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Disputes over the British Indian Ocean Territory: July 2017 update

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Summary

Between 1968 and 1973 the British Government cleared the entire Chagos Archipelago of its inhabitants, in anticipation of a US military base on the biggest island, Diego Garcia. The Archipelago was made a colony, the British Indian Ocean Territory (BIOT). It subsequently became a British overseas territory.

Two main disputes have arisen from these events. One has been between the Chagos Islanders and the British Government over the legality of their removal and whether they have a right to return. The other has been between the UK and Mauritius about sovereignty over the BIOT. In 1965 the UK undertook that it will cede sovereignty to Mauritius once the BIOT is no longer required for defence purposes.

A May 2013 Library briefing surveyed the origins and subsequent evolution since 1965 of these disputes, including past and ongoing legal cases brought before British, European and international courts. The briefing went on to explore potential ways forward for resolving these disputes by the time of the UK general election in May 2015. This update summarises the main developments over the intervening four years.

A fresh resettlement feasibility study has been carried out. It set out three resettlement options: large-scale resettlement; medium-scale resettlement; and pilot, small-scale resettlement. However, in November 2016 the previous Government announced that it had decided not to allow resettlement. The decision provoked condemnation from Mauritius and supporters of the Chagossian cause in the UK, and raised the prospect of further legal action. Since then, there has been debate about the best use of – and motives behind – a £40 million support package for Chagossians and renewed calls for the restoration of the right of abode, perhaps as a prelude to a change of policy on resettlement.

In 2015 a Marine Protected Area (MPA) introduced by the British Government around the Chagos Archipelago (apart from Diego Garcia, where there is a US military base) was ruled by a Tribunal under the UN Convention on the Law of the Sea to have been established without proper regard to the rights of Mauritius. Some legal commentators have taken this as tantamount to saying that the MPA is unlawful. The UK disagrees with this interpretation. The Tribunal was more equivocal on sovereignty than the Mauritian Government, which brought the case, will have hoped. It declined jurisdiction on the issue but found that the UK's 1965 undertaking to cede sovereignty to Mauritius when the BIOT is no longer required for defence purposes is binding under international law.

In July 2016 Mauritius said that it would seek a referral by the UN General Assembly to the International Court of Justice later in the year in order to obtain an advisory opinion on sovereignty. Mauritius ultimately held back from seeking a referral and there have been talks between the two governments. But Mauritius said that it would seek a

referral in June 2017 if insufficient progress was made in those talks by then. On 22 June the General Assembly voted 94-15 to refer the issue.

A decision on whether to extend the life of the US military base on Diego Garcia for a further 20 years had to be made by the end of 2016. The decision to do so was announced in November 2016.

In June 2015 the Supreme Court heard an application for the 2008 verdict of the House of Lords – which ruled that the use in 2004 of Orders in Council to prevent the Chagossians from returning had been lawful – to be set aside. In June 2016 the Supreme Court ruled against the application by a majority of 3 to 2. However, the decision of the previous UK Government against allowing resettlement has led to an application for judicial review of the original ban. Supporters of the Chagossians hope that it will be heard during 2017 but it may not happen until 2018.

The Supreme Court heard an appeal on behalf of Chagossians against the MPA on 28-29 June 2017.

1. November 2016: the previous Government decides against Chagossian resettlement

A new feasibility study was conducted…

The Conservative-Liberal democrat Coalition Government announced a new study on the feasibility of resettling Chagos Islanders in July 2013, undertaking to reach a decision about the right of return by the time of the May 2015 election. A previous 2002 study, which concluded that resettlement was not feasible, was viewed by many as seriously flawed.

The new feasibility study was carried out by KPMG. It submitted its report in January 2015. While accepting that there were challenges to resettlement, KPMG found that that there were no "fundamental legal obstacles". It undertook a multi-dimensional analysis of the feasibility of three resettlement options: large-scale resettlement; medium-scale resettlement; and pilot, small-scale resettlement. The study included indicative cost estimates for each of the options.

Significantly, Diego Garcia was included in the study. Until this point, discussion about resettlement had largely focused on the outer islands, in part because it was believed that the US would not want the island, where it has a military base, included.

Because of its position on sovereignty, the Mauritian Government declined to engage with the new feasibility study on resettlement, although it supports the Chagossians on the issue.

The Coalition Government made the KPMG study public in February 2015, saying that it was an "important milestone, enabling interested parties with different perspectives to better understand the range of issues affecting any potential resettlement." It added that it provided "a solid basis on which to begin our Policy Review."

… and a policy review undertaken…

In August 2015 the previous Conservative Government began a consultation exercise with Chagossians and other interested parties that ran until the end of October. A summary of the consultation responses was published in January 2016. Amongst the headlines was the finding that 98% of 895 Chagossian respondents had supported resettlement.

The All Party Parliamentary Group (APPG) on the Chagos Islands had endorsed a "pilot resettlement on Diego Garcia, work on which should begin immediately when the next government came to office, with a view to the first settlers arriving in early 2016." KPMG, at the request of the APPG, drew up a proposal for a settlement of 50 people.

The APPG broadly welcomed the outcome of the consultation exercise but said that the resettlement options set out by the Government in it had been overly restrictive. The group also queried the assumption of the Government that only UK funds would be available for resettlement,

arguing that other funding sources, including the US Government and the EU, could be available.

Following the publication of the summary of consultation responses, the previous Government said that it would consider the outcome before coming to a decision on resettlement. No time-frame was provided. On 12 April 2016, James Duddridge, then a FCO minister, said in the House:

> I recognise that Chagossians have urged us to announce a decision soon, and we very much hope to do so.

At the April 2016 meeting of the APPG it was reported that the issue of resettlement was being discussed by the National Security Council but that there were divisions over it:

> Members thought that the National Security Council, chaired by the PM, which had been considering the issues since early March, was divided. It was believed that the PM was sympathetic but some ministers were opposed on financial grounds. It was thought that the PM had therefore asked a neutral minister to carry out a further review. The Group hoped that this would be completed quickly.

The APPG's hopes that a decision would be announced before Parliament went into its summer recess on 21 July 2016 were not realised. Fears had also been expressed that the previous Government might hold over its decision until after the Supreme Court had ruled on an application to set aside the 2008 House of Lords verdict on the lawfulness of prohibiting resettlement. The Government said nothing publicly to indicate that this was its intention – but this is what happened. The Supreme Court ruled on the case on 29 June 2016, declining to set aside the 2008 House of Lords verdict (see section 5).

… but the Government rejected resettlement

On 16 November 2016 the previous Government announced that it had decided against resettlement. FCO Minister Baroness Anelay of St Johns said in a Lords' Written Statement:

> I am today announcing that the Government have decided against resettlement of the Chagossian people to the British Indian Ocean Territory on the grounds of feasibility, defence and security interests, and cost to the British taxpayer. In coming to this decision the Government have considered carefully the practicalities of setting up a small remote community on low-lying islands and the challenges that any community would face. These are significant, and include the challenge of effectively establishing modern public services, the limited healthcare and education that it would be possible to provide, and the lack of economic opportunities, particularly job prospects. The Government have also considered the interaction of any potential community with the US Naval Support Facility—a vital part of our defence relationship.
>
> The Government will instead seek to support improvements to the livelihoods of Chagossians in the communities where they now live. I can today announce that we have agreed to fund a package of approximately £40 million over the next 10 years to achieve this goal. This money addresses the most pressing needs of the community by improving access to health and social care and to

> improved education and employment opportunities. Moreover, this fund will support a significantly expanded programme of visits to BIOT for native Chagossians. The Government will work closely with Chagossian communities in the UK and overseas to develop cost-effective programmes which will make the biggest improvement in the life chances of those Chagossians who need it most.

… to the deep disappointment of supporters of the Chagossians…

Advocates for the Chagossians were quick to express deep disappointment at the decision. The APPG on the Chagos Islands issued this statement following the announcement:

> The Group held its 58th meeting on 16 November and considered the written ministerial statement issued two hours earlier, concerning the Government's decision not to allow the Chagossians to resettle in their homeland. Three ministers of state from the FCO (Baroness Anelay), Defence (Earl Howe) and Department of International Development (Lord Bates) had several weeks earlier been invited for a discussion on the issues regarding resettlement. Members were shocked to discover that this discussion had been pre-empted by the written statement. The Government had been telling Parliament that a decision on resettlement would not be announced until the end of the year. The reason for announcing it on 16 November could only be to close off discussion of the issues. This looked like a fait accompli. Members also expressed indignation that the decision had been leaked to the Guardian the day before it was made available to Parliament.
>
> Members expressed much disappointment at this decision. They felt it had ignored the arguments put by the Group and experts over the years concerning viability, sustainability, cost, funding, defence and security, international human rights obligations and the views of the Courts which since 2000 had deplored the treatment of the Chagossians. They did not accept the Government's premise that feasibility, defence and security interests and cost were sufficient grounds for not agreeing to a pilot resettlement, recommended by the KPMG feasibility study. The written statement lacked any reasoned argument as to why resettlement could not be implemented.
>
> Members appealed to ministers to think again on the basis of other studies, the KPMG report and further discussions with the Group. They were well aware that the US was not opposed to resettlement and that any security concerns were easily manageable. Given that, with the agreement of the US, the KPMG consultants had visited Diego Garcia and that this island was their preferred option it was not logical to deploy defence and security as a reason against resettlement.
>
> The APPG felt that the costs and style of resettlement had been significantly exaggerated and that in any case the Overseas Territories were a first call on the Aid Programme. The British tax payer would not fund the entire cost as the ministerial statement had implied. The US, who do not pay rent for the base would no doubt contribute. The Group took the view that the continuing damage to the UK's reputation for the promotion of human rights far outweighed the cost and difficulties of trying out a resettlement.

> The Group questioned whether the Government had properly considered the Supreme Court conclusions that in the light of the KPMG study maintaining the ban on Chagossian return may no longer be lawful, and that if the Government failed to restore the right of abode it would be open to Chagossians to mount a new challenge by way of judicial review. They noted that the ministerial statement had not referred to the right of abode which should be restored whether or not resettlement was allowed. Some Chagossians would only wish to visit their homeland and should be able to do so whenever they wanted.
>
> Members questioned if it was really in the tax payers' interest to prolong litigation for several more years. 17 years of expensive litigation, amounting to several million pounds, not to mention the cost of Whitehall staff and resources, could have gone towards the cost of resettlement. They also thought that it was not in the national interest for the international and national campaigns in support of the Chagossians, to continue with increasing opprobrium and negative publicity for the UK. This undermined the UK's human rights record and the British sense of fair play. Why should Chagossians, who are British, be treated any differently from other British nationals of Overseas Territories? Members noted that on 24 October, UN Day, Baroness Anelay had referred to the UK's "unwavering commitment to human rights".
>
> The Group also felt that the £40 million of project money that was being offered to the Chagossians would be better spent on funding resettlement. This was nearly twice the capital cost of resettlement estimated in 2008 by Dr John Howell, former Director of the Overseas Development Institute. But it was for Chagossians to decide. The Group would wait to hear their reactions before supporting anything less than a pilot resettlement.[1]

In a November 2016 article for the website Conservative Home, David Snoxell, the coordinator of the APPG on the Chagos Islands, described the decision as "unexpected" and "another human rights travesty." However, he argued that the decision would not be the end of the matter, asserting:

> This means that, after 17 years, further litigation will be resumed. The Supreme Court concluded in June that if the Government failed to restore the right of abode there could be grounds for judicial review.

The Government of Mauritius condemned the "unilateral decision", reiterating that it "does not recognise the legality of the actions that the UK has purported, or is purporting, to take in respect of the Chagos Archipelago as they are in breach of international law" (see also section 3).

… the decision provokes debate about support measures and whether the right of abode should nonetheless be restored…

Since November 2016, there has been debate about how to spend the £40 million over the next 10 years announced by the previous UK

[1] Hard copy available on request.

Government to support improvements to the livelihoods of Chagossians in the communities where they now live.

The previous Government hoped to engage with all Chagossians in the process of deciding how the money should be spent. However, the Chagos Refugees Group has rejected the package and has not participated in discussions about how to spend the money. Some Chagossians appear to view the money as an attempt to persuade them to abandon the idea of resettlement. However, the UK Government said in February 2017 that the package is "separate from legal proceedings or challenges over resettlement."

In March, the Government confirmed that it would be undertaking "a significantly expanded programme of heritage visits to the British Indian Ocean Territory", with the next visit expected later in 2017.

The APPG continued to argue in favour of a pilot resettlement but has also suggested that a compromise acceptable to both the Chagossians and the UK Government, pending further developments on the issue, could be restoration of the "right of abode" on the islands for Chagossians. It was restored by the then Labour Government in 2000 (with the exclusion of Diego Garcia), remaining in effect until the 2004 Orders in Council were issued.

The APPG argued in April 2017:

> As Lord Bingham (presiding Law Lord) put it in his 2008 judgment "It cannot be doubted that the right (of abode) was of intangible value, and the smaller its practical value the less reason to take it away". There is nothing to stop the FCO restoring the right of abode as distinct from the right of resettlement. It would demonstrate that the Government is serious about wanting to meet the aspirations of the Chagossian people and also its goodwill towards them and respect for fundamental human rights. It would cost the FCO nothing while redressing its damaged human rights record and reputation. The APPG urges the Government not to let the ongoing litigation be an excuse for not restoring the right of abode on moral, ethical and political grounds.

The previous Conservative Government said that it had no plans to restore the right of abode to Chagossians.

The APPG also decided that, while continuing to support a pilot resettlement, it would also "identify ways of strengthening the bonds between the Chagossians and their homeland" through the £40 million package announced by the previous Government in November 2016. The APPG's view was that this could best be achieved by creating ways for Chagossians to live and work on the islands – for example, through the creation of environmental, scientific and heritage employment opportunities, as well as promoting leisure activities for the staff on the US military base in Diego Garcia.

In its 2017 general election manifesto, the Labour Party pledged to restore the right of return to Chagossians. The Liberal Democrats, Greens, Scottish National Party and Social Democratic and Labour Party also supported doing so during the last parliament.

2. The Marine Protected Area in limbo?

2015 UN Tribunal ruling…

On 18 March 2015 an Arbitral Tribunal under the UN Convention on the Law of the Sea unanimously ruled that the Marine Protected Area (MPA) declared by the UK is not compatible with obligations under the Convention to give proper regard to the rights of Mauritius. The ruling is final and binding.

The MPA imposed a total ban on fishing around the Chagos Archipelago, apart from Diego Garcia. It was unilaterally established by the then Labour Government in April 2010, despite Mauritian protests. Mauritius supplied evidence to the Tribunal to back up its claim that, when it was established, FCO officials saw the MPA as a means of preventing Chagossian resettlement. However, the Tribunal did not accept this evidence, concluding that there was no suggestion of "improper purpose".

… Mauritius views the issue as linked to sovereignty…

In June 2015, the previous UK Government said that it had written on several occasions to its Mauritian counterpart since March proposing consultations with it on the protection of the marine environment around the BIOT. However, the Mauritian Government did not take up the offer because it is unwilling to address the issue of the MPA in isolation from that of the sovereignty of the BIOT (see section 1.3 below).

… the UK says that the MPA is still in effect…

Some legal commentators have interpreted the Tribunal's ruling as tantamount to saying that the MPA is unlawful. The UK's position is that the Tribunal did not say this but accepts that it found that the manner in which it was established was unlawful.

The UK's view has been that the MPA is still in effect. However, in January 2016, David Snoxell, the co-ordinator of the APPG on the Chagos Islands, said that the MPA "remained in legal and practical limbo."

There is also litigation pending on the MPA in the English courts (see section 5).

3. Movement on sovereignty?

UN Tribunal is unwilling to consider sovereignty…

While not directly about the issue, Mauritius's international legal challenge to the MPA inevitably included its longstanding claim to sovereignty over the BIOT.[2] By a majority of three judges to two, the Arbitral Tribunal found that it did not have jurisdiction to consider sovereignty. This had been the UK's argument.

… but does say the UK promise to cede sovereignty to Mauritius is binding under international law…

However, the Tribunal did find that the undertaking given by the UK in 1965 – namely, to cede sovereignty to Mauritius once the BIOT is no longer required for defence purposes – is binding under international law.

… talks begin but Mauritius warns that it may refer the issue to the International Court of Justice…

It has been suggested in the past that, even if sovereignty over the entire BIOT is unlikely to be on the agenda in the medium-term, there could be more room for flexibility on the outer islands, which are not required for defence purposes.

Throughout the last Parliament, the APPG on the Chagos Islands called on the UK to hold talks with Mauritius on issues relating to BIOT. Two official-level meetings took place in 2009 but Mauritius withdrew from the dialogue after the MPA was established (see above). Meetings at official level resumed in November 2015 and May 2016 but little progress appeared to be made.

In July 2016, Prime Minister Jugnauth announced that Mauritius would table a resolution at the UN General Assembly referring the issue of sovereignty to the International Court of Justice (ICJ) for an advisory opinion. This decision appeared to come in response to a statement by Baroness Anelay of St Johns to which Mauritius had taken exception:

> Referral of this matter to the International Court of Justice would cause lasting damage to Mauritius' bilateral relations and we have respectfully sought the Prime Minister of Mauritius' assurance that he does not intend to proceed with such action, and that he will return to a constructive path. Mauritius stands to benefit from friendly relations, including in relation to the British Indian Ocean Territory, where the UK and Mauritius are already engaged in talks that aim to implement the United Nations Convention on the Law of the Sea arbitral award of March 2015 and give due regard to Mauritius' interests in matters of marine conservation in the British Indian Ocean Territory.

In the end, Mauritius did not push for an early vote on a resolution at the General Assembly. Instead, the two sides agreed to resume talks.

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[2] It is worth noting that Mauritius refuses to use the term BIOT, preferring to speak of the Chagos Archipelago. It also prefers to use the phrase 'completion of decolonisation' to describe the issue at stake, rather than 'sovereignty'.

But Mauritius made it clear that, if there was no progress on sovereignty by June 2017, it would trigger a vote without further delay.

According to David Snoxell, the coordinator of the APPG on the Chagos Islands:

> These talks may offer a way forward. Mauritius could present the UK delegation with its ideas on how a gradual transition, with confidence-building measures, can be established towards eventual Mauritian sovereignty. That will require a staged timetable. The 1966 UK/US agreement, which is to continue until 2036, provides the obvious date for a transfer of sovereignty, although there is no reason why the outer islands (not Diego Garcia, where the US base is) should not be transferred to Mauritius long before then. In the meantime, there could be co-management of the islands and Mauritius could offer help and support for a Chagossian resettlement. A possible scenario is that the Chagossians, who are both British and Mauritian citizens, return under UK/Mauritius co-management.

There was another round of talks in November 2016.[3]

In its response to the previous UK Government's 16 November 2016 decision not to allow Chagossians to resettle in the Chagos Archipelago, Mauritius said:

> The Government of Mauritius will relentlessly pursue its initiatives in conformity with international law to complete the decolonisation of Mauritius, thereby enabling Mauritius to effectively exercise its sovereignty over the Chagos Archipelago. In light of the above, and in view of the purported unilateral actions of the UK, Mauritius would be fully justified in taking forward the completion of the process of decolonisation, which is now on the agenda of the current session of the UN General Assembly, with a view to putting the matter before the International Court of Justice for an advisory opinion.

… talks go to the wire as a June 2017 deadline set by Mauritius looms…

There were further rounds of talks in January and March 2017. Unconfirmed reports suggested that the previous UK Government had proposed some sort of 'co-management' arrangement for the outer islands but that its Mauritian counterpart had rejected the idea, insisting that the question of Chagossian resettlement should also be on the table for discussion.

… June 2017: the UN General Assembly refers the issue to the ICJ…

Mauritius eventually triggered a vote at the UN General Assembly on 22 June 2017.[4] Resolution 71/292 was passed by 94 votes to 15. 65 countries abstained, including a significant number of EU member states. 19 did not vote.

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3 For the view of Mauritius on events during the run-up to the November 2016 talks, see the Private Notice Question to the Prime Minister in the National Assembly on 29 November 2016.

4 For further background, see: "Statement by Ambassador Matthew Rycroft, UK Permanent Representative to the United Nations", 22 June 2017; UN summary of meeting contributions, 22 June 2017

Mauritius welcomed the result, as did many supporters of the Chagossian cause. Philipe Sands, who acted as legal counsel for Mauritius, said:

> The vote, passed by an overwhelming majority, sends a strong signal about the UN's attachment to decolonisation […] Its arguments that Chagos is about security and a bilateral matter between it and Mauritius were given short shrift.

David Snoxell said:

> This was a brilliant result for Mauritius and the Chagossians. Apart from the sovereignty issue […] the resolution was a means of bringing to the attention of the UN General Assembly the travesty of the UK's treatment of the Chagossian people since 1965 […]

An FCO spokesperson responded to the vote by saying:

> Sovereignty of the BIOT is clearly a matter for the UK and Mauritius to resolve ourselves. Taking this dispute to the ICJ is an inappropriate use of the ICJ mechanism. This is reflected in the fact that over half of General Assembly members did not vote for the resolution.

In a Written Statement made on 26 June, Sir Alan Duncan, Minister of State in the FCO, elaborated further on this point:

> […] This is an inappropriate use of the ICJ advisory mechanism because it is an attempt to circumvent the principle that no State should be compelled to have its bilateral disputes submitted for judicial settlement without its consent, not least on matters of sovereignty. This is a matter for the UK and Mauritius to resolve bilaterally.

He continued:

> The UK Government has made significant proposals to Mauritius which respect and recognise their long term interest in the archipelago. We have offered, without prejudice to our sovereignty, a framework for the joint management, in environment and scientific study, of all the islands of the territory except for Diego Garcia, and we have offered enhanced bilateral security cooperation. These offers were relevant to the dispute and were seriously made. We are disappointed that the Government of Mauritius chose to reject them and to walk away from bilateral talks and instead decided to use multilateral mechanisms.

… The ICJ: what next?…

The UN Charter (Article 96) states that the UN General Assembly and Security Council may request advisory opinions from the ICJ on "any legal question". The ICJ has held that "the purpose of the advisory function is not to settle—at least directly—disputes between States, but to offer legal advice to the organs and institutions requesting the opinion".[5] The Court's Statute confirms that the Court has discretion whether or not to give the advisory opinion requested.

Advisory opinions are not legally binding but can carry great legal weight.

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[5] Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, ICJ GL No 95, [1996] ICJ Rep 226, ICGJ 205 (ICJ 1996), 8th July 1996, para. 15

By contrast, the ICJ's judgments in contentious cases between States are binding, but cases can only go ahead if the States concerned have in some manner or other consented to the ICJ's jurisdiction.

Following the referral, one legal commentator has argued that the UK is likely to continue to object that the advisory opinion request is trying to circumvent the consent requirement for contentious ICJ jurisdiction, and is in effect asking the Court to litigate a bilateral dispute.

But the author also suggested that the drafting of the questions that the ICJ is being asked to address raises broader principles on decolonisation and the UK's continued administration of the Chagos Archipelago that may not require the Court to deal directly with the issue of sovereignty.[6]

The questions which Resolution 71/292 asks the ICJ to address in its advisory opinion are:

- Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?;
- What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?.

The advisory opinion may not be issued until late-2018 or 2019.

6 Marko Milanovic, 'ICJ Advisory Opinion Request on the Chagos Islands', EJIL Talk! Blog, 24 June 2017

4. The US military base on Diego Garcia is extended until 2036

The base was first established in 1966…

Under the 1966 Exchange of Notes between the UK and the US, a decision on whether to extend the arrangement for a further 20 years must be made by the end of December 2016.

Discussions between the two countries reportedly began in December 2014. However, the previous UK Government said in March 2016 that discussions had not yet started.

… Mauritius is not opposed to the base remaining on Diego Garcia and the US might not object to Chagossian resettlement…

Mauritius has said that it is content to allow the US military base to remain on Diego Garcia as and when it achieves sovereignty over the Chagos Archipelago.

The APPG's position has been:

> that any renewal next year of the 1966 UK/US Agreement on the use of BIOT for defence purposes should be conditional on a commitment by both parties to facilitate and support [Chagossian] resettlement.

During President Barack Obama's visit to the UK in April 2016, the then Prime Minister David Cameron and the Leader of the Official Opposition, Jeremy Corbyn, reportedly raised the issue of Chagossian resettlement with him. The APPG does not believe that the US has any fundamental objections to Chagossian resettlement or views it as incompatible with the continuance of its military base.

…. The decision to extend is announced in November 2016…

On 16 November 2016, at the same time as she announced the UK Government's decision not to permit Chagossian resettlement of the BIOT, Baroness Anelay of St Johns also confirmed that the US military base would continue for a further 20 years:

> Parliament will also be aware that the agreements underpinning the UK/US defence facility will roll over automatically on 31 December if neither side breaks silence. In an increasingly dangerous world, the defence facility is used by us and our allies to combat some of the most difficult problems of the 21st century including terrorism, international criminality, instability and piracy. I can today confirm that the UK continues to welcome the US presence, and that the agreements will continue as they stand until 30 December 2036.

5. Litigation in the English courts

June 2016 Supreme Court ruling on the right to return: one door closes but another potentially opens…

Litigation on various issues arising from the disputes has continued to work its way through the legal system in recent years.

The highest profile recent case has been an application to the Supreme Court to set aside the 2008 House of Lords verdict – which ruled 3:2 that the use of Orders in Council in 2004 to prevent the Chagossians from returning was lawful and not an abuse of power (overturning the verdicts of the High Court in 2006 and the Court of Appeal in 2007).

The Supreme Court heard the application on 22 June 2015. The grounds for the application were that the 2008 judgment was partly based on the 2002 feasibility study, which had now been shown to be flawed, and that documents which demonstrated this were not disclosed (under the 'duty of candour') to the Chagossians' lawyers during the original proceedings.

The Supreme Court published its ruling on 29 June 2016. By 3:2 it ruled against setting aside the 2008 Lords verdict. While disappointed by the outcome, many supporters of the Chagossians have argued that all is far from lost. Below is an important passage from the press summary of the ruling:

> It is now open to any Chagossian to mount a fresh challenge to the failure to abrogate the 2004 orders in the light of the 2014-15 study's findings, as an alternative to further lengthy litigation […]

The '2014-15 study' in question is the KPMG resettlement feasibility study referred to in section 1 of this briefing.

The APPG stated in July 2016:

> While accepting that it was a legal defeat the Group saw it as an ethical victory for the Chagossians, giving them the moral high ground. They were encouraged by the unequivocal message of all five judges that in the light of the KPMG feasibility study the Government should reconsider the ban on the Chagossians returning to their homeland since it may no longer be lawful. Also that if the Government failed to restore the right of abode then Chagossians would be able to challenge it by way of judicial review on the grounds of irrationality, unreasonableness and/or disproportionality. Members took note of the extensive strictures and criticism of the government for the way it had handled the matter and in particular its failure both to disclose documents to the Chagossian lawyers and of its duty of candour towards the Courts.
>
> Members urged the Government to take this censure seriously and expeditiously address the conclusions of the Court concerning the ban.

Following the previous UK Government's announcement on 16 November 2016 that it would not be proceeding with resettlement,

supporters of the Chagossians said that an attempt to challenge the ban through judicial review was highly likely. Legal aid has since been granted to lawyers for the Chagossians. There are hopes that the judicial review might be heard during 2017 but it could slip into 2018.

… meanwhile an appeal on behalf of Chagossians against the MPA nears its conclusion…

The Supreme Court heard an appeal on behalf of Chagossians against the MPA on 28-29 June 2017.

Below is the case summary from the Supreme Court website:

> **Issues**
>
> i Whether the Court of Appeal should have held that evidence wrongly held to be inadmissible by the court below (the "Wikileaks cable") could and would have led to the conclusion that the decision of the respondent to create a marine protected area in the British Indian Ocean Territory (BIOT) was motivated by an improper purpose;
>
> ii whether the Court of Appeal erred in finding that the Secretary of State was not personally motivated by the alleged improper purpose and relying on that fact to conclude that the decision of the court below on admissibility would have made no difference;
>
> iii whether the Court of Appeal erred as to a fundamental fact going to the lawfulness of the consultation that the Government of Mauritius had not asserted a right to fish in BIOT based on undertakings given by the United Kingdom and separate from its claims to sovereignty*; and
>
> iv (in an argument raised by the respondent) whether the Court of Appeal erred in ruling that the Wikileaks cable was admissible in evidence. The Court must also determine whether the appellant has permission to adduce new evidence that was not available to the courts below in support of its grounds.
>
> * The Court has not yet granted permission to appeal on this ground but will hear submissions at the hearing.
>
> **Facts**
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> The appellant is Chair of the Chagos Refugees Group, a group which represents the former inhabitants of the Chagos Archipelago (BIOT) who were removed between 1968 and 1973 and prevented from returning by the United Kingdom Government. In these proceedings the appellant challenged the decision of the respondent Secretary of State to establish a 'no take' marine protected area (MPA) in April 2010 in the BIOT, which brought to an end all commercial fishing including that carried on by Chagossians as owners and crew of Mauritian registered fishing vessels. In relation to the issues that are before the Supreme Court, the appellant alleges that the respondent's decision was motivated by the improper purpose of preventing future resettlement of the islands, and that the consultation which preceded it was flawed by non-disclosure of the fact that the decision would interfere with Mauritian (and therefore Chagossian) fishing rights in BIOT. In the courts below, the evidence relied on to establish the improper purpose was primarily a US diplomatic 'cable' put into the public domain by Wikileaks. The appellant also now seeks to adduce further evidence that was not made available to the courts below from:

i Foreign Office files released to the National Archives following the Court of Appeal's decision; and

ii evidence from the arbitration between the United Kingdom and Mauritius pursuant to Article 287 and Annex VII, Article 1 of the United Nations Convention on the Law of the Sea that has been made publicly available.

Background

Chagossians living in both Mauritius and the UK have been seeking to challenge the establishment of the MPA for several years. The original ground was that the public consultation process was flawed because it failed to acknowledge that resettlement was feasible. An additional ground was that the consultation failed to mention Mauritian or Chagossian fishing rights.

Lawyers for the Chagossians subsequently included reported statements by British officials in a 2009 US diplomatic cable published by Wikileaks about the motive behind establishing an MPA. Lawyers for the FCO argued that US government cables should not be admitted as evidence because this violated the 1961 *Vienna Convention on Diplomatic Relations*.

In June 2013, the High Court found against the Chagossians. The case went to the Court of Appeal. In May 2014 it upheld the verdict of the High Court, although in the course of doing so it overturned the High Court's ruling that leaked diplomatic cables should be considered inadmissible.

The Court of Appeal also refused leave to appeal to the Supreme Court. However, in February 2015 an application was lodged with it by lawyers for the Chagossians. This application was made concurrently with the application on the 2008 Lords verdict (see above).

For a while, the Supreme Court was thought likely to render judgment on both applications at the same time. However, in its 29 June 2016 ruling on whether or not to set aside the 2008 Lords verdict on the lawfulness of the 2004 Orders abolishing the right to return, the Court said it would hear this appeal separately in 2017.

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