

BANCOULT (NO. 2) AND LEGITIMATE EXPECTATION

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The background to this case is the removal of the Chagos islanders in the 1960s. This was done to clear the main island, Diego Garcia, to allow the US Government to build a major military facility there. The UK Government had entered into treaty obligations with the US requiring the island to be made available. The surrounding islands were also cleared. Shortly before Mauritius became independent, and before the removal of the islanders, the Chagos Islands were separated from Mauritius and created as the distinct colony, or overseas territory, of the British Indian Ocean Territory (“BIOT”).

Thereafter, three significant legislative events occurred.

First, in 1971 the Commissioner of BIOT promulgated the 1971 Immigration Ordinance. One of its objectives was to ensure that the Chagossians should not be able to return to the Chagos Islands. Under the constitution of BIOT, the Commissioner was the legislature for the territory. This was the legislation struck down by the Divisional Court in *Bancoult (No. 1)* in 2000 ([2001] QB 1067).

Second, as a response to the judgment in *Bancoult (No. 1)*, the Commissioner, at the instance of the Foreign Office, promulgated a new immigration ordinance in 2000 which removed the need for the Chagossians to have an immigration permit before entering upon the islands.

Third, in 2004 an Order in Council was promulgated which changed the constitution of BIOT so as to remove the right of Chagossians to enter upon the islands, and a further immigration ordinance was also made to give effect to that intention.

The particular topic for this short talk is the use made by the Court of Appeal in *Bancoult (No. 2)* in 2007 ([2007] 3 WLR 768) of the domestic public law concept of legitimate expectation in order to strike down the 2004 Order in Council changing the constitution of BIOT. I should declare at the outset my historic involvement in the case as junior counsel for the Crown in *Bancoult (No. 1)*. There were those of us who wanted to appeal, to test whether the Divisional Court’s interpretation of the ambit of the rubric “peace, order and good government” was too narrow. But the Foreign Secretary at the time, Robin Cook, decided otherwise. It is his statement reacting to the Divisional Court’s decision which has proved to be the basis for the legitimate expectation argument

accepted by the Court of Appeal in *Bancoult (No. 2)*. The statement is set out at para. [90] in the judgment:

“I have decided to accept the court’s ruling and the Government will not be appealing. The work we are doing on the feasibility of resettling the Ilois now takes on a new importance. We started the feasibility work a year ago and are now well underway with phase two of the study. Furthermore we will put in place a new Immigration Ordinance which will allow the Ilois to return to the outer islands while observing our treaty obligations. This Government has not defended what was done or said 30 years ago. As Laws LJ recognised, we made no attempt to conceal the gravity of what happened. I am pleased that he has commended the wholly admirable conduct in disclosing material to the court and praised the openness of today’s Foreign Office”.

This statement is taken by the Court of Appeal to be an assurance by the Foreign Secretary that nothing would be done to prevent the return of the Chagossians. It appears that if Robin Cook had just said, “We won’t appeal”, and then the 2000 Immigration Ordinance had been introduced, there would have been no legitimate expectation. Clearly, the promulgation of a form of subordinate legislation (the Ordinance) could not of itself say anything about what might or might not be done by way of amendment of a superior legal instrument, ie the constitution of BIOT contained in an Order in Council.

It is worth dwelling for a moment on just how far-reaching a legal result the Court of Appeal has said flowed from these few words issued by Robin Cook. His words did not purport to be legislative. Moreover, he had no power to legislate away by his own declaration the right of the Queen in Council to change the constitution of BIOT. Pronouncements by a Government minister cannot change the law. Also, looking at the matter from the other side, from the point of view of the Chagossians, there had been no detrimental reliance by them on Robin Cook’s statement. Yet the effect of the Court of Appeal’s analysis appears to be that the Government cannot now alter the constitution of BIOT or do anything to prevent the return of the Chagossians, unless there is some overriding change of circumstances. Robin Cook’s statement appears to achieve more than an amendment to the constitution of BIOT itself could have achieved – since that could always be amended back again without having to show any overriding change of circumstances. The words of a Government minister thus appear to have created a norm superior to the constitution of BIOT. This strikes me as a little strange.

The law of legitimate expectation has been developed to operate as a partial control over the exercise of discretionary power. As is well known, since *Coughlan* [2001] QB 213 (and perhaps before) a legitimate expectation may come in two forms: a procedural legitimate expectation or a substantive legitimate expectation. A procedural legitimate expectation arises where the decision-maker gives an assurance that a particular procedure will be followed before making a decision. Such an assurance does not bind the decision-maker in any way as to the ultimate result, and operates as a sort of supplement to the ordinary rules of fairness. For these reasons, since there is no major conflict between the court’s area of responsibility and that of the decision-maker, such

legitimate expectations can be enforced without difficulty or the risk of an illegitimate usurpation by the court of the role of the decision-maker. But even here, absent detrimental reliance by the person affected, the decision-maker can give notice that it is simply withdrawing the assurance for the future. The assurance has not created an absolute and binding right in law; it is merely the declaration of a policy, and policies can legitimately be changed by the decision-maker.

When one turns to substantive legitimate expectations, the potential for a clash between decision-making by the court and by the primary decision-maker becomes much greater. That is because a substantive legitimate expectation involves an assurance as to the substantive outcome of a decision, not as to the process by which it is reached. But the decision as to substantive outcome is one which the law – be it statute or common law – has entrusted to the primary decision-maker, who has to make the judgment what to do *at a particular point in time*.

I want to emphasise this point. For these purposes, let us assume that the Chagossians had no underlying right to return to the islands such as to prevent a change in BIOT's constitution to prohibit that from happening. Whether or not BIOT's constitution should be amended at any point in time is a judgment for the Foreign Secretary and Government of the day *at that time*. That is the essence of the law leaving a matter to the discretion of a decision-maker, rather than creating binding legal rules specifying particular outcomes in advance. If outcomes specified in advance are what is required, one specifies a right in law to that outcome. But the Chagossians had not right in law to prevent a change to the constitution. On the Court of Appeal's analysis, the change in BIOT's constitution could not be said to be irrational. The amplitude of the area of discretion available to the Government was very great indeed. So a Foreign Secretary other than Robin Cook could legitimately and lawfully have decided to proceed in a different way from how he decided to act. A different Government might have a different view from Robin Cook and the early Blair Government about how to proceed.

Robin Cook's statement was not law. It did not create rights to bind other people – other Foreign Secretaries, other administrations. At most, it was a statement of the policy of the Foreign Office at the juncture when it was made. Indeed, it did not even bind Robin Cook while he was Foreign Secretary with the absolute force given to it by the Court of Appeal. Decision-makers are entitled to change their policies for the future: *Hughes v DHSS* [1985] AC 776, 788 per Lord Diplock. Where there is significant detrimental reliance on a statement of policy, that right to change a policy may become restricted. But there was none here.

But the effect of the Court of Appeal's judgment is that the policy-maker, after giving a policy assurance, was then treated as disabled from changing that policy unless the *court* was satisfied that there was an overriding change of circumstances. The practical effect of this is that the policy statement of a Government minister has come to have the binding force of a law preventing later relevant decision-makers from exercising for themselves the very discretionary power which the law says they should exercise according to their own judgment. This does not fit well with basic constitutional law in England and Wales.

Why shouldn't a new Foreign Secretary, or a future Conservative government, not be allowed simply to say, "We don't agree with Robin Cook's judgment of what to do, and we will adopt a different policy – namely, to use a change in the constitution by Order in Council to eliminate any right of return"? Why were they, simply by virtue of what Robin Cook said, to be subject to an obligation to show "proven good reason", which obligation did not exist under the general law, or be treated as subject to an obligation of consultation which did not exist under the general law?

The Court of Appeal relied upon the statement by Robin Cook to create a situation in which it, the court, had become in substance the main decision-maker – as judge of whether a good reason had been proved – in place of the body which the underlying law stipulated should be the primary decision-maker. This seems to me to be the most problematic aspect of the Court of Appeal's decision; but let me turn shortly to another.

It is not ordinarily permissible for a discretionary decision-maker to bind himself at one point in time how he shall exercise his discretion at all points in future. He may not decide how to exercise his discretion *nunc pro tunc*, as Lord Browne-Wilkinson put it in *R v Secretary of State for the Home Department, ex p. Venables* [1998] AC 407, 496-497. But because the doctrine of substantive legitimate expectation has just this effect (ie a prior policy statement is binding upon the decision-maker as to the substance of a future decision) the criteria for holding a substantive legitimate expectation to be made out are very strict. The assurance has to be clear, unambiguous and devoid of relevant qualification; that is to say, the decision-maker must clearly have had to his mind when making the assurance the very substantive outcome with which he is to be fixed, later in time. Also, the decision-maker should have had available when making the assurance all relevant information which could bear upon the ultimate decision (see eg *R v IRC, ex p. MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545; *R v Secretary of State for Education and Employment, ex p. Begbie* [2000] 1 WLR 1115) – otherwise, proper and effective decision-making by public bodies will be undermined, since the practical, binding decision will have been made at one early point in time without reference to all potentially relevant information which might be material when the actual decision falls to be made.

It is questionable whether both these elements were properly made out in this case. First, take the assurance. That said nothing about what might or might not happen by way of amendment to the BIOT constitution in future. It wasn't mentioned at all. Even the constitution itself – a far more formal document – said nothing about that. And subordinate legislation in the form of the 2000 Ordinance could say nothing about what might be done in relation to the constitution.

Secondly, as to the information available when the assurance was given, we know that only a preliminary report of potentially relevant information was available, and more work was required. This again would suggest that a substantive legitimate expectation with the full binding force given to it by the Court of Appeal could not be spelled out.

Therefore, as will have appeared, I am skeptical that the Court of Appeal has applied the law of substantive legitimate expectation correctly. In effect, they have resorted to that law to by-pass the fundamental question in the case, whether the Chagossians *did* in law have an underlying right preventing change of the BIOT constitution. In my view, the resort to substantive legitimate expectation was a false move, and that underlying question of legal rights does require to be confronted. That is a topic on which others are to speak.