Responsibility and Redress: The Chagossian Litigation in the English Courts

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For many, the Chagossian litigation in the English courts highlights a travesty of social justice aggravated by the fact that the policy of deracination was pursued by successive UK governments against a background of UN-inspired decolonisation and by the current government’s unwillingness to correct the situation. Surely the actions of the UK government could not possibly have the colour of lawful authority?

This chapter examines the legal challenges brought against the UK government in the English courts to establish legal responsibility and redress for the expulsion and/or exclusion of the Chagossian people from the British Indian Ocean Territory (BIOT) to Mauritius and the Seychelles. In particular, it investigates the public law proceedings—the Bancoult litigation—which challenged the validity of the legislation denying the Chagossians right of abode in the outer Chagos islands.¹ The chapter also discusses attempts made to secure compensation for a number of private law wrongs perpetrated by the UK government in connection with the process of exiling Chagossian people (the Chagos Islanders case).² The Chagossian litigation invites normative analysis from a number of different legal perspectives, not least that of public international law. The international angle is considered by Maureen Tong in her chapter (this volume) and in several publications by the present author (see e.g. Allen 2007; 2008). The current chapter has a narrower, technical aim of analysing the legal issues in the above-mentioned cases and considering their legal ramifications for Chagossians and for English law in general.

¹ R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2001] 1 QB 1067 (‘Bancoult 1’); R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (‘Bancoult 2’) 2006] EWHC 1038 (Divisional Court); [2008] QB 365 (Court of Appeal); [2008] 3 WLR 955 (House of Lords).
Background

As described in previous chapters, in 1965, the UK government enacted the BIOT Order in Council,³ which excised the Chagos islands in the middle of the Indian Ocean from the British colony of Mauritius to constitute the BIOT.⁴ In a 1966 treaty, the UK government made Diego Garcia available to the US government for defence purposes.⁵ Although the US government only required the use of one island, it was agreed that the entire Chagos archipelago would be cleared of its inhabitants.⁶ Consequently, between 1968 and 1973, the UK government covertly exiled the Chagossian people from the BIOT. This process was purportedly authorised by the BIOT Commissioner. Acting in his capacity as BIOT’s colonial (subordinate) legislature, he enacted the Immigration Ordinance 1971. Section 4 of the Ordinance provided that no person was allowed to enter the BIOT or remain in the territory without a permit. Although many Chagossians had been removed by this time, the Ordinance ensured that they would be prevented from returning to the BIOT. The evacuation of Diego Garcia was completed in October 1971 and the outer Islands were emptied by May 1973. The displaced population were transported to Mauritius and the Seychelles where many of them became chronically impoverished (Jeffery and Vine, this volume). The displaced population also included those Chagossians who were temporarily outside the BIOT during the process of exile and were subsequently prevented from returning.

In 1972, the UK government agreed to pay the Mauritian government £650,000 in order to cover the costs of resettling the displaced Chagossians. However, while this sum was paid to the Mauritian government, it was not distributed to the Chagossians. By 1977, the lack of an official resettlement programme produced spiralling Chagossian debts, which led to demands, especially from Chagossian women, for the distribution of government funds. The fund was distributed between

³ S.I. 1965/1920. This Order also excised the islands of Aldabra, Desroches and Farquhar from the colony of the Seychelles and included them within the new colonial unit. BIOT came into existence on 8 November 1965.
⁴ The Treaty of Paris 1814 ceded Mauritius and its Lesser Dependencies (including the Chagos islands) to the UK.
⁵ Exchange of Notes between the UK and US Governments, 30 December 1966 at http://www.fco.gov.uk/resources/en/pdf/pdf17/fco_ts01-00_us_construct_biot
⁶ In a confidential agreed minute, the UK government undertook this ‘administrative measure’ under para. 2(a), ibid..