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Challenging the United Kingdom's Decision not to Support the Resettlement of the Chagos Islands: *R (on the application of Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWCA Civ 1010

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Introduction and background context

1. The long-running Chagos litigation has now entered into its third decade[1] with the Court of Appeal's decision in *R (Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*.[2] The appeal was brought by Ms Solange Hoareau and Mr Louis Olivier Bancoult to challenge the Divisional Court's earlier judgment.[3] The appeal concerns a decision taken at the very highest level of government in 2016, which was to refuse to support the resettlement of the Chagossians to the British Indian Ocean Territory ('the BIOT').[4] The Chagossians had originally been the inhabitants of the BIOT and many still wish to return to the outer islands of the Chagos Archipelago.[5] Rather than supporting resettlement, the UK government offered the Chagossians about £40 million in compensation over the course of 10 years. The appeal was heard in May 2020 by Sir Terence Etherton MR, Green LJ and Dingemans LJ, and judgment was handed down on 30 July 2020.

2. The BIOT, which encompasses the Chagos Archipelago and is also known as the Chagos Islands, was previously part of the British colony of Mauritius, until it was detached from Mauritius in November 1965 to create a new territory.[6] The rationale for the detachment was to facilitate the use of the Chagos Archipelago as a military

[1]Mr Bancoult first began legal proceedings in 1998. However, note the previous Vencatessen litigation which resulted in a settlement in the 1980s, with the UK government agreeing to provide additional compensation to the Chagossians.
[2][2020] EWCA Civ 1010, [2021] 1 WLR 472.
[3]*R (Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin), [2019] 1 WLR 4105.
[4]*Hoareau and Bancoult* (n 2) [1].
[5]These would not include the largest island in the BIOT, Diego Garcia, as it is the location of a joint UK and US military base.
[6]As a result of the Lancaster House agreement the representatives of the then non-independent Mauritius agreed to its detachment in return for compensation. Post-independence Mauritius has challenged the legitimacy of the detachment. For commentary on the international law dimension to the litigation see S Allen, *The Chagos Islanders and International Law* (Hart Publishing 2014); S Allen and C Monaghan (eds), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (Springer 2018); and T Burri and J Trinidad (eds), *The International Court of Justice and Decolonization: New Directions from the Chagos Advisory Opinion* (Cambridge University Press, forthcoming).

base by the US. In consequence, the Chagossians were removed from the BIOT by the UK in the late 1960s and early 1970s.

3. The UK government has apologised for its treatment of the Chagossians, for instance in 2018 in oral pleadings before the International Court of Justice in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. The then Solicitor General, Robert Buckland QC, had informed the International Court of Justice that, 'the United Kingdom … fully accepts that the manner in which the Chagossians were removed from the Chagos Archipelago, and the way they were treated thereafter, was shameful and wrong, and it deeply regrets that fact'.[7]

4. In light of the extent of the previous litigation and its inherent complexity, it is not possible to provide a full account of its history, other than to give a broad chronology. Previously in 2000, Mr Bancoult had successfully challenged the original Immigration Ordinance 1971 that had removed the Chagossians' right to live on the islands.[8] In response to the decision of the Divisional Court, the Secretary of State for Foreign and Commonwealth Affairs had agreed not to introduce new colonial legislation to restrict the right of abode. However, in 2004 two new Orders in Council were introduced that did just this, and these orders were challenged by Mr Bancoult. Despite being successful before the Divisional Court and Court of Appeal, Mr Bancoult was ultimately unsuccessful before the House of Lords.[9]

5. The present appeal was heard in the context of the Advisory Opinion of the International Court of Justice, which found that the UK, by its detachment of the Chagos Archipelago, had not completed the decolonisation of Mauritius. Therefore, the court advised that the UK should return the territory to Mauritius. The UK government has been keen to emphasise inter alia that the decision is only advisory and not binding. However, the subsequent Resolution of the United Nations General Assembly in May 2019 instructed the UK to 'withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months'.[10] To date the UK has not complied with the Resolution.

The three issues to be determined

6. There were three issues to the appeal relating to, first, whether as a result of the Advisory Opinion and the UN Resolution, the European Convention on Human Rights (ECHR) now extended to the BIOT; second, whether the Divisional Court or the original decision maker need to apply anxious scrutiny because of the importance of the right of abode; and, third, whether the decision was irrational for a number of reasons.[11]

[7]Oral Pleadings, 3 September 2018.
[8]*R (Bancoult) v Secretary of State for the Foreign and Commonwealth Office (No. 1)* [2000] EWHC 413 (Admin).
[9]*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61.
[10]For commentary see 'General Assembly Welcomes International Court of Justice Opinion on Chagos Archipelago, Adopts Text Calling for Mauritius' Complete Decolonization', United Nations, 22 May 2019, <https://www.un.org/press/en/2019/ga12146.doc.htm> accessed 22 September 2020.
[11]*Hoareau and Bancoult* (n 2) [92].

7. The first issue concerned whether the ECHR extended to the Chagos Islands and, if it did, whether there had been breach of Art 8 and Art 1 of the First Protocol. The appellants argued that despite the decision in *Chagos Islanders v UK*,[12] 'that had the ECtHR been aware of the Advisory Opinion and the UN Resolution then it would have taken, and been bound to take, a quite different approach' as the UK no longer lawfully had responsibility for the international relations of the BIOT.[13]

8. The Court of Appeal rejected the appellants' submissions in relation to the first issue, concluding that 'whilst recognising that there was a human right relating to resettlement, neither the Advisory Opinion nor the UN Resolution actually decided anything about that right', and although the UK is urged to co-operate with Mauritius on resettlement, the issue was part of decolonisation and even Mauritius was placed under no obligation to resettle the islands.[14] Furthermore, resettlement and decolonisation were not the same thing, and the Advisory Opinion was decided on the grounds of the incomplete decolonisation of Mauritius.[15] The final, 'and perhaps most' fundamental reason for rejecting the argument, was that 'neither the Advisory Opinion nor the UN Resolution support the proposition that the UK does not have *responsibility* for the foreign relations of the BIOT, at least pending full decolonisation' (emphasis in original).[16] Therefore, the UK's actions in relation to the BIOT were lawful, as the Advisory Opinion's remedy was designed to be prospective and not retrospective.[17]

9. This is extremely important, since had the Court of Appeal been willing to accept that the correct interpretation of the Advisory Opinion and Resolution was that the UK did not actually, as a matter of international law, have responsibility for the foreign relations of the BIOT, then this would have the result of bypassing the obstacle posed by Art 56 ECHR (as the 'colonial clause' is reliant on the decision not to extend the ECHR being taken by a state that is responsible for that territory's international relations).[18] The Court of Appeal was clear that 'Article 56 applies and Article 1 is excluded'.[19] Even if the Court of Appeal had been free to find that the common law right of abode had been enlarged by the application of the ECHR to the BIOT, the 2004 Orders in Council prevented the Chagossians from returning and the legality of these had been upheld in *Bancoult (No. 2)*[20] by a majority of the House of Lords.[21]

[12]App no 35622/04 (2012).
[13]*Hoareau and Bancoult* (n 2) [107].
[14]ibid [128]–[131].
[15]ibid [130].
[16]ibid [131].
[17]ibid [132].
[18]For a more detailed consideration of Arts 1 and 56 ECHR and the BIOT see R Wilde, '"Anachronistic As Colonial Remnants May Be … " Locating the Rights of the Chagos Islanders As a Case Study of the Operation of Human Rights Law in Colonial Territories' in S Allen and C Monaghan (eds), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (Springer 2018).
[19]*Hoareau and Bancoult* (n 2) [139].
[20]*Bancoult (No. 2)* (n 9).
[21]*Hoareau and Bancoult* (n 2) [143]–[144].

10. The second issue involved an interesting consideration of whether both the decision maker and the Divisional Court had needed to apply anxious scrutiny when reaching their decisions. The Court of Appeal referred to Sir Thomas Bingham MR in *R v Ministry of Defence ex p. Smith*,[22] where Bingham MR had stated that when deciding whether a decision was rational, the courts should apply more scrutiny to a decision that involves human rights.[23] However, the Court of Appeal also observed that Sir Thomas Bingham MR had been clear that the court must not be too willing to hold a decision to be irrational. This was because when deciding whether or not a certain policy was rational, then depending on the nature of the decision this was essentially a question of institutional competency.[24] The Court of Appeal held that the Divisional Court was correct in not applying anxious scrutiny when reaching its decision as 'this was not a decision which should be subjected to "anxious scrutiny" … because there was no "interference with human rights"'.[25] The Court of Appeal observed that although the removal and loss of right of abode had been wrongful, compensation had been offered.[26]

11. The Court of Appeal was clear that the appeal had been wrong to focus on the need for the decision to only concern human rights before anxious scrutiny could be applied, as a court could 'consider a matter closely if it raises issues of real important to individual' and importantly '[t]he Courts do not maintain any rigid classification or taxonomy of rights which is then used to govern the intensity of the scrutiny'.[27] Despite recognising respective institutional competence, i.e. the executive may be best placed to take certain types of decisions, the Court of Appeal was clear that 'it remains the constitutional duty of the court to ensure that the decision is lawful. The fact that the decision is in an area where the decision maker might be best placed to make the assessment is not a bar to a finding of irrationality'.[28]

12. This is important point for public law practitioners, especially those whose clients are seeking to challenge a government decision that concerns a balanced policy decision where there is no engagement with human rights. It should be noted that the domestic courts have never accepted that the ongoing Chagos litigation involved any human rights issues in the form of the ECHR. Here the overt willingness of the Court of Appeal to reiterate its constitutional duty is important, especially now given the anticipated attempts to reform judicial review.[29]

[22][1996] QB 517.
[23]ibid 554.
[24]ibid 556.
[25]*Hoareau and Bancoult* (n 2) [152].
[26]ibid.
[27]ibid [153].
[28]ibid [155].
[29]See 'Government launches independent panel to look at judicial review' Gov.UK, 31 July 2020 <https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review> accessed 22 September 2020; M Elliott, 'The Judicial Review Review I: The Reform Agenda and its Potential Scope', *Public Law for Everyone*, 3 August 2020 <https://publiclawforeveryone.com/2020/08/03/the-judicial-review-review-i-the-reform-agenda-and-its-potential-scope/> accessed 22 September 2020.

13. The Court of Appeal then considered, although it stated that it was not necessary to do so, whether the decision maker had to also apply anxious scrutiny when making a decision that concerned a human rights context.[30] The court rejected the proposition that this was the correct approach, but observed that the more important a decision then the more care a decision maker would 'likely … be required' to take.[31] Applying this to the present appeal, the Court of Appeal observed that the decision in question was 'taken with conspicuous care and consideration'.[32]

14. The third issue before the Court of Appeal involved the rationality of the government's 2016 decision not to support the resettlement of the outer islanders in the Chagos Archipelago. The appellants had argued that the Chagossians' right of return needed to have been 'considered separately from issues of resettlement', that there were also three material misdescriptions: the first about 'about the feasibility of constructing a runway', the second 'about the deliverability of the financial package', and the third concerning how the package had been calculated.[33] The Court of Appeal rejected the appellants' submissions, finding that the government had acted rationally. On the point of resettlement, the Court of Appeal observed the government had acted rationally in considering resettlement and the right of return, as any feasible return by the islanders would in reality be reliant on a government resettlement package.[34]

Conclusion

15. The appellants' arguments were strong and had made a very sound case for challenging the 2016 decision. However, perhaps it was not surprising that the Court of Appeal reached the conclusions it did on the first issue; especially, in light of the ECHR jurisprudence of the European Court of Human Rights[35] and the manner in which the Court of Appeal interpreted the nature of the Advisory Opinion and the Resolution of the UN General Assembly. This in turn in part explains the outcome for the second issue, as to whether the Divisional Court should have applied anxious scrutiny when reviewing the 2016 decision, although the Court of Appeal's commentary on the scope of the test for anxious scrutiny is of considerable importance for future public law litigation.

16. The decision of the Supreme Court as to whether it will hear an appeal from the appellants remains to be determined. If an appeal is granted then it will be interesting to see whether the Supreme Court reaches a different decision on the basis of the applicability of the ECHR, the need for anxious scrutiny, and the rationality of the decision.

[30] *Hoareau and Bancoult* (n 2) [157].
[31] ibid [159].
[32] ibid [160].
[33] ibid [162].
[34] ibid [170].
[35] See *Chagos Islanders v UK* (n 12) and *Al-Skeini and others v UK* App no 55721/07 (2011).

17. In light of the growing international pressure on the UK to return the Chagos Archipelago to Mauritius and complete the decolonisation of its former colony, it is likely that a future UK government might, subject to US agreement and assurances from Mauritius as to the future of the military base on Diego Garcia, concede that sovereignty rests with Mauritius. In that case, the question of the right of abode and resettlement is a matter to be determined by Mauritius and not the UK.