Case No: CO/3845/2009

Neutral Citation Number: [2009] EWHC 1039 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 May, 2009

Before :

LORD JUSTICE CARNWATH
and
THE HONOURABLE MR JUSTICE MITTING
– –

Between :

THE QUEEN ON THE APPLICATION OF MICHAEL MISICK	**Claimant**
− and −	
THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS	**Defendant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Edward Fitzgerald QC, Alison Gerry & Ruth Brander (instructed by **Simons Muirhead and Burton**) for the Claimant
Jonathan Crow QC & Jeremy Johnson (instructed by **Treasury Solicitor**) for the Defendant

Hearing date : 29th April, 2009
– –

Judgment
As Approved by the Court

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Lord Justice Carnwath :

1. The Claimant Mr Michael Misick is the former Premier of the Turks and Caicos Islands. He seeks permission to challenge the legality of "The Turks and Caicos Islands Constitution (Interim Amendment) Order 2009". The Order was expressed to be made under the West Indies Act 1962 on 18th March 2009, and laid before Parliament on 25th March 2009. The Order is a response to an interim report by Sir Robin Auld, as Commissioner appointed to investigate allegations of corruption and financial mismanagement. Its effect when brought into force, will be to suspend temporarily parts of the Turks and Caicos Islands' Constitution, by, among other things, removing the right to jury trial, and replacing representative government by the House of Assembly by a system of direct administration by the Governor.

2. The Government's stated intention is not to bring the Order into force until Sir Robin's final report is received, time for which has been extended to 31st May 2009. But the Governor has not ruled out earlier implementation if -

> "circumstances arose in the Territory prior to that date which justified suspending relevant parts of the Constitution".

3. By order of Wyn Williams J the case was to be listed for a "rolled−up hearing", with full argument to follow immediately if permission were granted. However, the parties have since agreed that only permission should be determined at this stage, and the hearing before us proceeded on that basis. Accordingly, we are concerned only with whether any of the grounds discloses an arguable case which merits further investigation at a full oral hearing (see White Book para 54.4.2).

4. In view of the importance of the case both for the parties and the public we have been assisted by fuller argument than would be normal on a permission application. For the same reason this judgment is rather longer than is typical.

Background

5. The present system of Government of the Territory is derived from the 2006 Constitution. It is a Crown dependency. Her Majesty's government in the UK exercises ultimate control under Section 26 of the Constitution. The Constitution provides for a Governor, a Cabinet and an elected House of Assembly. By section 33 the Governor is responsible for external affairs, defence, internal security and the regulation of international financial services and certain other matters, but he is otherwise required to act on the advice of the Cabinet, the majority of whom are elected members of the House of Assembly. The Claimant is a citizen of the territory and has been active in politics there for many years. He became the head of the Progressive National Party (PNP) in 2002. He became Premier following elections in 2003 and was re−elected in February 2007.

6. In June 2008 the House of Commons Foreign Affairs Committee published a report on Overseas Territories. It expressed grave concerns about allegations of corruption in the Territory. On 10th July 2008, the Governor appointed Sir Robin Auld as Commissioner to conduct an Inquiry under the Commissions of Inquiry Ordinance. Section 8 of the Ordinance provides that evidence given before a Commission is not admissible in civil or criminal proceedings against him, except for perjury or contempt.

7. The terms of reference required him −

> "To inquire into whether there is information that corruption or other serious dishonesty in relation to past and present elected members of the House of Assembly (previously known as the Legislative Council) may have taken place in recent years".

He was asked to report within sixteen weeks his preliminary findings and recommendations -

> "concerning:
>
> (a) instigating criminal investigations by the police or otherwise
>
> (b) any indications of systemic weaknesses in legislation, regulation and administration
>
> (c) any other matters relating thereto."

In relation to (a), he was "directed to refer such information and/or evidence [as he] may obtain to the TCI prosecuting authorities".

8. In December 2008, following an attempt to pass a motion of no confidence, the Claimant advised the Governor to prorogue the Assembly for 15 weeks. In February 2009 he announced that he would vacate his office at the end of March. Hon Galmo Williams was elected as the new leader of PNP on 28th February and thereafter appointed as Premier by the Governor. We were told that the Assembly resumed sittings on the 1st April.

9. Meanwhile, following a period of reviewing written evidence, the Commissioner held an oral hearing in the Territory in January and February 2009. The Claimant among others gave evidence. On 28th February the Commissioner delivered his Interim Report, including the recommendations which led to the Order in Council.

10. He said that his investigations prior to the oral proceedings had disclosed −

> ".. much information pointing to possible systemic corruption or of other serious dishonesty involving past and present

elected Members of the Legislature in recent years. I had also found indications of systemic weaknesses in legislation, regulation and administration and in related matters calling for attention by way of recommendation."

The oral proceedings had provided −

> "further information in abundance pointing, not just to a possibility, but to a high probability of such systemic venality. Coupled also with clear signs of political amorality and immaturity and of general administrative incompetence, they have, in my view, demonstrated a need for urgent suspension in whole or in part of the Constitution and for other legislative and administrative reforms×." (para 6−7)

11. He was submitting the Interim Report "at this early stage" to identify "in more detail the broad concerns that [he had] expressed× at the close of the Commission's oral proceedings". He continued:

> "8)× As I then indicated, government of the Territory is at a near stand−still. The Cabinet is divided and unstable. The House of Assembly stands prorogued until 1st April 2009. The Territory's finances are in dire straits and poorly controlled. There is a settled pattern of recourse to disposals of Crown land to fund recurrent public expenditure, for want of governmental revenue from other more fiscally conventional sources. I should have added that the financial position is so bad that the Government cannot pay many of its bills as they fall due. Governmental and other audit recommendations lie ignored and unattended. In short, there are wide−spread fears on the part of the people of the Territory that they are leaderless and that their heritage is at risk of continuing to drain away.
>
> 9) This Report - for the above reasons compiled in haste - consists of a list of recommendations under Parts (b) and (c) of the Commission's Terms of Reference, namely as to constitutional and other systemic reforms and related matters. They will require considerable development and elaboration in my Final Report, so as to provide more comprehensively for the middle and the long term. Some are of great urgency to meet what I consider chronic ills collectively amounting to a national emergency. The others are for the middle and longer terms, but require early consideration with a view to making ready for their timely introduction in due course.
>
> 10) As I have said, I am also satisfied on the information before me under Part (a) of the Commission's Terms of Reference of a high probability of systemic corruption and/or other serious dishonesty involving past and present elected Members of the House of Assembly and others in recent years.

> However, I am not ready to formulate provisional findings or recommendations for institution of criminal investigation in relation to any individual or any such interests he or she may have. When I am ready to do so, I shall, as I have publicly indicated, give each individual concerned an opportunity to make representations. I shall then take any such representations into account before making findings and recommendations under Term of Reference (a) in my further Report.
>
> Accordingly, I make no findings or recommendation in this Interim Report under that Term of Reference, save peripherally in recommendations (2), (16) and (17) below for preparation for the appointment of a Special Prosecutor to direct and conduct such investigations as I may recommend in my further Report, for additional Judges and trial by Judge alone."

12. Under the heading "Criminal Trial by Judge alone" (para 16), he noted that his proposal would involve removal of the right to trial by jury under section 6(g) of the Constitution, and commented:

> "But trial by jury is not a pre−condition of the "fair trial" requirement of Article 6 of the ECHR, of which this provision is an elaboration. Trial without jury is also a feature of a number of jurisdictions throughout the World, including India and Holland. If, as is clearly the case, it is Article 6 compliant in the many jurisdictions that permit trial of even the most serious offence without jury, it is not such a big step to take where national and "cultural" conditions are such, as here, that no fair or effective trial of such matters considered in this Inquiry could take place with a jury."

13. He then noted seven reasons why that step should be taken in this case, the first being that:

> "the stance taken by all attorneys acting for Ministers and/or other Members of the House of Assembly and others in the Inquiry was that their respective clients could not possibly be given a fair hearing by a jury, given the wide adverse publicity to allegations against them before, during and as a result of the work of the Commission; all or most of the attorneys, expressed with some cogency, in my view, the high likelihood that any trial judge, faced with an application for a stay of the prosecution on account of such prejudice, would stay it;"

Other reasons included "the clear risk× of jury-tampering" and

> "the potential complexity of allegations of corruption or other serious dishonesty of the sort canvassed in the Inquiry - taxing for any jury panel, whether in the TCI or any jurisdiction×"

14. On 16th March the Governor issued a statement responding to the Interim Report. He said:

> "In light of the accumulation of evidence in relation to TCI in the last year or so, and fortified by the Commissioner's interim report, the UK Government has formed the view that parts of the Constitution will need to be suspended and has decided to take steps to enable it to do so."

On the same day he was making public a draft Order in Council which would suspend parts of the Constitution initially for two years "although this period could be extended or shortened". The draft Order would be submitted to Her Majesty in Council at a meeting on 18 March, and, if made, laid before Parliament on 25 March. He added:

> "Unless the Commissioner's final report significantly changes the current assessment of the situation, the Order will be brought into force after the final report is received. However, the Order could be brought into force sooner if circumstances arose in the Territory prior to that date which justified suspending relevant parts of the Constitution."

15. The Order has now been made and laid before Parliament, but implementation now awaits the delivery of the Commissioner's final report, unless a decision is made to bring it into effect earlier.

The Claimant's case

16. The Claimant submits that the making of the Order in Council is outside the powers conferred by the West Indies Act 1962. As helpfully summarised by Mr Fitzgerald QC, the case falls into two main parts:

i) *Abolition of the constitutional right to jury trial*

a) The removal of the constitutional right to trial by jury by using secondary legislation and without consultation is not in accordance with the principle of legality;

b) It is specifically directed at the elected officials who were the subject of the Commission of Inquiry, and is thus objectionable as being both *in personam* and retrospective.

c) It would also in the circumstances violate other provisions of the Constitution, in particular the right to a fair trial and the right not to be compelled to give evidence.

ii) *Removal of representative government* :

a) The Order is inconsistent with the international law principle of self−determination;

b) It is inconsistent with the right to stand for election and, once elected, to sit as a member of parliament, guaranteed by Article 3 of Protocol 1 of the European Convention of Human Rights;

c) It is contrary to the principle of legality and is a disproportionate and irrational response to the alleged crimes of certain elected representatives; and

d) It is based on the recommendations of a flawed Inquiry and on recommendations which are themselves *ultra vires* the Inquiry's terms of reference.

Consideration

17. Section 5 of the West Indies Act 1962 empowers Her Majesty to provide by Order in Council for the government of the territory. The 2006 Constitution was made under this section. Section 7 makes clear that the power to make an Order includes power to vary or revoke. The relevant part of section 5(1) provides:

> "Her Majesty may by Order in Council make such provision *as appears to Her expedient* for the government of any of the colonies to which this section applies, and for that purpose may provide for the establishment for the colony of such authorities as She thinks expedient and may empower such of them as may be specified in the Order to make laws either generally *for the peace, order and good government* of the colony or for such limited purposes as may be so specified subject, however, to the reservation to Herself of power to make laws for the colony for such (if any) purposes as may be so specified." (emphasis added)

18. At the heart of the debate on both issues is an attempt to limit the apparently wide scope of such a legislative power by reference to what are said to be fundamental principles of international or common law. We have the advantage that similar arguments have been the subject of recent consideration by the House of Lords in *R (Bancoult) v Home Secretary (No 2)* [2008] 3 WLR 955 ("Bancoult (No 2)"), although it is not easy to extract from the 60 or so pages of the five speeches clear majority positions on some points.

19. In *Bancoult* the right in question (derived from the 29th chapter of Magna Carta) was that of a British citizen not to be removed from his country except by statutory authority. Although it was accepted that the principle could be regarded as important or even "fundamental" (see e.g. paras 45, 89), the House decided by a majority that the Order (in that case made under prerogative powers) had validly nullified that right.

20. It may be necessary to bear in mind that that case related to a "ceded" territory, rather than a "settled" colony, as in this case. (For a full discussion of this "arcane", but still relevant distinction, see Lord Rodgers's speech in *Bancoult (No 2)* at para 80 ff). Mr Fitzgerald argued that the powers of the Crown are more limited in the case of a settled colony, citing Coke's report of *Calvin's case* 7 Rep. 17b, where it was said to be clear that:

> "If a King comes to a kingdom by conquest, he may change and alter the laws of that kingdom; but if he comes to it by title and descent, he cannot change the laws of himself without the consent of Parliament."

I am not convinced that this is of much assistance in the present context. The issue is not whether Parliament has consented, which is clear from the 1962 Act, but what it has consented to. That is a matter of construction of the Act.

21. It is convenient to consider first the status of the "rights" on which the claimant relies, and secondly the principles by which they are said to qualify the apparently wide powers conferred by the Act; and then to draw the balance.

The rights

22. In this case, the right to a jury trial has been traced back to Magna Carta, and long−settled practice thereafter. The right to self−determination through an elected Parliament is said to be recognised generally by international law, and specifically by Article 3 of the First Protocol to the European Convention of Human Rights, which (as is common ground) applies in the Territory. I deal with some of the detail below. However, I conclude that while the rights on which the Claimant relies are undoubtedly of great importance, there is nothing in the authorities to support the argument that they have some special status going beyond that considered in *Bancoult(No 2)* .

Jury trial

23. Section 1 of the 2006 Constitution begins by asserting that "every person in the Islands is entitled to the fundamental rights and freedoms of the individual", one of which is the protection of the law; and states that the subsequent provisions are to have effect "for the purpose of affording protection to the aforesaid rights". Section 6 is headed "Provisions to secure

the protection of law". Sub−section (1) provides that everyone charged with a criminal offence shall be afforded "a fair hearing× by an independent and impartial court established by law". Section 6(2) sets out particular rights of those charged with a criminal offence, the last of which is that such a person -

> "(g) shall, when charged on information in the Supreme Court, have the right to trial by jury"

The Order would simply repeal paragraph (g) while leaving the remainder of the section in place, including the general right to a "fair hearing".

24. Mr Fitzgerald relies not only on the central place of jury trial in the common law, but more specifically on section 1 of the Constitution, which, he says, shows that the right to jury trial is not simply a creation of the Constitution but part of the settled law of the territory.

25. There is no doubt that the right to jury trial for serious offences has a powerful tradition in the common law, at least in the UK and the USA. For example, Mr Fitzgerald might have referred to Lord Devlin's often quoted observation −

> ".. trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives." (Trial by Jury (1956) p 164).

This was recently cited by Lord Steyn in the House of Lords, to support the statement that:

> "The jury is an integral and indispensable part of the criminal justice system. The system of trial by judge and jury is of constitutional significance×." (*R v Connor; R v Mirza* [2004] UKHL 2, [2004] 1 AC 1118 para 7).

26. On the other hand, as the Commissioner's interim report pointed out, jury trial is not seen as essential in other parts of the world, nor under Article 6 of the Human Rights Convention. Mr Crow also fairly makes the points that the great majority of criminal offences are tried without a jury, and that it is hard to point to a principled basis for drawing a clear line. (For those interested, the Wikipedia entry on jury trial has a surprisingly full, comparative treatment of the issue. The "positive belief" about jury trial in the US, is contrasted with sentiment in other countries in which it is considered "bizarre and risky" for issues of liberty to be entrusted to untrained laymen.)

Right to self−determination

27. In support of this right, Mr Fitzgerald relies on international treaty obligations. For example, Article 1 of both the United Nations International Covenants 1966 provides:

> "1. All peoples have the right of self−determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."
>
> 2×
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of non−self−governing, and Trust Territories, shall promote the realization of the right of self−determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

The "right of peoples to self−determination", as evolved from the UN Charter has been described by the International Court of Justice as "one of the essential principles of contemporary international law" (*East Timor (Portugal v Australia)* ICJ reports 1995 p 90 para 29).

28. However, as Mr Crow points out, that principle has not been incorporated into domestic law. While of course the right is protected by specific statutes in this country and is in practice taken for granted, nothing in any of the cases relied on by Mr Fitzgerald would enable it to be treated as a free−standing principle in the Territory derived from international law.

29. He finds more specific assistance in the European Convention of Human Rights. Article 3 of Protocol 1 states:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

He points out that this has been held to include a right to respect for the decision of the electorate once made:

> "× once the wishes of the people have been freely and democratically expressed, no subsequent amendment to the organisation of the electoral system may call that choice into question, except in the presence of compelling grounds for the democratic order." (*Lykourezos v. Greece* , no. 33554/03, para 52)

Mr Crow points to the concluding words of that quotation as particularly apt in the present context, where the Commissioner's report does indeed give compelling evidence of a failure of the democratic order.

30. However, this aspect of the argument has in my view been overtaken by events. Following the hearing we have been informed by the Treasury Solicitor that, if a decision is taken to bring the Order into force, the UK will in effect withdraw Article 3. This can be done without Parliamentary sanction. It requires a declaration to the Council of Europe under Article 4 of the First Protocol modifying the application of the Protocol to the territory by withdrawing the application of Article 3. It will be made clear that this is a temporary measure, pending steps to restore the principles of good governance in the Territory.

The width of the Crown's powers

31. On the other side of the balance it is necessary to consider the potential limitations on the Crown's power. Provisions in the form of section 5 have a long history. The wording has been held to confer a very wide law−making power. On the other hand, in seeking limits to the scope of the power Mr Fitzgerald's arguments also have a long and respectable pedigree, extending over two centuries. It is enough to summarise the four main lines of argument which have been touched on before us:

i) *Repugnancy* Before the Colonial Laws Validity Act 1865 it was sometimes argued that colonial laws could be declared invalid as repugnant to "fundamental principles" of English law. As Lord Hoffmann explained in *Bancoult (No2)* :

> "The background to the Act is the statement of Lord Mansfield in *Campbell v Hall* (1774) 1 Cowp 204, 209 that although the King had power to introduce new laws into a conquered country, he could not make "any new change contrary to fundamental principles." If the King's power did not extend to making laws contrary to fundamental principles (presumably, of English law) in conquered colonies, it was regarded as arguable, in the first half of the nineteenth century, that the same limitation applied to the legislatures of settled colonies. It was never altogether clear what counted as fundamental principles and the Colonial Laws Validity Act was intended to put the question to rest by providing that no colonial laws should be invalid by reason of repugnancy to any rule of English law except a statute extending to the colony." (para 36)

In this case, Mr Crow did not seek to rely on the 1865 Act (for reasons which were not entirely clear to me). However, like Lord Hoffmann in *Bancoult (No 2)* (para 39) one may question whether this line of argument adds anything in a modern context to the doctrines of English public law.

ii) *Principle of legality* Recent House of Lords authority recognises the principle that certain rights are so important that they cannot be overridden by general words in a statute:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights×. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual." (*R v Home Secretary, ex p. Simms* [2000] 115, per Lord Hoffmann at p.131E−G; see also per Lord Steyn at p.130E−G; and also *R v Home Secretary, ex p. Pierson* [1998] AC 539 at 589A, 573H−574B and 575D.)

In *Bancoult (No2)* Lord Hoffmann treated this principle as relevant to the argument before him, but inapplicable because the words of the Order itself were quite clear; and while the importance of the individual was something to be take into account by the Crown in exercising its legislative powers, there was −

> "no basis for saying the right of abode is in its nature so fundamental that the legislative powers of the Crown cannot touch it". (para 45)

iii) *Judicial review principles* There is no dispute before us that the decision to make the Order is reviewable on "ordinary principles" of judicial review. In *Bancoult (No2)* Lord Hoffmann referred to the "ordinary principles of legality, rationality and procedural impropriety" (following Lord Diplock's classic formulation in *CCSU*). Lord Carswell emphasised that, since the Human Rights Act 1998 did not apply, "*Wednesbury* unreasonableness", not "proportionality" was the test (para 131).

iv) *Human rights* Even without the underpinning of a specific statute such as the 1998 Act, human rights have been given a special status in judicial review. In *Bancoult (No 2)* Lord Carswell (para 131) accepted that in the context of human rights −

> "×the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable×" (following Sir Thomas Bingham MR in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554)

> A related principle is that "domestic legislation should as far as possible be interpreted so as to conform to the state's obligation under a (human rights) treaty" *Lewis v AG of Jamaica* [2001] 2 AC 50, 78F per Lord Slynn, at least where the language of the statute is uncertain or ambiguous (cf *R v Secretary of State for the Home Department, ex parte Brind* [1991] AC 696).

32. I am not convinced that in the modern law, there is any real distinction between these different ways of formulating the argument. In the end, short of arguments of irrationality, the issue must be one of construction of the statutory language conferring the power. As to that, the majority in *Bancoult(No2)* left no doubt. Lord Hoffmann said:

> "× the words "peace order and good government" have never been construed as words limiting the power of a legislature. Subject to the principle of territoriality implied in the words "of the Territory", they have always been treated as apt to confer plenary law−making authority. For this proposition there is ample authority in the Privy Council (*R v Burah* (1878) 3 App Cas 889; *Riel v The Queen* (1885) 10 App Cas 675; *Ibralebbe v The Queen* [1964] AC 900) and the High Court of Australia *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1). The courts will not inquire into whether legislation within the territorial scope of the power was in fact for the "peace, order and good government" or otherwise for the benefit of the inhabitants of the Territory." (para 50)

Relying on the same line of cases Lord Rodger (with whom Lord Carswell agreed on this point: para 130) said:

> "×it is not open to the courts to hold that legislation enacted under a power described in those terms does not, in fact, conduce to the peace, order and good government of the Territory. Equally, it cannot be open to the courts to substitute their judgment for that of the Secretary of State advising Her Majesty as to what can properly be said to conduce to the peace, order and good government of BIOT. This is simply because such questions are not justifiable. The law cannot resolve them: they are for the determination of the responsible ministers rather than judges. In this respect, the legislation made for the colonies is in the same position as legislation made by Parliament for this country,× " (para 109)

33. Even allowing for the differences between the various speeches, those of the majority in my view provide a clear message that the Crown's power to legislate for the good government of a territory (whether under the prerogative or a statute such as the present), although in principle subject to judicial review, is in practice not open to question in the courts other than in the most exceptional circumstances, which did not include the abrogation of the basic

right relied on in that case. I see no reason to think the rights claimed in this case, important as they are, should be accorded greater weight.

Other points

34. I can deal much more shortly with the other points in Mr Fitzgerald's argument.

35. I fail with respect to understand the argument that the Order would violate other provisions in Constitutions, such as the right to a fair trial and the right not to be compelled to give evidence. Those safeguards remain in place, and can be enforced through the domestic courts. The Order simply removes the right to insist on a jury trial as such, but does nothing to diminish the responsibility of the court to ensure that whatever form of trial is adopted in "fair" in the broadest sense.

36. Mr Fitzgerald went as far as to suggest that the setting up of the Commission made it unfair to resort to criminal proceedings, or led to some form of legitimate expectation that there would be no prosecution, or that at least that any trial would be with a jury. Again, with respect I see nothing in these points. As has been seen Section 8 of the Commissions of Inquiry Ordinance clearly contemplates that there may be criminal proceedings and provides appropriate protection. The terms of reference for the inquiry made it clear that this was a possible outcome, and it is not suggested that any specific representation to the contrary was made by the Commissioner or anyone else.

37. Similarly, I see nothing in the arguments that the removal of jury trial is objectionable because it is targeted at particular individuals, or retrospective. On the latter point Mr Fitzgerald relied initially on general statements by the US Supreme Court in *Calder v Hull* 3 US 386 (1798). However, I think he accepted ultimately that English authority is against him, as respects procedural matters such as rules of evidence (see *R v Makanjuola* [1995] 3 All ER 730732g−f). He suggested that the issue of jury trial was not a normal procedural issue, but he provided no authority to support the distinction.

38. His argument that the legislation is "targeted" at particular individuals such as his client was supported by reference to *Liyanage v the Queen* [1966] 2 WLR 682, in which the Privy Council declared invalid two Acts passed by the Parliament of Ceylon following an abortive coup d'etat in 1962. The Acts purported to change the law, so as among other things to legalise the detention of the alleged conspirators retrospectively, widen the category of cases which could be tried without a jury, and prescribe new minimum penalties. Lord Pearce said:

> "It goes without saying that the legislature may legislate, for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence. But the Acts of 1962 had no such general intention. They were clearly aimed at

> particular known individuals who had been named in a White Paper and were in prison awaiting their fate. The fact that the learned judges declined to convict some of the prisoners is not to the point. That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law is shown by the fact that the effect of those alterations was to be limited to the participants in the January coup and that, after these had been dealt with by the judges, the law should revert to its normal state." (p.695B−E)

Mr Fitzgerald points by analogy to the temporary nature of the changes to the law in this case.

39. However, he fairly acknowledges Lord Pearce's subsequent comment:

> "lack of generality in criminal legislation need not of itself, involve the judicial function, and their Lordships are not prepared to hold that every enactment in this field which can be described as *ad hominem* and *ex post facto* must inevitably usurp or infringe the judicial power× Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings" (p.695E−G).

40. I do not think it arguable that this much more extreme case provides any support for the Claimant's case before us. It is no doubt in the contemplation of those making the Order that the Claimant is one of those subject to risk of prosecution in the light of the Commissioner's final report. But that it is the most that can be said. The Order is expressed to be of general effect. Whether it is applied to the Claimant is dependent on decisions yet to be made as to whether he will be prosecuted, and if so on what evidence, for what offences, and in what form.

41. Turning to the incidental points under the other main issue, it is not in my view open to the Claimant to argue in judicial review proceedings that the suspension of the legislature is a "disproportionate" response, short of irrationality which is not alleged. Nor in my view is it relevant to the validity of the Order itself to seek to show that the inquiry was "flawed" in some way or that it went beyond its terms of reference, even if (which I do not accept) there were any serious grounds to support these allegations.

Conclusion

42. I conclude that there are no arguments which offer a realistic prospect of the Claimant's case succeeding at a full hearing, and that it would be wrong therefore to grant permission. Looking at the matter more generally, I remind myself of the gravity of the provisional conclusions drawn by the Commissioner. If they are substantiated in the final report, it is clearly vitally important that the UK Government should be able to take urgent action to deal with the matter, and indeed would be open to serious criticism if it failed to do so. As made clear in *Bancoult(No 2)* the Court will not enter into discussion of the merits of the particular measures. In the end, the challenge comes down to one of statutory construction or rationality, and on that basis it is bound in my view to fail. I would dismiss the application.