Neutral Citation Number: [2017] EWCA Civ 397

Case No: C4/2016/2334 and C4/2016/2403

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
The Hon Mr Justice Foskett
[2016] EWHC 954 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2017

Before :

LORD JUSTICE JACKSON
LORD JUSTICE BRIGGS
and
LORD JUSTICE IRWIN

- -

Between :

R (on the application of TAG ELDIN RAMADAN BASHIR & OTHERS)	**Appellants/ Cross-Respondents**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent/ Cross-Appellant**
- and –	
SOVEREIGN BASE AREA AUTHORITY	**Interested Party**

- -
- -

Raza Husain QC, Tom Hickman, Edward Craven and Jason Pobjoy (instructed by **Leigh Day**) for the **Appellants**
Thomas Roe QC and Penelope Nevill (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates : 17, 18, 19 January 2017

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Approved Judgment

Lord Justice Irwin :

Introduction

1. The Claimants are six heads of household representing a group of refugees resident in one of the British Sovereign Base Areas ["SBAs"] in Cyprus. The appeal and cross-appeal arise from the judgment of Foskett J given on 28 April 2016, reported as *R (Bashir and others) v Secretary of State for the Home Department* [2016] 1 WLR 4613. For clarity, I will refer to the parties as Claimants and Defendant.

2. In 1998 the Claimants were rescued from a dangerous Lebanese fishing boat in the Mediterranean. They were intending to go to Italy, but were taken to one of the SBAs in Cyprus. The Claimants and their families have (with very limited exceptions) now lived in former forces' accommodation known as Richmond Village in the Dhekelia SBA for many years. Although the Defendant has for long accepted the Claimants to be refugees within the meaning of the Refugee Convention, there has been a very extended dispute as to the rights and obligations flowing from that status, as to whether the United Kingdom owes these obligations, and in particular as to whether they must be permitted to move to the United Kingdom.

3. On 25 November 2014, the Secretary of State refused the Claimants admission to the United Kingdom. It was said the Claimants had no strong ties to the United Kingdom, and there were "no reasons for treating them exceptionally". Relocation of the Claimants from the SBAs to the Republic of Cyprus was a "demonstrably durable … decision". This letter of refusal evidences the decision challenged. Foskett J quashed this decision on the basis that it had been taken without considering the views of the UNHCR, expressed in their letter of September 2013, that re-settlement in the Republic of Cyprus was no longer "a desirable or practical option". It is this conclusion that is the subject of the Defendant's cross-appeal.

4. Much of the dispute turns on the particular factual and legal position of the SBAs. It is agreed that the accommodation in Richmond Village is very dilapidated and indeed hazardous. Both sides agree that the Claimants and their families should leave. However, put very broadly, the Defendant's position is that the United Nations Convention relating to the Status of Refugees (1951) does not extend to the SBAs. Nor does the European Union Charter of Fundamental Rights. Hence, says the Defendant, she does not owe the refugees the obligations which would arise if those instruments did apply.

5. Moreover, the Defendant has, she says, made arrangements with the Republic of Cyprus which are in fact suitable for the Claimants and their families, and which would satisfy the obligations (or at least the "spirit" of the obligations) under the Refugee Convention, if the Convention did apply. The Defendant argues that the Claimants and their families have no right, whatever legal basis is invoked, to move to live in Britain.

6. The Claimants argue that the Refugee Convention does extend to the SBAs in Cyprus, and that the United Kingdom owes them the full suite of obligations arising under the Convention. Since those obligations cannot be discharged within the SBAs, the consequence is they must be permitted to migrate to Britain where the obligations can be discharged. The Claimants say that the arrangements made with the Republic of

Cyprus do not divest the United Kingdom of its legal responsibilities to them, and are in any event uncertain, unreliable and unacceptable to them. The Claimants argue that, even were the Refugee Convention held not to apply directly to them, identical or similar obligations (necessitating the same outcome) arise, because the Defendant took critical decisions intending conformity with the obligations under the Refugee Convention and cannot now depart from that. Alternatively, the European Charter applies, with the same effect. As a further alternative, if the Defendant fails to treat the Claimants as she would refugees in another British Overseas Territory ["BOT"], that would represent unlawful discrimination against the Claimants and their families.

7. The principal issues in the case are whether the Refugee Convention applies, and if so, whether that requires the Defendant to permit the refugees to move to Britain.

8. In his careful and elegantly expressed judgment, Foskett J analysed the facts exhaustively. I do not intend for the most part to rehearse the detailed facts again, and will only do so to address matters of controversy.

9. The judge concluded that since the UK government has said throughout that it would treat those assessed to be refugees, including these Claimants, in accordance at least with "the spirit" of the Refugee Convention, the Defendant has acquired obligations to the Claimants pursuant to the "*Launder*" principle, laid down in *R v SSHD, ex parte Launder* [1997] 1 WLR 839, as approved in *R v DPP, ex parte Kebilene* [2000] 2 AC 326. However, it is not clear that he considered there was any breach of this obligation.

10. The judge did conclude that the relevant decision was flawed since it was taken without due consideration of representations made to the Defendant by the UNHCR in a letter of September 2013. The Defendant cross-appeals against that conclusion in the Court below.

11. The Grounds of Appeal are in substance as follows:

Ground 1(a): Does the Refugee Convention apply as a matter of public international law?

Ground 1(b): Does the Refugee Convention apply by virtue of the principle in *Launder*?

Ground 1(c): Does the Refugee Convention apply as a matter of EU Law?

Ground 2: Did the decision of 25 November 2014 breach Articles 26, 32 and 34 of the Refugee Convention?

Ground 3: Did the decision of 25 November 2014 breach Article 14 of the ECHR?

12. The Ground of cross-appeal is that the judge was in error in holding that the decision of 25 November 2014 was vitiated because the Defendant failed to address the view of UNHCR that relocation of the Claimants to the Republic of Cyprus was no longer "a desirable option".

Does the Refugee Convention apply to the SBAs as a matter of public international law?

13. Foskett J concluded that the Refugee Convention does not apply: see the judgment at paragraphs 181 to 260. In addressing this issue I make reference to some of the passages in the judgment without incorporating them here.

14. I note that the Defendant argues that this issue was not open for argument by the Claimants. Rather, they were or should be prevented from advancing their case on this issue, because they did so unsuccessfully in litigation before the Courts of the SBAs in 2011; thus they are estopped *per rem judicatam* from raising the matter again. As Mr Roe QC for the Defendant observed in the course of argument, properly speaking estoppel is a prior question to the substantive issue. However, in common with the parties, I address the substantive issue first, since at least in some measure that approach makes the estoppel point easier to analyse. At this stage I merely indicate that I am against the Defendant on estoppel.

15. After a period of British administration of the island, Cyprus became a British Colony by annexation in 1914, a status confirmed in the treaty of Lausanne soon after the First World War. Cyprus remained a colony until 1960.

16. The United Kingdom signed the Refugee Convention in 1951, ratified it in 1954, and in October 1956 made a formal declaration pursuant to Article 40(1) that the Convention was extended, *inter alia*, to the colony of Cyprus, taking effect from 23 January 1957. There is therefore no question but that the Refugee Convention applied to Cyprus, including the territory subsequently comprised by the SBAs, whilst Cyprus remained a British colony. The first issue under consideration turns on whether that application survived the creation of the Republic of Cyprus, the exclusion of the SBAs from the territory of the new Republic and the maintenance of British sovereignty over the SBAs.

17. In approaching the factual analysis which follows, it is well to have in mind the legal approach to this question, to which I return at greater length below. In *R (Bancoult) v SSFCA (No 2)* [2008] UKHL 61, [2009] 1 AC 453, Lord Hofmann observed that the key question as to whether an existing extension (in that instance of a different Convention) survived constitutional change to a colony, was whether or not the change in question represented the creation of a "new political entity". That formulation was agreed in that case by those of their Lordships who expressed a view. With that test in mind, the question here is whether the SBAs constitute a "new political entity".

18. The general political history of Cyprus is well-known, if complex. Before independence in 1960, the island was already the scene of tension between Greek and Turkish Cypriots. The Greek and Turkish governments, as well as the Cypriot authorities, were involved in the negotiations that led to the independence settlement. The two major military bases, Akrotiri in the south and Dhekelia in the east, were (and are) of major strategic importance to the UK. It is easy to understand, particularly in the context of such complex and volatile conditions in the island as a whole, why it was thought essential to reserve these bases under British sovereignty and British control.

19. The two Sovereign Base Areas taken together represent about 3 per cent of the land area of Cyprus. In each case, the SBA extends well beyond the military bases, the land under direct military occupation and use. Sizeable settlements, under the sovereignty and forming part of the territory of the Republic of Cyprus ["RoC"], exist as enclaves within the territory of the SBAs. Access to the military bases themselves is restricted, with perimeter fences and appropriate security. The land outside the military perimeters, aside from the settlements under Cypriot sovereignty but within the territory of the SBAs, is for the most part under the private ownership of Cypriot citizens, as indeed would have been the case before independence. The judge appended to his judgment a helpful sketch map showing the SBAs. In paragraphs 55 to 58 Foskett J set down the description of the SBAs in more detail.

20. The Treaty of Establishment of the RoC provides that:

> ***"Article 1***
>
> The territory of the Republic of Cyprus shall comprise the Island of Cyprus, together with the islands lying off its coast, with the exception of the two areas defined in Annex A to this Treaty, which areas shall remain under the sovereignty of the United Kingdom. These areas are in this Treaty and its Annexes referred to as the Akrotiri Sovereign Base Area and the Dhekelia Sovereign Base Area."
>
> .....
>
> "***Article 8***
>
> (1) All international obligations and responsibilities of the Government of the United Kingdom shall henceforth, in so far as they may be held to have application to the Republic of Cyprus, be assumed by the Government of the Republic of Cyprus.
>
> (2) The international rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of their application to the territory of the Republic of Cyprus shall henceforth be enjoyed by the Government of the Republic of Cyprus."

21. There follow extremely detailed provisions of the Treaty, designed to ensure continued British control over and use of the Sovereign Base Areas for United Kingdom purposes. It is not necessary to itemise them. Cypriot residents of the SBAs acquired citizenship of the RoC, but gained no political rights in relation to the governance of the SBAs. Indeed, the treaty itself does not suggest any arrangements, or alteration in arrangements, for the governance of the SBAs.

22. Annex E to the Treaty provides for the transfer of the property of "the Government of the Colony of Cyprus", save where it is "situate" in the SBAs. Property, "immovable, movable, tangible or intangible" of the Government of the Colony of Cyprus which is situated in the SBAs is to be the property of the UK authorities. Property of the

government of the Colony is defined as "property vested in that Government or in Her Britannic Majesty for the purposes of that Government", and there is no attempt to distinguish between the two.

23. One aspect of the Treaty addresses customs and excise. Annex F, section 3 provided for harmonisation of duties between the RoC and the SBAs, but with an express reservation that the UK must not be required to:

> "take any action which would conflict with pre-existing obligations of the United Kingdom under international agreements".

24. Appendix O to the Treaty consisted of a "Declaration by Her Majesty's Government regarding the Administration of the Sovereign Base Areas". The Appendix set out the purposes for which the SBAs were created. The UK government also undertook not to allow purely civilian development, or new permanent settlement within the SBAs. Provision was made for the payment to the Republic of taxes by Cypriots settled within the SBAs.

25. Pausing to consider the relevant provisions of the Treaty, set out or summarised above, it appears to me that the Treaty fully preserves the sovereignty of the United Kingdom over the SBAs, although a range of practical matters and important harmonisation and cooperation are agreed, necessary to make the military use of the SBAs effective, and to avoid difficulty and friction with the new Republic. Where the matter is touched on at all, the international obligations of the UK are expressly preserved. Nor does any Treaty provision set out to alter the internal governance of the SBAs by the United Kingdom.

26. It is unarguable that, however one construes the phrase "new political entity", such a development is provided for by the Treaty and subsequent legislation in respect of the RoC. However, the moot point is whether the Treaty or enacting legislation, including the creation of the RoC, provides for such a change within the area of preserved UK sovereignty in the territory of the SBAs.

27. The Treaty was given effect by the Cyprus Act 1960. Section 1 permitted the establishment by Order in Council of the Republic of Cyprus. The territory of the RoC was to be "in" the Island of Cyprus, but not to consist of the Island of Cyprus, since the SBAs were excepted by Section 2. Section 2(1) reads:

> "2.- (1) The Republic of Cyprus shall comprise the entirety of the Island of Cyprus with the exception of the two areas defined as mentioned in the following subsection, and –
>
> (a) nothing in the foregoing section shall **affect** [emphasis added] Her Majesty's sovereignty or jurisdiction over those areas ;
>
> (b) the power of Her Majesty to make or provide for the making of laws for the said areas shall include power to make such laws (relating to persons or things either within or outside the areas) and such provisions for the making of laws (relating

> as aforesaid) as appear to Her Majesty requisite for giving effect to arrangements with the authorities of the Republic of Cyprus."

28. Since the grant of independence to the RoC, the UK government has legislated for the SBAs by means of ordinances, enacted by the Administrator of the Sovereign Base Areas.

29. Provision for the government of the SBAs was made by means of the Sovereign Base Areas of Akrotiri and Dhekelia Order in Council, 1960. The Order provided for the appointment of an Administrator, who is to be a serving officer, appointed by Commission. The Order grants the Administrator the legislative powers, which have been exercised by successive Administrators as I have said (Order in Council 4(1)). Direct control over such law by the Crown is maintained by paragraph 4(3), which empowers a Secretary of State to disallow and annul any law. Provision was also made for the appointment of a Chief Officer, Resident and Senior Judges, an Advisory Board and a Legal Adviser to the Administration.

30. The Order in Council provides for the continuation of existing law, subject to repeal or amendment by the law-making power of the Administrator, in the following terms:

> "*Existing Law to continue to have effect*
>
> 5. (1) the existing law shall, save in so far as it is in its application to the Sovereign Base Areas or any part thereof repealed or amended by, or by virtue of, any law enacted under this Order continue to have effect, but by virtue of, any law enacted under this Order continue to have effect, but shall be construed subject to such modifications and adaptations as may be necessary to bring it into conformity with the provision of this Order.
>
> (2) In this section "existing law" means any law enacted by any authority established for the Island of Cyprus, any Instrument made under such a law, **and any rule of law, which is in force in the Sovereign Base Areas or any part thereof immediately before the date of commencement of this Order or** [emphasis added] which, in the case of such a law or Instrument, has been made, but has not yet come into force, before that date."

31. A number of the Administrator's ordinances were before the Court at first instance and are before us. A pertinent example concerns restrictions on settlement in the SBAs. One of the stipulations in the Treaty was that the UK government maintained very flexible powers to bring in service and support personnel and their families, including service personnel from other countries at the invitation of the UK. However, it was agreed that others would not be permitted to settle and reside in the SBAs, unless they were Cypriot citizens and/or residents. This was given effect by a consolidated ordinance, originally Ordinance 5 of 1960, which stipulates that:

> "A person other than a recognised resident must not reside in the Areas for more than 28 days in any consecutive period of 12 months, except in accordance with a permit in writing issued by a Control Officer …"

32. It follows, in my judgment, that even where arrangements were designed to harmonise relations with the new Republic, for example by preventing settlement in the SBAs by non-Cypriots, the exercise of sovereignty was firmly retained by the United Kingdom, to be exercised through the legislative and executive functions of the Administrator of the SBAs. Moreover, the relevant Order in Council explicitly maintained any "law, and any rule of law" in force in the relevant territory at the point of the creation of the Republic of Cyprus.

33. The principal contention of the Claimants, and a fundamental question, as the judge recognised in paragraphs 185 to 192, is that the Convention applied to the SBAs from their inception. It seems to me this is a question principally of law, to be considered in the factual context of 1960. The judge (as he was asked to do) considered subsequent "state practice" by the UK, including (i) the approach taken subsequently to some (but perhaps not the most interesting) international conventions and/or treaties as they affected the SBAs, (ii) the accession in 1968 by the UK to the 1967 Protocol Relating to the Status of Refugees, (iii) the varying advice given by officers over the years since 1960 as to legal questions, and (iv) the practicality of the fulfilment within the territory of the SBAs of the obligations arising under the Refugee Convention. However, it seems to me that such questions are at least peripheral and probably anachronistic in relation to the question in hand. The application of the Convention in the SBAs either survived the changes in 1960 or it did not. Had the first Administrator, perhaps prompted by an officious legal advisor, asked the question in 1961 whether the Refugee Convention attached to the SBAs, the answer (however enveloped in caution) must in the end have been either yes or no.

34. The judge himself did not take this view. His conclusions on this issue were as follows:

> "221. I have to say that, however the principles of public international law are to be deduced and/or applied, it makes no sense, in my judgment, to conclude that a Convention as significant as the Refugee Convention (with its substantive humanitarian obligations) can be applied to a territory which does not make an informed decision about whether it is willing and able to accept those obligations. This was the approach of the Secretary of State in the Circular referred to in paragraph 214 above and the need to adopt it is obviously sound. Whilst it is quite possible to see why a "deeming provision" could be applied to acceptance of the Protocol, such a provision would clearly be inapplicable to the Convention itself.
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> 222. It is at this point and in this context that the argument in the Detailed Grounds of Defence (see paragraph 191 above) concerning the limited nature of what the SBAs comprised at their inception has effect. These areas totalling 98 square miles and 3% of the land mass of the island of Cyprus were, it was

argued, to be military bases in respect of which there was a clear understanding and commitment by the UK Government not to populate them other than with necessary military and administrative personnel. Those who lived and worked there would ordinarily be there on a relatively temporary basis to serve in the military forces or to render such educational and health support to those forces as was necessary. There would be a significant local Cypriot population living in the SBAs (albeit not in the military establishments *per se*) and their needs were to be provided for by the RoC. If anyone within the UK Government had addressed specifically the role which the Convention might have in the context of such a geopolitical unit, the conclusion must surely have been that it lacked the social and legal infrastructure to be able to sustain fully the obligations to which adherence to the Convention would give rise.

223. Whilst those considering the matter may well not have addressed the issue on the basis of whether the SBAs constituted new political entities, it is not inconceivable that the prevailing view (if the issue was addressed at all) was that the question simply did not arise as there was no realistic way in which the obligations under the Convention could be fully met. On that basis there was nothing to do, either positively or negatively, so far as the Convention was concerned. I agree with Mr Husain that, for the avoidance of doubt, the UK Government could have made a decision in 1966/67 formally to exclude the SBAs from the Protocol under Article IX (see paragraph 34 above). However, that would have involved a recognition that the Convention had applied to the SBAs prior thereto and, if I am right, the UK Government did not consider that it did apply – or at least thought that it probably did not apply.

224. This is, of course, speculative to a degree as there is no clear contemporaneous material to suggest that the matter was given express consideration. However, that itself adds weight to the proposition that no one considered that the Convention applied to the SBAs. If the position had been considered in 1960, it is unlikely that the scenario that has occurred in the present case (and, it appears, subsequently), namely, of a boat full of migrants from across the waters landing on the shore of one of the SBAs and seeking refuge, would have been foreseen as a real possibility.

225. Subject to the further arguments that Mr Husain advances concerning the direct application of the Convention to the SBAs to which I will refer below, I do not consider that the suggested analogy of the Turks and Caicos and Cayman Islands supports his argument and, in my view, the conclusion of the

> Senior Judges Court that the SBAs did indeed constitute new political entities (and very different from the new RoC) at the time of their inception was correct. If that is the test I must apply, then it means that my conclusion must be that the Convention does not apply to the SBAs."

35. It is common ground that there is no evidence the UK government or the SBA administration took a conscious decision about the matter, during the period of negotiation and planning for the Treaty, during the drafting and enactment of the relevant statute, order in council or ordinances establishing the SBAs and the law of the SBAs, or indeed for years afterwards. Thus either these obligations under international law were silently preserved, or they silently fell away. A critical point of the judge's decision (see paragraph 221 quoted above) was that the obligations under the Convention are so significant that they "cannot be applied" to a territory without there being "an informed decision". I could fully understand such an approach to a question as to whether such obligations have been adopted, but it seems unsatisfactory as an answer to whether such obligations continue, where they have been adopted previously. There, in any view, the analysis must focus on the relevant test for the continued survival of existing obligations under international law, and this Court must consider and apply, to the different facts arising here, the approach indicated by the House of Lords in *Bancoult (No 2)*. The judge's application of that test ("if that is the test I must apply …") was that the "SBAs did indeed constitute new political entities … at the time of their inception" (see paragraph 225). In approaching that question, I now turn to the decision in *Bancoult*, and to the application of the decision in the successive judgments of the SBA Courts.

Bancoult (No 2)

36. The facts in *Bancoult (No 2)* are significant for the proper understanding of the case. The case arose from the displacement of the Chagos Islanders from Diego Garcia and the other islands in the archipelago. The Chagos Islands were originally a part of the Colony of Mauritius, which was ceded to the British Crown in 1814. In 1953, the United Kingdom made a declaration under what was then Article 56 of the European Convention of Human Rights, extending the application of the convention to Mauritius, as one of the "territories for whose international relations it is responsible" (see the speech of Lord Hoffmann in *Bancoult (No 2)*, paragraph 64). In 1965, the Chagos Archipelago was joined with three islands previously part of the Seychelles to constitute a new and separate colony, the British Indian Ocean Territory. This was done by the British Indian Ocean Territory Order 1965 ["BIOT"] (Lord Mance, paragraph 139). In 1976, the three islands were returned to the Seychelles as part of the preparations for the independence of the Seychelles. At the same time, the BIOT Order 1965 was replaced by an Order confining BIOT to the Chagos Islands.

37. In 1971, the Commissioner for BIOT, who constituted the legislative authority for the Colony, enacted an Immigration Ordinance which authorised the compulsory removal of the islanders and provided that no-one should enter or be present in BIOT without a permit (Lord Mance, paragraph 139). This was to facilitate the creation of a large US military base on Diego Garcia, the largest island in the archipelago. There followed a series of legal claims by Chagos Islanders, which led to successive attempts at resolution, and the payment of significant sums of money as compensation to the displaced islanders and their descendants, without achieving any final resolution. In

Bancoult (No 2) the Claimant challenged whether, on the facts, the prerogative power of the Crown extended to the capacity to exclude the inhabitants of BIOT from their homeland. The central issue in the case, as Lord Hoffmann observed in paragraph 32, was the determination of the limit of prerogative power, not the question relevant to this case.

38. Indeed the application of the ECHR formed a very limited part of the case. The Claimant argued:

> "If the claimant's submissions are otherwise rejected, he has a valid claim to relief under the European Convention since it has, at all material times, applied to the Chagos Islands by virtue of the declaration extending rights to the territory made pursuant to article 56 (ex article 63), and the absence of any denunciation under article 58 (ex article 65) of that declaration. The Order creating BIOT cannot be read as diminishing the inhabitants' rights. The Crown, having conferred those rights on them and having entered into an international obligation under the Convention to respect them and refrain from withdrawing them is obliged to secure them."

The Secretary of State replied:

> "The notification by the United Kingdom in 1953 of the Convention rights under article 56 (ex article 63) to Mauritius and the Seychelles did not refer in terms to the Chagos Islands and lapsed in respect of the islands when BIOT was created. No separate extension of the Convention has ever been notified in relation to BIOT. The United Kingdom is not therefore responsible for alleged violations there of any rights guaranteed by the Convention. In any event notification applies to a legal entity; the effect of the United Kingdom's notification in respect of Mauritius was to make the United Kingdom responsible for any violations of the Convention in the territory of that colony; the effect of the creation of the legal entity of BIOT was that the islands ceased to be part of the legal entity in respect of which notification had been made and the notification ceased to apply to them. BIOT was a new and separate legal entity in respect of which no notification was ever made. In 1968, after the grant of independence to Mauritius, the United Kingdom, being no longer responsible for its international relations, the 1953 notification lapsed in its entirety. On no footing, therefore, could the Convention extend to BIOT."

39. On the main issue, the House of Lords divided, the majority favouring the Secretary of State, with Lord Bingham and Lord Mance dissenting. However, Lord Rodger, Lord Carswell and Lord Mance agreed with Lord Hoffmann that the ECHR did not apply to BIOT. Lord Hoffmann's conclusions were expressed as follows:

> "64. That leaves two points which were not considered by the Divisional Court or the Court of Appeal and which were lightly touched upon in argument but upon which the House is invited to rule. They are whether, in principle, the validity of the Constitution Order may be affected by the Human Rights Act 1998 or by international law. I do not think that the Human Rights Act 1998 has any application to BIOT. In 1953 the United Kingdom made a declaration under article 56 of the European Convention on Human Rights extending the application of the Convention to Mauritius as one of the "territories for whose international relations it is responsible". That declaration lapsed when Mauritius became independent. No such declaration has ever been made in respect of BIOT. It is true that the territory of BIOT was, until the creation of the colony in 1965, part of Mauritius. But a declaration, as appears from the words "for whose international relations it is responsible" applies to a political entity and not to the land which is from time to time comprised in its territory. BIOT has since 1965 been a new political entity to which the Convention has never been extended.
>
> 65. If the Convention has no application in BIOT, then the actions of the Crown in BIOT cannot infringe the provisions of the Human Rights Act 1998: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529. The applicant points out that section 3 of the BIOT Courts Ordinance 1983 provides that the law of England as in force from time to time shall apply to the territory. So, they say, the Human Rights Act, when enacted, became part of the law of the territory. So be it. But the Act defines Convention rights (in section 21(1)) as rights under the Convention "as it has effect for the time being in relation to the United Kingdom". BIOT is not part of the United Kingdom and the Human Rights Act, though it may be part of the law of England, has no more relevance in BIOT than a local government statute for Birmingham."

40. As I have already observed, there was a factual error in Lord Hoffmann's account: the territory of BIOT was not wholly drawn from that of Mauritius, but partly from that of the Seychelles. What significance that bears, must be considered.

41. The parties before us are agreed first that we are bound by *Bancoult (No 2)* and second that there has been no subsequent authority on the point, save for the advisory authority represented by the decisions, at first instance and on appeal, of the courts of the SBAs. Having identified the relevant features of *Bancoult (No 2)*, I turn to the approach of those Courts in applying the decision.

The Decision of the SBA Courts

42. The Senior Judges' Court heard a judicial review claim (*Bashir and Others v Administration of the SBAs and the Secretary of State for Defence* (2010) Judicial

Review No 1), handing down judgment on 23 March 2011. The Court divided on this issue. Collender J concluded that the SBAs were not a "new political entity" but a continuation of the Colony of Cyprus. He looked in detail at the provisions of the Treaty and the Act, and considered *Bancoult (No 2)*. The Court had before it evidence from a Mr Regan, Assistant Legal Adviser to the Foreign and Commonwealth Office. Collender J rejected the relevance of that evidence, as did the other judges at first instance and on appeal. The view taken by departmental lawyers did not assist the Court in reaching its conclusion.

43. Collender J expressed his conclusion on this issue as follows:

> "61. In my judgment on this point, the Claimants' answer to the question posed is correct. The vital question is not answered by changes in nomenclature or administrative changes but the origins and nature of the political entity. Whilst there are close analogies between this case and the *Bancoult (No 2)* case, there is a vital difference that, in my judgment, goes to the heart of the question under consideration. In the *Bancoult (No 2)* case the military bases concerned were created as a new political entity out of a British colony, leaving that colony subsequently to be granted independence. In the case of Cyprus, the military bases and surrounding territory retained by the Treaty of Establishment were what was left as the rump of the British colony of Cyprus after the RoC was created as a newly independent state out of the balance of the colony. The use of a new name, the appointment of an Administrator rather than a Governor and matters of that kind did not change the essential political nature of the territory which remained a UK overseas possession acquired in 1914, albeit much reduced in size.
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> 62. The distinction between this case and the *Bancoult (No 2)* case is well drawn by the citation of two passages from the 5th (current) edition of Halsbury's Laws of England, Volume 13 that have been put before the court. At paragraph 856, Halsbury deals with the status of the territory concerned in the *Bancoult (No 2)* case, as follows:
>
> > "The British Indian Ocean Territory was created a separate colony in 1956 by removing the Chagos Archipelago from among the dependencies of Mauritius, and by removing the Farquhar Islands, the Aldabra Group and the Island of Desroches from the colony of the Seychelles. These territories were acquired from the King of France by cession in 1814, and the Crown retains its constituent and legislative powers under the prerogative. The Farquhar Islands, the Aldabra Group and the Island of Desroches were restored to Seychelles in 1976.
> >
> > The Commissioner appointed by her Majesty by instructions through a Secretary of State may legislate for the peace, order, and good government of the territory.

> He may create, appoint to, and dismiss from offices held at her Majesty's pleasure."

63. At paragraph 864, Halsbury deals with the status of the SBAs as follows:

> "**Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus**
>
> The Sovereign Base Areas of Akrotiri and Dhekelia consist of those portions of the colony of Cyprus that were not established by the Cyprus Act 1960 as the Independent Sovereign Republic of Cyprus and remain within Her Majesty's sovereignty and jurisdiction. They are to be regarded, therefore, as constituting a colony acquired by conquest or cession as from 5 November 1914. The Crown retains its constituent and legislative power under the prerogative; the Constitution of 1960 is made by virtue partly of the prerogative and partly of the power of Her Majesty under the Cyprus Act 1960 to make any laws (and provisions for the making of laws) relating to persons or things either within or outside the areas, which seem requisite for giving effect to arrangements with the authorities of the Republic of Cyprus."

64. I am satisfied that the 1951 Convention as amended by the 1967 Protocol currently applies to the SBAs."

44. However, Collender J was in a minority. The other substantive judgment was given by Rumbelow J, with whom Whitburn J agreed. Rumbelow J began by recording the concession by the Defendant that if the SBAs "were not a new political entity, but only the relict of the old Colony of Cyprus" then the 1951 Convention would have continued to apply within the SBAs; when the UK signed the 1967 Protocol to the Convention, it did not exclude the SBAs, as did happen in respect of some other British Overseas Territories. This concession was maintained by the Administrator of the SBAs at first instance and on appeal.

45. After a review of the arguments, Rumbelow J expressed his conclusion as follows:

> "16. As to whether a new political entity comes into existence in respect of the SBAs, it is appropriate to have regard to all the circumstances, rather than seeking a simple and single test. The creation of the BIOT was a clear case of the creation of a new political entity. It was not a relict. However, there are some parallels between the BIOT and the SBAs. The BIOT was similarly crated to facilitate the establishment of a military base in the largest of its constituent islands, Diego Garcia. Both the BIOT and the SBAs were designed by Orders in Council. Each was given a new system of government and its own administration. In the case of the BIOT the government was headed by a Commissioner, who had law making powers.

> In the SBAs the government is headed by an Administrator who has law making powers, and the Administrator must be a military officer.
>
> 17. In 1960 the Treaty concerning the Establishment of the Republic of Cyprus was made between the UK and the new Republic. Alongside that Treaty came the "Declaration by Her Majesty's Government Regarding the Administration of the Sovereign Base Areas", which is known as Appendix O. Appendix O set out the purposes for which the SBAs were created, namely as military bases, and amongst the other provisions, Appendix O undertook not to allow, within the SBAs, purely civilian development, nor to allow the new settlement of people other than for temporary purposes. Appendix O clearly reflected discussions with the Republic in providing for harmonisation of the laws of the Republic and the SBAs, and in providing for the Republic to be entitled to taxes from Cypriots already settled in the SBAs.
>
> 18. Taking Appendix O as a whole, it was more than a self limiting political declaration by the UK. There were fundamental changes in the purpose, nature and governance of the SBAs from those operating within the old colony. Constitutional interactions were set up between the Republic and the SBAs. The conclusion must be that a new political entity had come into existence, and that there was more involved than simply giving a new name to the remaining parts of the old colony. The fact that sovereignty continues over the SBAs is not the test, for the Queen may exercise sovereignty over a BOT, without the BOT being a part of the UK.
>
> Accordingly, the 1951 Convention ceased to operate within those areas which became the SBAs, and the 1967 Protocol never became operative in the SBAs."

I will return to a discussion of this view after considering the judgments in the SBA Appeal.

46. A different constitution of the Senior Judges' Court sat on appeal later in 2011 (*Bashir and Others v Administrator of the SBAs and the Secretary of State for Defence* [2011] Appeal No 1). The Court was unanimous in concluding that the SBAs did indeed constitute a "new political entity".

47. The Court was clear as to its view of the proper approach:

> "The conclusion of *Bancoult 2* was that the BIOT was a newly created political entity. We have been invited – and we are sure that this is the right approach - to look at all the circumstances surrounding the creation of the RoC and the SBAs so as to come to a proper conclusion as to whether these were in reality newly created entities or what was left of the pre 1960 colony.

> No one feature will be decisive. One must look at matters in the round and decide upon the cumulative effect of the available material. Taking all material into account, what was the reality of the situation in 1960? The first port of call, logically, is the documentation raised at the time. That should shed light upon the reality of what happened in 1960 and what was then created or retained. We cannot hope, in the course of this judgment, to mention, still less analyse, every document; but we look at what we regard as the material of primary relevance. First we turn to the Treaty concerning the Establishment of the Republic of Cyprus, together with the "Declaration by Her Majesty's Government regarding the Administration of the Sovereign Base Areas" – commonly referred to as "Appendix O"."

48. The Appeal Court dismissed the suggestion that "the matter of continuing sovereignty" was decisive: all BOTs remain under Her Majesty's sovereignty, as indeed did BIOT, although that was held in *Bancoult (No 2)* to be a new political entity.

49. The Appeal Court, too, expressly rejected the significance of the views of departmental lawyers or other legal advisers. It is clear they also rejected the significance of official practice based on that advice. The extension of the ECHR to the SBAs in 2004 was "but evidence of what UK legal advisers thought in 2004 – and again, is not something which assists us" (paragraph 20).

50. The Court's conclusions on this issue, upholding the majority below, were expressed as follows:

> "21. The respondents ask us to consider the raft of new appointments made at the time the SBAs came in to being, as evidenced by the first few editions of the SBA Gazette now contained within the `appeal bundle'. This is new material – in the sense that it was not made available to the court below. By way of example, an Administrator, Chief Officer, Resident Judge, Senior Judge, Administrator's Advisory Board and Legal Adviser were all appointed at the outset. We also look at the new legislation enacted at the time by the Administrator, as appears in the first SBA Ordinances. One of the first steps was to provide for the continuation of existing law – altogether unnecessary, say the respondents, if this were merely the continuing of a colony. The Sovereign Base Areas of Akrotiri and Dhekelia Order in Council 1960 provided a constitution for the SBAs. All this taken together, in our judgment, points strongly towards the creation of a new regime and entity, the establishment of something new rather than the continuation of the old regime. Of course, Collender J did not have the advantage of some of this material – it seems to us impossible to dismiss this raft of new appointments and positions as mere changes in nomenclature.

> 22. We also think it a useful exercise to take a step back from the specific and look at the situation as we divine it to have been in 1960 – the people of Cyprus were being given their independence. No longer was the island a colony of an overseas power. The creation of the RoC was, beyond peradventure, a new political entity – an independent state. It is perhaps difficult to see, from the points of view of either the newly emerging RoC or the UK, what the point or advantage would be of retaining two small colonial appendages to a new independent state. What surely was needed was the best arrangement by which two powers who would be geographically and ideologically side by side could best co-exist in peaceful harmony, to their mutual benefit. That would surely be by two new independent political entities. We are driven not only by this but by all the material in the case to the firm and unanimous conclusion that the majority decision of the court below was right – that is to say, that the SBAs were a new creation – a new political entity, rather than what was left of a colony after the creation of the RoC. We thus endorse and uphold the decision of the court below that the provisions of the Geneva Convention do not, as a matter of international law, apply to these appellants."

Analysis

51. It is not clear to me that the phrase "a new political entity" is easy in its application. It must be considered in the context of the obligation of a state in public international law, not just in a general sense. Clearly a state may go through enormous political and constitutional change, and indeed a radical change of territory, without shedding its international obligations. The territory of France, at a time when by domestic and international law France contained Algeria, was many times the area of France after Algerian independence. The politics and constitution of France were very different before and after that event. Yet no commentator would suggest that France shed its obligations in international law at the moment of Algerian independence.

52. It is clearly correct that international obligations attach to states, or "political entities" not to territories, as Lord Hoffmann observed. Yet it seems clear that part of the reason why BIOT was a new political entity at point of creation was that it was created by grafting together portions of territories from two different existing colonies.

53. Even very major constitutional or political changes cannot be said automatically to create a new political entity. It must be correct that when the thirteen colonies broke from the British Crown and formed the United States of America that was a new political entity. However, for present purposes it would seem most unlikely that the United States of America, on the day President Lincoln was assassinated, having acquired vast new territories and defeated secession in a devastating civil war, was for the purposes of international law other than the same "political entity" as on the day President Washington died.

54. In her Post-Hearing Submissions the Defendant relies on some of the political and representative institutions of pre-independence Cyprus (Executive Council, Village Commissions, Municipal Corporations, District Councils) which were replaced by the governance of the SBAs as I have described it above. However, in my judgment those colonial institutions are not the mark of a different entity to the post-independence SBAs. Constitutional change was present but here, as elsewhere, that is a different question.

55. Nor is it easy to see how even profound political and territorial changes necessarily bring about a "new political entity" so as to abrogate pre-existing treaty obligations. When Germany went through fundamental political and constitutional changes in the 1930s, and united with Austria, is it to be said those changes created a new political entity and, without more, released Germany from pre-existing treaty obligations or obligations in public international law? The answer must be no.

56. As the Claimants argue, international law does not take cognizance of domestic constitutional arrangements, see *Treatment of Polish Nationals in Danzig* (1932) PCIJ, Ser A/B No 44, 4 February 1932 and the *Greco-Bulgarian Communities* Case (1930) PCIJ Ser B No 17.

57. I agree with those Judges in the Senior Court of the SBAs who indicated that all the relevant circumstances should be considered. However, the application of those circumstances, it seems to me, must be focussed on the underlying question of continuing obligations in public international law. With great respect to five of the six Judges of the SBAs, it appears to me they took too general an approach to the *Bancoult (No 2)* test. In the case of the SBAs there was a very major reduction in the territory, and important administrative change within the SBAs. However, there was no "new" colony or "new" BOT, as there was with the creation of BIOT. The entity which became the SBAs appears to me to have been a continuation of the Colony of Cyprus, albeit with the loss of the great majority of the previous colonial territory, and with administrative and treaty arrangements necessary for good relations with the new Republic. Constitutionally and politically it was a continuation of what had gone before. In the case of BIOT, the United Kingdom had sovereignty over that colony after its creation, but before its creation sovereignty was being exercised over two different and distinct colonies and by two distinct colonial administrations. Therein lies an essential difference.

58. Drawing together the threads, in my view the SBAs were a continuing political entity, rather than a new political entity, within the test in *Bancoult (No 2)*. The public international law obligations of the British Government as the Colonial power must be taken to have continued. This question cannot turn upon whether there was a conscious adoption of the Convention after the independence of the Republic of Cyprus. On the contrary, such adoption would only be necessary if this was a new political entity, and since there was no express adoption of the Convention, the question simply does not arise. Nor can the legal position turn upon the attitude of government lawyers, or the representatives of foreign states, in the ensuing years. Here, I agree with the Defendant and the senior judiciary of the SBAs.

59. In any event this aspect is at best a double-edged argument. The fact that the United Kingdom expressly denounced the UN Convention on the Nationality of Married Women 1957 as regards the SBAs, despite the fact that it had never been extended to

the SBAs at or after Cypriot independence, means at the very least that official legal thinking was in two minds on this question. However, the principal point is that to reach a decision on this point of law by reference to historic views on the law by officials is simply inappropriate.

60. The Claimants argue that their case is assisted by the "state practice" by the United Kingdom in relation to the Turks and Caicos Islands and the Cayman Islands. In 1956 these territories were part of the British Colony of Jamaica. The Refugee Convention was extended to Jamaica in 1956. Despite the independence of Jamaica in 1962, the Convention was never re-extended to either the Turks and Caicos Islands, or the Cayman Islands, yet in 1966 the British Government accepted expressly the Convention applied in those colonies. International parties also accepted this was so at least implicitly. However, for essentially the same reasons I find this unpersuasive. The fact that the official mind was Janus-faced cannot determine the law.

61. Equally, it seems to me the capacity of the SBAs themselves to deal with practical consequences arising from the obligations under the Convention cannot be decisive. Many small states are signatories to the Convention, and in some instances at least, would have no greater capacity than the SBAs to discharge such obligations within their territory. In the case of the SBAs, the United Kingdom has ample resources as the "Colonial" power to address such obligations. In any event, that does not seem to me an apt test here. If the obligations survived, they are there to be fulfilled.

Conclusion on the Refugee Convention

62. For those reasons, I would conclude that as a matter of public international law, the Refugee Convention continued to apply in those parts of the Colony of Cyprus which continued, with the status of Colony or British Overseas Territory, as the SBAs.

Issue Estoppel

63. As I have indicated, the Defendant seeks to say that the Claimants are prevented by the doctrine of Issue Estoppel from claiming that the Refugee Convention applies to the SBAs. This is by reference to the decision of the Appeal Court of the SBAs as I have summarised it above. The matter was raised before the trial judge but not pressed before him. As the Defendant's submissions make clear, this was because of the established principle laid down in *R v Secretary of State for the Environment, ex parte Hackney LBC* [1983] 1 WLR 524 and [1984] 1 WLR 592. In the *Hackney* case the Divisional Court concluded that the Crown could not rely upon the principle of issue estoppel in judicial review cases. This was because there was no true *lis pendens* between the Crown and the Respondents to the application, that in many cases, decisions on applications for judicial review were not final since matters were left open for reconsideration, and in any event, in many instances of judicial review the relief granted was discretionary only and thus contrary to the concept of final determination of an issue. That position was upheld in the Court of Appeal by Dunn LJ (page 602 A/B), a view given some support by Sir John Donaldson MR (606 D/E).

64. More recently this principle was restated in the judgment of Simon J (as he then was) in *R (Eco-Power Co UK Ltd) v Transport for London* [2010] EWHC 1683 (Admin) at paragraph 19, where he described this as a "well established rule". As the Defendant

observes, it is correct that Simon J went on to say that this approach may need to be looked at again. The Defendant invites us to do so.

65. I would decline the invitation. In my view this is a most unpromising case in which to embark on such a reconsideration. Apart from other considerations, this case involves continuing rights and obligations of a fundamental nature arising from the Refugee Convention. The earlier decisions which would give rise to estoppel are in a different jurisdiction. Somewhat different arguments have been presented than were before the Courts of the SBAs. In her Post-Hearing Submissions the Defendant appears to concede that even if this Court were to decline to endorse the exclusion of issue estoppel from judicial review proceedings, it would be appropriate that the established "special circumstances" exception from the application of the doctrine should be more liberally applied where the public interest requires it. In my view this case would be very likely to fall into that exception. I would therefore reject the Defendant's reliance on issue estoppel in this case.

Application of the Refugee Convention by virtue of the EU Charter

66. The Claimants advance an elaborate argument in favour of the application of the Refugee Convention by virtue of the EU Charter. The trial judge rejected this, see paragraphs 262-284. As the Defendant points out, the starting point for this contention must be that the Refugee Convention does not already apply to the SBAs since, if it does, this argument is otiose. It follows from my earlier conclusions that in my judgment this argument is academic.

67. Taking the matter briefly, the Claimant's contention is that Article 51(1) of the EU Charter provides that the Charter applies to member states when "implementing union law". In the "explanations" to the EU Charter, The Supreme Court has recognised that "implementing union law" refers to an action of a member state that is "within the material scope" of EU law (see *Rugby Football Union v Viagogo Ltd* [2012] UKSC 55); [2012] 1 WLR 3333. The Treaty on the Functioning of the European Union ["TFEU"] provides in Article 355(3) that "the provisions of the Treaty shall apply to the European territories for whose relations a member state is responsible" and the SBAs are European territories for whose relations the UK is responsible.

68. However, the Claimants concede that the SBAs are subject to special arrangements. The UK's Treaty of Accession to the EU by Article 227(1) (later 229(6)(b) of the successor Treaty) provides that:

> "The Treaty shall not apply to the Sovereign Base Areas of the United Kingdom in Cyprus."

In my view that constituted a very clear exclusion of the SBAs from the ambit of the Treaty. However, the Claimants proceed to argue otherwise.

69. Annexed to the Treaty of Accession was a "joint declaration on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus". This stated:

> "The arrangements applicable to relations between the European Economic Community and the Sovereign Base Areas

> … will be defined in the context of any agreement between that community and the Republic of Cyprus."

70. The Treaty by which the Republic of Cyprus acceded to the EU contained Protocol No 3 relating to the SBAs: the Cyprus SBA Protocol. Article 7(b) of Part 4 of the Cyprus Protocol amends the Article (227(1) succeeded by 229(6)(b) succeeded by Article 355(5)(b) of the TFEU) excluding the application of the Treaty to the SBAs as follows:

> "This Treaty shall not apply to the United Kingdom Sovereign Base Areas … **except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas** of the United Kingdom …"

71. The recital to the Cyprus SBA Protocol includes the statement:

> "Recognising therefore the need to apply certain provisions of the Treaty establishing the European Community and related EC law to the Sovereign Base Areas and to make special arrangements regarding the implementation of these provisions in the Sovereign Base Areas …"

And there follow provisions of the Cyprus SBA Protocol, dealing for example by Article 5(2) with the obligation of the United Kingdom to exercise control on external borders of the SBAs. By Article 7 of the Cyprus SBA Protocol the United Kingdom is made "responsible for the implementation of this protocol in the Sovereign Base Areas".

72. Part Four of the annex to the Cyprus SBA Protocol provides:

> "7(a) An applicant for asylum who first entered the island of Cyprus from outside the European Community by one of the Sovereign Base Areas shall be taken back or readmitted to the Sovereign Base Areas at the request of the member state of the European Community in whose territory the applicant is present.
>
> (b) The Republic of Cyprus, bearing in mind humanitarian considerations, shall work with the United Kingdom with a view to devising practical ways and means of respecting the rights and satisfying the needs of asylum seekers and illegal migrants in Sovereign Base Areas, in accordance with the relevant Sovereign Base Area administration legislation."

73. By that route, the Claimants argue that since in relation to the provisions of the Cyprus SBA Protocol, the United Kingdom is working with the RoC in relation to the "rights and needs of asylum seekers", the United Kingdom is in that regard implementing "the arrangements set out in the Protocol on the Sovereign Base Areas" within Article 7(b). Thus, say the Claimants, the exclusion in the Treaty is set to one side, the Charter applies in respect of these responsibilities, and by that route the Refugee Convention is applicable.

74. In my view, the judge was correct to reject these contentions. Firstly, the overriding provision is that the Treaty (and thus the Charter) shall not apply to the SBAs. Secondly, by Article 355 of the TFEU the Treaties do not apply to the SBAs "except to the extent necessary to ensure the implementation of the arrangements set out in the Cyprus SBA Protocol … and in accordance with the terms of that Protocol". The Cyprus SBA Protocol applies and disapplies specific EU instruments. Article 5(2) requiring the United Kingdom to control the SBA's external borders does not import EU law on the entry and treatment of asylum seekers but instead imports an agreement making no mention at all of the EU *acquis*. In my view the Defendant is correct in saying this does not import EU law and the provisions requiring the RoC and the UK to work together in this regard cannot without more be thought to import the Charter.

75. The decision in this case does not concern asylum applications by British Overseas Territory Citizens in the SBAs for asylum in Cyprus, which might import EU law.

76. In any event, as the Defendant also points out, Article 40 of the Refugee Convention makes it clear that the Convention only extends to territories for whose international relations a state party is responsible, if that state party so declares. The provisions of the TFEU and/or the Cyprus SBA Protocol could not properly be read as such a declaration.

77. For those reasons, I would reject any appeal from the judge based on the argument derived from the EU Charter.

78. Given my conclusion on the principal issue as to the application of the Refugee Convention, I do not intend to address the judge's conclusions as to how the Secretary of State might apply the "spirit" of the Convention, or as to any possible impact of the *Launder* principle. I accept the judge's conclusion, so far as it goes, that the Defendant was obliged to consider the representations of UNHCR of September 2013. However, it is not necessary to consider the arguments of the Defendant as to the detail or potential impact of that letter, or to consider any of the fresh evidence sought to be advanced on the point. Nor is it necessary to consider the Claimants' arguments derived from Article 14 of the European Convention.

A Fresh Decision: Must the Refugees be permitted to move to Britain?

79. The Secretary of State must take the decision once more but on the basis that the Refugee Convention applies directly and the United Kingdom owes direct obligations to the Claimants by operation of public international law. In my judgment the outcome of that decision must take into account the history but cannot be determined by this Court merely by re-analysing the historic evidence. The decision must be taken in relation to the current facts. Absolutely critical to the decision are some obvious factors.

80. The obligations of a State with responsibility for refugees cannot be "exported": of course the obligation can be satisfied by mutual agreement, but in the absence of any of the narrow factors which can operate to set aside the obligations altogether (and which do not arise here), the obligations here remain with the Defendant.

81. It has been part of the Defendant's argument on the principal issue that those obligations cannot be met within the SBAs. This weighed significantly on the mind of Foskett J as the passages quoted above demonstrate. Although I have taken a different view from the judge on that principal issue, I note the emphasis and significance attached to the point below. Yet now it appears that Mr Roe argues that the duty to the Claimants may be satisfied by permitting them to remain where they are, in the admittedly unsatisfactory conditions which have afflicted them for so long. Apart from the inconsistency of position, it would seem to me unlikely that such can be consistent with the duty under Article 34 of the Refugee Convention, that the responsible State should "as far as possible facilitate the assimilation and naturalization" of refugees. It clearly is "possible" for the Defendant to permit the Claimants entry to the United Kingdom, and also to other BOTs.

82. These Claimants cannot be assimilated and naturalized within this non-metropolitan territory of the United Kingdom, adopting the language of Article 34. Apart from the practical considerations, such settlement would breach the Treaty obligation and be inconsistent with the intentions set out in Appendix O to the Treaty, and enshrined in Ordinance 5 of 1960, as set out above in paragraph 31. It is also the case that the Claimants are not in the same circumstances as aliens wishing to travel from other BOTs: they are not "aliens generally in the same circumstances" for the purposes of Article 26 of the Convention, and any permissible restriction on the freedom of movement of aliens in other BOTs.

83. I reject the Claimants' submission that the arrangement with the RoC amounted to "constructive expulsion" within the meaning of Article 32. The judge was correct in his conclusion on this point (see paragraphs 341-342 of the judgment). If such an approach were to be repeated by the Defendant in taking a fresh decision following this judgment, then in the absence of an unexpected agreement as to resettlement in the RoC, it would not constitute constructive expulsion and a breach of Article 32. However it would be very likely to represent a repeated failure to meet the obligations which I conclude fall upon the UK.

84. Prominent amongst the relevant factors must be the enormous delay which has affected these Claimants and their families. There can be no justification for any future decision which leaves these Claimants' position unresolved for any further length of time. As the judge made clear, their present conditions are quite unacceptable. That appears to be common ground.

85. It would seem to me appropriate that this Court should direct a timetable for the fresh decision which is now necessary. I would regard it as unreasonable and a failure of the obligations to the refugees if resettlement was not achieved rapidly.

86. To the extent indicated, the Claimants' appeal succeeds. Given the need for a fresh decision, I do not address the cross-appeal further.

Lord Justice Briggs:

87. I agree.

Lord Justice Jackson:

88. I also agree.