HOUSE OF LORDS SESSION 2005–06
[2005] UKHL 57

on appeal from: [2004] EWCA Civ 527

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina *v.* Secretary of State for Foreign and Commonwealth Affairs (Appellant) *ex parte* Quark Fishing Limited (Respondents)
Regina *v.* Secretary of State for Foreign and Commonwealth Affairs (Respondent) *ex parte* Quark Fishing Limited (Appellants)
(Conjoined Appeals)

Appellate Committee

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hope of Craighead
Baroness Hale of Richmond

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LORD BINGHAM OF CORNHILL

My Lords,

1. To fish for Patagonian toothfish in the Maritime Zone adjacent to South Georgia and the South Sandwich Islands ("SGSSI") it is necessary to hold an annual licence. Licences are granted by the Director of Fisheries of SGSSI. They are a valuable commercial asset, since the fishing is very profitable. Quark Fishing Limited, a Falkland Islands company, obtained such a licence for its motor vessel *Jacqueline* in each year from 1997-2000. In 2001 it applied again. But the Secretary of State for Foreign and Commonwealth Affairs on 7 June 2001 formally instructed the Commissioner of SGSSI to direct the Director of Fisheries of SGSSI to allocate licences for the 2001 season in a way which precluded the grant of a licence to Quark for *Jacqueline*. The instruction was followed and the licence withheld. Quark challenged the lawfulness of the Secretary of State's instruction on conventional public law grounds, and succeeded both in the High Court and on appeal: [2001] EWHC Admin 1174; [2002] EWCA Civ 1409. There is no further appeal on that aspect of the case. But an issue remains whether Quark is entitled to damages. On that issue, raised by an application to strike out, decisions adverse to Quark have been made by Collins J at first instance ([2003] EWHC 1743 (Admin)) and the Court of Appeal (Pill, Thomas and Jacob LJJ, [2004] EWCA Civ 527, [2005] QB 93). It is now accepted that Quark can recover damages against the Secretary of State only if it can show that his admittedly unlawful instruction violated its rights under article 1 of the First Protocol to the European Convention on Human Rights so as to render him liable in damages under sections 6 and 7 of the Human Rights Act

1998. But an anterior question has been raised, whether the Secretary of State, when giving his unlawful instruction, was acting for Her Majesty the Queen in right of the United Kingdom (as Quark argues) or in right of SGSSI (as the Secretary of State now argues). Collins J decided both questions against Quark. The Court of Appeal disagreed on the anterior issue, holding that the instruction had been given by the Secretary of State on behalf of Her Majesty in right of the United Kingdom, and the Secretary of State challenges that ruling before the House. But the Court of Appeal agreed with the judge that no claim could lie under the 1998 Act and the First Protocol, and Quark challenges that ruling.

SGSSI

2. SGSSI was acquired by the Crown by settlement. Its government was established under the British Settlements Acts 1887 and 1945. From 1908 until 18 April 1985 it was a British Dependent Territory and a Dependency of the Falkland Islands. But on the latter date, when the South Georgia and South Sandwich Islands Order 1985 (SI 1985/449) came into effect, it ceased to be a Dependency. It is now a British Overseas Territory as defined in the British Overseas Territories Act 2002, and its constitution is governed by the 1985 Order as amended.

3. Under section 4 of the 1985 Order as amended there is a Commissioner for the Territories appointed by Her Majesty. His powers and duties are laid down in section 5(1):

> "The Commissioner shall have such powers and duties as are conferred or imposed upon him by or under this Order or any other law and such other powers and duties as Her Majesty may from time to time be pleased to assign to him and, subject to the provisions of this Order and of any other law by which any such powers or duties are conferred or imposed, shall do and execute all things that belong to his office according to such instructions, if any, as Her Majesty may from time to time see fit to give him through a Secretary of State."

The instruction complained of in these proceedings was given under this subsection. The Commissioner has wide powers: to make laws for the peace, order and good government of the Territories (section 9(1)); to constitute offices and make appointments (section 7); to make grants of

land (section 14); to establish courts of justice, including a Supreme Court (section 13); and to grant pardons and remit sentences (section 11). But in matters touching on defence and security the Commissioner must follow the advice of the officer commanding Her Majesty's Forces in the South Atlantic (section 5(2)), and the Commissioner's exercise of other powers is subject to the instructions and control of the Secretary of State. Thus the Commissioner holds office during Her Majesty's pleasure (section 4(1), as amended). His powers and duties are those assigned to him by Her Majesty, with whose instructions he is bound to comply (section 5(1), above). The Commissioner's power to make laws is subject to the instructions of Her Majesty through a Secretary of State; the Commissioner must so far as practicable observe the rules set out in an annex to the Order; and laws made by him may be disallowed by Her Majesty (sections 9(2), 10(1)). The power to constitute offices is limited to such offices as may be constituted by Her Majesty, subject to local laws and subject to any instructions given (section 7). The power to dispose of land is subject to local laws and any instructions given (section 14). Pardons and remissions of sentence are to be granted in Her Majesty's name and on her behalf (section 11). SGSSI is a legal entity. But the United Kingdom is responsible for its external relations and thus has the responsibility in international law for ensuring compliance with those international obligations which apply to it.

4. SGSSI is a remote territory, far to the south of the Falkland Islands, close to the Antarctic Circle, and it has no inhabitants other than a transient population of about 12 scientists. Thus it is no surprise that it lacks the institutions (representative assembly, legislative council, courts and so on) ordinarily to be expected in a British Overseas Territory.

The regulation of fishing in SGSSI waters

5. In May 1993 the then Commissioner of SGSSI declared a Maritime Zone extending some 200 nautical miles from SGSSI, within which the government of SGSSI was to have exclusive jurisdiction over fisheries. Pursuant to powers conferred on him by the 1985 Order, the Commissioner enacted The Fisheries (Conservation and Management) Ordinance 1993 which, with the Fishing (Maritime Zone) Order 1993, controlled fishing within the Maritime Zone by introducing a licensing regime. Despite revocation and replacement of the first-mentioned Ordinance in 2000, the regime has remained in force. The Commissioner was required to appoint a Director of Fisheries who should administer the Ordinance and be responsible, among other things, for the conservation of fish stocks, the development and

management of fisheries, the regulation of the conduct of fishing and "the issue, variation, suspension and revocation of licences for fishing and fishing - related operations". Save in relation to prosecutions, the Director is under the direction of the Commissioner: section 4(2) of the 2000 Ordinance.

6. By section 4(5) of the 2000 Ordinance the Director is required when discharging his duties to have regard to the provisions of the Convention on the Conservation of Antarctic Marine Living Resources ("the Conservation Convention"). This was adopted in 1980 and came into force 2 years later. It was negotiated to address, among other things, the threat of over-exploitation of fin-fish in the Southern Ocean. It forms part of the Antarctic Treaty System, a body of treaties, agreements and regulations that provide for the orderly governance of Antarctica. The evidence shows that the United Kingdom is committed to the Antarctic Treaty System as the means by which the political and environmental security of the area can best be maintained. The United Kingdom was an original signatory of the Conservation Convention, whose members now include 23 states and the European Commission including the United Kingdom but not SGSSI.

7. The evidence makes plain that the control of fishing in Antarctic waters raises questions much wider than those of conservation and management. In the original judicial review proceedings, Laws LJ (in para 57 of his judgment) observed:

> "The limitation of the number of licences to be issued to British-registered vessels to two, against the Director's recommendation of four, was arrived at as a matter of judgment in the field of foreign policy."

This was echoed by Pill LJ in para 25 of the judgment under appeal:

> "Thus there was a strong political and diplomatic motive for the intervention and instruction of the Secretary of State."

This has not been challenged by the Secretary of State, and could not be challenged since it reflects the evidence which he adduced.

The first issue

8. The first issue, raised by the Secretary of State's appeal, is agreed by the parties to be:

> "Whether the Court of Appeal was correct to conclude that the Instruction of 7 June 2001 issued by Her Majesty through her Secretary of State was issued by Her Majesty in right of the United Kingdom."

9. The instruction in issue in this case was given to the Commissioner (who was required to direct the Director) by the Secretary of State. He was not of course acting on his own behalf but on behalf of the Crown, from which his authority derived. But it is now clear, whatever may once have been thought, that the Crown is not one and indivisible: *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Indian Association of Alberta* [1982] QB 892, 911, 916-917, 920-921, 928. The Queen is as much the Queen of New South Wales (*In re Bateman's Trust* (1873) 15 Eq 355, 361) and Mauritius (*R v Secretary of State for the Home Department, Ex p Bhurosah* [1968] 1 QB 266, 284) and other territories acknowledging her as head of state as she is of England and Wales, Scotland, Northern Ireland or the United Kingdom. Thus the Secretary of State as a servant of the Crown exercises executive power on behalf of the Crown in whatever is, for purposes of that exercise of executive power, the relevant capacity of the Crown. The question which divides the parties is: by what test is the relevant capacity of the Crown to be ascertained?

10. The Secretary of State through Mr Crow submits, in very brief summary, that the answer is found by identifying the system of government within which the particular exercise of executive power takes place. Here the relevant system of government is that established by the 1985 Order as amended, which contains the constitution of SGSSI. It makes plain that the Queen is the head of state and the source of authority in the state. Those who hold office locally do so during her pleasure and subject to her instructions and control. While instructions may be transmitted to the Commissioner by the Secretary of State he does so, in constitutional theory, as her mouthpiece or medium. He is passing on her instructions as Queen of SGSSI, not acting as Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom.

11. Mr Vaughan QC for Quark contends that the answer is found not in an analysis of the relevant constitutional arrangements, or not in them alone, but in an evaluation of the facts underlying the exercise of power which is subject to challenge. Here, he says, the decision to instruct the Commissioner was animated by concern for the wider interests of the United Kingdom and not solely by concern for the particular interests of SGSSI. He places reliance on the political and diplomatic motivation of the Secretary of State's instruction to suggest that this was, in truth, an exercise of power on behalf of Her Majesty's Government of the United Kingdom, not Her Majesty's Government of SGSSI.

12. Any constitution, whether of a state, a trade union, a college, a club or other institution seeks to lay down and define, in greater or lesser detail, the main offices in which authority is vested and the powers which may be exercised (and not exercised) by the holders of those offices. Thus if a question arises on what authority or pursuant to what power an act is done, it is to the constitution that one would turn to find the answer. Here, it is plain that the Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom has no power or authority under the constitution of SGSSI (the 1985 Order, as amended) to instruct the Commissioner. Such power and authority can be exercised only by the Queen, who in this context is (and is only) the Queen of SGSSI. It is in my view correct in constitutional theory to regard the Secretary of State as her mouthpiece and medium. This analysis points, in my view strongly, to the correctness of the Secretary of State's submission, but it is necessary to examine the authorities to see if they suggest a different answer.

13. From *The Queen in Right of Alberta v Canadian Transport Commission* (1977) 75 DLR (3d) 257, 259, is derived the proposition, which cannot I think be doubted, that the Crown in right of Alberta may be equated with the Government of Alberta. Thus it is the Government of SGSSI with which the House is here concerned. Little help is gained from *Bhurosah*, above: the appellants claimed to be holders of United Kingdom passports, but the definition of that expression in section 1(3) of the Commonwealth Immigrants Act 1962, quoted at p 283 of the report, made that contention, on the facts, all but unarguable.

14. In *Tito v Waddell (No 2)* [1977] Ch 106, an issue arose, in relation to what was called "the 1931 transaction", whether the acts of which the claimants complained were done on behalf of the Government of the Gilbert and Ellice Islands Colony (in which case no claim lay against the Crown, because excluded by section 40(2)(b) of the Crown

Proceedings Act 1947) or the Government of the United Kingdom (in which case, if a claim lay, it was not excluded). Sir Robert Megarry V-C (at p 254) accepted that the colonial government was plainly a subordinate government, all important decisions being referred to London, and the Crown, on the advice of the United Kingdom Government, having important powers that could be used to override acts of the colonial government. But the Vice-Chancellor concluded (at p 255):

> "In my judgment the government of the United Kingdom was not the government of the Gilbert and Ellice Islands Colony at any material time. It had important advisory and supervisory functions, as well as paramount powers. It also contributed much to the governing of the colony, in general and to the 1931 transaction in particular, eg in settling the form of the 1931 lease; but it was not the government."

Quark was unable satisfactorily to distinguish this authority.

15. In *Ex p Indian Association of Alberta*, above, the issue (see p 909) was whether obligations which the applicants sought to enforce were owed by "Her Majesty in right of Her Government in the United Kingdom". It was argued on their behalf, presumably to establish their claim, that Canada still did not enjoy full independence from the United Kingdom since there remained an ultimate power to deny Royal Assent to Canadian legislation. Both Lord Denning MR and May LJ concluded that any obligations were now owed by the Crown in respect or right of Canada, not the United Kingdom (at pp 919, 937). But Kerr LJ addressed the argument more directly and said (at p 927).

> "With respect, in my judgment this argument is wholly fallacious. As shown by the basic constitutional principles discussed at the beginning of this judgment, it is perfectly clear that the question whether the situs of rights and obligations of the Crown is to be found in right or respect of the United Kingdom, or of other governments within those parts of the Commonwealth of which Her Majesty is the ultimate sovereign, has nothing whatever to do with the question whether those governments are wholly independent or not. The situs of such rights and obligations rests with the overseas governments within the

> realm of the Crown, and not with the Crown in right or respect of the United Kingdom, even though the powers of such governments fall a very long way below the level of independence. Indeed, independence, or the degree of independence, is wholly irrelevant to the issue, because it is clear that rights and obligations of the Crown will arise exclusively in right or respect of any government outside the bounds of the United Kingdom as soon as it can be seen that there is an established government of the Crown in the overseas territory in question. In relation to Canada this had clearly happened by 1867."

Unusually, a five-member appeal committee of the House of Lords heard a petition for leave to appeal, and Lord Diplock gave reasons for dismissing it. He regarded the petitioners' contention as unarguable for the accumulated reasons given in the judgments of the Court of Appeal (see pp 937-938). These include the observations of Kerr LJ which I have quoted, and the express approval of the committee, including in Lord Diplock a notable authority in this area, must give them even greater weight.

16. Reliance was placed, finally, on the decision of the Queen's Bench Divisional Court in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067. In that case the applicant sought judicial review of an ordinance made by the commissioner for the British Indian Ocean Territory under powers similar to those conferred by the 1985 Order on the Commissioner for SGSSI. The Secretary of State and the commissioner were both respondents to the application, and an issue was raised whether the High Court in London had jurisdiction to entertain the proceedings and grant relief. In ruling that it had, Laws LJ (in para 28 of his judgment) said that "the Crown's reliance on the proposition that the Ordinance is a legal creature of the government of BIOT which must be taken to possess a separate and distinct sovereignty of its own, such that the Queen's courts sitting here in London have nothing to do with the matter, represents in my judgment an abject surrender of substance to form". He pointed out that the ordinance had been made on the orders or at the direction of Her Majesty's ministers here, in right of the Government of the United Kingdom. The court held that it had ample jurisdiction to quash an instrument the making of which had been wholly procured by Her Majesty's Government of the United Kingdom, and it did so. In the present case, the Secretary of State's instruction has been quashed, and there is no challenge to the court's jurisdiction to make that order. So the jurisdictional issue in *Bancoult* does not arise. It is however

appropriate, in my opinion, to decide in this case whether the instruction given by Her Majesty through the Secretary of State was given in right of the Government of SGSSI or that of the United Kingdom. I do not understand the court in *Bancoult* to have ruled or found it necessary to rule, in order to resolve the jurisdictional issue, whether the ordinance had been made by Her Majesty in right of the Government of the BIOT or in right of the Government of the United Kingdom.

17. None of the authorities cited is directly in point, and they do not conclude the issue in the Secretary of State's favour or against him. But they do in my view assist him, because they show that the possession and exercise of powers by a paramount government does not preclude recognition of the acts of a subordinate government as acts of the Crown in right of that government. And in none of the cases was it thought necessary to examine facts pertaining to the motivation of the paramount government.

18. The extreme difficulty of exploring governmental motivation in a context such as this, and its unsuitability for judicial determination, reinforce the Secretary of State's argument. The present case illustrates the point. There were of course matters strictly relating to the conduct of fishing in the Maritime Zone which were, or should have been, considered. These may be regarded as pure SGSSI issues. But the wider political and diplomatic issues alluded to above, while of obvious importance to the United Kingdom as a power with extensive overseas interests, cannot be dismissed as irrelevant to the interests of SGSSI. Given that the continuing status of SGSSI as a British Overseas Territory is not accepted without question by some significant states in the region, the promotion of international harmony may well be seen to contribute to the security of SGSSI. To treat the allocation of motive as the basis for attributing an exercise of executive power to one government rather than another would, in my opinion, be hazardous and unreliable.

19. Collins J, before whom this question was not (it seems) very fully argued, concluded in para 34 of his judgment that

> "there is no question but that in acting pursuant to the 1985 Ordinance, the [Secretary of State] was acting on behalf of the Crown in right of government of SGSSI."

The Court of Appeal reached a different view. In doing so, it observed (para 48) that under the 1985 Order there "is a very considerable reservation of powers to the Secretary of State". But this is not so. There is a considerable reservation of powers to Her Majesty, as Queen of SGSSI, but none to the Secretary of State. It went on to suggest (para 50), borrowing the language of Laws LJ in *Bancoult*, that "it would be an abject surrender of substance to form to treat the instruction given by the Secretary of State on behalf of Her Majesty as one given in right of [SGSSI]". But I do not think the issue is properly to be regarded as a contest between substance and form: it turns on identifying the correct constitutional principle. While the court accepted (para 51) that the reason why a particular decision is taken cannot be determinative of the construction of the instruction, it held that the instruction had nevertheless to be construed in the context of a factual matrix which included the political and diplomatic context of the instruction. Here, there is no issue of construction. What is in issue is the constitutional standing of the instruction. The factual matrix might, I accept, be relevant if there were in a given territory no government, or no government worthy of the name, other than the United Kingdom Government. There would then be no government other than that of the United Kingdom Government on whose behalf an exercise of executive power could be made, no other government in right of which the Queen could act. But that is not this case. Here, there is nothing to displace the initial inference that the instruction was given by Her Majesty, through the Secretary of State, in right of the government of SGSSI.

20. I would accordingly answer this issue in the negative: the Court of Appeal was not correct to rule as it did.

The second issue

21. The second issue was agreed in terms which indicated that it arose only if the first issue were answered affirmatively:

> "If so, whether the Court of Appeal was correct to conclude that the Instruction issued by Her Majesty in right of the United Kingdom and given to the Commissioner of [SGSSI] was incapable of giving rise to a claim for damages under section 7 of the Human Rights Act 1998".

Thus the parties assumed that no claim for damages under section 7 could lie if the instruction were held to have been given by Her Majesty in right of SGSSI.

22. In my opinion this was a wholly correct assumption. Since this conclusion is not, I think, in serious controversy I can give my reasons for reaching it very briefly.

23. To recover damages under section 7 of the 1998 Act, Quark must show that its rights under the European Convention have been violated by a public authority liable under the Act. So the essential stepping stones to success are a demonstrated breach of a Convention right and an answerable public authority.

24. The Convention right asserted is that under article 1 of the First Protocol to the European Convention. At this stage it is accepted, for purposes of argument, that denial of a fishing licence in 2001 may in the circumstances have amounted to deprivation of a possession within the meaning of article 1. But although it is common ground that the United Kingdom acted under article 63 (now 56) of the Convention to extend its coverage to SGSSI, it is also common ground that it has not taken similar action under article 4 of the First Protocol. That Protocol has not been extended to SGSSI. Thus a party complaining of conduct which would be a violation by SGSSI, for which the United Kingdom would be answerable, if the Protocol had been extended, would inevitably fail in an application to the Court of Human Rights at Strasbourg if (as is the case) the Protocol had not been extended. This principle is clearly established by Strasbourg authorities such as *X v Belgium* (1961) 4 YB 260, *Gillow v United Kingdom* (1986) 11 EHRR 335, *Bui van Thanh v United Kingdom* (Application No 16137/90, 12 March 1990, (unreported) and *Yonghong v Portugal*, Reports of Judgments and Decisions 1999 - IX, p 385.

25. A party unable to mount a successful claim in Strasbourg can never mount a successful claim under sections 6 and 7 of the 1998 Act. For the purpose of the 1998 Act was not to enlarge the field of application of the Convention but to enable those subject to the jurisdiction of the United Kingdom and able to establish violations by United Kingdom public authorities to present their claims in the domestic courts of this country and not only in Strasbourg. The territorial focus of the Act is clearly shown by the definition of "the Convention" in section 21 to mean the European Convention "as it has

effect for the time being in relation to the United Kingdom". In any event, the Secretary of State acting on behalf of Her Majesty in right of SGSSI is not a United Kingdom public authority, and so falls outside the scope of section 6.

26. It may very well be, as the Court of Appeal held, that a claim by Quark would not lie under the 1998 Act even if the Secretary of State had given his instruction on behalf of Her Majesty in right of the United Kingdom. But it is unnecessary to decide that question, and I see no advantage in doing so.

27. For these reasons I would allow the Secretary of State's appeal and dismiss Quark's cross-appeal.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

28. This appeal raises a question on the territorial reach of the Human Rights Act 1998. South Georgia and the South Sandwich Islands are in the remote south Atlantic. They are a British overseas territory as defined in the British Overseas Territories Act 2002, but they are not part of the United Kingdom. The question raised by this appeal is whether a direction given in London by the Secretary of State for Foreign and Commonwealth Affairs to the local government in South Georgia regarding property there is capable of being an act by a 'public authority' incompatible with a 'Convention right' within the meaning of the Human Rights Act and as such founding a claim for damages under section 7 of that Act.

29. Quark Fishing Ltd is a Falkland Islands company carrying on a business of fishing. For several years the company was licensed to fish for Patagonian toothfish with its vessel MV *Jacqueline* in the seas off the coast of South Georgia and the South Sandwich Islands, or South Georgia in short. On 7 June 2001 the Secretary of State for Foreign and Commonwealth Affairs instructed the Commissioner of South Georgia to direct the Director of Fisheries of South Georgia not to grant a new licence to the *Jacqueline* for the 2001 season. The Secretary of State gave his instruction pursuant to his powers under the South Georgia and

South Sandwich Islands Order 1985. The Commissioner and the Director duly acted in accordance with the Secretary of State's instruction, as they were obliged to do. Quark's licence was not renewed for the 2001 season. Quark asserts it suffered substantial financial loss as a result.

30. In these judicial review proceedings Quark successfully challenged the lawfulness of the Secretary of State's instruction. This aspect of the dispute is no longer in contention. What remains in issue is whether, as Quark submits, it is entitled to pursue a damages claim pursuant to section 7 of the Human Rights Act. Quark claims it is the victim of an unlawful act of a public authority, namely the Secretary of State. The Secretary of State's instruction, Quark says, was incompatible with a Convention right. Accordingly it was an unlawful act within the meaning of section 6 of the Human Rights Act. The Convention right said to have been violated is article 1 of the First Protocol (protection of property). The property comprises Quark's fishery rights in the South Georgia maritime zone. These waters are thousands of miles away from the United Kingdom. Quark claims this matters not because the Secretary of State, who gave the impugned direction, is a public authority in this country.

31. The issue is thus a comparatively narrow one. There can of course be no doubt that, had the impugned instruction been given by the Secretary of State in respect of property within the United Kingdom, it would have been capable of giving rise to a damages claim under section 7. The question is whether the position is different if the instruction is given to the local government of an overseas territory in respect of a property right situated there.

The territorial scope of the Human Rights Act

32. In resolving this dispute the appropriate starting point is to consider whether, as asserted by Quark, the Secretary of State's instruction was incompatible with a Convention right within the meaning of that expression in sections 6 and 7 of the Human Rights Act. The Act does not attempt to define in express terms what may loosely be called its territorial scope. Wisely so, because 'territoriality' has many aspects. Questions on the application of this slippery concept can arise in many different contexts. This is especially true of a statute having such a wide range of application as the Human Rights Act. The only clues given by the Act lie in the definition of its subject-matter: section

1 defines the key concept of 'Convention rights' by reference to specified articles of the Convention and its protocols, section 21(1) defines 'the Convention' as the European Convention on Human Rights 'as it has effect for the time being in relation to the United Kingdom', and section 7(7) provides that a person is a victim of an unlawful act only if he would be a victim for the purposes of article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

33. At first sight these unexceptional definitions might seem to be of little assistance. But that is not so. What is important is that they carry through the scheme underlying the whole Act. The purpose of the Act, as stated in its preamble, was 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights'. In colloquial terms, the Act was intended to 'bring rights home'. The Act was to provide a means whereby persons whose rights under the Convention were infringed by the United Kingdom could, in future, have an appropriate remedy available to them in the courts of this country. Persons who were victims of a violation of a Convention right within the meaning of article 34 of the Convention need no longer travel to Strasbourg to obtain redress.

34. To this end the obligations of public authorities under sections 6 and 7 mirror in domestic law the treaty obligations of the United Kingdom in respect of corresponding articles of the Convention and its protocols. That was the object of these sections. As my noble and learned friend Lord Hope of Craighead has said, the 'purpose of these sections is to provide a remedial structure in domestic law for the rights guaranteed by the Convention': *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, 564, para 44. Thus, and this is the important point for present purposes, the territorial scope of the obligations and rights created by sections 6 and 7 of the Act was intended to be co-extensive with the territorial scope of the obligations of the United Kingdom and the rights of victims under the Convention. The Act was intended to provide a domestic remedy where a remedy would have been available in Strasbourg. Conversely, the Act was not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg. Accordingly, in order to identify the territorial scope of a 'Convention right' in sections 6 and 7 it is necessary to turn to Strasbourg and consider what, under the Convention, is the territorial scope of the relevant Convention right.

The Human Rights Act and Article 56 extensions

35. Before doing so I must mention one qualification, more apparent than real, in respect of this analysis of the Act. It is this: sections 6 and 7 of the Act are confined in their scope to Convention rights arising from obligations assumed by the United Kingdom under the Convention and its protocols *other than* the extended obligations assumed by the United Kingdom pursuant to a notification given by it under article 56 or equivalent provisions in the protocols. Article 1 of the Convention imposed on contracting states an obligation to secure to 'everyone within their jurisdiction' the rights and freedoms defined in section 1 of the Convention. In article 56 the Convention made provision for contracting states' colonies and the like. These were described in article 56(1) as 'territories for whose international relations [a state] is responsible':

> 'Any State may … declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall … extend to all or any of the territories for whose international relations it is responsible.'

A similar power of extension appears in successive Protocols: see, for instance, article 4 of the first Protocol.

36. The Human Rights Act is a United Kingdom statute. The Act is expressed to apply to Northern Ireland: section 22(6). It is not expressed to apply elsewhere in any relevant respect. What, then, of Convention obligations assumed by the United Kingdom in respect of its overseas territories by making a declaration under article 56? In my view the rights brought home by the Act do not include Convention rights arising from these extended obligations assumed by the United Kingdom in respect of its overseas territories. I can see no warrant for interpreting the Act as having such an extended territorial reach. If the United Kingdom notifies the Secretary General of the European Council that the Convention shall apply to one of its overseas territories, the United Kingdom thenceforth assumes in respect of that territory a treaty obligation in respect of the rights and freedoms set out in the Convention. But such a notification does not extend the reach of sections 6 and 7 of the Act. The position is the same in respect of protocols.

37. The qualification just described is not in point in the present case. South Georgia is a territory for whose international relations the United Kingdom is responsible. In respect of South Georgia the United Kingdom has made a declaration in respect of the Convention. It has not made a similar declaration in respect of the first Protocol.

The territorial scope of the Convention

38. The responsibility of contracting states under the Convention for acts done outside their boundaries arises in a variety of contexts. The present case concerns, and concerns only, the responsibility of a contracting state for acts done in relation to a territory for whose international relations it is responsible but in respect of which the contracting state has not made a declaration under article 56 or the corresponding article in a protocol. In this opinion I confine my remarks to this question.

39. I turn then to the Strasbourg jurisprudence on this question. The question has been considered by the European Court of Human Rights and the Commission on several occasions. Most relevant to the present case are two admissibility decisions. The case of *Bui Van Thanh v United Kingdom* (application no 16137/90) concerned Vietnamese 'boat people' who were refused entry to Hong Kong. The applicants complained, among other matters, that their forcible return to Vietnam would be contrary to article 3 of the Convention. At that time the United Kingdom was still responsible for the international relations of Hong Kong but it had made no declaration under article 56 in respect of Hong Kong. The applicants said that, even so, the complaint was admissible because the policy of forcible repatriation of Vietnamese refugees was in reality a policy of the United Kingdom and the Hong Kong authorities exercised their functions on the basis of decisions taken in the United Kingdom. The Commission rejected this submission:

> 'It is an essential part of the scheme of article [56] that a declaration extending the Convention to [a territory for whose international relations a contracting party is responsible] be made before the Convention applies either to acts of the dependent government or to policies formulated by the government of a contracting party in the exercise of its responsibilities in relation to such territory. Accordingly, in the present case even if the Commission

> were to accept that the acts of the Hong Kong authorities were based on United Kingdom policy, it must find that it has no competence to examine the application since no declaration under article [56] has been made in respect of Hong Kong.'

40. This reasoning was adopted by the Court in *Yonghong v Portugal*, Reports of Judgments and Decisions 1999 - IX, p 385, a case concerning the proposed extradition of Mr Yonghong from Macao to China to face criminal charges. The court recognised that 'jurisdiction' under article 1 is not limited to the national territory of contracting states. Their responsibility can be involved because acts of their authorities produce effects outside their own territory: *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745, para 91. But article 1 of the Convention must be read in the light of article 56.

41. The reasoning of these two decisions is clear and cogent. In my view this reasoning leads ineluctably to the conclusion that Quark would have no standing to make a complaint in Strasbourg against the United Kingdom in respect of the impugned instruction given by the Secretary of State. There can be no rational distinction between the local government giving effect to policies of the contracting state, as in the *Bui Van Thanh* case, and the local government giving effect to a direction from the contracting state. In neither case is the responsibility of the contracting state under the Convention engaged in the absence of a declaration under article 56 or the relevant protocol in respect of the territory in question.

42. Nor, in such cases, can the responsibility of the contracting state depend upon whether, in formulating its policies or deciding to give a binding direction, the contracting state government attached weight primarily or solely to the interests of the contracting state as distinct from the interests of its overseas territory. These interests will often march hand-in-hand. Even where they do not, the liability of the contracting state under the Convention in cases of this type cannot depend on political considerations or motivations of this character.

43. In the present case the local government of South Georgia is comparatively undeveloped. It could hardly be otherwise, given there is no indigenous population and the inhabitants are largely confined to a handful of transient research scientists. But there is a genuine if simple form of local government, headed by a Commissioner having legislative

and executive authority. He is resident in the Falklands Islands. The territory has its own laws. I can see no reason to suppose the European Court of Human Rights would disregard the existence of this governmental structure when considering the application of the Convention in this case.

44. This being the position under the Convention, it follows in my view there has been no violation of Quark's Convention rights within the meaning of sections 6 and 7 of the Human Rights Act. To afford Quark a remedy in this case would be to afford Quark a remedy under United Kingdom law when it has no remedy against the United Kingdom under the Convention. As already indicated, that would be to extend the Human Rights Act beyond its intended reach. On this ground I would dismiss Quark's appeal.

The capacity in which the Secretary of State acted

45. With great respect to your Lordships who consider otherwise, I would not base my decision on the outcome of the argument concerning the capacity in which the Secretary of State acted when giving his instruction to the Commissioner of South Georgia. In my view this line of argument is misdirected in the present context. In the present context this is a non-issue. Quark's claim fails for a different reason. It fails because the Secretary of State's instruction was *not* incompatible with a Convention right within the meaning of the Human Rights Act. Had the instruction *been* incompatible, the capacity in which the Secretary of State gave his instruction would not have afforded him a defence. Clearly, when he gave his instruction the Secretary of State was exercising the powers of the Crown under section 5 of the South Georgia and South Sandwich Islands Order 1985: 'The Commissioner … shall do and execute all things that belong to his office according to such instructions, if any, as Her Majesty may from time to time see fit to give him through a Secretary of State'. But characterising the instruction the Secretary of State gave in this case as an instruction issued by Her Majesty 'in right of South Georgia', as distinct from 'in right of the United Kingdom', leads nowhere. It does not provide an answer to the question raised in the present proceedings. Far from being an anterior question, in this context it is an irrelevant question. It does not provide the answer, either way.

46. Test the matter this way. Suppose it were the case that the Strasbourg jurisprudence was to the opposite effect of what was decided

in the *Bui Van Thanh* case. Suppose it were the case that, under the Convention, a contracting state is liable for the consequences in a dependent state of an instruction given by it to the dependent government. If that were the law in respect of the Convention there could really be no doubt that sections 6 and 7 of the Human Rights Act would be applicable in the present case even though the Secretary of State was acting 'in right of' South Georgia when giving the impugned instruction. Otherwise the Act would fail to achieve its intended purpose of affording a domestic remedy matching the Strasbourg remedy.

47. This example illustrates that, as I have said, what matters in the present case is not the capacity in which the Secretary of State gave his instruction. What matters is whether his instruction violated a Convention right. In the Act the undefined expression 'public authority' is, in short, a reference to those bodies for whose acts or omissions the United Kingdom is answerable before the European Court of Human Rights: see the *Aston Cantlow* case [2004] 1 AC 546, 554, para 6. If the Secretary of State's instruction was incompatible with a Convention right and the United Kingdom was therefore liable under the Convention, the Secretary of State would be liable accordingly under the Act. He would be liable as a public authority even though he was acting in right of South Georgia.

48. I recognise of course that in other contexts, that is, contexts other than the scope of the Human Rights Act, the capacity in which a minister of the Crown was acting may be all-important. An instance of this can be found in *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Indian Association of Alberta* [1982] QB 892. There the issue was whether the obligations of the Crown to the Indian peoples of Canada were obligations of the Crown in right of Canada or obligations in right of the United Kingdom and as such a liability 'in respect of Her Majesty's Government in the United Kingdom' within section 40(2)(b) of the Crown Proceedings Act 1947. In contexts such as these it may be necessary to characterise, for this or that purpose, the capacity in which the Crown acted in a particular transaction. But in the present case that is not so. For this reason I would set aside the declaration made by the Court of Appeal, and in that respect allow the appeal of the Secretary of State, but not substitute any other form of declaration.

LORD HOFFMANN

My Lords,

49. South Georgia and the South Sandwich Islands (SGSSI), which consists of land and sea areas in Antarctica, is a British Overseas Territory. It is not part of the United Kingdom but the sovereign is Her Majesty the Queen. Its constitution is the South Georgia and South Sandwich Islands Order 1985 (SI 1985/449) ("the Order") as amended. The Order was made by Her Majesty in Council under powers conferred by the British Settlements Acts 1887 and 1945. The executive and legislative powers in SGSSI, referred to in the Order as "the Territories", are exercised on behalf of Her Majesty by a Commissioner. Section 5(1) of the Order confers executive authority:

> "The Commissioner shall have such powers and duties as are conferred or imposed upon him by or under this Order or any other law and such other powers and duties as Her Majesty may from time to time be pleased to assign to him and, subject to the provisions of this Order and of any other law by which such powers or duties are conferred or imposed, shall do and execute all things that belong to his office according to such instructions, if any, as Her Majesty may from time to time see fit to give him through a Secretary of State."

50. Section 9(1) confers plenary legislative authority:

> "The Commissioner may make laws for the peace, order and good government of the Territories."

51. Paragraph 1 of the Annex to the Order provides that laws made by the Commissioner are to be styled Ordinances.

52. Pursuant to his legislative powers, the Commissioner made the Fisheries (Conservation and Management) Ordinance 2000. This provided for the appointment of a Director of Fisheries. Fishing in the territorial waters of SGSSI was to require a licence from the Director. The Director was required by section 4(2) to perform his duties

(including the granting of licences) subject to the directions of the Commissioner.

53. In January 2001 Quark Fishing Ltd ("Quark"), owners of the MV *Jacqueline*, applied to the Director for a licence to fish for Patagonian Toothfish during the 2001 Antarctic winter season. The Secretary of State, pursuant to section 5(1) of the Order, instructed the Commissioner to direct the Director pursuant to section 4(2) of the Ordinance to refuse the application.

54. In judicial review proceedings brought in the High Court against the Secretary of State, Scott Baker J quashed the Secretary of State's instruction on administrative law grounds. His decision was upheld by the Court of Appeal. Quark was granted a licence for the 2002 and subsequent seasons but missed the 2001 season. They claim that they have thereby lost a catch worth £2.5 million.

55. After their success in the Court of Appeal, Quark made a claim against the Secretary of State for damages for breach of section 6(1) of the Human Rights Act 1998, which provides that it is unlawful for a "public authority" to act in a way which is incompatible with Convention rights. Quark claim that in giving the instruction under section 5(1) of the Order, the Secretary of State acted as a public authority and that his action was incompatible with Quark's Convention right under article 1 of Protocol 1 to the peaceful enjoyment of its possessions, which are alleged to include the legitimate expectation of being given a licence.

56. The Secretary of State applied to strike out the claim on two grounds. First, he said that Quark had no Convention rights as defined in the 1998 Act. "Convention rights" mean rights under the Convention "as it has effect for the time being in relation to the United Kingdom". It does not include such Convention rights, if any, as may exist under the law of SGSSI. As it happens, there are no Convention rights in the domestic law of SGSSI. The United Kingdom has by a declaration under article 56 of the Convention extended its application to SGSSI but, for two reasons, that is no help to Quark. One is that the declaration operates only in international law the other is that the extension does not include Protocol 1.

57. Secondly the Secretary of State says that in giving the instruction, he did not act as a public authority for the purposes of section 6(1). The 1998 Act is United Kingdom legislation; it does not purport to have extra-territorial application. A "public authority" is defined to include "any person certain of whose functions are functions of a public nature". That must mean United Kingdom functions. In giving the instruction under section 5(1) of the Order, the Secretary of State was acting on behalf of Her Majesty exercising Her powers as sovereign of SGSSI, not the United Kingdom.

58. In my opinion these objections are unanswerable but I must consider how Mr Vaughan QC, who appeared for Quark, tried to answer them. First, he said although the "possessions" which he claims the right to enjoy were in SGSSI, the Secretary of State interfered with them by an act done in the United Kingdom, namely the despatch of the instruction to the Commissioner. Mr Vaughan submitted that the Convention, even as it has effect in relation to the United Kingdom, can have an extra-territorial application. An act done by a public authority in the United Kingdom which interfered with property rights in another country could be a breach of convention rights.

59. There are cases in Strasbourg which support the proposition that the Convention can have an exceptional extra-territorial application when authorised agents of a Member State are exercising authority over persons or property outside its territory: for a recent discussion of this doctrine, see the judgment of the Court of Appeal in *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] 2 WLR 618. Thus the Convention may have extra-territorial application to persons or property within an area under military occupation by a Member State (*Cyprus v Turkey* (2001) 35 EHRR 731) or in its embassy in a foreign country (*M v Denmark* (1992) 73 DR 193. But the present case comes nowhere near falling within such an exceptional category. The United Kingdom government exercises no authority over the waters of SGSSI. That authority is vested in the Commissioner and the Director.

60. Mr Vaughan's argument is that as a matter of *real politik*, the United Kingdom is able, through the powers reserved to Her Majesty and exercisable on the advice of the Secretary of State, to impose its authority on SGSSI. But the Strasbourg jurisprudence says clearly that this is not a sufficient ground for giving the Convention extra-territorial application to dependent territories outside the United Kingdom. To do so would be inconsistent with the scheme of article 56 of the Convention, which provides that a State may declare that the

Convention shall extend to "all or any of the territories for whose international relations it is responsible". If there is no such declaration, then the Convention does not so extend. It would not be consistent to hold that, merely because the territory was dependent on the United Kingdom and its government could exercise reserved powers, the Convention's application to the United Kingdom extended extra-territorially to acts done under the law of that territory.

61. So, for example, in *Gillow v United Kingdom* (1986) 11 EHRR 335 the applicants complained of an infringement of their rights under article 1 of Protocol 1 when the housing authority in Guernsey refused to allow them to occupy the house they owned there. The United Kingdom had not made a declaration extending the Protocol to Guernsey and the Court held that it had no jurisdiction to deal with the complaint. In *Bui Van Thanh v United Kingdom* (1990) (Application No 16137/90) the Commission reached a similar conclusion about a complaint of infringement of Convention rights by the government of Hong Kong, to which the Convention had not been extended at all. The applicant's argument was similar to that of Mr Vaughan in this case: he said that the alleged infringing acts by the Hong Kong authorities had been "based on United Kingdom policy" and relied upon cases on extra-territoriality. But the Commission rejected the argument, saying that it would conflict with an "essential part of the scheme" of the Convention.

62. The Court of Appeal decided that Quark could not complain of infringement of a Convention right because Protocol 1 had not been extended to SGSSI. As *Gillow v United Kingdom* shows, that would have been the reasoning and conclusion if the case had been in Strasbourg. As a matter of international law, the Strasbourg court would have been concerned with whether the United Kingdom government had, by a declaration of extension under article 4 of Protocol 1, applied the Convention to SGSSI and accepted responsibility for its infringement by the government of SGSSI. But for the purposes of the 1998 Act, it does not matter whether the Protocol has been extended to SGSSI or not. The Act is concerned only with the Convention as it applies to the United Kingdom and not by extension to other territories.

63. Mr Vaughan's answer to the Secretary of State's other objection was much the same as the answer to the first. He said that although the acts of Her Majesty in respect of Her government of the SGSSI were in theory not acts of a United Kingdom public authority, Her instructions to the Commissioner in this case had been given on the advice of the Secretary of State and in what were perceived to be the interests of the

United Kingdom in its diplomatic relations with other states fishing in Antarctic waters. Therefore they were acts of the Secretary of State in his capacity as a United Kingdom public authority.

64. This argument failed before Collins J but succeeded in the Court of Appeal. In my opinion Collins J was right. The test for whether someone exercising statutory powers was exercising them as a United Kingdom public authority is in my opinion whether they were exercised under the law of the United Kingdom. In this case they were not. The acts of the Secretary of State in advising Her Majesty and communicating her instructions to the Commissioner had legal effect only by virtue of the Order, which is the constitution of SGSSI and not part of the law of the United Kingdom. The court is neither concerned nor equipped to decide in whose interests the act was done. That this would also be the approach of the Strasbourg authorities is shown by the decision of the Commission in *Bui Van Thanh v United Kingdom* (1990) (Application No 16137/90).

65. It is not in my opinion inconsistent with this construction of the 1998 Act that the Secretary of State conceded the jurisdiction of the High Court to quash the instruction by judicial review. There is authority both ancient and modern for the High Court's exercise of jurisdiction, first by prerogative writ and then by judicial review, over all Her Majesty's territories: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067. But that does not mean that the acts in question are acts of United Kingdom public authorities. On the contrary, the jurisdiction exists whether the act is one of a United Kingdom public authority or not.

66. I would therefore allow the appeal of Secretary of State and (although for reasons not quite the same as those of the Court of Appeal) dismiss Quark's cross-appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

67. One of the functions of government in the British Overseas Territory of South Georgia and the South Sandwich Islands ("SGSSI") is the regulation of fisheries in the maritime zone within which exclusive jurisdiction over commercial fisheries, among other matters, is vested in the government of the territory. It has become increasing clear in recent years that careful regulation is needed for the conservation of fish stocks in the Southern Oceans and the way in which fishing is conducted there. Among the species of fish that attract commercial fishing to the area is the Patagonian toothfish, which commands very high prices in the Asian markets and is regarded as especially valuable. There is an obvious risk to the survival of the species unless effective steps are taken to prevent stocks being reduced below the level at which the species can regenerate itself. This is not the only problem. Long line fishing, which is the method used for the taking of toothfish, attracts the attention of birds which roam these oceans in search of food such as the Black-browed Albatross. The mortality rate of these birds when caught on the long lines is so high that the survival of this species too is now at risk.

68. The need to conserve species in the area of sea in which SGSSI lies has been recognised internationally. The United Nations Food and Agriculture Organisation has divided the Southern Oceans into areas and sub-areas, and the Commission for the Conservation of Antarctic Marine Living Resources ("the CCAMLR") which was established under the Antarctic Treaty System meets at regular intervals to determine the total allowable catch of toothfish for the fishing season in each sub-area. Her Majesty's Government in the United Kingdom is internationally responsible for the external affairs of the British Overseas Territories. Among its responsibilities is ensuring that international treaties and international obligations are complied with. This includes the need to maintain the efficient and effective operation of the CCAMLR in the maritime zone for which the government of SGSSI is responsible. The government of SGSSI, for its part, supports the operation of the CCAMLR by maintaining a licensing system by which vessels are prohibited from fishing for toothfish unless this has been authorised by a licence for the season granted by the Director of Fisheries.

69. At its 19th meeting the CCAMLR set the total allowable catch for toothfish in the SGSSI's sub-area for the 2001 fishing season at 4,500 tonnes. The way the allowable tonnage was to be distributed among those interested in fishing for toothfish raised further questions in relation to the external affairs of SGSSI. Only about a dozen people live on South Georgia, most of whom are research scientists, and the South Sandwich Islands are uninhabited. Vessels equipped for fishing for toothfish are registered elsewhere. The Secretary of State shares responsibility with the government of SGSSI for the maintenance of good relations between SGSSI and neighbouring states, and good relations in the matter of fishing depends on the equitable distribution of licences. On 7 June 2001 the Secretary of State, in the exercise of a power given to Her Majesty by the South Georgia and South Sandwich Islands Order 1985 (SI 1985/449), issued an instruction to the Commissioner for the SGSSI not to grant a licence to fish for toothfish during the 2001 fishing season to any UK or UK overseas flagged vessels other than two vessels named in his instruction. In previous seasons a licence had been issued to *MV Jacqueline*, a vessel owned and operated by Quark Fishing Limited ("Quark"). But this was not one of the two vessels named in the instruction. The question which has given rise to these proceedings is whether Quark is entitled to damages.

The first issue

70. On 6 May 2004 the Court of Appeal made a declaration in these terms:

> "The instruction given on 7 June 2001 by the Secretary of State on behalf of Her Majesty to the Commissioner of South Georgia and the South Sandwich Islands, requiring him to act in the manner set out therein pursuant to s 5 of the South Georgia and South Sandwich Islands Order 1985 (1985 No 449), as amended by the South Georgia and South Sandwich Islands (Amendment) Order 1995 (1995 No 1621), was given by Her Majesty the Queen, acting through the Secretary of State, in right of the United Kingdom."

71. The first issue in this appeal is whether the Court of Appeal was correct to hold, as its declaration records, that the instruction of 7 June 2001 was issued by Her Majesty in right of the United Kingdom. My noble and learned friend Lord Bingham of Cornhill has described the

statutory background in the light of which this instruction was issued through the Secretary of State to the Commissioner, and I gratefully adopt what he has said about this. The question, in simple terms, is whether the instruction was issued by Her Majesty the Queen as Head of State of the United Kingdom (Mr Vaughan QC referred throughout his speech to Her Majesty as Queen of England, but the State of which she is the Head is the United Kingdom) or by Her Majesty the Queen as Head of State of SGSSI.

72. The starting point for an examination of this question, in my opinion, is the date of the coming into operation, on the date appointed for the coming into operation of the Constitution of the Falkland Islands, of the South Georgia and South Sandwich Islands Order 1985 ("the 1985 Order") which established a separate government for SGSSI. Its government is, in a variety of ways, subordinate to the government of the United Kingdom. But from this date forward SGSSI ceased to be a dependency of the Falkland Islands. It now has its own government. In *Tito v Waddell (No 2)* [1977] Ch 106, 254, the Vice-Chancellor (Sir Robert Megarry) said that a government did not cease to be a government because it was subordinate. In *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Indian Association of Alberta* [1982] QB 892, 927, Kerr LJ emphasised that the question whether the situs of rights and obligations of the Crown is to be found in right, or in respect of, the United Kingdom or of other governments within the Commonwealth of which Her Majesty is Head of State has nothing to do with whether those governments are independent or not. At p 927 he said:

> "Indeed, independence, or the degree of independence, is wholly irrelevant to the issue, because it is clear that rights and obligations of the Crown will arise exclusively in right or respect of any government outside the bounds of the United Kingdom as soon as soon as it can be seen that there is an established government of the Crown in the overseas territory in question."

73. The constitution of SGSSI is contained in the 1985 Order, as amended by the Order of 1995 (SI 1995/1621), and the powers and duties of the Commissioner are set out in section 5. It provides that he is to have such powers and duties as are conferred or imposed upon him by or under the Order or any other law

> "and such other powers and duties as Her Majesty may from time to time be pleased to assign to him …"

The reference to Her Majesty in this part of this section is plainly a reference to Her Majesty as Head of State and Queen of SGSSI. Mr Vaughan did not seek to suggest otherwise. The section then provides as follows:

> "… and, subject to the provisions of this Order or of any other law by which any such powers or duties are conferred or imposed, shall do and execute all things that belong to his office according to such instructions, if any, as Her Majesty may from time to time see fit to give him through a Secretary of State."

74. It was the reference to a Secretary of State in these concluding words that led the Court of Appeal to accept Mr Vaughan's argument that the instruction of 7 June 2001 was given by Her Majesty in right of the United Kingdom. As Pill LJ, with whom Thomas and Jacob LJJ agreed, explained, the court approached the issue as one of construction. He said that it was to be determined on a construction of the 1985 Order: [2005] QB 93, 111 - 112, paras 47-49. Having construed the Order, his conclusion was that the instruction was given to the Commissioner by Her Majesty in right of the United Kingdom. He explained his reasoning in this way:

> "48 Upon a consideration of the 1985 Order, that result appears to me to have been achieved in section 5 of the 1985 Order, and in other sections, in the context of the Order as a whole. A similar power is contained in sections 7, 9 and 10. There is a very considerable reservation of powers to the Secretary of State.
>
> 49 The Secretary of State identified in section 5(1) and elsewhere in the Order is clearly Her Majesty's Secretary of State in the United Kingdom. An instruction of Her Majesty through a United Kingdom Secretary of State would, on the face of it, be expected to be an instruction of Her Majesty as Queen of the United Kingdom. The Order appears to me to indicate in several sections an exercise of United Kingdom powers with respect to the governance of South Georgia."

In para 50 he said that it would be an abject surrender of substance to form to treat the instruction given by the Secretary of State on behalf of Her Majesty as one given in right of South Georgia.

75. In my opinion this construction places too much weight on the references in section 5 and elsewhere in the 1985 Order to the Secretary of State and too little weight on the references to Her Majesty. And the conclusion that it led to overlooks the constitutional reality. It was the constitution of SGSSI that provided the vehicle for the instruction. And it was the constitution of SGSSI that established the legal framework within which the instruction was given and which required the Commissioner to give effect to it.

76. If one approaches the 1985 Order, as one should, as an instrument which sets out the constitution of SGSSI, the references that it makes to Her Majesty fall to be read as references to Her Majesty in the exercise of her rights as Head of State and Queen of the territory unless that there is a clear indication to the contrary. As I have already said, that is the meaning that one would give to the first reference that is made to Her Majesty in section 5(1). I can see no good reason for altering the meaning of the phrase when she is referred to again in the same subsection or elsewhere in the 1985 Order just because the references on these occasions are to her giving instructions through a Secretary of State. These references reflect the constitutional reality that the government of SGSSI is subordinate to that of the United Kingdom. It is subject to instruction from time to time as to what it can and cannot do. But the constitutional reality is that, although the government of SGSSI is a subordinate government, it is nevertheless the government of the territory. The Secretary of State is not acting, when Her Majesty gives instructions under section 5(1), on behalf of Her Majesty as Head of State of the United Kingdom. What he is doing is providing the vehicle by which, according to the constitution of SGSSI, instructions are given and other acts done by Her Majesty as its Head of State.

77. Mr Vaughan accepted that section 5(1) was open to this interpretation. But he submitted that the question was not simply how the 1985 Order ought to be construed. It was, he said, necessary to look at the particular facts and circumstances and at the context in which the instruction was given to the Commissioner. In this case the instruction was out of the ordinary. It was clear from the correspondence that the factors on which it was based owed nothing to the local circumstances in South Georgia or elsewhere in SGSSI. It had nothing to do with the population there, such as it was, or to local politics as they did not exist.

The reasons of policy that lay behind it were founded exclusively on what was in the best interests of the United Kingdom's foreign policy, not that of SGSSI.

78. If this approach was sound, it would mean that an examination would need to be undertaken in each case to determine in right of which of the various sovereign positions which she occupies the instruction was given by Her Majesty. An instruction of the kind that was given in this case could have its origin in a variety of policy reasons or motives. Some of these might be said to be domestic to SGSSI and the maritime zone for which it is responsible. Some might be said to be concerned with its external relations or with the external relations of other governments with legitimate interests in its territory. Some might be said to be concerned exclusively with aspects of the United Kingdom's foreign policy. An examination of the question where the balance lay, whether the interests were as clear cut as they were said to be and as to which of these interests, if any, was predominant would be something for which a court is not at all well suited. I would not go so far as to say that the question was not justiciable. But if it was open to a court to consider the question this could give rise to difficulty in predicting the consequences of the instruction and to a situation of great uncertainty. I do not believe that the constitution was intended to work in that way.

79. But there is an underlying and, as I see it, an irremediable flaw in the argument. The reasons of policy that led to the giving of the instruction, or the motives that lay behind it, are irrelevant. The question is simply in what capacity was the instruction given by Her Majesty. The constitutional machinery provides the answer to it. It was that machinery that was being used to give the instruction. So it was in right of her position as Head of State of SGSSI that it was given by Her Majesty.

80. I would therefore allow the Secretary of State's appeal and set aside the Court of Appeal's declaration.

The second issue

81. The second issue in the appeal is whether the Court of Appeal was correct to conclude that the instruction was incapable of giving rise to a claim of damages under section 7 of the Human Rights Act 1998. It assumes, as Mr Vaughan put it when he was presenting his oral

argument, that this is a domestic case which raises the question whether the United Kingdom is answerable under the European Convention on Human Rights before the European Court in Strasbourg for acts done in the United Kingdom which have effects in a territory for whose external relations the United Kingdom is responsible. He conceded that if the first issue was decided against it Quark could not on any view succeed in its claim for a remedy under the Human Rights Act, although he said that this would not prevent it from seeking a remedy in Strasbourg.

82. Notwithstanding Mr Vaughan's concession it is, I think, necessary to explain more fully why a decision against Quark on the first issue deprives it of the possibility of a remedy under the Human Rights Act 1998. The point was fully argued on both sides, and it is a point of some general interest and importance.

83. The Court of Appeal approached this issue on three assumptions: first, that the instruction was given in right of the United Kingdom, secondly, that it is arguable that there has been a breach of article 1 of the First Protocol and, thirdly, that the instruction has affected property rights in a British Overseas Territory to which the First Protocol has not been extended under article 4 of the Protocol: [2005] QB 93, per Pill LJ at p 113, para 52. The first of these assumptions is no longer tenable in view of the answer that is to be given by the majority of your Lordships on the first issue. But the second and third assumptions remain. Their importance is demonstrated by the Court of Appeal's finding that the fact that the First Protocol has not been extended to SGSSI was fatal to Quark's claim: per Pill LJ at p 114, para 56.

84. Mr Vaughan said that it was sufficient for Quark to succeed in Strasbourg that there was a decision taken or act done in the United Kingdom whose external effects were in violation of its right under article 1 of the First Protocol, and that this in its turn was sufficient for it to succeed in its claim under the Human Rights Act 1998 for a domestic remedy. He submitted that it was not essential to his case that he should be able to show that the Secretary of State was acting in right of the United Kingdom when he was giving the instruction on behalf of Her Majesty. While his primary case was that the Secretary of State was acting throughout in his capacity as a member of the United Kingdom government, the matter did not end there. He said that Quark could still maintain that the Secretary of State was acting to protect the interests of the United Kingdom rather than those of SGSSI and that, as a Secretary of State as part of the government of the United Kingdom is a public

authority, he has acted here in a way that is made unlawful by section 6(1) of the 1998 Act.

85. Section 6(3) of the 1998 Act does not attempt to provide an exhaustive definition of what is meant by the expression "public authority". It proceeds on the basis that there are certain bodies that so obviously have the character of a public authority that it is not necessary to mention them. These are bodies which, because of the governmental functions that they perform, are public authorities through and through and are, as it is sometimes put, "core" public authorities: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 6-7, 34-35. It is plain that a Secretary of State, when performing the functions of his office, is a core public authority. Mr Vaughan's alternative approach to Quark's claim is based on the assertion that the Secretary of State was acting in the United Kingdom's interests when he was giving the instruction. I am far from being persuaded that this is a correct way of describing what he was doing under section 5(1) of the 1985 Order. But it is difficult to separate out completely the functions that he performs for Her Majesty under the constitution of SGSSI, whose government is a subordinate one, from those that he performs as Secretary of State for Foreign and Commonwealth Affairs in the government of the United Kingdom to which it is subordinate. I am content to examine this issue on the assumption that we are dealing here with an act which was done by him, in part at least, in the United Kingdom in his capacity as a public authority.

86. The critical question then is whether Quark can show that the act of which it complains was incompatible with any of its Convention rights. The only Convention right that is in issue is the right to the protection of property under article 1 of the First Protocol. So the question comes to be whether Quark can show that the right under article 1 of the First Protocol is one of the Convention rights within the meaning of section 6 of the 1998 Act. This depends upon the proper interpretation of the 1998 Act, as Lord Nicholls of Birkenhead said in *In re McKerr* [2004] 1 WLR 807, para 25.

87. Section 1(1) of the 1998 Act provides that the expression "the Convention rights" means the rights and fundamental freedoms set out in, among other articles, articles 1 to 3 of the First Protocol. But section 7(1) provides that a person may claim that a person has acted in a way that is made unlawful by section 6(1) only if he is (or would be) a victim of the unlawful act, and section 7(7) provides that, for the purposes of

that section, a person is a victim of an unlawful act only if he would be a victim for the purposes of article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that right. These provisions must be read in conjunction with the definition of the words "the Convention" in section 21(1), which is in these terms:

> "'the Convention' means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4 November 1950 as it has effect for the time being in relation to the United Kingdom."

The words "as it has effect for the time being in relation to the United Kingdom" do not appear in the definition of the words "the First Protocol". But article 4 of the First Protocol provides that a declaration made in accordance with that article shall be deemed to have been made in accordance with article 56(1) of the Convention, and article 5 provides that the provisions of articles 1, 2 and 3 and 4 shall be regarded as additional articles of the Convention and that all the provisions of the Convention shall apply accordingly. The qualification that is added to the definition of "the Conve ntion" applies, by implication, equally to the definition of the First Protocol.

88. These provisions show that a person cannot claim that an act of a public authority is made unlawful by section 6 of the 1998 Act unless the Convention right is one for which the United Kingdom would be answerable in Strasbourg. Article 1 of the Convention provides that the High Contracting Parties shall secure to everyone "within their jurisdiction" the rights and freedoms defined in section 1 of the Convention. Article 56 of the Convention provides that any State may declare by notification addressed to the Council of Europe's Secretary General that it is to extend to all or any of the territories for whose international relations it is responsible. A separate notification is needed under article 4 of the First Protocol to extend the provisions of the Protocol to those territories. The Convention was extended to the Falkland Islands and its dependencies on 23 October 1953. But the First Protocol was not extended to them. So SGSSI is not one of the territories for which the United Kingdom is answerable in Strasbourg for a breach of article 1 of the First Protocol. Quark could not claim in Strasbourg that, because of the effects of the Secretary of State's act on its property rights in SGSSI, it was a victim of a breach of that article. It follows that it cannot claim in domestic law that it was the victim of an act of a public authority made unlawful by section 6(1) of the 1998 Act.

89. Mr Vaughan then said that it would be enough for him in Strasbourg to show that an act was done in the United Kingdom which had external effects in a way that violated article 1 of the First Protocol. It is indeed the case that the jurisdiction of the European Court is not limited to the national territory of the High Contracting Parties. In *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745, para 91, the Court said that their responsibility can be involved because of acts of their authorities producing effects outside their own territory. But in *Bankovic v Belgium* (2001) 11 BHRC 435, para 80, the Court made it clear that, subject to article 56, the Convention was essentially territorial in its application and that it was not designed to be applied throughout the world, even in respect of the conduct of contracting states. Its jurisprudence shows that the scope of the obligations under the Convention of a contracting state in relation to a territory for whose international relations it is responsible has always depended on notification under article 56 or, as the case may be, under article 4 of the First Protocol.

90. In *X v Belgium* (1961) 4 YB 260, the applicants complained of actions taken by the Belgian Government which affected their assets in the Belgian Congo. The Commission said at p 268 that the specific object of article 63 (now article 56) of the Convention and article 4 of the First Protocol was to lay down for everyone the territorial field of application of the two instruments, and that this part of the complaint did not come within the competence of the Commission *ratione loci*. In *Gillow v United Kingdom* (1986) 11 EHRR 335 the applicants who owned a house in Guernsey were refused permission to occupy it under a law which restricted the right of residence there so they claimed that there had been a violation of their rights under article 1 of the First Protocol. The island of Guernsey is a territory for the international relations of which the United Kingdom is responsible, but no declaration had been made under article 4 extending to it the provisions of the First Protocol. The Court said in para 62 that it had concluded that it had no jurisdiction to entertain the complaints. In *Bui van Thanh v United Kingdom* (Application No 16137/90) (unreported), 12 March 1990, in which Vietnamese "boat people" complained that their removal from Hong Kong to Vietnam would be a violation by the United Kingdom in Hong Kong of their Convention rights, the Commission declared:

> "It is an essential part of the scheme of article 63 that a declaration extending the Convention to such a territory be made before the Convention applies either to acts of the dependent government or to policies formulated by the Government of a Contracting Party in the exercise of its

> responsibilities in relation to such territory. Accordingly, in the present case even if the Commission were to accept that the acts of the Hong Kong authorities were based on United Kingdom policy, it must find that it has no competence to examine the application since no declaration under article 63(1) has been made in respect of Hong Kong."

91. A declaration in similar terms is to be found in the Court's decision in *Yonghong v Portugal*, Reports of Judgments and Decisions 1999 - IX, pp 385, 392, where the issue was whether the applicant's extradition from Macao to China was a violation by Portugal in Macao of his Convention rights. Its decision in *Soering v United Kingdom* (1989) 11 EHRR 439 is not incompatible with the territorial principle that this line of authority demonstrates, as the applicant was still in the territory of the contracting state and his complaint was of what might happen to him if he was removed by the contracting state from its own territory. On these authorities the conclusion that I would reach is that this alternative argument would not succeed in Strasbourg.

92. It is plain from the definition of "the Convention" in section 21(1) of the 1998 Act, which limits the scope of that expression to the Convention as it has effect for the time being in relation to the United Kingdom, that the scope of the liability of public authorities for acts made unlawful by section 6(1) having effects in a territory for whose international relations the United Kingdom is responsible depends on notification under article 56 of the Convention and article 4 of the First Protocol. It is not the purpose of the 1998 Act to impose liability on a public authority where the complaint would not be within the jurisdiction of the European Court in Strasbourg. Despite Mr Vaughan's persuasive submissions to the contrary, I see no escape from the conclusion that, even if he had succeeded on the first issue, it would not have been open to Quark to claim that it was the victim of an act that was made unlawful by section 6(1) of the 1998 Act.

93. For these reasons, and for those given by my noble and learned friend Lord Nicholls of Birkenhead in his discussion of this issue with which I am in full agreement, I would hold the instruction of 7 June 2001 is incapable of giving rise to a claim of damages under section 7 of the Human Rights Act 1998. I would dismiss Quark's cross-appeal.

BARONESS HALE OF RICHMOND

My Lords,

94. There is an air of complete unreality about this case. A British career diplomat, for the time being Governor of the Falklands Islands and Commissioner for South Georgia and the South Sandwich Islands, would be minded to grant a licence to a company registered in the Falkland Islands to continue to fish for Patagonian toothfish in the territorial waters of South Georgia and the South Sandwich Islands. He knows that there was local discontent when the Islands ceased to be a Falkland Islands dependency following the 1982 war to regain the Falkland Islands from Argentina. He wishes to take into account the company's loyalty to the fishery as well as local sensitivities in granting the company a licence to fish. But he is instructed by the Foreign and Commonwealth Office in London not to grant the licence. The Foreign Office is relying instead on more strategic concerns for the management of fish stocks in the region and the maintenance of good relations with the other States which have interests there. South Georgia and the South Sandwich Islands have no permanent inhabitants other than the wildlife. They would probably not need a government at all were it not for the valuable fishing rights which surround them. Their government consists of the Commissioner and the Director of Fisheries, both of whom have other jobs in the Falklands Islands, and will no doubt go on to other jobs for the Foreign and Commonwealth Office in years to come. The Secretary of State who advises Her Majesty on the exercise of her powers in relation to the Islands is the Secretary of State for Foreign and Commonwealth Affairs in the government of the United Kingdom. The legality of his actions can be challenged in the courts of the United Kingdom. To the extent that he is in any way democratically accountable for the instructions which he advises Her Majesty to give to the Commissioner, it is to the Parliament of the United Kingdom.

95. In those circumstances, to maintain the strict separation between Her Majesty as Queen of the United Kingdom of Great Britain and Northern Ireland and Her Majesty as Queen of South Georgia and the South Sandwich Islands does indeed, as the Court of Appeal said, look like the "abject surrender of substance to form". I recognise that imperial law has had to draw that distinction, at least since the colonies began to attain full independence in the latter half of the 19th century. But, despite what was said by Kerr LJ in *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Indian Association of Alberta* [1982] QB 892, 927, the distinction may have less validity in the case

of territories which are in reality governed by and from the United Kingdom. The few modern authorities relied upon by the Secretary of State could be distinguished. The passport granted by the Governor of Mauritius in *R v Secretary of State for the Home Department, Ex p Bhurosah* [1968] 1 QB 266 clearly did not fall within the definition of a United Kingdom passport in section 1(3) of the Commonwealth Immigrants Act 1962. The act complained of in *Tito v Waddell (No 2)* [1977] Ch 106 was the act of the local official, whereas the act complained of here is the act of the Secretary of State. While I see the force of the imperial constitutional argument, therefore, I would prefer to decide this case on the basis of whether the Human Rights Act 1998 affords a remedy on these facts.

96. The fact that our courts were able to strike down the Secretary of State's instruction as wrong in law is not enough. Our law does not recognise a right to claim damages for losses caused by unlawful administrative action (although compensation may sometimes be available to the victims of maladministration). There has to be a distinct cause of action in tort or under the Human Rights Act 1998. No-one suggests that there is an action in tort here. The question is whether a claim for damages may be made under the Human Rights Act 1998. Under section 6(1) of that Act it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Under section 8(1) of the Act the court may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate in relation to any act of a public authority which the court finds unlawful. There is, for the reasons already given, a respectable argument that the Secretary of State for Foreign and Commonwealth Affairs, when advising Her Majesty on the conduct of government in South Georgia, is not a public authority within the meaning of the 1998 Act.

97. But there is an even stronger argument that the Convention rights covered by section 6(1) do not include the rights which Quark are claiming here. By section 1 of the 1998 Act, the Convention rights mean the rights and fundamental freedoms set out in the listed articles of the Convention and its First and Sixth Protocols. But by section 21(1) "the Convention" means the "Convention for the Protection of Human Rights and Fundamental Freedoms . . . as it has effect for the time being in relation to the United Kingdom". The Convention itself, in article 56 and in article 4 of the First Protocol, contemplates that Member States will have a choice about extending the effect of the Convention to territories which are not part of the territory of the Member State but for whose foreign relations the Member State is responsible. The United Kingdom extended the Convention to the Falkland Islands and its

dependencies but neglected to extend the First Protocol to them. We have no idea whether this was deliberate or an oversight. But the fact remains that the First Protocol does not have "effect in relation to the United Kingdom" in respect of the deprivation of possessions in South Georgia and the South Sandwich Islands. The choice permitted to Member States by article 4 of the First Protocol would be meaningless if it did.

98. For that reason alone, I would hold that Quark do not have a right to claim damages under the 1998 Act in this case. We are told that if they lose in the courts of the United Kingdom, they plan to apply to the European Court of Human Rights. I have a great deal of sympathy for Quark and the way in which they have been treated. But I find it difficult to understand how they can succeed there in vindicating a right which has not been extended to the territory in which the right (if right there be) has been violated. I would prefer to leave open what the position might be if the violated right were one which *had* been extended to South Georgia and the South Sandwich Islands, such as the right not to be tortured or deprived of one's liberty save in accordance with article 5. The domestic law of South Georgia and the South Sandwich Islands would supply a remedy for breaches of the Convention rights which are also breaches of the common law (and perhaps the revenue from fishing licences would be enough to pay the damages). There would also be a remedy in Strasbourg should that domestic law be insufficient to protect those Convention rights. But both of these might be hollow victories. If the real culprit were to be the government of the United Kingdom, I would prefer to keep an open mind about whether there might also be a real remedy here.

99. It follows that I would take the course proposed by my noble and learned friend, Lord Nicholls of Birkenhead, and for much the same reasons as his.