

Talk to the Public Law Project on 5 October 2015.

How Public Law has not been able to provide the Chagossians with a remedy

Introduction

1. It is 50 years ago next month since the Chagos islands were detached from Mauritius and the population deported to make way for an airbase. Many lawyers since that date have tried to construct a remedy, and this task has fallen to me for the past 18 years in company with Clifford Chance, with whom I am now a consultant and for 10 years before that as a partner with Sheridans. Over such a long period, with successes and failures along the way, this litigation has become a cat and mouse struggle between a government and its citizens in which the courts have played an important part. As a legal campaigner, I should point that out whilst I believe all the facts and comments in this talk are accurate I cannot pretend that all of what follows is agreed, and may not represent the views of the government, of some of the judiciary or indeed of my firm.
2. I therefore now describe some elements of this political and legal struggle. I will tease out some public law principles as pointers on the way to what I hope will be a successful outcome, but which is, as yet, beyond our grasp. I will interpose a few sub-headings as we go.

Background

3. At the height of the Cold War, in the 1960s the Russians were believed to be seeking a warm-water military port in the Indian Ocean. In 1966 Britain signed an Exchange of Notes with the USA handing over the entire Chagos Archipelago of 65 islands to the USA for "defence purposes" and the construction of a naval and military base on one of those islands, and agreeing to "resettle" the population. The Archipelago was detached from the Colony of Mauritius, in breach of specific UN resolutions, and the British Indian Ocean Territory (BIOT) was created on 8 November 1965.
4. The population of some 1,500 souls was removed from its homeland and dumped in Mauritius and Seychelles, some 1,000 miles distant, without homes or jobs thus condemning them to a life of poverty.
5. The New Colony had to be reported to the United Nations Decolonisation Committee. The UK informed the Committee that there were only contract labourers on the islands. It concealed the existence of a permanent population which had in fact been, settled for five generations, and was thus entitled to the "sacred trust" of Article 73 of the Charter of the United Nations.
6. Thus the only body that might have saved the Islanders was misled. Mauritius and Seychelles were paid £3m and the cost of an airport respectively. The Foreign and Commonwealth Office (FCO)'s lawyers advised that since Britain had not ratified the fourth protocol to the European Convention on Human Rights (ECHR), there was no legal right of return and accordingly the FCO could "*make up the rules as we go along*". An Order-in-Council was passed in 1971 making it a criminal offence for anyone other than those connected with the US military base to be on the islands. Government agents who had

continued to run the coconut plantations after their land had been compulsorily purchased, were instructed to kill nearly 1,000 pet dogs, but save the horses and deport the natives into exile.

7. This unique set of legal and political circumstances is the first and only occasion when an entire population of British subjects was removed from the whole of its British homeland as a deliberate act and policy of the UK government.
8. But over the period of 40 years that the Chagossian community has endured its exile, it has proven almost impossible to construct a legal remedy in such an intensely political case.
9. But why has this been so difficult? After all, it was 800 years ago, this year, that Magna Carta condemned the practice of exiling British subjects from the realm:-

"Chapter 29: No free man shall be exiled but by lawful judgment of his peers or by the law of the land".

But this broad statement of principle, relied upon by the Chagos islanders in both public law and private law actions against the FCO has been held to provide no remedy at all. Such gains as there have been have been met by officials determined to keep the Islanders from their homeland, and tactics adopted which lack integrity.

First Attempts at a Remedy – the Vencatassen case

10. The first action was brought in 1975 by one deported islander Michel Vencatassen. It was a strange pleading in tort based on intimidation, deprivation of liberty, assault by a British Naval Officer and conspiracy to prevent return. With half-hearted support from the Legal Aid Authorities, it defeated an attempt by FCO to block discovery of documents by claiming Public Interest Immunity. But the action went no further. The FCO however wished to settle and made an offer of £1.25. My predecessor Bernard Sheridan was required by FCO to involve all the islanders in a settlement. This he did with some alacrity, but before he could complete his mission, the terms of settlement, which included renunciation of all rights arising from the deportation, were excoriated and the deal fell flat.
11. After Bernard returned from Mauritius in 1979, Legal Aid was not extended so the action went to sleep. Other islanders agitated for settlement, and in 1982, just as the Falklands War was about to begin, a renewed offer of settlement was made by the UK directly to the Mauritian government. A bilateral Conference took place in Mauritius, with some Chagossians looking on. The legal firm of Bindmans and a QC were requested to attend on behalf of the Chagossians.

Settlement terms are mis-described.

12. The UK representative opened the meeting (which was conducted throughout in English, a language not understood by Chagossians who speak Creole) by saying there was now £3 million on the table and that the UK would no longer insist on individual renunciations, thus stating for the first time that the islanders could expect to return to the islands. Negotiations proceeded over an extended period. The offer was raised to £4 million and the Mauritian government agreed to provide £1 million worth of land for building of flats.

Chagossians are misinformed.

13. A mass meeting was held at which Chagossians were informed by a Mauritian minister that the amount of compensation was final but that they would retain their right to return to the islands. Bindmans and leading counsel returned home. A draft bilateral agreement which had been circulating suddenly acquired a new clause. Article 4 required

"the government of Mauritius is to use its best endeavours to procure from each member of the Ilois community in Mauritius a signed renunciation of the claims referred to in Article 2 of this agreement and shall hold such renunciations of claims at the disposal of the government of the United Kingdom".

Despite their introductory promise, the FCO simply could not prevent themselves from slamming the door on Chagossians and rubbing in the insult to the Mauritian government.

14. It may sound an idle quibble to point out that the article did not specify which government was to be exonerated by these yet-to-be-drafted forms of renunciation. (Both Mauritius or the United Kingdom were held responsible by the Chagossians, particularly Mauritius).
15. One might have thought that given the UK delegation statement that individual renunciations would no longer be required by the UK government, this ambiguity might have been resolved in favour of the Chagossians. In fact it was worse than that because the FCO actually informed us, in a later affidavit by their Director of the Americas, Peter Westmacott, that:-

"It was intended that waivers should be obtained from individual Ilois, which were to reflect at an individual level the settlement reached at community and government level. In fact waivers were only obtained in respect of the claims against the Mauritius government and not the UK government."

16. And so both the judicial review of 2000 and the group litigation of 2003 were both prepared on the basis that the Chagossians had not renounced any rights against the UK government, a fact supported by the press report stating that they retained their rights to return to Diego Garcia. You can imagine my shock, therefore, when at the opening of trial of the group litigation in October 2002, I was confronted with a pile of 1,344 renunciation forms, thumb-printed by every compensated Chagossian, albeit without any form of explanation or translation. Did I complain to leading counsel, who had agreed to their admission without demur? I will leave that answer to your imagination.
17. So the settlement had taken place in 1982, with the Chagossians ignorant of the oppressive conditions imposed. Each islander received an average of £2,795, sufficient for some to acquire housing and for others merely to pay off the debts incurred during a decade of absolute poverty. The Vencatassen action was stayed on the basis of a Tomlin Order, all disclosed documents were returned to Treasury Solicitor. These concealed settlement terms have cast a long shadow over subsequent attempts to achieve a just solution.

The Judicial Review in Bancoult (1) and its evolution

18. When I came to review what was left of Chagossians' rights in 1997 the position was extremely unclear. On reviewing the Vencatassen file there were no government documents there, merely some pleadings, a Sunday Times report from 1975 and a few miscellaneous documents and records. The Chagossians were adamant that they had not given up any rights in the 1982 settlement, that they had not been asked to do so and if asked would have stoutly refused. They retained their social position at the very bottom of a stratified society as a poverty-stricken group in Mauritius and Seychelles. By demonstrating against the British authorities and petitioning the USA, they had hoped to raise the profile of their case.

Procedural reform

19. Protests proved ineffective, but two things came to their aid. First, following the Law Commission report in 1976 (the year after the Vencatassen case was launched) the remedy of judicial review had been instituted and for the first time permitted, at least in theory, a claim for damages in public law. Judicial review had developed much procedure and case-law over the intervening decade.

Do Your Homework first.

20. Second, the passage of 30 years meant that records covering the establishment of BIOT in 1965 and the agreement with the USA in 1966 should now be available in public records. Searches were made and revealed a stream of correspondence between Whitehall and the UK representative at the United Nations, instructing him to mislead the Decolonisation Committee about the permanence of the population which it was proposed to remove. With this limited insight into the decision-making process, a judicial review was launched in 1998 challenging Clause 4 of the BIOT Immigration Ordinance 1971 which prevented the return of the population and gave cover for its unlawful removal. In granting leave to move for judicial review, Scott Baker J. observed that "*Someone is trying to pretend that the population does not exist*". Jurisdictional objections were dismissed and leave granted. It led directly to the production of internal documents which fully explained the whole sorry saga.

How did the High Court declare the Exile Unlawful?

21. I will highlight a couple of aspects of the judgment. It was held that Magna Carta did apply to the colonies but its effect was surprisingly limited. What chapter 29 provided was that if such freedoms as exile were to be cut down, all that was necessary was for the law of the land to make provision for it, i.e. Magna Carta only guaranteed a procedure not a right. The Immigration Ordinance 1971 providing for the banishment of the population was nonetheless the law of the land. The question was whether it was a valid law and in order to answer that question the Court had to look elsewhere.

22. Second, the court addressed the *ultra vires* argument that the colonial power of governance was limited to the welfare of the inhabitants and did not permit its exile. The court recognised that there was a long line of cases such as *Reil*, *Sekgome* and *Winfat* saying that a colonial legislature was sovereign in its territory and was not an agent of the Crown. Nonetheless the phrase "peace, order, and good government" (POGG) must mean something

since it was not an infinite power which the Commissioner (the Governor of the Territory) had to exercise. Although POGG was a large tapestry, the tapestry nonetheless had borders. In this case POGG required that subjects were to be governed and not removed and the clause in the BIOT Order providing for the exile was therefore ultra vires. A narrow interpretation was justified by the unusual factors of an unrepresentative legislature and a breach of fundamental rights, despite previous authority.

23. On the day of judgment Robin Cook accepted it and announced the new urgency in the Feasibility Study which he had set up to investigate the implications of return. In court we struggled to create some sort of remedy out of the court's decision. We asked for the case to be held over to enable the court in effect to supervise what the Foreign Secretary immediately promised namely a restoration of the right to return and an acceleration of the Feasibility Study. The court was having none of it, complimented the Foreign Office on its candour in volunteering the historical record, and left it entirely to government as to how a remedy should be fashioned.
24. Although damages were a theoretical possibility in judicial review, we were not within shouting distance of making any such claim. It would need several more years of litigation of the heaviest sort and involved the most vigorous resistance from government. This resistance was ultimately successful and Chagossians again were denied a remedy.
25. I observe here that, the court did in fact decide that there was a breach of Magna Carta. Since the law of the land (the challenged Immigration Ordinance 1971) required by chapter 29 was invalid, then the exile must be a violation. Magna Carta was to become an important platform when it came to seeking compensation in the group litigation.

The Group Litigation

26. On 23 April 2002 the group litigation was issued. It had taken over a year to enrol 4,287 Chagossians and to identify a sufficient cause of action to enable proceedings to issue. Compensation proceedings necessarily had to be a private law claim and based on tort. You will readily appreciate that the law of tort has more to do with snails in bottles than it has with exiled populations. Considerable ingenuity was required, just as it had been in pleading the Vencatassen case. But we had one advantage. In public law the removals had been declared unlawful and in effect a breach of Magna Carta established. So the headline claim was for "*the tort of exile*". In fact the claim was broadly based comprising six causes of action. In addition to the tort of exile, there was misfeasance in public office, negligence, deceit, property rights arising under the law of Mauritius, and breach of human rights (not arising under the Human Rights Act, but from the Mauritius Constitution 1964 which contained a Human Rights chapter). The FCO relied on two defences, the finality of the 1982 settlement, and, of course, limitation of actions, denying any continuity in any of these torts.
27. The trial judge dismissed all six causes of action as unarguable and upheld both of the FCO defences. The Court of Appeal was asked to rule. It concentrated on the three principal torts of exile, misfeasance and deceit.
28. The Court of Appeal's judgment shows in the starkest possible way that no-one gets damages against the State unless they can prove individual officials personally responsible for an

identified civil wrong. Not only can the State do no wrong in civil law, it simply has no liability. Sedley LJ acknowledged, without apology, the lack of a remedy in such a case, contrasting English public law with the civil law system in France where the judicial review judgment in November 2000 would in France have entitled Mr Bancoult and his compatriots to claim damages directly against the UK.

Misfeasance, what misfeasance?

29. But even the secondary proposition that the vicarious responsibility for individual torts which was provided by section 2 of the Crown Proceedings Act 1947, was not enough. It was necessary for each individual official or minister to be identified and particulars served of his state of knowledge. As the trial judge had observed, no doubt with some satisfaction, most of the main players here had long since passed away. In any event there was no kind of corporate responsibility which would enable the underlying illegal plan to rest upon the combined knowledge of the FCO and its ministers. Misfeasance has clearly been interpreted to apply mainly to police officers and corrupt officials and is totally inadequate to deal with an unlawful policy decided at the highest level. We were not allowed to amalgamate the knowledge of different officials and ministers who together conspired to cheat the Chagossians of their homeland.

30. We had relied upon the House of Lords decision in *Three Rivers v Bank of England* [2001] UKHL 16, at paragraph 126, where Lord Hutton had said

"It is clear from the authorities that a plaintiff can allege misfeasance in public office against a body such as a local authority or a government ministry" (citing *Dunlop v Woolahra* and *Burgoin v Ministry of Agriculture*).

31. But Sedley disagreed: He said

"What Dunlop set out self-evidently concerned a local corporation. The claim against the nominated department of State in Burgoin depended on proof that the "minister's motive was to further the interest of English turkey producers by keeping out the produce of French turkey producers" – an act which must necessarily injure them".

"In other words, if the necessary knowledge and motive could be brought home to the minister, the Crown, in the nominal form of the MAFF would be vicariously liable. It is in that sense that Lord Hutton was speaking of departmental liability for misfeasance in public office."

32. Well that is very strange. That is exactly what the Chagossians case was, namely that officials and ministers right up to the Prime Minister intended to remove the Chagos islanders, and to dump them 1,000 miles away without provision for homes or jobs. Normally a person is taken to intend the normal and probable consequences of his actions. But not, it seems, when ministers and officials of the Crown are involved. Sedley continued:

*"Faced with this inescapable difficulty (Counsel) submits that he's able to implicate officers of State in the tort so as to make the Crown vicariously liable ... (refers to the evidence) ... What he cannot point to however, is evidence that they or any of their subordinates (who constitutionally are their alter ego) **knew that it was illegal**. Such case law as there was ...*

confirmed that the power to make Ordinances for governments of dependencies went extremely wide. It was not until the divisional court decided in Bancoult 1 that a line was drawn."

33. So there we have it. Ministers and officials can do anything they like, closing their eyes to the obvious inhumanity involved, not bothering with Common Law, International Law or indeed Magna Carta, and claim that they did not know it was illegal. This was a judicial assumption, untested by evidence, that none of the participants were aware that to exile the Chagossians was unlawful. It was not good enough that they all knew that it was an outrageous breach of the practice of nations, a breach of the common law right of abode, a direct breach of a raft of international law from the Universal Declaration of Human Rights (1948) to the United Nations charter etc, etc. What was held to be decisive was the assumption that they did not know that they were acting unlawfully in English public law terms. They thought that they had the power to pass the Immigration Ordinance 1971, and it was held reasonable that they thought they could rely on the private ownership of land by the Crown (following compulsory acquisition).
34. Do we know any other area of the law where ignorance of it is a complete excuse? The simple fact is that they knew what they were doing was wrong (it involved lying to the United Nations and misrepresenting the case to the public), they certainly should have known about Magna Carta. The Common Law Right of Abode had been declared by the HL in *DPP v Bhagwan*, a case that started in 1970, before the unlawful Immigration Ordinance of BIOT was enacted. Even after the Immigration Ordinance 1971 was held unlawful in 2000, the High Court and Court of Appeal were prepared to exonerate an entire department plus its ministers upon an unproven assumption that they did not know it was illegal.
35. The judgment is open to the objection that it failed to understand or follow what the House of Lords had held in *Three Rivers v Bank of England*, and failed to understand the ground of appeal directed to what was called "Institutional Misfeasance". This was a direct challenge to the judge's excusal of the Foreign Office on the grounds that every single participant in the unlawful removal would have to be pinned down and his knowledge identified:

The judge wrongly held [276-287] that the Claimants had to identify an individual or individuals for whom a Defendant was responsible of whom it could be said that all the necessary ingredients of the tort of misfeasance could be shown to have been fulfilled by that individual, and wrongly in the circumstances of this case characterized the tort as one of personal bad faith [281], when the Claimants' case was one of institutional misfeasance over a long period of time.

36. By holding, almost in passing that Misfeasance was an "individual" tort, Sedley LJ stated a conclusion that was at variance with authority, and in so holding, failed to deal with misfeasance by a Department of State (which had already been upheld in the *Burgoin* case). Lord Hutton had held, (paragraph 126) that in charging the Bank of England with Misfeasance in Public Office, the Claimant need not particularise all of the acts nor the state of knowledge of all participants in the alleged misfeasance. Lord Hutton put it thus

126. Mr Stadlen QC, for the Bank, submitted that the pleadings were defective because they did not allege that identified or identifiable bank officials took conscious decisions to do acts or to refrain from doing acts with the requisite guilty state of mind. I do not accept that

submission. It is clear from the authorities that a plaintiff can allege misfeasance in public office against a body such as a local authority or a government ministry (see Dunlop v Woollahra Municipal Council [1982] AC 158 and Bourgoin SA v Ministry of Agriculture, Fisheries and Food [1986] QB 716). Therefore I consider that the plaintiffs are entitled in their pleadings to allege in the manner they have done misfeasance in public office against the Bank without having to give particulars of the individual officials whose decisions and actions they claim combined to bring about the misfeasance alleged.

37. By ignoring the vital passage highlighted, Sedley LJ failed to understand the concept of institutional misfeasance. His effort was clearly an exercise in judicial policy, but went off the rails by making misfeasance a purely individual tort which only a rogue official could commit, rather than an entire department for which the Crown was vicariously liable for all of its officials from top to bottom. His method of getting to this unfortunate conclusion was threefold:

First, he mischaracterised the attack based on "Institutional Misfeasance" as one claiming to "Implicate the State as a primary tortfeasor", which was not what was alleged by Bancoult's appeal. This was based throughout on the vicarious liability of the Crown under s.2 Crown Proceedings Act 1947

Second, it was wrong to hold that Misfeasance was a purely individual tort – *Burgoin* had pointed in the opposite direction, while Lord Hutton had decided that a claimant need not particularise every individual involved in the unlawful policy.

Third, there appears to be an unspecified assumption that misfeasance by a Corporation is a different case from misfeasance by a Government department. Whilst of course a corporation can be a "primary tortfeasor" unlike the Crown, both a corporation and the Crown have vicarious liability for the acts of its relevant agents and officers. So since the appeal was based on the vicarious liability of the Crown, it was not relevant to distinguish *Dunlop v Woolahra* and *Burgoin v MAFF* on the ground that *Dunlop* concerned a local corporation, while MAFF was a body Corporate (established under Board of Agriculture Act 1889). Since the essence of Misfeasance is the abuse of power by a public official, the fact that a corporation such as the Bank of England can commit Misfeasance in a public office, is an extension of the concept deriving from the public functions performed by some corporations. It is certainly not a different type of tort requiring different pleadings.

Magna Carta - The Fountain of all Liberty?

38. The great legal commentator Maitland described Magna Carta as a "*sacred text ... the nearest approach to an unappealable fundamental statute that England has ever had*". Moreover chapter 29 contains a negative injunction – "*thou shalt not exile*" – and there could not be a clearer breach than to remove an entire population from its entire homeland and dump it 1,000 miles away. Of course a breach of statutory duty requires further ingredients – the intention to benefit a particular class, and the absence of any other remedial provision. For reasons which I cannot explain, none of these issues was explored by the trial judge or the Court of Appeal, in a case which clearly required "anxious scrutiny". The Court of Appeal was willing to make all sorts of speculation on unpleaded matters (such as the speculation about a alternative cause of action based upon trespass to the person – for which evidence never existed), but to examine a breach of Magna Carta as a breach of statutory

duty does not seem to have occurred to the judicial mind – despite finding that Magna Carta had been breached.

Deceit – does it matter?

39. Well there was one consolation prize, paradoxically in the case of the tort of deceit. Whereas the trial judge had held that deceit must be practised on the plaintiff and not on a third party, the Court of Appeal considered it arguable that deceit of a third party, in the person of the United Nations, (the only body that could have rescued Chagossians at the time) was, at least arguably, a recognisable tort.
40. Of course it did not matter because all arguments deployed to overcome the statute of limitations – poverty, remoteness, lack of education and access to advice, the concealment practised by the UK etc. etc. – were all swept away in a rigid application of the six year time bar from the date of the 1982 settlement. And finally it was considered unarguable to seek a declaration of the right to return to all islands of the archipelago.
41. And so the Chagossians' quest for some form of remedy was finally disposed of. The European Court of Human Rights held the case inadmissible, largely on the basis that there was no jurisdiction to consider human rights in a territory to which the convention had not been extended.

You can't take that away from me, can you?

42. So Chagossians were denied compensation for their exile. But even then, one precious thing remained to the Chagos islanders – their inherent right of abode recognised in Bancoult (1) and given effect by Robin Cook's Immigration Ordinance which restored their right of return. But even that was to be snatched away from them in 2004.
43. In July 2002 the Feasibility Study which Robin Cook had promised to be the means of returning the population, managed to conclude that resettlement was not really feasible because, it was claimed, sea level rise would make life precarious for the population (but not for the military base), and the cost of sea defences would be prohibitive. This has now been shown to be scientific nonsense. But it took another two years, and a war in Iraq before the FCO bit the bullet and abolished the Chagossians' precious right of abode, in 2004. And it took us another decade to uncover the scientific distortions that had led consultants to the required conclusion to their work.
44. The risible conclusions of the Feasibility Study in 2002 had been gathering dust as the Iraq war gained in intensity. Then, stirred on by a public statement that the Chagossians intended to exercise their declared rights and actually return to the islands, the FCO sprang into action. Enacting an Order-in-Council without prior notice or consultation, Jack Straw passed a new constitution for BIOT, one which expressly excluded and indeed abolished the Chagossians' precious right of abode. This solemn farce was later admitted by Jack Straw to be one which exchanged legitimacy for speed. One wonders what kind of panic must have been caused by a Chagossian indicating that he would like to go home in exercise of his hard-won rights. Amongst the dark secrets that perhaps one day Sir John Chilcot will cast light upon, we may count the abolition of the Chagossians' right of abode as amongst the darkest.

Bancourt (2) 2004-2008

45. To defend their precious Right of Abode, Chagossians were plunged into another four years of litigation, culminating in the House of Lords in 2008. During this epic battle seven judges ruled that the 2004 Order –in-Council was unlawful on a multiplicity of grounds – ultra vires, irrationality, abuse of process, legitimate expectation, all of which were held to have limited the Crown's prerogative to abrogate fundamental rights. The FCO's appeal to the House of Lords was expressly justified by the Secretary of State on the basis that it was necessary to clarify whether the prerogative in the Overseas Territories was subject to these limitations. On that ground they lost, and the Crown's prerogative can now be judicially reviewed wherever it is deployed in the Overseas Territories . However on the ground of the rationality of its exercise, a narrow majority held that given the contents of the feasibility study (which had not been considered by any of the previous judges) it was not unreasonable to terminate the right of abode.

Were the Law Lords misled?

46. Which brings me on to the last and final attempt by Chagossians to penetrate the duplicity of their exile insofar as the FCO claimed that resettlement was not feasible.

47. This absurd conclusion (absurd because it did not apply to the US airbase on Diego Garcia) was solemnly set out in the 2002 study conducted by so-called independent consultants. As always with contested litigation you have to have the basic facts at your fingertips before you can contemplate a legal challenge. We therefore asked for the underlying papers relating to the Feasibility Study throughout the entire judicial review from 2004 to 2008. Not only were we refused but a claim was made that the papers no longer existed. But 4 years later, as our complaints got louder, suddenly in 2012 the file was found and the papers disclosed. Where were they found? In the archive of the Treasury Solicitor, the very person who had formally denied the existence of the file, on behalf of the FCO.

48. There followed not a word of explanation or apology, but the contents of the file were damning enough. The report published by FCO had concluded that increased storminess in the Indian Ocean would cause overtopping and flooding so as to require highly-expensive sea defences such that the UK taxpayer would be faced with a large and unending commitment. Sea-level rise was also relied on as a factor affecting the islanders' resettlement. However when we looked at the draft report, and the way it had been conducted by the FCO and their single peer reviewer – coincidentally the scientist spearheading the campaign for the marine-protected area – it was possible to see the scientific flaws and the expectations of a negative outcome which FCO gave to the consultants at the outset. In short, a wholly fictitious hypothesis that there would be a shift in the cyclone belt leading to increased storminess was, after pressure from the peer reviewer, completely excised from the final report in favour of a certain scientific prediction. This was bad science at its worst. Moreover estimates of sea-level rise were entirely based on global model values and projections, whilst local data which showed the historical rise had been negligible were ignored. Finally we instructed a real world-class expert on coral islands who filed a report to say that coral islands react to wave action by rebuilding themselves with the sediment displaced. They remain dynamic features and do not simply sink under the waves.

49. So when all this was revealed by the disclosure which had been refused to us throughout the journey to the House of Lords, we have now referred the matter back to the Supreme Court seeking to set aside the House of Lords judgment on the ground of a breach of the duty of candour and on the basis of new evidence.
50. Whilst judgment is awaited, and since we have been criticising the feasibility study for so long, the coalition government decided to redo the whole process. Fully independent consultants, KPMG, have now filed a further report, in which all the bad science and preconceived conclusions have been excluded, and no obstacle to resettlement identified. Instead the task is now to find out how many islanders want to return, and how much a resettlement programme will cost. It is quite possible that before the end of this year a formal decision to resettle the population will at last be made. So why was all this litigation necessary?
51. We hear quite a lot these days from government about a generational struggle against the forces of darkness that threaten our civilisation. Tell that to the Chagossians and they will know what you mean. Sadly, Public Policy and Judicial Policy have played their part in this injustice. As a result of holding that ignorance of illegality was an excuse for Misfeasance, and deciding there was no tortious remedy for a breach of Magna Carta, English Public Law has failed to provide justice to the Exiles from the Chagos Islands.

Richard Gifford

30 September 2015.