The consultation devotes a little over a page to the “international perspective” (pp. 37–8) and does not attempt to analyse the very different roles of prosecutors, judges, and indeed sentence review and parole courts in different jurisdictions. Nor does Lord Brown. The Extradition Act 2003, designed to facilitate extradition, has it seems encouraged a blinkered approach. Is it right to assume, as Lord Brown appears to do, that all pressure (apart from the unlawful) is legitimate? Surely not. The consultation states, apparently admiringly, that in the USA over 98% of criminal offenders plead guilty (page 5). But that (if true) is a terrifying figure: can we be confident that all those offenders really are guilty, or does the figure reflect the relative powerlessness of many suspects faced with an over mighty and ill-monitored prosecution system? I do not know, but McKinnon illustrates the extraordinary pressure the US system can impose, and its depressing reliance on lengthy and bleak prison sentences. It offers insights into how Sentencing Guidelines can be manipulated by prosecuting authorities. It shows the importance of having strong defence lawyers. It reminds us that “easier” extradition processes have resulted in English courts being rather less interested in fair trials abroad than they are in fair trials at home.

McKinnon’s application to the European Court of Human Rights was also unsuccessful (application no. 36004/08): he continues to challenge his extradition in the English courts, now on the grounds of his mental state.

NICOLA PADFIELD

JUDICIAL REVIEW OF PREROGATIVE ORDERS IN COUNCIL

PREROGATIVE Orders in Council are anachronistic because in substance they are executive legislation made without parliamentary approval or scrutiny. The existence and extent of the prerogative to legislate by Order in Council is therefore a matter of great constitutional importance. The question for the House of Lords in R. (Bancoult) v. Foreign Secretary (No. 2) [2008] UKHL 61; [2008] 3 W.L.R. 955, was whether a prerogative Order in Council exiling an entire indigenous population was valid.

In 1965 the Chagos Islands in the Indian Ocean were constituted a separate colony – the British Indian Ocean Territory (“BIOT”). To enable Diego Garcia, the principal island in the archipelago, to become an American military base an Immigration Ordinance was made in 1971 to remove all inhabitants of BIOT compulsorily. The 1971 Ordinance was quashed by the Divisional Court in 2000 because the
Commissioner of BIOT’s power to make laws for the “peace, order and good government” of the territory did not permit him to expel the entire population: R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2001] Q.B. 1067, noted [2001] C.L.J. 234. The then Foreign Secretary, Robin Cook, issued a press statement accepting the Divisional Court’s ruling, announcing that a study was being undertaken into the feasibility of resettlement and stating that a new Immigration Ordinance would be made permitting the Chagossians to return to the outer islands. The Immigration Ordinance 2000 permitted the islanders’ return, but then in 2002 the feasibility study reported that short-term resettlement was feasible on a subsistence basis, although long-term resettlement would be “precarious and costly”. In 2004 the British Indian Ocean Territory (Constitution) Order (“the Constitution Order”) was made by prerogative Order in Council, section 9 of which removed the Chagossians’ right of abode in BIOT.

The claimant contended that the right of abode was so fundamental that the Crown could not remove it by prerogative Order in Council. Only an Act of Parliament could do so. This was because the right of abode was a constitutional right as recognised in the 29th Chapter of Magna Carta, and secondly because the powers of the Crown were limited to legislation for the “peace, order and good government” of BIOT, thereby excluding a law which exiled the entire indigenous population. The Secretary of State argued that the courts had no power to review the validity of a prerogative Order in Council legislating for a colony because it was primary legislation with the same unquestionable validity as a statute.

The House of Lords held that in principle there was no reason why a prerogative Order in Council legislating for a colony could not be reviewable on ordinary judicial review grounds. Although prerogative Orders in Council were classified as primary legislation and in some respects resembled statutes, they differed in one crucial respect: the sovereignty attributed to an Act of Parliament was founded upon the unique authority Parliament derived from its representative character; such authority was wholly lacking in the case of executive legislation such as prerogative Orders in Council and there was accordingly no good reason why it should be immune from judicial review ([35], per Lord Hoffmann). Importantly, the House of Lords also clarified the scope of the courts’ powers to review the exercise of prerogative power. It will be recalled that in Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374, the scope of judicial review of the prerogative was the subject of divergent views: Lords Roskill, Scarman and Diplock held that direct exercises of prerogative power could be reviewed, whereas Lords Fraser and Brightman adopted a slightly more restrictive approach and based their decision on the fact that the
challenge was indirect since it concerned the exercise of executive discretion under power conferred by prerogative order rather than the validity of a prerogative order itself. In Bancoult, their Lordships saw no justification for distinguishing between direct and indirect challenges to the prerogative – both were permissible.

The claimant’s argument that the Crown has no prerogative power to remove an islander’s fundamental right of abode was rejected by the majority (Lords Hoffmann, Rodger and Carswell). Chapter 29 of Magna Carta provides *inter alia* that, “No freeman shall be ... exiled ... but by ... the law of the land”, but since the Constitution Order formed part of the law of BIOT it could authorise exile. In addition, the prerogative power to legislate for a ceded colony had never been limited by a requirement that the legislation should be for the “peace, order and good government” or otherwise for the benefit of the inhabitants of that territory. Her Majesty could legislate for BIOT in the interests of the United Kingdom, and the Divisional Court ([2001] Q.B. 1067) had been wrong to hold that she must legislate in the interests of BIOT alone. Furthermore, the words “peace, order and good government” were not words of limitation: they conferred plenary law-making authority and the courts had no jurisdiction to strike legislation down on the ground that it failed to promote or secure the peace, order and good government of a colony: see *Riel v. The Queen* (1885) 10 App. Cas. 675; *Union Steamship Co of Australia Pty Ltd. v. King* (1988) 166 C.L.R. 1.

In powerful and convincing dissenting judgments Lords Bingham and Mance denied that there was a prerogative power to legislate by Order in Council to exile an entire indigenous population. When the existence or effect of a prerogative power is in dispute the courts must, they said, conduct an historical inquiry to ascertain whether there is any precedent for the exercise of the claimed power. As Lord Camden famously declared in *Entick v. Carrington* (1765) 19 State Tr. 1030, 1066, “If it is law, it will be found in our books. If it is not to be found there, it is not law.” The Secretary of State could refer to no instance in which the royal prerogative had been employed to exile an indigenous population from its homeland. Accordingly the minority held that no such power existed. The majority overlooked this complete lack of precedent for the claimed prerogative power in a manner reminiscent of the Court of Appeal’s controversial decision in *R. v. Secretary of State for Home Department, ex p. Northumbria Police Authority* [1989] Q.B. 26, in which Nourse L.J. (at p. 58) held that the scarcity of reference in the books to the prerogative of keeping the peace within the realm did not disprove its existence, rather it may point to an unspoken assumption that it does exist. In a democratic society governed in accordance with the rule of law the prerogative to legislate by Order
Turning to the conventional judicial review grounds, the majority held that the Constitution Order was not irrational because the right of abode was only symbolic and of no practical value given the long-term impossibility of resettlement. The majority also held that Robin Cook’s press statement did not amount to a clear and unambiguous promise sufficient to found a legitimate expectation. The Human Rights Act 1998 could not avail the claimant because, although BIOT had been a dependency of Mauritius, the declaration extending the ECHR to Mauritius had lapsed when Mauritius gained independence from the UK. No separate declaration had been made in respect of BIOT, therefore the ECHR did not extend to BIOT.

Lord Hoffmann considered that the “main point” of the appeal concerned “the application of ordinary principles of judicial review” ([52]). However, it is questionable whether those familiar principles can be applied to prerogative legislation in the ordinary way. Usually in judicial review the court ascertains the proper purposes for which a decision maker may act and the relevant considerations he must bear in mind by construing the relevant statute. However, in the case of non-statutory powers such as prerogative powers there is no governing statute to construe. The difficulty of applying these grounds for judicial review in the non-statutory context has been recognised, but not resolved, by the Court of Appeal (see e.g. R. (Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence) [2003] Q.B. 1397, [39]; R v. Panel on Take-overs and Mergers, ex p. Guinness plc [1990] 1 Q.B. 146, 159). The decision in Bancoult is welcome in that it establishes that prerogative Orders in Council can be judicially reviewed, but it begs the question precisely how the traditional grounds for review should be applied.

RICHARD MOULES

MILITARY INTERVENTION, PUBLIC INQUIRIES AND THE RIGHT TO LIFE

FUSILIER Gentle and Trooper Clarke, both aged 19, were killed while serving in the British army in Iraq. Inquests by a coroner had clarified the immediate circumstances surrounding the deaths. The claimants, the mothers of the two young soldiers, contended that there existed an enforceable legal right to require the UK Government to hold an independent public inquiry into the circumstances leading to the invasion of Iraq in 2003. In R. (on the application of Gentle) v. The Prime Minister [2008] UKHL 20, [2008] 1 A.C. 1356 the House of