SUPREME COURT

BRITISH INDIAN OCEAN TERRITORY

BIOT SC/No3/2023 & BIOT SC/No 4/2023

Before:

THE HONOURABLE JAMES LEWIS KC

CHIEF JUSTICE OF THE BRITISH INDIAN OCEAN TERRITORY

B E T W E E N:

THE KING
(on the application of (1) VT, (2) CT, (3) AAA, (4) ZZZ, (5) AAB, (6) AAC, (7) AAD, (8) AAE, (9) AAF, (10) AAG)

Claimants

-and-

THE COMMISSIONER FOR THE BRITISH INDIAN OCEAN TERRITORY

Defendant

Representation

Chris Buttler KC and Zoe McCallum instructed by Duncan Lewis Solicitors on behalf of the First and Second Claimants.

Ben Jaffey KC and Natasha Simonsen instructed by Leigh Day on behalf of the Third to Tenth Claimants.

John Bethell and Sian Reeves instructed by the Government Legal Department on behalf of the Defendant.

Date of hearing: 28 April 2023 Date of Judgment: 5 May 2023

Lewis CJ

1. This is a conjoined application on behalf of the First and Second Claimants; and the Third to Tenth Claimants. The essential issue between all the Claimants and the Defendant is the same, namely whether the Defendant has power to grant funding for the legal representation of the Claimants in challenging their removal from the British Indian Ocean Territory ("BIOT") on non-refoulement grounds.

Background

2. The land mass of the BIOT (the Chagos Archipelago) comprises a number of coral atolls, located in the middle of the Indian Ocean, some of which are above sea-level and form islands. The main island, Diego Garcia consists of a long ribbon-like structure around the edge of an atoll, about 13 nautical miles by 6 nautical miles, enclosing a lagoon. These islands were formerly part of the British colony of Mauritius but in order to facilitate their use as part of a joint defence agreement made in 1966 between the United Kingdom and the United States of America they were separated out to create a new British colony called the BIOT.

3. The BIOT is a British Overseas Territory without any permanent population but has a transient population of over 4000 people mainly consisting of United Kingdom and United States of America service personnel and independent contractors. Each of the 14 British Overseas Territories, formerly colonies of the former British Empire, is constitutionally separate from the United Kingdom. The BIOT, as does each British Overseas Territory, has its own constitution and administration. Instead of a Governor, the BIOT has a Commissioner who carries out the function of both government and legislature in the Territory. That Commissioner is usually a senior civil servant in the Foreign, Commonwealth and Development Office and is assisted by a Deputy Commissioner, an Administrator and at present by around 15 other civil servants. The Commissioner exercises executive powers, may constitute offices for the Territory and make appointments to such offices.

4. The BIOT has a full and independent administration of justice system embracing all civil and criminal matters, with a Magistrates Court, Supreme Court, Court of Appeal and with final appeals going to the Judicial Committee of the Privy Council.

5. The Claimants were among a group of 89 asylum seekers, including 20 children, who left India by boat on 23 September 2021 with they say the intention of travelling to Canada. Their vessel

fell into distress in the Indian Ocean near the BIOT on 3 October 2021 and they were escorted into port at Diego Garcia by two British Royal Navy vessels. The Claimants are currently being housed in tented accommodation in a secure compound on the island of Diego Garcia.

6. The Claimants have issued an application for permission ("the Protection Proceedings") to challenge the Defendant's decision to make a "*removal order*" in respect of each of them pursuant to s.12(1) of the BIOT (Immigration) Order 2004 (the "Decisions"). The Decisions will, if executed, result in their forcible removal to Sri Lanka. The Claimants seek declaratory relief and Orders quashing the Decisions.

7. The Claimants are impecunious, have no resources, do not speak English and have no ability to deal with the legal situation they find themselves in. The Claimants say that the consequences for them if they are forcibly returned to Sri Lanka are of the utmost seriousness. An example of that can be seen from the Protection Claim by the First Claimant:

> "VT is at risk in Sri Lanka from the Karuna Group (which split from the LTTE in 2004) and the Sri Lankan State. He is from Trincomalee, a province in the North-East of Sri Lanka (a former LTTE hotspot). He transported goods from Government areas to LTTE controlled areas on instructions from his uncle (an LTTE member) between 2002/2003 and 2006. In 2005 he was arrested, detained and tortured by the State on suspicion of being LTTE. That same year the Karuna Group and the Sri Lankan army identified the Claimant at a protest organised on instruction of the LTTE and looked for him at home. He fled to an LTTE area and underwent military training. The Karuna Group became informants to the CID and told them of VT's involvement with the LTTE. His friend was disappeared by the GoS and subsequently burned to death by the Karuna Group and the Sri Lankan army. In 2011 the army visited VT's home so he went into hiding. He then participated in a large protest organised by the Tamil National Alliance Party in February 2021 and came to the attention of the Karuna Group. They beat him with sticks causing scarring and permanent damage. They told him that if he participated in any marches again, he would be killed. Around mid-July 2022, the Claimant was informed that his family had been threatened by the CID who said he would be detained on return."

The Claim

8. I had previously ordered a rolled-up hearing of the application for judicial review, but during the hearing it was apparent that permission should be granted and the hearing continued as the substantive hearing of the Claim. The issue was opened by Mr Buttler KC as the sole question

being whether the Defendant has power to make payments for the funding of legal representation.

9. During the hearing there was some dispute about the precise formulation of the issue, therefore it is necessary to set out the procedural history in a little detail.

10. By letters dated 1 and 2 February 2023 Leigh Day solicitors wrote to the Defendant requesting that legal funding be provided for the Claimants' challenge to their non-refoulement decisions.

11. By letter dated 3 February 2023 Duncan Lewis solicitors wrote a Pre-action Protocol Letter ("PAP") to the Defendant saying at [11]:

> "We continue to seek:
> a. Your confirmation that our clients are (subject to satisfying the means and merits criteria) eligible for legal aid under LASPO (as adapted to the circumstances in BIOT).
> b. Identification by you of the method by which our clients should apply for legal aid."

12. On the 6 February 2023 the Defendant to Leigh Day replied saying:

> "Re: Application for Legal Aid
> There are, some very limited, circumstances in which funding is available for legal representation under BIOT law, but this only relates to the defence of criminal allegations.
>
> As you are aware, the British Indian Ocean territory is constitutionally separate and distinct from the United Kingdom. It has its own legal system and laws. Those laws do not make provision for the commissioner to grant funding for legal representation in connection with the migrants immigration claims or for judicial review of the Commissioner's decisions.
>
> The BIOT Administration will therefore not accede to your request for funding.

13. Leigh Day on behalf of the Claimants wrote the same day a PAP letter to the Defendant. It contained in material part:

> "The details of the matter being challenged
>
> 5. The refusal of legal aid for the Claimants' application for judicial review of the Defendant's decision forcibly to remove them to Sri Lanka."
> …
> The issue and Grounds of challenge
> …

> 23. The Claimants are entitled to legal aid for their application for judicial review of the Defendant's decision forcibly to remove them to Sri Lanka. This is because the Legal Aid, Sentencing and Punishing of Offenders Act 2012 ("LASPO") applies in BIOT pursuant to Section 3(1) of the Courts Ordinance 1983.
> …
> 31. Further or in the alternative, the Claimants have a common law right to funding for legal representation for judicial review in the circumstances of this case…"

14. On the 10 February 2023 the Defendant replied to the PAP letter of Duncan Lewis. The defendant said at [7] ".. there is no provision for civil legal aid in the BIOT". The Defendant explained "that legal aid was not available for the proposed claims". Saying at [21]

> "..the short answer to your clients latest proposed claim is that there is no mechanism for legal aid to be provided to your clients or to anyone else in respect of judicial review proceedings in the BIOT."

15. On the 13 February the Defendant replied to the PAP letter of Leigh Day. The Defendant stated that LASPO had no application in BIOT, that section 58 of the BIOT Police and Criminal Evidence Ordinance gave a discretion to the Commissioner to allow payments to solicitors in giving police station advice and at [22]:

> "..the short answer to your clients latest proposed claim is that there is no mechanism for legal aid to be provided to your clients or to anyone else in respect of judicial review proceedings in the BIOT."

16. The decision challenged and the relief sought by all Claimants was:

> "The Claimants apply for judicial review of the Defendant's ongoing failure set out in his letter dated the 6th of February 2023 to determine the Claimants application for legal aid funding…
> The Claimants seek:
> (1) A declaration that the relevant sections of LASPO by virtue of Section 3(1) of the Courts Ordinance 1983: sections 1,9,11,26 and Schedule 1 LASPO apply in BIOT;
> (2) A mandatory order requiring the defendant to determine the claimants entitlement to civil legal aid in respect of the Protection Proceedings..."

17. The Summary Grounds of Resistance in the Defendant's Acknowledgement of Service stated:

> ".. the refusal to fund the Claimants' litigation is a function of there being no mechanism to provide legal aid within the BIOT."

18. In the skeleton argument of the Claimants served on the 21 April 2023 it was said the issue was:

> "The question in this claim is whether the Claimants (and anyone else in BIOT who cannot access justice without legal representation) can, in principle, seek legal aid under either (a) the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") via s.3(1) of the Courts Ordinance 1983, or (b) under the common law right of access to justice.

19. In the skeleton argument of the Defendant in response served on the 24 April 2023 Mr Bethell said at [2]:

> "But the simple reality of the situation should not be obscured, there is no legal aid system in the BIOT and any order of the type sought from the Court would require the Commissioner to establish entirely new administrative machinery that does not currently exist."

20. It is clear beyond argument: that the Claimants were asking the Defendant to grant legal funding either under the incorporation of LASPO into BIOT law or the common law right of access to the court; and the Defendant was taking the position there was no funding of legal representation in BIOT whatsoever save for the very narrow circumstance of a solicitor consultation in the police station.

Legislation

21. The question of whether LASPO is part of the Law of the BIOT will be determined by the Courts Ordinance which reads in material part:

> Section 3 (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;

(b) any provision of an Act of Parliament of the United Kingdom which of its own force or by virtue of an Order in Council or other instrument made thereunder applies to or extends to the Territory;

(c) any statutory instrument (as defined in the Statutory Instruments Act 1946) or prerogative Order in Council which applies to or extends to the Territory."

Section 4 (1) The Commissioner may declare that any United Kingdom enactment, statutory instrument or prerogative Order in Council, other than a provision referred to in section 3(2)(b) or (c), does or does not form part of the law of the Territory.

22. It is of note, as Mr Buttler KC observed, the Commissioner has not disallowed LASPO pursuant to Section 4(1) of the Courts Ordinance. Of course Section 4(1) does not permit disallowance of the common law only a United Kingdom enactment. A contrary law could be enacted by the Defendant, if it is constitutionally sound, pursuant to Section 10 of the BIOT Constitution Order 2004. Section 4(1) provides a safeguard to the Commissioner against incorporation pursuant to section 3(1) having unintended or undesired consequences.

Submissions of the parties

23. Mr Buttler KC made it clear he was not asking this court to determine if the Claimants are entitled to legal aid, but only if the Commissioner has power to grant legal aid in appropriate circumstances.

24. Given that the position of the Defendant was that there was no legal aid for civil or criminal proceedings (save for police station advice) he took the point that there would be no legal aid for those charged with serious crimes. He submitted that legal aid is an essential requirement for the administration of justice and this is achieved either through LASPO or the common law.

25. Mr Buttler KC submitted that there was a presumption that current English law applied so long as it was not inconsistent with BIOT law and was applicable and suitable. Those criteria being conjunctive. He submitted LASPO meets a similar need in BIOT as in England and Wales. Further in support he cited the UK Government 2012 White Paper, "*The Overseas Territories, Security, Success and Sustainability*", in which the UK Government stated that:

"The Rule of Law

…

> The Territories need an effective criminal justice system that delivers justice without delay, protects the civil liberties of all people, and works for the victims of crime and witnesses and also for the accused and convicted. Effective systems are needed, for example, to encourage dispute settlement, provide legal aid where this is needed, and to protect vulnerable witnesses" (emphasis added).

26. Modifications he submitted were permissible to make the English statute suitable as long as those modifications did not remove the essence of the Law in question.

27. Applying those stages, he submitted that LASPO applied in the BIOT. He submitted that Section 58 of the Police and Criminal Evidence Ordinance 2019 ("PACE Ordinance") was not incompatible with LASPO because that provision only dealt with payments to the solicitor and not the defendant; that it only covered travel and accommodation charges and, in any event, it could only be said to be incompatible, if at all, with section 13 of LASPO.

28. The only modification needed would be to substitute the position of Lord Chancellor with that of the Commission in LASPO and restrict the sections that were applicable to Sections 1, 4, 9, 11, 26 and Schedule 1.

29. Mr Jaffey KC submitted in the alternative that the common law right of access to the courts where fairness required it, required legal representation. He relied on *R (Howard League for Penal Reform) v Lord Chancellor* [2017] 4 WLR 92, which held that the absence of legal aid rendered the process for pre-tariff Parole Board reviews, Category A reviews, and removals to close supervision centres unfair as a matter of common law. He cited Lang J in *R (SPM) v Secretary of State for the Home Department* [2022] 4 WLR 92 at [95].

30. While accepting that the ECHR does not apply in the BIOT he argued that the common law recognises the same right of effective access to court as the ECHR. He pointed out that every other British Overseas Territory had some form of legal aid (save for the British Antarctic Territory whose constitutional provision he argued is so similar to Section 3 of the Courts Ordinance, it would also have legal aid if this Court determined legal aid or LASPO to be applicable in the BIOT).

31. Mr Bethell for the Defendant took a root and branch objection to the incorporation of LASPO into the law of the BIOT. He said so far as the Claimants' reliance upon LASPO 2012 is concerned, the starting point is that LASPO 2012 was not extended to the BIOT when it was enacted by the Westminster Parliament: see ss.152-153.

32. He submitted, Section 58 of the PACE Ordinance, was the complete code for the provision of legal representation in the BIOT and left no room for LASPO as it was an 'inconsistent' Law. The arrangements made in s.58(15) of the PACE Ordinance provide a "specific" BIOT law, within the meaning of s.3(2)(a) of the Courts Ordinance, for the purposes of funding legal advice and representation. The wholesale application of LASPO 2012 would be entirely inconsistent with these provisions.

33. Further submitted Mr Bethell, LASPO was neither applicable nor suitable to the local circumstances in the BIOT. He argued that the BIOT Administration is not the executive of a highly sophisticated modern administrative state. Rather it discharges important, but practically limited, functions in respect of a remote territory without any permanent population. Importantly he says the proper operation of LASPO 2012 (in the UK) requires, inter alia, the making of further secondary legislation under s.11 and a dedicated branch of the civil service to assess applications against those criteria. LASPO 2012 can no more function in the BIOT without that machinery than the (UK) Employment Rights Act 1996 could in St Helena.

34. He submitted it would be wrong to force the expenditure of public funds and that the BIOT had no income from which legal representation could be funded.

35. Finally, he submitted the obvious inapplicability and unsuitability of LASPO 2012 cannot be overcome by means of modifications to the English law, pursuant to s.3(1) of the Courts Ordinance. He said Section 3(1) does not create an obligation to reformulate each and every piece of English legislation so as to make it 'fit' the circumstances of the BIOT and apply there, notwithstanding the remainder of s.3(1). On the contrary, it is an interpretative principle that even the part of English law that is both applicable and suitable to the BIOT must be read with an eye to the realities of matters there. He submitted on no arguable view can LASPO 2012 be 'modified' for the BIOT.

36. So far as the common law right submitted by Mr Jaffey KC, he said prior to the Legal Advice and Assistance Act 1949, there was no civil legal aid in England. Its availability in England now is solely due to, and is entirely determined by, LASPO 2012. There is no free-standing "common law right". He said that the answer to the *Howard League* case was for the Claimants to advance the unfairness arguments as part of their challenge to the removal decisions.

Discussion

LASPO

37. There are three steps to consider whether an English statute is part of the law of the BIOT:

    1) Is there inconsistent local law already in force? If so English law gives way to that local law. If not, there is a presumption it applies subject to the proviso set out in steps 2 and 3;

    2) The English law only applies so far as it applicable and suitable to local circumstances; and

    3) The English law shall be construed with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary.

Inconsistent local law

38. The Defendant submits that Section 58 of the PACE Ordinance is inconsistent with the entirety of LASPO.

39. The temporal provision, "as from time to time in force", in Section 3(1) of the Courts Ordinance means that the current law of England and Wales is to be considered, and if the law changes in England then that change also occurs to any such enactment that applies in the BIOT.

40. It was common ground that if the first step is satisfied then the English law presumptively applies. In his written argument Mr Bethell at [22 (b)] says:

> Secondly, if, and only if, there is no such conflict, the English law concerned will presumptively apply in the BIOT but insofar (only) as is "*applicable and suitable*" to the circumstances of the BIOT (i.e. the circumstances in the BIOT at the time when the law came into effect in England).

41. I agree that absent an inconsistent local law in force the English statute is presumptively applicable. I do not agree with Mr Bethell's submission that the applicability and suitability is to be judged at the time when the law came into effect in England. The temporal provision in the statute is clear and the applicability and suitability must be judged at the current time. It is obvious an English statute that was either at its time of enactment appliable and suitable, or inapplicable or unsuitable, may after later amendments, partial repeals, etc become either appliable and suitable, or inapplicable or unsuitable. I therefore reject Mr Bethell's submission on this point. We need to consider LASPO as it currently stands.

42. The PACE Ordinance is closely modelled on the English Police and Criminal Evidence Act 1984 ("PACE Act"). The draftsman has closely followed the English sections and made local modifications. Section 58 in both the PACE Ordinance and the PACE Act is headed "Access to legal advice". Section 59 in the PACE Act dealt with the provision of legal aid for persons at police stations. It is now repealed as it is dealt with by Section 13 of LASPO. Section 59 in the PACE Ordinance is left blank. It is clear the draftsman of the PACE Ordinance conflated parts of what was Section 59 in the PACE Act into Section 58 of the PACE Ordinance.

43. It is clear the Section 58 of the PACE Ordinance was dealing with, and confined to, the provision of legal assistance of a solicitor while the defendant was in the police station. In relation to the discretion to make payment the position is somewhat different in the PACE Ordinance than was in the PACE Act.

44. Section 58 reads:

> 58 (13) If a solicitor wishes to travel to the Territory –
> (a) usual immigration controls will apply; and
> (b) before entering the Territory, the solicitor shall –
> (i) pay <u>any fees or other charges to be incurred</u> in such travel;
> (ii) pay <u>any fees or other charges to be incurred</u> for accommodation in the Territory; and
> (iii) provide the Administration of the Territory with proof of adequate personal insurance that covers medical evacuation and repatriation.
>
> (14) Nothing in this section shall require the immigration authorities of the Territory to permit the entry of a solicitor into the Territory.
>
> (15) Nothing in this section shall require the Commissioner, the Administration of the Territory, the Chief of Police or the court to provide funds for or towards <u>any fees or other charges incurred</u> by the solicitor, but the Commissioner may, in the interests of justice, and in the Commissioner's entire discretion, allow for part or all of <u>any such fees or other charges</u> to be paid from the Government Fund. [Emphasis added]

45. The phrase "fees or other charges incurred" in Section 58(15) is to be construed *ejusdem generis* to the words "fees or other charges to be incurred" in Section 58(a)(i) and (ii). These fees and charges are limited to travel and accommodation. They are expenses of the solicitor and not payment of fees for the advice and representation of the solicitor. The provisions in section 13 of LASPO concern the giving of advice by the solicitor. I agree with the submission of the Claimants that section 58(15) was principally enacted to make provision for the

exceptional costs that might arise from a solicitor attending the police station on Diego Garcia – the travel and accommodation costs referred to at s.58(13) of the PACE Ordinance

46. It is difficult, if not impossible, to see that the draftsman of Section 58(15) of the PACE Ordinance intended to provide a complete code for the provision of legal funding in all civil and criminal matters by this very limited provision.

47. Indeed, the logic of Mr Bethell's argument is that there is no provision in the BIOT for funding representation in criminal proceedings such as at trial (Section 14 of LASPO deals with those proceedings). If the Defendant's argument was right, a decision to introduce a bespoke BIOT scheme to ensure representation at the Police station would, by a side wind, have removed any possibility of legal aid at a subsequent trial, however serious the charges.

48. Faced with a close analysis of Section 58 (13) to (15) Mr Bethell appeared in the hearing to concede that his argument on outright incompatibility of LASPO was unsustainable.

49. I have no doubt that the existence of section 58(15) of the PACE Ordinance does not render the entirety of LASPO incompatible. At its highest it may be incompatible with the payment of travel and accommodation expenses if eligible to be paid under section 13 of LASPO but the section does not exclude *per se* legal funding for criminal or civil proceedings. Mr Bethell's written submission that "The arrangements made in s.58(15) of the PACE Ordinance provide a "*specific*" BIOT law, within the meaning of s.3(2)(a) of the Courts Ordinance, for the purposes of funding legal advice and representation" is wrong.

50. Mr Bethell's argument that sections 152 and 153 of LASPO only extend LASPO to England and Wales (and in part Northern Ireland and Scotland) and therefore LASPO cannot be extended to the BIOT is hopeless. The whole point of section 3(1) of the Courts Ordinance is to apply statutes that have not been extended to the BIOT.

51. It follows that LASPO is presumptively applicable in the BIOT.

Applicability and suitability

52. The words of the proviso to Section 3(1) of the Courts Ordinance are "Provided that the said law of England shall apply in the Territory only so far as it is applicable and suitable to local circumstances" [Emphasis added].

53. In oral argument there appeared to be an issue as to whether the whole Act had to be 'applicable' for the Act to apply or could just some provisions of the Act be 'applicable'.

54. In *Francis v AG* in the St Helena Court of Appeal, 1 of 2008, Woodward J. said quoting Martin CJ in the earlier case of *Slater v Serco* on similar wording[1] in the English Law (Application) Ordinance 2005:

> "2. A statute can only be applied if it is both applicable and suitable to local circumstances. There are two distinct tests. Is it applicable and is it suitable?
>
> 3. 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.
>
> 4. 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.

55. I do not fully agree with the formulation set out. I agree with paragraph 2 that applicability and suitability must be separately satisfied. I also agree with paragraph 3 that the Act must be capable of being reasonably applied, that 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. 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.

56. In the Privy Council in *R v Christian [2007] 2 AC 400*, Lord Hoffman said in relation to similar words:

> "But 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."

[1] It reads: "The Adopted English Law applies to St Helena only in so far as it is applicable and suitable to local circumstances, and subject to such modifications, adaptations, qualifications and exceptions as local circumstances render necessary."

> 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. Their Lordships think that there can be no doubt that the 1956 Act is an Act of general application and that there are no local circumstances which make it inappropriate to apply the provisions about rape, indecent assault and incest. [Emphasis added]

57. In that case the Board was applying specific provisions only from the English Sexual Offences Act.

58. In *Nyali* Denning LJ said:

> "The next proviso provides, however, that the common law is to apply "subject to such qualifications as local circumstances render necessary." This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far-off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task which calls for all their wisdom."

59. Of course, it may be that there are no provisions within an English Act that are applicable or suitable to the BIOT, and in that case the Act will not apply. But in my judgment the correct approach is once the English Act is presumptively applied in the BIOT, the proviso prevents unapplicable provisions or provisions that are not suitable despite modification, from being in force.

60. Applicability will require LASPO to meet a similar need in BIOT to that for which it was passed in England. The approach requires a solid ground of inapplicability. The Board said in *Leong v Lim Beng Chye* [1955] AC 648*,* at 665-6:

> **"**But English law itself has been introduced into Penang, as part of the Straits Settlements, " so far as " it is applicable to the circumstances of the place " (Yeap Cheah Neo v. Ong Cheng Neo 10); and, while so much of that law as can be said to relate to

> matters and exigencies peculiar to the local condition of England and to be inapplicable to the conditions of the overseas territory is not to be treated as so imported, their Lordships are of opinion that the process of selection cannot rest on anything less than some solid ground that establishes the inconsistency. [Emphasis added]

61. I agree with the Claimants who submit that while obviously on a much smaller scale the mischief that LASPO remedies is the same mischief that exists in BIOT. Having a full civil and criminal justice system comes with responsibilities and the BIOT government cannot shrink from those responsibilities when they arise. On the evidence it appears they will only arise rarely.

62. It is difficult to see how HMG of the BIOT does not have these same responsibilities, at least in principle, as HMG of the United Kingdom. In *R (GR) v Director of Legal Aid Casework* [2021] 1 WLR 1483, para.57, Pepperall J. said LASPO gives effect to the "state's obligation to provide fair and effective access to justice".

63. There cannot be any concept of 'lesser justice' in the BIOT. The Courts have recognised that, without legal aid, some individuals would be denied fair and effective access to justice. In *R (Gudanaviciene) v Director of Legal Aid Casework* [2015] 1 WLR 2247, the Court of Appeal held that some individuals would be unable to access justice without legal aid, e.g. because of the complexity of the legal issues (paras.90, 135, 172). I agree with the Claimants that the same applies in the BIOT. The need for a system of legal aid for those who would otherwise be unable to access justice is the same.

64. The mere fact, as the Defendant contends, that BIOT has no Lord Chancellor or Director of Legal Aid Casework prevents applicability is unsound. The plea of the Defendant is that "The BIOT Administration is not the executive of a highly sophisticated modern administrative state. Rather it discharges important, but practically limited, functions in respect of a remote territory without any permanent population". He argues that LASPO without accompanying machinery of implementing which is not available in BIOT renders the statute inapplicable.

65. Further, the defendant submits that lack of permanent population, no right of abode on the Islands, and lack of governmental resources all point to the inapplicability of the statute.

66. The Claimants submit LASPO does not require any complex administrative machinery. It requires: (1) a minister of the Crown (s.1), which in England is the Lord Chancellor and in BIOT is the Commissioner; and (2) a civil servant to act as Director of Legal Aid Casework

(s.4), who in England is a civil servant at the Ministry of Justice and in the BIOT would be one of the Commissioner's civil servants sitting in the FCDO.

67. Further, say the Claimants, the existence or non-existence of a settled population is nothing to the point. What matters is that there is a criminal and civil justice system that exists for the adjudication of rights and liabilities accruing in BIOT. Those rights and liabilities attach as much to contractors and visitors as they would to any settled population. The size of the (non-settled) population in the BIOT (4,000 individuals) is larger than the population of the Falkland Islands and the same as the population of St Helena, and both those territories have a framework of legal aid. The Claimants make the forensic point that the British Overseas Territory of South Georgia and the South Sandwich Islands, which like the BIOT has no permanent population, but nevertheless has a full system for the provision of criminal and civil legal aid. Rhetorically it is asked how can legal aid be applicable and suitable there and not in the BIOT.

68. I agree with the Claimants. It must not be forgotten in this case the state may seek to use coercive power against individuals in returning them forcibly to Sri Lanka. It is using the force of the BIOT law to do so. It must do so lawfully and attribute a fair hearing to those who challenge the use of state coercive powers against them. The rule of law cannot be set aside because of administrative difficulties or inconvenience.

69. In short, the criminal and civil justice system of BIOT requires access to justice in exactly the same way as the English civil and criminal justice system. Where access to justice depends on legal aid (as the English courts have recognised that it sometimes does), the proper and efficient administration of justice in BIOT will require legal aid in the same way. It follows I have no doubt of the 'applicability' of LASPO to the BIOT.

70. Suitability will depend on whether substantial modification is required. In oral argument the Claimants went through the provisions of LASPO they sought to be declared were in effect in the BIOT and the modification required. For completeness I will set them out with the modification shown by strikethrough and underlining in Annex 1 to this judgment.

71. As can be seen from the Annex the modifications are minor and unexceptional.

72. Section 1:The substitution of the office of Lord Chancellor with that of Commissioner is obvious and a necessary modification. It is a commonplace substitution where the function of

a Secretary of State is transposed to the Governor of a British Possession or Overseas Territory. It does not change the nature or purpose of the legislation.

73. Section 4: There is no special qualification for the civil servant to become the Director. The Commissioner has around 15 civil servants and can designate one as a Director of Legal Aid Casework. The provision has the benefit of preventing the Commissioner being a judge in his own cause in the grant of legal aid.

74. Section 11: It will be up to the Commissioner if he decides to make regulations. He has plenary powers to do so and does not need to be given *vires* under this provision.

75. Section 26: This provision is necessary to avoid costs being awarded against a legally aided person. It is of note that in this application the Defendant is seeking his costs, presumably of many thousand pounds against the impecunious Claimants

76. It follows in my judgment the relevant sections of LASPO, namely 1,4,9,11,26 and Paragraph 19 of Schedule 1 to the Act apply in the BIOT.

The Common Law

77. The Claimants put their case in the alternative on common law powers.

78. The legal team of the Claimants with commendable diligence, and particularly as it appears they were without guarantee of any funding, were assiduous in their preparation, as in the best traditions of the legal profession. This diligence unearthed a number of cases where the Commissioner had indeed paid for the legal representation of defendants charged with offences in the BIOT.

79. By letter dated 31 August 1988 it was shown the legal fees of the solicitor's firm retained in the defence of Mr Cenon de los Santos was authorised by Mr S Turner, Administrator of the BIOT. Mr de los Santos was convicted of murder of Abellardo Jayco in Diego Garcia by Sir John Fry CJ of the BIOT and sentenced to life imprisonment.

80. On 12 December 1988 Gregory Johnson a US citizen serving on board a United States merchant vessel moored in Diego Garcia lagoon pleaded guilty to a charge of wounding with intent and was sentenced to 30 months imprisonment. In a file note dated November 1988 it was stated " Johnson was asked today if he plans to pay for his own lawyer. He stated he does not and agreed to instruct a lawyer from a list presented to him." He in fact chose a lawyer

called B Rao from the list. This lawyer's costs were paid by the BIOT administration. The file note says " Rao's costs should be paid locally and charged to the British Ocean Territory budget in your post account quoting subhead c: vote 2 code 22062"

81. In June 1988 it appears legal aid was granted to a Master at Arms Evans (BIOT Chief of Police) for his appeal against drink driving in the BIOT. The signal message includes the passage " ...am assisting M Evans ref his appeal pending legal aid for civilian solicitor".

82. Mr Jaffey KC also pointed out that in the Exchange of Notes between the United Kingdom and the United States of America express provision was made for the provision of legal funding for American personnel tried in the BIOT courts:

> "1(i) Whenever a member of the United states forces is prosecuted by the authorities of the territory he shall be entitled
> (i) to a prompt and speedy trial;
> …
> (v) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the territory;
> …

83. It is clear that the BIOT Administration would be responsible for providing legal funding in such a case.

84. In the light of this, during the hearing before me, Mr Bethell conceded that the Commissioner had a discretion to pay for legal funding. Mr Bethell did not limit the concession to criminal proceedings or exclude civil proceedings. Indeed, it is difficult to see how he could as it became an agreed position that the power to pay for such funding as an *ex gratia* payment was a combination of prerogative power and appropriation under sections 5 and 7 of the Public Funds (Procedures) Ordinance 1992. Therefore there does appear to be a process, if not a mechanism, for legal funding in the BIOT.

85. This was the first time that the Court or the Claimants had been made aware that the Defendant accepted he had a discretion to pay for legal funding and the Claimants would have so applied if they had known it was available.

86. Mr Buttler KC submitted that this concession meant the claim should be allowed on that point alone as the Claimants had not only asked for funding but been told, after asking the Defendant to identify any route for funding, there was no mechanism in place to provide any funding for

legal representation in the BIOT. It is clearly unsatisfactory for such an important fact to be raised by concession during the hearing when, as can be seen from the section on 'The Claim' above, the Claimants had asked the Defendant to identify the method by which they should apply for legal aid funding. However, the question of whether funding is a common law right is important and I shall discuss it below.

87. The starting point is that the Court of Appeal of England and Wales has already recognised that the state may have to provide legal aid to avoid common law unfairness.

88. *In R (Howard League for Penal Reform) v Lord Chancellor* [2017] 4 WLR 92 the claimants, a charity providing representation to prisoners, sought judicial review of the Lord Chancellor's decision to introduce the Criminal Legal Aid (General) (Amendment) Regulations 2013, which removed funding for a number of areas of decision-making concerning prisoners from the scope of the criminal legal aid. The Court of Appeal held that determining whether the removal of legal aid from any category caused inherent or systemic unfairness depended on the application to the particular category of three factors, namely (i) the importance of the issues at stake, (ii) the complexity of the procedural, legal and evidential issues and (iii) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity and the other assistance that was available. The Court of Appeal expressly held that the absence of legal aid rendered the process for pre-tariff Parole Board reviews (para.92), Category A reviews (para.109), and removals to close supervision centres (para.126) unfair as a matter of common law.

89. Beatson LJ dealt with common law fairness and at [47] said:

> 47. We turn to *Gudanaviciene's* case [2015] 1 WLR 2247. Six claimants successfully challenged decisions by the Director of Legal Aid Casework refusing their applications for ECF funding and the Lord Chancellor's guidance which stated that legal aid is not required in immigration cases in the Administrative Court 5 . The Director and the Lord Chancellor appealed in five of the cases. This court, in a judgment handed down by Lord Dyson MR, stated at para 69 that there was no reason in principle why the test that the need for effective involvement in the decision making process might require the grant of legal aid should not apply to immigration cases. It also stated, at para 72:
> "Whether legal aid is required will depend on the particular facts and circumstances of each case, including (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity."

> The court dismissed the appeal of the Director and the Lord Chancellor in three of the cases. It decided that the individuals could not present their cases effectively or have any effective involvement in the decision-making process without legal advice, in one case because of language difficulties, in another because of legal complexity and in the third because of a combination of the two. The court allowed the appeal of the Director and the Lord Chancellor in the other two cases.

90. Lang J said in *R (SPM) v Secretary of State for the Home Department* [2022] 4 WLR 92 at [95]:

> 95. In the light of the judgments in *Howard* and A , I consider that the law has evolved since *Witham* and that a lack of legal aid provision can, in certain circumstances (for example, where a person is held in detention), constitute an obstacle to the fundamental common law right of access to justice.

91. In *R (GR) v Director of Legal Aid Casework* [2021] 1 WLR 1483, Pepperall J concluded that the ECHR right of access to justice went no further than the common law in the specific context of legal aid. At para.57:

> "It is of course fundamental that the state must provide access to justice. While the arguments before me were framed by reference to article 6 of the Convention, such right is, as Lord Reed JSC powerfully demonstrated in *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening) (Nos 1 and 2)* [2020] AC 869, not some recent European import but deeply embedded in our constitutional law."

92. It is therefore clear that at common law there is a right to practical and effective access to justice, and where fairness demands it, the common law requires that a person be represented and legal aid provided as necessary. This applies in the BIOT.

93. I accept the position of Mr Jaffey KC who submitted in the absence of legal aid, it is inevitable that most asylum seekers in BIOT will be unable to exercise their right to claim judicial review of the refusal of their protection claim at all, still less in a practical and effective way.

94. The evidence of Jeremy Bloom is instructive. He says:

> <u>How important are the issues at stake?</u> The protection claims brought by individuals on the BIOT are of the most profound importance to them, involving issues of life, liberty, health and protection from abuse.
>
> <u>How complex are the procedures, the area of law or the evidence in question?</u> As has been demonstrated in the Protection Proceedings for CT and VT, the procedures, area of law and the evidence in question are extremely complex. My view is that it is

inconceivable that individuals without legal representation would be able to navigate the procedures, law and evidence effectively without legal representation.

How capable is the individual of presenting their case effectively? Based on the eight individuals that Duncan Lewis has represented, my view is that it would be quite impossible for the individuals who are in BIOT to be able to present their case effectively:

The cohort of individuals who require representation appears to be largely non-English speaking, with a relatively low level of education.

The emotional involvement of the individuals in the issues in the case may be incompatible with the degree of objectivity expected of advocates in court.

Most individuals will not have relevant experience in the area of law, and may not have knowledge of the factual subject matter, beyond the facts of what they personally experienced.

Given the persecution that they have suffered in Sri Lanka, some individuals are likely to have mental health conditions or disabilities that may put them at a disadvantage vis-à-vis the Defendant. Some may lack capacity.

95. It follows that in the challenge to the serious and important removal decisions it is difficult if not impossible to see how these impecunious Claimants could fairly represent themselves. As noted above, the power of the state through the BIOT legal system may be used coercively against these Claimants with potential serious consequences. To effectively deprive the Claimants of a fair opportunity to challenge the exercise of that power by refusal of legal aid would be contrary to the rule of law. The suggestion by Mr Bethell that the Claimants could use that lack of legal representation as itself a substantive ground for challenging the Removal Decisions makes a mockery of the position. If they don't have representation how can they even raise the lack of representation in a fair, legal and comprehensive manner.

Conclusions

96. For the reasons set out above, permission is granted and the Claims are allowed. The Court will issue a declaration essentially in the terms sought.

ANNEX to the Judgment

These are the accepted modifications to LASPO.

Section 1(1)The ~~Lord Chancellor~~ Commissioner must secure that legal aid is made available in accordance with this Part.
(2)In this Part "legal aid" means—
(a)civil legal services required to be made available under section 9 or 10 or paragraph 3 of Schedule 3 (civil legal aid), and
(b)services consisting of advice, assistance and representation required to be made available under section 13, 15 or 16 or paragraph 4 or 5 of Schedule 3 (criminal legal aid).
(3)The ~~Lord Chancellor~~ Commissioner may secure the provision of—
(a)general information about the law and the legal system, and
(b)information about the availability of advice about, and assistance in connection with, the law and the legal system.
(4)The ~~Lord Chancellor~~ Commissioner may do anything which is calculated to facilitate, or is incidental or conducive to, the carrying out of the ~~Lord Chancellor's~~ Commissioner's functions under this Part.
(5)Nothing in this Part affects the powers that the ~~Lord Chancellor~~ Commissioner has otherwise than under this Part.

Director of Legal Aid Casework

Section 4 (1)The ~~Lord Chancellor~~ Commissioner must designate a civil servant as the Director of Legal Aid Casework ("the Director").
(2)The ~~Lord Chancellor~~ Commissioner must make arrangements for the provision to the Director by civil servants or other persons (or both) of such assistance as the ~~Lord Chancellor~~ considers appropriate.
(3)The Director must—
(a)comply with directions given by the ~~Lord Chancellor~~ Commissioner about the carrying out of the Director's functions under this Part, and
(b)have regard to guidance given by the ~~Lord Chancellor~~ Commissioner about the carrying out of those functions.
(4)But the ~~Lord Chancellor~~ Commissioner —
(a)must not give a direction or guidance about the carrying out of those functions in relation to an individual case, and
(b)must ensure that the Director acts independently of the ~~Lord Chancellor~~ Commissioner when applying a direction or guidance under subsection (3) in relation to an individual case.

General cases
9(1)Civil legal services are to be available to an individual under this Part if—

(a)they are civil legal services described in Part 1 of Schedule 1, and
(b)the Director has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn the determination).

Qualifying for civil legal aid
11(1)The Director must determine whether an individual qualifies under this Part for civil legal services in accordance with **the criteria in subsection (2)**—
~~(a)section 21 (financial resources) and regulations under that section, and~~
~~(b)criteria set out in regulations made under this paragraph~~.
(2)In setting the criteria, the ~~Lord Chancellor~~ Commissioner—
(a)must consider the circumstances in which it is appropriate to make civil legal services available under this Part, and
(b)must, in particular, consider the extent to which the criteria ought to reflect the factors in subsection (3).
(3)Those factors are—
(a)the likely cost of providing the services and the benefit which may be obtained by the services being provided,
(b)the availability of resources to provide the services,
(c)the appropriateness of applying those resources to provide the services, having regard to present and likely future demands for the provision of civil legal services under this Part,
(d)the importance for the individual of the matters in relation to which the services would be provided,
(e)the nature and seriousness of the act, omission, circumstances or other matter in relation to which the services are sought,
(f)the availability to the individual of services provided other than under this Part and the likelihood of the individual being able to make use of such services.
(g)if the services are sought by the individual in relation to a dispute, the individual's prospects of success in the dispute,
(h)the conduct of the individual in connection with services made available under this Part or an application for such services,
(i)the conduct of the individual in connection with any legal proceedings or other proceedings for resolving disputes about legal rights or duties, and
(j)the public interest.

Costs in civil proceedings
26(1)Costs ordered against an individual in relevant civil proceedings must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including—
(a)the financial resources of all of the parties to the proceedings, and
(b)their conduct in connection with the dispute to which the proceedings relate.
(2)In subsection (1) "relevant civil proceedings", in relation to an individual, means—

(a)proceedings for the purposes of which civil legal services are made available to the individual under this Part, or
(b)if such services are made available to the individual under this Part for the purposes of only part of proceedings, that part of the proceedings.

Sch 1. 19(1)Civil legal services provided in relation to judicial review of an enactment, decision, act or omission.