building of a landing strip on Outer Islands was ruled out because they were too small was not necessarily at odds with the Whitebridge

Report. The comparison with Hyde Park may have been intended to give Ministers a general impression of the size of the largest of the Outer Islands. It did not add materially to the point being made on the feasibility of building an airstrip on the Outer Islands. In any event, in purely physical terms anyone with a basic knowledge of Hyde Park would understand that it was big enough for an airstrip.

230. In this context it is also said for the Claimants that none of the briefing to the NSC informed decision makers that, in any case, a landing strip might not be required for Outer Island resettlement and tourism because it would be feasible to access the Outer Islands, through Gan International Airport, by seaplane. This is said to have been a material omission, significant both to feasibility and to the assessment of environmental impact.

231. This cannot amount to a material omission in circumstances where the Whitebridge Report itself did not conclude that a viable high-end tourist resort would be attractive to a private investor solely on the basis of the possible use of seaplane transfers from Gan International Airport. Further, even if this were a viable solution, the other obstacles to resettlement on the basis of an Outer Islands solution would have remained. There is no evidence to suggest that the KPMG evaluation of the practical and environmental difficulties of such an option could have been overcome through the grant of seaplane access to the Outer Islands. Dr Hayes comments that, whilst seaplanes can reach the Outer Islands with passengers, he knows that the majority of supplies and materials would have to be brought in by boat on grounds of cost. That would therefore have necessitated the establishment of an appropriate harbour, or at least landing stage, and the associated engineering.

232. Secondly, the Claimants submit that the decision against resettlement on the Outer Islands was taken on the incorrect information that the costs of building an airstrip were prohibitive. There was a failure to consider accurate information as to the true cost of an airport in the Outer Islands and reliance on inaccurate information.

233. There is no established factual error. The Defendant denies that the KPMG Report's conclusions on the cost of building an airport on the Outer Islands were inaccurate or unreliable. They were not based, as the Claimants assert, on the views of US Major Ted Morris in 2008 but rather on up to date research, including information from US contractors supporting the facilities on Diego Garcia and comparable projects undertaken in other overseas territories. Mr Moody recalls that KPMG also investigated local construction costs in Mauritius. In the report itself KPMG stated that they had reviewed relevant regional institutions, professional engineering and building bodies, international maritime and aviation authorities, and a number of regional bodies and countries to identify a range of costs that permit an estimate to be inferred for particular infrastructure provision. KPMG's various comparative costing exercises were set out with further detail in Annex 7.4 to the main report.

234. The figures relied upon by the Claimants are highly contentious. Mr Gifford advances a figure of US$27 million (against KPMG's figure of £125 million plus a £25 million contingency) as the cost of building an airstrip on a remote island. Dr Hayes, who has some experience in this area, describes Mr Gifford's evidence as "wildly optimistic" and the figure of US$27 million as "substantially wide of the mark".

235. It is not for us to resolve any such disputes. In any event and on any view, the costs involved were going to be very considerable. Dr Hayes also repeats that the actual costs of an airstrip, at whatever level, were not the sole or even dominant factor in determining the feasibility of the Outer Islands tourism option. That factor was the assessment that eco-tourism in the Outer Islands would require infrastructure investment and underwriting of the liabilities of investors.

236. Thirdly, the Claimants submit that the statement that resettlement on the Outer Islands decision was "too risky" was incorrect information on which the decision was taken. In fact, as set out above, what was said was a statement by the NSA to the Prime Minister that resettlement on the Outer Islands only as an option was "effectively discounted as too risky" in the KPMG Report.

237. It is correct that there was no statement in terms by KPMG that resettlement of the Outer Islands was "too risky". (Nor was the NSA representing otherwise: no quotation marks were used, and the word "effectively" points to the fact that what was being expressed was the NSA's reading of KPMG's views.) That does not mean that it was a misrepresentation to represent that as being KPMG's conclusion in effect. As Dr Hayes explains, part of the briefing process involved officials marshalling large amounts of detailed information into readily accessible and condensed form. The statement represented an evaluative judgment by the NSA of KPMG's overall position on resettlement on the Outer Islands and one which was far from irrational. As set out above, KPMG identified significant uncertainties inherent in the physical terrain; resettlement on the Outer Islands was discounted (or at the very least extremely challenging) on environmental and practical grounds; in contrast to Diego Garcia, Ile du Coin and Boddam are remote, demanding environments where all infrastructure and facilities would need to be established in the event of resettlement or tourism; this would be costly environmentally as well as economically. Construction of a port and/or airport would be extremely invasive and create major environmental injuries to the coral reefs. KPMG said in terms: "In theory an option could be developed which was based only on outer island settlement, but this has been discounted on environmental and practical grounds." As already indicated, whether this was outright rejection of the option or not, it emphasised the huge difficulties in the path of resettlement on the Outer Islands even before costs considerations. As to those, by way of example, the additional capital cost attributed by KPMG to the construction of an airport and harbour was £233.1 million.

238. The NSA's evaluative interpretation of KPMG's report was fair and accurate, or at the very least not obviously wrong. And in any event, the full KPMG Report was there (and in the papers for the March 2016 NSC meeting) for all NSC members to read, as indeed they had been instructed to do.

239. Fourthly, the Claimants submit that the statement by the NSA to the Prime Minister that the Outer Islands were "very remote…840km from the Maldives" was incorrect information. They submit that the distance from Gan International Airport in the Maldives to Peros Banhos is in fact 535km.

240. This point goes nowhere, since on any view the Outer Islands remained very remote. Further, the criticism is a subjective one, resting on the decision to measure the distance from Gan International Airport. The figure of 840km was based on a measurement taken from the midpoint of the territory of the Maldives. There is no established error of fact.

241. Fifthly, the Claimants contend that it was misleading to inform the Prime Minister that tourism development would be risky and would need the Government to underwrite any private investment. There was a failure to explain that those comments, taken from the Whitebridge Report, were made in the context of an all private sector funding model. This is not a valid criticism in circumstances where the Whitebridge Report's conclusions were predicated on the Government paying for and/or underwriting the costs of establishing a civic infrastructure on the Outer Islands. Whitebridge observed that it was highly unlikely that a private investor would be interested in bearing the full cost of the tourist development of an island and ensuring the financial solvency of the project without any call on government resources.

242. Sixthly, the Claimants submit that the NSC was erroneously informed that there were "lesser but still significant US concerns about a resettlement" on the Outer Islands. It is said that there is no evidence to support that statement. However, there was always US concern that any form of resettlement, including an Outer Islands only option, would affect Diego Garcia. The Defendant can also point to written communications from the Office of the Under Secretary of State of Defense sent on 13 February 2015 (sent separately to but at the same time as the Gottemoeller letter) to support his position and an internal FCO email of 9 March 2016.

243. For these reasons these specific further challenges to the decision not to resettle on the Outer Islands, either by themselves (individually or cumulatively) or taken together with the broader challenge on irrationality addressed above, do not make good the claims for judicial review.

Failure to take into account alleged non-deliverability of the support package in Mauritius

244. Mr Bancoult challenges the Resettlement Decision by reference to alleged non-deliverability of the support package in Mauritius. It is submitted that the Defendant knew that the support package was "largely undeliverable", having been informed by the British High Commissioner in Mauritius that it would not be deliverable there unless the ongoing sovereignty dispute was resolved, which was not likely to happen. The British High Commissioner said this on 12 August 2016:

> "Just a reminder to all that any package here would need to be administered by the Mauritian Government, given the proposals we have considered in the past. In the current circumstances, [redacted] and an acceptance by the Mauritian govt that resettlement is impossible, I cannot see how we could get the Mauritian govt to do this. So it is not feasible as things stand to separate this potential package from any agreement with the Mauritian govt on the wider sovereignty dispute."

245. It is alleged that this view was not reflected in the NSA's briefing of the Prime Minister on 25 August 2016 which was in the following terms (repeated for ease of reference):

> "10. There are nonetheless some risks to delivery of this package, the main one being that the programme in Mauritius could only be delivered through the Mauritian government and would therefore require their consent and co-operation, which might not be forthcoming while the sovereignty dispute continues. Given that elements of the package will likely need to be tailored to enhance education and health support in areas where there are high densities of Chagossians, their support will be critical, though it would also deliver broader benefits to Mauritius."

246. In the final letter from the Defendant to the Prime Minister, accompanying the October 2016 write-round, the Defendant said this:

> "The NSC provisionally agreed therefore on the third option of no resettlement with a support package which – following further policy work – is now suggested to amount to around £40million. This will support Chagossian communities in Mauritius, the Seychelles and the UK over the next 10 years….Officials will liaise with Chagossian Communities in the UK and overseas and work closely with the Governments involved to develop cost-effective programmes that make the biggest improvement in the life chances of Chagossians most in need. DfID will deliver the development aspects of this support package."

247. In his final briefing to the Prime Minister the NSA said this (on 9 November 2016):

> "It is important to note that we will require the cooperation of the governments of the Seychelles and [redacted] Mauritius to deliver this package in those locations. The FCO's announcement will make this clear…"

248. It was submitted for Mr Bancoult that, in light of the apparent significance of the support package as an alternative to resettlement and/or as part of the Ministerial decision on the BIOT review, it was misleading to allow the decision on the support package to proceed without clear and unambiguous advice on the likely barriers to its delivery in Mauritius being provided to Ministers in terms. Reference is made to a Cabinet Office agenda document and an information note from the OTD in October 2016. There was a failure to take into account the non-deliverability in Mauritius of the support package.

249. Further or alternative allegations were pleaded, though not developed orally before us. It was said alternatively that, if the view of Ministers was that delivery in Mauritius was likely to be impossible, then the availability of any support package for the Mauritian

Chagossians was an irrelevant consideration. Further, "in so far as" the 2015 Consultation raised a legitimate expectation that any non-resettlement options might benefit the Mauritian Chagossians a further consultation should have been undertaken when it became clear to officials and Ministers that such a package would be impossible and/or unfeasible to deliver whilst the sovereignty dispute was ongoing.

250. Mr Fitzgerald for Mr Bancoult made it clear that he does not challenge the Support Package Decision itself. Thus, as a precursor, he must establish that the Resettlement Decision and the Support Package decision were interdependent, such that irrationality on the latter justifies relief in respect of the former. That is, on the evidence before us, by no means clear. The decision in March 2016 was to rule out resettlement options outright and without any final decision on a support package (even in principle), only that a proposed development package would be reviewed and explored further. Whilst that package may have been seen as an alternative to resettlement in a loose sense, and even if it was relied on to mitigate the impact of the decision not to resettle, the decision on resettlement appears to us to have been self-standing.

251. That aside, the criticisms are in any event misplaced. The opinion expressed by the British High Commissioner in Mauritius was his view in August 2016 "in the current circumstances" and "as things stand". The Government was well aware of the risks to delivery of the support package through non-cooperation from the Mauritian government. There was no failure to take the risks into account; they were identified at all material stages, including in the NSA's final briefing to the Prime Minister as an "important" matter. They were risks creating a current problem to future delivery of that part of the package destined for Mauritius of which the Government was well aware.

252. The NSA's view was that non-cooperation from the Mauritian government was a risk but not an outright obstacle. The Defendant in October 2016 envisaged close liaison between governments to enable delivery of the package. The conclusion that the support package was a viable and realistic option, despite the risks to delivery, was an evaluative judgment made by the Government at the highest level. It cannot be said to have been an irrational one, not least given the ten year term envisaged for the programme. Nor, on this basis, was the existence of the support package an irrelevant consideration in deciding whether to pursue it as an alternative to resettlement (assuming for present purposes in Mr Bancoult's favour that it actually played a part in the Resettlement Decision).

253. In the light of this finding, Mr Bancoult's alternative or further allegations (which are premised on the Government being of the view that delivery of the support package in Mauritius was impossible (which it was not)) fall away.

254. For these reasons, we dismiss the Claimants' various challenges to the Resettlement Decision on grounds of irrationality.

Part XIII: Issue 5: the consultation challenge

255. The Claimants submit that the Resettlement Decision was flawed by misinformation as to the true nature of the responses to the 2015 consultation process and underlying errors

of fact. During the course of the litigation a large number of criticisms (including as to procedural unfairness and some in the alternative) have been levelled at the 2015 consultation process. The Defendant has responded to them all. Many were not then developed before us, as Sir James Eadie for the Defendant specifically highlighted in his oral submissions and so did not address orally either.

256. We focus on the Claimants' three central arguments as they were presented at the hearing:

i) First, the extent of support for resettlement was diminished for Ministers as a result of the emphasis placed on the fact that only 25% of Chagossians favoured resettlement on the basis of realistic options and on an alleged neglect of the 67% who were in favour of resettlement but "not clear if content with realistic scenarios";

ii) Secondly and so Mr Fitzgerald submitted "more fundamentally", the basis of the claim that only 25% were in favour of realistic scenarios was flawed because the scenarios adopted were unrealistic and this was not explained to the decision makers;

iii) Thirdly, it was also represented that a further 63% were undecided on alternatives to resettlement, an assertion unsupported by any objective analysis of the consultation responses received.

The consultation process and presentation

257. In order to assess the merits of these allegations, it is necessary to rehearse some of the detail surrounding the consultation process and presentation.

258. A draft consultation document was prepared by FCO officials in July 2015 following earlier preparatory work for consultation with the Chagossian communities to ascertain in greater depth the likely take up of any resettlement offer. Its terms were discussed and approved across Whitehall over several months, alongside the taking of legal advice.

259. The formal 2015 Consultation document was dated 4 August 2015, ran to ten pages and asked for responses by 27 October 2015. The 12 week period of consultation was at the upper end of Cabinet Office guidance for the length of public consultations. The document made it clear that it was not a statement of government policy. Under the heading "Purpose of consultation and assumptions" it stated:

> "4. The primary objective of this consultation is to understand the demand for resettlement from Chagossians which will then lead to a clearer assessment of the likely costs and ongoing liabilities to the UK Government. Whilst no policy decisions have been taken on any aspects of resettlement, we wish to make it clear from the outset that a resettlement which is open to all may not be viable, depending on the cost of providing adequate

> social support, including health and education, for those living on such remote islands.
>
> 5. A resettlement could be based on conditions that require resettled Chagossians of working age to have a job; security clearances and that all resettlers are sufficiently resilient to be able to cope with the limited healthcare facilities and lifestyle realistically available in BIOT. Although yet to be determined, permission to reside could be revoked for individuals who are unable to meet these or other requirements following resettlement."

260. For the purpose of better assessing demand, the Government sought to present the most realistic way in which resettlement could hypothetically take place. Thus under "Resettlement Options – Most Realistic Potential Lifestyles" the 2015 Consultation stated:

> "13. The UK Government is continuing to analyse KPMG's three resettlement options of a pilot, medium and large resettlement as well as another medium size option on the Outer Islands only. The following table clarifies how, hypothetically, these resettlement options could work and the type of living conditions and jobs most likely to be available. It is important to note that these do not constitute any form of commitment by the UK Government to resettlement taking place, or in the forms below, but present our assessment of the most realistic scenario for the purposes of clearly assessing demand from Chagossians…."

261. A series of assumptions was then set out in a table (Table 1.0). In the context of transport and access assumptions, it was stated that: "Resettled Chagossians would not be able to have visitors in Diego Garcia" ("the visitor scenario"). In the context of a livelihoods overview, it was stated that "Obtaining employment in the BIOT is likely to be a precondition of resettlement for all except Chagossians of retirement age and their immediate dependants which may include a spouse/long term partner, children up to 18 and parents" ("the employment scenario").

262. Annex A contained a detailed questionnaire for completion, which included the following questions:

i) "Are you interested in resettling in BIOT under the conditions in Table 1.0?" with possible answers "Yes/No/Undecided (please delete as appropriate)" ("the resettlement question");

ii) "Are there alternative options to resettlement that interest you?" with possible answers "Yes/No/Undecided (please delete as appropriate)" ("the alternative options question").

263. The scenarios in the Consultation Document were not presented as the only conditions on which the Government would consider permitting resettlement. When concerns were raised by the Chagossian community that the basis for the consultation was inappropriate and unduly limited the BIOT Policy Review Team assured "that the purpose of this questionnaire is not to tie Chagossians into a resettlement or the precise terms of any resettlement".

264. 832 responses were received from Chagossians of which 551 were hand-delivered to the British High Commission in Mauritius by Mr Bancoult on 26 October 2015. Other responses were received from:

i) The UK Chagos Support Association;

ii) Chagos Conservation Trust;

iii) The Linnean Society;

iv) The Zoological Society of London;

v) M. Jean Lefade from France;

vi) Mr Jon Slayer;

vii) Chagos Island Community Association;

viii) Crawley British Chagossian Community;

ix) Dr Michael Woolf.

265. FCO officials analysed the responses to the 2015 Consultation, including overall responses to meetings that had been held in Mauritius and the Seychelles. A series of pie charts and graphs illustrating the responses was produced. A summary was provided to the Minister for Overseas Territories on 3 December 2015, alongside an information note, followed by a formal summary published in January 2016, namely the Summary of Responses.

266. The Summary of Responses, which went before the NSC in March 2016, stated under the heading "Views on resettlement" that:

> "Though the vast majority of Chagossians were in favour of resettlement in principle, there were more nuanced views about the scenarios that were presented in the consultation document as the most realistic description of how it might work."

267. A pie chart then showed 25% in favour of resettlement and content with realistic scenarios and 67% in favour of resettlement but "not clear if content with realistic scenarios".

268. Under the heading "Alternatives to resettlement" it was stated:

> "Responses from Chagossians indicated a degree of uncertainty about alternatives to resettlement while around a third were clear they would not wish to participate in such options."

269. A pie chart then showed 8% interested in options that did not involve permanent resettlement, 29% not interested and 63% undecided.

270. The figures on resettlement were repeated in the information provided to the NSC in advance of the meeting on 15 March 2016, with the pie chart also appearing in the slidepack (but without the summary) and the following narrative in the NSC briefing paper:

> "*Chagossian aspirations*
>
> …..Chagossians expressed their motivations for seeking resettlement in the recent public consultation as (re)connecting to a place they consider their "homeland", and to seek a better life that they perceive to exist there. It demonstrated high demand from the 832 who responded, though this was only 9% of the 9,000 global Diaspora. Expectations include access to jobs and services in a developed economy, and freedom of travel and visits. Demand drops to just 25% (204 of those responding) when faced with conditions considered realistic to BIOT."

271. The NSA's briefing of the Prime Minister dated 11 March 2016 stated:

> "6. The FCO background paper and slides provide a good summary of the issues. In particular, Slide 1 summarises last year's public consultation. From the global diaspora of 9,000 Chagossians, there were only 832 responses (less than 10%). 77% of these were from Mauritius and the Seychelles, only 21% from the UK. Although 98% of the respondents expressed a desire to resettle, 60% are second generation Chagossians with no direct experience of life there, and only 25% expressed themselves content with the likely conditions of life in BIOT if they were to resettle."

272. The 25% figure was also repeated in correspondence during the write-round for the announcement in the WMS. Thus, for example, the Defendant wrote on 25 October 2016 to the Prime Minister stated:

> "….Most Chagossians wishing to resettle have never been to the Islands, and only 25% appear to favour resettlement under what we would describe as realistic conditions, so it is possible that if resettled, many would subsequently leave."

273. Under the heading "Non-resettlement" the NSC briefing paper for the March 2016 meeting went on to say:

> "Any solution which is a substitute for resettlement will probably not be seen positively by Chagossians, or reduce the risk of litigation in the short term since only 8% of respondents to the consultation expressed positive interest in such options while a further 63% were undecided…"

274. The 63% figure had also featured in the NSA's briefing of the Prime Minister dated 22 January 2016 (which also referred to the 67% figure):

> "The public consultation on the resettlement of the Chagossians has concluded and the FCO have published the results. The results (from 844 people, roughly 10%) show that 67% are in favour of resettlement on BIOT in principle. A small number (8%) are interested in alternatives to resettlement, while 29% said they would not be interested, and the balance (63%) was undecided. It is clear that there is a divergence between the FCO proposed package and what the Chagossians want. Overall, the Chagossians displayed a mixed response to the consultation. Some were irritated having been asked again for their views, most believe that HMG is close to a decision, and the majority think that HMG is obliged to agree to resettlement because they have requested it."

The Claimants' challenges

275. With this factual background we turn to the Claimants' challenges. As an overarching finding, we reject the suggestion that there was a failure conscientiously to take into account the responses to the 2015 Consultation. On the contrary, the evidence of Mr Moody in particular shows the care and attention that was paid to the responses and their onwards presentation. Significant time and effort was spent analysing the responses and seeking to capture their overall thrust in an accurate and intelligible way. Officials were at pains to present the responses as fairly as possible. Active consideration was given as to how to present ambiguous answers fairly.

276. So, by way of example, all 551 responses delivered by Mr Bancoult did not answer the resettlement question as requested ("Yes/No/Undecided"). Rather each response contained a standard answer:

> "I very much wish to resettle in my Homeland for which purpose the reasonable conditions of life must be available, such as security of home and land, job/pension, reasonable and adequate social services, and the freedom to travel and be visited."

This did not reflect any of the assumptions set out in Table 1.0. Table 1.0, for example, had expressly stated that there would be no private ownership of land or pension provision by the Government.

277. Strictly speaking, these respondents had answered the resettlement question in the negative. However, Mr Moody describes how he was mindful that this would present a negative picture of the level of interest in resettlement. As he says, "[t]his posed a dilemma". He wanted to take a fair and impartial position on the consultation but on the other hand, "one of the key issues to be resolved in the consultation was how many Chagossians would in reality commit to any of the resettlement options that were contemplated at the time." The solution that he adopted, after discussion with Dr Hayes and another colleague, was to record these responses as "Yes" to the resettlement question and then to provide additional analysis. Thus the interest in resettlement as a matter of principle was reflected, notwithstanding those Chagossians' apparent lack of interest in resettling on the terms set out in Table 1.0. The analysis broke down those Chagossians treated as being in favour of resettlement as a matter of principle into categories dependent on their approach to the conditions identified in Table 1.0. It conflated those Chagossians who had indicated in terms that they were undecided on resettlement on Table 1.0 conditions with those who had responded in the standard terms of the Mauritian Chagossians as delivered by Mr Bancoult. Mr Moody states that this:

> "… seemed to us the best way to deal with the large number of ambiguous responses while still highlighting to Ministers the level of interest in resettlement. It sought to avoid any possibility that the level of interest might be understated."

278. It is also important to note that the actual Summary of Responses document was within the materials provided for the NSC meeting in March 2016. Thus Ministers were not reliant solely on any briefing paper which must be seen in context.

279. The Claimants' first specific challenge is made by reference to the figures used of 25% and 67%. It is said that the figure of 25% used in the March 2016 briefing paper was misleading and greatly underestimated the level of support in so far as it omitted to mention the 67% who were undecided and the fact that it had earlier been recorded that the vast majority of Chagossians were in favour of resettlement.

280. These criticisms are misconceived. The NSC in March 2016 was well aware of the headline level of interest in resettlement. Thus, for example, the NSA's briefing of the Prime Minister dated 11 March 2016 referred to the fact that 98% of respondents to the 2015 Consultation expressed a desire to resettle (continuing that only 25% expressed themselves content with the likely conditions of life). Slide one of the slidepack stated in terms that "98% of respondents said want to resettle" (again continuing "but only 25% remain interested when faced with realistic conditions of resettlement"). The Summary of Responses also recorded that "the vast majority of Chagossians were in favour of resettlement in principle".

281. The use of the figure 25% was unobjectionable in context. The figure of 25% was clearly and accurately stated to represent the percentage of Chagossian respondents who

were in favour of resettlement and content with realistic scenarios. The 67% figure was not ignored. It was mentioned in the Prime Minister's briefing by the NSA dated 22 January 2016. It was also clearly shown and referred to in the Summary of Responses which was before the NSC in March 2016 as representing those in favour of resettlement but without it being clear that they were content with realistic scenarios. The relevant basic pie chart there displayed made the position very clear. The reasoning for the category behind the 67% figure is clearly and logically explained by Mr Moody, as set out above. A decision had to be taken as to how to represent the position of those who had not answered the resettlement question as requested. There is no proper basis for that evaluative judgment to be criticised.

282. Nor was the position unfairly or inaccurately presented to Ministers. The statements in the briefings for the March 2016 meeting of the NSC were fair evaluative presentations of the results of the 2015 Consultation, supported by detail in the Summary of Responses and the slidepack, all of which were before the NSC.

283. Turning next to the visitor and employment scenarios, the Claimants submit that these were not realistic for normal community lives, were inconsistent and negatively presented. In terms of visitors, the USG was not saying that settlers on Diego Garcia could not have visitors; rather that it would not permit tourism. In terms of employment, the impression given was that upon reaching the age of 18, a settler would have to leave unless he/she had a job. The Claimants point to an internal email dated 6 May 2015 from Dr Kenny Dick of the OTD ("Dr Dick") where he stated:

> "I assume others who know more about human rights issues will comment on the Options which have 18 year olds being forced to leave their home if they don't have employment but from a DfID point of view the reputational risks for HMG would be substantial."

284. The Defendant's preliminary objection to the challenge mounted by reference to the visitor and employment scenarios is one of delay. Under CPR 54.5 judicial review proceedings must be commenced promptly and in any event not later than three months after the grounds for making the claim first arose. Under s. 31(6) of the Senior Courts Act 1981 the High Court, where it considers that there has been undue delay in making an application for judicial review, may refuse to grant any relief if it considers that the granting of the relief would be likely to substantially prejudice the rights of any person or would be detrimental to good administration.

285. The Defendant submits that there has been a delay of some 15 months and the challenge is brought too late. To allow relief would cause the Government substantial prejudice. We would uphold this objection. It is right that during the consultation process the Chagossian community raised questions about resettlement options and the practical implications of life on the Islands. When handing in the 551 completed questionnaires on 26 October 2015 Mr Bancoult also wrote to the Defendant complaining of a lack of clarity in the consultation about the basic requirements of a settled community and making a number of other observations. But there was no criticism of the scenarios which were the underlying basis of the consultation. Mr Fitzgerald took us to a letter dated 11 November 2015 from the Crawley British Chagossian Community to the

Parliamentary Under Secretary of State for the FCO. This was a general letter written in the light of comments made by the Parliamentary Under Secretary in a recent Parliamentary debate. It expressed views on the current Chagos situation and the continuous struggle being faced by Chagossians. The letter emphasised certain changes that would be necessary if they were to be able to live, work and raise children as a family. It commented that the actual proposals treated Chagossians as "contract workers" which they emphatically were not. It requested a meeting to discuss the current stages of the resettlement studies. It made no mention of the 2015 Consultation or the scenarios adopted for its purposes. It cannot sensibly be seen as a criticism of the employment scenario used in the 2015 Consultation.

286. We do not accept that a challenge to the inadequacies relied upon could only have been pursued after it came clear how central the 2015 Consultation responses are said to have been to the decisions under challenge. Nor is the fact that the assumptions were not final an answer; they were the basis of the consultation which is now criticised. There has been undue delay and the granting of relief would be likely substantially to prejudice the Government's position. The Resettlement Decision has been taken. The consultation exercise would potentially have to be re-run.

287. For the sake of completeness, however, we also address the substance of the allegations. The scenarios did not represent final decisions but simply a basis for consultation in a voluntary consultation exercise. The scenarios selected represented the Government's evaluation of realistic scenarios on which to consult. The evidence demonstrates that active thought was given to those scenarios, commencing with the preparation of a core components framework in April 2015 and building up to a final framework in August 2015 that was used as the basis of the consultation document. Neither the visitor nor the employment scenarios can be attacked as so outlandish that no one could reasonably have deemed them realistic for consultation purposes. The visitor scenario was linked to the USG's objection to any form of tourism on Diego Garcia, and the employment scenario reflected the (not unreasonable) view that adult resettlers would need to work. The legitimate aim of the consultation was to gauge the Chagossians' appetite for resettlement on real terms in the absence of a fully developed social and financial support infrastructure.

288. As for the third criticism, it is said that the statement (in the NSC briefing paper for the March 2016 meeting) that 63% of Chagossians were undecided on alternatives to resettlement was a significant mis-statement; it overstated those in favour of a non-resettlement option. Mr Dunne has analysed the responses. His conclusion is that, in respect of those who actually responded to the question about non-resettlement options:

i) 56% explicitly rejected the option;

ii) 24% were undecided;

iii) 10% expressed an interest.

289. Given those "mathematical realities", the Claimants submit that it was "seriously misleading" to present the position was one where 63% were undecided (when in fact only 24% were and 56% explicitly rejected the option). Those conducting the exercise wrongly treated those who did not respond at all as undecided. They should have been recorded as having given no response at all. Criticism is also made of a slide prepared

for the March 2016 meeting of the NSC which indicated against the option of no resettlement that a positive impact would be that it would "satisfy many Chagossians who wish to succeed in current place of abode". The same entry, namely that it would satisfy "many Chagossians", was made as a positive impact for a resettlement option.

290. The "mathematical realities" relied on by the Claimants are not entirely straightforward or accepted by the Defendant. Thus, for example, the 56% figure is reached by discounting the 379 consultees who did not answer the alternative options question yes/no/undecided. But that detail does not matter for present purposes.

291. The Defendant acknowledges that those who did not respond at all (or who wrote "n/a") to the alternative options question (of whom there were 374) were placed in the "undecided" category. Mr Moody explains why. The BIOT Policy Review Team categorised blank responses as "undecided" because those respondents had not indicated decisively that they were either for or against an alternative to resettlement. It was felt that a blank response was most closely reflected by an "undecided" categorisation. This approach was felt to be "the most useful way for the responses to be presented to Ministers while neither over nor under-estimating actual demand".

292. Mr Dunne might have adopted a different approach. But that it is not the test. This was an evaluative judgment taken after due consideration as to how to address responses that did not admit of any easy categorisation. As Mr Moody comments, it is difficult to see how the creation of a separate category of "blank responses" within the 63% cohort shown as "undecided" would have materially assisted in the sense of shedding light on the degree of enthusiasm for the alternative options for resettlement. They would not have been shown either as being in favour or against alternative options. If they had been excluded altogether, Ministers would have been considering the responses to the alternative options question on a different statistical basis to all of the other responses.

293. There was no materially unfair or misleading presentation of the responses to the alternative options question, particularly when the pie chart showing the 63% figure is seen in the context of the preceding reference to indications of a "degree of uncertainty" from Chagossians as to alternative options.

294. Nor is there any meaningful basis to contend that it was in some way materially represented that there was an equivalence between the figures for those who would and would not be satisfied by resettlement by reason of the use of the word "many" in one of the slides. The statements appeared in what was an impact/risk assessment of various strategic options. It was not a document dealing with detail or figures. It was also not inaccurate to say there was a category of those "many" Chagossians who wanted to stay in their current situations and who would be satisfied with non-resettlement.

295. Finally, for Mr Bancoult it was submitted additionally that, upon the USG changing its position (as set out in the Gottemoeller letter) so as to withdraw its outright objection to resettlement on the Outer Islands (that was not dependent on transport through Diego Garcia), the Government came under an obligation to reconsult, specifically by reference to the option of resettlement on the Outer Islands alone. This point was not pleaded, but no objection was taken on this score by the Defendant and we propose to deal with it, albeit briefly.

296. Reliance was placed on *Devon County Council and others v Secretary of State for Communities and Local Government* [2010] EWHC 1456 (Admin) where Ouseley J upheld a challenge made to decisions taken on a basis contended to be "radically different" from that upon which statutory consultation had taken place. Formal re-consultation would not have been necessary; it would have sufficed for the parties to be alerted to the changed basis for the decision at the material time. Ouseley J stated at [68] that "sufficient information to enable an intelligible response requires the consultee to know not just what the proposal is in whatever detail is necessary, but also the factors likely to be of substantial importance to the decision, or the basis upon which the decision is likely to be taken". The "test" was "whether the consultation process was so unfair that it was unlawful" (at [70]).

297. On the facts of this case, the USG's position that it would not object to resettlement on the Outer Islands outright cannot be said to have produced a basis of decision-making so fundamentally different to that upon which consultation in fact took place as to require re-consultation. The Outer Islands option was fairly and squarely before consultees for comment, even if the emphasis was on a resettlement which included Diego Garcia. Thus consultees were asked to consider various options under consideration, one of which was "Medium option in Outer islands only". The fact that the Government did not re-consult does not render the Resettlement Decision unlawful.

298. As indicated, various additional allegations have formally been advanced, including as to an alleged failure to consult on alternative sources of funding, but were not pressed on us. They have in any event all been answered satisfactorily by the Defendant in his written submissions, pleadings and evidence. Thus, by way of example only, the 2015 Consultation was never intended to consult on alternative sources for funding, as paragraph 4 of the document made clear.

299. For these reasons, we reject the consultation challenge.

Part XIV: Issue 6: the support package challenge

300. Ms Hoareau brings a challenge to the Support Package Decision on the ground of irrationality. For Mr Bancoult it has been made clear that his claim focuses on right of abode and resettlement (to which he does not accept the support package as an alternative). He does not challenge the Support Package Decision directly, although he does not take any issue with Ms Hoareau's challenge to it.

301. It is common ground that the Government's decision to agree to fund a support package was entirely voluntary. An *ex gratia* scheme can be the subject of challenge (see eg. *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293; [2006] 1 WLR 3213) but in circumstances of such a discretionary exercise the court's role on a claim for judicial review will inevitably be very limited.

302. Ms Hoareau submits that Ministers were not given a fair presentation of all material facts, relying on the principles identified in *R (National Association of Health Stores and another) v Secretary of State for Health and another* (*supra*) and *Secretary of State for the Home Department v AT, AW* (*supra*).

Evolution of the support package

303. The starting point for Ms Hoareau's submissions is the WMS itself, where reference was made to money being made available to improve access to health and social care and to improved education and employment opportunities.

304. In March 2016 the figure identified by the NSA in slides produced for the NSC meeting on 15 March 2016 for a support package was £55 million. It was stated that the package would be eligible for Official Development Assistance ("ODA"). At the NSC meeting it was under that option that the package of development assistance was to be explored. On 23 March 2016 Mr John Gordon, head of the Overseas Territories Department, DfID, sent an internal email recording a meeting chaired by Mr Letwin to follow up on the NSC discussion on 15 March 2016. Mr Letwin had asked where the figure of £55 million had come from. It was explained that in the case of Mauritius and Seychelles it was based on "quite cursory analysis from the respective diplomatic missions". Mr Letwin concluded that the figure was not a useful basis for making judgments. A proper needs assessment should be undertaken to start to build a picture of what was needed, how it might be implemented and then how much it might cost. Mr Gordon recorded that the FCO was cautious about the Government being seen to be developing the detail of any non-resettlement package in advance of a formal announcement. Next steps had then been agreed.

305. On 12 April 2016 Mr Moody raised options with DfID as to how to advise on the use of any figure in an announcement including sticking to the £55 million figure, using another figure as an outline/budget or not identifying a figure at all (but only a broad budget) as having been set aside initially to be revisited in due course. The next day Mr Moody sent an email to the FCO Minister of State identifying the competing pros and cons of announcing a figure and asking whether the Minister had strong views about the need to include a figure to be reflected to Mr Letwin. The response came back shortly: it was felt that they "should aim to have a figure".

306. Further work on costs assessment was accordingly carried out for health and education. On 28 April 2016 DfID officials produced a working draft proposal showing a total figure of £20.5 million for Mauritius and £6.6 million for the Seychelles. The overall ODA-eligible component in the DfID package was shown as £27.1 million. A separate package was prepared for funding from the FCO's budget (at a cost of £19 million).

307. DfID officials realised that the Seychelles might not be eligible for ODA beyond 2017 because of their overall national wealth and gross domestic product. An internal email of 30 August 2016 from Dr Dick stated that at a Cabinet Office meeting the week before DfID had been allowed to reduce its budget to £21 million accordingly.

308. In his briefing of the Prime Minister dated 25 August 2016 (as set out in paragraph 79 above), the NSA told the Prime Minister that the proposed joint FCO-DfID development package (now reduced from £55 million to £40 million) was based on a "current best assessment of Chagossians' needs". It included a figure of £21 million over ten years for improved access to healthcare, education and employment for Chagossians in Mauritius and the Seychelles.

Ms Hoareau's challenges

309. Ms Hoareau's challenge based on a failure to carry out any needs assessment effectively fell away during the course of the hearing, it being accepted that one was carried out (albeit limited in nature). Indeed, the fact that an assessment was carried out is relied upon by Ms Hoareau, as set out below. It was based on feedback from Chagossians through the 2015 Consultation and other channels and on information provided by officials in the Seychelles and Mauritius and involved with Chagossian communities in the UK. The assessment included an examination of potential housing needs and took into account a variety of factors, including existing entitlements to welfare and benefits, the availability of funding and the need to foster good relations between Chagossians and non-Chagossians in other countries.

310. For the avoidance of doubt, in so far as any criticism of the adequacy of the assessment is maintained, it is not meritorious. The reasons for not engaging in a more detailed assessment before the announcement of the Decision were clear: there were justifiable concerns in doing so in advance of the announcement of the Resettlement Decision. In circumstances where the figure for the support package was approximate and provisional only, with in-depth investigation and analysis to follow after further consultation, the Government's approach cannot be said to be legally flawed. There were different inter-departmental preferences, with DfID for example strongly preferring for no figure at all to be mentioned at this stage. But the appropriate approach to be adopted was pre-eminently and ultimately one for the Government to judge.

311. Ms Hoareau's essential complaint is that, having carried a needs assessment which included a figure of £6.6 million for support for the Seychellois Chagossians, the figure of £6.6 million was then simply removed from the budget without Ministers being informed or an explanation given. They were not given an accurate or fair presentation of the £40 million figure. The figure was not going to achieve what Ministers were being told it would achieve. In terms of relief, Ms Hoareau seeks reconsideration of the figure of £40 million by the Government.

312. The nature of the remedy claimed reveals a core fallacy in Ms Hoareau's position: pursuant to the Support Package Decision itself the Government is in any event actively considering the correct figure to meet the costs of an appropriate support package for all Chagossians, including those in the Seychelles such as Ms Hoareau. The figure of £40 million was always approximate and indicative only; it was never a finalised amount. So much is clear on the face of the documents, which also confirm the political angles under consideration, including the desire to announce a figure set against the need for caution in referring to any value before the full detail was known and agreed upon. Thus the figure of £40 million over ten years was one that the Prime Minister and the Secretary of State had agreed could be "use[d]" based on current budgetary understandings.

313. The support package is not yet fixed to date; the determination of recipients and the final allocation of funds is yet to be determined. Ministers were not misled as to the inclusion of the Seychellois Chagossians in the package. FCO officials have held discussions with individual Chagossians, Chagossian groups, NGOs and government here and in the Seychelles to discuss what they would ideally like the package to focus on. The intention is for DfID to use ODA funding to target Chagossians living in Mauritius. Non-ODA FCO funding will be targeted towards Chagossians in the UK

and Seychelles, as well as meeting the costs of visits for Chagossians to the BIOT and associated costs in maintaining cultural heritage on the Islands. (There have been three heritage visits between November 2017 and March 2018.)

314. The inclusion of the Seychellois Chagossians in this way has always been clear. Reference can be made to DfID's submission to Ministers on 24 August 2016, the day after the Cabinet Office had accepted DfID's request to keep any financial value of the support package lower than the combined offers to date. The proposal was for a package for the Chagossians as a whole. DfID was preparing the "outline of a combined DFID/FCO package with a total cost of around £40m, the detail of which would be developed after a proper assessment. About £20-25m of this would come from DFID, spread over 10 years. Any final package is likely to be higher than this figure which is, in any case, a much more modest commitment than we were previously been pressed to provide (up to £60m)." A memorandum from the office of the Prime Minister on 31 August 2016 confirmed the understanding that the package would be for Chagossians in Mauritius, the Seychelles and the UK.

315. As for the figure of around £40 million, the Defendant accepts that it was a figure that was reached following budgetary considerations. But it was only ever a ballpark figure that would be refined and revisited based on need. The support package was presented to Ministers as a "package" that was work in progress with the Government to work "closely with Chagossian communities" "to develop cost-effective programmes", the aim being "to achieve [the] goal" of supporting improvements to the livelihoods of Chagossians where they now live. The proposed joint FCO-DfID package at £40 million was "based" on the "current best assessment of Chagossian needs" of DfID and the FCO and "based on a better understanding of the likely costs and demands", even if the precise level (based on further assessment) and distribution of funding available remained to be finalised. There had been a substantial data collection and analysis exercise carried out by FCO and DfID officials since the NSC meeting in March 2016, as the Defendant's witness statements confirm, alongside analysis of possible methods and sources of funding, including the availability of ODA funding.

316. That budgetary considerations were in play was no secret. It was always understood that DfID's contribution would be for ODA-eligible components (and would therefore be constrained by the rules governing ODA and the criteria for overseas assistance set out in s. 1(1) of the International Development Act 2002). This was highlighted repeatedly, including by DfID before the first meeting with Mr Letwin in April 2016 and in the final submission to Ministers by DfID on 2 November 2016 where the obstacle to ODA funding was expressly raised:

> "DFID officials continue to expect Seychelles to graduate from ODA eligibility in 2017, effectively preventing DFID from any support for the 1000 Chagossians living there. FCO have been made aware of this and the probable need for them to bid to the CSSF [the Conflict, Stability and Security Fund] for the non-ODA required for any support to Chagossians in Seychelles. Which Whitehall Department should manage this part of the overall support package is still to be agreed."

317. Ms Matthew deposes that the anticipated removal of the Seychelles from ODA-eligibility did not affect the overall of figure of around £40 million; what it would affect was which department would provide the funding for the Seychelles part of the package behind the scenes if the Seychelles' ODA eligibility ceased in 2017 (as it in fact did from January 2018).

318. In short, Ministers did not have less information than the law required, nor were they materially misled. There has never been any suggestion that the Seychellois Chagossians were to be excluded from the support package as a result of the removal of the sum of £6.6 million from the budget. The fact that Ministers were not told of the "missing" £6.6 million does not vitiate on grounds of irrationality the decision to commit in principle to a support package with an indicative value of approximately £40 million, the broad aim and cost of which were apparent (and which were to include the Chagossians in the Seychelles) but the details and final cost of which were yet to be determined and which legitimately involve detailed internal governmental budgeting and financial allocation considerations.

319. Ms Hoareau also argued in writing that there was a breach of legitimate expectation of consultation on the support package by reference to the well-known principles in *R v North and East Devon Health Authority, ex p. Coughlan* [2001] QB 213 at [57] and *Moseley v Haringey Borough Council* [2014] UKSC 56; [2014] 1 WLR 3947 at [35]. A promise or practice may create a legitimate expectation of being consulted before a particular decision is taken. If there is a fundamental change of circumstance arising during the course of any delay in the final taking of that decision, there will be a duty to reconsult (see eg. *R (Elphinstone) v Westminster City Council* [2008] EWHC 1287 (Admin) (upheld at [2008] EWCA Civ 1069) at [62] to [73]).

320. Reliance is placed on a promise by the Deputy Commissioner for BIOT to interested Chagossians in 2013 to listen "very carefully and transparently and fairly as we work out what it is we do next" and other public statements to the effect that the views of the Chagossian community would inform the decision-making process. Reference is made to the Defendant's practice in consulting the Chassogian community at key junctures in the policy review.

321. Against this background it is said that the failure to consult Ms Hoareau when conducting a standalone exercise to identify the needs of Chagossians in – *inter alia* – the Seychelles, and to work out the likely costs of meeting those needs, was a breach of her legitimate expectation of consultation. The fact that a consultation is now being carried out is no defence, since the targets and approximate value have already been set (see *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213).

322. There is no proper basis for a complaint based on lack of consultation on the support package alone on the facts here. The Chagossians were consulted on non-resettlement options in the 2015 Consultation and before the Support Package Decision was taken, including on alternative forms of assistance to Chagossian communities in their current locations. Chagossians were invited to consider a list of indicative and non-exhaustive alternative options: training and educational support for jobs in Chagossians' current places of abode; greater support through pre-qualifying training for Chagossians to enable them to apply for more jobs at the military facility on Diego Garcia; increased opportunities for Chagossians to visit the BIOT temporarily; support for the development and restoration of key cultural sites in the BIOT; increased participation

of Chagossians in conservation, enforcement and science work in the BIOT; key roles in new limited tourism in the Outer Islands. Officials' preliminary assessment of the needs of the Chagossian communities was based in part on feedback from the Chagossians in the 2015 Consultation and through other channels.

323. The overall level of (voluntary) funding to be offered was necessarily something for the Government to decide involving complex and sensitive macro-political and macro-economic considerations. Further, against a background of earlier consultation and in circumstances where it was always acknowledged that the policy detail remained to be worked out after the Support Package Decision, a staged approach in consultation was unobjectionable.

324. For these reasons, we reject the support package challenge.

Part XV: Conclusion

325. For all these reasons, we dismiss both the First and Second Claimants' claims.

326. It is important to emphasise some fundamentals about this case. These are claims for judicial review. Judicial review is an important mechanism for the maintenance of the rule of law. It serves to correct unlawful conduct on the part of public authorities. However, judicial review is 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. We stress these fundamentals in this case because there have been times when sight appears to have been lost of them. As we have mentioned earlier, a huge amount of factual material has been placed before the Court. Many of the grounds of challenge have either been abandoned or, as has been explained above, have turned out on proper analysis not to raise points of law at all. Judicial review is not, and should not be regarded as, politics by another means.

327. We conclude finally by expressing our gratitude to all leading and junior counsel, including the public interest immunity advocates, and solicitors for the careful preparation of the many bundles and written materials put before us, both in open and closed form, alongside the skilful marshalling of the arguments and effective co-operation between the parties. It is a testament to those endeavours that we were able to complete the full hearing within the five hearing days allotted and to deliver a judgment as swiftly as we have.