R v Secretary of State for the Home Department ex parte Bancoult

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

CO/3775/98, (Transcript: Smith Bernal)

HEARING-DATES: 3 MARCH 1999

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COUNSEL:
A Bradley (for S Kentridge QC) and L Fransman for the Applicant; Ms C Ivimy (for P Sales) for the Respondent

PANEL: SCOTT BAKER J

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The Chagos archipelago lies in the middle of the Indian Ocean just south of the equator and over 1000 miles from the nearest mainland. The biggest of the islands is Diego Garcia. For perhaps as long as 200 years or more the Ilois people inhabited these islands living a simple, largely self-sufficient, life as fishermen and farmers, occasionally visiting Mauritius and other islands. The islands of the Chagos group passed into the sovereignty of the Crown when the island of Mauritius, together with its dependencies, was ceded by France to Britain in 1814. Life went serenely on for the Ilois people until 1965 when Great Britain and the United States of America agreed that theislands should be used as an important strategic defence base for the armed forces of the two countries. This was to be for an indefinite period but starting with at least fifty years.

The archipelago was incorporated into a new colony called the British Indian Ocean Territory ('BIOT' as it is now known for short). This was achieved by the British Indian Ocean Territory Order 1965. The Order established the Office of Commissioner for the territory and vested in him powers of government. Originally, the Commissioner was the person who was, for the time being, Governor of the Seychelles. That changed when the Seychelles become independent in 1976. Nothing turns on the change. Since then the Commissioner has been the person who is, for the time being, head of the appropriate department at the Foreign and Commonwealth Office.

In 1965 there were between 1,500 and 3,000 inhabitants of the Chagos islands. As many as five generations were born and died on the islands. The applicant, like others, was in 1965 a citizen of the United Kingdom and colonies pursuant to the British Nationality Act 1948. The applicant lived on an island called Peros Banhos. In 1967 the applicant and his family had to go to Mauritius in order for his sister to receive medical treatment. When the family wished to return home his mother was told that there were no more communications with the Chagos islands and that ships had stopped going there. The family had no option but to remain in Mauritius being left to fend for themselves without housing or social security provision and suffering from extreme destitution and malnutrition.

Other Ilois made short-term visits to Mauritius during the period 1967 to 1971 only to find that they too were prevented from returning to the islands. In the years between 1967 and 1973 other residents of the island were required to leave their homes and to make the journey of 1,200 miles to Mauritius, travelling under adverse and overcrowded conditions. Those who remained in Diego Garcia were removed to the outer islands during 1971. Final removals including those from Peros Banhos and other outlying islands took place in 1973.

No provision was made by the United Kingdom government to enable Illois to settle into Mauritius. The social conditions which the Ilois experienced in Mauritius were extremely unfavourable as they had been deprived of their established way of life such as subsistence farming, fishing and plantation work. In Mauritius they were often destitute being without regular income and proper housing. The residents of the islands were either removed or not allowed to return because of the need for Diego Garcia, in particular, to be used as a military base, pursuant to agreement between Great Britain and the United States of America. The applicant and others do not dispute the strategic importance of this base but they contend that the authorities ran roughshod over the islanders' human and other rights. The operation was carried out on behalf the United Kingdom Government and no-one appears to have consulted the unfortunate Ilois.

On 12 March 1968 Mauritius become independent but the Chagos Islandscontinued to be a United Kingdom colony under the name of British Indian Ocean Territory and the applicant continued to be a citizen of the United Kingdom and the colonies.

On 16 April 1971 the Commissioner for BIOT made the Immigration Ordinance 1971. This provides:

"This requires an official permit has to be obtained before any person (other than members of the armed forces and public servants) may lawfully be present in or enter BIOT. No exception is made in favour of citizens of BIOT. The Ordinance is very broadly phrased, permitting permits to be issued and cancelled by an immigration officer 'acting in his entire discretion' and providing for an appeal to the Commissioner 'whose decision shall be final and conclusive and shall not be questioned in any court.' The present policy on access to BIOT is that permission for visits is granted only in exceptional circumstances and this policy is rigorously maintained."

The applicant, along with many of the Ilois now resident in Mauritius, seeks by this application to establish the right to return to the islands, whether for occasional or regular visits, or more extended residence. They recognise that defence and security considerations limit their ability to visit or remain in the restricted area of Diego Garcia but believe that those considerations do not apply to the outlying islands in the archipelago.

The applicant's solicitors first approached the Commissioner in London by telephone on 27 March 1998. The Commissioner in reply stated that the restrictions on access arose as a result of the exchange of notes between the United Kingdom and United States governments. Further letters were exchanged. On 10 June 1998 the applicant's solicitors wrote a reasoned letter to the Commissioner asking him to confirm that the Immigration Ordinance was void and requesting the Commissioner's proposals for enabling their clients to return to the islands. In a reply dated 30 June 1998 the Commissioner refused. A further request was made on similar lines in the middle of July 1998 and that, too, was refused.

The applicant, through Mr Sydney Kentridge QC, contends as follows:

1 The Crown has no prerogative power to exclude British nationals from British territory.

2 The applicant, as a British dependent territories citizen, which he is, has a fundamental constitutional right to reside in BIOT, which right is infringed by the Immigration Ordinance.

3 Although it is customary practice for immigration into a British dependent territory to be regulated by that terrority's legislation, such practice does not and could not authorise the banishment or complete exclusion of the citizens of the territory from it.

4 The Immigration Ordinance 1971 is not within the powers of the Commissioner to make laws for BIOT.

5 In so far as the Immigration Ordinance banishes and excludes citizens from BIOT it is repugnant to art 29 of the Magna Carta.

6 The Commissioner's powers to make laws for the peace, order and good government of BIOT is broad but not unlimited.

7 Even if the Immigration Ordinance does not exceed the Commissioner's legislative powers, the policy followed by the Commissioner under the Ordinance is unlawful and disproportionate and fails to take account of all relevant considerations.

The respondent's position advanced by Mr Sales is that the application should not be made here, to this court, but to the Supreme Court of BIOT which has a public law jurisdiction to exercise in proceedings arising from the applicant's grievances. Section 6 of the BIOT Ordinance No 3 for 1983 provides:

"The Supreme Court shall be a superior court of record with unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law and with all the powers, privileges and authority which is vested in or capable of being exercised by the High Court of Justice in England."

Appeal from the Supreme Court lies to the BIOT Court of Appeal and from there to the Privy Council. The Supreme Court has the same powers and the same jurisdiction in BIOT as the English High Court has in

England. The court may sit in Diego Garcia or in England of its own motion or, if requested to do so, by the parties.

Mr Sales' short point is that the English High Court has no jurisdiction to hear and determine the application. Alternatively, he contends that if the High Court has jurisdiction, it is concurrent with that of the BIOT court and this court should decline to exercise it. I have no difficulty with the prima facie merits of the applicants and the other Ilois' case.

The real issue on this leave application has been whether the High Court has jurisdiction to entertain the application and, if so, whether it should exercise it. The case turns, it seems to me, on the legality of the 1971 Ordinance. It is this Ordinance that prevents the islanders from returning. Mr Sales contends that the 1971 Ordinance is BIOT legislation. The policy with regard to permits is a policy adopted under that Ordinance, the legality of which must be determined under BIOT law. BIOT has its own government structure and, as I have illustrated, a complete court structure.

The English court, argues Mr Sales, has no jurisdiction to determine the legality of the Ordinance or the policy under it. Mr Kentridge contends that the Ordinance was passed at the diktat of the British government. The Commissioner was singing from the Whitehall Hymn Sheet. What lay behind it was the international agreement between Britain and the United States of America to let this archipelago be used for military purposes.

The issue of jurisdiction as to who may determine the legality of the 1971 Ordinance requires examination of the divisibility between the Crown in the United Kingdom and in the United Kingdom territory abroad. This is something which the authorities show has developed over the years.

Lord Denning MR said in R v The Secretary of State for The Home Department, ex parte Bhurosah [1968] 1 QB 266, [1967] 3 All ER 831 at 284 of the former report (the Mauritian passports case) that in Mauritius the Queen is the Queen of the Mauritius and that the issuing of passports by the Government of Mauritius, although a matter of foreign affairs and therefore under the control of the UK Government, was an act carried out in the name of the Queen in the right of Mauritius, and not the Queen in right of the UK.

Mr Sales contends that that mirrors the position in the present case. Not so, argues Mr Kentridge, the position here is different. I was taken to a number of authorities. The root of these is R v Cowle (1759) 2 Burr 835 which established the English High Court's jurisdiction to grant prerogative writs against the Crown's servants whether in Great Britain or overseas provided the subject matter of the application arises in relation to the territory of the Crown. Both sides relied on R v The Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta [1982] QB 892, [1982] 2 All ER 118 and Tito v Waddell No 2 [1977] Ch 106, [1977] 3 All ER 129. I was also referred to numerous other authorities. There is an issue about whether a prerogative writ can issue to a colony with a competent judicature.

Mr Kentridge argues that there is a difference between the English Court interfering with a run of the mill government matter in BIOT which, ordinarily, it would not do and the circumstances of this case. He contends the Ordinance could not have been passed without the instructions of the Secretary of State. The Secretary of State indeed has a right to disallow any subsequent order of the Commissioner. The United Kingdom made the policy giving rise to the Ordinance and it was not entitled to do so. This, argues Mr Kentridge, is as clear an example as you can get of direct rule. The Ordinance was beyond the powers of the Crown. It is the underlying policy that is fundamentally flawed and the applicant is accordingly entitled to seek a remedy in this country. The fact that there may be a concurrent remedy in BIOT is neither here nor there. The Commissioner's actions are, in reality, says Mr Kentridge, those of the United Kingdom Government.

I am satisfied that the applicant has, at the very least, an arguable case on jurisdiction. In my judgment, the case requires careful consideration of a difficult area of Constitutional Law. Mr Sales argues that, bearing in mind this is a jurisdiction point and that the circumstances of this case are very unusual, I should apply some higher threshold than the ordinary judicial review test. It would, he contends, be unfortunate to let this case go forward where there was only a weak argument on jurisdiction. I am unpersuaded that I should apply any test other than the ordinary test as to whether there is an arguable case. I am entirely satisfied that there is here an arguable case on jurisdiction as well as on the merits of the matter.

That is not the end of the matter because the next question is, given there is jurisdiction in this court, should it be exercised? Mr Sales says that there are compelling reasons why this court should defer to the BIOT court in respect of this legislation. It is not, he contends, just a matter of convenience. I observe in passing that the

evidence suggests that the BIOT court, in its whole existence, has only sat on three occasions. Realistically, if it sits in this case, it would not sit in BIOT, it would sit here in London.

Mr Sales observes that there is an appellate process which leads ultimately to the Privy Council, whereas the appellate process in the event of judicial review being granted would lie to the House of Lords.

Mr Sales draws some distinction in that he says, sitting on the Privy Council, there would be the opportunity to have a person or persons particularly experienced in this field. I am not persuaded that that is an argument which should weigh in my consideration. It seems to me that the British Court would be well able to deal with the issues in the case. He says, furthermore, and perhaps he lays more weight on this, that any member of the Ilois community could apply to the BIOT court and then there would be a conflict of jurisdiction and I should decline jurisdiction because of that risk. Furthermore, he says the BIOT court would not be bound by any decision of the English court. In my judgment, these problems are illusory, rather than real, particularly when one bears in mind that the applicant in this case is legally aided and there would be no opportunity to obtain legal aid to pursue this case in the BIOT court.

It seems to me, in all the circumstances, on the assumption that there is concurrent jurisdiction between this court and the BIOT court, there are good reasons why this court should decide the case.

Mr Sales' third and final point is expressed in this way:

"The First Respondent, the Secretary of State for the Foreign and Commonwealth Office, has no interest in this matter. All relevant decisions were taken by the Commissioner acting on behalf of the Crown in right of BIOT and not as the agent of the First Respondent. The Court cannot grant declaratory relief against a party who has no interest in the proceedings, and the mere joining of him cannot confer jurisdiction on the Court which it would not otherwise have."

Therefore, argues Mr Sales, the Secretary of State is wrongly joined and should depart from these proceedings.

I am not satisfied that this is so. Bearing in mind my conclusion that the fundamental issue relates to the legality of the 1971 Ordinance and the United Kingdom's government's responsibility for it, I think the Secretary of State was properly joined. In any event, he must, it seems to me, be an interested party and therefore I reject Mr Sales' third point.

Accordingly, I grant leave to apply for judicial review in the somewhat unusual circumstances of this case. Bearing in mind the very able arguments that have been advanced by both sides over the whole of yesterday, I have felt it right to explain in summary my reasons for doing so.

It seems to me that the substantive case, bearing in mind the issue of Constitutional Law, ought to be heard by a full Divisional Court.

DISPOSITION:
Leave to apply for judicial review granted.

SOLICITORS:
Sheridans; Treasury Solicitor