[2024] BIOT CA (Civ) 1

IN THE BRITISH INDIAN OCEAN TERRITORY COURT OF APPEAL
ON APPEAL FROM THE SUPREME COURT
MARGARET OBI, SITTING AS AN ACTING JUDGE
BIOT SC/15/2023 AND BIOT SC/16/2023

London
United Kingdom

Date: 24th May 2024

Before:

THE HON. MR JUSTICE CLIVE LANE, JA
THE HON. MRS JUSTICE EMMA NOTT, JA
THE HON. MR JUSTICE TOM LITTLE K.C., JA

BETWEEN:

THE COMMISSIONER FOR THE BRITISH INDIAN OCEAN TERRITORY

Proposed Appellant

and

THE KING (ON THE APPLICATION OF VT & ORS)

Proposed Respondents

Mr. Jack Anderson (instructed by **the Government Legal Department** for the **Appellant**
The 1st proposed respondent as a litigant in person
Mr. Chris Buttler K.C. and **Mr. Jack Boswell (**instructed by **Messrs Duncan Lewis**) for the 2nd-6th proposed respondents
Mr. Ben Jaffey K.C. and **Ms. Natasha Simonsen** (instructed by **Messrs Leigh Day**) for the 7th-12th proposed respondents

Hearing dates: 17 May 2024

APPROVED JUDGMENT

This judgment was handed down remotely at 10:30 UK time on 24 May 2024 by circulation to the parties or their representatives by e-mail.

Lane, JA, Nott, JA and Little K.C. JA:

1. This is the judgment of the Court to which we have all contributed.

Introduction

2. This is the determination of an application for special leave to appeal against a case management decision and subsequent Order of Judge Margaret Obi, Acting Judge of the British Indian Ocean Territory ('BIOT') Supreme Court, made in judicial review proceedings currently before that court of first instance under case reference SC BIOT No 15 & 16 of 2023.

3. The application for special leave is brought by the Commissioner for the BIOT (the 'Commissioner') pursuant to section 10(1)(c) of the Courts Ordinance 1983. The Commissioner is the Defendant in the substantive proceedings which are brought by 12 claimants who are part of a group of 61 Sri Lankan migrants seeking international protection and who are currently resident on Diego Garcia (the 'Respondents').

4. By way of cross-application the Respondents apply to strike out the application pursuant to Rule 60 BIOT Court of Appeal Rules 1996 on the basis that application for leave to appeal before the Supreme Court was made out of time, was procedurally deficient and that there is no identifiable ground of appeal.

5. This judgment follows an expedited 'rolled up' hearing that took place on 17 May 2024, the full Court of Appeal having directed that, if special leave is granted, the appeal should immediately follow the application. The substantive hearing is scheduled to take place during the first two weeks of July 2024. At the conclusion of the hearing on 17 May 2024 we announced our decision orally in Court. This judgment sets out, in detail, our reasons for doing so.

Substantive Claim

6. By their claims for judicial review and writs of habeas corpus issued on 18 December 2023, the Respondents allege that they are unlawfully detained on Diego Garica in the BIOT at Thunder Cove Camp. The Commissioner has conceded that permission to apply for judicial review should be granted and defends the claims on the basis that the Respondents are not detained, alternatively that their detention is necessary in light of the circumstances on Diego Garcia, including its military nature.

The Application for special leave to Appeal

7. The Commissioner seeks to appeal Judge Obi's decision that the substantive judicial review hearing will take place on Diego Garcia and will include a site visit to Thunder Cove Camp. Pursuant to that decision, Judge Obi has ordered that a three day hearing incorporating a site visit shall take place between 5 and 15 July 2024; the precise listing within that window is subject to travel arrangements.

8. The Commissioner, represented by Mr. Jack Anderson, avers that the learned Judge's decision was unlawful, falling outside the scope of reasonable case management decisions open to her, and risks setting a costly precedent.

9. The First Respondent is not currently represented. He attended the hearing remotely with a Tamil interpreter. He observed proceedings but did not wish to make representations. The Second to Sixth Respondents are represented by Mr. Chris Buttler K.C. and Mr. Jack Boswell. The Seventh to Twelfth Respondents are represented by Mr. Ben Jaffey K.C. and Ms. Natasha Simonsen. The Respondents jointly aver that Judge Obi's case management decision was well within her discretion, that the Commissioner's application before the Supreme Court was out of time and procedurally defective, that his application before this Court is out of time and abusive, and accordingly ask the Court to strike out the application, or alternatively to refuse special leave to appeal.

10. The Court has been greatly assisted by the detailed written and oral submissions of counsel. We have considered all of the documentation provided to us.

Procedural Chronology

11. On 16 February 2024 Judge Obi, Acting Judge of the Supreme Court, heard applications made by the Respondents concerning case management issues, including an application for a direction that the substantive hearing of their claims should take place in Diego Garcia. In a reserved judgment given orally on 19 February 2024, as reflected in her Order dated 23 February 2024, Judge Obi determined that "*the Court is willing in principle to direct that the hearing/part of the hearing will take place in Diego Garcia*" (Order §2(1)) subject to the Respondents confirming that notwithstanding the likely consequent delay they wished the hearing, or part of it, to take place in Diego Garcia (Order §2(3)). The Commissioner was given leave to respond to the Respondents' confirmation of position "*within 3 working days of receipt*" (Order §2(4)) after which the Court would "*make a direction as to the date and location of the hearing*" (Order §2(5)). By Order §2(6), "*Subject to the above, and pending further Order, the substantive hearing of this claim remains listed for 19 and 22 March 2024.*"

12. There is no transcript of the learned Judge's reasoned oral ruling. However the parties have produced an agreed Note in which the Judge's "*three main reasons*" for directing a hearing in Diego Garcia in principle are set out as follows:

> *(1) Justice should be done and seen to be done. Public confidence enhanced by transparency and accountability. Conducting in person hearing is an important component. Could be part of hearing.*
> *(2) Whether Cs are detainees will be assisted by site visit because of unique features of case.*
> *(3) Practical involvement of Claimants likely to be enhanced if can communicate with their legal representatives in person.* (Core Bundle p70)

13. The Judge balanced the considerations in favour of and against holding the substantive hearing in Diego Garcia:

> "*There are practical considerations, but not reasons for hearings [not] to take place on DG. I have no doubt that appropriate arrangements could be made for a suitable number of individuals to travel to Diego Garcia, and for a suitable venue. Practical considerations affecting court are delay – not costs/travel. Hearing listed before I had sight of papers, on understanding that the Court needed to sit urgently. If there is a site visit, it makes sense for that to take place before oral evidence heard. There is no possibility of the Court being able to sit in DG at any time during the w/c 18 March. In reality, sitting in DG will mean that current dates will have to be vacated. Even if prioritised for judicial availability, support. May be months rather than weeks. In principle, this Court is willing to sit in Diego Garcia. Subject to observations by counsel, dates can be communicated by the end of the week. This is on the understanding that the benefits of sitting in DG may be outweighed by the disadvantages of significant delay*." (Core Bundle p70-71)

14. On 26 February 2024, the Registrar of the Supreme Court wrote to the parties confirming that the earliest period during which the Court could sit in Diego Garcia was 5 – 14 July (the Hearing Window) (Supplementary Bundle p117).

15. The Respondents asked on Friday 1 March 2024 for the substantive hearing to take place in person in Diego Garcia during the Hearing Window notwithstanding the delay that would occur. (Core Bundle p66).

16. On 5 March 2024 the Registrar of the Supreme Court sent an email to the parties confirming the dates and location (Permission to Appeal Bundle p31). The solicitors for the Commissioner queried this confirmation, pointing out that under the Order dated 23 February 2024 the Commissioner had three working days to respond (PTA Bundle p42). The Registrar confirmed that this was the case (PTA Bundle p41) and, on 6 March 2024, the Commissioner's solicitors requested that the hearing take place in London (Supplementary Bundle p121-123).

17. On 15 March 2024 the Registrar wrote by email to the parties notifying them, "*Judge Obi has directed that the court listings of 19th & 22nd March are formally vacated…[and] that the hearings will take place in Diego Garcia within the 5th and 14th July window, with a 2-*

day hearing preceded by a court visit to the site" (Core Bundle p79). That direction was formalised by way of an Order drafted on 20 March 2024. That Order was not approved, sealed and issued until 9 April 2024 (Core Bundle p81-82), that is after the Commissioner had applied to the Supreme Court for leave to appeal the direction (3 April 2024) and after the Respondents had filed a joint response (8 April 2024).

18. The Commissioner's application for leave to appeal was made pursuant to s.10(1)(b) Courts Ordinance 1983, averring that Judge Obi's decision represented an unreasonable exercise of discretion which raised a matter of general or public importance due to cost and precedent. It was considered on the papers by Judge Obi and refused as being (a) out of time (b) procedurally deficient and (c) without merit (Order dated 11 April 2024, Core Bundle p91-96).

19. On 22 April 2024, after hearing submissions as to arrangements and representation ahead of the final hearing, Judge Obi approved the attendance at the substantive hearing on Diego Garcia of up to five lawyers (two counsel, two solicitors and one case worker) for each of the two groups of claimants (Agreed note of judgment, Core Bundle p83-87; Order dated 30 April 2024). That Order is not the subject matter of this, or indeed any, appeal.

20. On 29 April 2024 the Commissioner served and filed by Form CA1 notice of application for "*permission to appeal,*" together with Grounds of Appeal (Core Bundle p1-18). The Grounds make it plain that the application is for special leave to appeal pursuant to s.10(1)(c) of the Courts Ordinance 1983, the Supreme Court having refused leave to appeal pursuant to s.10(1)(b).

Legal Framework

The Territory

21. The BIOT is a British overseas territory without a permanent population, but with a transient population of around 4000 people consisting mainly of British and American service personnel and independent contractors. It is constitutionally separate from the United Kingdom, and has its own constitution and administration.

The Commissioner, usually a senior civil servant in the Foreign Commonwealth and Development Office, carries out the function of both government and legislature in the Territory.

22. The BIOT has a full and independent justice system, with a Magistrates Court, Supreme Court, Court of Appeal and with final appeals going to the Judicial Committee of the Privy Council.

Jurisdiction

23. By s.3(1) of the BIOT Courts Ordinance 1983, '*Subject to and so far as it is not inconsistent with any specific law for the time being in force in the Territory, and subject to subsections (3) and (4) of this section and to section 4, the law to be applied as part of the law of the Territory shall be the law of England as from time to time in force in England and the rules of equity as from time to time applied in England: Provided that the said law of England shall apply in the Territory only so far as it is applicable and suitable to local circumstances, and shall be construed with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary*.'

24. By s.6 of the Ordinance, BIOT's Supreme Court is '*a superior court of record with unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law and with all the powers, privileges and authority which is vested in or capable of being exercised by the High Court of Justice in England*.'

25. BIOT (Court of Appeal) Order 1976 confers jurisdiction on this Court. S.5 confers jurisdiction on the President to make rules for regulating the practice and procedure of the Court of Appeal with respect to appeals from the Courts of the Territory. The ambit of the President's jurisdiction is wide; as this is a recently re-constituted Court, the only rules issued under that section are the Court of Appeal Rules 1996.

26. The Court must apply principles derived from the law of England and Wales, including the Civil Procedure Rules and case law, unless in conflict with BIOT law (see s.3(1) Courts Ordinance 1983).

27. By Rule 2A BIOT Court of Appeal Rules 1996 (the '1996 Rules'), '*In any case not provided for by these Rules the practice and procedure for the time being of the Court of Appeal in England (or, as the case may require, the practice and procedure of the High Court in England in connection with appeals or intended appeals to that Court of Appeal) shall be followed as nearly as may be.*'

28. Under English law Civil Procedure Rule ('CPR') 52.5 deals with the determination of applications for permission for appeal to the Court of Appeal, specifying that the same should be dealt with on the papers unless otherwise directed. However Rule 48(1) and 48(2) of the 1996 Rules state,

> (1) *Every application to the Court, other than an application included in sub-rule (2), shall be heard by a single Judge: Provided that any such application may be adjourned by the Judge for determination by the Court.*
> *(2) This rule shall not apply –*
> *(a) to an application for leave to appeal…*'

29. The President therefore referred this application for leave to appeal to the Full Court which decided, given the terms of Rule 48(2) above, that this application should be determined by a three-Justice Court.

30. In all other respects relevant to this appeal, there is no conflict between BIOT laws and the CPR, which this Court will therefore follow pursuant to Rule 2A 1996 Rules.

Supreme Court Rules

Hearing Venue

31. The Commissioner and the Respondents have each in their respective written submissions cited rule 2(1) of the Supreme Court (Exercise of Jurisdiction in the United Kingdom) Rules 1998 as follows: '*Any direction made under section 11A(1) of the Order in Council that the Supreme Court shall sit in the United Kingdom for any purpose may be made by the Chief Justice, as he may think fit in any particular case, either in open court or in Chambers and either in the Territory or in the United Kingdom.*'

32. The reference to '*section 11(A)(1) of the Order in Council*' is to the BIOT Order 1976. However, BIOT Orders 1976 to 1994 were revoked by s.3 of the BIOT (Constitution) Order 1994, which Order replaced its predecessors. The discretion currently vested in the Chief Justice therefore derives from section 13 of the BIOT (Constitution) Order 2004 which provides:

> '*(4) The Supreme Court may, as the Chief Justice may direct, sit in the United Kingdom and there exercise all or any of its powers or jurisdiction in any civil or criminal proceedings.*
> *(5) Subject to subsection (6), the Chief Justice may make a direction under subsection (4) where it appears to him, having regard to all the circumstances of the case, that to do so would be in the interests of the proper and efficient administration of justice and would not impose any unfair burden on any party to the proceedings.*
> *(6) A direction under subsection (4) may be made at any stage of the proceedings or when it is sought to institute the proceedings and may be made on the application of any party to the proceedings or of any person who seeks to be or whom it is sought to make such a party or of the Chief Justice's own motion*'

33. Given the terms of Rule 13(5), as set out above, the exercise of any discretion to sit in the United Kingdom rather than on the Territory must have specific regard to any unfair burden that such a direction might impose on any litigant, as well as to administering justice properly and efficiently in all the circumstances of the case. The Respondents submit that the 'unfair burden' such a direction would have on them is that they would only be able to participate remotely from the other side of the world, and their ability to confer with their lawyers and give instructions on evidence, via interpretation, would also be impacted.

Applicability of CPRs

34. Pursuant to Rule 5 of The Supreme Court (Procedure and Practice) Rules 1984,

> '***General rules of procedure.***

Where no other provision is made by these rules or by any Ordinance, rule or regulation in force in the Territory, the rules of court that apply for the time being in England in the High Court and the practice followed in that court shall be observed in all civil proceedings in the court, so far as they may be applicable and with such modifications as may be necessary to adapt them to the circumstances of the Territory.'

Overriding Objective

35. CPR 1.1 provides as follows:

'(1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
(b) saving expense;
(c) dealing with the case in ways which are proportionate –
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with rules, practice directions and orders.'

Application for Leave/Special Leave to Appeal

36. Appeals from the BIOT Supreme Court to the Court of Appeal are governed by s.10 of the Courts Ordinance 1983 which provides:

'(1) In civil matters an appeal shall lie to the Court of Appeal –

> *(a) as of right, from any final judgment of the Supreme Court, where the matter in dispute on the appeal amounts to or is of the value of £5,000 or upwards, or where the appeal involves, directly or indirectly, some claim or question to or respecting property, or some civil right, amounting to or of the value of £5,000 or upwards;*
> *(b) at the discretion of the Supreme Court from any other judgment of the Court, whether final or interlocutory if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its general or public importance, or otherwise, ought to be the subject-matter of an appeal; and*
> *(c) should the Supreme Court refuse to grant leave to appeal under the preceding paragraph, in pursuance of special leave to appeal granted by the Court of Appeal.'*

37. As far this Court is aware, this is the first application for special leave to appeal from a decision of the Supreme Court made pursuant to s.10(1)(c) BIOT Courts Ordinance 1983. Therefore there is no BIOT authority or guidance concerning the basis upon which such an application should be made.

38. Pursuant to Rule 2A 1996 Rules, we have adopted and apply the test in respect of permission to appeal set out within CPR 52.6 and surrounding case law as analogous – '*as nearly as maybe*'.

39. CPR 52.6 provides that permission to appeal may only be granted where:

> *'(a) the court considers that the appeal would have a real prospect of success; or*
> *(b) there is some other compelling reason for the appeal to be heard.'*

40. Counsel for all of the parties agreed that special leave should be granted only if the Court was satisfied that the merits test ('real prospect of success') set out in CPR 52.6 had been met.

41. For the avoidance of doubt and by way of guidance, we conclude that any application for special leave to appeal to the Court of Appeal pursuant to s.10(1)(c) of the BIOT Courts Ordinance 1983 shall be granted only if the Court considers that the appeal

would have a real prospect of success or there is some other compelling reason for the appeal to be heard.

Striking Out

42. Rule 60 of the 1996 Rules governs applications to strike out a notice of appeal or an appeal:

> '*A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.*'

Time limits

Leave to Appeal

43. Rule 39 of the 1996 Rules which relates to applications for leave to appeal in civil matters provides:

> '*In civil matters –*
> *(a) where, under section 10(1)(b) of the Courts Ordinance 1983, an appeal lies to the Court with the leave of the Supreme Court, application for such leave may be made informally at the time when the decision is given against which it is desired to appeal or within 21 days thereafter;*
> *(b) where, under section 10(1)(c) of that Ordinance, an appeal lies to the Court by special leave of the Court, application for such leave shall be made within 42 days of the refusal of leave by the Supreme Court.*'

Appeal

44. Rule 54 of the 1996 Rules provides:

> '***Notice of appeal.***
> *(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the Supreme Court.*

(2) Every such notice shall be so lodged within 42 days of the date of the decision against which it is desired to appeal.

(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.

(4) When an appeal lies only with leave, it shall not be necessary to obtain such leave before lodging the notice of appeal.

(5) Where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging the notice of appeal.

(6) A notice of appeal shall be substantially in the Form CA2 in the First Schedule and shall be signed by or on behalf of the appellant.'

Calculation of Time

45. Rule 4 of the 1996 Rules which relates to 'computation of time' provides:

'*Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions –*

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or that act or thing is done;

(b) if the last day of the period is a Saturday or Sunday, or a public holiday in the place where the act is to be done (which days are in this rule referred to as excluded days) the period shall include the next following day, not being an excluded day;

(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day.'

The ambit of an Appeal and the admission of new evidence on Appeal

46. CPR 52.21 provides:

'(1) Every appeal will be limited to a review of the decision of the lower court unless –

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

(2) Unless it orders otherwise, the appeal court will not receive –

(a) oral evidence; or

(b) evidence which was not before the lower court.'

Submissions

47. Mr Anderson, on behalf of the Commissioner, submits that the Judge exercised her discretion unreasonably in

(i) Directing that a site visit should take place to inform the final hearing; and

(ii) Directing that the two day hearing should thereafter take place in Diego Garcia rather than in London.

48. The first of these submissions was put somewhat differently in the application for leave to appeal before the Supreme Court, where it was suggested that the Judge might visit the Thunder Cove Camp and other relevant locations in the absence of legal representatives. Having seemingly abandoned that submission in his Grounds before the Court of Appeal, Mr. Anderson sought to resurrect it in his skeleton argument at §35 and in oral submissions. He submits that there are precedents for judges attending a site meeting without representatives in planning appeals. We note that this was not a submission made before the Judge at first instance; it was raised for the first time in the application for leave to appeal; Judge Obi dealt with it in her reasoned refusal of leave dated 11 April 2024.

49. Mr. Anderson submits, in the alternative, that, should a site visit be considered necessary, then it could be separated from the substantive hearing and the Judge could be accompanied by one lawyer from each team. This suggestion was also not put to the Judge at first instance.

50. Mr. Anderson's principal argument is that the Supreme Court can fairly determine the disputed issues from written, photographic and video evidence together with the witness' evidence, and that further such evidence might be obtained to fill any gaps as necessary. He reiterated in his oral reply that the Commissioner's position is that a site visit is unnecessary and therefore the costs inherent in arranging such a visit mean that any decision to hold one is irrational.

51. In respect of his second submission, Mr. Anderson says that (i) little evidential value would attach to a site visit (for the reasons given above at [50]), (ii) open justice would not be promoted by a face to face hearing in the current litigation environment where remote hearings are increasingly common and a fair hearing could be achieved remotely and (iii) little would be gained by holding a hearing in the presence of the Respondents in an application for judicial review at which they will not give evidence. He submits that the costs and practical difficulties of holding a face to face hearing in the BIOT are substantial and that the Judge failed to give adequate weight to those costs and difficulties in her application of the overriding objective.

52. As to evidence, Mr. Anderson invites the Court to have regard to the witness statement of the Deputy Commissioner, Mr. Nishi Dholakia, and admit the same upon appeal on the basis that the detailed costs he sets out could not properly be assessed in advance of knowing the detail of the hearing date and number of lawyers involved.

53. On the issue of timeliness, Mr. Anderson submits that the Judge was wrong to rule that the Commissioner's application for leave to appeal under 10(1)(b) Courts Ordinance was out of time, since the decision subject of the application was not made until 15 March 2024; alternatively, he says that the Judge should have extended time in the circumstances. He submits that the Commissioner's application for special leave to appeal pursuant to 10(1)(c) of the Ordinance is, in any event, in time.

54. On behalf of the Respondents Mr. Buttler K.C. and Mr. Jaffey K.C. submissions can properly be summarised as being:

(a) The Judge's balancing exercise when determining the hearing venue was careful, principled and neither arguably wrong in law nor irrational;

(b) Her decision to hold a site visit was just and proper given the key factual dispute as to the conditions on the island which are on any view unique; as the finder of fact, seized of the evidence, it was clearly open to the Judge to find that she would be assisted by seeing those conditions for herself;

(c) Once the decision was made to hold a site visit, the cost differential between (i) a two day hearing immediately after a site visit in Diego Garcia as against (ii) a hearing in the UK was substantially reduced;

(d) The Judge cannot be criticised for failing to address arguments that were not taken before her, such as the Commissioner's submission that the Judge might conduct a site visit in the absence of the parties. Such a visit would, in any event, contravene the principle in Goold v Evans & Co [1951] 2 T L R 1189 (affirmed by Leveson LJ in the Divisional Court in M v DPP [2009] 2 Cr App R 12 §§19-20).

(e) The Respondents are witnesses in their claims, and, although the Commissioner has indicated he does not wish to cross-examine them, they have made witness statements giving accounts of, for example, collective punishment that are not accepted by the Commissioner, and which will be the subject of oral evidence from the Deputy Commissioner. The Respondents' representatives have struggled to take instructions from their clients as a result of the time difference and the conditions under which the Respondents are accommodated, with very limited access to mobile phones;

(f) The Judge had carefully considered the evidence before her, including the Commissioner's evidence surrounding cost and flight availability;

there is no good reason to depart from CPR 52.21(2) and allow the Commissioner to rely on further evidence that was previously available and that does not substantially change the position in any event (see also Ladd v Marshall [1954] 3 All ER 745)

55. In relation to the issue of timeliness, Mr. Buttler K.C. and Mr. Jaffey K.C. submit that the decisions subject to challenge were to all intents and purposes made on 19 February 2024, therefore time for an appeal under 10(1)(b) of the Courts Ordinance expired on 12 March 2024, meaning that the application lodged with the Supreme Court on 3 April 2024 was out of time. They submit that there was a particular need to act swiftly in this case given the administrative arrangements that need to be made to accommodate the July hearing. They further submit that the Commissioner's purpose in lodging an application to the Supreme Court under 10(1)(b) of the Courts Ordinance that was out of time may have been to generate additional time to make application to this Court under 10(1)(c). In that event, they say that the Commissioner would be abusing the process of the court and that the application for special leave should be struck out accordingly.

Analysis and Judgment

New Evidence

56. The Commissioner asks this Court to admit new evidence on appeal by way of a witness statement detailing the costs of arranging travel and accommodation for 14 lawyers, Judge and Registrar. This statement was not before Judge Obi.

57. Whilst we have considered this evidence *de bene esse* we decline to admit this evidence into any substantive appeal for the following reasons:

(i) The Commissioner had placed evidence before Judge Obi relating to cost which, while not as detailed, gave projected costs to substantially the same effect, including the cost of a charter flight.

(ii) Mr. Dholakia's witness statement does not deal at all with the legal costs, which will likely dwarf travel costs. By her Order dated 30 April 2024, Judge Obi approved the attendance in person of "*up to two solicitors, two counsel and a case worker for each of the two groups of Claimants*." Whether five lawyers per legal team might be thought to be excessive, that is not a matter for this Court as Judge Obi's Order of 30 April 2024 is not subject to appeal.

(iii) If the Commissioner now contends that previously unavailable evidence substantially changes the position regarding cost or viability, then the proper course is for the Commissioner to apply to the Supreme Court pursuant to s.13(6) BIOT (Constitution) Order 2004 for a direction that the hearing be moved to the UK (in other words, for the Supreme Court to vary its own direction).

(iv) There is no reason in the interests of justice to depart on appeal from CPR 52.21(2).

Respondents' Application to Strike Out as Out of Time/Procedurally Deficient

58. A critical question for us is whether the application for leave to appeal before the Supreme Court was in time. The reserved decision of Judge Obi, given orally on 19 February 2014, was not, in our opinion, a final decision or order that the substantive hearing should take place in Diego Garcia. Any other interpretation of the chronology fails to grapple with the substantive reality. The decision was an indication that in principle the Judge was prepared to direct that either the whole or part of the hearing, to include a site visit, should take place in the Territory but it was not a final decision. Any direction, and its extent, was dependent on both the Respondents confirming that they wanted the hearing to take place in Diego Garcia notwithstanding the delay and on the response of the Commissioner. This is reflected in the Order dated 23 February 2024, which maintained the substantive hearing dates in London.

59. If the decision communicated orally on 19 February 2024 was intended to be a final decision as to the venue of the hearing then that was certainly not made clear in the 23 February 2024 Order which is drafted in terms of an indication: "*the Court is willing in principle…,*" refers to "*the hearing/part of the hearing,*" and maintains the London listing "*pending further Order.*" Paragraph (1) of the Order (in effect, nothing more than an indication by the judge that she would be willing to consider sitting in the BIOT) reads more like a recital than part of the order itself. This lack of clarity in the drafting of the Order rendered uncertain the Court's position until at least the Registrar's email of 15 March 2024. Having given the Commissioner time to respond to the stated position of the Respondents, it would be wrong, in our judgement, to criticise him for so responding. The Commissioner had a reasonable expectation that his further submissions would be considered before the final decision was made; on the face of it, they were.

60. In our judgement the final decision to vacate the London listing and hold the full substantive hearing on Diego Garcia was not made until 15 March 2024, that is after the learned Judge had considered further written submissions from each party pursuant to her Order of 23 February 2024.

61. In the circumstances, the Commissioner's application for leave to appeal before the Supreme Court was not out of time, being made within 21 days of the final decision communicated on 15 March 2024.

62. Further, Judge Obi's decision was informally communicated to the parties via an email from the Registrar. No Order giving effect to Judge Obi's decision was drafted until 20 March 2024; it was not formally handed down until 9 April 2024, when the Order was signed and sealed. Even if the Judge was of the view that time started to run from her decision in principle, the subsequent informality and ambiguity militated in favour of her exercising her discretion to extend time, subject to the merits.

63. Whether or not the Commissioner's notice of application for leave to appeal before the Supreme Court was timeous (which in our view it was), his application before us

is in time, being an application under 10(1)(c) Courts Ordinance 1983 for special leave served within 42 days of the Supreme Court's refusal to grant leave on 11 April 2024 as per Rule 39(b) of the 1996 Rules. The time limits under Rule 54, relied on by the Respondents, apply to appeals as of right under s.10(1)(a) Courts Ordinance. However, even under Rule 54, the application would have been in time, having been lodged within 42 days of the disputed decision informally communicated on 15 March and formally handed down on 9 April, as calculated pursuant to Rule 4. The Commissioner has not, in our opinion, abused the Court's process as asserted by the Respondents, albeit we find that his position on the utility and form of any site visit as part of the substantive hearing has been inconsistent.

64. The Commissioner has not contended that his application before the Supreme Court was not procedurally deficient as identified by Judge Obi. The Respondents have not identified any prejudice flowing to them from any such procedural deficiency. Indeed, the Respondents have not contended that the application before us is procedurally deficient.

65. We therefore decline to strike out this application for special leave as out of time, abusive or procedurally irregular, and have considered the application for special leave on its merits.

Application for Special Leave

66. The proposed appeal lies against the exercise of discretion of the first instance Judge. Only if the judge were to reach a decision in exercise of her discretion which lay outside a range of reasonable responses on the particular facts would an appeal lie to the Court of Appeal. The most famous modern statement of this principle is found in *Tanfern v Cameron-MacDonald (Practice Note) [2000] 1 WLR. 1311*, where Brooke LJ at §32 cited an earlier dictum from a House of Lords case (*G v G [1985] 1 WLR 647*) *"If the appeal is against the exercise of a discretion by the lower court… the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."*

67. This principle was more recently applied in the UK Supreme Court in *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd (No. 2) [2014] UKSC 64* where dealing specifically with case management decisions Lord Neuberger emphasised at §15, "*the generous margin accorded to case management decisions of first instance judges,*" having underlined that it "*would be inappropriate for an appellate court to reverse or otherwise interfere with [such a decision] unless it was plainly wrong in the sense of being outside the generous ambit where reasonable decision-makers may disagree.*" (§13)

68. We should note that the applicable principles in relation to an appeal of a case management decision were not the subject of any dispute or argument before us.

69. The Commissioner, in substance, seeks to appeal Judge Obi's exercise of discretion in two respects: first in directing there should be a site visit, and second in directing the substantive hearing to take place on Diego Garcia. These need to be taken in turn.

Decision re Site Visit

70. At the outset we should emphasise that it is Judge Obi who will determine the substantive claim. She is best placed to determine the necessity and importance of seeing the military nature of the island generally and the living conditions at the Thunder Cove Camp specifically as against making decisions central to these claims of unlawful detention based only on photographic and video evidence. Her conclusion, having considered the respective arguments, that she would be greatly assisted by a site visit is, in our opinion, neither outside the margins of her discretion, nor unreasonable: her reasons are both considered and cogent. That is particularly the case when she has ordered that two of the witnesses should be cross-examined. Their evidence is linked to the necessity of the site visit and we note that the decision in relation to cross-examination is the not the subject matter of any appeal.

71. In his Grounds of Appeal filed before the Supreme Court on 3 April 2024, the Commissioner did not seek leave to appeal on the ground that the decision to hold a

site visit was wrong in principle or irrational; rather, he submitted that any necessary site visit could be facilitated such that the Judge could attend alone (§3(b), 3(c), Supplementary Bundle p86). The Judge considered this submission and found that it was unreasonable and that it would give rise to apparent bias in the context of the unique status of the Commissioner as responsible for both the Territory's legislature and its governance.

72. That this decision is both rational and compelling is reflected in the Commissioner's revised submission in his Grounds of Appeal before this Court that any necessary site visit could take place with the judge accompanied by "*one lawyer per team*" (Grounds of Appeal §30, Core Bundle p13).

73. In our judgement no arguable ground of appeal arises from the decision to hold a site visit, nor from the decision that all parties must be represented at that visit. It follows that such Grounds of Appeal as they relate to a site visit do not have a real prospect of success. Nor is there any other compelling reason why those Grounds of Appeal should be considered on appeal.

Decision re Hearing Venue

74. At the heart of the application is the issue as to whether the substantive hearing should take place on Diego Garcia. There is though, a clear link between the necessity for a site visit (for which Judge has given cogent reasons to support the exercise of a discretion manifestly available to her) and the location of the substantive hearing; in short, given that Judge Obi would travel to Diego Garcia for a site visit, it made obvious sense for the substantive hearing, or at least part of it, to take place there immediately thereafter. The Commissioner has made no application pursuant to section 13 of the BIOT (Constitution) Order 2004 for a direction that the Supreme Court should sit in the United Kingdom; rather the Judge was invited by the Respondents to confirm what the 2004 Constitution Order provides should be the default position, namely that the Court will sit in the Territory. In that context, the Commissioner sought to persuade her to exercise her discretion to sit in the UK on grounds of cost.

75. Once she had determined that a site visit was necessary, there were two options reasonably open to the Judge:

    (i) To direct the substantive hearing to be held in part in London and in part in Diego Garcia comprising a site visit;

    (ii) To direct the substantive hearing to be held wholly in Diego Garcia.

76. If the Commissioner's submissions are correct, only the first option would be reasonably within the Judge's discretion, having regard to the overriding objective of dealing with cases justly and at proportionate cost, and the need to ensure that no unfair burden would be placed on the Respondents through a remote final hearing.

77. The first option would involve arranging flights and accommodation for the Judge, Registrar and at least three lawyers, as opposed to flights and accommodation for the Judge, Registrar and up to 14 lawyers under the second option.

78. In her Order setting out her reasons for refusing leave to appeal, Judge Obi stated at §18, "*Cost is not a trump card; it is one factor amongst others. The overriding objective is a fair hearing*." She did not specifically refer to the proportionality of the costs as per CPR 1.1(2). Nonetheless, it is clear from reading the note of her decision of 19 February 2024 and the Order dated 11 April 2024 that Judge Obi had proportionality, the costs involved, the importance of the case, the complexity of the issues, the financial position of each party and the equal participation of each party firmly in mind throughout. She found unequivocally that the Court would be assisted by a site visit, that transparency was key, and that the involvement of the claimants would be enhanced with the ability to communicate directly with their legal representatives.

79. When considering any reasoned determination from a court of first instance, an appellate court should be mindful of Lord Hoffmann's classic observations in *Piglowska v Piglowski [1999] 1 WLR 1360*: (p1372): "*The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed.*

This is particularly true of an unreserved judgment such as the Judge gave in this case. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the Judge knew how he should perform his functions and which matters he should take into account… An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the Judge by a narrow textual analysis which enables them to claim that he misdirected himself."

80. Judge Obi, dealing with what she considered to be a straightforward case-management decision confirming the default position relating to the venue for the substantive hearing, gave succinct, clear reasons in her reserved oral determination of 19 February 2024, which she subsequently reiterated in her written judgment of 11 April 2024 by which she also refused leave to appeal. It is clear to us that Judge Obi knew how to perform her task and that she did so diligently.

81. The Commissioner has not made any formal application under the BIOT (Constitution) Order 2004 for the substantive hearing to take place in London. Nonetheless, the Judge considered with care his submissions, and the evidence surrounding the infrequency of flights and the problems of hosting civilians in the BIOT. In her Order refusing leave to appeal, she refers to having specifically considered the evidence before her as to cost and to having "*discounted [cost] as a consideration that outweighed the countervailing factors.*" She performed the balancing exercise required of her when determining the issue in pursuance of the overriding objective of a achieving a fair hearing at proportionate cost, and she considered the nature of any burden which a remote hearing might place on the Respondents (in this context, we observe that these particular Respondents, given their unique circumstances, cannot apply for leave to enter the United Kingdom for the purpose of participating in litigation to which they are parties). Judge Obi found that financial costs, while an important consideration, were not decisive. Afforded a generous ambit of discretion in making a case management decision in a case in which she will herself adjudicate at the final hearing, she weighed those costs and the difficulties surrounding travel arrangements against transparency, fairness and the practicalities of the Respondents' participation in claims raising very serious and important issues of fact and law and which, at their core, concern the liberty of the individual, and

found that the balance came down in favour of holding the substantive hearing in the Territory. In our opinion, that was a decision wholly within the range of possible outcomes reasonably available to her.

82. The Commissioner argues that there is no presumption that the BIOT Supreme Court will sit in the BIOT. That may be so, but it remains the default position for the Supreme Court to sit in the BIOT in the absence of any direction under s.13(4) BIOT (Constitution) Order 2004. Such a direction can only be given if the two conditions set out in the section are met. The effect of the Commissioner's argument would be that in any case of any substance, involving multiple litigants and the consequent financial cost, there should be a presumption that any hearing would take place in the UK. We do not consider that to be correct. In any event, the Judge did not exercise her discretion based on any presumption; she exercised her discretion balancing the proper and efficient administration of justice – properly acknowledging cost as a consideration – and the nature of the burden a hearing in the UK would place on the Respondents.

83. The Commissioner in effect argues that that Judge had no discretion at all; given the financial cost, she was obliged to direct that the hearing take place in the UK. For the reasons we have given, that argument has no real prospect of success.

84. The Judge's decision was specific to the particular circumstances of the case and did not purport to set any precedent for the management of future Supreme Court cases in the Territory. There will, no doubt, be cases in the future in which the Supreme Court decides that on the particular facts and in accordance with s13(4) of the BIOT (Constitution) Order 2004 and the overriding objective of the CPR that London is the correct venue for a judicial review claim. However, the instant claim is not one in which that was the only reasonable option for the Judge.

85. We therefore refuse special leave to appeal, there being no real prospect of success and there being no other compelling reason to allow the application.