SUPREME COURT

BRITISH INDIAN OCEAN TERRITORY

BIOT SC 17, 18, 19& 20 2024

Before:

Margaret Obi

ACTING JUDGE OF THE SUPREME COURT

B E T W E E N:

In the matter of Wardship Proceedings relating to

(1) CT, (2) RT, (3) RK, (4) KT

Applicants

In the matter of an application for permission to apply for Judicial Review

THE KING (on the application of)

(1) CT (2) RT (3) AAA (4) RK (5) KT

Claimants

-and-

THE COMMISSIONER FOR THE BRITISH INDIAN OCEAN TERRITORY

Defendant/Respondent

Representation

Chris Buttler KC, Naomi Wiseman and Jack Boswell instructed by Duncan Lewis Solicitors on behalf of the First and Second Applicants/Claimants

Ben Jaffey KC, Alexander Laing and Natasha Simonsen instructed by Leigh Day on behalf of the Third to Fifth Applicants/Claimants

Jonathan Auburn KC, Katherine Eddy, William Irwin and Tom Wilson instructed by the Defendant/Respondent

Dates of hearing: (in person and via video-link from Diego Garcia): 8 and 9 February 2024

Draft Judgment circulated: 27 March 2024 **Date of Judgment**: 2 April 2024

Margaret Obi:

Introduction

1. On 24 January 2024, CT and RT ('the Duncan Lewis Claimants') made an application for their children, DT and HT, to be made wards of court. The initial hearing of those proceedings took place on 9 February 2024. At that hearing, it became apparent that as this Court has an inherent jurisdiction to protect children where statutory remedies are inadequate (including making a child a ward of court), the Court would need to determine whether certain provisions of the Children Act 1989 ('the CA 1989') apply to the British Indian Ocean Territory ('BIOT' or 'Territory'). As Lieven J held in *Article 39 v Secretary of State for the Home Department* [2023] EWHC 1398 (Fam); [2023] 4 WLR 58, at §33:

> "*Although the inherent jurisdiction is a very broad one which can be used flexibly to protect children in very different circumstances, it cannot and should not be used where there are statutory powers in place that can essentially do the same job. Lying behind this proposition is the fundamental constitutional principle that where there is a statutory scheme, the Court should only use the inherent jurisdiction if there is a lacuna.*"

2. This Court made an Order on 9 February 2024 which, amongst other things, directed: (i) CT and RT, and the Leigh Day Claimants (AAA, RK, and KT), if so advised, to make any judicial review claim for breaches of the CA 1989 by 19 February 2024; and (ii) subject to the Claimants issuing an application for judicial review, a joint (wardship/judicial review permission) hearing to take place on 7 and 8 March 2024 to determine the preliminary legal issue. On 19 February 2024, RK and KT made an application for their children, VK and KK, to be made wards of this Court. On the same date, the Claimants applied for permission to bring a claim for judicial review.

3. Although the Court was provided with an update (in private) by Mr Buttler KC in respect of the wardship proceedings and heard a very brief response from Mr Auburn KC, there was insufficient time to hear detailed submissions. The issues arising from the update will be addressed on another occasion. The primary focus of the hearing was on the central legal question: *Do ss17 and 47 of the CA 1989 apply in the BIOT?* The answer to this question will resolve the preliminary issue in the wardship proceedings and the main issue in the judicial review proceedings. Subject to the outcome, further case management in respect of these proceedings will be required.

4. The Claimants' case (without prejudice to other provisions which may apply) is that ss17 and 47 of the CA 1989 apply to the BIOT and impose at least the following core duties on the Commissioner:

    - A duty to assess a child's needs for support to safeguard and promote their welfare ("the welfare assessment duty");

- A duty to assess the risks to a child where there is reasonable cause to suspect that they are suffering or are likely to suffer significant harm ("the harm investigation duty"); and

- Based on the assessments (referred to above), a duty to provide reasonable support to safeguard a child from the risk of significant harm and to safeguard and promote their welfare ("the safeguarding duty").

Background

5. The BIOT is a British Overseas Territory. It comprises more than 50 islands known as the Chagos Archipelago and is one of the most remote island groups in the world. Diego Garcia is the largest island of the Chagos Archipelago. There is no settled population on Diego Garcia. However, it is maintained as a joint UK/US military facility and is supported by a transient population of approximately 4,000 individuals made up of service personnel, public officers of the BIOT Administration, support staff for the defence facilities, and independent contractors. The BIOT also grants permits, from time to time, for visiting scientists on approved expeditions. All military postings and civilian contractors are required to serve without their families and/or dependents.

6. The BIOT is legally and constitutionally distinct from the UK. The constitutional arrangements are set out in the British Indian Ocean Territory (Constitution) Order 2004 ('2004 Order') and related instruments. The BIOT has its own laws and administration. The Territory is administered from London by the Commissioner who carries out the functions of both government and legislature.

7. The Claimants are of Tamil ethnicity. They were among a group of asylum seekers who left India by boat with the intention of travelling to Canada. On 3 October 2021, their vessel fell into distress close to the Territory, and they were escorted to Diego Garcia by the Royal Navy. CT and RT arrived on Diego Garcia with their children, DT and HT. The children were aged 12 and 5 respectively when they arrived; they are now aged 15 and 8. CT has made a claim for international protection. That claim is pending. AAA is a single mother. Her child, ZZZ, was 4 years old at the time of their arrival and is now aged 7. Both AAA and ZZZ have made claims for international protection. Those claims are pending. RK and KT arrived with their children, VK and KK. The children were aged 10 and 5 at the time of their arrival and are now aged 12 and 8.

8. The BIOT Administration is currently responsible for 66 asylum seekers: 61 are on Diego Garcia and 5 are in Rwanda on a medium-term basis for medical care. Of the 61 asylum seekers on Diego Garcia, 16 are children. Since their arrival, the asylum seekers on Diego Garcia have been accommodated in tents on a compound known as 'Thunder Cove Camp' ('the Camp'). The area of the Camp was originally 100m x 100m but since April 2022 has been extended in size to approximately 140m x 100m.

9. Initially, there was no formal safeguarding policy in relation to the asylum seekers in the Camp. Any concerns raised by clinicians, camp staff, or BIOT Administration officials were

referred to a group of relevant professionals on the island who would determine what action should be taken. However, in July 2023, the Commissioner implemented a policy entitled 'Policy and Procedures for Safeguarding Children and Vulnerable Adults Among Migrants on BIOT' ('the Safeguarding Policy'). Paragraph 2.2 of the Safeguarding Policy, under the heading 'Key Principles,' states:

> *"This policy is based on the principles underlying the UK's international obligations, which have been taken as 'best practice' despite the relevant treaties, laws and recommendations not having been extended to BIOT. In addition, this policy also takes into account principles set out in UK Guidance on safeguarding children."*

10. The United Nations High Commission for Refugees (UNHCR) conducted a monitoring visit to Diego Garcia from 18 to 26 November 2023. In the Executive Summary of its draft report, the UNHCR acknowledged "*the commitment and efforts*" of the BIOT Administration "*to ensure the safety and wellbeing of the asylum seekers and refugees on Diego Garcia in a very complex legal and operational situation*." Nonetheless, for present purposes, the following extracts from the Executive Summary illustrate the nature of the safeguarding concerns that were identified during the monitoring visit:

    - *"Conditions…fail to provide the necessary standards of privacy, safety and dignity.*

    - *UNHCR is particularly concerned that sixteen children are among those… in conditions that are damaging to their wellbeing and development.*

    - *Allegations of sexual assault and harassment of women and children by other asylum seekers indicate ongoing risks of gender-based violence (GBV). Arrangements for GBV prevention, mitigation and response require significant improvement.*

    - *…UNHCR is concerned that there is a significant risk of suicide and attempted suicide and further incidents of self-harm.*

    - *Primary health care services, including mental health support, are available and of high quality, however the lack of preventive care and referral options for non-acute but potentially severe conditions is of concern."*

The BIOT Legal Framework

UK and US Exchange of Notes 1966 (Treaty)

11. On 30 December 1966, the UK and the United States (US) signed an agreement to make the BIOT available for defence purposes ('the 1966 Treaty'). The Exchange of Notes between the two governments was published in Treaty Series No. 15 (1967).

12. Annex I of the Exchange of Notes states that US contractors, members of the US Forces, contractor personnel, or dependents are exempt from certain customs duties and income taxes. Articles 10(b) and 10(c) state that for the purposes of the agreement:

    b) *"'"Dependents" means the spouse and* ***children under 21 years of age*** *of a person in relation to whom it is used; and, if they are dependent upon him for their support, the parents and children over 21 years of age of that person;*

    c) *"Members of the United States Forces" means*

    (i) military members of the United States Forces on active duty;

    (ii) civilian personnel accompanying the United States Forces and in their employ who are not ordinarily resident in the Territory and who are there solely for the purpose of this Agreement; and

    (iii) ***dependents of the persons described in (i) and (ii) above****;"* (emphasis added).

13. A supplementary agreement was signed in 1976 ('the 1976 agreement') which states that "*in general*" access to Diego Garcia shall be restricted to members of the Armed Forces of the UK and US, the Commissioner and public officers of the BIOT and government representatives of both countries. The note in response to the supplementary agreement contains a footnote which states as follows:

    "The two Parties agree that the Supplementary Arrangements and the related notes are ***not*** *international agreements…They are published for information at the request of the Government of the United States of America"* (emphasis added).

Courts Ordinance 1983

14. As a British Overseas Territory with no settled population the BIOT does not have a comprehensive suite of laws. However, the Courts Ordinance 1983 enables the law of England to be applied in certain circumstances.

15. Section 3 of the Courts Ordinance 1983, insofar as is relevant, provides as follows:

    *"****Law to be Applied.***

    (1) Subject to and so far as it is not inconsistent with any specific Law for the time being in force in the Territory and subject to subsections (3) and (4) of this section and to section 4, the law to be applied as part of the law of the Territory ***shall be the law of England as from time to time in force in England and the rules of equity as from time to time applied in England:***

        Provided that the said law of England shall apply in the Territory only so far as it is ***applicable and suitable to local circumstances****, and shall be construed*

*with such **modifications, adaptations, qualifications and exceptions as local circumstances render necessary**.*

*(2) In this section **specific law** means –*

(a) any provision made by or under a law (including this Ordinance) made in pursuance of section 11 of the British Indian Ocean Territory Order 1965, section 9 of the British Indian Ocean Territory Order 1976, section 10 of the British Indian Ocean Territory (Constitution) Order 2004, or any similar section superseding the last mentioned section;" [emphasis added]

16. Section 4 of the Courts Ordinance 1983 confers a power on the Commissioner to declare that any UK enactment, statutory instrument, or prerogative Order in Council does or does not form part of the BIOT law. Any such declaration is determinative, provided it is published in accordance with section 10 of the 2004 Order (see below). However, there are restrictions on retrospective declarations.

British Indian Ocean Territory (Constitution) Order 2004

17. The 2004 Order establishes the office of Commissioner. The Commissioner may constitute offices for the Territory and make appointments to such offices. In addition, the 2004 Order provides as follows:

"No right of abode in the Territory

9. (1) Whereas the Territory was constituted and is set aside to be available for the defence purposes of the Government of the United Kingdom and the Government of the United States of America, no person has the right of abode in the Territory.

(2) Accordingly, no person is entitled to enter or be present in the Territory except as authorised by or under this Order or any other law for the time being in force in the Territory.

Commissioner's powers to make laws

10. (1) Subject to the provisions of this Order, the Commissioner may make laws for the peace, order and good government of the Territory.

*(2) It is hereby declared, without prejudice to the generality of subsection (1) but for the avoidance of doubt, that, in the exercise of his powers under subsection (1), the Commissioner may make any such provision as he considers expedient for or in connection with the administration of the Territory, and **no such provision shall be deemed to be invalid except to the extent that it is inconsistent with the status of the Territory as a British overseas territory or with this Order or with any other Order of Her Majesty in Council** extending to the Territory or otherwise as provided by the Colonial Laws Validity Act 1865.* [emphasis added]

(3) All laws made by the Commissioner in exercise of the powers conferred by subsection (1) shall be published in the Gazette in such manner as the Commissioner may direct."

British Indian Ocean Territory (Immigration) Order 2004

18. The British Indian Ocean (Immigration) Order 2004 confers the Commissioner with the power to restrict entry and presence on BIOT and to grant permits. The relevant provisions are set out below:

"Restriction on entering or being present in the Territory

5. (1) No person shall enter the Territory or be present there unless he is in possession of a permit issued under section 7 or his name is endorsed on a permit under section 9.

(2) This section does not apply to members of Her Majesty's armed forces, or to public officers, or to officers in the public service of the Government of the United Kingdom while on duty, or to such other persons as may be prescribed.

…

Endorsement on permits

9. An immigration officer may, in his entire discretion but subject to the right of appeal provided by section 10, endorse on a permit

(a) the name of the wife or a ***dependent child*** *of the holder of the permit, but any such endorsement shall expire*

(i) when the wife or ***child*** *ceases to be a dependant of the holder or, in* ***the case of a male child, when he earlier attains the age of 21 years****; or*

(ii) when the permit itself expires or is cancelled; or (b) a condition that the holder of the permit and his wife and ***child*** *shall reside, or shall not reside, in such part or parts of the Territory as are specified in the condition."* [emphasis added]

The Children Act 1989

19. Section 17(1) of the CA 1989 provides:

"It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—

(a) to safeguard and promote the welfare of children within their area who are in need; and

(b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs."

20. Section 17(10) provides that a child is "*in need*" if (i) they are unlikely to achieve or maintain or to have the opportunity to achieve or maintain a reasonable standard of health or development without provision of services from the local authority; or (ii) their health or development is likely to be significantly impaired, or further impaired, without the provision of such services; or (iii) they have a disability.

21. Section 17(2) provides that, for the purpose of facilitating the discharge of their general duty under section 17, every local authority shall have the specific duties and powers set out in Part I of Schedule 2 which include:

- The duty to take reasonable steps to identify the extent to which there are children in need within their area (paragraph 1(1)).

- The power to assess a child's needs for the purposes of the Act (paragraph 3).

- The duty to take reasonable steps, through the provision of services under Part III of the Act, to prevent children within their area suffering ill-treatment or neglect (paragraph 4(1)).

- The duty to take reasonable steps to reduce the need to bring proceedings under the inherent jurisdiction (paragraph 7 (a)(iv)).

- The duty to make such provision as considered appropriate for advice, guidance and counselling and occupational, social, cultural, or recreational activities to be made available to children in need in its area while they are living with their families (paragraph 8(a) and (b)).

22. As stated above paragraph 3 of Part 1 of Schedule 2 confers a *power* to assess a child's needs. However, *in R (G) v Barnet London Borough Council* [2003] UKHL 57; [2004] 2 AC 208, it was held that s17 of the CA 1989 imposes a duty to assess the needs of every individual child who may be "*in need*" (see §§ 32, 77, 106, 110, 117, per Lords Nicholls, Hope, Millett and Scott).

23. Section 17(6) provides:

"The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind or in cash."

24. Section 47(1) of the CA 1989 provides, in material part:

"Where a local authority—

...

(b) have reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm,

the authority shall make, or cause to be made, such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare."

Key Legal Principles

25. In *R (VT & others) v Commissioner for the BIOT* (BIOT SC/No.3&4/2023) (at §37), Lewis CJ set out the three steps to be considered when deciding whether an English statute is part of the law of the BIOT: (i) Is there inconsistent local law already in force? If so, that local law applies. If not, there is a presumption that English law applies subject to the provisos in (ii) and (iii); (ii) English law only applies insofar as it is applicable and suitable to local circumstances; and (iii) English law shall be construed with such modifications, adaptations, qualifications, and exceptions as local circumstances render necessary ('the three steps'). As stated in *Francis v Attorney General* (St Helena Court of Appeal Claim 1/2008 23 December 2008) (and cited with approval in *VT* §54): "*A statute can only be applied if it is **both** applicable and suitable to local circumstances"* (emphasis added).

26. A court may find that some parts of a statute are applicable and suitable to local conditions, but others are not. In *Francis* Woodward J (considering a provision of the English Law (Application) Ordinance 2005, with wording similar to that in section 3 of the BIOT Courts Ordinance 1983), quoted Martin CJ of the Supreme Court of St Helena in *Slater v Serco* (1999) SHLR 5 (SC 6 of 1998):

    "If a statute deals with one subject only, applicability and suitability must be tested by reference to the whole Act. It is not permissible to apply one part only. If a substantial part of such a statute is both applicable and suitable the whole may be said to be. The parts which are not can be deleted as necessary modification to meet local circumstances."

    Lewis CJ in *VT* at §55 considered the above paragraph and stated as follows:

    "*I do not agree that applicability has to be tested against the Act as a whole unless it is meant that the essence and purpose of the Act as a whole must be applicable*."

27. In *Slater* Martin CJ quoted with approval from the textbook Roberts-Wray on Commonwealth and Colonial Law, which states at p.555:

    "The view that the test of 'local circumstances' may include the circumstances of an individual party to proceedings is very questionable."

Martin CJ held in *Slater* that:

> *"A statute is 'applicable' if it is capable of being reasonably applied. It must meet a similar need to that justifying its existence in England and it is suitable if it can be applied to meet that need without substantial modification.*
> …
> *...modifications should not be made which would alter the substance of the statute....if a statute dealing with a single subject cannot be made suitable to local circumstances without very substantial alteration that is an indication that it is not in fact suitable."*

28. The Privy Council in *R v Christian* [2007] 2 AC 400, considered the wording of section 14 of the Judicature Ordinance 1970 which was very similar to section 3 of the Courts Ordinance 1983. It was submitted by the appellants in *Christian* that the language of the 1970 Ordinance was too imprecise and there could be much dispute over whether "*local circumstances*" made it appropriate for the law to apply. However, Lord Hoffman made the following observations:

> *"...this language has been used in legislation for British overseas possessions for many years without causing any difficulty. As Sir Kenneth Roberts-Wray said in his book on Commonwealth and Colonial Law (1966), p 545: "It has been in use for many decades, it has been the subject of judicial interpretation, it does not appear to have given the courts serious trouble, and it has much the same effect as the common law rule. So a change of formula may do more harm than good.*
>
> *13. Similar language was considered by the Court of Appeal in Nyali Ltd v Attorney General [1956] 1 QB 1 , where Denning LJ said, at p 17, that the task of making qualifications to English law to suit the circumstances of overseas territories called for wisdom on the part of their judges. But he described it, at p 16, as a "wise provision" and did not suggest that it was incapable of application."*

29. The limits of judicial interference by way of amendment or alteration to the statute are where "*some amount of moulding in formal or insignificant details are required…*" (see *Jex v McKinney* (1889) APP Cas 77). In *Francis* at §47) Woodward J held that:

> *"...the jurisdiction of the Court is no more than that vested in or capable of being exercised by the English High Court of Justice. Its powers must not be confused with that of the legislature. The power of the Court in identifying the relevant legislation is not to alter it or interfere with its essential nature or to produce a result contrary to the clear intention of the legislature or to the express wording of the statute. Changes which involve a balancing of competing interests, complex political or social considerations or the identification of and evaluation of economic implications are properly the province of the legislature."*

Submissions

On behalf of the Claimants

30. Mr Jaffey KC referred the Court to the BIOT constitutional documents. He submitted that the 1966 Treaty remains in force. It specifically refers to children and dependents and this was not changed by the 1976 agreement. He submitted that the supplementary arrangement to the 1976 agreement is, in effect, a non-binding policy agreement and this was a deliberate choice.

31. Mr Jaffey KC acknowledged that the Commissioner could pass a specific law or make a declaration under section 4 of the Courts Ordinance 1983 to override the CA 1989 in the future but has not done so. He also acknowledged that, as a matter of longstanding policy, postings on Diego Garcia are unaccompanied. However, he submitted that the fundamental legal structure of the BIOT has, since its inception, provided for the presence of children. To illustrate this point he drew the Court's attention to: (i) the definition of '*dependents*' and '*Members of the United States Forces*' in the Exchange of Letters; (ii) the power to issue permits to dependent children under the British Indian Ocean (Immigration) Order 2004; (iii) the reference to "*guardianship of minors*" and "*adoption*" in section 10 (Appeals in civil matters) of the Courts Ordinance 1983; and (iv) references to '*child*' '*juvenile*' or '*guardian*' in the Penal Code, the Police and Criminal Evidence Ordinance 2019, the Criminal Procedure Code 2019 and the Births and Deaths Registration Ordinance 1984 (these being specific local provisions).

32. Mr Jaffey KC submitted that the Commissioner's Safeguarding Policy is simply a policy. It has no binding value, and no policy is sufficient to exclude section 3 of the Courts Ordinance 1983. He further submitted that for decades laws relating to children have been made on the Territory including laws which only make sense if the CA 1989 applies. For example, the Births and Deaths Registration Ordinance 1984 refers to "*the father and mother*", and section 10 of the Courts Ordinance 1983 refers to guardianship or adoption in matrimonial cases; yet there is no BIOT legislation relating to parental responsibility or the appointment of guardians. He submitted that it is implicit that the provisions in the CA 1989 apply. He further submitted that the section 47 duty to investigate is an essential part of a coherent criminal justice scheme as the CA 1989 provides the police with the power to remove a child to suitable accommodation in emergency circumstances.

33. Mr Jaffey KC invited the Court to conclude that ss17 and 47 of the CA 1989 are both applicable and suitable to the local circumstances. He further submitted that the statutory framework is not of "*enormous complexity*" and the amendments that would need to be made are modest. He argued that the legal and factual circumstances envisage children on the Territory and if children are permitted the law protects them.

34. Mr Buttler KC agreed with and adopted the submissions made by Mr Jaffey KC on behalf of the Duncan Lewis Claimants.

On behalf of the Defendant

35. Mr Auburn KC emphasised that the BIOT was established for defence purposes. Furthermore, there is no settled population on the BIOT and the constitution prohibits the

right of abode. He stressed that the local circumstances cannot be defined by the current presence of children in Diego Garcia but by the circumstances that usually exist. He submitted that in recent times, excluding those in the Camp, there have not been any children present on Diego Garcia, and therefore no child welfare services. There may have been children in the BIOT in 1966 before the defence facility was built, but children have not been present since 1976 and the statutory position is not evidence of the facts on the ground. He acknowledged that there are local provisions which refer to children and dependents. However, he pointed out that there was no evidence to explain why these laws were passed, whether it was a deliberate choice or whether the drafters adopted a cautious approach. He submitted that the evidential picture is that there have only ever been between "*zero and a very small number*" of children on Diego Garcia but the outcome in respect of the legal position is the same. He argued that the submissions, made on behalf of the Claimants, focussed on the theoretical possibility of children being present on the BIOT rather than the *actual* local circumstances.

36. Mr Auburn KC submitted that the BIOT Administration is not the executive of a highly sophisticated modern State; it discharges important but practically limited functions in respect of a remote "*tiny jurisdiction*." He further submitted that since the arrival of the asylum seekers, the Commissioner has made every effort to provide them with temporary accommodation until their departure and has developed and implemented the Safeguarding Policy for children in the Camp.

37. Mr Auburn KC submitted that ss17 and 47 of the CA 1989 are wholly unsuitable to the BIOT and are not applicable. He argued that these are gateway provisions within the context of a broad statutory framework governing the duties and powers conferred on local authorities and cannot properly be considered in isolation. During his submissions, he directed the Court's attention to various provisions within the CA 1989 including section 18 (provision of day care for children in need under 5), section 20 (provision of accommodation for any child in need who appears to require accommodation) and section 22A (provision of accommodation for 'looked after' children). He argued that based on the Claimant's submissions, the statutory provisions relating to state education and the welfare system would also apply which cannot be right. He invited the Court to conclude that the modifications required to convert ss17 and 47 of the CA 1989 into freestanding obligations would be substantial. He relied on ***Francis*** and cautioned the Court against going beyond its judicial function by becoming a legislator.

Discussion

Overview

38. The issue in this case is not whether it is desirable to have a statutory safeguarding framework in the BIOT or whether the Safeguarding Policy goes far enough to protect the welfare and interests of the children on Diego Garcia. Nor is the issue whether the applicability of the CA 1989 would be administratively inconvenient. The issue is whether the separate but complementary statutory duties in the CA 1989, to safeguard and promote the welfare of children and investigate when there is reasonable cause to suspect that a child

is suffering or is likely to suffer significant harm, apply to the BIOT. This is a legal question which will be determined by applying 'the three steps' referred to in paragraph 25 above.

39. Mr Auburn KC invited the Court to make findings of fact in relation to the local circumstances based on the history of Diego Garcia and the available evidence, which includes the evidence of the Deputy Commissioner for the BIOT – Mr Nishi Dholakia, and the Commissioner's Representative for the BIOT – Mr Colvin Osborn. Questions of law and fact are often interwoven, and factual findings may be necessary to properly apply the law to the specific circumstances of a case. However, factual findings are not required in this case not least because there is no material dispute between the parties as to the factual background, at least not for the purposes of these proceedings; the dispute relates to how these facts are to be interpreted. For example, it is not in dispute that Diego Garcia is a military facility. The contracted personnel are posted to Diego Garcia in support of the military or the BIOT Administration and all postings are unaccompanied. There are no other families or children on Diego Garcia other than the asylum seekers and their children. As a consequence, there are no social care services nor children's services and no facilities expressly designed to support family life such as schools. There is no right of abode and entry to the Territory is generally restricted.

40. As accepted by the Claimants, if ss17 and 47 apply the Commissioner and the BIOT Administration will require time to make appropriate arrangements to discharge these duties effectively.

41. I turn to the steps to be considered and determined.

Is there an inconsistent local law?

42. Section 3 of the Courts Ordinance 1983 operates as a backstop to avoid a legal vacuum. In the absence of a specific local law, the law of England applies to ensure there is no lacuna.

43. The Commissioner has not disapplied the CA 1989 by way of a declaration made in accordance with section 4(1) of the Courts Ordinance 1983 and section 10 of the 2004 Order. This is not disputed. The Commissioner accepts that there is no inconsistent specific law in force. In the absence of an inconsistent BIOT law in force, the CA 1989 is presumptively applicable.

Applicability and Suitability

44. Applicability and suitability must be considered separately. The authorities distinguish between laws that can easily be adopted into local law and those that are specific to England or are unsuitable due to local circumstances. The ordinary natural meaning of Section 3(1)

of the Courts Ordinance 1983 is that the law of England applies but if the provisions are not applicable and/or not suitable despite modification, they will not be in force.

45. It is appropriate for the Court to consider the applicability and suitability of ss17 and 47 of the CA 1989 within the context of the Act as a whole. The CA 1989 is structured into several parts, each containing provisions addressing different aspects of children's welfare, protection, and rights. These include: (i) the responsibilities of local authorities to provide support and services for children "*in need*" and their families and provisions relating to assessments, services, and accommodation for children that require care and protection; (ii) the protection of children from abuse, neglect, and harm and provisions related to child protection investigations and emergency measures and court orders for the protection of children at risk; and (iii) the care and accommodation of children who are looked after by local authorities and provisions related to foster care, adoption, and the duties of local authorities in relation to looked-after children.

46. Section 17 of the CA 1989 is an overriding duty when performing the "other duties" in Part III and Schedule 2. The substance of the general duty is not to meet the needs of any particular child. It sets out the responsibilities of local authorities to provide a range of services to support children and families. There is a wide range of support services that a local authority may provide and as Lord Nicholls stated in *R (G) v Barnet LBC* [2003] UKHL 57, at §29:

> *"Section 17(1) deliberately eschews references to particular types of services. Section 17(1) is intended to be wide in its scope because the needs of children vary widely. So local authorities must provide an appropriate range and level of services, whatever those services may be."*

The purpose of s17 is to seek to prevent the need for children to be taken into care by providing support and early intervention to address their needs and improve their circumstances.

47. Section 47 places a duty on local authorities to make inquiries to determine whether intervention is necessary to safeguard the child's welfare. Section 47 investigations may be initiated in response to concerns raised by professionals, family members, or members of the public about the welfare of a child. The purpose of s47 is to enable a local authority to assess whether to exercise its powers which include initiating care proceedings or providing support services to the family. As HHJ Anthony Thornton explained in *R (AB) v LB Haringey* [2013] EWHC 416 (Admin), at §13:

> *'…the simple and apparently straightforward terms of s 47 mask a myriad of problems and to help deal with these, a plethora of rules, procedures and guidance have been produced. These are largely found in the statutory guidance issued by the Department for Children, Schools and Families and by statutory authorities such as the London Safeguarding Board. Statutory guidance is issued with statutory authority and it must therefore be complied with unless local circumstances indicate exceptional reasons to justify a departure from it in a specific case. This body of guidance is intended, if followed, to enable the very difficult decisions and exercises of professional judgment to be made satisfactorily on a case by case basis.'*

48. It is clear from the above description that both ss17 and 47 are "gateways" to wider duties. Some of these powers and duties are mandatory and some are discretionary; some may apply some may not. Much will depend on the circumstances.

49. As stated by Martin CJ in ***Slater,*** there is a distinction between rights and obligations and the machinery used to enforce them. If the procedural rules are not essential components of the entire system, they may be disregarded. Woodward J in ***Francis*** endorsed this principle. The issue in ***Francis*** was whether the Employment Rights Act 1996 ('ERA 1996') was applicable and suitable to the local circumstances in St Helena. There were no Employment Tribunals on Ascension Island or in St. Helena for the enforcement of the rights and obligations in the ERA 1996. Woodward J noted that the composition and powers of Employment Tribunals were set out in the ERA 1996 and he concluded that they were effectively "*all part of a piece*". He held that even if the legislation was applicable (which he doubted) it could not be considered suitable if the enforcement mechanism in the form of the exclusive jurisdiction of the Employment Tribunal and the Employment Appeal Tribunal were removed. It is clear that in ***Francis*** the court was also concerned that the whole essence of the 1996 Act was that matters should be determined by a Tribunal consisting of a legally qualified chairman and two lay members, one of whom represents employers and the other employees and that substituting the Employment Tribunal with the Supreme Court would significantly change what Parliament had intended.

50. Mr Auburn KC submitted that the modifications required to make the CA 1989 applicable and suitable are even more extensive than those considered in ***Francis***. I do not agree. The circumstances of this case are very different. There is nothing about the structure and content of the CA 1989 or the practicalities which makes it unapplicable or unsuitable to the BIOT. The statutory duties in ss17 and 47 of the CA 1989 do not require the creation of a social care system and a system of children's services. Nor do they require BIOT to have the equivalent of a lead council member with responsibility for children or a Director of Children's Services. It will be for the Commissioner to determine how the statutory duties are to be discharged. The Court was made aware that the BIOT Administration has recently made arrangements for a social worker to visit Diego Garcia. The practical application of the statutory duties would not be dissimilar; these duties would be vested in the Commissioner and specialist expert assistance can be obtained to meet these statutory obligations as required. The social services machinery of a local authority is not an integral and essential part of the duties in ss17 and 47 of the CA 1989. The duties do not depend upon a particular form of procedure for their existence.

51. In considering applicability and suitability, the Court must also consider the circumstances as they usually exist. There can be no doubt that children are not usually present on the Territory. That is unsurprising given that the 1966 Treaty was instrumental in enabling the establishment of a strategic military base on Diego Garcia and given the size and remote location of the island. Nonetheless, the 1966 Treaty was drafted broadly to include children and dependents and it must be assumed that this was intentional. The 1976 agreement supplements the 1966 Treaty but does not change its legal structure. It only relates to Diego Garcia, not the other 50+ islands in the Chagos Archipelago, and generally restricts access to Diego Garcia to specified groups, including the UK and US Armed Forces (which is a

defined term within the 1966 Treaty), but there is no absolute bar with respect to children. The 1976 agreement reflects what has since become an established policy of unaccompanied postings.

52. An earlier draft of the Safeguarding Policy refers to temporarily hosting certain groups of people, from time to time, who amongst them may include individuals who may be classified as vulnerable due to their age and lesser independence. These include illegal migrants, Chagossians taking part in heritage visits, adults and children on transiting yachts, and crews on illegal fishing vessels. Furthermore, successive Commissioners have made numerous laws relating to children in the context of civil and criminal justice proceedings. As highlighted by Mr Jaffey KC these are not complete self-contained provisions and in the absence of other legislation on the Territory, it is implicit that the CA 1989 fills the gaps. By way of example, in the event of a child being born on the Territory, the mother and father of the child have a duty to provide the Registrar with certain information in accordance with section 6 of the Births and Deaths Registration Ordinance 1984. There is a close relationship between birth registration, legal parent, and parental responsibility but there is no specific BIOT law that addresses this. However, ss2, 3, and 4 of the CA 1989 contain provisions for determining who has parental responsibility and how it can be acquired.

53. Applicability requires the CA 1989 to meet a similar need in BIOT to that for which it was passed in England. As stated by Lewis CJ in *VT* at §60: "*The approach requires a solid ground of inapplicability"* (see also *Leong v Lim Beng Chye* [1955] AC 648, at p665-6). I accept, as stated by Mr Auburn KC, that in recent years the number of children on Diego Garcia is somewhere between "*zero and a very small number*" but I do not accept that that means that the CA 1989 has no applicability. The BIOT constitution and its local laws contemplate that, from time to time, there may be children within its territory. It has been the policy for a long time that postings to Diego Garcia are unaccompanied, but the very nature of policies is that they can change at short notice. There is also the possibility that a child or children may find their way onto the Territory through a variety of means. The primary purpose of the CA 1989 is to ensure that the welfare needs of every child are met and provides the basis in law for most local authority duties and responsibilities towards children and their families in their area. If and when children are present in the BIOT the Commissioner will also be required to meet these objectives. The need to promote and safeguard the welfare of children by providing a range of services appropriate to those children's needs is the same. In normal circumstances, welfare and child protection issues are likely to occur on rare occasions, but legally and factually children may be present within the Territory and when that occurs the CA 1989 is capable of being reasonably applied. Children do not have to have the right to abode to benefit from the mandatory welfare and safeguarding duties within the CA 1989.

54. During his oral submissions Mr Jaffey rhetorically asked, "*How many children do you need for the law relating to safeguarding to be suitable?*" He suggested the answer is 1. I agree. There is no feature of the local circumstances on the BIOT which make it inappropriate and unsuitable to apply the relevant provisions of the CA 1989.

Modifications and Adaptations

55. As will be apparent from the preceding paragraphs of this judgment I do not accept that ss17 and 47 require substantial modification or adaptation to be suitable.

56. The substitution of 'local authority' with 'Commissioner' is a minor and unexceptional modification. It does not change the nature or purpose of the legislation and would not have a significant impact on the essential nature, purpose, and operation of the relevant provisions.

Conclusion

57. For the reasons stated above, ss17 and 47 of the CA 1989 apply in the BIOT. For the avoidance of any doubt, this includes the duties relied upon by the Claimants in Part 1 of Schedule 2 and set out in paragraph 21 above. In *VT* Lewis J stated that there cannot be any concept of '*lesser justice*' in the BIOT. The same principle applies with regard to safeguarding and promoting the welfare of children.

58. I am grateful to counsel and their supporting legal teams for the expert assistance and the clarity of their submissions both in writing and at the hearing. The parties are invited to draw up an order which reflects the conclusions set out in this judgment and agree the terms of any consequential matters including costs.