Neutral Citation Number: [2023] EWHC 767 (KB)

Case No: KB-2023-001442

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 March 2023

Before :

LADY JUSTICE WHIPPLE
and
MR JUSTICE CHAMBERLAIN

- -

Between :

BAA, BAB, BAC, BAD and BAE	**Claimants/ Applicants**
- and -	
(1) COMMISSIONER OF THE BRITISH INDIAN OCEAN TERRITORY ADMINISTRATION (PAUL CANDLER)	**First Defendant/ Respondent**
(2) THE SECRETARY OF STATE FOR THE FOREIGN, COMMONWEALTH AND DEVELOPMENT OFFICE	**Second Defendant**
(3) SECRETARY OF STATE FOR DEFENCE	**Third Defendant**

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Richard Hermer KC, Alistair Mackenzie and Natasha Simonsen (instructed by **Leigh Day**) for the **Appellants**
Cathryn McGahey KC, Émilie Pottle and John Bethell (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : 30 March 2023

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Approved Judgment

Whipple LJ and Chamberlain J:

Introduction

1 This is the judgment of the Court to which we have both contributed.

2 This is an application for injunctive relief in support of a claim by five claimants against three defendants. The claimants are Sri Lankan nationals of Tamil ethnic origin. The first defendant is the Commissioner for the British Indian Ocean Territory ("BIOT"), who exercises both the executive and the legislative functions of the Crown in right of the Government of BIOT (the "Commissioner"). The second and third defendants are the Secretaries of State for Foreign, Commonwealth and Development Affairs ("the Foreign Secretary") and Defence ("the Defence Secretary"). All three were named as respondents to the current application, but the claimants have clarified in advance of this hearing that they seek an injunction only against the Commissioner.

3 BIOT comprises a number of islands in the Indian Ocean. The largest of these is Diego Garcia, which has no permanent population. Around a quarter of its land area is occupied by a US naval communications facility.

4 The claimants were among 89 individuals who left Sri Lanka on a fishing boat in September 2021 intending to travel to Canada. On 3 October 2021, the boat became distressed in the Indian Ocean and was escorted by a Royal Navy ship into port at Diego Garcia. On arrival there, those on board sought protection. The Refugee Convention has not been extended to BIOT, but the Commissioner accepts that the non-refoulement obligation nonetheless applies to those who can establish a right to protection under customary international law and has established a process for determining the claimants' claims.

5 Pursuant to that process, the third and fourth claimants' claims have been refused. The fourth claimant has challenged the refusal in the Supreme Court of BIOT. The first and fifth claimants have very recently been told that they will not be returned to Sri Lanka and that the Commissioner is seeking to identify a safe third country to which they can be sent. The second claimant's claim remains under consideration by the Commissioner.

6 Since the claimants' arrival, further boats have arrived. Some of those on board have since returned to Sri Lanka. The remainder are accommodated on Diego Garcia in a tented compound in circumstances which they say amount to detention. The claimants say that the conditions in which they are being housed (about which we shall say more in due course) have had an adverse impact on their mental health.

7 Given the limited medical facilities available in Diego Garcia, *ad hoc* arrangements have made by the UK Government (which is responsible for BIOT's external affairs) with the Rwandan Government for the medical evacuation ("medevac") of individuals requiring specialist care to a hospital in Rwanda. On the UK side, the arrangements were negotiated by the British High Commission in Kigali and by the Permanent Under Secretary at the Foreign, Commonwealth and Development Office ("FCDO").

8 On each occasion when a medevac has been necessary, a specific request has been made of the Government of Rwanda and an undertaking given by the UK Government that the patient will be returned to BIOT when the treatment is complete.

9 The claimants all have histories of self-harm and have all made suicide attempts. All were medically evacuated to Rwanda between 3 and 16 March 2023 after ingesting sharp objects. They have complaints about their treatment in Rwanda, but they all agree that conditions there are better than in BIOT. They say that their life will be at risk if they are returned to BIOT and, accordingly, seek an injunction preventing the Commissioner from effecting or allowing that return.

10 The claimants now seek one of two orders: either (a) that the Commissioner be prohibited from removing the claimants from Rwanda; or (b) that the Commissioner must not remove the claimants to BIOT without at least five working days' notice being given to the claimants along with reasons for removal and supporting documents (prognosis, treatment plan and details of care and treatment arrangements in BIOT).

11 The claimants were represented at the hearing on 30 March 2023 by Richard Hermer KC, leading Alistair Mackenzie and Natasha Simonson. The Commissioner was represented by Cathryn McGahey KC, leading Emilie Pottle and John Bethell. We are grateful to all counsel and their supporting legal teams for their expert assistance.

The history of the litigation

12 On 17 March 2023, the claimants' solicitors, Leigh Day, wrote to the Commissioner, requesting that at least seven days' notice be provided of any planned transfer of four of the claimants back to the BIOT from Rwanda. On 21 March 2023, the Commissioner responded, explaining that those migrants in Rwanda were there only for the purpose of medical treatment and that when that treatment finished it might, in accordance with any immigration controls imposed by the Rwandan authorities, be necessary for them to leave that country at short notice.

13 On 22 March 2023, Leigh Day wrote a letter before claim on behalf of 20 Tamil asylum seekers. The letter was addressed to the Foreign Secretary, the Home Secretary, the Commissioner and the Defence Secretary. It threatened legal proceedings in the High Court of England and Wales and/or in the BIOT Supreme Court for false imprisonment and negligent infliction of physical and psychological injury. The remedies sought were: (1) a mandatory injunction requiring the defendants to relocate the 11 clients remaining on Diego Garcia to a safe third country while their protection claims were assessed; (2) alternatively, immediate amelioration of their living conditions to ensure their safety; (3) a prohibitory injunction preventing the defendants from facilitating, allowing or otherwise permitting the return to Diego Garcia of the five individuals now in Rwanda; (4) damages, including aggravated and exemplary damages.

14 An undertaking was sought from the Commissioner that the five claimants in Rwanda would be given 72 hours' notice of their removal to Diego Garcia. The Commissioner initially declined to give such an undertaking. On 23 March 2023, they indicated their intention to apply to the applications judge on the following day and sought an undertaking that they would not be returned before 11am on 24 March 2023. The answer was that there would be no transfers, but this was "subject to any decision made by the

Rwandan authorities to the effect that your clients would be required to leave before this time (I note that this is not expected)."

15 Thus it was that, on the evening of 23 March 2023, an application was made to the King's Bench Division duty judge, Chamberlain J. The application was said to be in support of a claim to be brought against (1) the Commissioner, (2) the Foreign Secretary and (3) the Defence Secretary for negligence and false imprisonment. The order sought was that:

> "The First Defendant shall not direct, sanction or permit the return of the Claimants to the British Indian Ocean Territory, or authorise or allow the arrival of the Claimants in the British Indian Ocean Territory, pending determination of the renewed application to be made on 24 March 2023".

16 Chamberlain J directed that the application be made on notice to the Government Legal Department duty lawyer. There was a remote hearing late on the evening of 23 March 2023, by which time the Commissioner was in a position to undertake that there would be no transfers on 24 March 2023. At that hearing, Chamberlain J fixed a further hearing for 2pm on 24 March 2023.

17 By the time of the hearing at 2pm on 24 March 2023, the Commissioner had filed evidence in the form of the witness statements of Colvin Osborn and James Thornton. That evidence is examined in greater detail below. They made clear that transfers would take some time to organise and were not imminent. An undertaking was given that the Commissioner would give at least 72 hours' written notice before transferring any of the five claimants currently in Rwanda to BIOT. The hearing of the application for injunctive relief was listed for the following Thursday 30 March 2023 before a Divisional Court. Chamberlain J directed that the issues would include:

(a) Does the Court have jurisdiction over the Commissioner in this application?

(b) Is the relief sought to be characterised as public law or private law relief, and what is the significance of that?

(c) If the relief is granted, what would be the practical consequence of a determination by Rwanda that the claimants' medical treatment has finished?

(d) Is the *American Cyanamid* test satisfied (as modified if necessary)?

18 On 27 March 2023, the claimants filed a Claim Form against (1) the Commissioner, (2) the Foreign Secretary and (3) the Defence Secretary, alleging negligence and false imprisonment by the Defendants. The Claim Form seeks the following relief:

> "damages to be quantified including aggravated and exemplary damages and injunctive relief (1) preventing the Defendants from facilitating, allowing or otherwise permitting their return to the British Indian Ocean Territory (2) ordering their relocation and/or (3) the amelioration of their living conditions such as to keep them safe from further harm".

The evidence

The claimants

19 We have before us a witness statement dated 23 March 2023 from Tessa May Gregory, partner at Leigh Day. She summarises her clients' complaints. The group sleeps in tents provided for them, there are 12-14 in each tent with little privacy or personal space. Individuals are moved between tents arbitrarily. There are allegations of at least two sexual assaults taking place while the group has been housed in this camp. Sanitation is limited, initially with a single shared toilet and shower block without curtains, although a second toilet and shower block has now been installed providing separate facilities for men and women. Limited, basic clothing has been provided; clothes must be hand washed and hung out to dry in a public area near the guards' post which is humiliating for the women in the camp. Initially, there was no education provided but since April/May 2022 basic provision for primary and secondary education following the Indian curriculum is available; classes are held outside because of a rat infestation in the shared facilities. Leaving the camp is prohibited except with security escort, originally provided by US military officers but now provided by G4S. Since January 2023, the remaining residents have been permitted to go to the beach for one hour per day, in groups of 12-14 people, under supervision by the guards. Medical care is provided by a company called ResponseMed.

20 Residents in the camp have limited access to the outside world. They had no access at all for six weeks when they first arrived. In early 2022, three fixed telephone lines were installed. There is an official iPad available for their use to hold video calls with legal representatives. Until December 2022 there was another iPad within the camp for all to use but its use is now restricted.

21 The food provided for the residents is basic. There have been bans on coffee, soap and cigarettes imposed by the security guards as collective punishment. There have also been instances where the guards have shouted, bullied and intimidated occupants of the camp.

22 The process for assessing protection claims was introduced in June 2022. To date, the Commissioner has taken 14 decisions, all of which have been negative. (Ms Gregory's statement pre-dated the two positive decisions communicated on 30 March 2023, the day of the hearing.) There is no right of statutory review, so applications for judicial review have been issued in 10 of those cases. Ms Gregory accepts that some of the original group have left, by plane (funded by the Commissioner and other named Defendants in the action) or by boat (with repairs and provisions for the journey funded by the Commissioner).

23 In the 18 months since the group arrived, there have been at least three hunger strikes. The most recent started on 19 March 2023 and involved 59 residents of the camp. Some are said to be in critical condition, although that hunger strike has now ended. In response to that hunger strike, the Commissioner instructed removal of all personal phones (not anyway used for communication because there is no wifi at the camp), prevented access to the telephone for all of them and withdraw medical treatment unless the individuals were willing to sign a form disclaiming certain liabilities of the BIOT Administration.

24 In recent weeks, there have been a number of suicide attempts by other migrants still in Diego Garcia.

25 Ms Gregory provides details of each claimant's personal situation. She confirms that none of the claimants wishes to return to Diego Garcia (although she has not spoken to the fifth claimant, who is too unwell). She exhibits medical records relating to each of them. The following is a summary based on her statement:

(a) BAA, the first claimant, is a 22 year old man with a significant history of physical, psychological and sexual abuse. He has a history of self-harm while on Diego Garcia, including multiple attempts at suicide. He has been diagnosed with PTSD, panic disorder with concurrent depressive symptoms and suicidal ideation. He was medically evacuated to Rwanda on 8 February 2023 and remained there until 15 February 2023, the Rwandan doctor telling him he had bacteria in his stomach. He was then returned to Diego Garcia where local medics noted that he had symptoms of uncontrolled anxiety with increasing expression of suicidality; he needed immediate medical evacuation to an inpatient setting with access to critical, surgical and psychiatric care. He was evacuated again on around 3 March 2023 after intentionally ingesting a sewing needle.

The report of an independent expert psychiatrist, Dr Peter Hughes, dated 10 January 2023, suggests that he is at ongoing risk of self-harm.

(b) BAB, the second claimant, is a 25 year old man who came to Diego Garcia from India. He has complained of severe stomach pains and vomits blood, and has been told by local medical staff on Diego Garcia that there is no treatment available. He has sleeping problems for which he has been given medication. He is suffering from depression and acute stress. He has suicidal ideation and has lost 10kg since being on Diego Garcia. He has attempted suicide on two occasions recently, ingesting a blade on 13 March 2023 and attempting to kill himself the following evening 14 March 2023, following which he was medically evacuated to Rwanda.

Dr Jane Stratton, independent expert psychiatrist, assessed him in August 2022 and considered his symptoms to be in keeping with PTSD and depression.

(c) BAC, the third claimant, is a 31 year old man. He has said that he would kill himself rather than be returned to India. He has suffered from sleep disturbances, feelings of worthlessness, irritability and suicidal ideation. He also has suffered a range of physical injuries linked to severe pain in his mouth, feet and hands. He was medically evacuated to Rwanda following an attempt at suicide by ingesting a blade.

He was assessed by "Freedom From Torture" in October 2022 and diagnosed with PTSD and marked avoidance behaviour, with (at that stage) a moderate suicide risk.

(d) BAD, the fourth claimant, is a 20 year old man. He has been diagnosed with depression and PTSD since September 2022 and is on medication for this. He has suffered significant physical, psychological and sexual trauma. He has been suicidal and has self-harmed. On 13 March 2023, he ingested a blade and inflicted wounds to his wrists; he made a further attempt to kill himself by swallowing two nails while under observation. He was medically evacuated to Rwanda on 16 March 2023.

(e) BAE, the fifth claimant, is a 23 year old woman. She reports suffering severe psychiatric issues as well as being molested and sexually assaulted by others in the camp. The Commissioner accepted (in a letter of 9 September 2022) that she was not required to attend her personal interview because of her poor mental state. She had seizures in her first months on the island and in February 2022 was medically evacuated to Bahrain. She has been diagnosed with PTSD, depression and anxiety disorder; she suffers from regular severe dissociative episodes and has repeatedly self-harmed including attempts at suicide. By November 2022, it was estimated that she had made or threatened to kill herself on 12 occasions while on Diego Garcia. She alleges that on around 3 October 2022she was raped by someone housed in the same tent; that person is no longer in the same tent but remains in the camp. Local medics considered her to be at high risk of suicide in a note dated 24 October 2022, and said that there was no-one on the island with qualifications to treat her in a note from November 2022. On 1 March 2023, following an exchange with an officer who suggested she would be returned to Sri Lanka or India, she tried to kill herself by ingesting a blade from a pencil sharpener. She was medically evacuated to Rwanda; by letter dated 23 March 2023, the BIOT Administration confirmed that her treatment in Rwanda is ongoing and there are no immediate plans to return her to BIOT.

On 13 July 2022 she was assessed by Professor Katona of the Helen Bamber Foundation who indicated that she was very likely to have PTSD as a result of the multiple traumatic experiences she described which culminated in detention and sexual abuse which triggered her departure from Sri Lanka.

26 Ms Gregory says that the claimants were all taken by plane and then ambulance to the hospital in Rwanda. They are not free to leave the hospital. They have their own rooms at the hospital and can visit each other's rooms. They have a TV in their rooms. Food is provided. Two Tamil interpreters who have travelled from Diego Garcia are available for most of the day, and G4S guards are also present. They have been told little about their medical treatment.

27 The claimants also rely on a witness statement from Thomas Short, also a solicitor at Leigh Day, dated 28 March 2023. He appends certain correspondence his firm has had with the Registrar of the Supreme Court of BIOT and details his experience attending another case recently heard by the Chief Justice of BIOT.

28 The claimants have also served a preliminary report from Dr Katy Robjant, a clinical psychologist, dated 28 March 2023. She has travelled to Rwanda but to date has been unable to see the claimants. She has however spoken to each of them. Her preliminary assessment suggests a likelihood of depression and PTSD in all cases. She assesses there to be an imminent risk in relation to the BAB (the second claimant) and BAE (the fifth claimant). She doubts their needs can be met in a camp setting on Diego Garcia, taking account of the facilities described in Colvin Osborn's first witness statement (see below).

The Commissioner

29 The Commissioner has filed three witness statements. Two are filed by Colvin Osborn, the Commissioner's representative based in Diego Garcia, with day to day control of the migrant camp. In his first statement dated 24 March 2023, he explains that the migrants arriving on the first boat on 3 October 2021 were offered use of tents set up for the use

by Covid patients at Thunder Cove. That has now become the migrant camp. Migrants were asked not to leave the camp for their own safety, because they were present on a military facility. There is fencing around the camp but there are gaps in it and beneath it. Since September 2022 the migrants have been able to walk to the beach during the day, but they must be accompanied by G4S personnel given the dangers of tide and sharks. G4S has imposed a set of basic rules on the group, including that the migrants should not leave the camp. There was one time when G4S said they would stop cigarettes for a week because migrants had been wandering outside the camp; supplies of coffee and soap were never stopped.

30 The tents are new and each is designed to accommodate 20 military personnel. Each has a functioning air conditioning unit. None is currently at full occupancy. Each tent has a migrant representative and the group sort out their own sleeping and living arrangements. Each migrant has a bed, duvet, blankets and sheets. Laundry facilities are provided. For most of the time, there has been one tent set aside as a school and one for medical purposes; both are kept in good and sanitary condition. There are two functioning toilet and shower blocks which are kept clean.

31 Medical services are provided to the camp by ResponseMed. At the time of Mr Osborn's first statement, there was one doctor, one paramedic, one nurse and two mental health practitioners. A further doctor and five nurses were due to arrive shortly. The US military has a doctor and medical clinic on the island, with capacity to carry out x-rays and other routine procedures. At that time, there were 25 G4S officers on the island, with another 6 shortly due to arrive. They are present at the camp around the clock and assist with welfare, safeguarding and security issues. Together with the medical team, the G4S officers can conduct regular checks of persons who are considered vulnerable or require attention; watches are kept on some individuals. There have been two hunger strikes and during the second, sharp objects were removed from the camp and other measures taken to prevent self-harm. There have been three relatively minor incidents involving G4S staff but each was investigated and dealt with, resulting in an apology to the individual affected.

32 While Mr Osborn accepts that the provision of medical care in this way may not be optimal for the long-term for persons with mental health problems, he believes that there are adequate medical and safeguarding measures in place for the period up to determination of the migrants' claims for asylum.

33 When the migrants first arrived, BIOTA wished to carry out checks before allowing them to communicate with the outside world. Once those checks were carried out, a telephone was provided. There are now three telephone lines available for the migrants to use as they please. The average monthly telephone bill, met by the BIOTA, is $60,000. The phone lines have on some occasions been closed, once recently when BIOTA believed that the claimants were encouraging the migrants in the camp to swallow objects to get themselves evacuated to Rwanda with the prospect of then going to the UK; but the closures have been temporary and the lines are now open. There are five iPads available, kept by G4S and released when required for use at the chapel where there is wifi.

34 Three meals a day are provided and the migrants are given their own supplies of spices and sauces. The migrants are given clothing, new and second hand (in good condition). Sanitary products are provided for women. Education is provided by two teachers resident on the island, using one of the tents, or giving classes outside. Various social

and sporting activities have been arranged, including football matches with British forces, cricket and volleyball. There is a television in the communal tent where Tamil movies, football and other programmes can be watched.

35 Mr Osborn says that the camp is well maintained and that whatever difficulties have arisen, they have been addressed. He attaches a letter from a recently arrived migrant who expresses gratitude for the comfortable accommodation and other facilities provided.

36 The second statement is from James Thornton, the officer who has organised the medical evacuations from BIOT to Rwanda, also dated 24 March 2023. He details efforts made to identify suitable third countries to provide medical treatment for the migrants, most of whom are not documented. He says that it has been difficult to find countries willing to accept the migrants for medical treatment. There were two medical evacuations in 2022 to Bahrain but further medical evacuations to that country are not now possible.

37 Negotiations with the Rwandan Government commenced in October or November 2022, for treatment at the Rwanda Military Hospital in Kigali. There is no general agreement with the Government of Rwanda to accept the migrants; instead, on each occasion when a medical evacuation is necessary, the BIOT Administration (BIOTA) makes a request to that Government accompanied by an undertaking that the patients will be removed when treatment is finished. The first medical evacuation to Kigali was on 15 November with those individuals returning to Diego Garcia on 8 December. The second medical evacuation involved one migrant, one of the claimants, from 8 February 2023 to 23 February 2023. The third medical evacuation took place on 2 March and the fourth on 16 March. Those last two evacuations involved the five claimants who are still in Kigali. Transport to and from Kigali was by aircraft arranged via a third party provider.

38 Each migrant who has been medically evacuated in this way has signed a consent form as follows:

> "I understand that the Government of Rwanda is allowing me to be admitted to Rwanda for medical treatment on an exceptional, humanitarian basis and their normal immigration requirements are being waived due to my lack of travel documents. As a result, during the course of my treatment restrictions may be placed on my ability to leave the hospital or any other accommodation provided for me. After I have received appropriate treatment, I will be transported back to Diego Garcia or, with my consent, to some other location."

39 Mr Osborn has filed a second witness statement dated 29 March 2023. He says that the resident medical team at that date comprises: two doctors (an emergency medicine specialist and a general practitioner), three paramedics, five registered nurses and two mental health care professionals (one female clinical psychologist and one male psychotherapist). Round the clock non-clinical observations of vulnerable individuals are carried out by the camp safety officers and recorded in a log. Observation intervals are directed by the medical team (usually from four hourly to half hourly). In cases of acute self-harm concern, the patient will be moved into the medical tent and kept under constant suicide watch by medical staff. The medical team have access to a psychiatrist in London and to further specialist medics who are on call around the clock. Facilities

for acute medical care exist on the island. There are 29 G4S staff and a total of five interpreters on the island.

Protection claims

40 The Commissioner has the power to order the removal of any person who is unlawfully present on BIOT, and to hold a person in custody until removal is effected, by section 12 of the British Indian Ocean (Immigration) Order 2004.

41 On 22 July 2022, the Commissioner published a statement on process for determining protection claims, pursuant to the Removal Order (Process of Determination) Regulations 2022 (SI 7/2022). In that statement, he says that the migrants are not being detained and they are free to leave if they can make proper arrangements to be collected; no assistance will be given to a collecting vessel and no repairs to existing vessels will be undertaken (paragraph 3). The statement recorded that a total of 173 migrants were at that date on Diego Garcia; some wished to return home and the Commissioner said that consideration was being given to their requests. For the remainder, the Commissioner set out the process to be adopted (paragraph 4). The Commissioner had been advised that neither the ECHR nor the 1951 Refugee Convention applied to BIOT, but the principle of non-refoulement did apply as a matter of customary law, in both the narrower refugee law sense and the wider human rights sense (paragraph 6). The process was introduced in order to determine whether returning the remaining migrants to Sri Lanka would be in breach of the principle of non-refoulement (paragraph 7).

42 By an amendment to section 13 of the 2004 Immigration Order dated 12 October 2022, a person who is removed from BIOT may be removed to the place from which they came, to the country of their nationality or, with the approval of the Commissioner, to any other place if the Government of that place consents to receive them, whether or not the individual consents to their removal to that third country.

43 In October 2022, the Commissioner told the group that if they could not be safely returned to Sri Lanka, UK Government policy was that they would not be taken to the UK, but instead would be taken to a safe third county.

44 The Commissioner indicates (by information contained in the skeleton argument, which was updated prior to the hearing) that as at the date of filing on 29 March 2023, 33 applications for asylum (representing 45 migrants, counting dependents) have been determined, all of them refused. 212 migrants have left Diego Garcia voluntarily, 131 being assisted by the BIOT administration to return to Sri Lanka by aeroplane, and 81 departing by boat. There are two extant judicial review applications before the BIOT Supreme Court, one of them brought by the fourth claimant.

The issues

Issue (a): This Court's jurisdiction to entertain the claim

The constitutional status of BIOT as a British overseas territory

45 There is no dispute as to the key principles governing the constitutional status of British overseas territories. They are set out in Hendry and Dickson, *British Overseas Territories Law* (2nd ed., 2018), p. 23, and may be summarised as follows:

(a) On the international legal plane, the UK and its overseas territories exist as one undivided realm. The overseas territories, including the BIOT, are not sovereign and the UK is responsible for their external relations.

(b) Within that undivided realm, as a matter of constitutional principle, the Crown acts in different capacities in relation to the different parts of the realm. This is commonly described as actions of the Crown 'in right of', or 'in right of the Government of' a particular territory. Thus, the Crown in right of the Government of BIOT is a separate legal entity from the Crown in right of the Government of the UK.

(c) Obligations owed by the Crown in right of the Government of one territory are owed only by that Government and do not give rise to any obligations on the part of another of the King's Governments. That principle applies regardless of the degree of functional autonomy enjoyed by the territory concerned.

46 In order to determine in which right the Crown acts it is necessary to identify the system of government within which the relevant exercise of power takes place: see e.g. *Quark Fishing Ltd v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2005] UKHL 57, [2006] 1 AC 529.

47 In the case of BIOT, the British Indian Ocean Territories (Constitution) Order 1984 establishes the office of Commissioner, who is appointed by Her Majesty by instructions given through a Secretary of State. The Commissioner has both executive and legislative power. When exercising these powers, he is an officer of the Crown in right of the Government of BIOT ("CBIOT").

48 As the *Quark* case shows, there are some cases where the King does some legal act through or on the advice of the Foreign Secretary, but the act is nonetheless done under the system of government of an overseas territory. The act will still be attributable to the Crown in right of the government of the territory. Usually, however, the Foreign and Defence Secretaries act as representatives of the Crown in right of the Government of the UK ("CUK"). It is common ground that the Foreign Secretary represents CUK when acting on the international plane to conclude agreements and arrangements with other States, even when the agreements and arrangements concern an overseas territory.

Does this Court have jurisdiction to entertain a claim against the Commissioner qua officer of CBIOT?

49 At first, we were concerned that we may lack jurisdiction to entertain a claim against the Commissioner qua officer of CBIOT. At common law, there could be no action in tort against the Crown. The Crown Proceedings Act 1947 enabled such claims to be brought in the courts of England and Wales, but only against CUK: see s. 40(2)(b). Equivalent legislative provisions in the overseas territories (including relevantly the British Indian Ocean Territory Ordinance 1984) enabled claims to be brought against the Crown in right of the government of that territory, but only in the courts of that territory.

50 Mr Hermer for the claimants was alive to this point. He submitted that the claimants would have been entitled to sue the Commissioner as the person who authorised the torts, rather than as representative of CBIOT, even before the Crown Proceedings Act 1947 and its overseas territories equivalents came into force; that this is so even where the acts

or omissions relied upon were done in his official capacity; and that the enactment of a statutory right to sue the Crown did not affect this. In this respect, Mr Hermer relied on the speech of Lord Woolf *M v Home Office* [1994] 1 AC 377, 409-410.

51 We note that Ms McGahey, while formally maintaining the Commissioner's contest to the jurisdiction of this Court, did not in her oral submissions attempt to convince us that Mr Hermer's point was unarguable. It may well have to be considered in more detail at a later stage, but for the purposes of an application for interim relief it is sufficient to say that we consider it arguable.

Should the claim have been brought in the Supreme Court of BIOT?

52 Under s. 6 of its Courts Ordinance 1983, BIOT has a Supreme Court, which is "a superior court of record with unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law and with all the powers, privileges and authority which is vested in or capable of being exercised by the High Court of Justice in England".

53 In writing, the Commissioner argued vigorously that the BIOT Supreme Court is the proper venue for this claim, which alleges torts committed in BIOT by the Commissioner acting as an officer of CBIOT.

54 Mr Hermer submitted that it is arguable that this Court has jurisdiction to entertain this claim, and that it will in due course decide to exercise that jurisdiction, on the following basis:

(a) The Commissioner is based and currently present in London. Once he is served with process, the court has jurisdiction *in personam*, subject to any application to stay the proceedings on the ground of *forum non conveniens*: see e.g. Dicey, Morris and Collins (16th ed.), §11-042.

(b) BIOT is not a State, so he cannot assert State immunity.

(c) If sued as the person who committed or authorised the torts (rather than as an officer of CBIOT), he has no basis on which to contest the jurisdiction (in the strict sense) of the Court.

(d) In order to persuade the Court to stay proceedings, the burden would be on him to show not only that England and Wales is not the natural or appropriate forum, but also that there is another available forum which is "clearly and distinctly more appropriate". Even if that burden were carried, a stay would be refused if the claimants could show that granting one would give rise to a real risk of substantial injustice: *Spiliada Maritime Corporation v Cansulex* [1987] AC 460, 476-8.

(e) In identifying the most appropriate forum in an action against multiple defendants, it is necessary to consider *(inter alia):* whether there is a single jurisdiction in which the claims against all defendants may most suitably be tried; and accessibility to courts for parties and witnesses (*Lungowe v Vedanta* [2020] AC 1045, [66]). Both considerations point in favour of England and Wales.

(f) Governing law is likely to be more important in cases where there is evidence of relevant differences in the applicable legal principles (*VTB Capital v Nutritek* [2013] 2 AC 337, [37]). There are no such differences here, because the Courts

> Ordinance 1983 expressly provides in s. 3 that English law applies, albeit with such modifications, adaptations, qualifications and exceptions and local circumstances render necessary.

55 Again, Ms McGahey in her oral argument did not invite us to refuse interim relief on the basis that these points are unarguable. It is accordingly sufficient to record that we consider it arguable that the defendants will not be able to show that the BIOT Supreme Court is "clearly and distinctly more appropriate". One matter that may point in the direction of the courts of England and Wales is that the claims against the Secretaries of State – if they are maintainable at all – are claims against CUK (since it is not suggested that either Secretary of State personally committed or authorised the torts complained of); and the Supreme Court of BIOT has no jurisdiction to entertain a claim against CUK: see s. 27(2)(b) of the Crown Proceedings Ordinance 1984.

56 Although the point was not pressed orally, we have considered the Commissioner's argument that *R v Secretary of State for Foreign and Commonwealth Affairs ex p. Indian Association of Alberta* [1982] QB 892 establishes some wider principle that claims touching on the exercise of powers by the Crown in right of a territory outside the UK must necessarily be brought in the courts of that territory. We think there are obvious differences between that case and this one. In the first place, the *Alberta* case involved a public law claim. Secondly, it concerned a territory (Canada) which was also a sovereign State for the purposes of international law. Thirdly, there is some authority that, even in the public law sphere, the supervisory jurisdiction of the High Court in England and Wales can in principle extend to acts done by the Crown in right of the government of an overseas territory: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, [21]-[29] (Laws LJ), endorsed in *Quark*, at [65] (Lord Hoffmann).

57 That being so, for present purposes, the only question is whether the Commissioner may be unable to show that the BIOT Supreme Court is "clearly and distinctly" more appropriate. At this stage, we consider that he may be unable to show this. It is accordingly not necessary for us to reach any conclusion about Mr Hermer's arguments that a trial in the Supreme Court of BIOT would give rise to substantial injustice because of the inability of that court to deal with substantial litigation or to resolve urgent applications expeditiously.

Issue (b): The appropriateness of the interim relief sought on this application

58 The principal relief sought on this application is an order preventing the Commissioner from allowing the claimants to return to BIOT. We began our consideration of this case with serious doubts that this was relief which we could properly grant in a private law claim. The power which the claimants seek to enjoin the Commissioner from exercising – namely the power to return the claimants from Rwanda to BIOT – is, quintessentially, a governmental or public law power. Relief restraining a party from exercising such a power would normally be sought in judicial review proceedings. Our starting point was to think that the Commissioner was right to rely on the principle in *O'Reilly v Mackman* [1983] 2 AC 237 as indicating that the relief sought in this case was inappropriate in a private law claim.

59 Mr Hermer, however, suggested an answer to this point. He relied on the decision of the Court of Appeal in *Connor v Surrey County Council* [2010] EWCA Civ, [2011] QB 429.

In that case, the claimant sought damages (rather than an injunction), but the language used by Laws LJ (with whom on this point Sedley and Thomas LJJ agreed) makes it at least arguable that its ratio applies equally to claims for injunctive relief seeking to compel the exercise of public law powers. At [106], Laws LJ held that "the law will in an appropriate case require the duty-ower to fulfil his pre-existing private law duty by the exercise of a public law discretion, but only if that may be done consistently with the duty-ower's full performance of his public law obligations".

60 This statement seems, at least arguably, to fit the facts of the instant case. But the qualification also seems to us to be very important. Laws LJ went on to explain the qualification in these terms:

> "107… The demands of a private law duty of care cannot justify, far less require, action (or inaction) by a public authority which would be unlawful in public law terms. The standard tests of legality, rationality and fairness must be met as they apply to the use of the public law power in the particular case. If the case is one where the action's severity has to be measured against its effectiveness, it must also be proportionate to whatever is the statutory purpose. The varying states of affairs which I have identified from the principal authorities, though no touchstone of liability in this present context, may bring into focus the relevant public law constraints and demands created by the statutory scheme in hand. That will help to set the measure, case by case, of the requirement that the duty-ower, if he is to fulfil his duty of care by means of a public law discretion, must act consistently with the full performance of his public law obligations.
>
> 108. Thus a duty-ower may be required to fulfil his pre-existing private law duty by the exercise of a public law discretion. But I have said that may only be done consistently with the duty-ower's full performance of his public law obligations. What is the reach of this qualification? The demands of a private law duty of care cannot justify, far less require, action (or inaction) by a public authority which would be unlawful in public law terms. The standard tests of legality, rationality and fairness must be met as they apply to the use of the public law power in the particular case. If the case is one where the action's severity has to be measured against its effectiveness, it must also be proportionate to whatever is the statutory purpose. The varying states of affairs which I have identified from the principal authorities, though no touchstone of liability in this present context, may bring into focus the relevant public law constraints and demands created by the statutory scheme in hand. That will help to set the measure, case by case, of the requirement that the duty-ower, if he is to fulfil his duty of care by means of a public law discretion, must act consistently with the full performance of his public law obligations."

61 On the facts, the defendant's public law duty and its duty of care to the claimant "plainly marched together" (see [111]) so that "while there may have been factors pro and con",

there were "no public law imperatives which should have prevented the council from fulfilling its duty of care to the claimant" (see at [113]). At [114], Laws LJ laid down a marker:

> "the result in this case offers nothing remotely resembling a *vade mecum* for others in the future to build private law claims out of what may be sensitive and difficult decisions, including policy decisions, of public authorities."

62 The qualification in *Connor* was framed in terms of compatibility with domestic public law, but we see the case as an illustration of a wider principle applicable whenever relief is sought in a private law claim which would affect the exercise by the defendant of a public law power. In deciding whether the relief is appropriate, the Court must bear in mind the public law context. If, looking at the matter through a public law lens, there are strong factors pointing in a particular direction, the court should in our view be loath to grant private law relief which requires a public authority defendant to do the opposite. The significance of this point is developed under the next two headings.

63 Ms McGahey did not press the issue of appropriateness of the remedy sought in this private law claim. We do not therefore make any determination on the issues outlined above. The focus of Ms McGahey's objection to the application was in relation to the next two issues.

Issue (c): If the relief is granted, what would be the practical consequence of a determination by Rwanda that the claimants' medical treatment has finished?

64 We begin by noting as follows:

(a) None of the claimants had or has any right (whether under international law or Rwandan law) to enter or remain in Rwanda.

(b) In each case the claimant was permitted to enter and remain in Rwanda pursuant to an arrangement negotiated by the UK Government with Rwanda.

(c) The terms of that arrangement include an express written undertaking by the UK Government, contained in a *note verbale*, that the BIOT Administration will remove the claimant from Rwanda once treatment is complete.

(d) On the evidence before us, the interim injunction sought would be needed only if, and when, the Rwandan authorities decide that treatment is complete, unless by that time he has negotiated an arrangement with a third country willing to accept the claimants.

(e) Thus, if the interim injunction has any effect at all, it will prevent the Commissioner from honouring the undertaking given on his behalf by the UK Government.

65 As to what would happen then, there is an absence of evidence. However, this absence is not surprising. Rwanda is a sovereign State. It is not required, and cannot be expected, to give a running commentary on what it will do if its international interlocutors renege on their commitments. That does not mean that we should close our minds to what it might be expected do in that situation. We have no evidence about Rwandan law in this respect. But there is no reason to doubt that it would be entitled to detain the claimants

as persons who lack the right to remain in Rwanda. There would be no legitimate reason for criticising it if it did. The possibility that such detention might occur (and in unknown conditions) would, in our judgment, be a highly material consideration for the Commissioner in deciding whether to transfer the claimants back to BIOT once their treatment in Rwanda is complete, or to allow the flight to land in BIOT. It is also a highly material consideration for us in deciding whether to grant interim relief.

66 Even if Rwanda decided not to detain the claimants, the grant of relief against the Commissioner would prevent him from honouring the UK Government's assurance. Again, the effects of this are uncertain, but it is far from fanciful to suppose that it might cause the Rwandan Government to decline further requests for medevacs from BIOT. Given the limited medical facilities available on BIOT, and the lack of any other current arrangements for medevac to third countries, such a decision would be bound to give rise to serious risks to the health (and possibly life) of other asylum seekers on BIOT. This too would be a highly material consideration for the Commissioner when considering whether to exercise of his public law powers to arrange a transfer flight back to BIOT or to allow the flight to land in BIOT – and therefore for us in deciding whether to grant interim relief.

67 It may be objected that this analysis misses an obvious way in which the Commissioner could avoid dishonouring the UK Government's undertaking that the claimants will be removed from Rwanda once their treatment is complete: i.e. transfer them to the UK. We do not think it was improper for Ms McGahey to invite us to infer that this is, in reality, what the claimants are seeking to achieve by this litigation. But the possibility of transfer to the UK is not, in our view, a legitimate answer to the question of what will happen if the relief sought is granted. That is so for three reasons.

68 First, this application is made against the Commissioner only. As an officer of CBIOT, he has no power to require the UK Government to allow the claimants to enter the UK. It is simply not open to him to transfer the claimants to the UK. There is no evidence that the UK Government has any intention of allowing any of the claimants to enter the UK. We have to decide the application for interim relief on that basis.

69 Second, the question whether to grant leave to the claimants or any of them to enter the UK would be a matter for the Home Secretary, who is not currently even a defendant to the claim, never mind a respondent to the present application for interim relief. Answering that question is likely to engage a range of policy issues on which the court would give considerable weight to the view of the Home Secretary. But there has been no opportunity for that view to be made known.

70 Third, in those circumstances, it would be wrong to grant interim relief against the Commissioner which assumed that transfer to the UK was a viable option. To do so could have the collateral effect of placing pressure on the Home Secretary to exercise her public law powers in a particular way. It would not, in our view, be legitimate to grant interim relief having that effect.

Issue (d): Is the *American Cyanamid* test satisfied?

71 This larger issue breaks down into four sub-issues: (i) does the *American Cyanamid* test require modification in this case? (ii) is there a serious issue to be tried? (iii) if so, would

damages be an adequate remedy? and (iv) if not, where does the balance of convenience fall?

(i) Modification of the test

72 The claimants rely on the formulation of the test in *American Cyanamid* –

> "unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought" per Lord Diplock at p407.

73 The Commissioner notes that the test is modified in public law proceedings, citing *R (Hussain) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin), at [9] (Swift J) and the case law referred to there.

74 There is a live issue as to whether the proceedings, as a whole, are properly to be characterised as public law or private law proceedings and there is, in consequence, an issue about whether the test should be modified. But Ms McGahey did not press orally her submissions that modification to the higher public law standard was appropriate. For present purposes, we apply the unmodified standard articulated in *American Cyanamid*, a private law case.

(ii) Serious issue to be tried

75 The claimants submit that the underlying claims have a real prospect of success. The duty of care arises, they say, as a result of the relationship of detainer and detainee, citing *GB v Home Office* [2015] EWHC 819 (QB), see para. 59 of the claimants' skeleton argument.

76 We have doubts about whether it can be said that the Commissioner, or the administration of BIOT, is detaining any of the migrants. They are free to leave Diego Garcia at any time, and many of their number have left, with assistance from the administration. Some have stayed behind because they do not want to, or cannot, return to their country of origin; while they are on Diego Garcia, they are reasonably (so it appears to us) subject to some restriction on their movement, for their own safety and to ensure security at the defence facility. If the migrants are not detained, then the basis and scope of any duty of care is uncertain.

77 However, Ms McGahey did not invite us to refuse relief on this basis. For present purposes, we are prepared to accept that the claim does not fall within the category of cases described in *American Cyanamid* as failing to disclose any real prospect of succeeding at trial.

(iii) Adequacy of damages

78 It is common ground that, if the other aspects of the claimants' arguments are made out, damages would not be an adequate remedy for the claimants: they say that their health and lives are at risk.

79 The claimants do not offer an undertaking in damages to the Commissioner, because they have no resources. Rightly, in our view, the Commissioner does not suggest that this should be a bar to the remedy.

(iv) Balance of convenience

80 It is on this sub-issue that the dispute has centred. The claimants' application advances two alternative forms of relief, which are set out at paragraph 10 above. Mr Hermer says that either order will protect the claimants against the grave danger of imminent return to BIOT and the risk to life and limb (and liberty) he submits that will entail. If order (a) is imposed (i.e., enjoining the Commissioner from removing the claimants to BIOT), he says that the Commissioner can at any time apply to vary it, and at that stage put evidence before the Court as to the conditions which will await the claimants in BIOT, so that the Court can assess the arrangements and permit return (by discharge or variation of the order) if satisfied they are adequate; if order (b) is imposed (ie, requiring notice prior to removal to BIOT), that at least gives the claimants time and opportunity to come back to court to seek an injunction preventing removal at that stage, inviting the court's review of the supporting documents provided by the Commissioner and advancing their arguments, if they have them, that the arrangements are not satisfactory.

81 Mr Hermer recognises that an order in either form risks putting the Commissioner in breach of undertakings given to the Rwandan Government, but submits that the need to protect these claimants outweighs the possible difficulties which might be caused with Rwanda.

82 We address first order (a), an injunction prohibiting return of the claimants to BIOT. We begin by considering the claimants' current medical conditions. There is no doubt that all the claimants have medical needs. They have been medically evacuated to Rwanda for treatment. Each has had suicidal ideation and has self-harmed. The first and fifth claimants' medical difficulties appear, on the basis of the evidence we have, to be particularly significant. We accept that the need to safeguard the claimants' wellbeing is a very important factor for us to weigh in the balance.

83 However, it is necessary to evaluate the risk which faces the claimants in more detail. As things stand today, the claimants' medical needs are being met through their treatment in hospital in Kigali. The claimants are currently safe. The concern they express, and the reason for this application, relates to future events. At the point when their treatment is concluded they fear that the Commissioner will wish to take them back to BIOT and they assert that they will face risk at that point.

84 There are two matters which are relevant to assessing the risk at that point. First, at that point the claimants' treatment will have finished and they will have been discharged from hospital by their treating doctors. Although there were some guarded suggestions, from Dr Robjant and by Mr Hermer, that the claimants' treating doctors could not be trusted on to determine when the claimants are fit for discharge, we see no proper evidence to support that suggestion. We are satisfied that their treating clinicians are in the best position to determine when the claimants are well enough to be discharged and will act professionally in doing so. We work on the assumption that, at the point of return to BIOT, the claimants will be well enough from a medical perspective to go there.

85 Secondly, it is necessary to have regard to the conditions which will meet the claimants on return to BIOT. The tort claim is based on past alleged failures. For present purposes, we have accepted the points raised are arguable. But the Commissioner's evidence demonstrates that the facilities being provided to this migrant group have been increased substantially in recent weeks and days, since the claimants were medically evacuated to Kigali, and that the provision of support to the migrant group remains under constant review. The number of medical and security staff on site has been increased and there are now sufficient to staff to provide a presence around the clock. Migrants requiring observation can be managed. In severe cases, suicide watch will be undertaken by qualified healthcare workers. This is in addition to the existing facilities: a US run medical facility on the island for basic physical tests, and the possibility of further evacuation to Rwanda. The claimants may wish to suggest that these measures are inadequate, but the claimants would not be returning to an environment where no support is to hand; at least some medical care and other types of support will be available.

86 There is one other important factor to weigh in the balance when considering the claimants' interests. If the claimants succeed in this application, the Commissioner would be prohibited from removing them to BIOT. As discussed above, that would leave the migrants in an uncertain and vulnerable position as undocumented individuals with no right to be in Rwanda. That puts them at risk, at the worst, of being taken into immigration detention as illegal immigrants. If that occurred, the Commissioner would lack any power to secure their release or to support them, because they would be in the detention of another sovereign State. Mr Hermer says that this is speculation, alternatively a small risk. We do not accept that the risk of this occurring can be marginalised or minimised in this way. We consider this to be a material risk which must be weighed in the balance of risks faced by the claimants. There is a material risk that by granting an order in the form of (a), this Court could make things worse for the claimants than returning them to BIOT.

87 Pausing there and weighing the factors we have so far identified, we conclude that, even considering the matter purely from the perspective of the claimants, it would be undesirable to grant this injunction. We are not persuaded that the risk to the claimants on return to BIOT outweighs the risk to them if they stay in Rwanda pursuant to an order of this Court.

88 We have not so far considered the wider picture including the various points emphasised by Ms McGahey in her oral submissions. Mr Hermer accepts that the points she makes should be taken into account. The first and important point is that the grant of an injunction in the form of order (a) would put the Commissioner in an impossible position: if he complied with the order, the UK Government would be in breach of its assurances to the Rwandan Government, which is a very serious matter. If instead he abided by those assurances, that would put him in breach of an order of this Court and potentially in contempt of court, also a very serious matter. We could and should not put the Commissioner in such a position. Although the grant of the injunction would not put the Commissioner in breach of his domestic public law duties (the situation envisaged in *Connor*), it would put the UK in breach of a diplomatic commitment. In our judgment, there are strong public interest reasons not to grant relief in these circumstances.

89 There would be further problems associated with the grant of an injunction. One foreseeable consequence would be the likelihood of the Rwandan authorities refusing to take further migrants from BIOT for treatment, which would be to the disadvantage of

all those who are now or may in the future be on Diego Garcia (including the claimants themselves if they should ever return there). Another foreseeable consequence would be the deterioration of diplomatic and governmental relations between the UK and Rwanda more generally because the trust which Rwanda has placed in the UK's assurances would be undermined. It is possible to envisage other problems consequent on the failure by the UK to abide by its international commitments.

90 In short, once the wider view is taken, it is clear that there would be very significant detriments if the order in version (a) were to be granted. The balance tips decisively against granting such an order.

91 We turn to the alternative version (b). Here too, serious difficulties would arise. Such an injunction would still put the claimants in a potentially vulnerable position as illegal immigrants, because for the 5 day notice period – which may well occur after their treatment has ended – they would remain in Rwanda without lawful reason to be there. This would still amount to a breach of the undertakings given to the Rwandan Government because the Commissioner would not be able to remove claimants once their treatment was concluded. It gives rise to the same concerns about disrupting the possibility of medical evacuation for other refugees on Diego Garcia. It still jeopardises UK/Rwanda relations, and the trust which other states could repose in assurances given by the UK, more generally.

92 An order in form (b) would anyway serve little purpose: if an application were to be made during the 5 day notice period, seeking at that stage an injunction prohibiting the claimants' return to Diego Garcia, the court hearing that application would be faced with the same arguments as have been advanced before us as to the potential damage (from the claimants' perspective as well on the wider public interest plane) which would flow from such an order. The court would be bound to conclude that that it should not make such an order. Accordingly, the balance of convenience also lies against making an order in the form of (b).

Conclusion

93 For these reasons, we dismiss this application.