IN THE SENIOR JUDGES' COURT OF THE SOVEREIGN BASE AREAS OF AKROTIRI AND DHEKELIA, ON APPEAL

SITTING AT EPISKOPI

Appeal No. 1 of 2011

Before: The Hon. Mr Justice J J Teare, Presiding Senior Judge
The Hon. Mr Justice R G Chapple, Senior Judge
The Hon. Mr Justice G Risius CB, Senior Judge

Tag Eldin Ramadan Orsha in Bashir and others

Appellants

-v-

Administrator of the Sovereign Base Areas of Akrotiri and Dhekelia

First Respondent

-v-

Secretary of State for Defence

Second Respondent

Ms Claire Physsas and Ms Nicoletta Charalambidou for the Appellants
Ms Samantha Broadfoot and Mr Ravi Sampanthar for the Respondents

13 September 2011

JUDGMENT

Introduction

1. This is an application by Tag Eldin Ramadan Orsha in Bashir, a national of Sudan, together with a number of other Sudanese, Ethiopian and Egyptian nationals, Iraqi and Syrian Kurds, as well as members of their families (all of whom together will be referred to as "the appellants") for leave to appeal against the refusal by the court below (Mr Justice Whitburn QC, Mr Justice Collender QC and Mr Justice Rumbelow QC) at first instance on 23 March 2011 of their application for judicial review of:

a. the decision made by the First Respondent on 28 January 2010 to terminate their welfare payments and the provision of accommodation with effect from 26 March 2010, and

b. the decision made by the Second Respondent on 28 January 2010 to give them notice to vacate the Ministry of Defence property at Richmond Village, near Dhekelia Station, by 31 March 2010

2. In the court below, the appellants challenged the decisions on five grounds, posed as a series of questions:

a. Question 1 – Does the 1951 Geneva Refugee Convention currently apply to the Sovereign Base Areas ("SBAs"), and if it does, can the appellants rely upon it to obtain an order from the court reversing the challenged decisions on the ground that they were incompatible with the provisions of the 1951 Convention?

b. Question 2 – Is the legal and constitutional relationship between the SBAs and the UK under domestic and international law such that the UK is obliged to find durable solutions for the appellants respecting the rights guaranteed by the 1951 Convention?

c. Question 3 – Can the relocation of the appellants in the Republic of Cyprus ("RoC") be considered as "resettlement and as a durable solution guaranteeing the rights provided by the 1951 Convention"?

d. Question 4 – Were the decisions to terminate weekly welfare benefits and to evict the appellants from their accommodation illegal?

e. Question 5 – Does the decision to evict the appellants from their accommodation violate their rights to a home?

3. The court below answered these questions in two judgments, the first by Collender J (the minority judgment), and the second by Rumbelow J, with whom Whitburn J agreed (the majority judgment).

4. Both judgments were in agreement that the answers to Questions 2-5 were all in the negative, though on Question 2 Collender J supported Rumbelow J's reasoning with additional reasons of his own. Both judgments also agreed that the answer to Question 1 was also in the negative, though there was disagreement as to whether the 1951 Convention currently applies to the SBAs. Collender, J held that it does, but went on to hold that as it had not been incorporated into the domestic law of the SBAs, it could not be enforced by the appellants. The application for judicial review was accordingly refused.

Appeal

5. The appellants now seek leave to appeal on eight grounds. This judgment, to which we have all contributed, records our decisions on the grant of leave and our conclusions on the grounds relied on.

6. Given the division of opinion in the court below as to Question 1, we feel it only right to grant leave to appeal on Ground 1. We also think it right to grant leave on Ground 8, in the light of the further evidence submitted by the appellants, which was not available to the court below. As to the remaining grounds, we consider that the overlap between them is such that the fairest course is to grant leave to appeal in respect of them all.

Background

7. The background to the appellants' claims is set out more fully in the judgments of the court below, but for present purposes the following outline will suffice.

8. The precise circumstances in which the appellants came to the island of Cyprus on 8 October 1998 were not clearly in evidence, but it appears they were

among a group of about 75 individuals from Ethiopia, Iraq, the Sudan and Syria who arrived in a foundering boat off the Akrotiri in the Western Sovereign Base Area ("WSBA"), apparently on their way to Italy. They came ashore, or were rescued, and were initially detained on behalf of the First Respondent in barrack accommodation. Refugee status was accorded to 19 individuals in July 1999, and to the remainder in February 2000.

9. In May 2000 they were provided with homes in the Eastern Sovereign Base Area ("ESBA"), at a place called Richmond Village. The married quarters there, where British soldiers had previously lived with their families, belonged to the Second Respondent. By then all the properties were vacant and a number had been demolished, leaving only 23 still standing, 13 of them uninhabitable. All were subsequently found to contain asbestos.

10. The appellants are now all recognised by the Sovereign Base Areas Administration (the "SBAA") as refugees, but from the outset it has been the SBAA's position that the SBAs, as military bases, lack the infrastructure to provide long term refugee facilities. The First Respondent's decision to recognise the appellants as refugees was taken in 1999 and 2000 after their circumstances were considered by the Home Office in London. In 2001 the appellants sought clearance to enter the UK, but the Home Office refused. In 2005 the RoC agreed to apply the provisions of a Memorandum of Understanding ("MOU") retrospectively, so as to extend its terms to the appellants. Most of the appellants have so far refused to move to the RoC, preferring instead to continue their attempts to seek entry to the UK.

11. In early 2007 the appellants were notified that the SBAA would stop providing them with welfare benefits and they were to vacate their homes. Following protests these notifications were temporarily withdrawn, but were reimposed as recorded in paragraph 1a. and 1b. above.

Hearing

12. We were provided with helpful skeleton arguments, bundles of authorities and further documentary evidence, and we heard submissions from Ms Physsas for the appellants and Ms Broadfoot for the respondents over five days from 5 September 2011.

We did in turn deal with each of the Grounds of Appeal advanced in the perfected skeleton argument filed on behalf of the respondents.

Ground 1 – whether the 1951 Refugee Convention and its 1967 Protocol apply to the Sovereign Base Areas ("SBAs")

13. The appellants contend that the 1951 Geneva Convention and the 1967 United Nations Protocol relating to the status of refugees apply to the SBAs. The aims and objects of the Convention are well known – in short summary, to afford protection to those who fall within the definition of `refugee' – protection from refoulement, discrimination and unequal treatment.

14. The UK signed the Geneva Convention on 27th July 1951 and ratified it on 11 March 1954. On 25 October 1956, the UK gave notification that the Convention applied to its then colony of Cyprus. The 1951 Convention applied only to those who could claim refugee status as a result of events occurring before 1st January 1951. The original Convention also gave signatory states the option to restrict the events upon which applicants for refugee status could rely to those occurring within Europe. The UK acceded to the 1967 Protocol on 4 September 1968; that protocol effectively removed the temporal and geographical limitations contained in the original 1951 Convention.

15. The appellants were amongst those who arrived in the SBAs in 1998 - they would not then have been within the ambit of the original convention, but (if it applies to the SBAs) would have been included by reason of the 1967 protocol.

16. In 1960, the Republic of Cyprus was created. The vast majority of the island became the newly formed republic. Two areas of land became the Sovereign Base Areas of Akrotiri and Dhekelia – situated within each of the SBAs were military establishments. Undoubtedly, as the respondents put it, this was, as a matter of fact, a fundamental change in the affairs and situation of the island of Cyprus. The status and nature of the SBAs lies at the heart of the appellants' first ground of appeal. The question for determination here, it is agreed, was correctly identified by the court below (the test applied deriving from *R (Bancoult) -v- Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453) as whether the SBAs were:

a. Relics of the old colony of Cyprus or, as Collender J in the court below put it "what was left as the rump of the British colony of Cyprus after the RoC was created as a newly independent state out of the balance of the colony"; or

b. A newly created political entity.

17. If the SBAs are effectively the surviving parts of the colony of Cyprus, then it is agreed that the Geneva Convention applies (the 25 October 1956 notification still applying to the remaining part of the colony – and the respondent's concession that if that be the situation, the 1967 protocol also applies). That of course is the appellants' case, it being contended that the majority decision at first instance was wrong and that the dissenting view of Collender J is to be preferred. The respondent's case, here and below, is that in 1960, the colony of Cyprus ceased to exist. Two new political entities were created: the RoC and the SBAs. If that be right, it must follow that the Geneva Convention does not apply to the SBAs. The application of the Geneva Convention to the colony of Cyprus came to an end with the break up and death of the colony in 1960. It is common ground that there has been no notification from the UK that the 1951 Convention or 1967 protocol applies to the SBAs.

18. We have considered in some detail and have derived assistance from the judgments in *Bancoult (No 2)* – the litigation arising from the distressing (to use the description applied in their Lordships' judgments) removal of the Chagos islanders from their homeland. That part of the judgments of assistance in this case concerned the applicability or otherwise of Human Rights legislation rather than the Geneva Convention, but we nevertheless find useful parallels with this case and particularly between the British Indian Ocean Territory (BIOT) created in that case and the SBAs created in Cyprus in 1960. The conclusion of *Bancoult 2* was that the BIOT was a newly created political entity. We have been invited – and we are sure that this is the right approach - to look at all the circumstances surrounding the creation of the RoC and the SBAs so as to come to a proper conclusion as to whether these were in reality newly created entities or what was left of the pre 1960 colony. No one feature will be decisive. One must look at matters in the round and decide upon the cumulative effect of the available material. Taking all material into account, what was the reality of the situation in 1960? The first port of call, logically, is the documentation raised at the time. That should shed light upon the reality of what happened in 1960 and what was then created or retained. We cannot hope, in

the course of this judgment, to mention, still less analyse, every document; but we look at what we regard as the material of primary relevance. First we turn to the Treaty concerning the Establishment of the Republic of Cyprus, together with the "Declaration by Her Majesty's Government regarding the Administration of the Sovereign Base Areas" – commonly referred to as "Appendix O". We find the latter to be an illuminating document, since it explains, with clarity, the purpose for which those areas of land were excluded when creating the RoC and retained by the UK. Further, it sets out how the SBAs and the RoC were to co-exist. HM Government declared at the outset of the document "that the main objects to be achieved [by the SBAs] were:

(1) Effective use of the Sovereign Base Areas as military bases.

(2) Full co-operation with the Republic of Cyprus.

(3) Protection of the interests of those resident or working in the Sovereign Base Areas.

Her Majesty's Government further declare that their intention is:

(i) not to develop the Sovereign Base Areas for other than military purposes

(ii) not to set up and administer colonies .....

(iii) not to allow new settlement of people in the Sovereign Base Areas other than for temporary purposes ....."

19. It can be seen that Appendix O placed considerable limitation upon the use to which SBA land could be put – the SBAs' primary function was undoubtedly military. It would, of necessity, rely heavily upon the RoC for the provision of "a wide range of public services .... for Cypriots in the SBAs" (3(4)) of the Appendix. It is unsurprising that the appellants concede that whatever the solution may be, they cannot remain resident in the SBAs, given the contents of Appendix O and the lack of any adequate infrastructure to support long term residence. It is noted that at the outset of Appendix O, reference is made to the SBAs "being those areas ..... which remain under the sovereignty of the United Kingdom". The notion of continuing sovereignty is prayed in aid by the appellants; that, together with the very inclusion of `Sovereign' within the description of the SBAs is more consistent with a colony than a new

political entity. Similar expressions appear in the Cyprus Act, 1960. The respondent draws attention to Her Majesty's continuing `sovereignty' of, by way of example, Australia, New Zealand, Jamaica – no-one would seek to apply the term `colony' to these nations and thus that is far from decisive. All British Overseas Territories remain under Her Majesty's Sovereignty, but that does not decide the question of their status and nature. BIOT remained under the Sovereignty of the UK, albeit the House of Lords held it to be a new political entity.

20. Ms Broadfoot, on behalf of the respondents, has prayed in aid the view of the Foreign and Commonwealth Office as to what the situation was and what, in their view, was the status of the SBAs. By way of example, Mr Regan, barrister and assistant legal adviser in the Foreign and Commonwealth Office, ventures the view in his affidavit (page 241) that: "the [Sovereign Base] Areas were established as a new colony in 1960, a different political entity to the colony of Cyprus. It is the FCO's view that a specific extension of the Refugee Convention to the Areas is necessary for the Refugee Convention to extend to a new political entity, even one created from a territory to which the Refugee Convention had previously been extended." We have placed no weight upon this evidence. It seems to us that the nature of what was created is a matter for the court below and now this court to determine. No-one has put Mr Regan forward as an expert witness. We are not assisted by what the Foreign and Commonwealth Office thinks the situation to be. By the same token, we do not regard the fact that the European Convention of Human Rights was extended to the SBAs in 2004 as of any great significance to the question this court has to resolve under this heading. The respondents argue that the extension of the ECHR to the SBAs would have been unnecessary had the SBAs been merely a surviving part of a colony, since it would have automatically applied. But the specific application of the ECHR is but evidence of what UK legal advisers thought in 2004 – and again, is not something which assists us.

21. The respondents ask us to consider the raft of new appointments made at the time the SBAs came in to being, as evidenced by the first few editions of the SBA Gazette now contained within the `appeal bundle'. This is new material – in the sense that it was not made available to the court below. By way of example, an Administrator, Chief Officer, Resident Judge, Senior Judge, Administrator's Advisory Board and Legal Adviser were all appointed at the outset. We also look at the new

legislation enacted at the time by the Administrator, as appears in the first SBA Ordinances. One of the first steps was to provide for the continuation of existing law – altogether unnecessary, say the respondents, if this were merely the continuing of a colony. The Sovereign Base Areas of Akrotiri and Dhekelia Order in Council 1960 provided a constitution for the SBAs. All this taken together, in our judgment, points strongly towards the creation of a new regime and entity, the establishment of something new rather than the continuation of the old regime. Of course, Collender J did not have the advantage of some of this material – it seems to us impossible to dismiss this raft of new appointments and positions as mere changes in nomenclature.

22. We also think it a useful exercise to take a step back from the specific and look at the situation as we divine it to have been in 1960 – the people of Cyprus were being given their independence. No longer was the island a colony of an overseas power. The creation of the RoC was, beyond peradventure, a new political entity – an independent state. It is perhaps difficult to see, from the points of view of either the newly emerging RoC or the UK, what the point or advantage would be of retaining two small colonial appendages to a new independent state. What surely was needed was the best arrangement by which two powers who would be geographically and ideologically side by side could best co-exist in peaceful harmony, to their mutual benefit. That would surely be by two new independent political entities. We are driven not only by this but by all the material in the case to the firm and unanimous conclusion that the majority decision of the court below was right – that is to say, that the SBAs were a new creation – a new political entity, rather than what was left of a colony after the creation of the RoC. We thus endorse and uphold the decision of the court below that the provisions of the Geneva Convention do not, as a matter of international law, apply to these appellants.

Ground 2 – whether the UK and the Sovereign Base Areas Administration are estopped from denying the applicability of the 1951 Refugee Convention

23. The appellants submit that the majority of the court below erred in finding that the 1951 Geneva Convention does not apply within the SBAs by reason of the provisions of Article 45(b) of the Treaty of Vienna.

24. If that were the limit of this second Ground of Appeal, then our decision would be simple. We have already decided that the 1951 Convention does not apply to the SBAs, and the Vienna provisions cannot reverse that position.

25. Article 45(b) reads as follows:

> "A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending a treaty…if, after becoming aware of the facts: … (b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

26. It follows, in the view of this court, that it is a pre-requisite that there must be a binding treaty in place. If there is a change in circumstances which could permit the State to invalidate etc. the treaty, then if it continues by its conduct to behave as if the treaty were still in operation, it would be estopped from denying that the treaty was in operation. In the present case it cannot apply as there is no binding treaty. But what the appellants' counsel argues, with more commitment than clarity, is that the officers of the SBA behaved so much in the spirit of the 1951 Convention that they cannot now deny that the Convention was in force.

27. There are two arguments on behalf of the appellants that can be dealt with shortly. The first is that the Administrator, as an officer of Her Majesty's Forces, acts in his military capacity when he performs his duties as Administrator, and therefore in some way acts through the Ministry of Defence in a way to bind the Crown in its right in the UK. The Administrator has to be an officer of Her Majesty's Forces by reason of Article 2 of the Sovereign Base Areas of Akrotiri and Dhekelia Order in Council 1960, and is habitually a two-star officer from either the Army or Royal Air Force. In that capacity he is Commander, British Forces, Cyprus.

28. The Administrator has two distinct roles and they must not be confused. In his dealings with the appellants he has never been acting as a military commander, but rather as a civil Governor. As such he can only bind the Crown in its right in the SBAs.

29. The second point is that the SBAA can, in some way, behave as an agent of the UK so as to bind the UK in its international relations.

30. The SBAA is responsible for its own domestic laws, whereas the UK takes responsibility for the international obligations of the SBAs. Because the SBAA behave in a particular way relating to international obligations, it does not in any way bind the UK. In any event, the UK is not a party to these proceedings and we can make no order or declaration which would affect the UK.

31. When the appellants first arrived in the SBAs in 1998 the SBAA were obliged to accept responsibility for them. The alternative was to abandon them to the waves. But because it did so, because it has provided for their basic needs for many years, and because it has granted them refugee status, that does not mean that it has any more responsibility for them than it did in 1998, and it does not mean that it has assumed responsibility under any treaty, convention or ordinance unless such a measure says that it does either directly or by inference. The responsibility has always been humanitarian, but the appellants say that it is more than this.

32. On 20 February 2003 a Memorandum of Understanding was signed on behalf of the Government of the United Kingdom and the Government of the Republic of Cyprus concerning the implementation of the Protocol on the SBAs in so far as it concerns Illegal migrants and asylum seekers. We rehearse the relevant extracts:

> *"Noting that the United Kingdom through the Sovereign Base Areas Administration has the responsibility for illegal migrants and asylum seekers that enter the island of Cyprus by the Sovereign Base Areas.*
>
> *Emphasising the importance of the international obligations of the Governments of the United Kingdom and the Republic of Cyprus with regard to asylum seekers, including the prohibition on indirect refoulement.*
>
> *Bearing in mind humanitarian considerations, such as those reflected in the 1951 Convention relating to the Status of Refugees, and the need for the Republic of Cyprus and the United Kingdom to work together with a view to devising practical ways and means of respecting the rights and satisfying the needs of asylum seekers and illegal migrants in the Sovereign Base Areas.*
>
> *In light of the fact that the Government of the United Kingdom has committed itself not to develop the Sovereign Base Areas for other than military purposes and, in particular, not to allow new settlement of people in the Sovereign Base Areas other than for temporary purposes.*

The Government(s)…have reached the following understanding:

1. For the purpose of this Memorandum of Understanding an asylum seeker is any person seeking international protection relating to the Status of Refugees, or the European Convention on Human Rights, or the United Nations Convention against Torture 1984.

7. The administrative bodies competent for the examination of asylum applications under the Refugee Law of the Republic of Cyprus will be authorised to examine, under the relevant Sovereign Base legislation and on behalf of the Sovereign Base Areas Administration applications of asylum seekers arriving directly in the Sovereign Base Areas. To this effect the Administrator of the Sovereign Base Areas will ensure that the necessary legislation is enacted and in so doing, will reflect, to the extent possible, the laws applicable to asylum seekers in the Republic of Cyprus

9. Subject to paragraph 13, the Government of the Republic of Cyprus will grant the following benefits to asylum seekers arriving directly in the Sovereign Base Areas:

(a) Free medical care, in case they lack the necessary means

(b) Welfare benefits equivalent to those given to the citizens of the Republic of Cyprus

(c) The right to apply for a work permit in accordance with the relevant laws of the Republic of Cyprus

(d) Access to education

12. The United Kingdom, through the SBAA, will endeavour to resettle persons recognised as refugees or granted any other form of international protection in countries willing to accept those persons, and not later than one year after the decision granting the relevant status has been taken.

13. The United Kingdom will indemnify the Republic of Cyprus for the net costs incurred …"

33. By this time the Administrator had already recognised the appellants as refugees. They had been granted accommodation and welfare benefits. They had been granted refugee travel documents. It is suggested by the appellants that these

acts gave them a legitimate expectation that they would be resettled in a third country or the UK. Certainly they could expect to be resettled in a third country, and the question of legitimate expectation will be dealt with later in this judgment. But to suggest that it in some way gave rise to a 1951 Convention obligation (which in some further way brought the Treaty of Vienna into play), so that the appellants can rely on such an obligation, makes little sense in law.

34. We agree with the submissions of the respondents. The SBAs had no policy or mechanism in place to deal with asylum seekers or illegal migrants when these appellants came ashore. There was no Convention in place, but it was agreed that the SBAA would act "in the spirit of the Convention" (see affidavit of John Macmillan). With no expertise or experience within their personnel, they sought the assistance of the UK Home Office and UNHCR. The final decision was taken by either the Chief Officer on determination or the Administrator on appeal.

35. It has been argued that this argument stands alone from the first Ground of Appeal and can be decided separately. In our judgment it cannot, and it fails with the first Ground.

Ground 3 - whether the 1951 Geneva Refugee Convention was incorporated into SBA domestic law by the 2003 Refugees Ordinance

36. This issue was considered by Rumbelow J in the court below, as part of his response to Question 1. This asked whether the court was satisfied that the 1951 Convention and its 1967 Protocol applied and were binding in the SBAs. Having decided that the SBAs were a new political entity and not a relict colony, and that neither treaty applied to the SBAs, he went on to note the appellants' recognition that "even had these treaties been operative, their provisions would not be enforceable by the Claimants, unless they [had] been incorporated into the domestic law of the SBAs". He also noted their claim that "the relevant provisions of the 1951 Convention are effectively found in the SBA's domestic law, in the form of the 2003 Refugees Ordinance", the argument being that the SBAA had in effect persuaded the RoC to offer the appellants the benefit of the 2003 MOU, to give domestic effect to which the 2003 Ordinance was enacted, and therefore the appellants were entitled to the rights contained in the Ordinance, which were in substance 1951 Convention rights.

37. He decided, however, at paragraph 28 of his judgment that the appellants' argument was unsound. This was because the MOU was an understanding, not a treaty; the SBAA was not party to it; and it was entirely for the RoC to decide whether to exercise its discretion to extend to the Claimants the refugee rights of the MOU, there being no requirement to construe its provisions retrospectively so as to apply to them.

38. Ground 3 renews the contention rejected below. The appellants assert in their notice of application for leave to appeal that the 2003 Refugees Ordinance "constitutes a sufficient instrument for the incorporation of the 1951 Convention and the 1967 Protocol as it reflects the rights of refugees as those are provided in the Convention. International Treaties need not be incorporated in any formal way ... The fact that the 2003 Refugees Ordinance was enacted so as to give effect to the MOU ... is irrelevant, as Ordinances are legally binding instruments which produce legal effects". In her skeleton arguments and oral submissions, counsel for the appellants developed these arguments. Attention was drawn, for example, to the fact that the reference in the Immigration Rules to the 1951 Convention and 1967 Protocol was considered by the House of Lords as incorporating them into UK law *R v Secretary of State for the Home Department, Ex parte Sivakumeran* [1988] AC 958, but in the context of this case we find the authority of little assistance.

39. In our judgment the court below was correct in holding that the 2003 Refugees Ordinance did not have the effect of incorporating the 1951 Convention and 1967 Protocol into SBA domestic law. On the evidence before us, neither treaty has ever been expressly adopted in the SBAs. Nor does section 23 of the Ordinance assist the appellants, because it refers to "Any person recognised as a refugee <u>under this Ordinance</u>" (emphasis added). If it had meant, "whenever" or "howsoever" recognised, it would have said so. The Ordinance mirrored the Convention because it had to do so, given that the RoC was already bound by it and therefore the Ordinance had to reflect it. The Ordinance does not reflect what does not apply.

40. Rumbelow J's reasoning is also fortified in our opinion by the views expressed in the skeleton arguments and oral submissions of counsel for the respondents, in particular her reliance on *Salomon v Customs and Excise Commissioners* [1967] 2

QB 116 and *EN (Serbia) v SSHD; SSHD v KC (South Africa)* [2009] EWCA Civ 630, and her responses in paragraphs 38-47 of her skeleton arguments.

Ground 4 – whether the UK and/or the SBAA are responsible for finding durable solutions respecting 1951 Refugee Convention rights

41. Under this ground of appeal, the appellants submit that there is a legal and constitutional relationship between the SBAs and the UK under domestic and international law which obliges the UK to find durable solutions for the appellants respecting the rights guaranteed by the 1951 Convention in the UK. It is therefore necessary to examine the relationship between the SBAs and the UK to discover whether the UK has such responsibility, bearing in mind at all times that the UK is not a party to these proceedings and we have no power to bind the UK in any way.

42. We are greatly assisted in our task by the recently published work *British Overseas Territory Law,* by Ian Hendry and Susan Dickson (Hart Publishing 2011), which was not available at the time of the hearing before the lower court. It is a volume which justifies commendation, setting out as it does with clarity the law relating to the 14 British Overseas Territories in existence today, from Anguilla to the Virgin Islands, which include the SBAs.

> "Each British overseas territory is a constitutional unit separate from the others and from the United Kingdom… Each territory has a government separate from the United Kingdom." (p9)
>
> "Each territory has its own legislature, which enacts the great majority of laws for the territory. In the less populated territories the Governor (or equivalent) is the legislature (which includes the SBAs)." (p10)
>
> "The overseas territories are plainly not independent sovereign states. Their external relationships remain the responsibility of the United Kingdom, the sovereign power. Accordingly the United Kingdom is responsible for each of the territories under international law. The United Kingdom has treaty-making power in respect of the territories, and very many treaties concluded by the United Kingdom have been extended to the territories. The more substantially populated territories, however, have for some time conducted various forms of external relations in their own names, including the negotiation and conclusion

of international agreements, by virtue of authority granted by the United Kingdom." (p12)

"The keys to the constitutional relationship between the overseas territories and the United Kingdom lie in the power of the United Kingdom Parliament and the position of the Crown. The part played by the courts is also important." (p22)

43. The governments of the United Kingdom and the SBAs are distinct. Under section 40(2)(b) Crown Proceedings Act 1947:

"Except as therein otherwise expressly provided, nothing in this Act shall:-

(b) authorise proceedings to be taken against the Crown under or in accordance with this Act in respect of any alleged liability of the Crown arising otherwise than in respect of His Majesty's Government in the United Kingdom, or affect proceedings against the Crown in respect of any such alleged liability as aforesaid;"

44. This provision is reflected in the SBAs by the Crown Proceedings (Amendment) Ordinance 2005 which amends the Crown Proceedings Ordinance 1966.

45. The 2003 Memorandum of Agreement, made between the Governments of the United Kingdom and the Republic of Cyprus was an international agreement that (*inter alia*) the SBAs would enact the relevant domestic legislation. That legislation (the Refugees Ordinance) brings into effect the agreement between the RoC and the SBAs. But it cannot be argued that it provides a backwards link between the appellants and the UK upon which they can rely.

46. We repeat and re-emphasise the distinction between the duties of the Administrator as Governor, and his military role as Commander British Forces Cyprus. At all times in this case he was acting in his capacity as Governor, and could not in any way bind the UK through his military role. Hendry and Dickson add the following commentary at p37:

"It is often said that Governors 'wear two hats', because they head the governments of the territories but are appointed on the advice of, and report to, the Secretary of State. Governors are charged by Ministers in London with

endeavouring to ensure good government in their territories, as well as representing to local politicians the policies of the United Kingdom Government. But the Governor must at the same time represent and explain the views of the territory governments to London. These different roles can sometimes present difficulties. But constitutionally a Governor has only one position, and that is to be the representative of the Queen as Queen of the territory concerned. So, constitutionally speaking, no Governor is an officer of the United Kingdom Government. The Governor is the senior officer of the Government of the territory."

47. It is clear to us that there is a distinct division of roles and powers between the political entity which is the SBAs, and the Government of the United Kingdom; and that the Administrator, as head of the government in the SBAs, is in no way an officer or agent of the Government of the United Kingdom, but is Her Majesty's representative in the Areas. Neither the SBAA nor the Administrator can bind the UK Government in the way that it is suggested by the appellants and Ground 4 must also be dismissed. We have also had our attention drawn to the majority decision of the House of Lords in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, which supports this view.

48. We should say, before we leave this topic, that the British Nationality Act 1981 raises a totally separate issue between the appellants and the UK Home Office, and is of no assistance to us.

Ground 5 – whether 1951 Refugee Convention states parties are obliged to facilitate durable resettlement solutions

49. This Ground of Appeal submits that there is a responsibility and/or an obligation for Contracting States to the 1951 Convention to facilitate durable solutions for refugees and for their resettlement in a country where refugee rights would be respected.

50. This Ground can be rejected at once, as this court has already come to the conclusion that the SBAs are not a Contracting State, and therefore cannot be bound by any obligations or responsibilities under the 1951 Refugee Convention.

51. But the appellants say that their argument goes further than this, and that they are entitled to rely upon a legitimate expectation that they would be resettled in a country which will accept them and in which they are willing to resettle. They say that, because of the way that the SBAA has treated them over the years, the SBAA must continue to treat them as if bound by the obligations of the 1951 Convention.

52. First, says counsel for the respondents, there are two different meanings to the word "resettlement". It has a specific meaning in UNCHR literature and a much looser meaning in general use. When used by the UNHCR it is a term of art to refer to the process of finding a permanent solution in a country willing to accept the refugee and to which he or she is willing to go (UNHCR Resettlement Handbook 2004 §1.1). But in its more general use it means to relocate to somewhere where there no risk of significant harm or persecution. They say that relocation in the RoC is not resettlement in its technical meaning, but the term has been used by different people in different ways.

53. There is no obligation under the Convention for a Contracting State to resettle refugees elsewhere (ECHR Handbook 1/3). The respondents argue that if the appellants are correct in their submission, it means that they have the right to pick and choose where they can relocate.

54. It is important to consider the concept of "legitimate expectation".

55. In deciding whether such an expectation has arisen the court has to consider the precise terms of the promise or representation, the circumstances in which it was made and the nature of the particular statutory or other discretion. The essential question is how, on a fair reading, the alleged representation would have been understood by those to whom it was directed. (*Association of British Civilian Internees: Far East Region v Secretary of State for Defence* [2003] QB 1397; *R v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213). To succeed, an appellant must be able to show that the promise was unambiguous, clear and devoid of relevant qualification, that it was made in favour of an individual or a small group of persons affected, that it was reasonable to rely on it; and that he did rely on it generally, but not invariably, to his detriment (*R v Inland Revenue Comrs., Ex parte MFK Underwriting Agents Ld* [1990]1 WLR 1545; *R v Secretary of State for Education and Employment, Ex parte Begbie* [2000] 1 WLR 1115).

56. A substantive expectation will only be upheld where not to do so would be equivalent to a breach of contract or an abuse of power, but it can lawfully be frustrated if there is an overriding public interest which justifies that course (*R v Inland Revenue Comrs. Ex parte Preston* [1985] AC 385; *Coughlan,* above).

57. As a starting point we believe that we need to identify whether there was a promise, if so what it was, to whom it was made, and what action that person or persons took when acting on it.

58. At a directions hearing on 1 June 2011 the appellants were permitted to file affidavits which had not been before the court below, and the respondents were permitted to file their own affidavits in answer. The affidavits of the respondents, particularly those of Andrew Livingstone, Jeffrey Brown and James Smart, deal with the extensive meetings and conversations between the SBAA officers and the refugees over the years. A summary would be that there were many meetings, some noisy and unruly. The refugees sometimes heard only what they wanted to hear. The only promises that were made were that efforts were going to be made and were made to relocate them to a third country, and that they could remain as temporary residents until they could be relocated. The options of "a third country" became fewer, and with the UK rejection of the appellants in 2001 realistically reduced to the RoC alone. No promises were ever given about permanence of residence in the SBAs or about UK citizenship.

59. But in our first task of seeking to identify a promise, we do not have to rely upon the affidavits on behalf of the respondents, it is only necessary to examine the affidavits from the appellants. Apart from being told that they might be relocated in the RoC there is no assertion by them that they were given any promise which was not subsequently qualified or withdrawn, and certainly the service of the notices to quit in 2007 must have been shocking notification that there was no promise for their future. Indeed Tag Eldin Ramadan Orsha in Bashir swears, at §20 of his affidavit:

> "I was never, through all these years, given the impression or got information that the SBAA were really trying to resettle us in a third country or to find a viable solution in our cases. Any efforts for my resettlement in a third country were made largely by myself. Since 2005, all the time and efforts spent from

the SBAA and Mr Jeffrey Brown on our case, had only one aim, namely to get rid of the problem and convince us to move to the Republic of Cyprus."

60. No other affidavit suggests that there was any promise, only aspirations for the future, received with rejection and sometimes hostility, because they involved relocation to the Republic.

61. We find that there was no promise upon which the appellants could rely. There might have been aspirations and expectations, but nothing the withdrawal of which would lead to conduct amounting to a breach of contract or an abuse of power. If it is said by the appellants that the legitimate expectation is expressed to be a right to remain in the SBAs until resettlement (using its technical sense), then it is quite clear that there is an overriding public interest behind the change in the SBAA's policy, which is on sufficient public grounds (*Bancoult (No2) §135* above).

62. We have already concluded that the 1951 Convention does not apply to the SBAs, and the appellants' extended argument under this Ground of Appeal takes them no further forward and must be dismissed.

Ground 6 – whether the appellants would receive their 1951 Refugee Convention rights in the Republic of Cyprus

63. In view of our conclusions above, it is not strictly necessary to deal substantively with this ground, but given the concerns expressed, the gravity of the allegations made – the implicit suggestion is that the RoC would act in breach of its convention and international duties and responsibilities - and in deference to the arguments advanced and the material placed before us, we think it right to do so.

64. The appellants contend that the court below erred in concluding that the rights of the appellants would be assured in the RoC. Particular concern was expressed that all the appellants had was a "verbal agreement" that the 2003 Memorandum of Understanding applied to them and protected their refugee status in the RoC. This assertion is not fully understood, given the subsequent concession that, as Mr Brown confirmed in his first affidavit, all appellants had been issued with a "pink slip" temporary residence/work permit slip, an identity card, medical card and a travel document. The appellants argue that if relocated to the RoC there would be a "real risk" of refoulement; only temporary residence permits have been issued (carrying

with it the risk that these could be revoked or not renewed on expiry). Criticism was made of the lower court's observation that it "could not possibly conduct a comprehensive audit of the extent to which the Republic meets its Convention responsibilities" and its "impression that the 1951 Convention rights are now generally being provided to refugees coming from the SBAs." The court, argue the appellants, had a wider and more comprehensive duty than that. With the leave of the court, substantial further evidence has been placed before us, both by the appellants and the respondents, bearing upon the question of the treatment of the appellants, in the event that they relocate to the RoC.

65. At first blush the respondents and the court are entitled to assume that the RoC does and will continue to honour and comply with its Convention obligations and its international obligations generally (including those contained in the Memorandum of Understanding, to which it appended its signature, through its minister). The authority for that proposition is *Barclay -v- The Lord Chancellor* [2010] A.C. 464. Whilst that is the initial assumption, it is far from being an invariable rule, as was made clear in *MSS –v- Belgium and Greece* (application no 30696/09). Rather, as was explained in that case, it is a rebuttable presumption – a very well known legal concept. For it to apply there must at least be *some* cogent and clear evidence to rebut the presumption. The appellants' evidence before the lower court of its concerns that rights would not be respected or guaranteed by the RoC was vague, unfocussed and, in one instance, outdated. The further evidence served on behalf of the appellants bears the same characteristics and in parts, lacks credibility. As to the fear of refoulement, the appellants' affidavit evidence speaks of a very generalised fear: "I do not trust that the Cypriot authorities will fulfil their obligations under the Convention" (Mr Bashir); ".... I do not think that me and my family as recognised refugees would be secure in Cyprus and that we will not eventually be sent back to Iraq" (Kameran Amin). The respondents brought to our attention one example of positively misleading statements made in the appellants' affidavits: Mr Amin's affidavit leaves one with the impression that the respondents refused him medical treatment. This false impression was only corrected when Mr Livingstone's affidavit gave the full story. There is a substantial amount of evidence from the respondents which was not available to the court below. That evidence is not, as we understand it, challenged by the appellants; no application was made for the

deponents of any of those affidavits to attend for cross-examination. The appellant's response to that new evidence is that it deals only in generalities and not with the specific cases of any appellant.

66. The appellants express concerns on several fronts. They are, it is said, at risk of refoulement. As appears above, that is raised in only the most general of terms. There is no evidence before us of any case of refoulement from the RoC. Mr Gondelle dealt with the suggestion at page 229 of his affidavit: "I was particularly concerned about this latter suggestion and I sought the views of the UNHCR on it. The response from the UNHCR Associate Protection Officer ... was that the UNHCR did not consider there to be a general risk of refoulement in the RoC."

67. The appellants contend that there are substantial grounds for fearing that they will not be treated fairly on other fronts: that welfare and disability payments will not be paid; that citizenship would not be granted; integration will not be possible; medical and educational needs will not be met. Each and every one of these alleged concerns is addressed head on by the new affidavit evidence served on behalf of the respondents, particularly the comprehensive affidavits of Ms Constantinou and Mr Brown. No useful purpose would be served by repeating here the contents of those affidavits. True it is that these affidavits address the situation generally rather than the specific case of any particular appellants, but it is surely incumbent upon the appellants, if there are any specific difficulties or reasons for concern on the part of any particular appellant, at least to raise them – they have not done so. In the few instances in which the appellants' evidence descends to particulars, the difficulty seems to be attributable to a lack of co-operation on the appellants' part or by reason of something unconnected with their refugee status. It is the way of the world that bureaucratic problems are encountered in all systems. We note the subsequent acceptance on behalf of the appellants that 3 year residence permits will be renewed as a matter of right.

68. Last but by no means least, we look at the situations of those who, having arrived with the appellants off the Akrotiri coast in 1998, have voluntarily relocated in the RoC. Again this is new evidence, served for the purposes of this appeal (Mr Brown's second affidavit and the schedule exhibited thereto). Many are now working in the RoC, their children are in full time education, have all the appearance of having integrated well, and none has been deported.

69. Albeit that the respondents have served a large amount of evidence to address the point and this judgment has dwelt upon the question at some length, overall we do not consider that the "Barclay presumption" has in this case been rebutted. Thus the respondents and this court are entitled to assume that the RoC does and will continue to honour and comply with its Convention and international obligations. If we are wrong about that and the presumption is rebutted, we are altogether satisfied on all the material before us that there are no reasonable grounds for fearing that the appellants or any of them will suffer or that refugee rights will not be respected and guaranteed in the RoC. Indeed, the overwhelming preponderance of evidence is that they will.

Ground 7 – whether it was unlawful to terminate the appellants' welfare benefits

70. The contention in this ground is that the First Defendant's decision of 28 January 2010, to discontinue welfare payments and the provision of accommodation, amounted to a breach of the 2003 Refugees Ordinance, which is said on behalf of the appellants to provide public relief and assistance in line with the provisions of the 1951 Convention, and that the decision ran counter to "the legitimate expectations of the [appellants] that as recognised refugees they would be entitled to rights enabling them to live in dignity".

71. In the court below, Rumbelow J noted that this allegation was aimed primarily at the decision to terminate benefits rather than free accommodation, which was dealt with in answer to Question 5, and that the legitimate expectation aspect was on the basis that the benefits would "be paid indefinitely, or until some alternative arrangement [was] agreed with the [appellants]". He went on to note his earlier conclusion, at paragraph 28 of his judgment, that the appellants did not fall within the provisions of the 2003 Refugees Ordinance; that the appellants had all been issued by the RoC with documentation recognising them as refugees and to entitlement to the financial benefits flowing from that status; and that on the facts, as he set them out, the appellants could not "demonstrate a legitimate expectation of benefits, either in principle or for any given sum or for any given period".

72. We have already set out above our reasons for concluding that the 2003 Refugee Ordinance has no application to the appellants. Accordingly, the decision to discontinue benefits cannot amount to a breach of any rights thereunder.

73. We also agree with Ms Broadfoot, that even if section 23 of the 2003 Refugees Ordinance did apply to the appellants, it would still not assist them, because the rights extended are by reference to what is accorded to others; and regardless of who pays, the rights are deemed to have been accorded.

74. As to legitimate expectation, we accept that the appellants never expected benefits to be paid indefinitely, but only for so long as they were unable to find work or to secure a dignified standard of living, but we see no reason to disagree with the reasoning in paragraphs 50 - 53 in Rumbelow J's judgment, or his conclusion that this aspect of the claim must fail. It is true that in his minute of 20 October 2006, the SBA Administrative Secretary acknowledged the absence of a written agreement with the RoC about extending the 2003 MOU so as to cover the appellants, but as he noted in his minute, there was an exchange of letters confirming the amounts to be paid. In these circumstances we do not consider the absence of a formal written agreement invalidates Rumbelow J's judgment on the issue.

Ground 8 – whether the notices to evict the appellants from Richmond Village breached their rights under the 2004 Human Rights Ordinance

75. This is said by counsel for the appellants to be a discreet issue. Article 8 of the European Convention on Human Rights provides:

1. "Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

76. When the appellants first arrived in the SBA they were homeless. As the purpose of the SBA is to function as a military base, there was nothing in the nature of social housing where they could be accommodated. Initially they were housed in unused barrack blocks, but were eventually located in a disused set of married quarters called Richmond Village (the property of the Second Defendant} which was earmarked for demolition. It was surplus to the requirements of the Base and to be allowed to return to nature. As Rumbelow J said at first instance:

> "The name "Richmond Village" gives a misleading impression of the accommodation. It is not a rural idyll. There are no shops or other amenities at Richmond Village and it is simply a small housing estate of 23 houses, 13 of which are uninhabitable. Materials are being taken from the uninhabitable houses to repair those being occupied."

77. In 2008 a survey revealed the presence of asbestos in the properties. They are, were, and continue to be unsatisfactory for decent living. In addition there has been no facility for education in Richmond Village since about 2004. There is no dispute between the parties that it is inadequate.

78. The court of first instance fully set out the history of the respective actions of the appellants and the respondents during the time that the appellants have been resident in Richmond Village. There were times when the majority of the appellants seemed content to relocate to the Republic, times when they were seeking relocation to the UK, and instances when they were seeking alternative accommodation in the SBAs. Notices to quit were served on the residents in 2007 which resulted in civil disorder and subsequent withdrawal of the notices.

79. It is submitted that the test that should be applied is the five-step approach proposed in the case of *R (Razgar) v Secretary of State for Home Department* [2004] 2AC 368 by Lord Bingham, as follows:

> (1) Will the proposed eviction be an interference by a public authority with the exercise of the applicant's right to respect for his home?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> (3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

80. Counsel for the appellants argues that questions 1 – 4 can be answered in the affirmative and question 5 in the negative, and referred us to a number of cases to assist us in the proper test to apply, namely *Connors v United Kingdom* [2005] 40 EHRR 9, *Blečić v Croatia* [2006] 43 EHRR 48, *McCann v United Kingdom* [2008] 47 EHRR 40, *Kay and others v United Kingdom* [2010] and *Manchester City Council v Pinnock* [2010]UKSC 45, (which was expressly followed by the court below).

81. *Pinnock* gives us true assistance. It was a case decided by no fewer than nine judges of the Supreme Court, and the judgment was that of the whole court. It considered carefully the conflict between earlier decisions of the House of Lords, and the decisions of the European Court of Human Rights (including, amongst many others, all the above cases) and accepted that the approach of the Strasbourg court, in the context of proceedings such as these, should be followed. When an order for possession is sought by a [local] authority, the court must have the power to assess the proportionality of making that order, and in making that assessment, to resolve any relevant dispute of fact.

82. It is said by the appellants that the court below, while accepting that Article 8 engaged, erred in its proportionality assessment. It did not (it is argued) consider the special circumstances of this case and the special circumstances of the appellants. These were identified as follows:

a. They have lawfully lived in the same accommodation for the last 12 years. It is their home.

b. No alternative accommodation in the Republic is proposed.

c. There is a risk that they will not satisfactorily integrate into the social fabric of the Republic (UNHCR report on Refugees looking for Integration in Cyprus Society; undated).

d. There is a lack of permanency, with little or no prospect of naturalisation in the Republic (UNHCR report on Naturalisation of Refugees in Cyprus; September 2007).

e. There is no guarantee of employment or welfare benefits (UNHCR report on Refugee Issues in Cyprus; 2010).

f. The desire of the Second Respondent to allow the land to return to nature must be set against the compelling individual rights of the appellants.

83. We also were referred to a report from a non-governmental organisation called KISA – Action for Equality, Support and Antiracism - dated February 2006 on Recognised Refugees and Asylum Seekers in the Sovereign British Bases in Cyprus; a letter from KISA to the British High Commissioner in the Republic dated 9 March 2007 (which largely repeated the 2006 report); and correspondence between KISA and the Cypriot Ministry of the Interior, the SBAA and the appellants' solicitor.

84. The respondents argue that the action was proportionate and helpfully set out their reasons in the same order recited in Article 8.

a. It is in the interests of national security. The SBAs are a military base and the respondents must be free to use it as such, even in the present circumstances where it is envisaged that it will return to nature. The appellants' continued occupation constitutes a considerable drain upon public resources, both human and financial, which otherwise would be directed towards national security.

b. Public safety and economic well-being of the country. Although the accommodation is provided free of charge it was earmarked for demolition even before the appellants arrived in the SBAs. It is now beyond economic repair. There is a potentially significant risk arising from asbestos. We were referred to the affidavits of Lt Col Peter Riches and James Gondelle. The appellants were aware of this situation.

c. The protection of the rights and freedoms of others. The properties need demolition, and adjoining properties cannot be demolished when adjoining properties are still occupied, because of the asbestos hazard. While they are still standing there is a risk that others will seek to occupy them.

85. In addition, the respondents argue that:

a. Occupation by the appellants is contrary to Appendix O, which prevents the new settlement of people in the SBAs other than for temporary purposes.

b. The Second Respondent (as landlord) has an unencumbered right at common law to recover the property.

c. The right to occupy is, in any event, only a licence not a tenancy.

d. The SBAA has made real efforts to satisfy the appellants' anxieties. It has made enquiries to ensure that they will receive benefits if they are unable to support themselves; it has undertaken to pay €7,000 rent per family for one year in the RoC; it has offered help and support in negotiating with the officials in the RoC, including provision of an interpreter, transport, and the attendance of an SBAA officer to accompany the appellants (affidavit of James Gondelle).

86. In *Chapman v United Kingdom* [2001] 33 EHRR 18 the European Court of Human Rights said that the court cannot examine legislation and policy in the abstract. Its task is to examine the application of specific measures or policies to the facts of each individual case. Neither *Chapman* nor any other jurisprudence of the Court acknowledges the right to a home. While it is desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision (§99).

87. We have read the affidavits of six of the appellants, namely Kameran Amin, Al Merza Edel Mohmmed, Tag Eldin Ramadan Orsha in Bashir, Khaled Farhan Amin, Mustapha Shirmus and Hajar Hassan Ali, who could properly be described as the heads of their families. Even though many of their allegations are disputed in the affidavits provided by the respondents, we are of the view that (for the purposes of considering the individual circumstances of each individual for this ground of appeal) we should accept the contents of their affidavits. They reveal a long history of negotiations with the officials of the SBAA concerning their stay in the SBAs going back to 2000. They have been promised that they would only stay in Richmond Village for 5 years. They have been promised resettlement "in a third country". They have been told that they could live in Richmond Village until a third country was found. We have dealt earlier in this judgment with the argument of legitimate

expectation and will return to it later, but these statements by the SBAA officers amount to nothing more than (with hindsight) the truth. The appellants have been permitted to stay in Richmond Village until arrangements for resettlement in a third country were in place, as they were at the time of the original notices to quit in 2007 and as they are now.

88. The notices to quit Richmond Village will undoubtedly cause disruption to the lives of the appellants, and in some circumstances hardship. But while they have lived in the same location for 12 years, the accommodation is unsuitable and even hazardous to repair, there is no infrastructure apart from water and electricity, and there are no facilities for medical care or education. Indeed the children of the appellants are educated in schools within the RoC, and we are informed that some of the appellants may be working informally there.

89. We have also considered the anxieties of the appellants in relation to non-integration, lack of permanency, and non-entitlement to employment and benefits. We are as satisfied as we can be that the SBAA has done its utmost to relieve those anxieties and that they are more feared than factual.

90. We have examined the circumstances of each of the individual families so far as we may from the affidavits filed, which were not before the court below, and have reconsidered the issue of proportionality in the light of them. We have come to the conclusion that the service of notices to quit were, in the circumstances, entirely proportionate under Article 8.

Conclusions

91. In the course of her closing submissions, Ms Physsas advanced what may be described as her over-arching approach to this case, complaining that neither the court below nor the respondents at this hearing had dealt with what she contended was the fundamental question at the heart of the case. It is plain upon all the evidence, say the appellants, that the SBAA have accepted from the outset and continue to accept a responsibility for the appellants. No-one, she complains, has hitherto identified the origin of that responsibility. Any responsibility must, the argument continues, spring from and have its origins in a duty. The right approach then, argue the appellants, is to start with the duty that gives rise to the responsibility and identify the legal basis for it. Since complaint is made that matters were not

addressed in this way, we will shortly conduct that exercise, albeit we do not, regard it as the correct approach. It was for the claimants below and for the appellants here to establish that the withdrawal of benefit and / or the eviction from Richmond Village was unlawful, that is to say, was in breach of a legal duty owed by the respondents to the appellants. To start with the respondents' acceptance of a responsibility and then to seek to place the onus for explaining the origin and nature of that duty upon either the respondents or the court is to look at the situation from the wrong end of the telescope. In any event, it seems to us that the over-arching question posed was answered in the court below: the appellants asked that five questions be answered and the court did so. In this court the appellants have advanced eight grounds of appeal and we have addressed them all.

92. Ms Physsas listed the possible sources of the duty underlying the responsibility accepted, as follows:

(i) The 1951 Geneva Convention

(ii) The European Convention on Human Rights

(iii) The SBA Refugees Ordinance 2003

(iv) Legitimate expectation

(v) Duty assumed as a humanitarian responsibility

93. We are satisfied – and the respondents accept it – that the SBAA assumed a responsibility in respect of all those who arrived on SBA shores in 1998. All the evidence, all the actions and efforts of the SBAA establish that acknowledgment of responsibility. We have addressed each of the possibilities (i) to (iv) above and rejected them. That leaves an acceptance of responsibility on humanitarian grounds. That, we are sure, is the source and nature of the responsibility accepted by the SBAA. We do not come to this conclusion because, on the appellants' analysis, it is the only one left, but because we are driven, inexorably and emphatically to that conclusion by all the evidence in the case and the inferences to be drawn therefrom. Throughout 13 difficult years (difficult both for the appellants and for the SBAA), the SBAA has, it is clear to us, done its best to grapple with a substantial problem; done its best to deal with matters in a humane, fair and proper manner; balancing the clear need to respect the essential rights and comforts of the then large number of immigrants and the imperative of ensuring that the operation of

the SBAs continued within the meaning of the agreement with the RoC (Appendix O).

94. Why, the appellants argue, if the duty was `merely' humanitarian, did the SBAA follow a procedure to consider whether refugee status should be granted and go on to consider relocation to a third country? The answer, we are sure, is this: once the humanitarian decision had been taken (and of course, in reality, there was no other decision that could have been made in the situation that was thrust upon the SBAA) that the new arrivals could not be turned back to the sea, a way forward had to be found. Something had to be done to achieve some resolution of the situation. There was no `do nothing' option. As we have determined, no legislation or convention applied. As we have observed, but it bears emphasis, the SBAA has throughout been at pains to deal with things fairly and humanely, treating the immigrants (as they then were) with dignity, respect and concern for their future. That thread runs through all the material placed before us, from Major General Ramsay's determination of the appeals dated 5 February 2000 to the most recent affidavits. With no binding law or practice to guide or apply, it made sense, in uncharted waters, to look at how others, facing similar situations, had approached the problem. Where else would or should a British Overseas Territory look for help to fill such a lacuna than the UK? It was but a small step from that for the SBAA to inform itself and follow the spirit of the Geneva Convention and the guidance and assistance offered by the UNHCR. As we have endeavoured to make clear, the fact that the spirit of those principles was applied does not establish that they applied as a matter of law.

95. We have already considered whether the SBAA's actions over the years gives rise to a legitimate expectation that can be legally enforced. We revisit that question here by way of applying a final check. The way in which the SBAA approached the matter would certainly have given rise to an expectation in the appellants that they would continue to be treated fairly and humanely. It is, realistically, conceded that the appellants could not remain in the SBAs indefinitely; they must have known and did know that, from all that was said and done – not least the relocation of the majority of the refugees to `third countries.' The situation was far from static. As Ms Broadfoot observed, the aims and objectives of the SBAA (underneath the umbrella of overall fairness and humanity) evolved over time. Relocation was intended to be

voluntary, but, given the appellants 'refusal to accept voluntary relocation otherwise than to a country or their choice, the impasse had to be progressed and resolved. When pressed in argument, Ms Physsas explained that the legitimate expectation contended for in this case was "that the SBA had responsibility for them [the appellants] and, given there was no reasonable prospect of employment in the RoC, that benefits would not be terminated until resettlement to the UK or a third country that accepted them and to which they were willing to go." Simply put, the evidence in the case does not begin to support the proposition of any legitimate expectation of resettlement to the UK – that may have been the aspiration of the appellants, but nothing was said or done by the SBAA to foster an expectation that that would be done – even if it lay within the gift or outcomes that could be achieved by the SBAA, which it did not. The suggestion that these appellants or any of them could legitimately have expected a right of veto on any proposed third country is, in truth, unarguable. Even if that were the legitimate expectation, in our judgment there was an over-riding public interest which would justify the breach of expectation in all the circumstances of this case.

96. For all the above reasons, our unanimous view is that this appeal must be dismissed.

Hadjiconstatas: My Lords the respondents apply for costs in this case.

Teare PSJ: Ms Charalambidou our initial reaction is that costs should follow the event.

Charalambidou: Yes My Lord, normally this is the case from what I understand but perhaps it should be taken into account the vulnerability of the appellants and the fact that they don't have enough means or subsistence in this case.

Teare PSJ: Well we don't know who is funding this case, whether it's the appellants or whether it's somebody else.

Charalambidou: Mainly, I mean both myself and Miss Physsas have been working *pro bono* in this case.

Teare PSJ: Was there anything you wanted to say Mr Hadjiconstantas, you have taken instructions.

Hadjiconstantas: Can I just take a moment please My Lord?

Teare PSJ: Yes, of course.

Hadjiconstantas: My instructions are that Your Lordships decide the matter of costs.

Teare PSJ: Yes. Ms Charalambidou although there were differing judgments in the Court below, the decision of the Court below was in fact unanimous. The appellants have decided to take the case to this Court, their appeal has been dismissed and we take the view that it must be dismissed with costs.

The Hon. Mr Justice J J Teare
Presiding Senior Judge

The Hon. Mr Justice R G Chapple
Senior Judge

The Hon. Mr Justice G Risius CB
Senior Judge