[2026] BIOT CA (Civ) 1

IN THE BRITISH INDIAN OCEAN TERRITORY COURT OF APPEAL
ON APPEAL FROM THE SUPREME COURT
THE HON. JAMES LEWIS K.C., CHIEF JUSTICE

London
United Kingdom
12th November 2026

Before:

SIR HOWARD MORRISON, K.C.M.G, C.B.E, K.C., PRESIDENT
THE HON. MR JUSTICE LANE, JA
THE HON. MRS JUSTICE NOTT, K.C. (Hon), JA
THE HON. MRS JUSTICE PLIMMER, JA
THE HON. MR JUSTICE BIRD, JA

Between:

HIS MAJESTY'S COMMISSIONER FOR THE BRITISH INDIAN OCEAN TERRITORY

Appellant

-and-

THE KING

on the application of

(1) LOUIS MISLEY MANDARIN

(2) LOUIS MICHAEL MANDARIN

(3) LOUIS ANTOINE LEMETTRE

(4) GUY SHANE ADRIEN CASTEL

Respondents

-and-

(1) SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS

(2) BERNADETTE DUGASSE, MICHEL ANDRE VIDOT, AND MARIE MICHELLE CYNTHIA OTHELLO-KRIHIFF

(3) BERTRICE POMPE

(4) HUMAN RIGHTS WATCH

Intervenors

Mr. Jason Pobjoy K.C., **Mr. William Irwin**, **Mr. Yaaser Vanderman**, and **Mr Emile Simpson** (instructed by the **Government Legal Department**) for the **Appellant**

Mr. Philip Rule K.C., **Mr. James Tumbridge**, and **Ms. Susana Ferrin** (instructed by **Keystone Law**) for the **Respondents**

Sir James Eadie K.C., **Mr. Kieron Beal K.C.**, and **Mr. John Bethell** (instructed by the **Government Legal Department**) for the **Secretary of State for Foreign, Commonwealth and Development Affairs**

Mr. Jonathan Levy, solicitor, appearing directly for **Bernadette Dugasse**, **Michel Andre Vidot**, and **Marie Michelle Cynthia Othello-Krihiff** (**written submissions only**)

Mr. Philip Rule K.C. and **Mr. Michael Polak** (instructed by **Luke & Bridger Law**) for **Bertrice Pompe** (**written submissions only**)

Mr. Ben Jaffey K.C., **Ms. Natasha Simonsen**, and **Mr. Abe Chauhan** (instructed by **Leigh Day**) for **Human Rights Watch** (**written submissions only**)

Hearing dates: 15-17 July 2026

JUDGMENT

This judgment was handed down remotely at 10:00am UK time on 12 November 2026 by circulation to the parties or their representatives by e-mail

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MR JUSTICE LANE

(**with whom the President, Mrs Justice Nott K.C. (Hon), Mrs Justice Plimmer and Mr Justice Bird agree**)

Introduction

1. On 22 May 2025, the governments of the United Kingdom and Mauritius signed an agreement ('the 2025 Treaty') 'concerning the Chagos Archipelago including Diego Garcia' (known, since 1965, as the British Indian Ocean Territory (BIOT)). Article 1 of the 2025 Treaty provides that 'Mauritius is sovereign over the Chagos Archipelago in its entirety, including Diego Garcia.' The bill by which this Treaty will be incorporated into United Kingdom law (The Diego Garcia Military Base and British Indian Ocean Territory Bill) completed its legislative stages in both Houses of Parliament in January 2026. The bill awaits final enactment and royal assent.

2. On 16 February 2026, the respondents (Louis Misley Mandarin, Louis Michel Mandarin, Louis Antoine Lemettre and Guy Shane Adrien Castel) landed on Île du Coin, an island in the BIOT, approximately 135 miles north of Diego Garcia. They arrived without having obtained permission to enter the territory. The respondents are United Kingdom citizens and Chagossians (also known as Chagos Islanders or Ilois (French Creole for 'islanders')). They or their ancestors lived in the BIOT before the Chagossian population was removed by the United Kingdom government between 1968 and 1973. The appellant before us is His Majesty's Commissioner for the BIOT ('the Commissioner').

3. On 18 February 2026, the Acting Principal Immigration Officer of the BIOT served on the respondents notices under section 12 ('the section 12 notices') of the BIOT Immigration Order 2004 ('the Immigration Order') requiring the master of the *SY No Excuse* (the vessel on which the respondents had arrived in the BIOT) to remove the respondents forthwith and requiring the respondents to remain outside the BIOT until further notice.

4. The respondents did not leave the BIOT. On 20 February 2026, they obtained from the BIOT Supreme Court an *ex parte* injunction preventing their removal. The respondents also appealed to the appellant under section 10 of the Immigration Order against the removal notices. When those appeals were dismissed, the respondents filed an application in the BIOT Supreme Court to bring proceedings for judicial review. On 31 March 2026, following a 'rolled up' hearing, the BIOT Supreme Court handed down its judgment.

5. The Chief Justice of the BIOT Supreme Court, the Hon. James Lewis KC, ('the Chief Justice') (i) granted permission to bring judicial review; (ii) declared section 9 of the BIOT Constitution Order 2004 ('the Constitution Order') to be unlawful and quashed the section; (iii) quashed the section 12 notices; (iv) made no order for costs *inter partes.*

6. As at the date of the hearing before this Court, the respondents and two other individuals remained on Île du Coin.

The Commissioner's Appeal to the BIOT Court of Appeal

7. The appellant appeals against the BIOT Supreme Court's judgment on four grounds. First, that the BIOT Supreme Court had no jurisdiction to consider an application to quash section 9 of the Constitution Order (**Ground 1**). Secondly, that the BIOT Supreme Court perpetrated a procedural irregularity by considering the lawfulness of the Constitution Order at all and, in particular, by finding that the enactment of section 9 had been impermissible *ab initio* given that the respondents had not pleaded the issue. The BIOT Supreme Court had further erred by finding that there had been a change of circumstances in the BIOT without allowing the first intervenor and the appellant a reasonable opportunity to provide evidence (**Ground 2**). Thirdly, but only in the event that BIOT Supreme Court did have jurisdiction, it had erred in law by quashing section 9 of the Constitution Order (**Ground 3**). Fourthly, that the BIOT Supreme Court erred in law by quashing the section 12 notices (**Ground 4**).

The Respondents' Cross-Appeal

8. The respondents cross-appeal on four grounds. First, that it should follow from the Supreme Court's conclusion as regards the right of abode that section 5 of the Immigration Order should be 'given a compatible reading' and/or that any 'offending parts' of the Constitution Order should be removed (**Ground A**). Secondly, that the intended enforced removal of the respondents from the Chagos Islands amounts to deportation constituting an offence under the United Kingdom International Criminal Court Act 2001 ('ICCA 2001') and, as such, should be prohibited on the basis that it is illegal and amounts to a crime against humanity (**Ground B**). Thirdly, that the exclusion of the Chagossians from their homeland under section 9 of the Constitution Order is a continuation of a crime against humanity and is accordingly an abuse of power (**Ground C**). Fourthly, that the correct order for costs in the BIOT Supreme Court should be that the Commissioner should pay the costs of the claimants before that court (**Ground D**).

The Intervenors

9. This Court has granted permission to intervene in the appeal/cross appeal to the Secretary of State for Foreign, Commonwealth and Development Affairs ('the Secretary of State') (the first intervenor), to Bernadette Dugasse, Michel Andre Vidot, Marie Michelle Cynthia Othello-Krihiff (the second intervenors); Bertrice Pompe (the third intervenor) and Human Rights Watch (the fourth intervenor). The second, third and fourth intervenors appeared by way of written submissions only.

GROUND 1: No jurisdiction to quash section 9 of the Constitution Order

'In right of the United Kingdom'; 'In right of BIOT'

10. There are 14 British Overseas Territories, of which 12 have constitutions made under powers granted by Acts of the United Kingdom Parliament. Only two territories, Gibraltar and the BIOT, have constitutions 'made exclusively by virtue of the Royal Prerogative' (see *Hendry and Dickson, British Overseas Territories Law* (2nd edition, 2018) pp. 14-20). Both territories were acquired by cession (in the case of what is now BIOT, from France under the Treaty of Paris in 1814) and, as such, they lie outside the definition of 'British Settlement' for the purposes of the British Settlements Acts of 1887 and 1945 'and no Act of Parliament has been passed that deals with their constitutional arrangements' (*Hendry and Dickson:* p. [19]). Consequently, the Crown enjoys a full prerogative power to make such legislative, executive and judicial provisions for the BIOT as it thinks fit, provided that those provisions do not contravene any Act of Parliament extending to the territory.

11. The provisions which have hitherto been made by the Crown in respect of the BIOT, including the Constitution Order, have not contravened any such Act. Moreover, there is a common law rule that the establishment of a legislature in an overseas territory will lead to the loss of the prerogative power (see *Sammut v Strickland* [1938] AC 678) unless an Order in council expressly reserves to the Crown full constituent and legislative power. The Constitution Orders of both BIOT [section 15] and Gibraltar have such provisions. All constitutional and judicial arrangements for the BIOT, therefore, including the creation of the BIOT Supreme Court and Court of Appeal, emanate from the exercise of powers vested exclusively in the Crown.

12. In its relationships with other sovereign entities on an international level, the United Kingdom and its territories operate as a single undivided realm. As regards the function of the Crown within that undivided realm, the Crown acts in different capacities, the Crown acting '*in right of*' the territory or '*in right of the United Kingdom*' depending upon the nature of the function and on the part of the realm in which the act occurs. Those distinct capacities pertain regardless of whether the territory is independent (but where the King is Head of State), otherwise self-governing or (as in the case of BIOT) not self-governing at all.

13. An example of those distinct functions operating in practice appears in *R v. Secretary of State for Foreign and Commonwealth Affairs (Appellant) ex parte Quark Fishing Limited* [2005] UKHL 57, which concerned the capacity in which the Secretary of State had acted when refusing fishing licences in the overseas territory of South Georgia and the South Sandwich Islands ('SGSSI'). The House of Lords held that the Secretary of State had acted in right of SGSSI and not in right of the United Kingdom. As a result, there could be no claim for damages for breach of the Human Rights Act 1998 which is not part of the law of SGSSI.

14. Claims brought in the courts of an overseas territory cannot, therefore, be pursued against the Crown in right of the United Kingdom and, for that reason, the Secretary of State will generally seek to appear before those courts only in order to make submissions as to jurisdiction (as in the instant appeal) or where proceedings might potentially engage the United Kingdom Government's dealings with other sovereign states.

15. In its judgment, the BIOT Supreme Court observed at [150] and [152]:

> 150. I then turn to consider Section 9 of the Constitutional Order 2004. First, the prerogative power of the Crown to legislate by order in council on the advice of Her Majesty's ministers in relation to a territory such as the BIOT is subject to judicial review, that should not be in doubt. All members of the House of Lords in *Bancoult No.2* accepted that the Constitutional Order 2004 was susceptible to judicial review on ordinary principles of legality, rationality and procedural impropriety.
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> 152. There are fundamental differences between legislation enacted by the executive through Her Majesty in Council and legislation subject to democratic debate in Parliament. There is clearly a qualitative difference between legislation by the Crown in Council (exercise of the prerogative) and legislation by the Crown in Parliament (Acts of Parliament). The former is reviewable while the latter is not. The Constitutional Order 2004 is an exercise of the royal prerogative alone.

16. The appellant and the first intervenor submit that the Constitution Order was made in right of the United Kingdom and that, consequently, the BIOT Supreme Court had no jurisdiction to consider its lawfulness and still less to quash it. They argue that any challenge to the lawfulness of the Constitution Order can only be brought before the courts of England and Wales. Moreover, such a challenge has already taken place, culminating in the judgment of the House of Lords in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 ('*Bancoult No. 2*'). The Commissioner and the Secretary of State further submit that the BIOT Supreme Court has erred in law by seeking to revisit that authority (which determined that section 9 of the Constitution Order is not unlawful) and by then following the opinions of those members of the court who had been in the minority.

17. Sections 9 and 15 of the Constitution Order provide:

> No Right of Abode in the Territory
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> 9. (1) Whereas the Territory was constituted and is set aside to be available for the defence purposes of the Government of the United Kingdom and the Government of the United States, no person has a right of abode in the Territory
>
> (2) Accordingly, no person is entitled to enter or be present in the Territory except as authorised by or under this Order or any law for the time being in force in the Territory.
>
> Powers reserved to Her Majesty

15. (1) There is hereby reserved to Her Majesty full power to make laws for the peace, order and good government of the Territory, and it is hereby declared, without prejudice to the generality of that expression but for the avoidance of doubt, that-

(a) any law made by Her Majesty in the exercise of that power may make any such provision as Her Majesty considers expedient for or in connection with the administration of the Territory; and
(b) no such provision shall be deemed to be invalid except to the extent that it is inconsistent with the status of the Territory as a British overseas territory or otherwise as provided by the Colonial Laws Validity Act 1865.

(2) Without prejudice to the generality of the power to make laws reserved to Her Majesty by subsection (1), any such law may make such provision as Her Majesty considers expedient for the purposes for which the Territory was constituted and is set aside, and accordingly and in particular, to give effect to section 9(1) and to secure compliance with section 9(2), including provision for the prohibition and punishment of unauthorised entry into, or unauthorised presence in, the Territory, for the prevention of such unauthorised entry and the removal from the Territory of persons whose presence in the Territory is unauthorised, and for empowering public officers to effect such prevention or, as the case may be, such removal (including by the use of such force as is reasonable in the circumstances).

18. The Chief Justice has set out *in extenso* the complex litigation history (much of it involving Mr Louis Olivier Bancoult, a Chagossian) which followed the removal of the Chagossians from the territory. This appeal is only the latest episode in that history. There is no need for me to repeat that history and I shall address it only in so far as it may be relevant to the issues in this appeal and in order to provide essential context.

19. The Chief Justice noted that in previous *Bancoult* litigation the Secretary of State had argued that there had been no settled population in the BIOT prior to the removals of inhabitants which had been completed by the early 1970s. The judgment of the Divisional Court in *R (Bancoult) v Foreign Secretary* [2001] QB 1067 (*'Bancoult No. 1'*) which set aside an earlier Immigration Order, made way for the BIOT Ordinance No. 4 of 2000 ('the Immigration Ordinance 2000'), which enabled individuals who could show that they were citizens of British Dependent Territories by virtue of their connection with BIOT to enter and remain on islands in the territory (other than Diego Garcia) as of right. The Immigration Ordinance 2000 remained in force until the enactment of the Constitution Order and Immigration Order in 2004, which removed any right of abode. Other than heritage visits facilitated by the Commissioner, no one visited or sought to settle anywhere in the BIOT in the period 2000 to 2004. That fact, as I shall discuss below, became significant in the majority judgments in *Bancoult No. 2.*

20. Having determined that he had jurisdiction to hear a challenge to the lawfulness of the Constitution Order and Immigration Order, the Chief Justice was aware that he was being asked by the respondents to reach an outcome diametrically opposed to that in *Bancoult No. 2:*

In *Bancoult No.2* [ibid] the Claimant sought a declaration from the Divisional Court that the provisions of Section 9 of the Constitutional *(sic)* Order 2004 were unlawful. That case and its consideration by the Court of Appeal and House of Lords is important as the very same issue is being put forward before this Court. Accordingly, I will deal with the details of the judgments and speeches when I come to analysing the arguments. However, it is convenient to say at this point that the Divisional Court (Hooper L.J. and Cresswell J.) held that Section 9 of the Constitutional Order 2004 was unlawful; the Court of Appeal (Sir Anthony Clark MR, Waller and Sedley L.JJ.) dismissed the appeal also holding that Section 9 of the Constitutional Order 2004 was unlawful; and the House of Lords allowed the appeal by a majority (Lords Hoffman, Rodger and Carswell holding Section 9 of the Constitutional Order 2004 was lawful and Lords Bingham and Mance that Section 9 of the Constitutional Order 2004 was unlawful).

The Chief Justice agreed with the respondents and adopted the opinions of the minority in *Bancoult No. 2*.

21. At [30-35], the Chief Justice discussed at length the litigation which occurred after 2004, noting that an attempt to set aside *Bancoult No. 2* on the basis of a 'failure of candour' (concerning a report on the feasibility of resettlement of the BIOT) had failed (see *Bancoult No 4* [2016] UKSC 35*)*. The Chief Justice noted that there had been support in the judgments of the several United Kingdom Supreme Court justices for the proposition that the Constitution Order could, notwithstanding the outcome of *Bancoult No. 2*, be challenged in the light of new information regarding the feasibility of settlement. The question for the BIOT Supreme Court (and this Court) concerns the correct jurisdiction in which such a claim may properly be made.

22. At [116], the Chief Justice summarised the issue before him:

> The first issue to decide is whether this Court has jurisdiction to consider the vires or reviewability of Section 9 of the Constitutional Order 2004. The Claimants submit it has, while the Defendant submits it does not. If this Court does have jurisdiction it is common ground that this Court is not bound by the decision of the House of Lords in *Bancoult No.2* [*ibid*]: the speeches are highly persuasive but not binding.

23. It is at this point in his analysis that the Chief Justice, in my opinion, began to fall into error. At [119-127] he considered the opinion of Lord Rodger in *Bancoult No. 2* ('At the hearing of the present appeal, however, it was common ground that the Constitution Order was made by Her Majesty in right of the United Kingdom') but discounted that opinion (and that of Lord Carswell also in *Bancoult No. 2* – 'The Orders in Council, unlike the [Immigration] Ordinance, were made in right of the United Kingdom, not in right of the BIOT') because (i) it was inconsistent with the 'approach of counsel for the Secretary of State in both the Court of Appeal and Divisional Court below, and contrary to the express findings of the Divisional Court and Court of Appeal in the proceedings below' and (ii) the comments were made 'without argument.' The Chief Justice also recorded [12] that the Secretary of State and the Commissioner have 'previously vacillated' on the matter of jurisdiction, both arguing in *Bancoult No. 1* that a judicial review of an immigration order should be brought in the BIOT Supreme Court.

24. The Chief Justice at [135-137] quotes passages of the judgment of the Divisional Court in *BAA v Commissioner of BIOT* [2023] EWHC 767 (KB) at [53] in which that court recorded that the Commissioner had 'argued vigorously' that torts allegedly committed in BIOT by the Commissioner acting as an officer of CBIOT should be litigated in the BIOT courts and not those of the United Kingdom. The Chief Justice seems to have put considerable weight on what he considered to be the mutability of the Commissioner's views on jurisdiction in reaching his conclusion at [136] that the exercise of a supervisory jurisdiction by courts of England and Wales did not mean that the jurisdiction of the BIOT courts was 'excluded or ousted'. In my opinion, he was wrong to do so. Parties to litigation very often change their stance on issues as litigation progresses through appeals in different courts and, indeed, they may do so in the course of a single appeal before the same court. There was nothing to prevent the Secretary of State and the Commissioner changing their minds between *Bancoult No. 1* and *Bancoult No. 2*. Moreover, the court in *BAA* was concerned with a different jurisdictional issue from that before the Chief Justice. As I note below [25], jurisdiction is a legal absolute; as regards specific causes of action in a particular court, it will either exist or not exist; the opinions of parties to the litigation are immaterial. The Chief Justice was wrong to find in the different views on jurisdiction adopted by parties in previous unrelated litigation any justification for the existence of a concurrent jurisdiction over BIOT shared by the BIOT courts and the courts of England and Wales.

25. Secondly, as the Chief Justice himself acknowledged [128], 'it is trite law that law cannot be made by counsel's concessions'. Nowhere is that more true than in the matter of jurisdiction, which is, in a sense, a legal 'absolute'; it either exists or does not exist, cannot be qualified and cannot be conferred by a judge or created by the agreement of parties. Accordingly, any change of mind or 'vacillation' by any party was irrelevant to the judge's task of establishing whether or not he had jurisdiction.

26. Thirdly, it is unclear why the Chief Justice dwelt so long on those opinions in the *Bancoult* litigation which were ultimately shown to be incorrect by the House of Lords in *Bancoult No. 2*. If the Chief Justice wished to mine United Kingdom jurisprudence for guidance, his starting, and end, point should have been *Bancoult No. 2* in which the majority of the court had provided an authoritative statement of the law. The unequivocal statement of Lord Carswell quoted above [23] appears in a judgment with which the majority of his colleagues agreed. Moreover, it is clear that jurisdiction was a live issue before the court in *Bancoult No. 2* (see below) whilst Mr Bancoult's case before the House of Lords accepted that The Queen in Council had 'undoubted power under the royal prerogative to grant a constitution to the BIOT' and 'that the 2004 Orders were made by Her Majesty in right of the United Kingdom as well as the BIOT.' In the context of the *Bancoult No. 2* judgment read as a whole, I consider that the remarks of Lords Carswell and Rodger are axiomatic. They should be taken at face value and without qualification.

27. Fourthly, the Chief Justice was wrong to conclude that:

132. It does not appear [that] the issue of whether the Constitutional Order 2004 was made in right of BIOT or right of the United Kingdom was fully argued in the House of Lords in *Bancoult No.2.*

Whilst I acknowledge that it was not the primary focus of the case before the House of Lords, *Bancoult No. 2* does address the question of jurisdiction, concluding that the Constitution Order was made in right of the United Kingdom. Before the House of Lords, counsel for the Secretary of State had argued that the Constitution Order 'is a law made for the Colony by Order in Council and therefore a 'colonial law'. Rejecting that submission at [40-41] and [47-49], Lord Hoffmann stated:

40. But these proceedings are concerned with the validity of the Order, not simply as part of the local law of BIOT but, as Professor Finnis says, as imperial legislation made by Her Majesty in Council in the interests of the undivided realm of the United Kingdom and its non-self-governing territories. The Constitution Order created the BIOT legislature, in the form of the Commissioner, and it seems to me to illustrate the amphibious nature of the Order in Council, as both British and colonial legislation, that the legislature which is said to bring BIOT within the definition of a colony for the purposes of the Act was created by the very Order which is said to be a law "made for a colony". The fact is that Parliament in 1865 would simply not have contemplated the possibility of an Order in Council legislating for a colony as open to challenge in an English court on principles of judicial review. It was concerned with the law applicable by colonial courts, not English courts.

41. It therefore seems to me that from the point of view of the jurisdiction of the courts of the United Kingdom to review the exercise of prerogative powers by Her Majesty in Council, the Constitution Order is not a colonial law, although it may well have been from the point of view of a BIOT court applying BIOT law.

47. There are two answers to this submission. The first is the prerogative power of the Crown to legislate for a ceded colony has never been limited by the requirement that the legislation should be for the peace, order and good government or otherwise for the benefit of the inhabitants of that colony. That is the traditional formula by which legislative powers are conferred upon the legislature of a colony or a former colony upon the attainment of independence. **But Her Majesty exercises her powers of prerogative legislation for a non-self-governing colony on the advice of her ministers in the United Kingdom and will act in the interests of her undivided realm, including both the United Kingdom and the colony: see Halsbury's Laws of England (4th ed 2003 reissue) vol 6, para 716:**

"The United Kingdom and its dependent territories within Her Majesty's dominions form one realm having one undivided Crown…To the extent that a dependency has responsible government, the Crown's representative in the dependency acts on the advice of local ministers responsible to the local legislature, but in respect of any dependency of the United Kingdom (that is, of any British overseas territory) acts of Her Majesty herself are performed only on the advice of the United Kingdom government."

48. Having read Professor Finnis's paper, I am inclined to think that the reason which I gave for dismissing the cross-appeal in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, 551 was rather better than the reason I gave for allowing the Crown's appeal and that on this latter point Lord Nicholls of Birkenhead was right.

> 49. Her Majesty in Council is therefore entitled to legislate for a colony in the interests of the United Kingdom. No doubt she is also required to take into account the interests of the colony (in the absence of any previous case of judicial review of prerogative colonial legislation, there is of course no authority on the point) but there seems to me no doubt that in the event of a conflict of interest, she is entitled, on the advice of Her United Kingdom ministers, to prefer the interests of the United Kingdom. I would therefore entirely reject the reasoning of the Divisional Court which held the Constitution Order invalid because it was not in the interests of the Chagossians.
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> **[My emphasis]**

28. In these paragraphs, Lord Hoffmann addresses the Colonial Laws Validity Act, which is not relevant in the instant appeal. However, what he says about the 'amphibious' nature of the Constitution Order is highly relevant. The Constitution Order is not a BIOT law ('not a colonial law'). It is 'amphibious' in the sense that it exists in two different legal environments; it operates as a part of the law of the King's undivided realm and also as a set of provisions for the governance of BIOT. The crucial word in [41] is 'applying'. It is the role of the BIOT courts to *apply* the Constitution Order in the sense of construing and interpreting the Order when required. Had Lord Hoffmann considered that the BIOT Supreme Court alone had the jurisdiction to consider the lawfulness of the Constitution Order itself, it is inconceivable that he would not have said so.

29. The latter point is reinforced by the judgment of Laws LJ in the first of the *Bancoult* cases, *Bancoult No. 1* at [28-29].

> 28 … Nothing is plainer, from the history of events which I have recounted by reference to the contemporary documents, that the making of the Ordinance and its critical provision, section 4, were done on the orders or at the direction of Her Majesty's ministers here, Her ministers in right of the government of the United Kingdom. That government had entered into obligations and understandings with the Americans, not with the government of BIOT. The government of BIOT, indeed, was itself a very creature of those understandings. If the applicant in these proceedings had sought to sue in the BIOT courts, the reply might have been that those courts had no authority to control the Secretary of State sitting in Whitehall, and it would have been a true reply.
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> 29 The question for this court is whether to quash an instrument, the Ordinance, whose making was wholly procured by the United Kingdom Government. If the suggestion that the court lacks the power to do so has a place in our legal tradition, it is not one which I recognise. I would hold that we possess ample jurisdiction to make the order sought.

30. The Chief Justice's analysis of *Bancoult No. 2* is flawed. He concluded incorrectly that the question of jurisdiction remained unanswered and had left a lacuna in the law, which he then proceeded to fill by arrogating to the BIOT Supreme Court a jurisdiction that it did not possess. He then reached an outcome regarding the Constitution Order which was directly opposed to that of the highest court in the jurisdiction which exclusively exercises the power to consider its lawfulness.

31. In my opinion, the Chief Justice also misunderstood the case of *Quark Fishing* (see [13] above). In *Quark,* the Secretary of State had instructed the Commissioner of SGSSI to issue fishing licences to two boats but to deny a licence to the claimant's boat. The House of Lords stressed that it was necessary to identify the system of government within which the exercise of executive power had taken place (that is to say, the administrative organs of SGSSI or the Secretary of State in London). Under the constitution of SGSSI, the Secretary of State had no power to instruct the Commissioner so the Secretary of State had, therefore, acted on the behalf of The Queen in Her right of the territory and not the United Kingdom. The similarities which the Chief Justice identified between the issues before him and *Quark* at [138-147] are illusory. The BIOT appeal does not involve an executive action taken under a constitutional order (as in *Quark*) but rather the lawfulness of the order itself. Sir James Eadie KC's skeleton argument [92] emphasised that qualitative distinction. He noted that the Secretary of State had undertaken a fresh analysis of his case before *Bancoult No. 2* and in the light of the judgment in *Quark,* contending that the creation 'of a system of government for the BIOT cannot sensibly be regarded as a step taken in the operation of its governmental machinery.' *Sammut and Strickland* (see [9] above) also supports that contention, confirming that constituent acts in relation to an overseas territory are not made in exercise of any power conferred on the Crown by the territory's constitution.

32. There is a real difference, therefore, between a constitutional instrument and such an instrument 'in action' within a territory (as in *Quark Fishing*). The instrument itself is (to use Sir James's phrase) a 'foundational document.' Sir James referred us at length to *Quark*. He submitted that the correct test for determining whether the Crown acts in right of the United Kingdom or in right of the territory was that advanced by the Secretary of State at [10] and approved in Lord Bingham's judgment in answer to the question, 'By what test is the relevant capacity of the Crown to be ascertained?'

The Secretary of State through Mr Crow submits, in very brief summary, that the answer is found by identifying the system of government within which the particular exercise of executive power takes place. Here the relevant system of government is that established by the 1985 Order as amended, which contains the constitution of SGSSI. It makes plain that the Queen is the head of state and the source of authority in the state. Those who hold office locally do so during her pleasure and subject to her instructions and control. While instructions may be transmitted to the Commissioner by the Secretary of State he does so, in constitutional theory, as her mouthpiece or medium. He is passing on her instructions as Queen of SGSSI, not acting as Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom.

At [78] of *Quark*, Lord Hope held:

The reasons of policy that led to the giving of the instruction, or the motives that lay behind it, are irrelevant. **The question is simply in what capacity was the instruction given by Her Majesty. The constitutional machinery provides the answer to it**. **It was that machinery that was being used to give the instruction.** So it was in right of her position as Head of State of SGSSI that it was given by Her Majesty.

[My emphasis]

In his oral submissions, Sir James contended that, 'the Constitution is made in right of UK because the United Kingdom then sets up, in essence, the basis on which the relevant territories will then fall to be governed. It is a very simple proposition. It was the use of what Lord Hoffmann described in *Bancoult No. 2* [as] the use of a constituent power, "constituent" meaning the thing that sets it up, the base.' I agree with that submission. The Constitution Order (unlike the instruction to the Commissioner in *Quark*) was issued in London by The Queen through Her ministers in Council. It was an act of The Queen determining on behalf of Her undivided realm how part of that realm, the BIOT, should operate thereafter. The Constitution Order is a form of primary, 'foundational' legislation. Crucially and to use Lord Hoffmann's phrase in *Bancoult No. 2,* it is 'not simply part of the local law of BIOT'.

33. The Constitution Order could, in principle, have been drafted so as to permit the courts of the territory to consider the lawfulness of its provisions. However, in common with all other overseas territories and perhaps unsurprisingly, it does not do so. The Constitution Order was imposed on BIOT by the United Kingdom government, which alone has power to amend it. Applying *Quark*, the 'system of government' exercising power by creating the Constitution Order was manifestly the Crown acting in right of the United Kingdom. Sir James observes in his skeleton argument at [83] that the Constitution Order revokes previous orders relating to the BIOT (including the 1976 Order) which were statutory instruments. I agree with his submission that 'as an order revoking United Kingdom legislation, the Constitution Order was, necessarily, made within the United Kingdom system of government.'

34. The notion that the BIOT Supreme Court has the power to review the Constitution Order is incorrect for other reasons. Several times in his judgment, the Chief Justice states that the fact that the United Kingdom courts may enjoy jurisdiction over overseas territories (following the remarks of Laws LJ in *Bancoult No. 1*) must mean that the jurisdiction of the BIOT courts is 'not excluded.' Given that he does not suggest that the jurisdiction of England and Wales is also not excluded, it seems that the Chief Justice considered that there exist shared or concurrent jurisdictions. However, it is clear that such blurring of the distinction between the Crown acting in right of BIOT or in right of the United Kingdom cannot be sustained following *Quark;* it is either one or the other, not both. Moreover, the Chief Justice made no attempt to examine the undesirable and in some respects absurd consequences of a shared or concurrent jurisdiction. For example, the Constitution Order [13] reaffirms the court system of the BIOT. If the BIOT courts can review the Constitution Order, those courts could, as the Secretary of State's skeleton argument puts it, 'alter the fundamental terms of their own constitutional status'; in other words, the BIOT Supreme Court could abolish itself. Moreover, if the United Kingdom and BIOT courts have a shared or concurrent jurisdiction (the Chief Justice stresses at [102] that the Courts Ordinance 1983 confers on the BIOT Supreme Court 'all the powers … vested in or capable of being exercised by the High Court of justice of the United Kingdom'), then it is unclear why the jurisdiction of the BIOT Supreme Court to

adjudicate on acts of government taking place in the United Kingdom should not extend beyond the Constitution Order.

35. A shared jurisdiction also raises questions of the operation of judicial precedent; should the judgments of the United Kingdom Supreme Court or the House of Lords (viz. *Bancoult No. 2*) bind the BIOT courts or not and *vice versa*? Section 3(1) of the BIOT Courts Ordinance 1983 provides:

> 3. (1) Subject to and so far as it is not inconsistent with any specific law for the time being in force in the Territory, and subject to subsections (3) and (4) of this section and to section 4, the law to be applied as part of the law of the Territory shall be the law of England as from time to time in force in England and the rules of equity as from time to time applied in England.

If the jurisdictions are concurrent, then it is unclear why the judgment of the House of Lords in *Bancoult No. 2* should not be binding on the BIOT Supreme Court.

36. Moreover, a concurrent jurisdiction might readily result in administrative chaos. A dissatisfied litigant before the High Court of England and Wales could simply try his luck before the BIOT courts. In the event of different outcomes in different courts, it would be unclear which should be followed.

37. Although the Chief Justice concluded at [148] that the Constitution Order was passed in right of BIOT, he went on to say at [149] that 'in any event there is a more principled answer to this issue [of jurisdiction]':

> [149] …In the present case the Claimants have been said by the Defendant to have committed a criminal offence in the BIOT, see Section 14 of the Immigration Order 2004. The Section 12 Removal Notice is issued under the laws of the BIOT. The Claimant in defending himself or seeking review of the Removal Notice must be able to invoke the jurisdiction of this Court if he challenges the Removal Notice as unlawful. This Court determines the scope of the laws of the BIOT including the Constitutional Order 2004. **The suggestion by the Defendant that such a person subject to enforcement procedures in the BIOT, under BIOT laws, must seek judicial review in England and Wales to argue unlawfulness is fanciful. Accordingly I find that this court has jurisdiction to consider the lawfulness of Section 9 of the Constitutional Order 2004**.
>
> [My emphasis]

The BIOT Supreme Court is the correct court in which to bring proceedings for judicial review of the section 12 notices. Public law challenges to notices issued under the Immigration Order on, for example, the grounds of procedural unfairness, irrationality and *Wednesbury* unreasonableness fall squarely within the jurisdiction of the BIOT Supreme Court. There is no issue concerning the jurisdiction of the Supreme Court to adjudicate on the challenge to the section 12 notices (Ground 4). However, for the reasons I have given above, any challenge to the lawfulness of the Constitution Order itself must be brought in the United Kingdom. That is not 'fanciful' as the Chief Justice found but simply the consequence of a correct application of the law. It is not an uncommon requirement for public law challenges to be made in different courts. The First-tier and

Upper Tribunals, for example, may disapply secondary legislation which is incompatible with the Human Rights Act 1998 (see *RR v Secretary of State for Work and Pensions [2019] UKSC 52*), but only the High Court, Court of Appeal and Supreme Court can issue a declaration of incompatibility under section 4 of that Act. There is no reason why requiring a litigant to bring different claims in different jurisdictions should in consequence ('Accordingly, I find…) confer a jurisdiction on the BIOT Supreme Court which it does not otherwise possess.

38. It follows that the Commissioner was not the appropriate defendant in the BIOT Supreme Court proceedings in any event. Any challenge to the Constitution Order should have been brought against the first intervenor in the High Court in England and Wales. The Commissioner is bound by the Constitution Order; he played no part in its creation.

39. In his skeleton argument at [42], Mr Rule KC, for the respondents, submits that:

> It would seem to follow that the Appellant believes that the domestic courts of BIOT, which would have no jurisdiction over the constitution at all, are unable to consider the correct interpretation of the constitution (particularly if a construction were based on a challenge to the legality of a provision if otherwise construed). Certainly, where a power is being exercised by the Appellant, in the BIOT, it seems no recourse can be had in the proceedings that ensue in the BIOT, to any argument about the extent or legality of the power being purportedly exercised … On this proposition, a challenge to a removal notice, or to a failure to grant a permit, each within the functions of the Commissioner, would have to be litigated only in England if seeking to invoke any challenge to the interpretation, effect, or validity of the executive Order in Council powers being purportedly exercised.
>
> I reject that submission. The appellant has not argued that a challenge to the lawfulness of a removal notice or refusal to grant a permit can only be litigated in England and Wales. That is to confuse the status of an Order as an emanation of powers vested exclusively in the Crown and a challenge to the application of those powers in the territory. As we shall see, the BIOT Supreme Court has the jurisdiction to consider whether the section 12 notices issued to the respondents pursuant to the Immigration Order were lawful.

40. In his skeleton argument at [50], Mr Rule submits: 'The appellant's complaint that (on its reading of the judgment below) there are 'diametrically opposite' conclusions in two jurisdictions is nothing to the point of whether jurisdiction exists in both. Ultimately, each has an apex court constituted by largely the same judiciary and can resolve any differences.' In my opinion, Mr Rule overlooks, as did the Chief Justice, the problems posed to the operation of precedent in a concurrent jurisdiction; it is difficult to see how an 'apex court' (the United Kingdom Supreme Court or the Judicial Committee of the Privy Council) might resolve any differences if their respective judgments had only persuasive as opposed to binding effect (see the Chief Justice's treatment of *Bancoult No. 2* in his judgment at [116]: 'highly persuasive, but not binding').

41. The submissions of the second intervenors, prepared by Dr Jonathan Levy do not adequately address the issues surrounding jurisdiction. At [37], the Court is urged not 'to extend' the reasoning in *Bancoult No. 2*. Authorities such as *Kennedy v Charity Commission, Somerset's Case* and *Liversidge v Anderson* are cited but little, if any, attempt is made to explain their relevance. We are told that section 9 of the Constitution Order is 'unsupported by any established prerogative power' and is 'inconsistent with fundamental common law rights' but no reasoning in support of these assertions is provided.

42. The submissions of the fourth intervenor, Human Rights Watch, focus on the BIOT Supreme Court's consideration of the lawfulness of the Constitution Order having determined that it had jurisdiction to quash it. Given my conclusion on Ground 1, my discussion of those submissions will be brief.

Decision on Ground 1

43. I allow the appeal on Ground 1.

GROUND 2: The BIOT Supreme Court perpetrated a procedural irregularity by considering the lawfulness of the Constitution Order at all and, in particular, by finding that the enactment of section 9 had been impermissible ab initio.

44. At [110-11], the Chief Justice wrote:

> 110. This issue of the legality of Section 9 of the Constitutional Order 2004 was raised and argued before me. It is convenient to deal with it before dealing with the individual grounds dealing with procedural propriety, rationality and illegality in issuing or failing to issue a permit or Removal Notice.
>
> 111. The Defendant took the point that a challenge to Section 9 of the Constitutional Order 2004 did not feature in the original grounds. However, it was pleaded in the Claimants' Reply to the Detailed Grounds of Defence at paragraphs [40] to [46]. The Reply was filed pursuant to paragraph 9 of the Court's direction of 26 February 2026; and the issue was addressed in both the Claimants' and Defendant's skeleton arguments as well as in oral argument before me. The hearing was a rolled-up hearing prior to permission being granted, and in my opinion the issue was sufficiently raised, and sufficient opportunity to deal with it has been given.

45. The appellant complains that: (i) the respondents never sought to amend their pleadings to argue that section 9 of the Constitution Order was unlawful but relied instead on their Reply; (ii) the respondents never argued that the majority in *Bancoult No. 2* had been wrong in law or that section 9 was unlawful *ab initio*; (iii) because the issue was raised so late in the course of the proceedings, the Commissioner was prevented from adducing evidence from the Secretary of State, 'the only person who could have rebutted the arguments being made' (appellant's skeleton argument, [43(4)]), and (iv) in consequence,

the Chief Justice proceeded to consider the 2025 Treaty without any explanation of its contents from officials.

46. The respondents contend that: (i) the BIOT Supreme Court issued directions on 26 February 2026 inviting submissions on section 9 of the Constitution Order; (ii) the respondents' skeleton argument addressed the 'varied reasoning' in *Bancoult No. 2*; (iii) the appellant never made an application after the hearing to adduce evidence from the Secretary of State; (iv) the terms were clear on the face of the 2025 Treaty and required no interpretation by officials. The possibility of resettlement of the outer islands of the Chagos archipelago under the 2025 Treaty was evident to the judge and which the parties had acknowledged in documents emanating from the BIOT Sovereignty and Policy Unit.

47. I find that the Chief Justice erred in law and that the appellant's appeal should be allowed on Ground 2.

48. First, there is what Mr Pobjoy KC called the 'technical' issue concerning the failure of the respondents to amend their grounds of application to raise section 9 of the Constitution Order but instead to rely only on their Reply.

49. The background here provides important context. Mr Pobjoy helpfully took us through the events immediately preceding the hearing at the BIOT Supreme Court on 13 March 2026. In correspondence at the end of February, the respondents' solicitor had invited the appellant to seek to join the Secretary of State in the proceedings. I accept Mr Pobjoy's submission that, on the face of the pleadings, only the section 12 notices were in issue and that those notices were solely a matter for the Commissioner, whilst a separate issue raised in the correspondence concerning heritage visits could not reasonably be addressed in the short time before the hearing. I reject Mr Rule's submission that this late flurry of correspondence had given adequate notice to the Commissioner and the Secretary of State of the issue concerning the Constitution Order and that it had been the Secretary of State's own choice not to engage in the proceedings. I find that the Commissioner had been fully entitled to hold the respondents to their pleaded case.

50. It is also clear that, before the courts of England and Wales, a Reply is not an appropriate pleading for raising a new issue. The current procedure is succinctly articulated by Johnson J in the recent case of *Beyond GM v Secretary of State for Environment, Food and Rural Affairs* [2026] EWHC 1306 (Administrative) at [164]:

> 164. There is a more direct route to the same conclusion: the decision not to make regulations for traceability was vitiated by the Minister being misdirected that he did not have the power to do so. That argument was articulated in the Reply, but not in the Statement of Grounds. In a claim for judicial review, the grounds of challenge must be set out in the Statement of Grounds accompanying the claim form. A Reply is for responding to the defendant's acknowledgment of service and should only be filed where it is considered necessary to assist the court (for example

to respond to a discrete point which was not addressed in the claim form): The Administrative Court Judicial Review Guide (2015) paragraph 8.5.1. It is not for introducing new grounds of claim. If a claimant wishes to rely on an additional ground of claim, then the correct course is to apply to amend the grounds: The Administrative Court Judicial Review Guide (2015) section 10.2. Permission is required to rely on an additional ground: CPR 54.15. Accordingly, if the claimants had wished to advance this as a ground of challenge, then it would have been necessary to amend the Statement of Grounds.

The CPR and Administrative Court Judicial Review Guide do not apply in the BIOT courts. However, those courts should nonetheless be concerned to see that litigation is conducted with procedural rigour. Procedural rigour is not an end in itself; it serves the wider purpose of ensuring that all parties in litigation are treated justly. A court is entitled, and frequently required, to probe and test the legal arguments advanced before it. It is not confined to the analysis presented by the parties. But there is an important distinction between testing an argument and determining proceedings upon a materially different basis which the parties have not been afforded a proper opportunity to address. The respondents' Reply was not an appropriate or sufficient means to introduce a new ground of claim. Moreover, as Mr Pobjoy submitted, the respondents' claim before the BIOT Supreme Court sought only a mandatory order and an injunction; it did not even include the familiar 'catch-all' of 'such other relief as the court considers appropriate.' The declaration at [227] of the Chief Justice's judgment ('I quash and will declare the Section 9 of the Constitution Order 2004 is unlawful and/or Wednesbury unreasonable, especially in the light of current circumstances') was an outcome never sought anywhere in the respondents' pleadings. By granting that relief the Chief Justice erred in law.

51. Secondly, I hold that the Chief Justice also erred in law concerning what Mr Pobjoy called the '*ab initio*' point. The Chief Justice set out the respondents' case on the Constitution Order at [112]:

> The Claimants' position was essentially that the principal reasons for allowing Section 9 of the Constitutional Order 2004 to override the fundamental right of abode for the Chagossians in the outer Islands have disappeared. There has been a sea change in the circumstances of:
> (i) national defence; and
> (ii) feasibility / prohibitive cost.

52. The Chief Justice went on to conclude that section 9 of the Constitution Order had always been unlawful (i.e. '*ab initio*'). It had not only been rendered unlawful by a change in circumstances brought about by new evidence on the feasibility of resettlement, but also because the entire territory was no longer 'constituted and set aside to be available for' defence purposes. This '*ab initio*' argument did not rely on a finding that *Bancoult No. 2* had been rendered obsolete by changed circumstances but rather that the majority in that case had been wrong and the minority right. It was an argument introduced by the Chief Justice himself, entirely unsupported by the parties. By introducing it, the Chief Justice entered the arena impermissibly.

53. I reject any notion that the '*ab initio*' argument had crept into the proceedings as if by osmosis or that the appellant had been given any opportunity to address it. Indeed, the Chief Justice himself seems to have been unable to identify when and where exactly the '*ab initio*' argument was first mooted. In his reasons for granting permission to appeal to this Court, the Chief Justice at [7] wrote:

> 7. The submission of the Defendant is that it was procedurally unfair to allow the Claimants to make their submission on Section 9 of the Constitutional Order 2004 is misplaced. **While it may have been unclear in the original grounds,** the Court itself sought clarification from the parties whether the issue was being raised. The Court invited the parties to make clear:
>
> "Is there is a challenge to the validity of section 9 of the British Indian Ocean Territory (Constitution) Order 2004, and if so that it be addressed in the skeleton arguments."
>
> [My emphasis]

The *'ab initio'* argument was not 'unclear' in the grounds; it was from the outset and remained throughout wholly absent. At [9], the Chief Justice states that the 'validity of Section 9 of the Constitutional Order 2004 was then squarely addressed in the skeleton arguments of the Defendant and the Claimants' and at [10] that it was 'addressed orally.' Mr Pobjoy took us to the skeleton arguments and through the relevant passages of the transcript of the hearing. I agree with his submission that neither of the Chief Justice's statements are accurate. The fact that, following the hearing, the Chief Justice himself seems to have had a flawed recollection of what had been argued before him is, in my opinion, a compelling indication that the appellant had been denied a proper opportunity to make submissions on matters which ultimately formed an essential part of the judgment.

54. There is support for Mr Pobjoy's submission in *Phones 4U Limited v EE Limited and Others* [2025] EWCA Civ 869 at [194-195]:

> 194. Drawing the threads together, I would summarise the position as follows:
>
> a) The starting point is that a judge is not entitled to decide a case on a basis that has neither been pleaded nor canvassed before him. His function is limited to deciding the issues put before him.
>
> b) Where, as in *Al-Medenni and Satyam*, a "theory" advanced by the judge is outside the scope of the pleaded issues (in the sense of the facts necessary to establish a claim or defence: *Shagang Shipping* at [98]), that will generally be a clear indication that reliance on that theory is impermissible.
>
> c) However, the key point is the interests of justice and, in particular, the question of prejudice to the losing party.
> d) This may mean that, even if an uncanvassed "theory" is not outside the scope of the pleaded issues, it would be unfair in all the circumstances of the case for the judge to rely on it. Conversely, in some cases it might not be unfair for the judge to depart from the scope of the pleaded issues, although generally only if this was fully addressed at trial.

195. It follows that I would not accept Mr Pickford's submission of a "bright line" distinction between a departure from the pleaded issues and other evidence, the former being always impermissible. I would however agree that there is a spectrum, with cases of a wholesale departure from a pleaded case, as in *Al-Medenni and Satyam*, being at an extreme end of decision-making that will clearly be impermissible.

Mr Pobjoy submitted that a 'wholesale departure from a pleaded case' had occurred before the Chief Justice. I agree. Even on a generous interpretation, the respondents' pleaded case had been limited to a change in circumstances, including national security considerations. The Chief Justice went beyond deciding the issues which had been put before him. In consequence, the appellant suffered manifest prejudice resulting in an outcome (the setting aside of section 9 of the Constitution Order) which he has been required to come before this Court to remedy.

55. Finally, I reject the respondents' submission that the appellant had an opportunity to put in post-hearing evidence but had failed to do so. I agree with Mr Pobjoy that the submission only highlights the unfairness to the appellant. I do not accept that, having been unable to respond to his opponent's case, it was properly the responsibility of the appellant, the innocent party, to put matters right by seeking permission to put in evidence after the hearing. To say the least, such an approach would do little to promote procedural rigour.

Decision on Ground 2

56. I allow the appeal on Ground 2.

GROUND 3: In the event that it did have jurisdiction, the BIOT Supreme Court erred in law by quashing section 9 of the Constitution Order

57. I emphasise that Ground 3 is advanced on the basis that the BIOT Supreme Court has the jurisdiction to consider the lawfulness of the Constitution Order. For the reasons I have given above, I hold that it does not have that jurisdiction. Only if I am wrong as regards Ground 1, does Ground 3 have any relevance.

58. I shall deal first with the concession which counsel for the Commissioner, Ms Demetriou KC, made before the BIOT Supreme Court and which is recorded by the Chief Justice at [116]:

116. The first issue to decide is whether this Court has jurisdiction to consider the vires or reviewability of Section 9 of the Constitutional Order 2004. The Claimants submit it has, while the Defendant submits it does not. If this Court does have jurisdiction it is common ground that this Court is not bound by the decision of the House of Lords in *Bancoult No.2* [ibid]: the speeches are highly persuasive but not binding.

59. The transcription of the hearing before the BIOT Supreme Court records the following exchange:

> CHIEF JUSTICE JAMES LEWIS: I just have a recollection that Lord Bingham in *Bancoult No 2* relies on *Quark* to say it is effectively -- although he is in the dissenting minority.
> MS. DEMETRIOU: Yes.
> CHIEF JUSTICE JAMES LEWIS: He relies on to it say it is effectively His Majesty in right of BIOT, because in *Quark*, of course, it was in right of South Georgia and the South Sandwich Islands. Please take your time because it is an important point and I want to get it right.
> MS. DEMETRIOU: Yes. My Lord, you have our submission, which is that we rely on Lord Rodger. Lord Bingham was in the minority, and so we say that no weight can be placed on his judgment because he was in the minority, and Lord Rodger records --
> CHIEF JUSTICE JAMES LEWIS: **Except you would accept none of that is binding on me in this court?**
> MS. DEMETRIOU: **My Lord, I accept that, that it is not formally binding on you, but it is obviously highly persuasive**. My Lord, the other point --
> CHIEF JUSTICE JAMES LEWIS: **For the avoidance of doubt, it is open to me to prefer the minority over the majority.**
> MS. DEMETRIOU: **My Lord, it is, but we say that the majority view is correct** and, my Lord, there is a further point here, which is a point about fairness. So even if it were -- even if it were possible to bring a challenge to the validity of the Constitution Order in this forum, so assuming in favour of my learned friend for a moment, and even if it were possible to seek to rerun the argument that had been run and failed in previous litigation, which again we don't accept, but let's assume that for present purposes in my learned friend's favour. What he says, the basis for his submission is he says, "Well, things have moved on." That's the basis for his submission and one of the points he made was that one of the considerations that was important to majority in Bancoult No 2, which was the funding position, he says that has moved on because there is now a treaty with Mauritius and so the United Kingdom is not going to incur that cost.'
>
> [My emphasis]

60. Mr Pobjoy submits that the Commissioner should be permitted to resile from this concession because: (i) the point arose for the first time in the course of oral submissions; (ii) the Commissioner did not have any proper opportunity to consider the validity of the Constitution Order which had not been in issue in the proceedings hitherto; (iii) the issue is one of significant public interest; (iv) it would be unfair for the point to be decided on a concession which had been given under a misapprehension; (v) the respondents have suffered no prejudice.

61. Taking the last point first, Mr Pobjoy submitted that his skeleton argument deals in terms with the concession and the appellant's application to resile from it [80] and that the respondents have raised no objection. So far as I am aware, Mr Rule raised no objection in his oral submissions. Secondly, and given the absence of any objection, I find that there was no prejudice to the respondents and that, having regard to all the circumstances, there were good reasons for allowing the concession to be withdrawn (see *AM (Iran) v SSHD* [2018] EWCA Civ 2706 at [41]). Thirdly, the concession concerned a pure point of

law. I find that the Chief Justice's opinion as expressed at [59] above was wrong in law; the fact that Ms Demetriou agreed with the judge did not make it right. Fourthly, I accept Mr Pobjoy's submission that Ms Demetriou was effectively (and unfairly) 'bounced into' making a concession by the Chief Justice. It is apparent from the transcript that the issue emerged out of nowhere late in the hearing; indeed, it was introduced by the Chief Justice in the course of Ms Demetriou's oral submissions. Fifthly, I find that the matter is one of significant public interest, especially in light of the fact that the Secretary of State was not represented before the BIOT Supreme Court. Accordingly, I grant permission to the appellant to resile from the concession made on his behalf by Ms Demetriou.

62. Having carefully considered the submissions of all the parties, I have concluded that: (i) the Chief Justice was bound by the judgment of the House of Lords in *Bancoult No. 2*; (ii) the majority in *Bancoult No. 2* was right and it was wrong in law for the Chief Justice to follow the opinions of the minority; (iii) even if he was not bound to follow *Bancoult No. 2,* the Chief Justice should have attached great weight to the opinions of the majority; (iv) if he chose to attach lesser weight to those opinions, he should have given reasons. His failure to give any or adequate reasons was an error of law; (v) having decided to depart from *Bancoult No. 2*, the Chief Justice attached inappropriate weight to an unincorporated treaty.

63. My reasons are as follows. First, I hold that the operation of a system of judicial precedent between the courts of England and Wales and jurisdictions in overseas territories (for which the Judicial Committee of the Privy Council (JCPC) is the highest court of appeal) is not in any doubt. In *Willers v Joyce (No. 2)* [2016] UKSC 44 Lord Neuberger set out the position as follows:

> 12. … First, given that the JCPC is not a UK court at all, decisions of the JCPC cannot be binding on any judge of England and Wales, and, in particular, cannot override any decision of a court of England and Wales (let alone a decision of the Supreme Court or the Law Lords) which would otherwise represent a precedent which was binding on that judge. Secondly, given the identity of the Privy Counsellors who sit on the JCPC and the fact that they apply the common law, any decision of the JCPC, at least on a common law issue, should, subject always to the first point, normally be regarded by any judge of England and Wales, and indeed any Justice of the Supreme Court, as being of great weight and persuasive value. **Thirdly, the JCPC should regard itself as bound by any decision of the House of Lords or the Supreme Court at least when applying the law of England and Wales. That last qualification is important: in some JCPC jurisdictions, the applicable common law is that of England and Wales, whereas in other JCPC jurisdictions, the common law is local common law, which will often be, but is by no means always necessarily, identical to that of England and Wales.**
>
> [My emphasis]

64. Applying those principles, the Chief Justice should have considered himself bound by *Bancoult No. 2*. The law of BIOT is, in so far as it is compatible with local ordinances, the law of England and Wales (see Section 3(1) of the BIOT Courts Ordinance 1983, quoted

at [35] above). As a judgment of the House of Lords, *Bancoult No. 2* was part of the law of England and Wales and the Chief Justice erred in law by not following it.

65. That conclusion is supported by the authors of *Hendry and Dickson* [see [10] above] at pp. 156-157:

> In principle, the decisions of United Kingdom courts have no more than persuasive authority in the overseas territories. Those courts do not form part of the judicial systems of those territories.
>
> However, there are some circumstances in which decisions of United Kingdom courts should be treated as binding in an overseas territory. The first is where the common law and rules of equity for the time being in force in England have been incorporated into the law of the territory by legislation of that territory. The development of the common law and the rules of equity by the decisions of the English courts must inevitably form part of such incorporation into the territory's laws.

There is an example of a mirror image of that principle in *Bancoult No. 1* where, at [42] Laws LJ, considers whether he was bound by a judgment of the JCPC:

> 42. I did not understand Sir Sydney to submit that we should feel free not to follow this authority on the footing that, as a decision of the Privy Council, it is persuasive only, however great the respect it may command. This is of some importance. As a municipal court of England and Wales we are in this case treading in the field of colonial law. We are, as I see the matter, justified in doing so for the reasons I have given upon the jurisdiction issue. But there is a trade-off. It seems to me particularly important that we should respect the decisions of the Privy Council upon relevant issues of colonial law. Where there is a body of jurisprudence, possessing high authority, which addresses the legal relation between the United Kingdom and its colonies, we should, sitting in this court, treat it as settled and binding. Otherwise we risk the spectre of conflicting judicial opinion to which I referred earlier, in paragraph 22.

There is, therefore, substantial authority for the principle that 'a body of jurisprudence, possessing high authority' (a description aptly describing *Bancoult No. 2*) whether established in a domestic or overseas jurisdiction should be treated as 'settled and binding.'

66. On the basis that he was bound by a judgment of the House of Lords, was the Chief Justice entitled to 'prefer' the opinions of the minority to those of the majority? The short answer is that he was not. In *Harper v National Coal Board* [1974] QB 614 at p621 Denning MR made this pithy observation:

> The second proposition is that if we can discover the reasoning on which the majority based their decision, then we should accept that as binding upon us. The third proposition is that, if we can discover the reasoning on which the minority base their decision, we should reject it. It must be wrong because it led them to the wrong result.

The opinions of the minority are wrong because they are minority opinions. There is one exception to that principle; majority judgments should not be followed if they are *per*

incuriam (that is, wrong in law because a relevant statute or binding judicial authority has been overlooked). There is no suggestion that the opinions of the majority in *Bancoult No. 2* were *per incuriam*.

67. Secondly, I consider that, even if he was not bound to follow *Bancoult No.* 2, the Chief Justice should have attached 'great weight and persuasive value' to the majority's opinions. It follows that, if he chose not to attach such weight and value, the Chief Justice should at the very least have given reasons for not doing so. However, he does not engage with the issue beyond his comment at [116] that 'the speeches are highly persuasive but not binding'. It is clear that he was not persuaded at all by the opinions of the majority. The Chief Justice appears to criticise the House of Lords majority at [165] for having reached a decision 'on pragmatic reasons' and at [168] for having relied on a feasibility study for resettlement which may have been unreliable. Whilst those observations may have been part of the Chief Justice's reasoning for attaching less than highly persuasive weight to the majority's opinions, he does not describe them as such. Then, without further reasoning, the Chief Justice simply records at [169] that 'with the speeches of Lord Bingham and Lord Mance in *Bancoult No.2*, I respectfully agree. It follows I also find that the use of the prerogative to enact Section 9 of the Constitutional Order 2004 was not permissible and it is therefore void.' Having determined that he was not bound by *Bancoult No. 2*, the Chief Justice should, in my opinion, have taken the judgment of the majority as the starting point for his analysis. Any departure from that starting point required an explanation. None was provided and, accordingly, the judge fell into error.

68. Thirdly, the Chief Justice's analysis of the (unincorporated) 2005 Treaty and the weight he attached to it is flawed. The Chief Justice discusses the 2025 Treaty at [170-177]. He notes that Article 6 provides:

> In the exercise of its sovereignty over the Chagos Archipelago, Mauritius is free to implement a programme of resettlement on the islands of the Chagos Archipelago other than Diego Garcia. Such resettlement shall be implemented in conformity with the terms of this Agreement and the laws of Mauritius.

At [176-177], he finds:

> 176. All that is needed to be said is that that HMG has committed to pay substantial sum to Mauritius for a commitment that includes the costs of resettlement, albeit this resettlement is not guaranteed under the Treaty.
>
> 177. It follows from this Treaty that it is not possible to say that the outer islands are required for the defence purposes of the Government of the United Kingdom and the Government of the United States of America as set out in Section 9 of the Constitutional Order 2004 nor that repopulation is no longer feasible on economic grounds.

The appellant contends that the findings in [176-177] are flawed. The Chief Justice had not received any evidence from the Secretary of State regarding the 2025 Treaty because he had allowed a challenge to the Constitution Order to proceed without giving the appellant a proper opportunity to respond to it. Moreover, the Chief Justice had made

findings on the legal effect of the Treaty [177] which were not open to him. The House of Lords in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 had held that courts had no authority to interpret a treaty which had not been incorporated into domestic law by legislation (the bill which will incorporate the 2025 Treaty still awaits enactment – see [1] above).

69. I find that the Chief Justice fell into error for the reasons advanced by the appellant. He sought to interpret the legal effect of a treaty which has not been incorporated into United Kingdom law by statute when he had no jurisdiction to do so. Moreover, even assuming he had jurisdiction, his findings at [177] were plainly not available to him on the evidence but constitute a *non sequitur*. It is not clear at all how the payment of money by the United Kingdom government to that of Mauritius, which the Chief Justice himself acknowledges is not 'guaranteed' for the resettlement of Chagossians, should necessarily bring to an end United Kingdom national security concerns. Indeed, the 2025 Treaty provides for further negotiations regarding any resettlement programme and specifically states (Article 3(2)(b and Annex 1) that the parties shall not 'undermine, prejudice or otherwise interfere with the long-term, secure and effective operation of the [UK/US] base [on Diego Garcia.]' Having strayed into an area which was closed to him, the Chief Justice then compounded his error by reaching findings which were not available to him on the evidence.

70. The Chief Justice's comments on the financial settlement under the Treaty are also problematic. He starts [173] by announcing that 'the prohibitive costs reason [regarding resettling the Chagossians] has also disappeared.' He then quotes figures from 'a letter attached to the Treaty dated 22 May 2025' (the legal status of which he does not determine) 'roughly summarising' these figures at [174] before concluding (somewhat vaguely) that 'this gives a grand total of many, many billions of GBP.' He then states abruptly [176] that 'the figures are immaterial.' The Chief Justice appears to conclude that the sums of money which will flow under the Treaty from the United Kingdom to Mauritius are likely to be so vast that any financial argument against resettlement is untenable. It is unclear what evidence, beyond his own calculations, led him to find that the financial arrangements under the Treaty 'include the costs of resettlement.' What is clear from the evidence of the appellant's witness, Paul Norris (Deputy Director in the Overseas Territories and Polar Directorate and Head of the Diego Garcia Treaty Implementation and Migrants Team at the FCDO) and which was filed in the appeal before this Court, is that none of the money which will be paid under the Treaty will be hypothecated for resettlement. I am not satisfied that the Chief Justice's somewhat haphazard analysis rationally justifies the conclusion he draws from it.

71. Mr Rule's written submissions on Ground 3 return to the question as to whether *Bancoult No. 2* was binding on the BIOT Supreme Court. I have already answered that question above. He also contends that the change in circumstances in the BIOT means that the court in *Bancoult No. 2* would now rule that section 9 of the Constitution Order was irrational. That submission presupposes that the evidence currently available is capable of justifying such an outcome. Given the current status of the 2025 Treaty and the

evidence of Mr Norris, I am not satisfied that it is. Mr Rule also advances an argument based on *Willers v Joyce No. 2* (see [63] above). For the reasons given above, I prefer the submission of Mr Pobjoy. I also reject Mr Rule's submission (skeleton argument, [91]) that the Chief Justice relied on the 2025 Treaty only for 'evidential purposes.' As I explain above [68-70], the Chief Justice did more than that; he sought to provide legal interpretation of an unincorporated treaty.

72. The submissions of Human Rights Watch address the change of circumstances brought about by the 2025 Treaty, new evidence as to the feasibility of resettlement and the contention that the opening words of section 9 of the Constitution Order ('Whereas the Territory was constituted and is set aside to be available for the defence purposes of the Government of the United Kingdom and the Government of the United States') no longer pertain. Leaving aside the core issue of jurisdiction, I am not satisfied that the BIOT Supreme Court had before it evidence capable of supporting those submissions.

73. Before I leave Ground 3, I need to address the Chief Justice's misapprehension of the right of abode of Chagossians in the BIOT. At [160], he writes:

> The opposite view, in *Bancoult No.2* by the majority (Lord Hoffmann, Lord Rodger of Earlsferry and Lord Carswell) was that, although the Chagossians **had had important common law rights of abode,** they were not so fundamental that they could not be removed by section 9 of the Constitution Order 2004, and that it was not irrational to do so.
>
> [My emphasis]

Any right of Chagossians to live in the BIOT in the period since their expulsion in the 1970s has not been a common law right. As Sir James Eadie observes (skeleton argument, [121]) many Chagossians have a right of abode as citizens in the United Kingdom under the Immigration Act 1971 but that is right conferred by statute; there is no common law right of abode in any part of the United Kingdom or its overseas territories, whilst a right to live in one part of the King's undivided realm does not confer a right of abode in all parts of that realm (see *Thornton v The Police* [1962] AC 339). The Chagossians had a right to enter the BIOT in the period 2000–2004 because the Immigration Order 2000 conferred that right upon them; they had no additional or underlying common law right to enter or reside. As Lord Hoffmann said in *Bancoult No. 2* at [44-45]:

> 44. In a ceded colony, however, the Crown has plenary legislative authority. It can make or unmake the law of the land.
>
> 45. What these citations show is that the right of abode is a creature of the law. The law gives it and the law may take it away. In this context I do not think that it assists the argument to call it a constitutional right. The constitution of BIOT denies the existence of such a right. I quite accept that the right of abode, the right not to be expelled from one's country or even one's home, is an important right. General or ambiguous words in legislation will not readily be construed as intended to remove such a right: see *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131-132. But no such question arises in this case. The language of section 9 of the Constitution Order could hardly be clearer. The importance of the right to the individual is also

something which must be taken into account by the Crown in exercising its legislative powers - a point to which I shall in due course return. But there seems to me no basis for saying that the right of abode is in its nature so fundamental that the legislative powers of the Crown simply cannot touch it.

Decision on Ground 3

74. If I am wrong as to Ground 1, the appeal is allowed on Ground 3. If I am correct as to Ground 1, then Ground 3 is otiose.

GROUND 4: The BIOT Supreme Court erred in law by quashing the section 12 notices

75. The first point to make on Ground 4 is that the all the parties are agreed that public law challenges to the section 12 notices issued under the Immigration Order (with the exception of any challenge based on the lawfulness of section 9 of the Constitution Order) fall properly within the judicial review jurisdiction of the BIOT Supreme Court. The Chief Justice acknowledges this at [184].

76. The Chief Justice summarises the respondents' grounds of challenge to the section 12 notices at [95]:

> 95. The Claimants' grounds in summary are:
>
> (i) The failure of the Defendant to exercise the power to grant a permit or provide for any form of visitation.
>
> (ii) The failure to follow a fair procedure in issuing the Section 12 Notices.
>
> (iii) Procedural unfairness or failure in the Defendant's conduct of the appeal process against the Section 12 Notices under section 10 of the Immigration Order 2004.
>
> (iv) Illegality and/or abuse of power. The decision to issue a notice to remove is vitiated by unlawfulness in that for these Chagossians the act of removal and threat of removal would involve:
>
> i. Commission of a serious crime; and/or
> ii. Discrimination.
>
> (v) The decision to issue a notice to remove is not lawful and fails to comply with public law duties.

77. The Chief Justice found that (i) the respondents had not been given an opportunity to explain their position before they were served with the section 12 notices [214-217]; (ii) no consideration was given to heritage visits [218]; (iii) reasons had not been given for issuing the notices other than that the presence of the respondents was illegal [211]; (iv)

the respondents' appeal to the Commissioner under section 10 of the Immigration Order was flawed and failed to put right any unfairness [139].

78. Sections 5, 10 and 12 of the Immigration Order provide:

> Restriction on entering or being present in the Territory
>
> 5. (1) No person shall enter the Territory or be present there unless he is in possession of a permit issued under section 7 or his name is endorsed on a permit under section 9.
> (2) This section does not apply to members of Her Majesty's armed forces, or to public officers, or to officers in the public service of the Government of the United Kingdom while on duty, or to such other persons as may be prescribed.
>
> Appeal to the Commissioner
>
> 10. A person aggrieved by any decision of an immigration officer may appeal to the Commissioner, whose decision shall be final and conclusive.
>
> Power to remove persons unlawfully present in the Territory and to prevent unlawful entry into the Territory
>
> 12. - (1) The Commissioner or the Principal Immigration Officer may make an order directing that any person who is unlawfully present in the Territory shall be removed from the Territory and shall remain out of the Territory, either indefinitely or for such period as is specified in the order, or that any person not then present in the Territory shall not enter the Territory and shall remain out of the Territory, either indefinitely or for such period as is specified in the order.

79. I find that the Chief Justice erred in law by quashing the section 12 notices.

80. First, I agree with Mr Pobjoy that there is no universal standard of fairness. What is fair or unfair will depend on the statute or regulations under which an administrative act is taken and on the particular facts in each instance (see *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531; *Secretary of State for the Home Department v Kolicaj* [2026] 2 WLR 83).

81. Secondly, there is no requirement for there to be policy guidance in addition to a statutory scheme. As Saini J noted in *Ismailov (No.2)* [2026] EWHC 1188 (Admin):

> So, the Supreme Court in *Shvidler* at [222] held that the absence of a published policy on designation was "a marker of a proportionate and tailored response, not the opposite". In *Dana CA,* it was similarly held at [64] that the argument "goes nowhere", as there is no public law duty to have a policy.
>
> The absence of a policy, as the Supreme Court observed in *Shvidler* [222], is the 'marker of a proportionate and tailored response, not the opposite.'

82. When applying those principles, as is clear from *Doody*, the requirement that a person, who may be adversely affected by a decision, should have the opportunity to make

representations may be satisfied before or after the decision has been taken. Therefore, in determining whether an administrative act is fair, the decision and any appeal should be assessed together. Moreover, any duty to give reasons for a decision will be highly fact-specific and depend on the nature of the decision; there will be circumstances in which detailed reasons will be necessary and others where no reasons at all will be required (see *R v Aylesbury Vale DC, ex parte Chaplin* (1998) 76 P.&C.R. 207).

83. The details of the respondents' arrival in the BIOT are set out by the Chief Justice at [42-47] and I shall not repeat them here. The respondents had not made applications for entry permits in advance of their landing in the BIOT. Mr Goddard (see [3] above) in his witness statement at [8] states that Mr Daniel Texeira, a BIOT Senior Fisheries Protection Officer, had encountered individuals who had landed on Ile du Coin, including the respondents. They told him that they 'intended on staying on the island permanently.' Whilst Mr Rule in his written submissions [100] complains that 'at no point did anyone actually speak to the respondents before deciding to issue the removal notices', Mr Goddard's evidence has not been disputed by the respondents.

84. Thirdly, I find that the Chief Justice was wrong to find that the respondents had been treated unfairly because they had been denied an opportunity to make representations before the notices were served on them. The Immigration Order contains no obligation for the Commissioner to seek representations prior to service of a section 12 notice. Instead, the Order provides for any objections to be addressed by way of a *de novo* appeal to the Commissioner (section 10). As the case law cited above shows, that is an entirely fair and legitimate provision. Moreover, the respondents had made it clear that they had not applied for permits in advance, were in the territory illegally and, most significantly, intended (and had made clear to all their intention) to remain in the BIOT permanently. Given those facts, it is not clear what purpose written reasons would have achieved; plainly, both the Commissioner and the respondents knew exactly where they and the other party stood. As Mr Pobjoy put it, 'the reasons for serving the notices were straightforward and obvious' (skeleton argument, [103]). On the particular facts, there was no need to provide any reasons on the face of the notices.

85. The Immigration Order provides a complete scheme by which the Commissioner can rapidly serve the public interest in maintaining efficient and orderly immigration control in the BIOT whilst ensuring the fair treatment of individuals affected by any acts carried out under the provisions of the Order. The Chief Justice's apparent criticism [200] that there is no additional 'policy or written procedures in this area' and that the Removal Order (Process of Determination) Regulations 2022 apply only to a group of migrants who landed on Diego Garcia in 2022 and who have now left the BIOT is unfounded. As noted above [81], there is no requirement for a policy, whilst there was nothing to prevent the Commissioner from treating the 2002 asylum seekers as a discreet category of entrant and formulating a policy which was specific to them.

86. Fourthly, 'a reasons challenge will only succeed if the party aggrieved can satisfy the court that he has been substantially prejudiced by the failure to provide an adequately

reasoned decision' (*per* Lord Brown in *South Bucks DC v Porter* [2004] UKHL 33; [2004] 1 WLR 1953 at [36]). I can identify no prejudice to the respondents in this instance and it was not argued before the Chief Justice that they had suffered any.

87. Fifthly, the Commissioner was under no obligation to consider granting temporary heritage visit permits to the respondents. Indeed, given that the respondents had told the Commissioner's officers and had broadcast widely through global media channels that they did not intend to leave the BIOT, it would have been absurd for the Commissioner to issue temporary visit permits to individuals who had made it clear that they intended to breach the terms of such permits. As the Chief Justice noted at [44]:

> Nowhere in [the 26 February 2026 application for interim relief] did the Claimants inform the Court that their intention was not to carry out a temporary visit but rather was to establish a permanent camp, nor that their plan to enter the BIOT in breach of entry restrictions without a permit had been developed over the course of some months. Rather the impression given to the Court was that the Claimants had been ignored in their request for a heritage visit and were driven to take matters into their own hands.

88. Sixthly, I find that the Chief Justice was wrong to conclude that the appeal procedure employed by the Commissioner under section 10 of the Immigration Order was defective. The respondents' appeal was made in the form of a letter. It contained no grounds of appeal. It is not clear what, if anything, the Commissioner should have made of such a document. In the absence of any reasoned case for setting aside the section 12 notices, the Commissioner's dismissal of the appeals was the only rational outcome. Moreover, the respondents' submission that the Commissioner should have read across to their appeal the contents of an interim relief application in the BIOT Supreme Court is without merit. The two processes were entirely separate. As the Commissioner wrote in his appeal decision at [8]: 'As noted above, you have failed to articulate any grounds of appeal. It is incumbent on you to set out why you think that the appealed decision is wrong. Your failure to do so is, without more, sufficient grounds to dismiss this appeal.' In the particular circumstances before him, that was a fair and reasonable response. Mr Rule (skeleton argument [104]) complains that 'there was … a failure to give adequate and sufficient reasons on the appeal consideration.' However, as King Lear observed, 'nothing can come of nothing.'

Decision on Ground 4

89. For the reasons I have given, I allow the appeal on Ground 4.

The Respondents' Cross-Appeal

GROUND A: Section 5 of the Immigration Order should be quashed

90. The respondents seek the removal of section 5 of the Constitution Order ('No person shall enter the Territory or be present there unless he is in possession of a permit issued under section 7 or his name is endorsed on a permit under section 9') as a 'necessary part of the relief on this judicial review and to give effect to the recognition … of the rights of abode of Chagossians…'

91. The Chief Justice reasoned at [182-183}:

> 182. Immigration control by permit may be seen in a different category to the right to abode. Obviously the refusal of a permit to those who can legitimately claim a right to abode would require very strong reasons indeed. Permits may be on varying terms and involve different locations. Applying for a permit to set up a permanent camp on an uninhabited island with no adequate resources and safety concerns requires different discretionary considerations from that applying for a temporary permit to visit graves for example whereas Lord Hoffman said "immigration consent will be no more than an additional formality."
>
> 183. I recognise a government has the legitimate right to control entry to specific locations, albeit with different concerns, and on different terms, for those with a right to abode. Many factors could properly inform any immigration controls, including *inter alia* habitability and safety, so I cannot say that Section 5 of the Immigration Order 2004 falls automatically with Section 9 of the Constitutional Order 2004.

If I am wrong on Ground 1 of the Commissioner's appeal, I adopt the Chief Justice's reasoning regarding section 5 of the Immigration Order.

GROUNDS B and C: Deportation of the Chagossians – illegal and a crime against humanity

92. The Secretary of State's skeleton argument [137-147] contends that the ICCA 2001 is not part of the law of BIOT and that no charge in respect of crimes against humanity allegedly committed in the BIOT has ever been brought. Moreover, the Rome Statute of the International Criminal Court (to which the ICCA 2001 gives effect) applies to crimes committed on or after 1 January 1991, 18 years after the last Chagossian left the BIOT.

93. Sir James Eadie submits that the comparison made in the cross appeal between the circumstances of the respondents (who knowingly entered the BIOT, a territory set aside for purposes of defence, without first obtaining permits) with victims of genocide, torture and 'ethnic cleansing' is vexatious. Although I make no comment on that latter submission, I am not satisfied that Grounds B and C are made out. For the reasons given by Sir James, the matters complained of are not justiciable within the BIOT court system, whilst the references in the cross-appeal grounds to 'Chagossian people' and the 'Chagossian population' make little, if any, sense in the context of the appeal before this Court. As Sir James points out, only one of the respondents has ever been to the BIOT previously, whilst the third and fourth respondents claim to have Chagossian ancestry.

94. I also agree with the reasoning of the Chief Justice at [223, 224 and 226]:

223. The Claimants submit removal would be the commission of a serious crime; and/or discrimination. Essentially this is based on offences under the UK International Criminal Court Act 2001. That Act makes it a crime against humanity to deport an entire population.

224. This ground is unarguable. It is quite hopeless to suggest that the officers of BIOT have committed such an offence, or were acting in a discriminatory manner, when carrying out their duties in respect of these Claimants. Further, it is trite law that unincorporated treaties are not the law of the land.

226. It also follows that the crime relied upon by Mr Rule KC under the Treaty of Rome (deporting an entire population), or under the UK ICC Act, is not a crime in the BIOT. It is not arguably, even if it were a crime in the UK which I do not believe it is, that would prevent the Defendant from carrying out the laws of the BIOT.

GROUND D: the Chief Justice was wrong to make no order for costs.

95. As a consequence of our judgment in the appeal, the costs in the court below will need to be revisited in any event.

Decision on the Respondents' Cross-Appeal, Grounds A-D

96. The cross-appeal is dismissed on all grounds.

CONCLUSION

97. The appeal of the Commissioner is allowed on all grounds. The cross-appeal of the respondents is dismissed on all grounds.

98. The Chief Justice set out his conclusions at [227-231]. Addressing those conclusions and for the avoidance of doubt, (i) the BIOT Supreme Court's declaration [227] that section 9 of the Constitution Order is unlawful and unreasonable is set aside. (ii) I agree with the Chief Justice at [228] that the respondents entered the BIOT without permits and that section 5 of the Immigration Order 'remains valid.' (iii) The order of the BIOT Supreme Court quashing the section 12 notices [229] is set aside. I declare that the section 12 notices were lawfully drawn and served on the respondents. (iv) All applications hitherto made by the respondents for permits to visit the BIOT have been lawfully determined by the Commissioner [230]. The Chief Justice's order as to costs is set aside. Any party seeking an order in respect of costs before this Court or in the BIOT Supreme Court should apply no later than 14 days after the handing down of this judgment.

Postscript

99. Sir James opened his oral submissions by expressing the United Kingdom Government's sincere regret for the manner in which the Chagossians were removed from the territory between 1968 and 1973. I have not dwelt at any length in this judgment on the severe difficulties which the Chagossian population suffered as a consequence of those removals. Strictly speaking, the legal issues before the Court did not require me to do so. However, it is important to bear in mind that this litigation is not only concerned with abstract principles of constitutional law; it also touches directly on the lives of individuals.