IN THE COURT OF APPEAL OF THE PITCAIRN ISLANDS

CA 1/2012

BETWEEN	**MICHAEL WARREN** Appellant
AND	**THE QUEEN** Respondent

Hearing:	11 – 14 March 2013 (at Auckland High Court)
Coram:	Robertson P McGechan JA Potter JA
Counsel:	T Ellis and G Edgeler for Appellant K Raftery and S Mount for Respondent
Judgment:	12 April 2013 at 11.30 am (at British High Commission, Wellington)

JUDGMENT OF THE COURT

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Introduction

[1] The case before the Court arises from a decision of the Supreme Court delivered on 12 October 2012. The litigation has a long and tortuous history which must be noted to appreciate the current situation. The narrative part of the decision is a judgment of the three Judges sitting. That is followed by a joint judgment of McGechan and Potter JJA and a separate judgment of Robertson P dealing specifically with the application for the recusal of the President. The remainder of the decision is again a judgment of the Court dealing with the question of venue and future steps in the matter.

Background

[2] Police on Pitcairn executed search warrants on 26 May 2010 at both the home of the appellant and at his Mayoral office. In his bedroom over 1,000 images and videos were located which are alleged to constitute child pornography. In addition, there were images of the appellant in various states of undress. The latter do not, in and of themselves, form the basis for any specific charges. They have been tendered in evidence to rebut explanations provided with regard to the presence of the other images. His counsel accepts that the former images would amount to pornography in the United Kingdom.

[3] In November 2010, the appellant was charged with 20 counts of possessing child pornography, contrary to s 160 of the Criminal Justice Act 1988 (UK). Five charges were also laid under the Pitcairn Summary Offences Ordinance for possession of indecent articles.

[4] The Criminal Justice Act charges are triable only in the Supreme Court. The others are triable only in the Magistrate's Court. The latter have been adjourned for consideration following the outcome of the more serious charges.

[5] There was a preliminary hearing on 1 August 2011, following which the Magistrate's Court committed the appellant for trial in the Supreme Court.

[6] A 20 count information was filed in the Supreme Court on 18 August 2011.

[7] The following day the appellant filed a document in the Supreme Court entitled "Constitutional Challenges to method of trial and charges being brought under English Law, and evidence sought to be relied upon by the prosecution". This was expressed as being an application under s 25 of the Constitution of Pitcairn. That section provides:

> (1) If any person alleges that any of the provisions of this Part has been, is being or is likely to be breached in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a breach in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.

[8] The 19 August document set out a raft of challenges at a high level about the constitutional framework and system for Pitcairn, as well as the appellant's particular circumstances.

[9] The appellant specifically appeals the decision in the Magistrate's Court to commit him to trial without first referring the constitutional questions addressed in that Court to this Court under s 25(7) of the Constitution. The appellant said the committal was premature before the determination of the constitutional questions.

[10] There was an amendment to the initial constitutional challenge of 19 August 2011, which provided:

> For the avoidance of doubt in respect of both the constitutional challenge, and appeal the stay sought is amended to read:
>
> (i) A temporary stay until the constitutional challenge, and any appeals, from a decision of this Court, or the Court of Appeal are determined;
>
> (ii) A temporary stay until the appeal, and any further appeals from a decision of this Court, or the Court of Appeal, are determined;
>
> (iii) In the event of the constitutional challenge and/or appeal being wholly or partially successful (subject to any further amendment depending upon the quantum of success) and that the constitutional challenge and/or appeal is not subject to any further appeal a permanent stay of proceedings is sought.

[11] In a Joint Plea and Directions Memorandum filed in the Supreme Court on 29 September 2011, the nature of the appellant's challenge was elaborated upon. On 12 January 2012 the appellant filed a third application expressed as being under the Bill of Rights Act 1688 (UK).

[12] Subsequently in this Court there has been filed an "Appearance under Protest to the Jurisdiction", which called into question the validity of the Pitcairn (Court of Appeal) Order 2012, together with applications for recusal of the Bench in whole or in part on various grounds.

The Court chronology

[13] Following several hearings in the Supreme Court, in a judgment delivered on 12 October 2012, the Supreme Court declined to exercise its powers under either the Constitution or the Bill of Rights Act 1688. Mr Warren was committed for hearing.

[14] On 26 October 2012, the appellant filed a Notice of Appeal in this Court and submitted that the decision declining to exercise the constitutional powers on the grounds that there were adequate means of redress under the ordinary criminal process, the Bill of Rights challenge refusal and the committal were all in error.

[15] There was an initial case management telephone conference between the President and counsel on 2 November 2012. As a result, a document was filed on 7 December 2012 entitled "Detailed Grounds of Appeal". It contained 188 paragraphs. It expanded on the general position and alleged that there had been a failure by the Supreme Court to deal with some issues, other issues had been dealt with in error, and that there were substantive and procedural failings which meant that the right to a fair trial had been denied.

[16] There was a further case management telephone conference between counsel and Robertson P on 12 December 2012. Pursuant to arrangements agreed at that conference, the appellant lodged 253 pages in an initial submission document. Subsequently, additional submissions were filed in two further substantive documents.

[17] These were challenges not only to the process which had been followed with regard to the obtaining of search warrants, the execution of the warrants and the dealing with the items obtained, but virtually the entire governmental and legal structure of Pitcairn was said to be fatally flawed. The situation was summarised by Mr Ellis in submissions before us when he said he had instructions "to the effect of taking any and

all relevant constitutional challenges, not just the traditional defences" in the conduct of this case.

[18] What in fact was under challenge was something of a moving target and new arguments have been presented for the first time in this Court. That is partly because of the recent release of documents, particularly from the Attorney General. Some of these are matters in respect of which factual findings are needed before there could be an appellate court consideration of them.

[19] At the telephone conferences on 2 November 2012 and 12 December 2012, counsel mentioned the need to invite the Supreme Court to rule on matters not already covered in its judgment. The possibility was left unresolved pending the receipt of submissions.

Pre-appeal hearing position

[20] In a joint memorandum filed on 7 March 2013, counsel for both parties argued that it was necessary for an appeal fixture for two weeks commencing on 11 March 2013 to be adjourned. It was said this would provide the opportunity for all relevant documents to be obtained, for the parties to make any further applications and for the Supreme Court to hear additional evidence and make factual findings on outstanding matters. It was said that this would enable the appeal to come back before us with all relevant factual findings and determination of all matters which had been raised. That was advanced as the joint position of counsel.

[21] In addition, however, the memorandum noted:

> 4.7 The appellant is in general agreement with this proposal, subject to the caveat that the Court should deal with the issues relating to the constitutionality of the Court, and its individual members, and the question of venue on Monday 11 March, and the appellant considers the case should not be heard by Lovell-Smith J, or Blackie CJ, but by either a temporary Judge, or permanent replacement for Justice Russell Johnson. The question of where a replacement justice is sworn in is a live issue.

[22] The Judges conferred and advised counsel that all matters (including the adjournment application) would be considered in Court on 11 March.

Progress of the hearing

[23] When the Court convened, the first issue considered was adjournment. Both counsel were heard. After briefly conferring, the Court advised that it was concerned that some progress had to be made and that identified issues could properly be dealt with at that point, even if it was not possible to deal with the appeal in full.

[24] Counsel were accordingly advised that commencing on the afternoon of 11 March the Court would consider:

(a) The protest to jurisdiction.

(b) The exact nature of the matters which were before the Court by way of appeal, bearing in mind the issues which had been before the Supreme Court.

(c) The more generic issue of the validity of appointments of all the Judges, including the force and effect of the Pitcairn (Court of Appeal) Order 2012, issues as to whether further oaths were required and the place where a swearing-in could take place.

(d) A more general duty on all Judges to resign from office because the Constitution and legal framework of Pitcairn was so fundamentally flawed that there could not be substantive justice provided.

(e) A discrete issue of the need for the President to recuse himself.

(f) Issues relating to the proper place of sitting. Generically the argument that it was unlawful, or at least improper, for any Court to sit outside of Pitcairn except for the most cursory and management matters.

[25] The Court began hearing these matters that afternoon. Part way into that exercise we were advised that an accommodation had been reached between the parties which affected those issues.

[26] The Court was given a document entitled "Waiver/Undertaking on behalf of Michael Warren" dated 12 March 2013, which was in the following terms:

> **1 Introduction**
>
> 1.1 Michael Warren (the Appellant) has appealed against the decision of the Pitcairn Supreme Court T1-20/2011 dated 12 October 2012.
>
> 1.2 The Appeal (CA 1/2012) has been listed before Robertson P, McGechan JA and Potter JA.
>
> 1.3 In the course of the appeal the Appellant has challenged the validity of the appointments of the four justices of appeal. This challenge is based, in part, on the requirement of the Promissory Oaths Act 1871 that the judicial oath and oath of allegiance must be sworn in open court and administered by a Judge. As at 12 March 2013 these requirements have not been met in relation to any of the four Justices of Appeal.
>
> 1.4 In order to facilitate the prompt progress of the current 20 charges the Appellant undertakes not to challenge the four current Justices of Appeal swearing their oaths of office and allegiance in a Pitcairn Supreme Court hearing before the Chief Justice in open court in New Zealand.
>
> **2 Proposed swearing in**
>
> 2.1 It is proposed that:
>
> (a) On 14 March 2013 (New Zealand time) there will be a sitting of the Pitcairn Supreme Court in Auckland, New Zealand, in Courtroom 1 at the High Court Auckland. The Court will sit pursuant to the authorisation of the New Zealand Government under the Pitcairn Trials Act 2002.
>
> (b) The Court sitting will be notified to Pitcairn Islanders by notice on the public notice board on 13 March 2013 (New Zealand time), in the form attached.
>
> (c) By consent, there will be orders under ss 15E and 15F of the Judicature (Courts) Ordinance that the Supreme Court will sit at the High Court Auckland, New Zealand, and that the Appellant will participate in the hearing by way of live-link television.
>
> (d) In accordance with those orders, the Court sitting will be transmitted by live video link to Pitcairn Island, and will be open to the public in Pitcairn.
>
> (e) Chief Justice Blackie will administer the Judicial Oath and Oath of Allegiance set out in the Schedule to the Constitution of Pitcairn to Sir James Bruce Robertson, Robert Andrew McGechan and Dame Judith Marjorie Potter.

(f) At a later date the same process will apply in respect of Sir David Baragwanath.

3. Undertaking / waiver

3.1 If the proposal above is followed, the Appellant undertakes that in all future Court hearings arising from the present prosecutions he will not challenge the propositions that:

(a) Justice Sir James Bruce Robertson is validly appointed as President of the Court of Appeal pursuant to s 52(1)(b) of the Constitution of Pitcairn.

(b) Justices Robert Andrew McGechan and Dame Judith Marjorie Potter are validly appointed as Justices of Appeal pursuant to s 52(1)(b) of the Pitcairn Constitution.

(c) Chief Justice Blackie was lawfully entitled to administer the judicial oath and oath of allegiance to Sir James Bruce Robertson, Robert Andrew McGechan and Dame Judith Marjorie Potter on 14 March 2013.

(d) Chief Justice Blackie is lawfully entitled to administer the judicial oath and oath of allegiance to Sir David Baragwanath on a date to be advised.

(e) Robertson P, McGechan JA and Potter JA are validly in office following the swearing of oaths of office and oaths of allegiance in the manner set out above, pursuant to s 52(5) of the Pitcairn Constitution.

4 Saving / reservation of rights

4.1 The Appellant reserves his right to submit that all Pitcairn Court hearings should be held on Pitcairn Island (other than the swearing in ceremonies in this matter).

4.2 The Appellant reserves his right to submit the Pitcairn (Court of Appeal) Order 2012 is invalid for the purposes of the wider constitutional arguments including self determination. However, the Appellant does not challenge the Pitcairn (Court of Appeal) Order 2012 for the purposes of the validity of judicial appointments in the current Court of Appeal proceedings.

4.3 A statement reflecting the Appellant's views on the unlawfulness of the process of hearings outside Pitcairn will be incorporated in the Supreme Court record.

[27] There was a subsequent document dated 14 March 2013 to provide clarification, which said:

1 Introduction

1.1 The Court has raised with counsel the status of the Appellant's submission that all members of the Court should recuse themselves on the grounds of a pecuniary interest in the outcome of the appeal, and the submission that they are judges in their own cause.

2. Agreed Position

2.1 The Appellant has not waived his right to raise the submissions referred to in paragraph 1.1 above.

2.2 By consent, the issues outlined in paragraph 1.1 may be adjourned for determination by the Court at the resumed hearing.

[28] In terms of the arrangements between counsel, the Court of Appeal Judges appeared in the Supreme Court at Pitcairn at a special session in accordance with paragraph 2 of the 12 March waiver document, and oaths were administered to them by the Chief Justice.

[29] As a result, the parties were agreed that the matters upon which the Court needed to hear full argument and reach determinations at this preliminary hearing were the recusal of the President and the question of where the Court of Appeal hearing this case should sit.

Joint judgment of McGechan and Potter JJA on the President's recusal

The application

[30] The appellant has applied for an order that "His Lordship Robertson P recuses himself, or is recused, from further involvement in this case".

[31] The President has not recused himself. That is proper in a situation where he is able to receive independent guidance from the considered judgement of two other Judges.

Decision process

[32] This is the joint judgment of McGechan and Potter JJA, who fortunately have been able to agree. It has been prepared independently of Robertson P. A copy, after finalisation, was supplied to Robertson P for his information.

[33] We were reminded, unnecessarily, of the need for judicial independence inter se, noted in the Commentary on the Bangalore Principles of Judicial Conduct (Bangalore) paragraph 39. That has been observed as always.

Grounds of application

[34] The Notice of Application states that the grounds are contained in the submissions filed contemporaneously. This is unsatisfactory. Grounds should be stated concisely within the notice. The Court should not be left to sift through extensive submissions endeavouring to ascertain what is advanced.

[35] Five matters appear to have been raised. Three arise from the decision of this Court on a bail appeal determined on 21 September 2011, with reasons delivered 6 October 2011 (the bail decision). Two arise from decisions made by the President in a teleconference on 12 December 2012, minuted on 14 December 2012 (the procedural minute). These decisions, set against other background, are said to demonstrate bias or apparent bias on the part of the President.

[36] We consider these five matters separately in the order in which they are raised in submissions. We then consider the position overall.

The Law: Bias or apparent bias

[37] The appellant starts from Bangalore Value 2, paragraph 2.5, and the Commentary (2007) at paragraphs 81, 90, 100 and 108, citing recognition by the European Court of Human Rights in *Harabin v Slovakia;*[1] mention by the Privy

[1] *Harabin v Slovakia* [2012] ECHR 1951, paras 107-108, 131, 139.

Council in *Hearing on the Report of the Chief Justice of Gibraltar Referral;*[2] and the statement by Madam Justice Levers in the Privy Council in *Hearing on the Report of (The Cayman Islands)*[3] that Bangalore is "the undisputed international benchmark for the conduct of judiciaries".

[38] Distilled, Bangalore at paragraph 2.5 directs that a judge shall be disqualified in any proceedings "… in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially". Similarly distilled, the Commentary at paragraph 81 states:

> The generally accepted criterion for disqualification is the reasonable apprehension of bias. … The apprehension of bias must be a reasonable one, held by reasonable, fair minded and informed persons, applying themselves to the question and obtaining thereon the required information. … Would such person think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly.

[39] The Crown made a more traditional start. Citing *Porter v Magill,*[4] the test was put as:

> … whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

[40] We note also the decision of the Privy Council in *Bolkiah v The State of Brunei Darussalam.*[5]

[41] The two formulations are virtually identical, subject to a subtlety as to the degree to which the observer must be satisfied. We accept as the test for present purposes, the well informed and impartial observer who would consider there is a real possibility the Court is biased. This favours the appellant.

[42] As to this hypothetical observer, we are assisted by the observations of the Privy Council in *Bolkiah's*[6] case that the observer:

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2 *Hearing on the Report of the Chief Justice of Gibraltar Referral* [2009] UKPC 43 [28].
3 *Hearing on the Report of (The Cayman Islands)* [2010] UKPC 24 [81].
4 *Porter v Magill* [2002] 2 AC 357 at [103].
5 *Bolkiah v The State of Brunei Darussalam* [2007] UKPC 62, para 15, using the "real possibility" test.
6 At para 16.

> … must be taken to have a balanced approach, neither naïve or complacent nor unduly suspicious or cynical. … he must be taken to have a reasonable working grasp of how things are usually done.

[43] The appellant's submissions allege various errors by the President. When questioned whether error can go to bias rather than to competence and removal from office, Mr Ellis accepted that error was not per se a ground for recusal for bias: the error must be "so bad that it looks like bias".

Ground 1: Procedural minute paragraph [1] – determination of venue

[44] The appellant first asserts errors by the President in relying on ss 15E and 15F of the Judicature (Courts) Ordinance as a basis for directing New Zealand as the venue for the teleconference and this appeal. Sections 15E and 15F are said to relate only to the Magistrate's Court and the Supreme Court and not to the Court of Appeal. This is correct on the face of the Ordinance. The Crown's response is that:

(a) Under s 50(2) of the Pitcairn Constitution, on an appeal such as this the Court of Appeal is invested with the powers of the Supreme Court, which include powers under ss 15E and 15F.

(b) Alternatively, the President had power under s 50(3) of the Constitution to direct venue and any error was immaterial. The Crown says no mention was made of the constitutional power in the teleconference concerned.

[45] We do not accept the Crown argument based on s 50(2) of the Constitution in relation to s 15E. That provision passes up the Supreme Court's powers "subject to this Constitution and any other law". Section 50(3), immediately following, provides that the Court of Appeal may "in accordance with any directions issued by the President of the Court, sit in Pitcairn or elsewhere …". This specific provision in s 50(3) of the Constitution is clearly intended to be governing, displacing within its scope powers of the Supreme Court passed up in a general way which otherwise might apply. As a matter of law, a s 50(3) direction was needed.

[46] We accept the Crown argument based on s 50(2) in relation to s 15F. There is no comparable specific provision in the Constitution or other laws which displaces the s 50(2) transfer of powers. There was no error in the invocation of s 15F.

[47] The Crown argues in the alternative that the error was "immaterial", as power existed under s 50(3). That has some force. Power certainly did exist under s 50(3). However, we think a rather subtler analysis is needed.

[48] The material question is not simply the existence of error, but whether such error would cause a well informed impartial observer to think there was a real possibility the President was biased.

[49] The appellant opens with a submission that the President appeared to have little experience or training in constitutional law, and to lack an at least passing knowledge of the constitutional and legislative framework for appeals. Against that asserted background, the appellant submits that the President blindly followed the Crown's submission (referring to ss 15E and 15F) – or at least would have appeared to such an observer to do so. We do not accept that argument. There is no factual basis on which the appellant can assert such intellectual deficiencies before us except the President's conduct in these proceedings. That is quite insufficient. It would not be an impression harboured by a well informed impartial observer. There is not anything like sufficient evidence of a so called blind following, improbable in any event in an experienced and respected trial and appellate Judge. The appellant's assertions are unfortunate and bordering on contemptuous. It cannot be said the decision contains no reasons. The President says the decision is discretionary, and he considered it "appropriate". That is spartan but it is an explanation.

[50] The well informed and impartial observer would be aware that teleconferences are conducted under time pressures, without realistic opportunities for checking statutory references. He or she would be aware of the separate provisions in s 15E and s 50(3), and that the Crown had referred only to s 15E without correction by the appellant. He or she would be aware that the decision on venue for the appeal had practical implications and was not one to be determined lightly – let alone blindly. We consider it would not be likely the observer would conclude there was a real possibility

the Judge was blindly adopting a Crown position. It was likely the well informed impartial observer, ex hypothesi not unduly suspicious or cynical, would conclude the Judge decided the matter in the normal way on its merits; and simply was misled by the erroneous Crown citation into giving an incorrect statutory reference for the power to do so. This is a much more probable conclusion. There was no "chilling signal" to the Islanders.

[51] The appellant submits that the minuted decision gave no consideration to the interests of the Islanders, said to be a prime consideration in its own right under the United Nations Charter. The best point in support is that the words "interests of the Islanders" and "self determination" were not actually used, but this is not merely a matter of mantra. Amongst the Islanders' interests there is an important interest in the just and expeditious disposal of this criminal prosecution. As often is said, justice delayed is justice denied. The Islanders also, of course, have an interest in being able to observe the proceedings off-Island. The President, to all appearances, sought to promote both interests. This teleconference was not, itself, an appropriate occasion to decide deeper matters of self determination and democracy. We do not accept that the well informed impartial observer would consider the President ignored the interests of the Islanders.

[52] The appellant also submits that to determine the Court should sit in Auckland in a "telephone call" would be seen as "colonial and patronising if not worse". We do not agree. The teleconference, for better or worse, has become an established institution for procedural hearings. A decision as to venue in a teleconference would not appear at all unusual or suspicious. Indeed, given the logistics and expense involved in convening the Court on Pitcairn to determine a question which the Constitution authorises a single Judge, the President, to make by directions, is not a course which would have appeared sensible. It is to be remembered the decision was not one as to the venue for the eventual criminal trial itself. The well informed impartial observer would not have been troubled.

Ground 2: Bail appeal paragraph [18] – European Convention on Human Rights

[53] The appellant criticises the opening sentence of paragraph [18] of the bail appeal decision which reads:

> The ECHR was to be considered, but its provisions are not enforceable.

This is said to be simplistic and misleading, as Part 2 of the Constitution is "in effect the ECHR with some updating". It is said that sentence would give rise to the view that decisions of the European Court of Human Rights will not be considered. That would have a chilling, indeed "icy" effect. It is said also to ignore whether the Human Rights Act (E&W) Ordinance, which requires consideration of the ECHR, is in force. It is said that if the Human Rights Act 1998 (UK) can be invoked, the "rigorous" standards imposed by Convention case law apply. Standards at least as high as in the English Courts are to be expected, in line with ECHR, not slacker New Zealand standards. The approach taken, it is said, would not give an independent observer confidence that a constitutional challenge relying heavily on European principles will receive a fair hearing.

[54] The Crown says there is no concern the ECHR will not be considered when the Court expressly indicated its intention to do so.

[55] Our first observation is that at least to the extent the matter was argued on appeal, the sentence now criticised was correct. The ECHR is the source of Part 2 of the Pitcairn Constitution and as such is of interpretative value. Section 25(13) directs that in a s 25 proceeding under the Constitution, decisions of stated bodies, which include the European Court of Human Rights, on the interpretation and application of the ECHR are to be taken into account so far as considered relevant. The ECHR was not, however, advanced as a law of Pitcairn directly enforced, and nor could it be. It was not so enacted. While there were international obligations on the part of the United Kingdom and Pitcairn, under s 1(3) of the Constitution no legally enforceable rights or obligations were created.

[56] Next, the impugned sentence should be put in context. On the bail appeal the appellant had submitted that the Court must consider the jurisprudence of the ECHR.

Pitcairn was tiny and remote. To be forced to remain on it for some time was oppressive. The prosecution and Supreme Court were "bitten by a Napoleon complex": *Guzzardi v Italy*,[7] as to confinement on a small island and explaining a whole range of criteria which needed consideration, was cited and contrasted with *Raimondo v Italy*.[8] This submission was summarised in the bail decision paragraph [13](v) as "the Court was obliged under the Constitution to consider the ECHR. To be forced to remain on tiny Pitcairn is oppressive and an unlawful deprivation of liberty". It was in response to this particular approach that the Court said:[9]

> The ECHR was to be considered, but its provisions are not enforceable. Further, we find it difficult to believe the appellant's restriction pending trial to Pitcairn Island can be viewed as oppressive. He is not Napoleon on Elba. He is a Pitcairner, content to be on this little island, to the point where he has become Mayor.

It was a response to the appellant's submissions based on the ECHR, not a denial of it.

[57] We do not accept that a well informed impartial observer would conclude from an assessment of this remark that there was a real possibility the Court of Appeal with the President presiding would not give a constitutional challenge relying heavily on European principles a fair hearing. Those principles were before the Court and were considered.

Ground 3: Bail appeal paragraph [9] – no constitutional issue

[58] Paragraph [9] of the bail decision commences: "We consider this overstates the position, and that no constitutional issue is raised". The appellant submits that "liberty of the subject" is a constitutional issue, and that an independent observer would consider the President biased or lacking competence in constitutional matters and ECHR law – or at least appearing so.

[59] It is important to any proper understanding that the impugned sentence be put in context. Under a subheading "The Unconstitutional Ground", paragraph [8] of the decision records the appellant's submission that the starting point is the Constitution,

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7 *Guzzardi v Italy* 7367/76 (1980) ECHR 5.
8 *Raimondo v Italy* (1994) 18 EHRR 237.
9 At [18].

and in particular, rights of freedom of movement conferred by s 18. It noted that ss 18(1) and (2) conferred rights to move within and to leave Pitcairn. It noted that under s 18(3) those rights were not to be subject to restrictions except those provided by law and necessary to protect public order. It noted the submission had been that it was for the prosecution to bring the application for conditions within the "public order" exception, and for the Judge to determine it applied – neither of which was done. It noted the submission was that there had been an oral unreasoned application, impermissible, and without reasons given by the Court, which was "unconscionable". We observe that this is strong language.

[60] The Court's response to it was:[10]

> We consider this overstates the position, and that no constitutional issue is raised. *The constitutional freedom of movement* is subject to powers of arrest, remand and bail on conditions conferred by law and which are necessary to protect public order. *It is clear the Court had power to act as it did.* The question whether the court proceeded correctly *within its powers* is a matter for normal appellate review. *Not everything which is wrong is unconstitutional.* (Italics added)

[61] We think it plain that the Court did not say the Constitution was not invoked, and plainer still that liberty (freedom of movement) was not a constitutional matter. The Court simply said that no issue *as to the Constitution* was raised: the issue was whether the power to impose bail on conditions, provided for by the Constitution, had been exercised correctly. It was normal appellate review, and nothing more.

[62] We do not accept that a well informed and impartial observer, considering that sentence in the context in which it was uttered, would have concerns that the President may not understand or apply the Constitution in proceedings before him.

Ground 4: Bail appeal – Presiding Judge

[63] The Court of Appeal sat on the bail appeal heard on 21 September 2011 in the order of precedence Robertson P, Blackie CJ, McGechan JA.

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10 At [9].

[64] The appellant, to use the words of his relevant subheading, submits that the President "unlawfully usurped" the "position of precedence" at the bail appeal, that is, the position of Presiding Judge. It was submitted that the common law, and constitutional conventions, in the Commonwealth are that the Chief Justice is the Senior Judge. Further, that the judges themselves have no right to alter the order of precedence, and if they did, it would need to be in open court with reasons given.

[65] It was further said: "That the three most senior Judges arranged this between themselves, and not in public, does not bode well for the rule of law, or the appellant's appeal", and that to meet and discuss the matter ex parte "shows a disregard of the rule of law to such an extent" that the independent observer would rightly have no confidence in a fair hearing.

[66] The appellant advances two associated matters:

(i) The New Zealand hierarchy in which the President is a retired Court of Appeal Judge, McGechan JA a retired High Court Judge, and the Chief Justice is lower in the hierarchy as a District Court Judge is "totally irrelevant" as this is a Pitcairn matter.

(ii) No individual recusal application is made against McGechan JA as the latter (as well as being "entitled to a learning curve") is not involved in multiple examples of ignoring or not understanding the Constitution.

[67] The Crown submits the order of precedence was a matter for the Judges to determine. The alleged disregard of mandatory requirements does not identify the source of those requirements in Pitcairn law. There was no prejudice, and no indication of bias.

[68] While the subheading alleges an unlawful "usurpation", which has pejorative overtones, under questioning Mr Ellis eventually redefined the term as a more neutral "to take office to which not entitled". That accords with the tenor of the submissions

which follow, which do not allege some form of coup, but merely improper mutual agreement.

[69] The Pitcairn Constitution provides for the appointment of a Chief Justice (s 47(1)) and President of the Court of Appeal (s 49(2)), and envisages that those Judges will have "functions". It does not contain any provision as to which, if either, shall preside at hearings in the Court of Appeal.

[70] Mr Ellis did not cite authority for the proposition that under common law the Chief Justice must preside. When questioned, his response was that there was no authority to the contrary. The only authority advanced for the constitutional convention was a group of statutory provisions, said to be examples, in New Zealand, Western Australia, New South Wales, Singapore and Mauritius. We do not see these as establishing a constitutional convention. Indeed, while they might be viewed as exemplifying a constitutional convention, it equally may be said they would not be needed if such a constitutional convention existed.

[71] Undoubtedly there is a usual practice, at least in Commonwealth countries, that a Chief Justice, if sitting, will preside over the court concerned, including courts of appeal. We cannot ourselves recall an occasion, apart from this present, where that has not occurred. However, we consider it is no more than a practice. In the absence of statutory provisions, it is not a rule of law. As it is no more than a practice, there can be lawful departures.

[72] There is no common law or statutory requirement for judges to discuss, announce or explain any change in precedence in open court. It is a matter of judicial administration, not decision making, and, with no disrespect to Chief Justices, not one of particular importance. The presiding judge does not have a casting vote, or any superior influence on decisions ultimately reached. His or her functions are to act as spokesperson for the bench and to regulate procedure in the court room, invariably in consultation with fellow judges. It is not a matter properly of concern to parties. Indeed, Mr Ellis did not suggest his case would have been better served if the Chief Justice had presided, carefully saying he did not know. He did not put the matter higher than one of principle.

[73] In our view, it is not shown that the well informed independent observer would regard this change in presiding judge as showing disregard for the law. It was not a breach of the law. The observer would regard it as unusual, but knowing the President had considerably greater appellate experience than the Chief Justice, and that the Chief Justice might in due course be the trial judge sitting alone, would regard it as understandable. He would not suspect impropriety reflecting on the President or anyone else.

Ground 5: Procedural minute paragraphs [5] to [8] – mode of hearing; paragraph [9] – venue

[74] Paragraphs [5] to [8] of the procedural minute deal with the appellant's submission that three matters relating to the appeal (validity of appointment of Pitcairn Judges; ability to sit outside a British settlement; disclosure of constitutional documents) required a separate preliminary hearing. The President ruled that was not necessary or appropriate, and that all matters should be dealt with at one hearing. The appellant's submission that a single judge did not have jurisdiction to consider such matters was "noted".

[75] Paragraph [9] of the minute directed hearing of "the issues" (that is, that one hearing) would take place in Auckland.

[76] The appellant submits these directions should have been made by the Court of Appeal (that is, three Judges) not the President alone.

[77] The opening submission in support was that the Judicature (Appeals in Criminal Cases) Ordinance 2000 "is no longer extant". That plainly is wrong. The submission then asserted that the current criminal rules are made under the Pitcairn Court of Appeal Order 2000 (revoked), and are not saved by the transitional provision s 8 of the Pitcairn Constitution Order 2010. The first assertion is wrong and the second does not arise. Appreciating developing difficulties, counsel stated during oral argument that this approach was subject to change. It was not taken further.

[78] The second submission was that s 35C of the Judicature (Appeals in Criminal Cases) Ordinance 2000 specifies the powers of a single judge. They do not include the mode of hearing and venue topics. It was said the nature and venue of hearing are not mere administrative matters. Venue, in particular, was said to require consideration of the interests of justice, not blind acceptance of the Crown position. *Taylor v Manager of Auckland Prison*[11] was cited as an example.

[79] There was a further submission that determination of venue without considering a process for appeal under the Constitution s 51(2)(h) did not look judicial, let alone independent and impartial.

[80] On these bases, and citing Bangalore requirements for scrupulous respect for the law, the appellant submits the President's actions "bring the judicial office into disrepute, encourage disrespect for the law, and impair public confidence in the integrity of the judiciary", and would be viewed by an independent observer in that way.

[81] The Crown submits the orders could be made by a single judge despite the terms of s 35C, citing, *R v Chatha (No 2).*[12] That case, decided in the face of s 393 of the Crimes Act 1961 (NZ), was said to hold that "it is common for preliminary matters to be dealt with by one judge". The President's decisions were said to be within the category of "case management" issues appropriately dealt with by the President pending a full sitting.

[82] The Constitution s 51 empowers the President to make rules regulating practice and procedure. It is clear from ss 51(2)(h) and 51(3)(b) that rules can empower sittings by a single judge except on most final determinations, with provision for reference to the Court from single judge decisions. No such rules have been made. As matters stand, the only legislative provision permitting single judge sittings is the Judicature (Appeals in Criminal Cases) Ordinance 2000 at s 35C. It relates to specific matters: leave to appeal, extension of time, presence of appellant, warrants for detention, and bail. Refusal of an appellant's application confers entitlement to determination by the

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11 *Taylor v Manager of Auckland Prison* [2012] NZHC 1241, Duffy J, 5 June 2012.
12 *R v Chatha (No 2)* [2008] NZCA 466 at [7]-[8].

Court. The President's decisions as to mode of hearing, and venue, do not fit within these powers.

[83] *Chatha*[13] was a case decided against the background of s 393 of the Crimes Act 1961 (NZ), which is in terms virtually identical to s 35C of the Ordinance. The appellant concerned requested the Registrar of the New Zealand Court of Appeal to advise the date, and by whom, a certain High Court Judge was authorised to sit on the Court of Appeal. The request was referred to the judge who would preside, Glazebrook J. Glazebrook J issued a minute refusing the request, noting the assignment of the Judge was a matter of "routine judicial administration". This drew a recusal application relating to Glazebrook J, counsel contending that the minuted decision did not come within s 393. The Court ruled s 393 "is not exhaustive". There are, it was said, "many matters of administration relating to appeals that may be dealt with by a minute of one Judge (for example timetabling orders and extensions of time to file submissions)". Glazebrook J noted a procedure under which when the membership of the Court was known, the presiding judge usually would consult with other members before deciding "routine administrative matters", but was not obliged to do so.

[84] *Chatha* is not binding on this Pitcairn Court. It has persuasive authority only. If it were necessary to determine the point, we would be somewhat troubled by the omission to state authority for the (undoubted) practice of single judge determination of matters outside s 393. The New Zealand Court of Appeal, like this Court, is a creature of statute and does not have an inherent jurisdiction. It is perhaps not enough to say "we have a power to do this because it is what we have always done", however sensible the practice may be.

[85] However, and fortunately, we do not need to do so. The relevant question is how the President's actions would appear to a well informed impartial observer. Such an observer would consider that the commonplace practice recognised in *Chatha* at least arguably justified the President's rulings if they came within the category of "routine judicial administration".

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13 Above n 12.

[86] The decision not to hold a preliminary hearing on certain issues but determine them at the outset of one overall hearing, clearly does. It is not determinative. Essentially, it is a mere matter of scheduling.

[87] The decision to hold that united hearing in Auckland, not Pitcairn, is less immediately obvious. However, we have come to the view that it can be so categorised. It determined nothing as to outcome of the various applications and the overall appeal. With the provision of television to the Island, it did not significantly disadvantage the appellant. Given the considerable logistical difficulties in convening this Court on Pitcairn, to no advantage, it was a decision which could only go one way: it was not a matter which demanded close analysis and reflection.

[88] We do not ignore *Taylor v Manager of Auckland Prison.*[14] It involved a question whether a notorious prisoner who had launched judicial review proceedings, on which he would appear in person, should be compelled to present his case via audio visual link from prison instead of appearing in the courtroom. It was an extreme case, with novel features, demanding due consideration. No one could describe the issue raised as "routine". It does not much assist present consideration.

[89] The appellant is correct that the decisions concerned were made without provision for appeal. The reservation of leave to apply for a further telephone conference or directions prior to hearing does not obviously encompass a simple review of the directions given. As the President stated in the course of argument in this Court, it was his understanding that these matters could be reviewed before the Court of three Judges. It is not clear to us whether that understanding was made clear at the time. In fairness to the appellant, we will assume not. The Constitution s 51(2)(h) envisaged the President making rules for the review of single judge decisions. How would a well informed impartial observer view the President's rulings, given that the President had not made such rules? (A well informed observer would not expect the President to make such a rule on the hoof.) The question for the observer becomes one whether in those circumstances the decisions should have been made at all. The appellant's counsel puts the appearance as non judicial, and as not independent or impartial. We do not agree. Given that the decisions concerned were routine judicial administration,

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[14] Above n 11.

and in no way determinative, we do not consider the well informed impartial observer would be troubled.

The position overall

[90] These various grounds, to the extent they have any substance at all, in the end must be viewed cumulatively. There was an error in citing s 15E, but it has not been shown the President in fact blindly followed the Crown's submissions. A great deal more than mere acceptance of Crown arguments is needed for such a serious assertion, especially when no attention was drawn to the errors by the appellant's counsel. Likewise, it has not been shown that the actions of the President would cause the well informed impartial observer to conclude there was a real possibility that the President was biased and would not afford the appellant a fair hearing. They were not of a type or degree which would so allow, and certainly not such as would bring the law into disrepute.

Judgment of Robertson P on his recusal

[91] I respectfully adopt and adhere to the conclusion reached after an exhaustive assessment of the application for my recusal by the other two Judges.

[92] I am not persuaded that the actions complained of by Mr Ellis could sensibly lead a reasonable observer to conclude that I was unable to decide impartially in this case.

[93] The issues identified with regard to the bail decision of a Court of which I was a member in 2011, lack substance when read in context or are rooted in conjecture.

[94] The complaint about the minutes following the two telephone conferences are divorced from the reality of case management needed in this unique jurisdiction if progress is to be made. Robust and commonsense preliminary decisions have to be taken. Such initial rulings will always be subject to review by the Court. It is almost three years since this case began. The right to a fair trial includes a duty on the Court to endeavour to facilitate the timely disposition of challenges raised for determination.

Venue for hearings of this appeal

Where should this Court sit?

[95] By minute dated 14 December 2012, Robertson P directed that this appeal hearing be held in Auckland. The appellant challenges that this Court has power to sit outside Pitcairn. We are not assisted by the appellant's Notice of Appeal, which refers to "such other grounds of appeal as may be advanced by my counsel". Nor by the 188 paragraphs of the "Detailed Grounds of Appeal" subsequently filed.

[96] The issue is for determination pursuant to the agreement of the parties as recorded at paragraph [29] above.

[97] The parties presented full written and oral submissions to the Court.

Preliminary issue: Jurisdiction to review

[98] The appellant seeks review by this Court of the validity of the Pitcairn Constitution Order 2010, made under the British Settlements Acts 1887 and 1945 and the Judicial Committee Act 1844.

[99] The Court invited submissions on its power to review, this being an Order of Her Majesty the Queen in Council made under authority of United Kingdom statutes.

[100] The Crown referred to *R v Seven Named Accused.*[15] The Crown submitted to the Court of Appeal in that case that being United Kingdom statutory instruments, certain Orders in Council made by the Queen in London could be challenged only in the United Kingdom Courts. The Court of Appeal made the following observations:

> [30] Although at first sight the submission may seem to have some attraction, we doubt its correctness.
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> …
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> [32] … it seems reasonably clear that the British Settlements Act, being statutes of general application and in force in England, are in force in Pitcairn

[15] *R v Seven Named Accused* [2004] PNCA 1; CA 1-7 2004 (5 August 2004) at [29]-[33].

> and form part of its law. It would follow that subsidiary legislation based on those Acts also forms part of Pitcairn law. For example, if a provision in such an Order in Council clearly could not be said to come within the words 'necessary for the peace, order and good government', then it would seem appropriate for the local Court to so declare. It would be able to determine what was and what was not Pitcairn law.

[101] In light of those observations, the Crown invited this Court to assume, without deciding, that it has the power to consider the validity of the Pitcairn Constitution Order and the Constitution it brings into effect, under the British Settlements Act.

[102] Accordingly, we have proceeded on that basis, leaving open the question of whether the Order and the Constitution can be challenged in Pitcairn.

Has this Court power to sit outside Pitcairn?

[103] The starting point is the Constitution of Pitcairn. The Constitution was brought into effect pursuant to the Pitcairn Constitution Order on 4 March 2010. It comprises nine parts. Part 1 sets out the partnership values between the United Kingdom and Pitcairn.[16] Part 2 is essentially a Bill of Rights affirming Fundamental Rights and Freedoms of the individual. Part 5 provides for the Legislature. Part 6 relates to the Administration of Justice; it constitutes the Supreme Court and the Court of Appeal and defines their jurisdictions.

[104] In Part 6, under the heading "Court of Appeal" the Constitution provides:

> **50.**—(1) The Court of Appeal shall have jurisdiction to hear and determine such appeals from the courts of Pitcairn as may be prescribed by this Constitution or any other law.
>
> (2) In connection with any appeal from a court of Pitcairn, the Court of Appeal shall, subject to this Constitution and any other law, have all the powers and jurisdiction that are possessed by that court under any law; and decisions of the Court of Appeal in respect of any appeal from a court of Pitcairn shall, subject as aforesaid, be enforced in Pitcairn in the same way as decisions of that court.
>
> (3) The Court of Appeal may, in accordance with any directions issued from time to time by the President of the Court, sit in Pitcairn or elsewhere for the purpose of exercising any jurisdiction and powers conferred on it by or under this Constitution or by any rule made under section 51; but anything done elsewhere than in Pitcairn by virtue of this subsection shall have, and have only, the same validity and effect as if done in Pitcairn.

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[16] By s 61 of the Constitution "Pitcairn" means Pitcairn, Henderson, Ducie and Oeno Islands.

[105] Thus the Constitution authorises the Court of Appeal to sit "in Pitcairn or elsewhere" as directed by the President. The word "elsewhere" has a plain meaning: the Court of Appeal is authorised to sit in places outside Pitcairn as directed by the President. The meaning and intent of the word "elsewhere" may be confirmed by reference to s 43(4) of the Constitution, which authorises the Pitcairn Courts to sit in Pitcairn, but also "… in the United Kingdom, or in such other place as the Governor, acting in accordance with the advice of the Chief Justice, may appoint".[17]

[106] The Crown submitted that because by s 50(2) the Court of Appeal has all the powers and jurisdictions of the Supreme Court on an appeal from that Court, the Court of Appeal has the powers in ss 15E and 15F of the Judicature (Courts) Ordinance 2000. Under s 15E a Judge of the Supreme Court (or a Magistrate) may order any proceeding or step in a proceeding to be held in Pitcairn, in the United Kingdom, or in New Zealand, taking into account criteria specified in the section. For reasons given in the judgment of McGechan and Potter JJA on the recusal issue,[18] we do not accept that submission.

[107] However, we do accept that under s 50(2), s 15F authorises a Judge of the Court of Appeal, if satisfied that it is in the interests of justice, to order that any person involved in the proceeding who is in Pitcairn when the Court is sitting outside Pitcairn, may participate in the proceeding by live-link television.

[108] The Crown noted in submissions that the power for Pitcairn Courts to sit outside Pitcairn is relatively common for small island territories,[19] and that the Privy Council, Pitcairn's final Court of Appeal, sits in London, England.

[109] The appellant submitted there is something "profoundly wrong" with a judicial system that allows its courts to sit anywhere in the world. He submitted that the Pitcairn Courts cannot "elect" to sit extraterritorially without statutory power, that the

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17 On 29 July 2010 the Governor appointed Adamstown in Pitcairn and "any place within New Zealand" as places where the Magistrate's Court may sit.

18 At [44]-[46].

19 Examples given include the Supreme Court of the British Indian Ocean Territory sits in the United Kingdom, the Falkland Islands Magistrate's Court hears cases arising in the British Antarctic Territory, South Georgia and the South Sandwich Islands, and the Supreme Court of the Territory of the Cocos (Keeling) Islands is permitted to sit anywhere in Australia (without limitation to any particular Australian State).

Constitution attempts to give this power, but that the empowering provisions are ultra vires the British Settlements Act 1887.

[110] We turn to consider this issue.

Are the provisions of the Pitcairn Constitution empowering the courts to sit outside Pitcairn intra vires the British Settlements Act 1887?

[111] As we have described above, the Pitcairn Constitution came into effect on 4 March 2010 under a Proclamation of the Governor made pursuant to The Pitcairn Constitution Order 2010. The Constitution is set out in Schedule 2 of the Order.

[112] The Order was expressed to be made in exercise of the powers conferred on the Queen by the British Settlements Acts and the Judicial Committee Act 1844 and all other enabling powers.

[113] It is common ground that the applicable provisions are in the British Settlements Act 1887:

> **2 Power of the Queen in Council to make laws and establish courts.**
>
> It shall be lawful for Her Majesty the Queen in Council from time to time to establish all such laws and institutions, and constitute such courts and officers, and make such provisions and regulations for the proceedings in the said courts and for the administration of justice, as may appear to Her Majesty in Council to be necessary for the peace, order, and good government of Her Majesty's subjects and others within any British settlement.

[114] The Crown submitted the issue for this Court is whether a reasonable legislator could have regarded the provisions of the Pitcairn Constitution empowering Pitcairn Courts to sit outside Pitcairn, as being for the peace, order and good government of Pitcairn. The Crown referred to the judgment of Laws LJ in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs,*[20] in submitting that the power to legislate for the peace, order and good government of a settlement is the widest possible legislative power analogous to that available to the Sovereign.

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[20] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, 1102.

[115] In that case Laws LJ, in whose judgment Gibbs J, the other member of the Court, concurred, said:

> 53 … Mr Pannick marshalled a formidable body of authority to support the proposition that the formula 'peace, order, and good government', used so often in measures conferring powers to make colonial law, was to be taken as having the widest possible intendment. …
>
> 54 I have already referred (paragraph 40) to what was said in *Ibrelebbe v The Queen* [1964] AC 900, 923: the words peace, order and good government 'connote, in British constitutional language, the widest law-making powers appropriate to a sovereign'. This was approved in *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733, 747 …
>
> 55 … Peace, order and good government may be a very large tapestry, but every tapestry has a border. In *Trustees Executors and Agency Co Ltd v Federal Comr of Taxation* (1933) 49 CLR 220, 234-235, Evatt J in the High Court of Australia stated:
>
> > The correct general principle is … whether the law in question can be truly described as being for the peace, order and good government of the Dominion concerned … The judgment of Lord Macmillan [in *Croft v Dunphy* [1933] AC 156] affirms the broad principle that the powers possessed are to be treated as analogous to those of 'a fully sovereign state', so long as they answer the description of laws for the peace, order, and good government of the constitutional unit in question …
>
> 56 In answering the question whether a particular measure, here section 4 of the Ordinance, can be described as conducing to the territory's peace, order and good government, it is I think no anachronism, and may have much utility, for the court to apply the classic touchstone given by our domestic public law for the legality of discretionary public power as it is enshrined in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. Could a reasonable legislator regard the provisions of section 4 as conducing to the aims of section 11? In answering the question, the force of the cases shows that a very wide margin of discretion is to be accorded to the decision-maker; yet in stark contrast our modern domestic law tends in favour of a narrower margin, and a more intrusive judicial review, wherever fundamental or constitutional rights are involved. This recalls the dissonance to which I referred at paragraph 43 between the rights which the common law confers here, and the thinner rule of law which the jurisprudence has accorded the colonies. But the dissonance is historic, and in my judgment does not in any event drive the result in this present case.

[116] The appellant submitted that the provisions of the Constitution empowering the courts to sit outside Pitcairn are not for the peace, order and good government of the inhabitants of Pitcairn. His lengthy and discursive submissions addressing the question "Where can Pitcairn Courts sit?" included the following points:

(a) There is no power in the British Settlements Acts to allow Pitcairn to create courts which sit extraterritorially;

(b) New Zealand was, but is no longer, a British settlement and is outside the scope of the empowering legislation, ss 2 and 4 of the British Settlements Act 1887.

(c) The power to sit worldwide "may" offend against the European principle of proportionality.

(d) The Constitution provides for a statutory and constitutional challenge to the peace, order and good government by ss 36 and 25.

(a) Extraterritoriality

[117] The appellant's submission misses the point. No Pitcairn Courts which sit outside Pitcairn have been created. The Courts created under the Constitution are Pitcairn Courts, presided over by Pitcairn Judges appointed under the Constitution, which apply Pitcairn law in respect of Pitcairn inhabitants. And s 21 of the Pitcairn Trials Act 2002 (NZ) expressly provides that a Pitcairn Court's premises in New Zealand are under the control and authority of the Pitcairn Court.

[118] As the Court of Appeal of the Cook Islands said in relation to that Court sitting in New Zealand:[21]

> [10] … Sitting in New Zealand, the Court [the Cook Islands Court of Appeal] is applying Cook Islands law, not New Zealand law. It is not in any way encroaching on New Zealand sovereignty or purporting to exercise jurisdiction over New Zealand subjects, or attempting to impose sanctions or orders within New Zealand other than in accordance with established protocol.

[119] Issues of sovereignty and political comity require cooperation from the jurisdiction in which it is proposed a Pitcairn Court should sit. In this case, that cooperation is recorded in an agreement between the United Kingdom and New Zealand Governments dated 11 October 2002 (to which we subsequently refer in more

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[21] *Drollett v The Police* [2004] CKNZCA 1; CA No 10 of 2003 (13 December 2004).

detail), but neither the agreement nor the legislation implementing it[22] confers nor recognises any extraterritorial jurisdiction in the relevant domestic jurisdiction.

(b) New Zealand no longer a British settlement

[120] This point has no relevance. Section 2 of the British Settlements Act 1887, which is the relevant provision, empowers the Queen in Council to establish laws and courts and otherwise make provision for the peace, order and good government of her subjects and others within any British settlement. The Constitution relates to British subjects and other persons within Pitcairn. It does not engage New Zealand.

[121] Section 4 of the British Settlements Act 1887 empowers the Queen in Council to confer on any court in a British possession, jurisdiction in respect of matters arising in any British settlement. But this provision has not been invoked in respect of Pitcairn. The Constitution creates Pitcairn Courts having jurisdiction in Pitcairn law. It simply provides authority for Pitcairn Courts to sit in places other than Pitcairn. No jurisdiction has been conferred on any Court in New Zealand or elsewhere outside Pitcairn.

(c) Proportionality

[122] The appellant submitted, tentatively, that the power to sit worldwide "may" offend against the European principle of proportionality. Assuming (without deciding) that principle could apply, we do not agree. Pitcairn has almost unique isolation, a tiny population, and lacks infrastructure. A power to sit elsewhere, certainly in appeal hearings, strikes a fair balance amongst competing considerations.

(d) Peace, order and good government

[123] We return to the essential issue, whether a reasonable legislator could have regarded the provisions of the Constitution which empower the Pitcairn Courts to sit outside Pitcairn as being for the peace, order and good government of Pitcairn.

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[22] In Pitcairn, the Judicature Amendment Ordinance 2003; in New Zealand, the Pitcairn Trials Act 2002.

[124] The appellant did not take issue with the relevant principles set forth by Laws LJ in *Bancoult (No 1).* As counsel noted, however, *Bancoult (No 1)* was overruled by the House of Lords[23] in the context of law-making by use of prerogative power.

[125] In *Bancoult (No 2)* the House of Lords by a majority allowed the appeal by the Secretary of State against the judgment of the Divisional Court in *Bancoult (No 1),* which had been upheld by the Court of Appeal. That judgment declared invalid orders which disentitled inhabitants of the Chagos Archipelago in the Indian Ocean from entry or presence on the islands without specific permission. The Orders were made by the Queen in Council under the powers of the Royal prerogative, not pursuant to any statutory power. It was common ground before the Divisional Court that the British Settlements Act 1887 did not apply as the British Indian Ocean Territory was a ceded, not a settled, territory, when annexed to the United Kingdom. The House of Lords held that the prerogative power of the Crown to legislate for a ceded colony had never been limited by the requirement that legislation be for the peace, order and good government of the inhabitants; rather, Her Majesty, on the advice of Her Ministers, will act in the interests of her undivided realm, including both the United Kingdom and the colony.[24]

[126] Lord Hoffman said that the words "peace, order and good government" had never been construed as words limiting the power of the legislature and have always been treated as apt to confer plenary law-making authority.[25] His Lordship said the courts will not enquire into whether legislation within the territorial scope of the power was in fact for the peace, order and good government or otherwise for the benefit of the inhabitants of the territory. Insofar as *Bancoult (No 1)* departed from that principle, he considered it wrongly decided.

[127] Thus, while disagreeing with the Divisional Court in *Bancoult (No 1)* about judicial intervention in the law-making process, the House of Lords affirmed the

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23 Counsel's submissions referred to the Privy Council but the reference intended is clearly to the judgment of the House of Lords in *R (Bancoult) v Secretary for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61.

24 At para 47.

25 At para 50, citing the authority of the Privy Council in *R v Burah* (1878) 3 App Cas 889; *Riel v the Queen* (1885) 10 App Cas 675; *Ibrelebbe v the Queen* [1964] AC 1900; *Union Steamship Co of Australia Pty Limited v King* (1988) 166 CLR 1 (HCA).

principles set out by Laws LJ in relation to peace, order and good government, derived from the authorities.

[128] In this case the Pitcairn Constitution Order 2010 was made by the Queen under the powers of (relevantly) the British Settlements Act 1887 as necessary for the peace, order and good government of the inhabitants of Pitcairn.

[129] As we have previously said, the empowering provisions as to where the Pitcairn Courts may sit, relate only to the geographical situation of sittings of the courts. For a tiny, remote island territory such as Pitcairn, such a power cannot be regarded as unreasonable. Indeed, we consider it eminently reasonable and sensible for the peace, order and good government of Pitcairn and well within the plenary constitutional powers of the British Settlements Act.

[130] For the reasons given above, we have determined that the provisions of the Constitution empowering the Pitcairn Courts to sit outside Pitcairn are within the powers of the British Settlements Act. Therefore, even if we, as a Pitcairn Court, have power pursuant to s 25 of the Constitution to make a declaration of invalidity in respect of any part or parts of the Constitution (which we expressly do not decide), it would have no application to the empowering provisions in issue in this case.

Other matters

[131] In the context of a general challenge to the Pitcairn Constitution, the appellant also made submissions concerning International Law Obligations and Discrimination. These are matters which by agreement of the parties were adjourned and on which the Crown, appropriately, did not make submissions. We therefore address the appellant's submissions on these matters only in relation to the issue of venue for the hearing of the appeal.

[132] *Interests of inhabitants paramount – Article 73 UN Charter:* Article 73 of the UN Charter provides that the Islanders' interests are paramount. The appellant's submission asks rhetorically: "How and when it was determined" that it was in the paramount interests of the Islanders to have courts sitting anywhere in the world and to

have "so many judges"? It is argued that United Kingdom obligations under the Vienna Convention on the Law of Treaties must be observed and provisions of domestic law to the contrary do not show good faith and should not be followed. We do not accept these arguments. There is no breach of the paramount interests of the Islanders. These features are dictated by need, and serve the Islanders' interests in seeing justice done. As a Pitcairn Court, we must follow Pitcairn domestic law properly interpreted with due regard to international obligations.

[133] *Discrimination:* The holding of trials in New Zealand, the absence of jury trial in Pitcairn, and indeed the absence of a local legislature, are said to be discriminatory within s 23 of the Constitution, the International Convention on Civil and Political Rights and the International Convention on the Elimination of Racial Discrimination. The comparator adopted is United Kingdom citizens generally. We do not agree. There are special circumstances relating to Pitcairn which can warrant different treatment.

The Pitcairn Trials Act 2002 (NZ)

[134] The purpose of this Act is stated in s 3:

> **3 Purpose of this Act**
>
> (1) The purpose of this Act is to make provision to implement in New Zealand law New Zealand's obligations under the Agreement.
>
> (2) To that end, this Act provides–
>
> (a) for Pitcairn Courts to sit in New Zealand for the purpose of holding certain trials under Pitcairn law; and
>
> …

"Agreement" is defined as:[26]

> … the Agreement between the Government of New Zealand and the Government of the United Kingdom of Great Britain and Northern Ireland concerning Trials under Pitcairn Law in New Zealand and Related Matters dated 11 October 2002, a copy of which is set out in Schedule 1.

[26] Section 4(1) Pitcairn Trials Act 2002.

The definition of "Pitcairn Court" includes the Magistrate's Court and the Supreme Court of Pitcairn and:

> (c) the Pitcairn Court of Appeal established by Article 3 of the Pitcairn Court of Appeal Order 2000 (United Kingdom).

[135] Section 6 provides for the Government of Pitcairn to ask the Minister of Justice for New Zealand to allow a trial that is not a special investigations trial (which this proceeding is not) to take place in New Zealand. The request must be in writing and the Minister must advise the Governor of the outcome.

[136] The appellant submitted that there is no jurisdiction for this Court to sit in New Zealand because:

(a) The definition of Pitcairn Court in the Pitcairn Trials Act includes "the Pitcairn Court of Appeal established by Article 3 of the Pitcairn Court of Appeal Order 2000 (UK)", but the 2000 Court of Appeal Order was revoked by the Pitcairn Constitution Order 2010.[27] In short, there has been a statutory error which results in there being no authority for this Court to sit in New Zealand. The appellant contrasts this situation with the amendment to Article 2 of the Pitcairn (Appeals to Privy Council) Order 2000 made by s 9 of the Pitcairn Constitution Order 2010, which redefined the Court of Appeal as "established by the Constitution".

(b) There has been no "request" to the Minister in terms of s 6(1) of the Pitcairn Trials Act 2002.

[137] We do not accept either submission.

[138] As to the first submission, the Pitcairn Trials Act is a New Zealand statute. Accordingly, s 22(2) of the Interpretation Act 1999 (NZ) applies.[28] It provides that "a reference in an enactment to a repealed enactment is a reference to an enactment that,

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[27] The Court of Appeal is constituted by s 49 of the Constitution.

[28] There is a provision to similar effect in s 17 of the Interpretation Act 1978 (UK) which would apply to United Kingdom enactments relating to Pitcairn.

with or without modification, replaces, or that corresponds to the enactment repealed".[29]

[139] As to the second submission, a letter from the Acting Governor to the Minister of Justice (NZ) dated 15 July 2010 sought:

> … permission to allow the Pitcairn Island Courts to sit in New Zealand pursuant to s 6 of the Pitcairn Trials Act 2002, in relation to an anticipated criminal proceeding.

The letter then described the general nature of the allegations against the appellant, and the steps likely to be involved "without prejudicing the various decisions yet to come". It continued that if permission were granted, a decision whether any particular step in the case would be held in New Zealand or on Pitcairn Island was a decision for the Pitcairn judiciary. The Acting Governor indicated that she anticipated "strong interest" in holding procedural or formal hearings in New Zealand, given the time required to travel to Pitcairn. But, given that the potential defendant (the appellant) was a Pitcairn Islander, this might be a factor weighing in favour of holding the substantive hearings on Pitcairn.[30]

[140] By an undated letter in response to letters of 21 April 2010 and 15 July 2010, the Minister of Justice acceded to the request for "… permission to allow the Pitcairn Island Courts to sit in New Zealand pursuant to section 6 of the Pitcairn Trials Act 2002".

[141] This correspondence speaks for itself. There is no rational basis to read down the meaning and clear intent of the communications because, as the appellant suggests, proceedings before the Court of Appeal are not specifically included in "possible … following steps" referred to in the Acting Governor's letter of 15 July 2010. Both letters clearly relate to "the Pitcairn Island Courts", which include the Court of Appeal.

[142] Assertions by the appellant that this process was "unfair" because he was not notified of these administrative actions, have no merit. These were facilitative steps

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[29] We note that s 4(1)(c) of the Pitcairn Trials Act 2002 requires legislative amendment. The Pitcairn Court of Appeal is now established by the Constitution.

[30] Counsel for the Crown advised the Court that the Crown would not oppose the substantive trial being held on Pitcairn.

taken in accordance with statutory requirements in relation to anticipated proceedings. In this context, we note that a challenge by the appellant to the decision of the Minister of Justice by way of judicial review filed in September 2011 in the New Zealand High Court, was discontinued. The Minister's granting of the Governor's request stands unchallenged.

Should an order be made that this appeal be held in New Zealand with the appellant present by live-link television?

[143] The authority to make such an order is in s 15F of the Judicature (Courts) Ordinance, which applies to this Court by virtue of s 50(2) of the Constitution.

[144] The appellant contends that his fair trial rights affirmed by s 8 of the Constitution are prejudiced unless he is present in person at the appeal hearing. He suggests that the Court needs to consider transporting him to Auckland or Wellington for a "proper hearing" in his presence.

[145] Section 15E, though not directly applicable to the Court of Appeal, as we have said above,[31] provides guidance as to the matters to be taken into account in determining whether such an order should be made.

(a) The nature of the proposed step or hearing:

This is a pre-trial appeal hearing addressing legal argument. It will largely consist of legal submissions by counsel. Although the submissions are lengthy and refer to constitutional issues, these are essentially standard pre-trial applications. Historically, appellate legal argument has almost invariably taken place in the absence of the appellant. The Crown submitted, and we agree, that this type of hearing is suitable for determination in the manner proposed. It is not a trial and no verdict will result.

(b) The interests of justice:

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[31] At [106].

> The appellant is represented by two counsel at the hearing, for whom legal aid has been approved. He is able to see and hear everything that happens in the courtroom via live-link television. During the three and a half days when the applications the subject of this judgment were heard, the appellant indicated that he could hear clearly throughout. Only rain on the roof in Pitcairn briefly interrupted the hearing. The Court then adjourned to ensure the appellant was not disadvantaged. In the regular adjournments, and when the Court adjourned at the request of appellant's counsel, the appellant was able to communicate freely and in private with his lawyer. No difficulties for the appellant were apparent or raised. We find no substantive prejudice to his interests by his participation being by live-link television.

(c) The interest in the efficient disposal of Court business:

> The appellant's suggestion that he be transported to Auckland or Wellington implies an acknowledgement of the efficiencies available if the appeal is heard in New Zealand. The inevitable delays inherent in the Court sitting in Pitcairn would not advance the proceeding nor meet the appellant's expressed wish that these charges be progressed to trial.

[146] The appellant referred to three cases in support of his contention that he be present in person.

[147] *Taylor v Manager of Auckland Prison.*[32] This case is addressed in the recusal judgment of McGechan and Potter JJA and little more needs be said.[33] The important distinguishing factors are, first, that Mr Taylor was to represent himself in person at the hearing where the Crown proposed an audio visual link (AVL) be used, although at the hearing before Duffy J he was represented by counsel. The appellant, in contrast, will continue to be represented by two counsel throughout the appeal hearing.

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32 *Taylor v Manager of Auckland Prison* [2012] NZHC 1241, Duffy J, 5 June 2012.
33 At [88].

[148] Secondly, while this appeal involves constitutional issues and the appellant's submissions are lengthy and wide-ranging, these are standard pre-trial applications on appeal.

[149] In *Sakhnovskiy v Russia*,[34] the case was determined in favour of the applicant on the ground that he did not have effective legal representation. But the European Court of Human Rights left open the use of AVL.

[150] In *Zubayrayev v Russia*,[35] two years later, the European Court of Human Rights stated that AVL is not incompatible with a fair and public hearing. The applicant had not been present at the hearing, which the Court held to be unfair in the circumstances of the case. The Court said:

> 32. Admittedly, the applicant was detained in the Republic of Chechnya and the appeal hearing was to be held in Moscow, that is, some 1,779 kilometres away, and the applicant's transfer for the purposes of his participation in the appeal hearing in person would have called for certain security measures and needed to be arranged in advance. The Court notes, however, that it was also open to the domestic judicial authorities to ensure the applicant's participation in the appeal hearing by means of a video link prescribed by the domestic rules of criminal procedure and earlier found by the Court to be compatible with the requirements of Article 6 of the Convention (see *Marcello Viola v. Italy*, no. 45106/04, §§ 63-77, ECHR 2 November 2010). The Court notes that the Supreme Court did not discuss whether such an arrangement was feasible in the circumstances of the case.

[151] Rather than supporting the appellant's position, the two Russian cases recognise that AVL may be an appropriate and pragmatic means of ensuring for a litigant a fair and public hearing, provided the litigant can follow the proceeding, can be heard as necessary, and can effectively and confidentially communicate with his counsel. This will require a case specific enquiry by the Court considering whether an order should be made.

[152] Those criteria can be adequately and properly met in respect of the appellant's appeal hearing. The interest in the efficient disposal of court business weighs heavily in favour of live-link television in the circumstances of this case and we see no prejudice to the appellant's fair trial rights.

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34 *Sakhnovskiy v Russia*, ECHR, Application no. 21272/03, 2 November 2010.
35 *Zubayrayev v Russia*, ECHR, Application no. 34653/04, 26 September 2012.

[153] We conclude that an order under s 15F of the Judicature (Courts) Ordinance is appropriate.

This decision and the substantive grounds of appeal

[154] This decision as to venue for the hearing of this appeal is final. It has been necessary for us to determine some matters in the course of this decision which arise also within substantive grounds of appeal which have been adjourned. We record that determinations for the purpose of this decision do not preclude further argument and consideration relating to those matters, otherwise than as to venue, when those substantive grounds are considered.

Conclusion

(a) The Court notes counsel's mutual accommodation with regard to the Judges swearing of Oaths of Office and Allegiance as recorded in paragraph [26].

(b) The application for recusal of the President is dismissed.

(c) All hearings of the appeal from the Supreme Court decision dated 12 October 2012 and any related and associated matters will take place in New Zealand. The appellant will participate in those hearings by live-link television, and the proceeding will be publicly available on Pitcairn with proper prior notification.

(d) The appellant within 21 days of this judgment is to file and serve a memorandum of not more than four pages which succinctly identifies the issues which he contends this Court must address within the confines of the current prosecutions. It should indicate areas in respect of which further evidence is required and factual findings made in the Supreme Court. Within 21 days of receipt of that document, the Crown must similarly indicate areas which it contends need further consideration in the Supreme Court and in this Court.

(e) There will be a telephone conference with the President and counsel on Friday, 28 June 2013, at 9 am, to consider any matters arising from the parties' memoranda, to monitor steps being taken in the Supreme Court, and to consider the future conduct of matters in the Court of Appeal.

[155] The Court of Appeal does not have power to direct which Supreme Court Judge should preside at a trial or for any pre-trial applications. It would not, in any event, be proper for us to do so. That is a matter for the Chief Justice.

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Robertson P

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McGechan JA

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Potter JA