Judicial Review

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rjdr20

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To cite this article: Chris Monaghan (2023): Returning to *Bancoult*: New Perspectives, Judicial Review, DOI: 10.1080/10854681.2022.2154484

To link to this article: https://doi.org/10.1080/10854681.2022.2154484

JUDICIAL REVIEW
https://doi.org/10.1080/10854681.2022.2154484

Routledge
Taylor & Francis Group

Returning to *Bancoult*: New Perspectives*

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1. The purpose of this article is to return to the House of Lords' decision in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*.[1] It draws upon new empirical research in the form of interviews with the lawyers acting for Mr Bancoult, to offer a human account of the litigation, alongside the existing empirical research on how the actual decision was reached. This is a decision that I have been reflecting on for over a decade and one that offers so much to scholars, not least the problematic context, the legal reasoning and how it is now perceived as a matter of contemporary legal history. It also considers how the Law Lords reached their decisions during Lord Bingham's tenure as the Senior Law Lord. Since 2008 there has been a steady flow of academic literature on the decision in *Bancoult (No 2)*, some seeking to justify the decision,[2] although most academic opinion has criticised the majority's reasoning.[3]

*A version of this article was delivered at a research workshop at the University of Worcester in July 2021 and some of the themes raised were discussed in a paper I delivered at *The Chagos Litigation: A Socio-Legal Dialogue Conference* in June 2015 at the University of Greenwich. The research for the empirical part of this article was funded by the School of Humanities Research Investment Fund. I am grateful for Gemma Noyce for transcribing the interview recordings. I would like especially to thank the late Professor Anthony Bradley QC for his kindness and generosity in giving me access to his notes and other documents relating to the *Bancoult* litigation, including annotated skeleton arguments and a counsel notebook recording the proceedings before the House of Lords. I would also like to thank Maya Lester QC, Sir Sydney Kentridge QC, Eliza Kentridge, Richard Gifford and Dr Ewan Smith. Professor David Sugarman was very helpful with his advice during the preliminary stages of this research. Finally, I would like to thank Dr Stephen Allen and Dr Colin Murray for their comments on the article and to Stephen for drawing my attention to William Twining's essay 'Legal reasoning and argumentation' in W Twining, *Rethinking Evidence: Exploratory Essays* (2nd edn, Cambridge University Press 2006). It goes without saying that all errors remain my own.

[1][2008] UKHL 61, [2006] 1 AC 453.

[2]See J Finnis, 'Common Law Constraints; Whose Common Good Counts?', Cambridge Centre for Public Law, Colloquium on Common Law, Royal Prerogative and Executive Legislation, 19 January 2008 <https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/File/Finnis_J_Paper%281%29.pdf> accessed 3 December 2022; the inclusion of the Court of Appeal's decision in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2007] EWCA Civ 498, [2009] QB 365 in the Judicial Power Project's 2016 list of 50 Problematic Cases <http://judicialpowerproject.org.uk/50-problematic-cases/> accessed 3 December 2022; and SJ Lakin, 'Justifying *Bancoult (No 2)*: Why Justice Hercules Must Sometimes Disappoint Us' in S Allen and C Monaghan (eds), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (Springer 2018).

[3]See for example CRG Murray and T Frost, 'The Chagossians' Struggle and the Last Bastions of Imperial Constitutionalism' in S Allen and C Monaghan (eds), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (Springer 2018); TT Arvind, '"Though it Shocks One Very Much": Formalism and Pragmatism in the *Zong* and *Bancoult*' (2012) 32(1) OJLS 112; S Juss, 'Bancoult and the Royal Prerogative in Colonial Constitutional Law' in S Juss and M Sunkin (eds), *Landmark Cases in Public Law* (Hart Publishing 2017); and B Hadfield, 'Constitutional Law' in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876–2009* (Oxford University Press 2011). Finally see, C Monaghan, 'Lord Mance's dissent in *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No2)* [2008] UKHL 61' in C Monaghan and N Geach (eds), *Dissenting Judgments in the Law* (Wildy, Simmonds and Hill 2012) 239.

Put simply, the decision will not go away and generates sufficient academic interest to draw attention to what are arguably the deficiencies in the majority's judgment.

2. This article is divided into two distinct parts. The first part presents a discussion on the Bingham Court and draws on the research carried out by Professor Alan Paterson alongside my own analysis of the House of Lords' decision. The second part explores the empirical research that I undertook based on the experiences of those involved with the *Bancoult (No 2)* litigation and considers the results of the interviews that I conducted in 2020 and 2021. It is argued that these interviews offer a new perspective on the House of Lords' decision and will help contextualise the written judgments, crucially by offering a human insight. This human insight is essential for later generations to appreciate what it was *actually* like to appear before the House of Lords and how it felt to act in the case. This cannot be readily gleaned from the law reports, as first, this is not their purpose, and secondly, academic commentary typically reflects on the deficiencies or merits of a decision.

Introduction

3. This article is primarily concerned with the House of Lords' decision in *Bancoult (No 2)* and offers a new perspective through the use of empirical interviews with the lawyers acting in the proceedings for Mr Bancoult. It does not wish simply to retell the story, but rather, with this new perspective, permit the reader to look at the decision afresh. This is a decision steeped in the legacy of colonialism and is in many ways evidence, not least through the government's conduct in 2004, of a continued colonial mindset – a mindset the legacy of which has been critiqued, not least in *Empireland*,[4] and permits the continued oppression of an indigenous population, whilst offering apologies and attempting to atone by way of financial compensation.

4. The 2008 judgment of the House of Lords marked the end of the attempt to challenge the 2004 removal of the Chagossians' right of abode on the outer Chagos Islands. Those who have followed the *Bancoult* litigation will appreciate the relative complexity and numerous cases in the proceedings. These can divided into challenging the original expulsion of the Chagos Islanders (*R (Bancoult) v Foreign and Commonwealth Office (No 1)*[5]), the request for additional compensation (*Chagos Islanders v The Attorney General*[6]), the challenge to the removal of the right of abode (*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*[7]), the challenge to the creation of the Marine Protected Area (*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)*[8]), the application to the European Court of Human Rights

[4] S Sanghera, *Empireland: How Imperialism has Shaped Modern Britain* (Penguin 2021).
[5] [2000] EWHC 413 (Admin), [2001] QB 1067.
[6] [2004] EWCA Civ 997.
[7] *Bancoult (No 2)* (n 1).
[8] [2019] UKSC 3, [2020] AC 185.

(*Chagos Islanders v UK*[9]), the attempt to reopen the House of Lords' decision in *Bancoult (No 2)* (*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*[10]), and the challenge to the decision not to resettle the outer islands (*R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs*[11]). In addition to the domestic litigation, Mauritius has, on the whole, successfully challenged the UK in international law in three rounds of legal action.[12]

5. It will be necessary briefly to sketch out the background context to the House of Lords' decision. In the early 1960s the UK and the US agreed that the Chagos Islands could be used as the location of a joint US/UK military base. To achieve this, the UK pressured Mauritius, which was then a British colony and the territory from which the Chagos Islands were administered, to agree to the transfer of the islands to the UK. The UK then proceeded to create the British Indian Ocean Territory in November 1965 and gradually started to remove the indigenous population of the Chagos Islands. This expulsion of the population was given legal basis by the Immigration Order of 1971 and was finally achieved by 1973. The Chagossians had initially sought compensation and then the right to challenge the Immigration Order. In *Bancoult (No 1)* Mr Bancoult successfully challenged the Immigration Order, and the Divisional Court held that it was invalid. In response, the Foreign Secretary announced that the government accepted the decision and would allow the islanders to return to the outer islands (as the main island, Diego Garcia, was still used by the US as a military base). However, in 2004 two Orders in Council were introduced that removed the right of abode and these were challenged by Mr Bancoult.

6. The *Bancoult (No 2)* litigation started in the Divisional Court, where Hooper LJ found in favour of Mr Bancoult. The government appealed to the Court of Appeal, and the Court found in favour of Mr Bancoult. Finally, the government appealed to the House of Lords, and by a majority of three to two, the House of Lords found in favour of the government. The majority in the House of Lords were Lord Hoffmann, Lord Carswell and Lord Rodger. The minority judges were Lord Bingham and Lord Mance. Throughout the *Bancoult (No 2)* litigation Mr Bancoult was represented by Richard Gifford, from Sheridans, and the counsel appearing on his behalf were Sir Sydney Kentridge QC, Anthony Bradley (later a QC) and Maya Lester (now a KC). The Secretary of State for Foreign and Commonwealth Affairs was represented by the Treasury Solicitor and John Howell QC (before the Divisional Court and Court of Appeal), Jonathan Crow QC (before the House of Lords), and Kieron Beal (now a KC) (throughout).

[9]Application No 35622/04 [2012] ECHR 2094.
[10][2016] UKSC 35, [2017] AC 300.
[11][2020] EWCA Civ 1010, [2021] 1 WLR 472.
[12]The most high-profile of these was the Advisory Opinion of the International Court of Justice in *Legal Consequences of the Separation of the Chagos Archipelago*, 25 February 2019. For commentary see T Burri and J Trinidad (eds), *The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion* (Cambridge University Press 2021).

Existing research on *Bancoult* and the Bingham Court

7. The decision in *Bancoult (No 2)*[13] was determined by a bare majority of three judges out of five. To understand how the House of Lords operated as a court, the role of counsel and the opportunities for constructive dialogue between the Lords of Appeal in Ordinary (the Law Lords), is to gain a critical perspective on why the decision *may* have been decided as it was. An important reason for any decision is who gets to be on the panel? Penny Darbyshire, in her empirical research into the working lives of judges, has observed that,

> it was clear in 2005 and 2008 that the Law Lords did not fully understand the selection criteria. 'We just say when we're available'. A very experienced Law Lord confessed in 2008 that it was a 'mystery' when seven and five member panels were convened.[14]

8. Five Law Lords (Lord Bingham, Lord Mance, Lord Hoffmann, Lord Rodger and Lord Carswell) found themselves assigned to the panel to hear the government's appeal. Alan Paterson's research on the Law Lords provides an insight into judicial decision-making in the House of Lords, which, if not directly focused on this particular case, offers a much-needed insight into the decision. The starting point is the Law Lords who heard the appeal.[15] Paterson noted that the relationship between the Law Lords had changed since the 1960s, as:

> by 2009 the Law Lords did not discuss cases much in advance with each other … did not lunch together or discuss cases very much at lunch and with shorter hearings had fewer opportunities to engage with their colleagues or elicit the views of the more silent ones such as Lord Nicholls or Lord Walker.[16]

9. It is striking that there appeared to be a lack of substantial dialogue between the Law Lords during the course of the hearings, and it is interesting to consider what effect this might have had on how the judges developed the genesis of their opinions, without having an early opportunity of gauging what directions their colleagues were going regarding the merits of the appeal.

10. The appeal in *Bancoult (No 2)* was heard by the Bingham Court, with Lord Bingham on the panel as the Senior Law Lord and ultimately one of the dissenters. The most prominent of the three majority judgments was that of Lord Hoffmann. Paterson has contrasted the different approaches of the Law Lords and it is interesting to consider the differences between Lord Bingham and Lord Hoffmann.[17] According to Paterson,

[13] *Bancoult (No 2)* (n 1).
[14] P Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing 2011) 369.
[15] Judicial personalities and differences in how a particular judge might approach a decision are not confined to *Bancoult (No 2)*. David Pannick has written that '[i]n 1935 the first Lord Chancellor Hailsham was anxious to persuade Lord Sankey to sit on the Appellate Committee of the House of Lords in a significant case so that it would not be necessary to ask Lord Atkin who "is rather apt to take the opportunity of making the law as it ought to be, instead of administrating it as it is"' (D Pannick, *Judges* (Oxford University Press 1988) 26).
[16] A Paterson, *Lawyers and the Public Good: Democracy in Action? The Hamlyn Lectures* (Cambridge University Press 2012) 165.
[17] ibid; and Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013) 55.

Lord Bingham would circulate his judgment on the Monday after the oral hearing because 'he wanted to get the thing off his desk before he was into another case'.[18] This approach was at odds with Lord Hoffmann's rationale for making sure he circulated the earliest judgment.[19] Once the judgment had been circulated and it was clear that his would 'be the leading opinion [Lord Bingham] would entertain his colleagues' requests for a tweak here or dropping a phrase there'.[20] Crucially, 'if he didn't win his colleagues over at the first conference or with the circulated opinion, that was largely it'.[21] Paterson noted that this resulted in Lord Bingham failing to win over his colleagues in some cases, 'because of his disinclination to counter the efforts of the majority Law Lords to persuade the swing voter to stay with them'.[22] On the other hand, Lord Hoffmann was a tactician who distributed his judgment 'at a very early stage in an attempt to influence his colleagues'.[23] Paterson commented that 'Lord Hoffmann used his exchanges with counsel to make points to his colleagues: " … It's an opportunity not just for counsel to exercise advocacy on the bench but for the judges to exercise advocacy on each other"'.[24]

11. Returning to judicial advocacy, Paterson commented that, '[l]ike Lord Hoffmann [Lord Bingham] saw the first conference as an opportunity for judicial advocacy, but not for him, but for the junior Law Lord who spoke first'.[25] Paterson noted that there were similarities between Lord Bingham and Lord Hoffmann.[26] However, Lord Bingham was arguably hindered by his unwillingness 'to push his position beyond the first circulation'.[27] Paterson's research provides much invaluable insight into the way that the Law Lords could be persuaded to support a particular argument. Interestingly, where there were two Law Lords who had a tendency to be tacticians in a particular case, Lord Carswell 'often considered that he was the swing voter in such cases'.[28] Paterson also observed that several Law Lords had revealed to him that had they had been sitting in *Bancoult (No 2)*[29] they would have voted in support of the minority.[30] It is interesting to consider how these revelations came about – either by express questioning, or rather, was the decision that unpopular, with some of the other Law Lords, that they wished to take the opportunity of an anonymous interview to make their own views known? Lady Hale has remarked in a lecture in the US that 'I was not a member of the panel which heard that case. I wonder which way I would

[18]Paterson, *Final Judgment* (n 17) 149.
[19]Paterson, *Lawyers and the Public Good* (n 16) 184.
[20]ibid 185.
[21]ibid.
[22]ibid 186.
[23]Paterson, *Final Judgment* (n 17) 149.
[24]Paterson, *Lawyers and the Public Good* (n 16) 168–169.
[25]ibid 180.
[26]ibid 185–186.
[27]ibid 186.
[28]Paterson, *Final Judgment* (n 17) 152.
[29]*Bancoult (No 2)* (n 1).
[30]Paterson, *Final Judgment* (n 17) 194–195. Paterson explored how 'It is thought that it was cases like [*Bancoult*] that persuaded Lord Phillips to push for the much greater use of seven- and nine-judge panels in the Supreme Court, because it was too easy to argue that close call cases turned on which judges were on the hearing panel' (ibid195).

have decided it?'[31] To answer this would be a matter of speculation, but it does demonstrate that this is not a dormant decision in terms of how contemporary judges felt moved by the outcome.

12. Returning to *Bancoult (No 2)*[32] Paterson attempted to explain the reasons for the decision:

> [h]ow are we to account for this? There was an element of luck. First, one of the original Law Lords assigned to the hearing pulled out and he was thought to have favoured the islanders, while his replacement did not. Secondly, Lord Bingham, unusually, did not get his judgment out immediately because the long vacation and his retirement intervened, whereas Lord Hoffmann did, which helped to shore up the majority.[33]

13. However, Paterson credited the ability of Jonathan Crow QC, the senior counsel acting on behalf of the Secretary of State, as being the most significant reason for the government winning. This was because of Crow's ability to frame the argument to focus on the recent decision to prevent the islanders from returning, by acknowledging the appalling way that the islanders had been treated.[34] Thus the Secretary of State 'squeaked home in the Lords by a 3:2 majority, to the astonishment of many observers'.[35] Paterson observed, '[i]t should frankly have been an unwinnable case for the Government'.[36] Of the three reasons given by Paterson, the first was to do with who happened to replace that Law Lord, the second was due to Lord Bingham and, as it appears from reading Paterson's observations, a real absence of tactical game-playing and determination to see his judgment *accepted* by a majority of his fellow Law Lords, and the third was due to the art of a skilled advocate in presenting the Secretary of State's argument in a way that favoured the government, and yet, conceded the reality of how the UK had treated the Chagossians. It is unsurprising that judges do not come to hear an appeal without an opinion on the case before them, especially in one as controversial as this, something that was indicated by Paterson's observations that the Law Lord who was due to hear the appeal, but ultimately did not sit, 'was thought to have favoured the islanders', which was a position not shared by his successor.

14. The language used in the judgments and the focus of each of the Law Lords is telling. The focus on history in Lord Bingham's succinct dissent is apparent: it is clear that Bingham's experience of having read history at university is evident and that he was conscious of the constitutional role of the courts in determining the correct limits of the

[31]Lady Hale, 'Magna Carta: Our Shared Heritage' (Washington DC, 1 June 2015) <https://www.supremecourt/docs/speech-150601.pdf> accessed 6 April 2022, 18. However, for an indication see Her Ladyship's judgment in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* (n 10).
[32]*Bancoult (No 2)* (n 1).
[33]Paterson, *Lawyers and the Public Good* (n 16) 52–53.
[34]Paterson, *Final Judgment* (n 17) 55.
[35]ibid.
[36]A Paterson, *Lawyers and the Public Good* (n 16) 51.

use of the prerogative power.[37] Using the now defunct online *Wordle*[38] application, which then permitted a user to submit text online so that the website can highlight the most commonly used words, the most prominent word in Bingham's judgment was 'prerogative'.[39] Interestingly, when having used *Wordle* to view the judgments of Lord Hoffmann, Lord Rodger and Lord Carswell, the word 'prerogative' was one of the least predominate words in all three judgments. It is submitted that this is not an exact science, nor in any way a suitable replacement for a thorough engagement with the reasoning in each judgment. However, it does provide a useful way to re-approach a familiar judgment.

15. In terms of what can influence the way a decision is decided *may* be the apparent appropriateness of the litigation. One important aspect of Lord Hoffmann's judgment was his criticism of why the litigation was being brought: '[f]unding is the subtext of what this case is about … The action is … a step in a campaign to achieve a funded resettlement'.[40] However, Lord Mance refuted any notion that the proceedings could be dismissed as part of a 'mere campaign' to gain the UK's support for resettlement, or to embarrass the US and UK governments.[41] Organisations and individuals who are seeking to draw attention to their cause or to highlight a perceived wrong often use litigation. This is a form of accountability, as it provides a way to challenge a decision by a public body in the hope that the court will find in their favour. Even if the litigant is unsuccessful, this may generate sufficient publicity to benefit their cause, a point that Jeff King has identified as a prima facie benefit of legal accountability.[42] King

[37]This is a point also made by Lord Sumption, 'The Historian as Judge' (Rolls Building, 6 October 2016) <https://www.supremecourt.co.uk/docs/speech-161006.pdf> accessed 6 April 2022. Lord Sumption had observed, 'I do not think that it was an accident that Tom Bingham, one of the greatest judges of the past century, read history at university and was an avid reader of history all his life. His interest in history unmistakably marked his style, in both his judicial and his extra-judicial pronouncements' (ibid 8–9). Lord Bingham himself observed that, '[h]appily, as I think, it has increasingly come to be recognized that a lawyer without history, as well as literature, is a mechanic, and probably not a very good mechanic at that' (T Bingham, *Lives of the Law: Select Essays and Speeches 2000–2010* (Oxford University Press 2011) 44).

[38]This is not the same application as the popular Wordle word-guessing game.

[39]See <www.wordle.net> last accessed 28 June 2017. Please note that the application no longer exits. However, as I have maintained records of the results, I will refer to these. I previously used the results of the *Wordle* application on the decision in *Bancoult (No 2)* in my paper at the Social-Legal Studies Association's Annual Conference in April 2014. I am grateful for Thomas DC Bennett for originally introducing me to this application. Alan Paterson has similarly used *Wordle* as a way to explore the judgment in the *Belmarsh* case in order to highlight the different emphasis on each of the Law Lords and how these differed from Lord Bingham's approach (Paterson, *Lawyers and the Public Good* (n 16) 189–192). Paterson replicates the *Wordle* results in his book and these figures offer an invaluable aid to reevaluate this important decision.

[40]*Bancoult (No 2)* (n 1) [55] (Lord Hoffmann).

[41]ibid [138] (Lord Mance).

[42]J King, 'The Instrumental Value of Legal Accountability' in N Bamforth and P Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013) 147–149. There are other examples of where a particular decision does not accord with the expectations of Parliament and the government, such as where vulnerable individuals are left unprotected by judicial interpretation of statutes intended to confer protection. Examples include *Malcolm v Lewisham LBC* [2008] UKHL 43, [2008] 1 AC 1399, which concerned the Disability Discrimination Act 1995, and *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, which concerned whether a private care home was a public body for the purposes of the Human Rights Act 1998 (see C Costigan, 'Contracting out of the Human Rights Act 1998: Lord Bingham's and Baroness Hale's Dissents in *YL v Birmingham City Council and Others (Secretary of State for Constitutional Affairs Intervening)* [2007] UKHL 27' in N Geach and C Monaghan (eds), *Dissenting Judgments in the Law* (Wildy, Simmonds and Hill Publishing 2012); R Horton, 'The end of disability related discrimination in employment?' [2008] *Industrial Law Journal* 376; and M Connolly, 'Disability protection weakened by *Malcolm*' (2008) 152(32) *Solicitors Journal* 20. These House of Lords decisions generated considerable parliamentary criticism and were reversed by legislation, the former by s 15 of the Equality Act 2010 and s 145 of the Health and Social Care Act 2008.

considered the benefits of legal accountability and observed that there were a number of prima facie benefits. These benefits included publicity, which meant that the group bringing the case could ultimately win in the court of public opinion, despite losing the case. King observed that '[i]n this respect, even lost cases can represent political victories, as the exposure of poignant stories can create sympathy and increase the costs of political interference or apathy'.[43] King cited *Bancoult (No 2)*[44] as an example of when publicity does not result in the reversal of a judicial decision.[45] Negative judicial responses to the perceived use of the courts for political campaigning or lobbying are nothing new. KD Ewing provides an apt comparison between Lord Devlin in *Chandler v DPP*[46] and Lord Hoffmann in *Bancoult (No 2)*.[47] According to Ewing, Lord Devlin:

> [F]ell into line, rejecting the idea that the trial judge should allow 'hours or days to be spent at the trial in giving an accused the opportunity of expounding his political views', in the process evoking parallel concerns with those expressed by Lord Hoffmann in recent cases about the courts being used as a platform for the continuation of political campaigns as diverse as opposition to the war in Iraq to the re-settlement of the Chagos Islanders.[48]

16. Recently in *R (SC, CB and 8 children) v Secretary of State for Work and Pensions*,[49] Lord Reed, in giving judgment on behalf of the Court, was clear about the aims of campaigning groups that used litigation to pursue their agenda if they had failed to win the political argument. This has parallels with the concerns raised by Lord Hoffmann and the perceived misuse of the courts. His Lordship was clear that:

> In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign.[50]

17. It is clear that the Chagos litigation, while generating headlines in newspapers such as *The Guardian*, had until fairly recently received little coverage in the television media and therefore the Chagossians' campaign had arguably reached a narrow audience. In the experience of the author, most people were unaware of the Chagos litigation, whilst those who tend to be most acutely aware have a link to Mauritius, the country that many of the Chagossians had been transferred to by the UK. This has all changed following the Advisory Opinion of the International Court of Justice, the resolution of

[43]King, 'The Instrumental Value of Legal Accountability' (n 41) 148.
[44]*Bancoult (No 2)* (n 1).
[45]King, 'The Instrumental Value of Legal Accountability' (n 41) 148.
[46][1964] AC 763.
[47]*Bancoult (No 2)* (n 1).
[48]KD Ewing, 'Cold War, Civil Liberties, and the House of Lords' in T Campbell, KD Ewing and Ad Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011) 165.
[49][2021] UKSC 26, [2022] 2 AC 223.
[50]ibid [162].

the United Nations General Assembly in 2019,[51] and the visit by the Mauritian Ambassador to the United Nations and Chagossians to some of the outer Chagos Islands in 2022. There is, however, an All-Party Parliamentary Group that contains parliamentarians from the main political parties and this group has been active in campaigning for the rights of the Chagossians.[52] Almost a decade ago, during the course of the *Richard III* litigation, Chris Grayling MP, the then Secretary of State for Justice and Lord Chancellor, criticised the use of judicial review by pressure groups to attack governmental decisions. Grayling had cited the *Richard III* litigation (*R (Plantagenet Alliance) v Secretary of State for Justice*[53]) as an example of when media exposure highlighting a campaign, here that Richard III should not be reinterred in Leicester, negated the need for judicial scrutiny of a public law decision.[54]

18. From the existing literature, and most notably Paterson's empirical research, one can attempt to read beyond the text of the House of Lords' judgment in *Bancoult (No 2)*. Furthermore, by bringing in issues such as judicial decision making and the contentious issue of campaigning through the courts, this offers a chance to reassess the decision. However, what was it like to be involved with the litigation and what more can this tell us about the decision and the reasons for the outcome? These questions will now be considered below.

Empirical research: the interviews

19. Between the autumn of 2020 and the summer of 2021, I conducted a number of interviews with those who had been involved with the litigation in *Bancoult (No 2)* and the House of Lords' decision.[55] I had originally intended to interview a broad range of individuals including judges, barristers, solicitors and the litigants. It had been my intention to present the views of lawyers on both sides of the litigation. I contacted those involved and received a number of polite refusals, which meant that only Bancoult's lawyers agreed to be interviewed. In terms of the judges involved, Lord Hoffmann politely declined to be interviewed and Sir Stephen Sedley, who had been one of the judges in the Court of Appeal, kindly referred me to what he had written extra-judicially about the Chagos litigation, specifically *Lions under the Throne: Essays on the History of English Public Law*.[56] I was also in communication with Dame Margaret Beckett who had been the Foreign Secretary during the early stages of the present litigation. Dame Margaret kindly informed me that:

[51]United Nations General Assembly, A/RES/73/295.
[52]This group is coordinated by David Snoxell who was previously the UK's High Commissioner to Mauritius.
[53][2013] EWHC 3164 (Admin).
[54]Chris Grayling, the former Secretary of State for Justice and the Lord Chancellor, had criticised the current situation in England and Wales, where in his opinion pressure groups have used judicial review to attack the government's decision making. Grayling argued for the reform of judicial review to prevent this. See C Grayling, 'We must stop the legal aid abusers tarnishing Britain's justice system', *The Telegraph* (20 April 2014) <http://www.telegraph.co.uk/news/uknews/law-and-order/10777503/Chris-Grayling-We-must-stop-the-legal-aid-abusers-tarnishing-Britains-justice-system.html> accessed 3 December 2022.
[55]*Bancoult (No 2)* (n 1).
[56]Cambridge University Press 2015. I was subsequently invited to meet with Sir Stephen Sedley.

> I am, of course, aware in a broad general sense, of the Chagos Islands case and various aspects of it were continuing while I was at the Foreign Office. However, to the best of my recollection, it never crossed my desk in any meaningful way, nor do I recall taking any decisions in that connection.[57]

20. The result of my requests for interviews were that all three counsels for Mr Bancoult, Sir Sydney Kentridge, Professor Anthony Bradley (appointed as an Honorary QC in 2011) and Maya Lester (appointed as a QC in 2016), agreed to be interviewed, along with Mr Bancoult's long-standing solicitor Richard Gifford. It was unfortunate that no one representing the government was willing to be interviewed. I am conscious that the interviews I undertook were with those representing and acting for the Chagossians, and therefore I am mindful that this is just one side, and not a full representation of both parties. Nonetheless, the interviews were intended not so much to recount the merits of legal argument, but to gain a human perspective of what it was like acting in such an important public law decision. The human story is important and allows for the capturing, albeit over a decade later, of what it felt like to be involved with the case and offers interviews to give an account of their own unique experiences.

Sir Sydney Kentridge KC

21. I interviewed Sir Sydney Kentridge KC in November 2020. Kentridge had been the Head of Chambers at Brick Court Chambers in London. He had been instructed by Richard Gifford, the solicitor acting for Louis Olivier Bancoult, to act as the lead counsel in the litigation being brought against the Foreign and Commonwealth Office. It was Kentridge who had delivered the submissions on matters of constitutional law before the House of Lords. Kentridge had been assisted by two junior counsel, Maya Lester from Brick Court Chambers, and Anthony Bradley, who Kentridge described as follows, 'he was an academic, a constitutional lawyer, very helpful chap'.

22. I was intrigued by how Kentridge had found appearing before the Appellate Committee of the House of Lords. Kentridge was quick to offer his assessment of Lord Hoffmann, observing that he 'was a really brilliant lawyer … [and] a very technical lawyer'. I asked Kentridge whether he was surprised by the House of Lords' decision. Kentridge responded:

> I was not entirely surprised because, you know, because Hoffmann … and forget Rodger and Carswell … I mean they showed their hands pretty clearly during the argument … Well, you know the sort of questioning of counsel during the hearing often gives you a very good idea of what the judge is thinking, so you know I thought that particularly Hoffmann and Carswell were very much against me.

[57]Email from Dame Margaret Beckett to Chris Monaghan on 25 January 2021.

23. This reflects the eventual judgment and the division of the judges between the majority and the dissent, but also demonstrates that from a lawyer's perspective, it appeared to him that a decision had been reached early on.

24. Therefore, it must have been clear that a majority (including Lord Rodger) was forming to find in favour of the government. What about Lord Bingham and Lord Mance who would dissent and find in the Chagossians' favour? Kentridge did not believe at the time he was delivering his submissions that it was apparent Lord Bingham had been won over,

> but it was clear that he had a very open mind on it, as did Mance. I mean, you know I would say that Bingham and Mance were the two top judges on the court, but I suppose that I would say that, and I thought their judgments were the most convincing, but that makes very little difference because the majority decided it and that was that.

25. I was intrigued about how Kentridge found his time before the Bingham Court and the inclusion of such notable legal jurists on the court, including Lord Hoffmann, who several years previously had given a landmark dissent in *A v Secretary of State for the Home Department*.[58] Commenting on Lord Bingham's style of judging, Kentridge observed that:

> [h]e was a comparatively silent judge; you know some judges really like going into an ongoing argument with counsel. You know, in his case if he thought there was difficulties with an argument or if he had not understood it fully, he would put it to counsel, but you know, he was very restrained in his interchanges with counsel, unlike some of the other Law Lords.

26. This is telling on the omission of the other exchanges which were not perhaps as restrained, and the everyday experience of counsel in responding to the differing approaches of individual judges. This dialogue between counsel and judge is of critical importance considering the style of hearings in the UK and the central role of the advocate to persuade the judge. An example of this is Sir Thomas Bingham MR (as he was), being persuaded by counsel in *R v Ministry of Defence ex p Smith*,[59] that there was a heightened test for unreasonableness where there was a substantial interference with human rights, and then adopting this as the proposition.[60]

27. Kentridge was clear about the view of the Law Lords during the hearing and how it was apparent that some judges had, in his opinion, reached a decision early on:

> you know, judges have what has been called unspoken philosophies and, you know, the people who were mainly against me during argument namely Hoffmann and Carswell, well Hoffmann in particular was a very, very good judge politically … he was a very technical chancery judge. On the other hand, Bingham and Mance were judges who were very sensitive to

[58][2004] UKHL 56.
[59][1996] 1 All ER 256.
[60]The counsel was David Pannick QC (now Lord Pannick KC).

> individual human rights and, as I say, it may just be prejudice, but I had no doubt that they were the two top judges in the House of Lords and I know Bingham was very disappointed in the outcome … I do not know why it was but of course Hoffmann and Carswell took very much against it and although Rodger was more silent you know, he took the same view as Hoffmann so it was … [a] very disappointing result but so be it.

28. The focus on the importance of the right of abode by the dissenting judges was apparent.[61] This shines through in the decision, and on paper each judgment offers a different focus and justification for the outcome. The recognition of the rights involved was emphasised in the dissent, whilst Lord Hoffmann's leading majority judgment warned against human rights being used by activists merely to embarrass the government and further their own political cause.[62]

29. I was interested in hearing about whether the litigation received attention outside of the committee room of the House of Lords. Kentridge was clear about the nature of the litigation, being at that time of a peripheral nature: 'You know after all from an outsider's point of view this case concerned a very, very distant colony. I do not think it made much of a flurry in legal or political circles'. It was surprising that, given the subject matter, the taint of colonialism and the removal of the right of abode, the decision did not make more of an impact within legal circles and beyond the legal profession.

Maya Lester KC

30. I interviewed Maya Lester KC in March 2021. I asked Lester how she came to be involved in the litigation. Lester replied,

> I was quite junior. I had been a pupil in Chambers in 2000 and I was in, still am, in Sydney Kentridge's chambers, and I do not know how I first got involved … I imagine what happened is that Sydney Kentridge needed a junior … and suspect wanted another junior in chambers.

31. The working relationship of a legal team is important, and Lester recounted her own experience of being a junior and working with Bradley and Kentridge. Lester was full of praise for Kentridge as her senior counsel:

[61] *Bancoult (No 2)* (n 1) [138] (Lord Mance). Lord Mance was clear that '[i]t is not in my view shown that the Chagossians have been, in *Bancoult I* or the present proceedings, engaged in a mere campaign to obtain United Kingdom government support for resettlement or to embarrass the United Kingdom and United States governments. Their wish for recognition of their historic connection, and on their case rights of abode, in relation to the Chagos Islands is deep-felt, longstanding and, in my view, understandable. Arguments that any right of abode is symbolic, since it would be impracticable to exercise without expensive government support to which it is accepted that there is no right and which would not be forthcoming, in my view miss the point'.

[62] *Bancoult (No. 2)* (n 1) (Lord Hoffmann). Lord Hoffmann had observed, '[i]n either case, since permanent resettlement on the islands was impractical without substantial investment, the landings, even if followed by temporary camps, could be no more than gestures in furtherance of the respective political aims of the parties, designed to attract publicity and embarrass the governments of the United Kingdom and the United States' (ibid [25]). His Lordship continued, '[t]hus their right of abode is, as I said earlier, purely symbolic. If it is exercised by setting up some camp on the islands, that will be a symbol, a gesture, aimed at putting pressure on the government. The whole of this litigation is, as I said in *R v Jones (Margaret)* [2007] 1 AC 136, 177 "the continuation of protest by other means"' (ibid [53]). Finally, '[t]he Chagossians have, not unreasonably, shown no inclination to return to live Crusoe-like in poor and barren conditions of life. The action is, like *Bancoult (1)*, a step in a campaign to achieve a funded resettlement' (ibid [55]).

> Sydney was an absolute expert on all the constitutional issues and he being from the generation, I mean he never used a computer Sydney, he researched everything in the old fashioned way with text books and law reports, you know hard copy law reports, so I remember him thinking that if I managed to find a case online it was the most, it was like magic for him, and so I think my role was very much supporting him. I mean he wrote out his speeches and skeleton arguments in long hand and would have them typed up, but he wrote everything in his sort of wonderful notebook, but I think I was general junior counsel, so I think I helped draft the skeleton arguments, put together the bundles, everything. So, you know, Anthony Bradley was obviously a very senior barrister and academic so I was the kind of main junior barrister who would have been doing everything else other than the real brainwork which was undoubtedly Sydney.

32. This must have been an experience and shows the meeting between traditional research skills, based on paper and books, with the then fairly new use of online resources.

33. I was intrigued by what it must have felt like to be involved with this litigation, especially as a junior counsel. Lester was clear about the significance of appearing in the case:

> it was obviously an amazing case to be involved in as a junior public law barrister and also amazing to be working with Sydney apart from anything else. And a sort of dream constitutional case with a real, as you are looking at, a real human story.

34. Such an impression is hardly surprising; as Lester notes, it had a real human story, and it is this story that still resonates today with audiences in both the classroom and academic events.

35. Lester had been involved with the *Bancoult (No 2)* litigation throughout and provided an interesting account of why Bancoult had been successful prior to the House of Lords' decision. One reason identified by Lester was that the judge as first instance,[63] Hooper LJ, did not agree with the government's argument that the Chagossians were a security threat:

> Hooper had himself looked up the Chagos islands on the internet … and he had discovered that there was a right of innocent passage around the islands, in other words that you could sail or go into a boat right up to the islands, and so he was very affected by that because the Government's case, as I recall, was that there was a security problem with allowing people back on the islands, and I think the fact that he looked that up and spotted this, his starting point was this seems absolutely bonkers that there cannot be a security threat and also the security threat suggested was several kilometers away and the idea I think to him that some unskilled islanders would be likely to put surveillance cameras on … Hooper who was very affected by [evidence relied on in the hearing and he] just could not understand the rationality of saying we cannot have people living on islands kilometers away because they will be a security risk but it is fine to have boats and cruise ships … It is a classic sort of irrationality thinking, it just cannot really be the reason and [Hooper thought that it was 'bonkers'] … [Hooper] was

[63] *R (Bancoult) v Secretary of State for Foreign Affairs (No 2)* [2006] EWHC 1038 (Admin).

> very, I do not know if angry is the right word, but he was very concerned by the historic documents of course that Laws [a judge in *Bancoult (No 1)*] had also been concerned with.

36. Lester also believed that a reason for the change of outcome in the House of Lords was:

> that the approach the Government took to its submissions in the High Court and at the Court of Appeal[64] was very, very different from the approach they took in the House of Lords and I think that is what accounts, apart from the makeup of judges, I think that accounts for a massive shift.

37. Key to this was that 'there were different counsel which has a big impact too'. The change of counsel, with Jonathan Crow QC taking over as lead counsel, was highly significant. Lester observed that in

> the High Court and Court of Appeal the government were very, very black letter if I can put it like that, and they really focused on the lack of justiciability and the Colonial Laws Validity Act[65] and these kind of legal ways of trying to get the court not to look at the merits of the decision. And the judges, Lord Justice Hooper and Lord Justice Sedley in particular, really were not attracted by that and were very horrified by the merits and public law is all about merits as we know. It is facts and merits and really affects things and I think the Government probably did not help its case in retrospect by being, if you like, quite legalistic in a case where the injustice was so enormous.

38. According to Lester, Jonathan Crow QC played a key role in changing the government's strategy. This supports Paterson's assessment above and highlights the significance of changing senior counsel and adopting a new approach. Lester recounted:

> in the House of Lords Jonathan Crow took an entirely different approach, very wisely from the Government's perspective, and focused much more on the merits of the decision about whether to repopulate in 2004 … he was much more focused not on anything to do with [initially] clearing the islands but what were the factors that went into the Government's decision at that time … I think that different approach made a massive difference.

39. The admission of an apology for the historic mistreatment by the government in the submissions before the House of Lords certainly was important. Arguably, this could permit a distinction between the past misconduct in the 1960s and 1970s, and the then more recent conduct of the government in removing a right of abode. It is telling that Lord Hoffmann adopted such an approach in his own judgment, drawing a distinction between the past conduct and the impact it had on the Chagossians' rights, and the present circumstances, and how such rights, much reduced by the passage of time and circumstances, should be viewed today.[66] It must have been interesting to have observed the development of this new strategy and the

[64] *R (Bancoult) v Secretary of State for Foreign Affairs (No 2)* (n 2).
[65] The Colonial Laws Validity Act 1865.
[66] Lord Hoffmann was clear about the importance of the passage of time: '[i]f we were in 1968 and concerned with a proposal to remove the Chagossians from their islands with little or no provision for their future, that would indeed be a profoundly intrusive measure affecting their fundamental rights. But that was many years ago, the deed has been done, the wrong

correspondence and dialogue between the Foreign and Commonwealth Office, its lawyers and counsel in the case.

40. I was intrigued by the human element of being involved with the litigation and whether this case felt any different than other cases. Lester was clear as to the significance of the case and how it compared with her legal practice to date, observing:

> I think that is probably the most special case I have been involved in … I mean it is really nice to be on the side of, that you really believe in the merits, because you know quite often we are hired guns and we can be arguing all sorts of stuff, but this, I mean it is hard to think of a case where the merits are more strikingly, you know, so the British Government behaving badly in a colonial way.

41. Lester is clear that this was colonial behaviour, and it is clear that it was behaviour that was motivated by colonial considerations, i.e. the needs of the imperial master and its ally, and not the population, and that this behaviour was justified by the language of domestic British constitutional law.

42. The conduct of the British officials in removing the population played a role in galvanising the team. Lester observed that:

> [w]e were all very fired up. I mean Sydney is wonderfully measured, and I think one of the things I learnt from him was that, particularly in a case like this where it would be so easy to go way over the top, I think his restraint and understatement were absolutely brilliant. He just did not, because his view was always the documents speak for themselves, you do not need adjectives and adverbs and hype and actually it would detract. You know, it is perfectly clear to the court what has gone on. So, I learnt a huge amount. It was incredibly exciting and also it was very emotional and very emotionally engaging because, particularly at the first and second stages of the case, we were very lucky with our judges I would say.

43. It is interesting to consider the extent to which counsel in other appellate decisions feel 'fired up' and role played by the subject matter in motivating counsel.

44. Lester made a very interesting observation about the impact of the choice of judges on the outcome:

> one of the things I learnt was how much difference judges can make in terms of, you know, which judges get picked and I think it was a good line-up of Sydney's style with particularly Hooper and Sedley, combined with a rather black letter approach on the government's side and it was, I mean it is wonderful and quite unusual to be in a case where the court is kind of adding extra points to your case because they feel so strongly as well, and they were really angry by the government's approach I would say. And so conversely it was a real roller coaster case, because when we got to the House of Lords and the judges were thinking about it differently and there was a different dynamic.

confessed, compensation agreed and paid. The way of life the Chagossians led has been irreparably destroyed' (*Bancoult (No. 2)* (n 1) [53]).

45. Commenting on the House of Lords, Lester noted, 'they were just more skeptical, and I do think quite a lot of that was down to the different way that the government put it, as I say'. I asked Lester how it felt to have lost the appeal before the House of Lords. She replied:

> at that point having come so far it was really like being dashed on the rocks and particularly when there are dissents and it is so close, it was terrible actually and I remember gosh, ok I should not get so involved in cases in the future because it is so upsetting. So, I think it probably was the case that has, one of the cases that has most upset me having lost it.

46. Lester was clear that, 'if you do a judicial head count I think there were more judges in favour of the claimants than against by quite some margin, it is just you know at the wrong level of the hierarchy'.

47. I was intrigued about what it was like appearing before the House of Lords in the committee room. Lester noted:

> I distinctly remember … some of the judges looking sort of grumpy and I remember as quite a junior and perhaps naive barrister thinking, you guys have the most interesting job going and how can you not be … and maybe they were just concentrating, but they seemed a bit grumpy at times. And it was not a great atmosphere in the Lords, I mean I think it is partly because Jonathan Crow did it very well for the government and we were, or I was, depressed by that. And you know, and rightly so, he did it beautifully.

48. The approach of the House of Lords compared to the earlier courts was markedly different, and Lester recalled:

> I just remember in the committee room being very surprised by the judges' reactions but particularly by … how completely different, 180 degrees different, different judges can be about exactly the same set of facts, and quite often people say oral hearings do not make that much difference, which may be true, and which judge you get does not get that much difference, but I think this case is a real example where that is just not the case. You know, it is the same facts but who knows what the factors are – different judges, different barristers – and the whole thing felt entirely different, just as a matter of the chemistry of the courtroom.

49. This is an apt reminder of the importance of individuals and personality, legal philosophy, and basic human relationships, and this explains how a case can be won at two stages of the litigation and lost at the final stage.

50. Lester was of the view that the reasons for this change between the lower courts and the House of Lords were how the litigation was perceived. She said:

> [I] think the other difference in chemistry and approach was that the House of Lords in the majority saw this and I get that, as a sort of campaigning case. And you get a lot of this in the flavour of the judgment that this is not the role of the courts, this is pure policy, this is quintessentially something that the courts should not get involved. It is policy, it is foreign policy and this is a sort of campaign to have a kind of restoration of history, reparation and that is not appropriate, whereas the lower court has seen this as exactly the time the

> courts should step in, when there was a sort of arbitrary use of executive power or Lord Justice Sedley described it as an abuse of power, and so I think partly it is about what is the appropriate role of the courts and of course that debate in public law continues very strongly to this day.

51. The contrasting philosophies and approaches of the judges helps to explain this different reaction to the Chagossians' campaign and the appropriateness of using the courts to achieve the desired result. It might appear correct to one judge that it is proper to use the available legal means to achieve a goal, even if this goal is being sought through a sustained campaign, whereas another judge views it as an inappropriate use of the court's resources and attention. My view is that the fact that the litigation was part of a lengthy struggle to achieve justice, does not necessitate the conclusion it was a *mere* campaign, as there were fundamental rights involved and it was necessary to view the law as one part of a broader strategy to return home.

52. As to whether it was a campaign, Lester was clear in her view: 'it did not feel like a campaign other than this was real people who had a very real sense that they had been taken off their homeland and meanwhile were being quite poorly treated in Mauritius'. Lester noted how involved the Chagossians were with the case:

> I mean they all came to court. Olivier Bancoult was definitely very involved. I mean, clearly they were not the experts on the constitutional issues and they left it all to Sydney because it is a very legal case as well as a very merits case but they were driving it through.

Anthony Bradley (QC Hon)

53. Anthony Bradley was the first person I interviewed. Anthony had been a Professor of Constitutional Law at the University of Edinburgh before leaving academia at the age of 55 to join the English and Welsh bar. Bradley noted that, 'believe me being a barrister and having a successful life as a barrister is much more difficult than being an academic'. He offered a frank account of life at the bar, comparing legal practice to his former life as a legal academic. It was interesting to hear from Bradley about his own long-standing interest in the litigation and how it preceded the *Bancoult* litigation. Bradley observed that:

> in 1993 I was approached by Stephen Grosz the solicitor of Bindmans for an opinion about immigration restrictions for the Chagos Islands and the budget was strictly limited. I gave advice about what they could do with those restrictions, but we could not consider any further action, as at that time legal aid was not considered available for people who were resident abroad.

54. In terms of his own involvement with the *Bancoult* litigation, Bradley explained that Richard Gifford (then at Sheridans) had asked for an opinion five years later and Sheridans selected Sir Sydney Kentridge to lead Bradley in the litigation. Bradley's observations of Kentridge and why he agreed to be involved are interesting:

> I had already appeared with Kentridge in the House of Lords. The main reason was apparently [that] … Kentridge owed the senior partner in Sheridans a favour and Kentridge duly responded and agreed to appear with me in the first *Bancoult* case.

55. Once again this is the human element, that brought a barrister of Kentridge's caliber (having acted for Nelson Mandela at his treason trial) to represent Bancoult.

56. Bradley emphasised the importance of the choice of leading counsel, observing that:

> [i]n the first *Bancoult* it was Kentridge against David Pannick, and David Pannick and Kentridge I believe met between themselves at one stage to agree the parameters of the hearing before the Divisional Court in the first *Bancoult* case and that paid off, I think, in terms of time taken in court and the general manner in which the case had conducted. In the second *Bancoult* case the Foreign Office were represented by John Howell QC and he is a very determined, dogged advocate and he does not let any points go by …

57. The government had clearly instructed a leading advocate and there would be no concession of its case that the removal of the right of abode was lawful.

58. What Bradley informed me about what happened prior to the Court of Appeal hearing is significant:

> Three days before [the hearing was due to start] … the Foreign Office asked to have Lord Justice Sedley removed from the court because he was biased. And the reason they said he was biased because of some favorable comments he had made about the position of the Chagos Islanders in the compensation proceedings when he had given his opinion rejecting the appeal from Mr Justice Ouseley. Now, Sydney Kentridge set me to work to look at what the situation is when one party asks for a judge to be stood down because of bias, and so I did research over the weekend, and I came to court on Monday morning armed with authorities about this but … John Howell made no request to have Lord Justice Sedley removed. Now, this seems to me … bad forensic tactics to antagonize the court before it sits and then not to pursue it. If they have grounds for getting rid of a judge, they should have continued to press but they must have antagonized the whole Court of Appeal by that action, because the presiding judge in the Court of Appeal would have been told and would have known that this move was being made.

59. I had never previously heard this, and it provides a fascinating insight into the litigation and the tactics being used to advance the government's case. It is extremely unlikely, 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that [Sedley LJ] was biased'[67] and the fact that an earlier judgment had taken a particular view about the Chagossians should not be taken to show that Sedley LJ's previous judgment would have the appearance of bias.[68] Nonetheless, it would have been interesting had such an

[67] *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 [103] (Lord Hope).
[68] See *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004, [2000] QB 451, where the Court of Appeal was clear that in determining that there was bias, '[t]he mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection' (at [25]).

application been made for Sedley LJ to have been replaced. In the absence of such an application, the Foreign Office had arguably made a tactical mistake in raising this possibility unless it was willing to proceed; and even then it is extremely unlikely that it would have been successful. This mooted attempt demonstrates an awareness of judicial personalities that is at the heart of any decision, given the unescapable human element, but personality does not on its own amount to bias.

60. The change of counsel to Jonathan Crow prior to the appeal to the House of Lords was regarded as significant by Bradley. He noted that the previous strategy of re-running 'the whole history of the clearance of the islands in an attempt to establish that nothing wrong had occurred… did not go down well, either with the Divisional Court or with the Court of Appeal'. The new senior counsel,

> Jonathan Crow was a very experienced advocate who had done a lot of work for the Government. Well, when it came to the Lords it was immediately clear that Jonathan Crow would make no attempt to re-run history. He accepted that the clearance of the islands and the wisdom of that was not an issue, and he argued that because of subsequent events the 2004 constitution was justified anyway. Now that, I think, had a beneficial effect on their Lordships because they no longer had to listen to these out of date arguments and the government had already accepted that the Chagossians had been treated badly, and I think if you look at the different judgments in the Lords you will see that each of them, even those who found against the Chagossians eventually, said that they had been treated badly and one might say that the reason … why the House of Lords decided differently to the Court of Appeal by the majority was that better tactic, better policy being followed by the Foreign Office in arguing the case and Jonathan Crow was a very persuasive advocate in the Lords.

61. This shows the importance of the choice of counsel and the willingness to concede that what had happened in the late 1960s and early 1970s had been wrong, that the Chagossians had been treated badly, but to crucially distinguish the past from the present issue of the removal of the right of abode.

62. Bradley offered an interesting account of the judges in the House of Lords and the importance of Lord Hoffmann: '[d]espite Lord Bingham presiding I think it is pretty clear that Lord Hoffmann had formed a view against the Chagossians at some point'. Bradley was critical of Hoffmann's judgment and the view that they 'were just after making no more than gestures to attract publicity and to embarrass the Governments of the United Kingdom and the United States'. He touched upon the dialogue between Kentridge and Lord Hoffmann and the attempts by Kentridge to persuade Hoffmann,

> that the court should not take these letters from the [US] defense department seriously, that they were exaggerated. Kentridge was a very skillful advocate and normally would succeed [in] anything he set his mind to but obviously it had not succeeded on this occasion.

63. In terms of his own submissions, Bradley provided an account of his own arguments regarding the grounds of legitimate expectations:

> it fell to me to deal with the legitimate expectation arguments and so I suppose I got to my feet about 11.00 or 11.30 on the Thursday morning and I had prepared my notes, we had a detailed case on legitimate expectation and by chance I realised that I [could not] find most of my papers. I … found a folder which contained the case extracts which I talked about, but the legitimate expectations arguments were not all that difficult to present because it was clear that the courts wanted the case to be settled, to be finished so that they could get down to business of deciding.

64. Bradley was clear that there was disagreement between Lord Hoffmann and Lord Bingham. He elaborated why this was the case as, 'Bingham was presiding, but Hoffmann was expressing fairly dominant views and the court were impatient for the end of the hearing and they did not want me to spend much time on legitimate expectation'. I asked Bradley more about the differences between the judges and their different approach to judging and he replied:

> I certainly did not feel that they were all happily still working out what they should say as a result of the case. I thought it was pretty clear that Bingham … gave a shortish judgment. I did have an Australian visitor come to this and … he said … it seemed clear that Lord Bingham had made up his mind that the Government had got it wrong and you know that was about all that needed to be said … But I have appeared several times … in the House of Lords and I have not felt this level of possibly antagonism before… I really cannot refer to anything specifically, except I think to say neither of those judges wished me to go on very long about the legitimate expectations, but that may have been my failings as an advocate …

65. Bradley offered this view of his colleagues, that he had 'immense admiration for Kentridge who is a supreme advocate', and he paid 'immense tribute to Richard Gifford who has been a marvelous solicitor'. Bradley was also keen to discuss Louis Olivier Bancoult and the impact that he had upon him:

> I think I met Bancoult, he was always very careful to be around when the court in London was sitting and so I talked [to] him on quite a few occasions and I still remember the time that he told [me about] … the time when his mother, he had come to the Mauritius for a short while for hospital treatment or something and he went to the office to book a passage back to the Chagos Islands and was told there were no more passages and he was four years old I think at the time and he still remembers the utter shock and horror this caused his mother, the news that they could not go back home. And that story remained with me as a moving example of the effects of British government's actions.

66. I asked Bradley whether he was surprised by the outcome of the case before the House of Lords. He replied:

> I think it was clear what Bingham was going to do, exactly how he did it of course I could not say. What I did not know was [how]… Carswell and Rodger… would react, whether they would go with Bingham or with Hoffmann and so [the outcome] was surprising. No, I cannot say, I thought we were. Yes, we felt … that this could well have been different with one different Judge in the Lords.

67. Finally, Bradley discussed the legacy of slavery and how this legacy fits in with how the litigation and the background would be viewed today. He observed that:

> if you think that the Chagossians were descendants of slaves … it gives extra depth to what Sedley and Bingham and others were saying about the importance of having somewhere to live and the importance of the mother country and so I think from that point of view that has been re-emphasized the value of somebody, you know you cannot just move them from anywhere and take away all their roots. So, I think on a longer view… what was said by those judges about the importance of having… somewhere to live… was… I thought of great interest…

68. This is key, as the background context to the decision represented the continual exploitation of a people for the commercial and strategic benefits of the UK, whether it was to fund the industrial revolution or to curry favour with its most important ally.

Richard Gifford

69. The final interview was with Richard Gifford, who has acted as Bancoult's solicitor since the 1990s. Gifford first heard about the earlier litigation in the late 1970s and early 1980s, which had led to a settlement and additional compensation for the Chagossians. He noted that:

> [o]ne of my partners or two of my partners were dealing with the case in 75 up to 82. I kept my ear to the ground, it struck me as a most fascinating case, and I think I was probably a bit miffed that I was not involved in it.

70. Gifford later became involved with the litigation when he heard,

> that there were Chagossians demonstrating outside the British High Commission in Port Louis in Mauritius complaining that they had been removed from their homeland, so that was the trigger, I thought goodness gracious me, what one earth is going on here because one thing you learn as an immigration lawyer is that you cannot lawfully exclude people from the country where they were born.

71. This led Gifford to investigate and to send

> my son Mark who was then a trainee solicitor in the firm and a Mauritian journalist who knew about the case … [down to the Public Records Office in London and] together they came back with about 100 letters and things which showed an extraordinary story.

72. Gifford was clearly, from the legal perspective, the driving force behind launching the litigation and building a case. This demonstrates the importance of someone needing to initiate the new litigation and the excitement, underlined by a sense of injustice, that must have existed during the initial phase of the litigation.

73. What Gifford needed now was Chagossians to initiate the litigation and this led him to meet Louis Olivier Bancoult:

> Now, how did I get together with Mr Bancoult? Well after we started initiating the case of 1997, I decided to get to Mauritius and the Seychelles and [it] helped in the Seychelles because a friend [of mine] was the High Commissioner… [and] we had become very pally with him and he sort of hosted us in the Seychelles and set up meetings with Chagossians over there.
>
> Because the two communities [of Chagossian Islanders] had become almost entirely split you see, there was no communication [between them]. They did not travel from one [country] to the other, or at least it was very difficult, and not very many of [the Chagossian Islanders] had telephones, or anything, so we sort of had to develop two lots of clients at the same time and that was extraordinary.
>
> We had public meetings in Mauritius. I have a photograph somewhere of a mass meeting underneath the shade of trees, where about 80 Chagossians answered the question [as to] who wants to go back to Chagos islands by raising their hat.
>
> [In] the Seychelles [the Chagossian Islanders] were so shocked that there was any possibility of the case taking place that they did not trust me, basically there were people that walked out of the meeting.

74. Eventually, after initial difficulties finding a client, Gifford was introduced to Bancoult: 'he was a marvelous client, always up for a principled fight and he was very keen to do it and that's how we got legal aid in his name'. Finding a client proved crucial and this meant that Gifford,

> was able to start instructing Anthony Bradley and [another barrister] … so that is how we got the case into a sort of legal framework and they gave a joint opinion that sort of pointed to interesting arguments to challenge the 1971 Immigration [Ordinance] which was very equivocal about the chances of success which is what the legal aid people need to know.'

75. The involvement of Kentridge in what would become the *Bancoult (No 1)* litigation and continue to the *Bancoult (No 2)* litigation was a surprise to Gifford, as he noted:

> So, I thought we need a really top leader so funnily enough I heard Sydney Kentridge QC was a personal friend of Cyril, my partner who had dealt with the [earlier] case and I suggested to Cyril that we should instruct Sir Sydney [Kentridge] and he did not like that at all. Oh no, he said, Sydney will never take this case on, never take this case on. I will not speculate on his feelings about that, maybe he thought I was pinching his prize contact for a case that he had not been able to pursue. But anyway, I sent the joint opinion down to Sydney's chambers and within half an hour Sydney's office rung me and said let's have a conference so we got Anthony and Laurence and I down to a consultation with Sydney Kentridge and that's how we got the case going. That was about 20 years ago, 1997 I think it was.

76. In terms of *Bancoult (No 2)* Gifford observed:

> it was working very well, I mean we had an excellent, well-motivated team. Maya Lester … she was very helpful and very industrious, and she was particularly good when it came to taking the case to the European Court of Human Rights in Strasbourg for which we started off in the wake of the dismissal of the group litigation in 2002 but they then made us wait until the end of *Bancoult 2* in 2008 before we could proceed with it.

77. The decision of the House of Lords was a disappointing one.

Conclusion

78. The interviews demonstrate the importance of the human element, as each interviewee's unique perspective allows us to gain a greater insight into the decision and the background to the litigation. The interviews highlight the importance of the dynamic between barrister and judge, the relationship between judges, and what it felt like to be before the Law Lords in the committee room of the House of Lords. It is acknowledged that being restricted to Bancoult's legal team had its shortcomings, as it would have been preferable to include the experiences of the government's legal team and the judges. Understandably many individuals were unable to be involved in this research and I am grateful to those who were interviewed. I believe that there are merits in capturing even one side of the litigation, as these four voices tell a narrative, and each observes common themes and how it felt to act in the proceedings, and offers a much-needed first-hand account.

79. This article has sought to offer new perspectives on the House of Lords' decision in *Bancoult (No 2)*. It has done this by using exiting empirical research and original empirical research that was conducted specifically for the article. The decision can be explained by a range of factors including the choice of counsel, the choice of judge and the relationship between the Law Lords and their different approaches to judging. It is hoped that this article can inform the ongoing discussion around the decision in *Bancoult (No 2)* and its impact on domestic constitutional law. This is especially the case given the amount of interest in Chagos at present as the result of Mauritius' diplomatic and legal campaign against the UK.

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