Neutral Citation Number: [2025] EWHC 370 (Admin)

Case No: AC-2024-LON-001080

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2025

**Before** :

**MR JUSTICE CHAMBERLAIN**

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**Between :**

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| **THE KING**<br>**on the application of**<br>**KP** | **Claimant** |
| **- and -** | |
| **(1) SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS**<br>**(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Defendants** |
| **- and -** | |
| **COMMISSIONER FOR THE BRITISH INDIAN OCEAN TERRITORY** | **Interested Party** |

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**Helen Law and Eleanor Mitchell** (instructed by **Duncan Lewis**) for the **Claimant**

**Edward Brown KC, Jack Anderson, Sian Reeves and John Bethell** (instructed by the **Government Legal Department**) for the **Defendants**

Hearing date: 12 February 2025

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# Approved Judgment

This judgment was handed down remotely at 10am on 21 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**Mr Justice Chamberlain:**

## Introduction

1. The claimant is a 34-year old Sri Lankan national of Tamil ethnicity. He is in custody on the island of Diego Garcia in the British Indian Ocean Territory ("BIOT"), serving a sentence of imprisonment for assault occasioning actual bodily harm. He had previously received a suspended sentence after conviction on one count of arson and four counts of sexual assault of a woman. He has complex mental health problems and has self-harmed and attempted suicide. His claim for international protection has been accepted by the BIOT authorities, with the result that he cannot be returned to Sri Lanka.

2. The Home Secretary decided on 8 November 2024, that she would grant leave outside the rules ("LOTR") to allow 61 migrants then in Diego Garcia to enter the UK. However, she refused to grant LOTR to the claimant, because of his criminal convictions. The defendants recognise that the claimant cannot remain in Diego Garcia permanently. They say that they are making good faith efforts to find a third country willing to take him and, while these efforts continue, admitting him would be contrary to UK public policy.

3. The claimant challenges the decision of 8 November 2024 and the ongoing decisions not to make arrangements for his transfer and relocation to the UK. The sole ground of challenge is that the decisions are irrational because there is a serious risk to the claimant's health and life while he remains on Diego Garcia and no realistic prospect of any other country accepting him in the foreseeable future.

4. A small amount of the material served by the defendants pursuant to their duty of candour was subject to a public interest immunity application. I upheld the application in part, but ordered that some of the material be disclosed into a confidentiality ring, which included the claimant's lawyers but not the claimant himself.

5. The claim was heard on a rolled-up basis on 12 February 2025. Most of the hearing was in public. There was a short hearing in private pursuant to CPR 39.2(3)(c) and (g) at which submissions were made by counsel for the claimant and defendants about the confidentiality ring material.

## Background

Diego Garcia

6. Diego Garcia is one of the Chagos Islands, an archipelago lying about 1,000 miles south by west of the southern tip of India. The Chagos Islands are currently part of BIOT, an overseas territory for whose external relations the UK is responsible. The Foreign Secretary is the Minister with responsibility for the external relations of the UK and its overseas territories. The legislative and executive functions of the Crown in right of the government of BIOT are conferred on the interested party ("the BIOT Commissioner").

7. Diego Garcia has no permanent population but hosts a joint US-UK defence facility, which the UK Government describes as "highly sensitive and strategically important". A political agreement has recently been reached under which the UK proposes to cede sovereignty over the Chagos Islands to Mauritius on terms which will ensure the continued presence of the defence facility.

The claimant's journey to Diego Garcia

8. In 2007, the claimant was tortured and sexually abused by Sri Lankan military personnel. He fled to Tamil Nadu in India. In 2021, he was part of a group who set off in a boat hoping to reach Canada, with the intention of claiming asylum there. The boat ran into trouble and was escorted by a Royal Navy vessel to Diego Garcia on 3 October 2021. Between then and December 2022, six other vessels containing migrants arrived. Altogether, that amounted to 349 migrants.

The status and treatment of the migrants in Diego Garcia

9. On arrival in Diego Garcia, the claimant and his group sought international protection. They were accommodated in a camp at Thunder Cove, where they were given food and medical treatment. Some educational provision was made for the children. However, their freedom to move around the island was limited. On 16 December 2024, Acting Judge Margaret Obi, sitting in the BIOT Supreme Court, held that in all cases this amounted to unlawful detention. She held that the situation of the claimant (and VT) was "even more stark" while they were accommodated in a building known as the short-term holding facility ("STHF"), other than during the period when serving a custodial sentence. The BIOT Commissioner has applied for permission to appeal to the BIOT Court of Appeal. However, he had conceded before Acting Judge Obi that KP and VT were "factually detained" during the periods when they were accommodated in the STHF: see at [80].

10. The UK has not extended the Refugee Convention or the European Convention on Human Rights ("ECHR") to BIOT, so the claims by the claimant and others for international protection did not fall to be considered under either of those instruments. Instead, the BIOT Commissioner devised a bespoke procedure for assessing whether returning the migrants to the countries of which they were nationals would infringe the customary international law ("CIL") prohibition on *refoulement*.

11. The majority of the migrants left voluntarily, many of them to Sri Lanka. Of the remainder, most received negative international protection decisions. Eight, including the claimant, received positive decisions, with the result that the defendants accept they cannot be returned to their countries of origin.

The claimant's stay in Diego Garcia

12. The claimant was initially accommodated in the main camp at Thunder Cove. He struggled with his mental health from the outset. His medical records mention suicidal ideation, anxiety and depression from September 2022. In April 2023, he self-harmed by swallowing a fishing hook and razor blade. In May 2023, he attempted to drown himself. In June 2023, he set fire to a tent while inside it. In July 2023, he removed his

clothing, cut his neck and wrists with a razor blade and began striking himself with a chair.

13. At this point the claimant was relocated from the main camp to a laundry room. This was a concrete room which on one side was open to the elements save for a wire mesh, so that the claimant could be observed. He shared this room with another migrant for three months and occupied it alone for a further five months. He self-harmed by swallowing blades in August and December 2023. In November 2023, following a monitoring visit, the United Nations High Commission for Refugees ("UNHCR") said that it was "deeply concerned" by the conditions in which he was being kept.

14. On 31 May 2024, the claimant was convicted before Diego Garcia Magistrates' Court of arson (committed in June 2023, when he set light to his own tent) and four offences of sexual assault on an adult woman (committed while in the main camp in January 2023). On 3 June 2024, he was sentenced to 20 months' imprisonment, suspended for 12 months. At this point, he was returned briefly to the main camp and then to the STHF. While in the STHF, he was under constant surveillance, but continued to self-harm, swallowing coins on 12 July 2024 and a piece of hard copper wire on 19 August 2024. The latter necessitated his medical evacuation to Bahrain for treatment.

15. On 17 October 2024, the claimant was convicted of assault occasioning actual bodily harm. The offence was committed in May 2023, when he tried to drown himself and then assaulted a security officer who came to his aid. The BIOT Magistrates' Court accepted that the offence had occurred during the course of a genuine suicide attempt, but imposed an immediate custodial sentence of 24 weeks' imprisonment. He was initially detained on his own at the Diego Garcia police station in a small cell with no natural light. He experienced auditory hallucinations and banged his head against the wall. His representatives sent pre-action correspondence threatening to challenge his continued detention there.

16. On 2 November 2024, the claimant was moved from the police cell to the STHF, part of which had by this time been designated as a prison. He remains there today. For most of that time, he has been imprisoned with VT, but VT is shortly to be transferred to Montserrat under the Colonial Prisoners Removal Act 1884 ("the 1884 Act").

The evolution of the Government's policy in relation to the migrants in Diego Garcia

17. The Camp at Thunder Cove was visited in May and June 2024 by a social worker engaged by the BIOT Commissioner and by Beth Stamp, the Foreign, Commonwealth and Development Office ("FCDO") Safeguarding Lead for the Overseas Territory and Polar Directorate. On 26 June 2024, the BIOT Commissioner wrote to the Minister for the Overseas Territories and the Foreign Secretary recommending that families with children, those migrants whose international protection claims had been successful and one particularly vulnerable individual (39 individuals in all) be admitted to the UK.

18. Immediately after the General Election, advice in similar terms was submitted to the new Foreign Secretary. On 16 July 2024, the Foreign Secretary's Private Secretary wrote to the Home Secretary's Private Secretary requesting that the 39 identified migrants should be transferred to the UK. This became known to those in the camp. It precipitated a mass self-harm incident where around 20 single males (who had not been

included in the recommendation) swallowed sharp objects and cut themselves in view of the other inhabitants of the camp.

19. After this, the BIOT Commissioner took the view that all migrants should be transferred to the UK. On 25 July 2024, he communicated this view to the Minister of State for Europe, North America and the UK Overseas Territories. The Minister replied on the next day saying that he had commissioned urgent work with the Home Office to find a solution.

20. In the light of this, a Small Ministerial Group consisting of the Foreign Secretary, the Home Secretary, the Solicitor General and the Chief Secretary to the Treasury was established. It met on 15 August 2024. The Deputy National Security Adviser attended, together with officials from the Foreign Office, Home Office, Ministry of Defence and Cabinet Office, among others.

21. There was a further meeting of the Small Ministerial Group on 17 September 2024. This time the ministerial attendees were the Foreign Secretary, the Home Secretary, the Defence Secretary and the Solicitor General. At this meeting, Ministers were concerned about the risk that, by admitting the migrants to the UK, they would be seen to have opened up a new route to the UK for migrants. Accordingly, they agreed to seek the transfer of 36 of the migrants to a UNHCR transit facility in Romania, for a maximum period of six months. The agreement was subject to approval by the UNHCR and the Government of Romania. Within this period, the individuals transferred would be admitted to the UK unless they had voluntarily accepted an offer of relocation to a safe third country in the interim. The claimant was not among those offered relocation to Romania, because the UNHCR facility did not accept those who had been convicted of criminal offences or posed a risk to others in the facility.

22. On 3 October 2024, it was announced that the UK had reached a political agreement with the Republic of Mauritius on the exercise of sovereignty over the Chagos Archipelago.

23. On 15 October 2024, a Memorandum of Understanding was signed with the Government of St Helena (another British overseas territory) which provides that any migrants arriving in BIOT after that date would be transferred to St Helena, where they would be accommodated, and any international protection claims processed, by the St Helena authorities. The memorandum was to last for 18 months, by which time it was envisaged the transfer of sovereignty over the Chagos Islands to Mauritius would be complete.

24. Dr Meirav Elimelech, Deputy Director of the Asylum and Protection Unit in the Home Office, explains in paragraph 8 of her first witness statement as follows:

> "The combined effect of the political agreement between the UK Government and the Republic of Mauritius and the MoU between the Government of the UK and the Government of St. Helena is that the potential migrant route between the BIOT and the UK is effectively closed."

25. Shortly before the conclusion of the agreement with St Helena, and in anticipation of it, further advice was given to the Home Secretary. There were further discussions, affected by intelligence that another boat containing migrants may have been about to land in Diego Garcia. The Home Secretary indicated that she was minded to grant LOTR (subject to identity and other checks) to all the remaining families, children and those of the unaccompanied males who had not been convicted of, and were not under investigation for, criminal offences – 61 people in all. The Foreign Secretary indicated his agreement on 3 November 2024. The Prime Minister agreed on 4 November 2024.

26. On 8 November 2024, the Home Secretary decided formally to grant LOTR to the 61 migrants. Of these, 55 have since been transferred to the UK. The remaining six (a family) are in Bahrain, where one of the children is receiving medical treatment. All the judicial review claims brought by those who have been, or are shortly to be, granted leave to enter the UK have now been settled.

27. That left three migrants in Diego Garcia. Of these, the claimant and VT are serving sentences of imprisonment. They are detained in part of the STHF. VT was convicted of a serious sexual offence against a child and was sentenced to 3 years' imprisonment. He is shortly to be transferred to another British overseas territory, Montserrat, where he will serve the remainder of his sentence. His judicial review claim has been stayed. The third migrant still on Diego Garcia, AC, is under criminal investigation and is accommodated in another part of the STHF, which is not designated as a prison.

28. The reasons for the Home Secretary's decision to refuse to grant LOTR to the claimant and VT are explained by Dr Elimelech, in paragraph 20 of her first witness statement, as follows:

> "a. The individuals have no right of entry into the UK. The LOTR granted to the other migrants was made on a wholly exceptional discretionary basis outside of the ordinary immigration rules. This required a careful judgement regarding their personal circumstances and the general public interest. In exercising the discretion in their favour, the Home Secretary was providing an immigration route that would not normally be available to other migrants. However, public interest considerations pointed towards excluding the migrants with a history of criminality.
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> b. Admission of the individuals was considered to present an unacceptable risk to those in the UK. The offences are very serious in their nature and recent. Admitting individuals with a propensity to criminal behaviour therefore creates an inevitable risk to those in the UK arising from further offending or reoffending. Exclusion of criminals eliminates that risk.
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> c. Although it is acknowledged that risk from criminals can be mitigated through the domestic criminal justice system, the nature of the offences is such that risk mitigation is inappropriate. The migrants are not in the same position as individuals who can lawfully enter the UK and, therefore, the balance in favour of protection of the public is therefore more compelling.

> d. The imposition of measures such as licence conditions in the domestic criminal justice system are designed for individuals in the UK and to reduce the risk presented by such individuals. It is self-evidently far more effective to deny entry. No individualised assessment of risk was therefore appropriate.
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> e. The UK Government has a strong policy position against serious violence, sexual violence and, in particular, violence against women and girls. The nature of the offences in question was therefore a significant factor in the decision.
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> f. Public confidence in immigration and asylum is a high priority. The UK has recently experienced public disorder in which immigration policy featured significantly. There is a high risk that public confidence regarding the November decision, and in immigration control generally, would be undermined if the individuals were granted entry.
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> g. These considerations are a well-understood feature of immigration control and right to remain in the UK generally. Individuals with recent serious criminal activity will generally be refused entry or right to remain in order to protect those in the UK. It would be contrary to long-established practice to facilitate the entry of individuals with serious recent criminality. Moreover, KP and VT are liable to be refused entry to the UK in terms of Part 9 of the Immigration Rules."

Steps taken to ensure the claimant's health and safety while in detention

29. The evidence in relation to the consideration of a prisoner transfer for the claimant and VT is given by Harriet Mathews, Director General for Africa, the Americas and the Overseas Territories at the FCDO.

30. In the light of the decision of 8 November 2024, the Foreign Secretary asked officials to work towards concluding an agreement to transfer the claimant, together with VT, to serve the remainder of their sentences at HMP Brades in Montserrat. Formal consultations with the government of Montserrat began on 18 November 2024. On 19 December 2024, the Foreign Secretary received advice recommending pursuing a Memorandum of Understanding ("MoU") for the transfer of up to three prisoners to Montserrat. VT was to be transferred first, with a final decision in respect of the claimant deferred until after his request for early release had been considered. On 9 January 2025, the Foreign Secretary accepted the recommendation.

31. On 13 January 2025, the Foreign Secretary received further advice recommending the finalisation of an MoU with Montserrat in respect of VT only, with the claimant serving the remainder of his sentence in BIOT. This was because the claimant had already served half of his sentence, so any transfer would be for 6-8 weeks only. The new prison regime in Montserrat would be disruptive and unsettling for him, particularly in view of his mental health needs. Furthermore, although his application for early release

had been refused by the BIOT Commissioner, he had challenged that decision and might still be released early, leaving even less time for him to serve.

32. In the submission, the Foreign Secretary was advised as follows:

> "14. This approach is not risk free. The Short-Term Holding Facility in which KP and VT are held was not built for the purpose of holding individuals serving long custodial sentences. Furthermore, as noted in previous advice, KP needs close monitoring and support because of his mental health profile. Nevertheless, for the following reasons, we have come to the conclusion that KP can reasonably serve out the rest of his sentence in DG if we support BIOTA to take steps to mitigate remaining risks:
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> i. a 2019 Ministry of Justice prison inspection report recommended that nobody be detained in DG beyond three months (KP will have spent three months in detention by the end of this week). However, current detention conditions are better than they were in 2019. KP and VT are not being detained in the police cells which were a key focus of the 2019 report, but in a more spacious building where they have access to TV, online newspapers, a prayer area and an outside space equipped with an exercise bike. Wi-fi connectivity enables regular contact with legal representatives;
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> ii. we understand that BIOTA is pursuing a number of additional improvements at pace, including the installation of air conditioning units, further work to remove ligature risks, and the installation of CCTV to enable less intrusive supervision of wellbeing. They are also looking into providing online rehabilitation counselling (which would close a gap highlighted in the 2019 report);
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> iii. the two detainees currently receive regular medical visits. Earlier this month BIOTA staff informed us that they considered the two prisoners to be content and in relatively good mental health (the level of medications they needed had been reducing). In KP's case, there have been no reported major incidents of self-harm since his custodial sentence began; and
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> iv. at their request, the detainees are to be offered the opportunity to work, with tasks including environmental activities such as beach clear ups. This will provide physical exercise opportunities (another issue raised in the 2019 report). Any privileges they receive in return for work (e.g. a wider range of food options, extended online access) will further support their mental health.
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> 15. Nevertheless, KP will require continued support and close monitoring; and we need to highlight here both the limited emergency treatment options available in DG and the likely challenges we would face, given KP's status as a convicted

> criminal and sex offender, in arranging receptive emergency medevac destinations in the event of a future serious incident. Absent a third country medevac option, he would in emergency circumstances requiring immediate treatment likely need to be brought to the UK. It will be necessary to reach an understanding on this matter with the Home Secretary. We will provide further advice no later than next week on this and other aspects of KP's situation, including the steps we are taking to explore post-prison destination options for him."

33. The Foreign Secretary agreed to the recommendation not to pursue a prisoner transfer for the claimant on 15 January 2025. This decision was informed by measures being undertaken in BIOT to improve detention conditions and mitigate welfare and mental health risks which had previously been identified. In particular:

    (a) In 2019, the Overseas Territory Prison Adviser had visited BIOT and recommended that "arrangements should be established to transfer prisoners elsewhere if it were ever necessary for anyone to be held for over 3 months". He also noted that the building now known as the STHF (which was then being used to detain fishermen who had been fishing illegally) required improvements, including the removal of ligature points and the installation of operational CCTV.

    (b) On 28 October 2024, when the claimant was detained in the police station, the BIOT Commissioner wrote to the Foreign Secretary requesting a prisoner transfer, on the basis that the claimant could not "safely and decently serve his sentence in the custodial facilities available in BIOT". He asked for transfer before the claimant had served three months – i.e. by 17 January 2025. This was partly on the basis that the STHF was required to be available as contingency accommodation for the main cohort of migrants at Thunder Cove.

    (c) On 2 November 2024, the BIOT Commissioner designated one part of the STHF as a prison and moved the claimant and VT to that part. It was noted that the recommendation in the 2019 report was made in respect of the cells in the police station and its author had confirmed that "the three months limit he recommended to imprisonment in the BIOT police cell in 2019 was intended to express that the facility was not suitable for long term imprisonment, rather than setting a precise time limit".

    (d) On 2 and 3 December 2024, 55 of the 58 migrants then in Diego Garcia were brought to the UK. This meant that the STHF was on longer required as contingency accommodation.

    (e) Significant improvements had been made to the STHF, its staffing and management, since October 2024. These include:

        (i) Operationally the STHF is staffed by 12 trained, equipped and experienced prison officers. Two Tamil interpreters are available. Staff can request emergency assistance from the nearby police station.

        (ii) The BIOT Administration has contracted a private provider, ResponseMed, for the provision of on-site medical services at the STHF. This includes a

doctor, a nurse and a mental health professional, all of whom have served on previous rotations on BIOT and have developed a productive working relationship with the claimant. The claimant and the other two migrants in the STHF are under 24-hour observation.

(iii) The doctor has scheduled appointments with the claimant every week. The nurse assists and monitors the administration of medication daily. The mental health professional has several scheduled appointments with the claimant per week, totalling four hours, as well as additional check-ins. Both the mental health professional and the doctor are on call 24/7.

(iv) The STHF building has two parts, one of which was re-designated a prison on 2 November 2024. The designated part of the STHF consists of a large, rectangular open living area. Each of the two prisoners (the claimant and VT) has a bed; additionally, there is a sofa, fan, television and selection of books. The ablution facilities are separate to the living area and both prisoners have unrestricted access to a small outside area. The prisoners' movement is unrestricted across the living area, ablution facilities and the outside area.

(v) As part of its work to improve the conditions in the designated part of the STHF, the BIOT Administration has provided various facilities which were not previously available: a television with a comfortable viewing area, writing material, a designated area and material for religious practise, an exercise bike (always available in the outside area), yoga classes twice a week, art material and a dedicated Wi-Fi system for the STHF which allows the claimant to make calls to his family and legal representatives.

(vi) Prisoners are able to do work related tasks, such as cleaning their living space, for which they earn additional privileges, for example additional phone time.

(vii) Other improvements are being pursued, including the installation of air conditioning units, the provision of online courses and counselling and the installation of CCTV cameras, with the aim of making surveillance less intrusive.

(viii) However, it has not been possible to remove ligature points, as recommended in the 2019 report. This would require structural alterations which are not feasible.

34. For any medical response beyond the capacity of ResponseMed, prison officers would make an emergency call for assistance from the US medical centre, which is located one block away. If medical assistance was required which could not be provided by the staff at this centre, the Foreign Office would assist the BIOT Administration in seeking assistance from a third country. The choice of country would depend on a range of factors prevailing at the time, including the nature of the requirement and the third country's capacity to treat. This approach has been activated on a number of occasions over the last three years for migrants in the claimant's group. Members of that group have been transferred to Rwanda and, on three separate occasions, to Bahrain for emergency medical treatment.

35. Ms Mathews adds this at paragraph 36 of her fourth witness statement:

> "Whilst securing a standing agreement for such potential medical evacuation is preferable as it further mitigates risk, as identified in our advice of the foreign secretary on prison transfer options of 17 January 2025, [the claimant's] criminal profile could heighten the challenges of securing third country agreement to hosting a medical evacuation. However, there is a distinction between securing prospective agreement for the medical transfer of KP and securing such agreement on an ad hoc basis in response to an actual medical emergency. Indeed, in July 2024, we secured the agreement of Bahrain to accept [the claimant] for emergency medical Treatment despite his status as a convicted sex offender. The fact that on that occasion the evacuation progressed smoothly and [the claimant] was successfully removed from Bahrain following treatment, provides reassurance that a medical evacuation could be achieved in the event of a further serious incident."

The most recent evidence about the claimant's mental health

36. The most recent evidence about the claimant's mental health comes in the form of a report from Dr Pankaj Agarwal, a consultant Forensic Psychiatrist, who initially assessed the claimant on 19 April 2024 and provided an addendum report on 7 February 2025. In the latter, Dr Agarwal says that the claimant continues to suffer from post-traumatic stress disorder ("PTSD"); that his symptoms of anxiety and depression have been exacerbated since his first report; and that he is likely also to satisfy the diagnostic criteria for depressive disorder.

37. In Dr Agarwal's view, the uncertainty about the claimant's future and lack of positive prospects for resettlement were likely to be significantly exacerbating his symptoms of depression associated with anxiety. In addition, the conditions in the STHF, which is surrounded by a wire fence and where the claimant is constantly monitored by uniformed guards, was triggering his PTSD by reminding him of the trauma he suffered in Sri Lanka. He had made several suicide attempts, one of which required medical treatment that could not be provided on the island. Therefore, there was a "risk of serious injury or even death should a situation arise that cannot be managed by the medical facilities on the island". It was a concern that the medical team treating the claimant had not linked his current symptoms of depression to his PTSD.

38. As to the risk of self-harm, Dr Agarwal noted that, since his first report, the claimant had made a significant suicide attempt in August 2024. This indicated that "the changes in his situation on the island had significantly exacerbated his risk of suicide". The claimant therefore remained "at significant risk of suicide".

39. Dr Agarwal acknowledged that some positive changes to the STHF had been made, but these had made little practical difference to the claimant. The factors that trigger his PTSD remained. The ligature points in the STHF remained. There had been a recommendation for these to be removed in 2019, but this had not been done because

they were part of the fabric of the building. Although he was currently monitored, there was nothing to say that he would not find other methods of self-harm or suicide if his mental state deteriorates significantly. Once he has greater freedom, after the end of his sentence, he is "more likely than not to act on his thoughts, especially if the prospects for his future continue to be negative".

40. In addition, the imminent departure of VT to Montserrat was likely to increase the claimant's feelings of isolation and exacerbate the symptoms of his depressive disorder.

Steps taken to locate a third country post-detention

41. Ms Mathews explains that, unlike previous negotiations with third countries, which involved proposals to transfer a much larger cohort of migrants from BIOT, the present and planned negotiations relate to a single migrant, the claimant. However, as Ms Mathews concedes, the fact that the claimant has been convicted of serious criminal offences inevitably raises sensitivities for any safe third countries approached.

42. The steps taken to date have been these:

    (a) Between November and December 2024, FCDO officials gave renewed consideration to those third countries previously considered for the potential transfer of the larger cohort.

    (b) Between December 2024 and January 2025, FCDO officials held a series of discussions with the UK heads of missions or their deputies stationed in those states to consider a potential transfer of the claimant. This resulted in a list of five countries deemed "suitable and viable" for the potential transfer of the claimant.

    (c) There were meetings with officials from one of these five countries on 13 and 21 January 2025. The officials explained that it would take some time to provide a response.

    (d) In respect of the other four countries, the FCDO is pursuing exploratory meetings.

    (e) Separately the Foreign Office has been liaising with the Home Office regarding potentially engaging a sixth country.

43. If no agreement with a third country has been secured by the time the claimant completes his sentence on 2 April 2025, he will continue to be housed in the STHF, though possibly not in the same part of it and in any event not under conditions of detention. Once released from detention, he will be permitted to access areas of Diego Garcia including Turtle Cove and the Plantation Area, subject to restrictions on movement imposed by the Restriction of Movement (Relevant Persons) Order 2025, which was gazetted on 24 January 2025.

44. Ms Mathews has confirmed in a fifth witness statement dated 5 February 2025 that FCDO officials have now spoken to officials from all of countries 1 to 5. Each of the countries concerned had said that they would consider further and consult internally. However, country 4 subsequently confirmed that it would not take the claimant.

**Law and policy**

The legal status of the governments of the UK and overseas territories

45. The position of some of the migrants with whom the claimant arrived in BIOT has already been judicially considered once in this jurisdiction. In March 2023, a small number of them had been evacuated to Rwanda for medical treatment. They brought private law proceedings against the BIOT Commissioner and Secretaries of State seeking injunctions to prevent their return to BIOT. The claim came before a Divisional Court. Whipple LJ and I refused the applications for injunctive relief: *BAA v Commissioner of the British Indian Ocean Territory* [2023] EWHC 767 (KB).

46. We endorsed the description of the constitutional status of British overseas territories in Hendry and Dickson, *British Overseas Territories Law* (2nd ed., 2018), at p. 23, which we summarised at [45] of our judgment as follows:

> "(a) On the international legal plane, the UK and its overseas territories exist as one undivided realm. The overseas territories, including the BIOT, are not sovereign and the UK is responsible for their external relations.
>
> (b) Within that undivided realm, as a matter of constitutional principle, the Crown acts in different capacities in relation to the different parts of the realm. This is commonly described as actions of the Crown 'in right of', or 'in right of the Government of' a particular territory. Thus, the Crown in right of the Government of BIOT is a separate legal entity from the Crown in right of the Government of the UK.
>
> (c) Obligations owed by the Crown in right of the Government of one territory are owed only by that Government and do not give rise to any obligations on the part of another of the King's Governments. That principle applies regardless of the degree of functional autonomy enjoyed by the territory concerned."

47. As we also made clear at [46]-[48], when exercising the legislative and executive power of the Crown in BIOT, the BIOT Commissioner acts as a representative of the Crown in right of the government of BIOT. The Foreign Secretary, when acting on the international plane to conclude agreements and arrangements with other states, represents the Crown in right of the government of the UK, even when the agreements and arrangements concern an overseas territory.

48. In *R (Bashir) v Secretary of State for the Home Department* [2018] UKSC 45, [2019] AC 484, the Supreme Court had to consider the position of migrants who had arrived in another overseas territory, the Sovereign Base Areas ("SBAs") in Cyprus. The question before the Court was whether the migrants were entitled to be resettled in the United Kingdom. The Supreme Court held that the Refugee Convention applied in the SBAs. Nonetheless, the Court held at [89] that:

> "A state's duties under the Convention to a refugee reaching a particular territory for whose international relations the state is

> responsible are in principle and in normal circumstances limited to providing and securing the refugee's Convention rights in the context of that territory."

49. There was no dispute as to the consequence of this legal principle in the present case. Even if the Refugee Convention applied in BIOT, the claimant would have no right (whether in international or domestic law) to enter the UK. The position is *a fortiori* in the context of BIOT, to which the Refugee Convention has never applied.

The Colonial Prisoners Removal Act 1884

50. The 1884 Act confers power on the Secretary of State, acting with the concurrence of the Government of each overseas territory concerned, and where a triggering condition is met, to order a prisoner undergoing a sentence of imprisonment in one territory to be removed to any other territory, or to the UK, to serve the remainder of his sentence there. One of the triggering conditions is "that it is likely that the life of the prisoner will be endangered or his health permanently injured by further imprisonment" in the first territory.

The Immigration Rules and leave outside the Rules

51. Section 3(2) of the Immigration Act 1971 ("the 1971 Act") requires the Secretary of State from time to time to lay before Parliament "statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances".

52. The Immigration Rules, made under this power, are a statement of the Secretary of State's administrative policy: *Mahad v Entry Clearance Officer* [2009] UKHL 16, [2010] 1 WLR 48, [10]. Part 9 deals with the grounds for refusal of entry clearance, permission to enter and permission to stay in the UK. That provides materially as follows:

> "**Criminality grounds**
>
> 9.4.1. An application for entry clearance, permission to enter or permission to stay must be refused where the applicant:
>
> (a) has been convicted of a criminal offence in the UK or overseas for which they have received a custodial sentence of 12 months or more; or
>
> (b) is a persistent offender who shows a particular disregard for the law; or
>
> (c) has committed a criminal offence, or offences, which caused serious harm.
>
> […]

> 9.4.3. An application for entry clearance, permission to enter or permission to stay may be refused (where paragraph 9.4.2. and 9.4.4. do not apply) where the applicant:
>
> (a) has been convicted of a criminal offence in the UK or overseas for which they have received a custodial sentence of less than 12 months; or
>
> (b) has been convicted of a criminal offence in the UK or overseas for which they have received a non-custodial sentence, or received an out-of-court disposal that is recorded on their criminal record."

53. The Home Office policy document *Grounds for Refusal: Criminality* (version 3.0, updated on 18 January 2024) provides as follows:

> "**Sentences of less than 12 months**
>
> Where a person has been convicted of an offence and sentenced to a period of imprisonment of less than 12 months, you must refuse the application unless 5 years have passed since the end of their sentence. If they are applying for settlement you must refuse a person with a sentence in this category unless 7 years have passed since the end of the sentence.
>
> However, for entry clearance and leave to enter applications, you must always consider whether there are any very compelling factors that amount to an exceptional reason why the application should be granted, even though fewer than the required number of years have passed since the end of their sentence."

54. The Secretary of State has a wide residual power under the 1971 Act to grant leave to enter or remain in the UK even where such leave would not be given under the Rules: see e.g. *Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799, [18]. Leave given in such circumstances is LOTR. The grant of LOTR is also the subject of a policy document, *Leave Outside the Immigration Rules* (version 3.0, updated on 30 August 2023), which provides materially as follows:

> "**Important principles**
>
> A grant of LOTR should be rare. Discretion should be used sparingly where there are factors that warrant a grant of leave despite the requirements of the Immigration Rules or specific policies having not been met.
>
> …
>
> **Reasons to grant LOTR**
>
> Compelling compassionate factors are, broadly speaking, exceptional circumstances which mean that a refusal of entry clearance or leave to remain would result in unjustifiably harsh

> consequences for the applicant or their family, but which do not render refusal a breach of ECHR Article 8, refugee convention or obligations. An example might be where an applicant or relevant family member has experienced personal tragedy and there is a specific event to take place or action to be taken in the UK as a result, but which does not in itself render refusal an ECHR breach.
>
> Where the Immigration Rules are not met, and where there are no exceptional circumstances that warrant a grant of leave under Article 8, Article 3 medical or discretionary leave policies, there may be other factors that when taken into account along with the compelling compassionate grounds raised in an individual case, warrant a grant of LOTR. Factors, in the UK or overseas, can be raised in a LOTR application. The decision maker must consider whether the application raises compelling compassionate factors which mean that the Home Office should grant LOTR. Such factors may include:
>
> - emergency or unexpected events
> - a crisis, disaster or accident that could not have been anticipated
>
> LOTR will not be granted where it is considered reasonable to expect the applicant to leave the UK despite such factors. Factors, in the UK or overseas, can be raised in a LOTR application. These factors can arise in any application type."

Rationality: two aspects

55. In most contexts, rationality is the standard by which the common law measures the conduct of a public decision-maker where there has been no infringement of a legal right, no misdirection of law and no procedural unfairness. It encompasses both the process of reasoning by which a decision is reached (sometimes referred to as "process rationality") and the outcome ("outcome rationality"): see e.g. *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649, [98] (Leggatt LJ and Carr J).

56. Process rationality includes the requirement that the decision maker must have regard to all mandatorily relevant considerations and no irrelevant ones, but is not limited to that. In addition, the process of reasoning should contain no logical error or critical gap. This is the type of irrationality Sedley J was describing when he spoke of a decision that "does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic": *R v Parliamentary Commissioner for Administration ex p. Balchin* [1998] 1 PLR 1, [13]. In similar vein, Saini J said that the court should ask, "does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?": *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin), at [33].

57. Outcome rationality, on the other hand, is concerned with whether – even where the process of reasoning leading to the challenged decision is not materially flawed – the outcome is "so unreasonable that no reasonable authority could ever have come to it" (*Associated Wednesbury Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 233-4) or, in simpler and less question-begging terms, outside the "range of reasonable decisions open to a decision-maker" (*Boddington v British Transport Police* [1999] 2 AC 143, 175).

Rationality: standard of review

58. In *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, the House of Lords had to consider the proper standard of review in a case where the claimant said that his life would be in danger in the country to which he was to be removed. At 531, Lord Bridge said this:

> "I approach the question raised by the challenge to the Secretary of State's decision on the basis of the law stated earlier in this opinion, viz. that the resolution of any issue of fact and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State subject only to the court's power of review. The limitations on the scope of that power are well known and need not be restated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

59. This was applied in *R v Secretary of State for Defence ex p. Smith* [1996] QB 517, where at 554 Sir Thomas Bingham MR (with whom Henry and Thorpe LJJ agreed) approved the following as an accurate statement of the law:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

60. In *R (YH (Iraq)) v Secretary of State for the Home Department* [2010] EWCA Civ 116, [2010] 4 All ER 448, Carnwath LJ (with whom Moore-Bick and Etherton LJJ agreed) said at [23] that the term "anxious scrutiny" had gained a "formulaic significance". At [24], he continued as follows:

> "…the expression in itself is uninformative. Read literally, the words are descriptive not of a legal principle but of a state of mind: indeed, one which might be thought an 'axiomatic' part of any judicial process, whether or not involving asylum or human rights. However, it has by usage acquired special significance as underlining the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account."

61. Since then, it has been said often that rationality is a flexible standard. In *R v Department for Education and Employment ex p. Begbie* [2000] 1 WLR 1115, 1130, Laws LJ (with whose reasons Sedley LJ agreed) said that the *Wednesbury* principle was itself "a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake". In *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455, Lord Mance (with whom Lord Neuberger and Lord Clarke agreed) suggested at [55]-[56] that in some cases there may be no difference between rationality review and "European" (i.e. proportionality-based) review. And in *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591, Lord Sumption (with whom Lord Neuberger, Lady Hale and Lord Wilson agreed) said this at [107]:

> "The differences between proportionality at common law and the principle applied under the Convention were considered by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paras 27-28. In a passage with which the rest of the House of Lords associated itself, he identified three main differences: (i) a proportionality test may require the court to form its own view of the balance which the decision-maker has struck, not just decide whether it is within the range of rational balances that might be struck; (ii) the proportionality test may require attention to be directed to the relative weight accorded to competing interests and considerations; and (iii) even heightened scrutiny at common law is not necessarily enough to protect human rights. The first two distinctions are really making the same point in different ways: balance is a matter for the decision-maker, short of the extreme cases posited in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. But it may be questioned whether it is as simple as this. It is for the court to assess how broad the range of rational decisions is in the circumstances of any given case. That must necessarily depend on the significance of the right interfered with, the degree of interference involved, and notably the extent to which, even on a statutory appeal, the court is competent to reassess the balance which the decision-maker was called on to make given the subject matter. The differences pointed out by Lord Steyn may in practice be more or less significant depending on the answers to these questions. In some cases, the range of rational decisions is so narrow as to determine the outcome."

62. In *R (King) v Secretary of State for Justice* [2015] UKSC 54, [2016] AC 384, Lord Reed explained at [126], by reference to *Pham,* that "the test of unreasonableness has to be applied with sensitivity to the context, including the nature of any interests engaged and the gravity of any adverse effects on those interests".

63. In *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWCA Civ 1010, [2021] 1 WLR 472, the Court of Appeal (Sir Terence Etherton MR, Green and Dingemans LJJ) undertook a review of the case law concerning "anxious scrutiny" in the context of rationality review, concluding at [154] that the intensity of review depends on both the legal context (the nature of the right asserted) and the factual context (the subject matter impugned). However, the court was careful to add that a recognition that a case concerns an important right "does not answer the question about the extent to which a court, in the absence of any applicable statutory duties or statutory limitations on the decisionmaker, will recognise that the evaluative judgement involved is a matter for the decision-maker". This might be particularly so in areas touching on national security, foreign relations and the allocation of resources: see at [155].

## Submissions

The claimant

64. Helen Law for the claimant submits that the decisions under challenge give rise to grave risks to the claimant's health and life. Anxious scrutiny is therefore required. As the Supreme Court made clear in *Pham*, in some cases, there will be only one rational option. This is one such case, given that:

    (a) the defendants accept that they are responsible for identifying a durable solution for the claimant, and that the UK is the ultimate "backstop";

    (b) the effect of their refusal to engage this backstop is that the claimant will remain on Diego Garcia for months or years, while the defendants seek to identify a safe third country willing to resettle him;

    (c) the evidence strongly suggests that the search will not succeed;

    (d) the delay will come at great expense to the claimant, exposing him to continued serious harm and placing his life at risk;

    (e) the claimant is acutely vulnerable, and his time on Diego Garcia has already caused serious deterioration in his mental health and precipitated multiple suicide attempts;

    (f) the claimant remains imprisoned in the STHF, which remains unsuitable and even after completing his sentence will remain in an unsuitable environment;

    (g) expert evidence, informed by contemporaneous medical records, strongly suggests that an indefinite further period in these conditions is likely to cause further harm to the claimant's mental health, and that he will remain at risk of self-harm or suicide;

(h) in the event of a medical emergency, the evidence of the defendants shows that the lack of an agreed evacuation destination places the claimant's life at further risk.

65. In addition, the assessment relied upon by the defendants of the risks and harms faced by the claimant is predicated on a demonstrably inaccurate assessment of the claimant's previous safety and wellbeing in the STHF, and of the recent state of his mental health, and is thus fundamentally flawed.

66. The general policy of excluding those with criminal convictions may be appropriate for the general run of cases. It might supply a good reason for excluding the claimant if he were in good health, if there were a community on Diego Garcia or if some viable third country option were close to fruition. But given the facts as they are, it does not.

The defendants

67. Edward Brown KC for the defendants submits that the decision of the Court of Appeal in *Browne v Secretary Parole Board for England and Wales* [2018] EWCA Civ 2024 shows that the test for judicial review does not go beyond rationality, even in cases concerning fundamental rights. Furthermore, this is not a case that requires anxious scrutiny. The logic of the claimant's submission would be that "in any case where a foreign national, with no right to enter the UK, requests that they be admitted on grounds that they will otherwise be at risk of serious harm, such a standard should be applied".

68. In any event, the test must be sensitive to the fact that the claimant has no connection to the UK and no ECHR rights. The decision also involves "questions of intense socio-political controversy", since "reasonable people may disagree about the extent to which the UK owes moral obligations to non-nationals (let alone non-nationals outside its borders with criminal convictions), where it has not positively entered into particular legal obligations". It is also relevant that the decision was taken at a high level of government.

69. It is important to take a structured approach. The starting point is that the claimant has no free-standing right to enter the UK. The protection decision made by the BIOT Commissioner does not change that: its effect is just that, at the present time, he cannot lawfully be returned to Sri Lanka. Attempts to find a third country are at an early stage. It cannot be assumed that they will be unsuccessful. Against that background, the UK Government is entitled to adopt a clear policy position, visible internationally, that it will not tolerate violence against women and girls.

70. The Home Secretary is not required by law to prefer to mitigate the risk to the claimant at the expense of increasing the risk to women and girls in the UK. The Home Secretary is also better placed than the court to judge whether and to what extent admitting a foreign offender with the claimant's history risks undermining public confidence in immigration control. The decision to refuse LOTR, and the subsequent decisions not to make arrangements for the claimant's admission and transfer to the UK, were therefore not even arguably irrational. The same is true of the decision not to transfer the claimant to the UK to serve his sentence here under the 1884 Act.

## Discussion

The context of the challenged decisions

71. That the claimant does not have, and has never had, any legal right to enter the UK is, I accept, relevant in evaluating the lawfulness of the challenged decisions. It is also relevant that the claimant is not, in fact, in the UK and has no ECHR or equivalent rights exigible against the UK Government. In these respects, the claimant is, as the defendants submit at paragraph 72 of their skeleton argument, in the same position as "countless individuals with physical or mental health difficulties that may be capable of treatment in the UK".

72. Most such individuals have no plausible claim to engage the UK Government's responsibility. If they were to apply for LOTR, the Home Secretary would be likely to refuse their claim for that reason alone. If she did so, any court considering the legality of the refusal would be unlikely to be required to focus on the applicant's individual circumstances. It would be sufficient to ask whether the conclusion that the UK's responsibility was not engaged was rational. It may well be that a court would not lightly interfere with such a conclusion.

73. The claimant's case, however, has three very unusual features. First, he is in an overseas territory for whose external relations the UK Government is responsible as the paramount government. This on its own would not bring him within the ambit of the UK's responsibility, as the Supreme Court's decision in *Bashir* shows. Second, however, unlike the SBAs in Cyprus, BIOT is a territory with no permanent population and the defendants accept it is impracticable for any migrant (let alone one with the claimant's mental health difficulties) to remain there in the long term. Third, the BIOT authorities have decided that it would violate CIL to return him to the country of which he is a national.

74. On the basis of these features, the defendants accept that there are only two options open to them: find a third country willing to take the claimant, or admit him to the UK. Both involve positive action by the UK Government. Thus, the defendants accept that they must find a long-term solution for the claimant. On their own case, the unusual constellation of factors I have described mean that he falls within the ambit of the UK Government's responsibility. This acceptance provides the framework against which the challenged decisions fell to be made and fall to be understood. The court's assessment of their rationality must be undertaken within the same framework.

The standard of review for rationality: general

75. Three relevant propositions can be drawn from the authorities about how to assess the rationality of decisions of this kind in respect of a person with a plausible claim to engage the UK Government's responsibility.

76. First, the court's approach to assessing the rationality of a decision varies depending on the importance of the interests affected by it or, to put the point another way, the gravity of its potential consequences. In this connection, it is not necessary to identify a "right" impacted by the challenged decision. It is true that, in *Bugdaycay* itself, Lord Bridge made reference at 531 to the "right to life", but what made a "more rigorous

examination" appropriate was not the existence of such a right but rather "the gravity of the consequences" flowing from the challenged decision – i.e. the fact that the decision was said to have put the claimant's life at risk. This is consistent with the formulations used by Laws LJ in *Begbie* ("the nature and gravity of what is at stake") and by Lord Reed in *King* ("the nature of any interests engaged and the gravity of any adverse effects on those interests"). The interests in question *may* be such as to ground a right properly so-called (as in *ex p. Smith* and *Pham*), but not necessarily. In many of the situations in which the heightened standard of review applies, the claimant will have no prior right, whether under statute or at common law, to the benefit which the decision denies him.

77. Second, where it applies, the heightened standard of review has implications for the way the court evaluates complaints of both process and outcome irrationality. In the former case, the court will subject the decision to "more rigorous examination, to ensure that it is in no way flawed" (*Bugdaycay,* 531). In this connection, the court will expect the decision-maker "to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account" (*YH (Iraq)*, [24]). Where the complaint is of outcome irrationality, more will be required by way of justification (*ex p. Smith,* 554); and the importance of the interests affected may, in principle, narrow the range of decisions open to the decision-maker, potentially to just one (*Pham*, [107]).

78. Third, however, the importance of the claimant's interests is not the only factor relevant to the court's approach to a complaint of outcome irrationality. The nature and importance of the public interests on the other side of the balance may also be important. In some fields, institutional considerations may require the court to recognise that it is less well-placed than a democratically accountable decision-maker to evaluate the impact that a particular decision may have on a particular public interest, or the weight to be accorded to that impact. Equally, constitutional considerations may dictate that the court should pay particular respect to the views of a democratically accountable decision-maker about how to balance the public and private interests. In such cases, even where a decision will have grave consequences for the individual, the court may have to afford the decision-maker a wide margin when considering whether the outcome is irrational: *Hoareau*, [155].

The standard of review for rationality: application to the present case

79. The challenged decision affects the claimant's vital interests (health and life) and has potentially grave consequences for him (serious injury or death). In principle, this claim therefore falls within the category to which the heightened standard of rationality review applies. This is so notwithstanding that the claimant has no prior legal right to enter the UK and the defendants have no legal duty to admit him, unless rationality compels it.

80. One part of the claimant's case is that the challenged decisions are vitiated by a demonstrably inaccurate assessment of the claimant's previous safety and wellbeing in the STHF, and of the recent state of his mental health. This is a process irrationality complaint. The effect of applying the heightened standard of review is that the court must subject the challenged decisions to more rigorous examination, to ensure that they

are in no way flawed. In doing so, it will expect to check that the decision-maker has taken into account every factor that might tell in favour of the claimant.

81. The larger part of the claimant's argument, however, is directed at the outcome of the challenged decisions. Here, the claimant's argument has two main strands.

82. First, the claimant invites the court to conclude, on the basis of a detailed examination of the disclosed materials, that – contrary to the judgement of the defendants – there is no realistic prospect that a third country will take the claimant within any reasonable timescale. The conclusion that the case attracts a heightened standard of review does not displace the well-established institutional reasons for the court to afford the defendant a wide margin when making a judgment of this kind. The judgment involves a prediction about what foreign states might do in the context of a diplomatic negotiation. When evaluating such judgments, the courts will accord great respect to the view of the FCDO, because of its institutional experience and expertise: see e.g. *Hoareau*, [155] and *R (Carlile) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, [32].

83. Second, the claimant complains about the balance struck between his interests and those of the general public when excluding him because of his history of criminality and because of the effect admitting him would have on public confidence in the immigration system. Courts have expertise and experience in evaluating evidence relevant to risk and in conducting balancing exercises at the micro-level. But, especially where Parliament has allocated the decision to the Secretary of State, there are sound constitutional reasons why courts should afford respect to Ministers' views about the weight to be attached to the public safety risks flowing from a positive decision. The same is true, *a fortiori,* when evaluating the risk that a decision in an individual case would undermine public confidence in the immigration system as a whole.

Did the defendants mischaracterise the risks to the claimant of remaining in Diego Garcia?

84. Ms Law criticised passages in the defendant's Amended Detailed Grounds of Defence and evidence as underplaying the extent of the suicide/self-harm risk. She focussed on the final sentence of paragraph 26 of Ms Mathews' witness statement, which reports the BIOT Administration's confirmation that "there have been no reports of self-harm or suicidal ideation since my last witness statement". This was an accurate encapsulation of a report from the BIOT Commissioner, but ResponseMed noted on 28 November 2024 (the same day on which Ms Mathews had filed her last witness statement) that the claimant "claims to be hearing voices that won't stop telling him to harm himself". Ms Law also cites another report from ResponseMed on 17 December 2024, in which she says the claimant "again described himself as struggling with these voices".

85. These criticisms are, in my judgment, misplaced. In the first place, what matters is the information on the basis of which Ministers took the challenged decisions. That information was not, in my judgment, materially misleading. When the Home Secretary indicated on 1 November 2024 that she was minded to exclude the claimant and two others from the cohort to whom LOTR was being granted, she did so "on the basis that alternative provision can be made for them on BIOT or Montserrat". However, when the Foreign Secretary was advised not to pursue a transfer to HMP Brades on Montserrat, there was a clear and candid recognition that leaving him in BIOT was "not

without risks". Any reader of that submission would have been aware that there had previously been major incidents of self-harm; that the claimant therefore required continued support and close monitoring; that an emergency medical evacuation to a third country would be required in the event of a further serious incident; and that such an evacuation would be difficult given his offending profile.

86. It is true that there was a reference in the medical notes on 28 November 2024 to the claimant hearing voices telling him to harm himself, but a fair reading of the later notes bears out the assessment that the treatment offered had improved his mood and presentation. The picture given to Ministers was of an improvement in the claimant's condition since the claimant had been moved from the police cell to the STHF and in particular since the package of measures to improve conditions there had been implemented, albeit risks remained and continued monitoring was required. That was, in my judgment, an accurate representation of the evidence at the time.

87. Next, Ms Law noted that the trumpeted improvements to the STHF did not address the fundamental problem that the ligature points had still not been removed, even though the problem had been identified as long ago as 2019. No doubt it would have been better if these could had been removed, but the failure to do so is not as significant as it would have been if the claimant were not being monitored 24 hours a day. The other parts of the package do, on their face, seem to have been received positively. The unchallenged evidence is that the claimant has been receiving two (not four) hours of counselling per week, in addition to two hours of yoga classes. Nonetheless, the mental health support is not dissimilar to what would (or should) be provided to a prisoner with similar needs in the UK.

88. Finally, Ms Law referred to the risk, should a serious self-harm incident or suicide attempt occur, that the FCDO would be unable to secure the agreement of a third country to a medical evacuation quickly enough to save the claimant's life. There is some force in this point. For the same reasons that the UK is unwilling to admit persons with the claimant's convictions, third countries are also reluctant to do so, even on a temporary basis for medical treatment. That said, Ms Mathews was entitled to draw some degree of comfort from the fact that, when the claimant last needed emergency medical evacuation in August 2024, a country was found that would accept him, even though he had by that time been convicted of four sexual assaults. It is true that the position may well be more difficult now that he is in custody (assuming the evacuation is required while he remains in custody), but the position put to the Foreign Secretary was that in these circumstances it might be necessary to admit him to the UK. This is clearly something that has not been ruled out should the need arise.

89. The common theme running through Ms Law's submissions is that the relevant decision-makers understated the risk to the claimant of remaining in Diego Garcia. In my judgment, they did not. When read as a whole, and even applying the "more rigorous examination" required in a case where the risks to life are asserted, the defendants' evidence gives a fair account of what had been done to mitigate the risks and a realistic acceptance that some risks remained. The basis on which the challenged decisions were taken was, therefore, a properly informed one.

The search for a safe third country

90. Ms Law began by pointing out that the search for a safe third country for the wider cohort had begun as long ago as October 2022. It had continued until October 2024 and had been unsuccessful. The search for a safe third country for the claimant was not likely to be any more successful, given his offending profile. The defendants' own documents showed that they themselves judged that the identification of such a country would be "challenging" and "difficult". Further submissions were made in private that the documents subject to the confidentiality ring showed that the search was very likely to be in vain.

91. I can deal with this point relatively briefly and without giving any confidential reasons. The documents do indeed disclose judgments by FCDO officials that there are likely to be considerable difficulties in finding a state willing to accept the claimant. This is hardly surprising. The states in question are ones with which the claimant has even less connection than he has with the UK. It is likely to be contrary to their public policy, as it is contrary to ours, to accept an individual with his criminal convictions. The confidential material discloses which countries have been approached. I agree with the claimant that, in one case, on the basis of the material in the confidential witness statement of Simon Robinson and generally, there are strong reasons to question whether the country concerned is at all likely to be receptive.

92. These general points, however, are not the end of the story. First, and obviously, the approaches made to the five countries identified are being made through diplomatic channels. When a state such as the UK makes an approach of this kind, the authorities of the state receiving it may have reasons to oblige the UK, whether because they want something in return or because they judge it to be in their own long-term interests to do so. This is how diplomacy works. Second, a request to take the claimant may be easier for a third country to accept than a request to take a much larger cohort. It therefore does not follow that, because the UK was unable to find a destination for the wider cohort, it will be unable to do so for the claimant. Third, the latest evidence in Ms Mathews' fifth witness statement is that requests have in fact been made to five countries and of these only one has refused outright. The other four are presently considering the request.

93. These factors together mean that, at this stage, it is in my judgment rational for the defendants to conclude that there is a realistic prospect that a third country will take the claimant. Put another way, given the FCDO's institutional expertise in this area, the judgment that the current approaches stand a realistic prospect of success falls within the range of decisions rationally open to the defendants.

The overall balance of risks

94. The most recent submissions to the defendants recognised that, despite the measures put in place to mitigate the risk, the decision to leave the claimant in Diego Garcia gives rise to some risk to his health and life. This risk had to be, and was, recognised. But, even in cases where Article 2 ECHR applies and *a fortiori* in cases such as the present where it does not, there is no rule requiring a public authority to do everything in its power to eliminate or minimise a risk to life. Sometimes, the disbenefits of doing so are too great. A person who himself poses risks to others cannot expect the

Government to focus exclusively on the risks to himself, even if they are risks to his life.

95. In this case, the disbenefits include risks to the safety of the UK public and, relatedly, risks to public confidence in the immigration system. Both of these are real risks. So is the risk that admitting the claimant in these high-profile circumstances would tend to undermine the UK's international commitment to tackling violence against women and girls. The task of evaluating the weight and importance of avoiding these risks falls, in the first instance, to Ministers, not judges. Given the nature of the risks in question, the court should allow a wide margin to the democratically accountable ministers who, together with their officials, performed it. The court's supervisory function is limited to ensuring that the defendants' decisions fall within the wide range of reasonable decisions open to them. In my judgment, they do.

## Conclusion

96. For these reasons, permission to apply for judicial review is granted, but the claim is dismissed.