

Cambridge Colloquium on the Royal Prerogative, 19 January 2008.
Political context (the Bancoult case) and Possible Solutions.

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“These days we are all too familiar with conducting foreign policy on the basis of false or misleading facts”. (Tam Dalyell MP in Adjournment debate on the BIOT Orders in Council, 7 July 2004).

I will assume that all are familiar with the legal arguments and with the three judgments which provide a rich harvest of quotations. To pick one that most succinctly sums up the view of the Courts I would choose Lord Justice Hooper at Judicial Review. “The suggestion that a minister can, through the means of an Order in Council, exile a whole population from a British Overseas Territory and claim that he is doing this for the ‘peace, order and good government’ of the Territory is to us, repugnant”.

I will try to set the judicial proceedings in the wider political context. There are several aspects to the BIOT/Chagos saga – first and foremost the human rights and humanitarian dimension; then defence and security; bilateral relations with Mauritius and the sovereignty issue; Anglo-American relations; international pressure arising from the Human Rights bodies of the UN and Europe; a Commonwealth and Africa regional dimension. Also the Archipelago has a global importance as one of the most pristine tropical marine environments still surviving. For the sake of brevity I will concentrate on resettlement, defence and sovereignty and suggest a way forward.

The long and tortuous history of the Chagos saga is riven with conflicting interests. Not surprisingly the FCO has not been averse to kicking the issues into the legal long grass. It buys time; officials and Ministers move on; ministers don't grasp political nettles unless they have to or there is a discernable UK benefit; the marine environment is preserved. But increasingly there is also a domestic political dimension which is forcing HMG to explore possible solutions. The legal battles of the last decade have been crucial in putting the Chagos Islands on the domestic and international political map. Once the legal process is exhausted there will be no alternative to negotiation. Since 2000 I have argued that there is only one way forward – HMG should call the parties together (US, Mauritius, the Chagossian leadership) to work out an overall settlement of the issues.

Foreign Secretary's commitment to the Chagossians

Within 3 hours of the High Court judgment of 3 November 2000 the Foreign Secretary, Robin Cook, made a statement: “I have decided to accept the Court's ruling and the Government will not be appealing. The work we are doing on the feasibility on resettling the Ilois now takes on a new importance. We started feasibility work a year ago and are now well under way 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...The Government has not defended what was done or said 30 years ago. I am pleased that he (LJ Laws) has commended the wholly admirable conduct in disclosing material to the Court and praised the openness of today's Foreign Office” - words, which 7 years later sound hollow and will continue to haunt the FCO until justice is finally done. A few days later, as British High Commissioner to Mauritius, I

told the Chagossians that they could start to return, knowing there was no provision for how that was to be achieved. It was clear that without assistance this hard won birth-right would remain theoretical.

In 1995 I became Deputy Commissioner of BIOT - a post held in FCO, so I never visited the islands. At that time the subject rarely rose above desk level. It helped that almost no one in public life knew of the Chagossians, though several MPs had espoused their cause over the years. My time as High Commissioner in Mauritius spanned the High Court judgment of November 2000 and 3 years 7 months later, the enactment of the Orders in Council (10 June 2004) which overturned the Foreign Secretary's decision, the High Court judgment and bypassed Parliament. Five days later, in a written statement to Parliament, the FCO Minister, Bill Rammell explained the measures. He justified them on two grounds: resettlement was not feasible and the UK's treaty obligations to the US to keep the islands set aside for defence purposes. These two justifications merit examination.

Resettlement

Announcing a resettlement study in 1999 would show to the Courts that HMG was taking the matter seriously. In his statement (above) Robin Cook said that the FCO would crack on with the feasibility work. Leading marine biologists were sceptical about the approach and quality of this 'independent' three phase study, and subsequently quietly critical of the results. I believe that officials began this process in good faith. But the political climate changed substantially after 9/11 whilst the Study was in progress. The conclusions, as cited by the Minister on 15 June 2004, were much more against resettlement than a 2001 draft which has since been lost! It was no surprise that the Study reflected the assessment already reached by the Overseas Territories Dep't of the FCO. In his justification of the Orders Mr Rammell made much of the Study conclusions, adding, for good measure, that resettlement "would involve expensive underwriting by the Government for an open ended period, and probably permanently". There is currently another study going on, commissioned by the Chagos Support Association, which is likely to reach a very different conclusion. All one can say is that, if 4000 servicemen can live on Diego Garcia, 150 miles to the South of the Outer Islands, over the past 40 years, resettlement is not impossible. It's a question of will and resources. Indeed Mr Rammell said so in the Adjournment debate of 7 July 2004 "If one is prepared to sign a blank cheque for resettlement, one can repopulate". And the latest official comment on the issue (FCO Minister to an MP on 17 December) states that the Study 'emphasised that any long-term resettlement would be precarious and costly'. This 2002 conclusion is in need of re-examination.

Defence and Security

Mr Rammell said much less on defence, only that the Orders were "necessary to ensure and maintain the availability and effective use of the territory for defence purposes for which it was in fact constituted and set aside in accordance with the UK's treaty obligations". The resettlement point has receded in recent FCO statements in favour of the defence argument. The PM's reply to the Downing St petition on 29 November 07 stated that "Mrs Beckett decided to seek permission to appeal, because our treaty obligations to the US require the Territory to be kept 'for the defence needs' of both governments and our 2002 feasibility study came down heavily against the feasibility of resettlement". In evidence to the Public Accounts

Committee on 10 December 07 the PUS (FCO) claimed that the “US have made clear that resettlement of the islands by the Chagos Islanders would pose security risks to the operation of the base on Diego Garcia”, without outlining what those risks are. I have never seen a convincing explanation as to why limited resettlement of UK nationals, on the Outer Islands would pose a threat to the security of the base, 150 miles away, or compromise its defence role. We are just told that it is so. But the Courts have seen two State Department letters, written at the behest of the FCO, to explain the defence needs. Those letters merit analysis by an independent defence expert. US bases in other parts of the world seem to have operated effectively, cheek by jowl with local populations. Of course 9/11, coming a year after the 2000 judgment, had a psychological impact. In a letter to the Times of 25 June 2004 Lt Cdr R W Cooper who surveyed the Chagos Waters in 1951 put it rather well: “Any objections to the occupation of the western islands arising from the present occupiers of Diego Garcia smack of military paranoia on the part of our allies, a phenomenon to which many of us have become accustomed. Defence Security compromised? By whom –flying fish?”

American pressure?

But how sure are we that the US objects to resettlement? In the first place I doubt that the US ever did demand that all the islands be evacuated, though they were probably silent accomplices. And I am doubtful too that the US pressured the FCO to fight resettlement through the Courts. Indeed Mr Rammell also said in the debate “We made our decision based on our own assessment and not as a result of any pressure from other parties. I have certainly received no representations from the US”, and he noted, neither had the Foreign Secretary. The FCO would, however, have taken care to ensure that the US concurred with the proposed course of action. On the day the Orders were announced the US Ambassador to Mauritius congratulated me. “Good for the Brits” he said. “Mind you we couldn’t do that in the States”. (He knew I was ‘flaky’ on the subject). It may suit the FCO to appear as acting either under US pressure (they will usually oblige) in fulfilment of the treaty obligations - in reality a 1966 Exchange of Notes - or to be acting independently, according to the prevailing legal and political situation.

The 2004 Orders

Without the Orders of June 04, which forced the issue back into the Courts, this Colloquium would not be taking place. An ill-considered recommendation by 2 or 3 middle ranking officials has had democratic and constitutional implications which neither they nor I, could have envisaged. They surely would not have pursued this course if they had. I argued against on human rights, humanitarian, bilateral and UK reputation grounds. So why did the FCO use this device to prevent the Chagossians returning? Following the 2000 High Court judgment it became apparent that resettlement would lead to the re-creation of a settled Overseas Territory, a prospect which would entail an open-ended political and financial liability. We were not in the business of re-creating colonies. The creation of a settled OT would put Chagos back in the UN ambit, a situation which three decades of dissimulation and subterfuge had kept out of the purview of the UN. As a colonial power the UK would be required to report on the Territory to the UN Secretary General under Article 73(e) of the Charter. Add to this the considerable cost of providing modern day facilities, required for resettlement (one day’s warfare in Iraq?). For as long as the Chagossians did

not, of their own volition return, FCO did not have to confront the issue but in late 2003 reports began to circulate of a planned surprise landing on the islands. In consultation, I assume, with the BIOT Legal Adviser the official responsible for BIOT came up with an ingenious stratagem - ban the Chagossians from returning by Orders, deploying the Feasibility Study and the defence and security arguments as justification. I believe FCO Legal Advisers had qualms. I hope that I was not the only official during the preceding weeks to argue that overturning a High Court judgment in this way, without informing Parliament, would be seen as behaving with colonial arrogance and would compound the human rights violations and deceptions of the past. Governing Overseas Territories by Order is everyday FCO business but wider FCO, Whitehall and Parliamentary consideration could have brought out the potential consequences of the proposal and led to its abandonment. But officials were anxious to get the Order in before the next Council, two months later, and did not want delay.

And Parliament was deliberately bypassed. Jack Straw admitted this in a letter of 15 June 2004 to the Chairman of the Foreign Affairs Committee. He conceded that the Orders fell within the ambit of a 2002 arrangement by which the FAC should ordinarily be given advance sight of Orders relating to the Constitutions of Overseas Territories. But the Foreign Secretary had a reserved right not to follow the agreed procedure in certain sensitive circumstances, eg because confidentiality was imperative until the measures were taken. Of course a prime motive for such confidentiality was to prevent MPs and the Government of Mauritius from making a fuss and stopping the Orders going forward.

Sovereignty dispute

On 23 September 1965 the Mauritian Chief Minister, Dr Ramgoolam and Council of Ministers reluctantly agreed to detach the Chagos Archipelago in the knowledge that HMG would have gone ahead anyway without their consent. In return Mauritius received a £3m grant along with a British undertaking to return the Archipelago to Mauritius when no longer needed for defence purposes. Mauritius was also granted fishing rights and the benefit of any minerals or oil discovered in or near the Chagos Archipelago. From the early 1970s onwards Mauritius has regularly claimed sovereignty over the Chagos in the UN and other fora, and demanded their return. In 1982 Dr Ramgoolam, by then PM, told a Mauritian Select Committee that the prime reason he had accepted the excision in principle was that 'he felt he had no legal instrument to prohibit the UK Government from exercising the powers conferred upon it by the Colonial Boundaries Act 1895, which powers could not be resisted even by India when the partition of that country took place before its independence'. Mauritius became independent on 12 March 1968. The Constitution conferred Mauritian citizenship on everyone born in Mauritius by that date and that part of BIOT which had previously been part of the Colony of Mauritius. Following the 2004 Orders the Mauritian Government threatened to withdraw from the Commonwealth in order to take the sovereignty dispute to the ICJ by way of a GA resolution.

The FCO continued to say, in response to Mauritian claims, that we remained open to discussions (which we did not encourage) regarding arrangements governing BIOT or the future of the Territory and that the Archipelago would be ceded to Mauritius when no longer required for defence purposes. In 2002 FCO added the rider 'subject to the requirements

of international law', an oblique reference to potential conflict between the hallowed principles of territorial integrity (as enshrined in GA Resolution 1514) and self-determination, should the Chagos become a settled OT.

Future Prospects

In a letter to the Times of 12 February 2007 I asked "Is it not time that HMG brought together Chagossian Leaders, Mauritius and the US to sort out this relic of the Cold War and rectify one of the worst violations of fundamental human rights perpetrated by the UK in the twentieth century?" In a further letter of 26 May, I said "The time has come for Government to exercise political will and resolve these issues diplomatically, rather than through the Courts. Apart from the legal costs, the UK's reputation for defence of human rights and basic freedoms is brought into question. For HMG to be pursuing a case that denies the Chagossians their fundamental right to return to their homeland, a right restored three times over 7 years by the Courts, puts us on a par with those countries which we condemn for lesser human rights violations. I hope the Foreign Secretary will try to see how this looks to the rest of the world, especially in Africa". It is clear from PQs and ministerial letters that the FCO no longer oppose the right of return. This suggests that they now accept that the Orders were wrong. Perversely FCO are appealing for reasons unrelated to the plight of the Chagossians but this is an issue for the PM's proposed Constitutional Reforms Commission and Parliament, rather than for the Courts.

There are today some 4 to 5,000 Chagossians living mainly in Mauritius of whom about 700 are the original inhabitants of Chagos, and a further 150 in Seychelles. Most will only want to visit their ancestral homeland. A just settlement involving the three governments and the Chagossians has always been possible. I suggest the following elements:

- Amend the BIOT Constitution and announce a package to include assistance to those who want to return, transport and basic infrastructure for up to 300 Chagossians; compensation to those who don't. Ask the US to contribute.
- Announce that it is HMG's intention to cede the Outer Islands to Mauritius when the UK-US Agreement expires on 30 Dec 2016. Diego Garcia to remain British for as long as the Base is required.
- Establish a UK/Mauritius Joint Commission to manage the Outer Islands, resettlement and commercial exploitation, including fisheries.
- Seek UNESO World Heritage status to protect the marine environment. Establish an international scientific monitoring station.
- In 2015 allow the Chagossians who have re-settled, to decide whether to remain a British OT or become part of Mauritius, on the lines of the autonomous Rodrigues model. Independence is unlikely to be a viable option.
- Involve DfID for development and MOD for transport, logistics etc
- Engage the FAC for parliamentary input and oversight.

- Convene a conference of the four parties to work out the above.

This 42 year saga of deception, legal wrangling, and violation of human rights may be drawing to a close. Hopefully in 2008, four decades after the start of the expulsions, the legal process will be exhausted and HMG will right the wrongs done to the Chagossians. Sadly, as the process continues to be drawn out, it will be too late for some. In their case justice delayed was justice denied. If FCO must appeal why not pursue the Prerogative case as a separate constitutional issue and in the meantime restore justice to the Chagossians?