IN THE PITCAIRN ISLANDS
COURT OF APPEAL

CA 1/2012

BETWEEN **MICHAEL WARREN**

Appellant

AND **THE QUEEN**

Respondent

Hearing: 27 – 31 July 2015

Coram: Potter JA (Acting President)
Blanchard JA
Hansen JA

Counsel: T Ellis for Appellant
S Mount, Attorney General, and K Raftery for Respondent

Judgment: 23 October 2015 at 5 pm

JUDGMENT OF THE COURT

Table of Contents

Introduction

[1] The appellant, Mr Warren, a resident of Pitcairn Island, faces 20 charges under the Criminal Justice Act 1988 (UK) and five charges under the Summary Offences Ordinance (Pitcairn). These charges were laid in the Pitcairn Magistrate's Court sitting in Auckland, New Zealand, on 19 November 2010, after the New Zealand Minister of Justice granted permission under the Pitcairn Trials Act 2002 (NZ) for the Pitcairn Island Courts to sit in New Zealand in relation to this matter.

[2] The charges relate to pornographic images, videos and documents of an indecent and obscene nature relating to both adults and children, found in Mr Warren's possession when search warrants were executed at his home and office on 26 May 2010. Mr Warren was found in possession of at least 1,013 images and videos of child pornography.

[3] On 1 August 2011 a Pitcairn Magistrate committed Mr Warren for trial in the Supreme Court on the 20 charges under the Criminal Justice Act. The five charges under the Summary Offences Ordinance have been adjourned pending disposition of the more serious charges.

[4] The appellant first appeared in the Supreme Court on 23 August 2011. On 29 September 2011 the Crown and the appellant jointly filed a Plea and Directions Memorandum containing the following:

> The Accused admits the following facts, subject to a defence of legitimate or reasonable excuse:
>
> (a) On 26 May 2010 he possessed the photographs and video recordings referred to in the 20 charges;
>
> (b) Those images if put before an English jury would be found to be indecent under English law;
>
> (c) Those images depicted children aged under 18 years.

[5] Since then there has been a series of complex pre-trial issues involving numerous hearings in the Supreme Court and the Court of Appeal. Efforts by the Courts and the Crown to advance the matter with reasonable expedition have had to be balanced with fair opportunity for Mr Warren to advance the numerous challenges he

has made. We understand there is now agreement that the trial is to be held in two parts. The first part, to be held in New Zealand, is scheduled for February 2016 and will relate to matters arising in New Zealand, such as the forensic analysis of the exhibits in the Electronic Crime Laboratory. The second part of the trial will be held on Pitcairn Island at a later date.

[6] The matters before this Court arise from two Supreme Court pre-trial judgments: the judgment of Lovell-Smith J on 12 October 2012 and the judgment of Haines J on 28 November 2014, notices of appeal having been filed respectively on 26 October 2012 and 23 December 2014.[1] The parties agreed that all live appeal issues should be heard before this Court at the sitting commencing on 27 July 2015.

[7] At the outset of the hearing the Court ordered, pursuant to s 50(3) of the Pitcairn Constitution, that the Court of Appeal sit in New Zealand and that an audio-visual link with the appellant on Pitcairn Island be established and maintained for the duration of the hearing.[2] Mr Warren participated throughout the five day hearing via the audio-visual link established, with only minor interruptions from occasional brief disconnections.

Pitcairn Island

[8] Pitcairn is an Overseas Territory of the United Kingdom. It is governed under the Pitcairn Constitution created by the Pitcairn Constitution Order 2010, a statutory instrument made under the British Settlements Act 1887.

[9] Legislative power for Pitcairn rests with the Governor, who makes Ordinances after consultation with the Island Council. Executive power rests with Her Majesty and is exercised by the Governor and officers subordinate to the Governor. The Island Council has the powers and functions set out in the Local Government Ordinance.

---

1 *R v Warren* Pitcairn Islands Supreme Court T 1/2011, 12 October 2012 [*Lovell-Smith J Judgment*]; and *Warren v R* Pitcairn Islands Supreme Court T 1/2011 and CP 1/2013, 28 November 2014 [*Haines J Judgment*].

2 An order to like effect was made by this Court in its judgment of 12 April 2013, but because of the unusual route by which the live points on appeal from the two Supreme Court judgments reached this Court, the further order was made on 27 July 2015 for avoidance of doubt.

[10] Pitcairn is one of a group of four islands situated in the Southern Pacific Ocean. Its nearest neighbours are New Zealand, some 5,500 kilometres (3,500 miles) to the south-west, and Peru, approximately 10,000 kilometres (6,200 miles) in the opposite direction. There is no access to Pitcairn by air, there being no airport or airstrip, and there is no sea port. Access by sea must culminate in delivery of the passengers at Bounty Bay by longboats operated by the Islanders, due to the precipitous perimeters of Pitcairn Island. There is limited internet and television access. Electricity is provided by generators.

[11] Pitcairn, occupying 4.6 km^2, is the only populated island. Henderson, Ducie and Oeno Islands are uninhabited. The population of Pitcairn is dwindling. It currently comprises approximately 50 people (down from 56 in 2014), 38 of whom have the right to vote while 30 comprise the able-bodied work force. The economy is largely subsistence, with United Kingdom aid providing approximately 90% of government expenditure. Recent efforts to encourage immigration have been ineffective.

[12] Pitcairn's small population and physical isolation for materials, technology, personnel and expertise, places it in a unique situation in many respects, including governance. It has the smallest population of any democracy in the world. Many Islanders hold multiple roles. In 2010 Mr Warren was simultaneously the Mayor, the Communication Technician and Second Engineer for the Island.

[13] Pitcairn has a long association with New Zealand, which mainly came about through shipping routes. Britain has traditionally turned to New Zealand for assistance in the governance and administration of Pitcairn. Hence, the Pitcairn Trials Act 2002 (NZ) provides for trials to take place in New Zealand. Since 1970, when Fiji became independent, Pitcairn has been administered from the British High Commission in New Zealand, and the British High Commissioner in New Zealand is appointed the Governor of Pitcairn. Prior to the Pitcairn Constitution Order 2010, Pitcairn's constitutional arrangements were recorded in the Pitcairn Order 1970 and the Pitcairn Royal Instructions 1970.

Jurisdiction on appeal

[14] This appeal is against a range of pre-trial rulings by the Supreme Court. This Court's jurisdiction on appeal against pre-trial rulings is set out in ss 35DD and 35E of the Judicature (Appeals in Criminal Cases) Ordinance. Leave of this Court to appeal is required under both sections. On appeal this Court may vary or set aside the Supreme Court decision or make such other order as it thinks ought to have been made by the Supreme Court Judge.

[15] Mr Warren also appeals under s 25(10) of the Pitcairn Constitution, which provides for an appeal as of right to this Court, and from this Court to the Privy Council, against "any final determination" of any application or question by the Supreme Court or this Court, as the case may be. The Crown accepts that the decisions of Lovell-Smith J and Haines J in dismissing the appellant's applications under s 25 are "final determinations" for the purpose of his appeal to this Court. Hence, leave is not required.

Recusal application

[16] On 22 July 2015, five days before the hearing in this Court was due to commence, Mr Warren filed an application for recusal of the entire bench of this Court. The appellant filed submissions with his application for recusal and the Crown filed a memorandum opposing the application on 24 July 2015. We heard oral submissions at the start of the hearing on 27 July 2015. Having taken time to consider, we dismissed the application with reasons to follow. We now state those reasons.

Relevant background

[17] There are four permanent judges of this Court, the President and the three Judges comprising the Coram.

[18] On 11 June 2015, Robertson P, through the Registrar, informed the parties of the Coram for the hearing scheduled to start on 27 July 2015, comprising Potter JA (Presiding) and Blanchard and Hansen JJA. Mr Warren had previously filed an application for recusal of the President dated 27 May 2015 upon the ground of lack of

independence. Mr Warren has made seven applications for recusal at the outset of Supreme Court and Court of Appeal hearings following the laying of charges in 2010.

[19] This appeal hearing relates to issues arising from the two Supreme Court judgments of Lovell-Smith J and Haines J. A minute of the President dated 13 September 2013 records that counsel preferred that all matters stand over until issues before the Supreme Court were concluded. A further minute on 18 March 2014 directed that all issues and any appeals from the April 2014 Supreme Court hearing (that before Haines J) be dealt with together. Accordingly, the Coram is appointed for the hearing of a fresh appeal.

Grounds for recusal

[20] The grounds raised by the appellant for recusal are:

(a) The President lacked independence and so was not able to act in selecting the Coram.

(b) The Coram selected lacks objective independence and impartiality, as the selection of judges (and in particular the change in composition from earlier hearings) was arbitrary and there was no system in place governing selection or replacement of judges or ability to challenge such selection.

[21] The Crown's position is that:

(a) The President does not lack independence and even if he did, this would not require the present members of the Court to recuse themselves.

(b) The selection of judges for this hearing does not in any way give rise to any lack of objective independence or impartiality.

Objective test for independence and impartiality

[22] Mr Warren is guaranteed fair trial rights by s 8 of the Pitcairn Constitution. This requires hearings before an independent and impartial tribunal. Mr Warren makes no allegation of personal bias. The issue is therefore the independence and objective impartiality of the judges whose recusal is sought. In *Bochan v Ukraine,* cited by both the appellant and the Crown, the European Court of Human Rights stated the objective test as:[3]

> … ascertaining whether the judge offered sufficient guarantees to exclude any legitimate doubt in this respect.

The Court continued:[4]

> Under the objective test, it must be determined whether there are ascertainable facts which may nevertheless raise doubts as to the courts' impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings.

[23] The same Court in *Moiseyev v Russia* stated the objective test in similar terms:[5]

> As regards the issue of "independence", the Court reiterates that in order to establish whether a tribunal can be considered "independent" … regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence.

[24] In this case, were there ascertainable facts which may raise legitimate doubts as to the Judges' impartiality?

[25] In submissions, Mr Warren said there have been or will be 10 judges who have sat or will sit on this case. Relying on *Moiseyev*, he submitted that the selection by the President of the Judges for this appeal hearing without giving explicit reasons was arbitrary and unconstrained. He complained generally that no reasons have been given for changes of judges, no systemic practice is in place, and no system of review is available. He maintained these factors lead to a conclusion that the Court acts arbitrarily and is neither independent nor objectively impartial in all its sittings in relation to the appellant.

---

3 *Bochan v Ukraine* (7577/02) Section V, ECHR 3 May 2007 at [66].
4 At [66].
5 *Moiseyev v Russia* 62936/00 Section V, ECHR 9 October 2008 at [173].

[26] The context in *Moiseyev* was quite different from this case. In a trial for treason there were 11 replacements of judges on the bench during the course of the trial, without ascertainable reasons. The Court held:[6]

> In these circumstances, the applicant's doubts as to the independence and impartiality of the trial court may be said to have been objectively justified on account of the repeated and frequent replacements of members of the trial bench in his criminal case, which were carried out for unascertainable reasons and were not circumscribed by any procedural safeguards.

[27] The Court held there had accordingly been a breach of the applicant's fair trial rights. The Court referred to the "inordinate number of changes in the bench", made without explanation.[7] *Moiseyev* is not authority for a principle that reasons must be given for the assignment of a hearing to a particular judge or judges, nor for the need for an identified process or practice for assignment of cases or hearings to judges. These factors became of significance in *Moiseyev* only when doubt about the impartiality of the bench had been raised by the unexplained repeated and frequent replacement of judges on the bench during the trial. But the absence of reasons and the absence of a legal process did not in themselves give rise to doubts about impartiality.

[28] In both *Moiseyev* and *Bochan* the Court recognised that legitimate reasons or grounds for reassignment of the case could be assumed from the circumstances.[8] In *Bochan* reassignment of a civil case to a different lower court was ordered by the Ukraine Supreme Court after it expressly disagreed with the findings of a lower court. These circumstances, together with the additional concern that the Supreme Court had failed to give reasons for the reassignment, raised objective concerns that the judges of the court to which the case was transferred would have to consider the case in accordance with the Supreme Court's view.

[29] In this case the proceedings have taken place over an extended period since charges were laid in November 2010. There have been several applications and appeals and the hearings associated with them. The appellant has raised challenges against various members of the Pitcairn judiciary. Inevitably there have been changes in the judiciary by reason of retirement, resignation, appointment of new judges and

---

6 At [184].
7 At [180].
8 *Moiseyev v Russia*, above n 5 at [181]; and *Bochan v Ukraine*, above n 2 at [71].

unavailability from time to time. Assignment of judges for the various hearings has been undertaken routinely, in accordance with the normal role of domestic courts and authorities in the management of proceedings, recognised in both *Bochan* and *Moiseyev*.[9]

[30] We turn briefly to consider Mr Warren's submission that the President lacked independence and therefore should not have selected the Coram for this appeal. Mr Warren's claim that the President lacked independence revolves around alleged errors in his appointment and the subsequent retrospective validation of his appointment (and the appointment of two other Justices of Appeal, since resigned) by the Pitcairn (Court of Appeal) Order 2012. The alleged lack of independence, it is said, derives from the retrospective nature of the Order, which is said to render it unlawful. By acting pursuant to an unlawful Order, the President is said to have demonstrated lack of independence. Further, the Order is said to amount to influence and interference by other branches of government with judicial decision-making, thus compromising independence and prejudicing the appellant's fair trial rights.

[31] We do not accept these submissions. Section 44 of the Pitcairn Constitution requires judges to act independently. The 2012 Order responded to a complaint about the validity of three judicial appointments (those of Robertson P, Baragwanath and McGechan JJA) on technical grounds. But even if the President's independence were compromised (which we reject), that does not taint or infect in any way the independence and impartiality of the Coram selected for this hearing. Mr Warren has raised objections in relation to both the President and Chief Justice Blackie. The President has selected the three remaining permanent members of the Pitcairn Court of Appeal as the Coram for this appeal. This is the hearing of a fresh appeal and there is no issue of replacement of judges during the hearing, as was the case in *Moiseyev*.

[32] There being nothing on the facts to suggest lack of independence or impartiality on the part of the Coram, or that the fair trial rights of the appellant are compromised in any way, we dismissed the application.

---

9 *Bochan v Ukraine*, above n 3 at [71]; and *Moiseyev v Russia*, above n 4 at [176].

Judges in their own cause

[33] Although not stated or argued as a separate ground in the appellant's application for recusal of the Coram or the subject of a separate application, the appellant raised in submissions that the Judges of this Court are automatically disqualified as judges in their own cause.

[34] Haines J dealt with this issue under the heading "The disqualification point" at [296]-[304] of his judgment and at [304] rejected the submission in relation to the Supreme Court Judges.[10]

[35] The submission is advanced on two grounds:

(a) The Judges have a pecuniary interest in the outcome of the proceedings as the proceedings challenge their appointments. The alleged pecuniary interest is the continuation of the Judges' ordinary judicial remuneration. It is not alleged that any of the Coram has an external economic or financial interest which could give rise to a conflict of interest.

(b) Non-pecuniary: the status of the decision-maker as a judge.

[36] As to (a), the appellant cites from Lord Hutton's judgment in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)*:[11]

> I find persuasive the observations of Lord Widgery CJ in *R v Altrincham Justices, ex p Pennington* [1975] QB 549 at 552*:*
>
> > There is no better known rule of natural justice than the one that a man shall not be a judge in his own cause. In its simplest form this means that a man shall not judge an issue in which he has a direct pecuniary interest, but the rule has been extended far beyond such crude examples and now covers cases in which the judge has such an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the impartiality and detachment which the judicial function requires.

---

10 *Haines J Judgment*, above n 1.

11 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL) at 145.

[37] The appellant then submits "in the case before the Court the very appointments of the Judges sitting is under attack from the start of their tenure, to the end of it. It is without doubt besides anything else a direct pecuniary interest. Whilst no more need be said, judges not disqualifying themselves would lead a well informed, independent observer to conclude this would undermine judicial integrity".

[38] Shortly after *Pinochet*, in *Locabail (UK) Ltd v Bayfield Properties Ltd,* the English and Welsh Court of Appeal adopted a de minimis exception, being a personal interest "so small as to be incapable of affecting [the Judge's] decision one way or the other."[12] We accept the Crown's submission and agree with the conclusion of Haines J, that any financial benefit to the Judges in the continuation of the case is de minimis. Judges of the Court of Appeal sit only when required.[13] The link is at best tenuous and incidental and it cannot sensibly be suggested that it would affect the discharge by the Judges of their decision-making responsibilities.

[39] Similarly, the issue of the Judge's status as a decision-maker falls within the de minimis category. Under s 52(5) of the Pitcairn Constitution, Pitcairn Judges take the oath of allegiance and the judicial oath "… to do right to all manner of people according to law, without fear and favour, affection or ill will". It is regrettable that the appellant should suggest, and unlikely, that a judge who has taken these oaths would be affected by the potential to benefit from the result of a question for decision such as the validity of the swearing in of the Chief Justice.

[40] Nor do we accept Mr Warren's submission that a fair minded and informed observer, having considered all the facts, would conclude there is a real possibility, viewed objectively, that the Coram may be biased.

[41] The above conclusions render it unnecessary to consider the doctrine of necessity advanced by the Crown. However, we note the Bangalore Principles (referred to extensively by the appellant) provide:[14]

---

12 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 (CA) at [10].

13 That happens only infrequently; there is at present only the one case in the Pitcairn court system of which we are aware.

14 Bangalore Principles of Judicial Conduct, value 2.5.

> … disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case ...

[42] Only three judges are available to constitute the Coram for this appeal hearing. Any substitute judge appointed would face the same challenges from the appellant. The doctrine of necessity would apply in these circumstances.

Was the Chief Justice lawfully sworn in?

[43] In the Supreme Court, by application dated 3 May 2013, Mr Warren sought a declaration that Chief Justice Blackie has not lawfully entered office or has vacated office. The application was dismissed by Haines J.[15] A number of grounds were advanced in support of the application in the Supreme Court, which are addressed comprehensively by Haines J.[16] On appeal, only the oath, the location of swearing in and "the consequences" are pursued; the claimed consequences include that no judge of the Supreme Court or Court of Appeal is validly in office because the Chief Justice was unable lawfully to administer the oaths to other judges.

[44] The appellant contends that Haines J was wrong in determining that:

(a) The Governor had power to administer the judicial oath to the Chief Justice and that his oath was valid.

(b) There was no requirement for the judicial oath and oath of allegiance to be taken before a judicial officer in a public court hearing on Pitcairn.

[45] The facts relating to the appointment of the Chief Justice are set out in the judgment of Haines J:[17]

- Charles Stuart Blackie was appointed Chief Justice of the Supreme Court of Pitcairn, Henderson, Ducie and Oeno Islands with effect from 1 February 2000, by Notice under the hand of the (then) Governor, dated 8 June 2000.

---

15 *Haines J Judgment*, above n 1 at [213].
16 At [174]-[213].
17 At [181]-[184].

- He was sworn in at Auckland, New Zealand, on 30 June 2000 by the (then) Governor, who administered to him the oath of allegiance and the judicial oath.

- At the time there was no magistrate or judge of the Supreme Court or Court of Appeal in office in Pitcairn (there appears to have been an Island magistrate in office).

- At the time there was no legal authority for a Pitcairn Court to sit in New Zealand.

[46] In holding that the Governor had power to administer the oaths to the Chief Justice, Haines J relied on the Pitcairn Royal Instructions 1970, s 3 of which provides:

> The Governor may, whenever he thinks fit, require any person in the public service of the Islands to make an oath or affirmation of allegiance in the form set out in the Schedule to these Instructions together with such other oaths or affirmations as may from time to time be prescribed by any law in force in the Islands, in the form prescribed by any such law. The Governor shall administer such oaths or affirmations or cause them to be administered by some public officer in the Islands.

[47] There was no form of judicial oath prescribed for Pitcairn at the time, but the form was provided by United Kingdom statutes, the Promissory Oaths Act 1868, s 4, and the Supreme Court Act 1841 (now known as the Senior Courts Act 1981), which by s 16(1) of the Judicature (Courts) Ordinance 1999 operated to fill the gap.

Was the Governor authorised to administer the oath to the Chief Justice?

[48] Mr Warren submits that Haines J was wrong to conclude that "a judicial officer was a public servant" and could therefore be sworn in by the Governor. He says the reasoning applied by Haines J overlooks that the judiciary must be independent and "cannot be public servants liable to direction by their employers". Counsel for the appellant quoted extensively from a 1932 article by Professor Holdsworth, which discussed the meaning of "persons in His Majesty's service" in the context of a specific Order in Council relating to salary cuts in the United Kingdom.[18] The author reasoned,

---

[18] WS Holdsworth "The Constitutional Position of the Judges" (1932) 48 LQR 25.

applying the "law of the constitution", that the phrase did not extend to judges who were statutory officers and not agents of the Crown.

[49] Not only does Professor Holdsworth's article concern a different ordinance in a different context, but it concerns a different phrase. Section 3 of the Pitcairn Royal Instructions 1970 applies to "any person in the public service of the Islands". It does not refer to "public servants" and it is not limited to those in an employment, contractual or agency relationship with the Crown.

[50] As Haines J noted,[19] the phrase is to be interpreted purposefully in its context, including:

(a) The Pitcairn Order 1970, s 5, which in addition to empowering the Governor to make laws for the peace, order and good government of the Islands, specifically authorised him to constitute courts for the Islands.

(b) The Judicature (Courts) Ordinance 1999, s 5, which at that time constituted the Supreme Court and empowered the Governor to appoint the Chief Justice and other judges.

(c) The Pitcairn Royal Instructions 1970, which empowered the Governor to administer not only the oath of allegiance but also "other oaths".

[51] We agree with Haines J that these provisions should be "interpreted as evidencing a unified purpose to constitute courts, to appoint judges and to administer the requisite oaths".[20] Mr Warren's submission ignores the careful distinction in s 3. Judges are not "public servants" but, as Haines J says, the natural meaning of the phrase in s 3 "any person in the public service of the Islands" is broad enough to include judges.[21]

[52] Further, the reality and practicality of the situation support this interpretation. The Governor has express power to make laws for the peace, order and good

---

19 *Haines J Judgment*, above n 1 at [194].
20 At [195].
21 At [196].

government of the Islands, to constitute offices and make appointments to those offices, and for that purpose to require persons in the public service of the Islands to make an oath, and to administer such oaths. When Chief Justice Blackie was appointed the first Chief Justice of Pitcairn, there was no other appropriate judicial officer to administer the oath. The appellant submits that a statutory process could have been devised, providing for the manner and location of the oath to be taken to cater for the swearing in of the first Chief Justice. He says the absence of a process makes the procedure conducted unlawful.

[53] We accept the Crown's submission that specific legislation was not necessary. The Governor had explicit power to administer the oaths and it was lawful and practical in the circumstances for the Governor to swear in the first Chief Justice.

[54] However, should there remain any doubt as to the Governor's authority to administer the judicial oath to the Chief Justice under the provisions referred to, we consider he was entitled to do so in exercise of the Royal Prerogative.

[55] In *Terrell v Secretary of State for the Colonies* Lord Goddard CJ said:[22]

> It is for the Crown by exercise of the Prerogative, or Parliament by statute, to set up courts in acquired territory whether the acquisition be by cession, conquest or mere settlement, and the conditions under which judges of those courts are to hold their office must depend upon the terms on which the Crown or Parliament establish them.

[56] It must follow that where a colonial court is established by legislation that omits to provide for an essential step in the process, that gap in the legislation can be filled by resort by the Governor to the Prerogative. The provisions in this case in the 1999 Ordinance did not restrict the exercise of the Prerogative for plainly they did not cover the field.[23]

[57] Given the powers vested in the Governor of Pitcairn to constitute courts for the Pitcairn Islands, and to appoint the Chief Justice and other judges, it cannot have been intended that he would have no authority to administer the judicial oath to the Chief Justice and other judges. Such an exclusion would have required clear expression. The

---

22 [1953] 2 QB 482 (QB) at 493.

23 See generally *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL).

authority of the Governor to administer the judicial oath is a necessary inference derived from the Crown's responsibility to establish courts in its Pitcairn Islands territory.

[58] Mr Warren further submits that Haines J erred in finding that the oaths were not required to be taken in open court and need not be sworn on Pitcairn Island.

[59] This aspect was comprehensively traversed by Haines J in his judgment at [200]-[212]. At [209] he says, in summary, that there is no such requirement in Pitcairn ordinances and that English statutory provisions and English law relied on by the appellant do not assist. Mr Warren has not identified in which respects the Judge's careful analysis is wrong. Importantly, Haines J states as "the overarching point" that the unique circumstances of Pitcairn, the distance, the small size of the population and logistical difficulties in arranging sea passage, make it impracticable to swear in a senior judicial officer on the Island in a court sitting. He said:[24]

> These local circumstances require a local solution, and this was achieved by the vesting in the Governor of the power to constitute courts and offices (the Pitcairn Order 1970, ss 5 and 7), to appoint the Chief Justice and other judicial officers (the Judicature (Courts) Ordinance 1970, s 5) and to administer the oath of allegiance and "such other oaths" as may be prescribed by the law in Pitcairn (Pitcairn Royal Instructions 1970, s 3). In these circumstances, there is neither need nor legal "space" for any super-added requirements of English law.

[60] The important fact is, as Haines J noted, that the Chief Justice took his oaths, not the location where he did so. We agree.

[61] Finally on this issue, we turn to the Crown's submission that the de facto officer doctrine is a complete answer if there remain any concerns over the validity of the Chief Justice's oath. Mr Warren maintains that the de facto doctrine does not apply in this case.

---

[24] *Haines J Judgment*, above n 1 at [211].

[62] The Crown referred to *Coppard v Customs and Excise Commissioners (Lord Chancellor intervening)*.[25] Sedley LJ, in delivering judgment for the English and Welsh Court of Appeal, said:[26]

> The central requirement for the operation of the doctrine is that the person exercising the office must have been reputed to hold it. Given this, *Wade & Forsyth, Administrative Law,* 8th ed (2000), pp 291-292 describe the doctrine in this way:
>
> > In one class of case there is a long-standing doctrine that collateral challenge is not to be allowed: where there is some unknown flaw in the appointment or authority of some officer or judge. The acts of the officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all.

After referring to *Re Aldridge*[27] and *Fawdry & Co v Murfitt (Lord Chancellor intervening)*,[28] where doubt was cast on the application of the doctrine to the position of a "usurper", the Court held:[29]

> We would hold that the de facto doctrine cannot validate the acts, nor therefore ratify the authority, of a person who, though believed by the world to be a judge of the court in which he sits, knows that he is not. We accept, on well known principles, that a person who knows he lacks authority includes a person who has shut his eyes to that fact when it is obvious, but not a person who has simply neglected to find it out. We will call such a person a usurper.

[63] The Court found that the case was not one of usurpation in that the judge who sat in the High Court was not authorised to do so "by a most regrettable oversight". There was neither knowledge by the judge of his own incapacity nor wilful blindness to it.[30]

[64] The Court then considered whether application of the de facto doctrine validated not only the acts of the de facto judge but the judge's office itself, such that it was a tribunal established by law for the purposes of art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms scheduled to the Human

---

25 *Coppard v Customs and Excise Commissioners (Lord Chancellor intervening)* [2003] EWCA Civ 511, [2003] QB 1428.
26 At [15].
27 *Re Aldridge* (1893) 15 NZLR 361 (CA) at 372.
28 *Fawdry & Co v Murfitt (Lord Chancellor intervening)* [2002] EWCA Civ 643, [2003] QB 104.
29 *Coppard v Customs and Excise Commissioners (Lord Chancellor intervening)*, above n 25 at [18].
30 At [23].

Rights Act 1998 (UK). The Court held that the judge-in-fact is a tribunal whose authority is established by the common law.[31]

[65] Addressing in this case the question posed by the Court in *Coppard*, "was the judge a usurper?", the answer in respect of Blackie CJ is clearly "no". He was appointed by Notice of Appointment dated 8 June 2000. He swore the oath of allegiance and the judicial oath before the then Governor, Martin Williams, at the offices of the British High Commission in Auckland on 30 June 2000. He has carried out his duties for the past approximately 15 years in the bona fide belief that he validly holds office of Chief Justice of Pitcairn. Mr Warren raised for the first time before Haines J the alleged invalidity of the Chief Justice's judicial oath,[32] and the only judicial determination on the point by Haines J in December 2014 is to the contrary. The Chief Justice was not obliged to cease performing his judicial duties merely because counsel had raised a question, when the Chief Justice did not agree with what was being said against him. He was not shutting his eyes to an obvious fact.

[66] The international cases and texts referred to in submissions by the appellant's counsel, including *Prasad v Republic of Fiji* and *Mitchell v Director of Public Prosecutions*, relate to situations of revolution and constitutional crisis where the doctrine of necessity may be applied under very different circumstances and in accordance with different principles.[33] They do not support the appellant's submission that *Coppard* is not to be followed in this case.

[67] The challenge by the appellant to the validity of the Chief Justice's appointment cannot succeed.

[68] As a further observation, we note that on 12 March 2013 a document was given to this Court entitled "Waiver/Undertaking on behalf of Mr Warren". It arose out of challenges to the manner in which the oaths of the then presiding Court of Appeal Judges had been taken. The document proposed an agreed arrangement for Chief Justice Blackie to administer the oaths to Sir James Bruce Robertson, Robert Andrew

---

31 At [32] and [40].

32 In a Memorandum of Counsel dated 19 July 2013, filed in the Supreme Court.

33 *Prasad v Republic of Fiji* [2001] NZAR 21, [2001] 1 LRC 665 (Fiji HC) and *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35 (Grenada CA) at 88-89.

McGechan and Dame Judith Marjorie Potter, in the Supreme Court of Pitcairn sitting in the High Court at Auckland. The document recorded that if the proposal was followed, Mr Warren undertook that in all future court hearings arising from present prosecutions he would not challenge a number of propositions, including:

> 3.1 …
>
> (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.

[69] The agreed process for taking the oaths of the Court of Appeal Judges was duly implemented on 14 March 2013 at the High Court at Auckland.

[70] Mr Warren subsequently argued that the waiver/undertaking was of no effect because of the terms of s 7, Promissory Oaths Act 1868. He contended that these terms are mandatory and incapable of waiver by counsel. In its judgment of 12 August 2013, this Court rejected that contention on its merits and held that the waiver/undertaking was effective and that the validity of the Judges' appointments could not be challenged.[34]

[71] The waiver/undertaking was not referred to in submissions on the issue of the validity of the Chief Justice's oaths. Mr Warren would no doubt have similarly argued that the matters in (c) and (d) above were incapable of waiver if Chief Justice Blackie was not validly sworn in. On this issue we have rejected the appellant's contentions on their merits, but note the appellant's acceptance in the waiver/undertaking of 12 March 2013 that the Chief Justice was lawfully entitled to administer the judicial oath and the oath of allegiance to the Court of Appeal Judges then presiding.

The Pitcairn Constitution

[72] The appellant challenges various aspects of the Pitcairn Constitution and legal system, which he contends make the intended trial in this case unlawful or unfair. He

---

[34] *Warren v R*, CA 1/2012, 12 August 2013, at [19].

seeks a stay of proceedings on the basis that the matters complained of amount to an abuse of process by the Crown. As his primary complaints of this kind concern the non-representative nature of the way in which Pitcairn laws are created and the absence of any provision giving him a right to trial by jury, we must briefly describe the Constitution of Pitcairn which was established by the Pitcairn Constitution Order 2010 made by Her Majesty the Queen on 10 February 2010.

[73] The Constitution is found in Schedule 2 of the Order in Council. It begins with Part 1, consisting of s 1, which is a statement of partnership between the United Kingdom and Pitcairn stated to be based on values that include good faith, the rule of law, good government and compliance with applicable international obligations of both partners.[35]

[74] All organs of government of Pitcairn are said to have a duty to give effect to the partnership values.[36] But it is expressly provided that nothing in the section creates any legally enforceable rights or obligations.[37]

[75] Part 2 contains a guarantee of fundamental rights and freedoms, including the right to a fair trial ("everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law")[38] and the right to respect for private and family life.[39] Section 23 prohibits discriminatory laws. "Discriminatory" includes the affording of different treatment to different persons on the ground of race or any other form of status unless there is an objective and reasonable justification and reasonable proportionality.

[76] Section 25 relevantly provides as follows:

> (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.

---

35 The Pitcairn Constitution Order 2010, sch 2, s 1(1) [Pitcairn Constitution].
36 Section 1(2).
37 Section 1(3).
38 Section 8. No mention is made of trial by jury.
39 Section 11.

(2) The Supreme Court shall have original jurisdiction—
(a) to hear and determine any application made by any person in pursuance of subsection (1); and
(b) to determine any question arising in the case of any person that is referred to it in pursuance of subsection (7),
and may make such declarations and orders, issue such writs and give such directions as it considers appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this Part.

However, pursuant to subs (3) the Supreme Court may decline to exercise its powers under subs (2) if it is satisfied that adequate means of redress for the breach alleged are or have been available to the person concerned under any other law.[40]

[77] Finally, in Part 2, there is s 26 which requires that as far as it is possible to do so, legislation of Pitcairn must be read and given effect in a way which is compatible with the rights and freedoms set forth in the Part.

[78] In Part 3 (the Governor) there is provision for the appointment of a Governor by Her Majesty with functions conferred or imposed by the Constitution or any other law and functions assigned by the Queen through a Secretary of State.[41]

[79] Part 4 (the Executive) vests the executive authority of Pitcairn in Her Majesty. It is exercisable by the Governor, either directly or by subordinate officers.[42] An Island Council of elected members is established.[43]

[80] Section 36, in Part 5 (the Legislature), empowers the Governor, subject to the Constitution, "acting after consultation with the Island Council [to] make laws for the peace, order and good government of Pitcairn". The Governor is not obliged to act in accordance with the advice of the Island Council but if the Governor does not do so, any member of the Council has the right to submit his or her views on the matter to a Secretary of State.

[81] Laws made by the Governor must be published in Pitcairn as directed by the Governor.[44] They may be disallowed by Her Majesty through a Secretary of State.[45]

---

40 Section 25(3).
41 Section 27.
42 Section 33.
43 Section 34.
44 Section 39.
45 Section 41.

[82] Part 6 of the Constitution deals with the administration of justice. Section 42 provides for the application of English law:

> (1) Subject to subsection (2), the common law, the rules of equity and the statutes of general application as in force in and for England for the time being shall be in force in Pitcairn.
>
> (2) All the laws of England extended to Pitcairn by subsection (1) shall be in force in Pitcairn so far only as the local circumstances and the limits of local jurisdiction permit and subject to any existing or future Ordinance, and for the purpose of facilitating the application of the said laws it shall be lawful to construe them with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties and otherwise as may be necessary to render those laws applicable to the circumstances.

Section 42 reflects the position at common law. In *Cooper v Stuart*, Lord Watson said:[46]

> In the case of such a Colony the Crown may by ordinance, and the Imperial Parliament, or its own legislature when it comes to possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits. But, when that is not done, the law of England must (subject to well-established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. Insofar as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute.

Lord Watson was speaking of a colony established by settlement, namely New South Wales.

[83] Under s 43(1) of the Constitution the courts of Pitcairn are stated to be the Pitcairn Supreme Court, the Pitcairn Court of Appeal "and such courts subordinate to the Supreme Court as may be established by law". Subsections (3) and (4) provide:

> (3) Without prejudice to the generality of the power conferred by section 36(1), the Governor may by any law constitute courts for Pitcairn with such jurisdiction, and make such provisions and regulations for the proceedings in such courts and for the administration of justice, as the Governor may think fit.
>
> (4) Subject to any law, a court established under subsection (3) shall sit in such place in Pitcairn as the Governor, acting in accordance with the advice of the Chief Justice, may appoint; but it may also sit in the United Kingdom, or in such other place as the Governor, acting in accordance with the advice of the Chief Justice, may appoint.

[84] Section 44 requires that judges and judicial officers must exercise their judicial functions independently from the legislative and executive branches of government.

---

[46] *Cooper v Stuart* (1889) 14 App Cas 286 (PC) at 291.

[85] Section 45 constitutes the Supreme Court and confers on it, "subject to this Constitution", all such jurisdiction in and in relation to Pitcairn as is necessary to administer the law of Pitcairn. Section 49 constitutes the Court of Appeal.

[86] Section 53, which is referable to all the Pitcairn courts, provides:

> (1) There shall be paid to every judge or judicial officer such remuneration as may be agreed between the Governor and the judge or judicial officer immediately before his or her appointment, and such remuneration shall be charged on the public funds of Pitcairn.
>
> (2) The remuneration and allowances and other terms and conditions of a judge or a judicial officer shall not be altered to the disadvantage of the judge or judicial officer during his or her continuance in office.

[87] The Pitcairn Constitution Order contains transitional provisions. One of them states:

> **5.**—(1) The existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and, so far as possible, shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.
>
> (2) In subsection (1), "existing laws" means laws and instruments (other than Acts of Parliament of the United Kingdom and instruments made under them) having effect as part of the law of Pitcairn immediately before the appointed day.

No representative legislature

[88] Mr Warren complains, as he did in the Supreme Court, that this Constitution is undemocratic and is in breach of the Bill of Rights 1688, which contains guarantees of the freedom of election, of freedom of speech in Parliament and of frequent sittings of Parliament. The Constitution does not give Pitcairn a representative (elected) legislature. Rather, the legislature consists solely of the Governor, who does not have to accept the advice of the Island Council. Such a constitution, Mr Warren's counsel asserts, is unlawful because it contravenes international human rights norms, and thus all organs of government established under it and all ordinances created under it by the Governor are also unlawful. It follows, so the argument goes, that all arrangements for trials on or pertaining to Pitcairn are unlawful. Mr Ellis referred us to art 75 of the United Nations Charter and to arts 1 and 25 of the International Covenant on Civil and

Political Rights, and to the summary by Lord Collins of the principles emerging from decisions of the European Court of Human Rights on art 3 of the Optional First Protocol to the European Convention on Human Rights in *R (Barclay) v Lord Chancellor and Secretary of State for Justice*.[47] Counsel also invoked provisions of the Vienna Convention on the Law of Treaties 1969. He submitted that, by virtue of its ratification of these instruments, the United Kingdom, and through it the Government of Pitcairn, have an obligation in international law to comply with them and that this requires that Pitcairn must have a legislative chamber elected by universal suffrage and there must be a proper separation of the legislative and executive branches of government. Counsel also pointed to s 26 of the Pitcairn Constitution, to which we have referred above.[48] This last argument seemed to be that the Court should somehow read down Part 4 of the Constitution in a manner that would give effect to the references to a democratic society in Part 2. Mr Ellis went so far as to suggest that the Court could, if willing to do that, make a declaration under s 25 or even make an order striking down Part 2.

[89] We are bound to say that we have struggled to find any recognition in counsel's submissions of the realities of the unique circumstances on Pitcairn. We of course do not question the principles to which he made reference, but there are very real practical difficulties in giving full effect to them in a remote place where there is a declining population of now less than 40 adults. The system of governance in the 2010 Constitution is a rational response to the circumstances of the Pitcairners.

[90] Counsel's argument on the validity of the Constitution faces formidable legal difficulties, not the least of which is that the courts of Pitcairn are established under the very enactment which the appellant is challenging. We need not pursue that question because, in any event, there is an issue of justiciability under the broad law-making authority relied upon in the making of the Constitution.

[91] The Order in Council was made in the exercise of powers conferred, inter alia, by the British Settlements Act 1887. Section 2 of that Act declares:

---

47 *R (Barclay) v Lord Chancellor and Secretary of State for Justice* [2009] UKSC 9, [2010] 1 AC 464 at paras [52] et seq. In fact the First Protocol has not been extended to Pitcairn.

48 At [77].

> 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.

[92] In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* Lord Rodger confirmed that a power to make laws "for the peace, order, and good government" of British subjects and others within a British settlement is a power equal in scope to the legislative power of the Imperial Parliament and it is not open to the courts to hold that legislation enacted under such a power does not in fact conduce to the peace, order and good government of the territory concerned.[49] Nor, he said, is it open to the courts to substitute their judgment for that of the Secretary of State advising Her Majesty as to what can properly be said to conduce to that peace, order and good government:[50]

> This is simply because such questions are not justiciable. The law cannot resolve them: they are for the determination of the responsible ministers rather than judges.

Lord Hoffmann said that the words "peace, order, and good government" had never been construed as words limiting the power of a legislature. They were "apt to confer plenary law-making authority". He too said the courts will not enquire into whether legislation within the territorial scope of the power is in fact for the peace, order and good government or otherwise for the benefit of the inhabitants of the territory.[51]

[93] If it is said that, notwithstanding what is said in *Bancoult*, the courts may still pursue the question of whether the power conferred by the British Settlements Act permits the establishment of a non-representative legislature, the answer is that in fact the very purpose of the Act was exactly that, notwithstanding the guarantees of the Bill of Rights 1688 (and assuming for the moment that the Bill of Rights otherwise forms part of Pitcairn law). In *Sabally and N'Jie v H.M. Attorney-General* Lord Denning MR

---

49 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61, [2009] 1 AC 453, at [109].

50 At [109]. Lord Carswell agreed with Lord Rodger at [130].

51 At [50]. Section 36(1) of the Constitution gives the Governor the same plenary power of legislation but, in this case, the power may not be exercised inconsistently with the provisions of the Constitution and so is open to some limited review by the courts.

said that there were some settled colonies for which a representative legislature was unsuitable:[52]

> The population was too sparse: the inhabitants too little educated. Such were the Falkland Islands and the colonies on the West Coast of Africa, including the Gambia. For these colonies it was desirable to set up in those days a non-representative legislature; and as the Crown could not do it by its prerogative for a settled colony, Parliament intervened so as to enable the Crown to do it by statutory authority. It passed Acts in 1843 and 1860, which were repealed and replaced by the British Settlements Act, 1887. Under these Acts the Crown had power to, and did, appoint a governor to legislate with a nominated council but no elected assembly. This was the form of legislature in the Colony of the Gambia until recent times. It was a non-representative legislature constituted under the British Settlements Act, 1887, and nothing else.

[94] Mr Ellis rather dismissively said that the position in the Gambia was not at all comparable, but this overlooks the real point and the generality of Lord Denning's remarks. He could just as well have said that a representative legislature was unsuitable when the population was too sparse or too few.[53] The British Parliament, in enacting s 2 of the 1887 Act, was therefore authorising Her Majesty in Council to make laws which departed from the Bill of Rights guarantees to which we have referred, insofar as they might otherwise apply in a colony. It is well accepted that the Bill of Rights is not entrenched legislation and its provisions can expressly or impliedly be repealed.[54]

[95] Haines J went into the question of the validity of the Constitution with great thoroughness. We have not thought it necessary to deal with the international law principles which the Judge discusses[55] as Mr Ellis did not advance before us any plausible argument appearing to rely upon them. It is also apparent that counsel's arguments concerning the United Kingdom's treaty obligations and the consultation and other processes preceding the creation of the Constitution received much greater emphasis in the Supreme Court than they did before us. We consider that it has not been shown that Haines J erred either in law or in fact in his assessment of those matters.

---

52 *Sabally and N'Jie v H.M. Attorney-General* [1965] 1 QB 273 at 294.

53 It seems likely also that the population of the Falkland Islands in 1887 would have been at least as many as that of Pitcairn in 2010.

54 *Boodram v Baptiste* [1999] UKPC 30, [1999] 1 WLR 1709 at [8], 1711F–G.

55 *Haines J Judgment*, above n 1 at [22]-[31].

[96] The appellant's argument that the Constitution is invalid because it provides for a non-representative legislature is, in any event, simply unsustainable. Her Majesty was, by a statute of the United Kingdom Parliament, given full plenary power to make a constitution for Pitcairn for the peace, order and good government of Pitcairn, providing for a non-representative form of government. The references to democracy in other Parts of the Constitution are incapable of being read in a way that would assist the appellant's argument.

No trial by jury

[97] The appellant argues that he is entitled under the law of Pitcairn to a jury trial. This submission again asserts that the Bill of Rights 1688 forms part, indeed it was said a fundamental part, of the law of Pitcairn. It includes trial by jury as one of the "true auntient and indubitable Rights and Liberties" of the people of the United Kingdom.[56] The Constitution makes no mention of trial by jury in the Supreme Court and it might have been expected that some mention of it would have been made in Part 2 if it had been intended that a defendant were to have such a right. There is still, however, the issue of whether the provisions of the Justice Ordinance, under which trial can be by judge alone, can stand with the Bill of Rights guarantee of trial by jury. It would have been possible, consistently with the Constitution, for that or another ordinance to provide for jury trials. This was not done. The Justice Ordinance does not permit jury trials (and provides for assessors in the Supreme Court only if a judge so orders).

[98] Are Pitcairn laws concerning trial of criminal offenders invalid to the extent that they do not provide for trial by jury? Or, putting it another way, should a right of trial by jury be read into them for consistency with the Bill of Rights? We have no doubt that in this respect also the Bill of Rights is not in force in Pitcairn. We do not say this merely because the Bill of Rights does not expressly extend to Pitcairn (obviously, because of its date). It has in fact been taken to extend to other parts of the Commonwealth, including New Zealand, which became British territory after 1688. So that is not conclusive. The question, rather, is whether the guarantee of trial by jury is incompatible with local circumstances in Pitcairn. The position is essentially the same as for the non-representative legislature. In conferring plenary power by the 1887 Act,

---

[56] Bill of Rights 1688 (Eng) 1 Will & Mar c 2.

the British Parliament was making it possible for the Crown to make laws which were appropriate for its settled colonies, including those where local circumstances were very different from those in Britain. In an exercise of this power, the Queen in Council has provided in s 42 of the Pitcairn Constitution that the statutes of general application in force in England shall be in force in Pitcairn. The Bill of Rights is certainly a statute of general application in force in England. But in subs (2) of s 42 it is said that such laws of England extended to Pitcairn are to be in force in Pitcairn "so far only as the local circumstances" permit and subject to any existing or future ordinance. As we have seen, that was also the position at common law.

[99] Mr Ellis realistically accepted that it would be practically impossible to find 12 jurors whose knowledge of alleged serious criminal offending in the small community of Pitcairn, or whose relationship with the defendant, would not disqualify them. Indeed, by the standard set for jury selection in other parts of the common law world, it might be a struggle to find any Pitcairner able to serve on a jury, particularly where the charge alleged serious offending. Mr Ellis accordingly advanced his argument on the basis that as a consequence of the applicability of the Bill of Rights Mr Warren was entitled to be tried by a judge and a "small jury" (perhaps three persons) or by a judge and a similar number of assessors.[57] Late in the argument it was suggested that the practical difficulty could perhaps be solved by asking Pitcairners who live in New Zealand, Australia or the United States, to serve as jurors or assessors, though counsel did not articulate how they could be appropriately selected or compelled to serve (either on Pitcairn or in New Zealand or another place of trial).

[100] We have no doubt that the circumstances of Pitcairn would almost always make jury trials, even with a small jury or assessors, quite impracticable. The trials would be endlessly derailed by objections to the composition of the jury on the grounds of association with the defendant or witnesses. It is no doubt for this reason that the use of the provision for assessors is left in the discretion of the judge in cases of crime serious enough to be tried in the Supreme Court.

[101] Nor does the Pitcairn Justice Ordinance fall foul of the Colonial Laws Validity Act 1865. The Pitcairn Constitution, including s 42, is not inconsistent with

---

[57] Under s 9(2) of the Justice Ordinance certain persons are disqualified from selection as assessors.

("repugnant to") the Bill of Rights because the 1887 Act has authorised the making of a constitution for the peace, order and good government of Pitcairn. The Pitcairn Constitution is validly made under this power and s 42, consistently with the common law, disapplies any English legislation of general application that is unfit for local circumstances. So, to this extent at least, the Bill of Rights is not in force in Pitcairn. Thus, there is no repugnancy for s 2 of the 1865 Act to make void.

Discrimination

[102] It was submitted for Mr Warren that in several respects the proceedings against him are an abuse of process because of discrimination that he is suffering. He seeks a stay of proceedings because of it. Mr Ellis makes the general point that all Pitcairners are being unjustifiably treated differently from other British subjects because they have no representative legislature and no ability to insist on trial by jury for alleged serious offending. We have already dealt with these complaints and described the practical justifications for the present arrangements.

[103] Mr Warren also asserts discrimination in the making of orders allowing legal proceedings to be heard in New Zealand (with him having to participate by video-link), and in the appointment of only New Zealand judges to hear the proceedings against him and his appeals.

[104] This argument was, in general terms, before this Court at an earlier appeal hearing in the case and was rejected on the ground that the special circumstances in Pitcairn can warrant different treatment from that of UK residents.[58] In other words, there was an objective justification. We respectfully agree. Insofar as the argument relied upon s 23 of the Constitution, we agree also with Haines J that s 23 is directed to discrimination between Pitcairners.[59] Nothing in the section requires a comparison with British subjects elsewhere, and it is highly unlikely that this would have been intended. Given Pitcairn's unique circumstances and the variety of circumstances of other British subjects, that is unsurprising. Even if the comparison were to be confined to those living in the United Kingdom, the stark contrast in their circumstances from those in

---

58 *R v Warren* CA 1/2012, 12 April 2013 at [133].
59 *Haines J Judgment*, above n 1 at [317].

Pitcairn would have made such an exercise very strained. They are simply not in analogous situations. Instead, the framers of the Constitution were intent on ensuring by s 23 that, so far as reasonably possible, all Pitcairners are treated alike in the respects detailed in subs (3).

[105] The international instruments to which Mr Warren referred us – art 26 of the International Covenant on Civil and Political Rights, and arts 1(1) and (5)(a) and (c) of the International Convention on Elimination of all Forms of Racial Discrimination – are also concerned with unjustifiably different treatment of people within a country. They do not, and realistically could not, require a country to treat people in exactly the same way in vastly different territories within its realm.

Committal hearing in New Zealand

[106] The hearing at which Mr Warren was committed to stand trial took place in New Zealand in the Pitcairn Magistrate's Court. The Magistrate made orders under ss 15E and 15F of the Judicature (Courts) Ordinance 2000 that the hearing take place in New Zealand with Mr Warren participating by video-link. Mr Warren argues that, despite such orders, it was not a valid committal hearing because the Magistrate's Court had not been lawfully authorised by the Governor to sit outside Pitcairn.

[107] Section 43 of the Constitution relevantly provides:

> (1) The courts of Pitcairn shall be the Pitcairn Supreme Court, the Pitcairn Court of Appeal, and such courts subordinate to the Supreme Court as may be established by law.
>
> ...
>
> (3) Without prejudice to the generality of the power conferred by section 36(1), the Governor may by any law constitute courts for Pitcairn with such jurisdiction, and make such provisions and regulations for the proceedings in such courts and for the administration of justice, as the Governor may think fit.
>
> (4) Subject to any law, a court established under subsection (3) shall sit in such place in Pitcairn as the Governor, acting in accordance with the advice of the Chief Justice, may appoint; but it may also sit in the United Kingdom, or in such other place as the Governor, acting in accordance with the advice of the Chief Justice, may appoint.

[108] Although the Governor had purported to give a notice under subs (4) authorising the Court to sit in New Zealand, it is said that he lacked power to do so. Mr Warren made three arguments:

(a) That s 43(4) gave no such power to the Governor because the Magistrate's Court had actually been established by the Governor on 1 February 2000 and thus before the Constitution was made, and so the Court was not "established under subsection (3)".

(b) That as the advice of the Chief Justice in accordance with which the Governor acted was given only orally, subs (4) had not been complied with.

(c) That consequently ss 15E and 15F could not authorise the making of the orders by a magistrate.

[109] The first of these arguments pays no regard to s 5 of the Constitution Order 2010.[60] The Magistrate's Court existed under Pitcairn law prior to "the appointed day". Its establishment by the Governor therefore had effect as part of the law of Pitcairn as if it had been done by the Governor in accordance with the Constitution. For the purposes of subs (4) of s 42 of the Constitution the Court was, under s 5 of the Order, to be treated as if constituted by the Governor under subs (3).

[110] As to the second argument, the advice of the Chief Justice was given, as the notice itself confirms. It has not been shown that the notice was erroneous in this respect. Nothing in subs (4) says that the advice has to have been in writing. Oral advice was a sufficient basis for the Governor's exercise of the power to authorise the Court to sit in New Zealand.

[111] It follows that ss 15E and 15F did authorise the Magistrate to make the orders.

---

[60] See [87] above.

Human Rights Act 1988

[112] In his written submissions Mr Ellis sought to rely upon provisions of the Human Rights Act 1988 (UK). He appeared to be foreshadowing a civil claim for damages under that Act. The submission overlooked the fact that the House of Lords in *R (Quark Fishing Limited) v Secretary of State for Foreign and Commonwealth Affairs* and the United Kingdom Supreme Court in *Bancoult* have held that the Act has no application in a British Overseas Territory in the absence of a declaration by the United Kingdom under (now) art 63 of the European Convention on Human Rights extending the Convention to that territory.[61] No such declaration has yet been made in respect of Pitcairn, notwithstanding anything that may have been said by officials, who were probably in fact intending to refer to the human rights provisions in the Pitcairn Constitution.

[113] When this difficulty was drawn to the attention of Mr Ellis in oral argument, he did not further pursue submissions on the point.

Criminal Justice Act 1988 (UK)

[114] Mr Warren submitted that the charges brought against him under the Criminal Justice Act 1988 (UK) are invalid because that Act is not in force in Pitcairn. Therefore, he says, there can be no offence against s 160 (Possession of indecent photograph of child) in Pitcairn. The argument is made that the statute is not one of general application in the United Kingdom and, if that is not accepted, it does not apply in Pitcairn because there is a provision in a local ordinance, s 8 of the Summary Offences Ordinance, covering the field.

[115] Lovell-Smith J said only that, like the Sexual Offences Act that was discussed in the *Christian* case, the Criminal Justice Act "is a public general Act of the United Kingdom, and therefore it should be regarded as fully incorporated into local law under s 42(1) of the Pitcairn Constitution".[62]

---

61 *R (Quark Fishing Limited) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)*, above n 49 at [64]–[65].

62 *Lovell-Smith J Judgment*, above n 1 at [117].

[116] Mr Warren attempts to distinguish the two Imperial statutes on the ground that while the Sexual Offences Act provisions have a common subject matter, the Criminal Justice Act is a miscellany of diverse subject matters, some of which do not apply to all parts of the United Kingdom or are of local significance only. Therefore, counsel contended, it is not an Act of general application.

[117] We fail to see, however, why in a statute of this character provisions which are of general application should not apply in Pitcairn under s 42 if not displaced by an ordinance. That a section like s 160, which plainly applies generally, appears among miscellaneous provisions does not affect its generality. Many, perhaps most of them, are also general in their application. In the words of Sir Kenneth Roberts-Wray, they are "not based upon politics or circumstances peculiar to England".[63] Nor should it make any difference that some sections of the statute are confined in their application to particular parts of the United Kingdom and have no relevance on Pitcairn.[64] Obviously, the need for a statutory prohibition against possession of child pornography is not something peculiar to the United Kingdom. The manufacture of such pornography is a world-wide scourge requiring proscription and substantial penalties for those who are found in possession of it. Pitcairn, just as much as the United Kingdom, has a need for a provision doing the work of s 160.

[118] We are equally unconvinced by Mr Warren's argument that s 8 of the Summary Offences Ordinance is intended completely to cover the field of child pornography. To start with, it is concerned with all kinds of pornography and, on the basis of the very limited penalties prescribed (fine not exceeding $250 or imprisonment for a maximum of 100 days, or both), it must be intended to deal with the lower end of such offending.

[119] Indeed, that illustrates the wider point that the relative absence of local Pitcairn laws about criminal activity demonstrates that it must be intended that through s 42 the criminal statutes in force in England are to extend to Pitcairn. The relatively few exceptional situations are those where certain low level offending is dealt with in the Summary Offences Ordinance. It deals, for example, with such minor matters as disorderly conduct, fighting in a public place or common assault. Section 5 of the

---

63 Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens, London, 1966) at 556.

64 *Christian v R* [2006] UKPC 47, [2007] 2 AC 400 at [76]–[79] per Lord Hope.

ordinance states an offence of indecent behaviour in a public place but, as *Christian v R* reveals, more serious offending of a sexual nature is proscribed by the extension of English statute law.[65] The same must be true for drug importation, for plainly the low penalties in s 7 of the ordinance are not apt to cover commercial importations of dangerous drugs. Possession of child pornography likewise cannot be considered low level offending, and for that Pitcairn must depend upon s 160.

[120] It was suggested for Mr Warren that the level of penalties under s 160 reflected an English circumstance that could not be brought into Pitcairn law. We do not accept that. Assuming for the sake of argument that it would not be just to inflict on Pitcairn offenders the same level of penalties as are customarily imposed in the United Kingdom, that would, in our view, be a matter for the judgment of a sentencing judge in the Pitcairn court. The judge could, if it were appropriate, depart from English sentencing scales which were inappropriately severe in Pitcairn conditions. But that is no reason for concluding that Pitcairn has been left without a means of trying and punishing serious offending involving possession of child pornography. We conclude that s 160 of the Criminal Justice Act is in force in Pitcairn.

Other systemic matters

[121] In support of his application for a permanent stay of proceedings, Mr Warren makes other complaints about what he says are serious deficiencies in the Pitcairn criminal justice system.

(a) Inaccessibility of criminal laws

[122] It is submitted, as it was in *Christian v R*, that there is unfairness because Pitcairners have great difficulty in discovering what laws are in force in the territory, which is an unacceptable position, especially in relation to criminal statutes. How, counsel asked, does a Pitcairner know of the Criminal Justice Act or, if known, whether it may have been amended? This complaint was accompanied by a narrative of how difficult it was for counsel to locate Pitcairn ordinances on a website. Mr Ellis called this the passing of "secret" laws.

---

65 At [38].

[123] There is of course nothing secret about the Criminal Justice Act. Pitcairners could hardly be unaware that civilised societies frown on the possession of child pornography because of the sexual exploitation of children involved in its production. If minded to research the Pitcairn law on the subject, a Pitcairner could be expected, since the *Christian* case at least, to know that there was likely to be an English statutory provision extended to Pitcairn making possession of indecent photographs of children an offence and could readily carry out a computer search to find it, just as someone resident in England could do. There may, admittedly, be some temporary difficulty in discovering whether an English statute has been disapplied by a local ordinance, but someone contemplating doing in Pitcairn something that amounts to a serious criminal offence in England must surely, if in doubt about the legality of his or her intended action, be expected to make enquiry as to the position. Lord Woolf said in *Christian v R:*[66]

> The criminal law can only operate on Pitcairn, as elsewhere, if the onus is firmly placed on a person, who is or ought to be on notice that conduct he is intending to embark on may contravene the criminal law, to take the action that is open to him to find out what are the provisions of that law.

[124] Haines J summarised evidence on how Pitcairn ordinances are made known to the Pitcairn public, including on a government website.[67] We agree with him that the Criminal Justice Act was reasonably accessible to Mr Warren.

[125] It was not in fact suggested to us that Mr Warren was actually ignorant of the fact that possession of child pornography was likely to be treated as serious criminal offending under Pitcairn law. Nor, we consider, could such a proposition ever be taken seriously.

(b) Use of only New Zealand judges

[126] Mr Warren contends that "it is impossible to get a fair trial by foreign judges, not being nationals of Pitcairn". Recognising the absurdity of that assertion in a situation where there are no Pitcairners – certainly no residents of the Island – competent to conduct Supreme Court criminal trials, his counsel modified the

---

66 At [41].
67 *Haines J Judgment*, above n 1 at [384].

complaint by saying that Pitcairners are entitled to trial by British judges (from a system said to be more akin to the Pitcairn system than is New Zealand law). And in oral argument he modified it again to say that there should be a mixture of British, Commonwealth and Irish judges, not merely New Zealand judges.

[127] In essence, then, what is being said is that New Zealand judges, such as the Supreme Court Judge who is to conduct the trial of Mr Warren and the members of this Court, are not competent to apply the laws of Pitcairn. As Lord Hoffmann said in *Christian*, it is hard to take this argument seriously.[68] Nothing was put forward to demonstrate lack of competency of New Zealand judges. Many sit in courts throughout the Pacific at the request of local governments, who appear to value the expertise they bring. No one suggests that they need "training" in the local laws of those countries, other than through the helpful submissions of local counsel. The common law based legal systems in those jurisdictions, as in Pitcairn and in Britain, do not depart markedly from New Zealand laws and practices, in the area of criminal law at least.

(c) Registrar holding multiple appointments

[128] Another complaint of no greater merit is that the Registrar, Mr Ford, has been appointed to that position in all of the Magistrate's Court, the Supreme Court and this Court. His appointments have, of course, been separately made.

[129] Mr Warren says that the multiple appointments lead to a systemic lack of independence of the Registrar. The argument, as best we could follow it, seemed to be that he might somehow confuse his roles.

[130] The short answer is that s 17A(2) of the Judicature (Courts) Ordinance expressly allows for the fact that the same person may be registrar of two or more courts. Mr Ford is a very experienced retired New Zealand court registrar and we have seen nothing suggesting that he is not aware that he must function as registrar separately for each of the courts, though in a single registry. We add that, given the very small number of cases in the Pitcairn court system, it would be needlessly complicated, inefficient and expensive to have three different people as registrars.

---

[68] *Christian v* R, above n 64 at [26].

(d) Corruption of legal system by Prosecutor

[131] The appellant alleges that the former Pitcairn Public Prosecutor, Mr Moore, corrupted the criminal justice system and demonstrated a lack of independence when in February 2000 he wrote to the Pitcairn Governor's then legal advisor, Mr Treadwell, suggesting that certain persons might be suitable for appointment to the Pitcairn magistracy and to a proposed panel of defence lawyers.

[132] Both Lovell-Smith J and Haines J rejected this factual allegation – and rightly so. The letter was written more than 10 years before the present prosecution commenced, to an addressee and about people none of whom has had any involvement in this case. Mr Moore himself has been appointed a High Court judge in New Zealand and has relinquished his position as Pitcairn Public Prosecutor. The letter seems to have been written in response to a request for help by Mr Treadwell, rather than in an attempt to influence him. It was, in its context, a perfectly proper response. It provides no basis at all for an allegation of a systemic flaw in the legal system some 15 years later. It was an entirely unjustified allegation which should not have been made. It is also yet another instance of the tendency of Mr Warren to put forward arguments based on generalised principles of law but not related to the facts of the Pitcairn situation and not realistically grounded on the facts of the case.

(e) Lack of prosecutorial guidelines

[133] Mr Warren submits that because the Pitcairn Prosecutor had not formulated guidelines for prosecutors in Pitcairn, as found in other jurisdictions such as the United Kingdom and New Zealand, the decision to prosecute him must have been arbitrary and therefore unlawful. He says that the lack of guidelines shows a lack of independence on the part of the Prosecutor.

[134] As it happened, the decision to prosecute in this case was based upon the English Code for Crown prosecutors.[69] There was nothing arbitrary about this, nor has anything been put forward to show arbitrary conduct of the Prosecutor in any other case. No lack of independence is demonstrated merely because Pitcairn does not have

---

[69] See *Haines J Judgment*, above n 1 at [357]. The reasons for the decision were formally recorded and are in the Record of Proceedings (Vol 2, tab 23).

its own guidelines. It is entirely proper for the Prosecutor in a British Overseas Territory to follow English practice.

(f) Remuneration of judges

[135] The appellant argues that the Pitcairn judges lack independence because:

(a) some are remunerated differently from others; and

(b) some are not paid out of the public funds of Pitcairn as required by s 53 of the Constitution.

[136] The reason for the difference is that some of the Pitcairn judges are seconded from the New Zealand District Court judiciary (Lovell-Smith J and Tompkins J, the trial judge designated to try Mr Warren, are in this category) but others do not serve, or do not now currently serve, in the New Zealand judiciary on a full-time basis or at all (Haines J and the judges of this Court are in this latter category).

[137] In accordance with ordinary practice, a serving New Zealand judge on secondment to an overseas court, such as Pitcairn, Samoa, Vanuatu and the Cook Islands (or for that matter the Privy Council), continues to be paid a New Zealand salary and is not remunerated by the overseas government, whether the New Zealand salary is higher or lower than the other judges of the overseas court. On rare occasions where payment is made to a serving New Zealand judge by an overseas government, the judge must account for it to the New Zealand Ministry of Justice so that there is no "double dipping".

[138] For those Pitcairn judges who are not full-time judges in New Zealand, the Pitcairn Government pays a daily rate of remuneration roughly equivalent to that of the daily remuneration of a District Court judge in New Zealand. Hence, on a per diem basis, there should be no significant difference in what Pitcairn judges are receiving. That disposes of argument (a).

[139] As to argument (b), it would of course be possible for a serving District Court judge to be paid on a per diem basis by the Pitcairn Government the equivalent of his or

her New Zealand salary. But the judge would then need to account for it to the New Zealand Ministry of Justice. There would be no advantage to the judge in this procedure.

[140] Each judge agrees on his or her remuneration with the Governor prior to appointment as a Pitcairn judge. It will be apparent from the last paragraph that it makes sense for full-time New Zealand judges to agree a nil salary so as to save the time and trouble of having to account for everything that is received from Pitcairn. That does not, in our view, create a breach of s 53.

[141] None of this suggests that some Pitcairn judges are worse off than others ("an unequal bench", to use Mr Ellis's term) or that anything is occurring which might give rise to concern by an objective observer about the independence of any Pitcairn judge in this or any other case.

Admissibility of evidence

[142] Mr Warren challenged the admissibility of evidence obtained as a consequence of the execution of two search warrants and the subsequent analysis of the evidence obtained. The challenge was based on the validity and execution of the search warrants, the lawfulness of a court order sought by the Police to send the exhibits to New Zealand, and the action taken pursuant to that order. Procedurally this challenge was effected by the Crown filing an application under s 70AA of the Justice Ordinance for an order that the evidence of Sergeant Medland and all evidence arising from the search of Mr Warren's home and its subsequent analysis was admissible. The appellant had previously objected to the admissibility of the evidence in the hearing before Lovell-Smith J, who found the evidence admissible. Further grounds of objection were advanced before Haines J on the basis that he would not revisit any of the issues heard and determined by Lovell-Smith J. He found that none of the new objections raised by Mr Warren had any substance and granted the Crown application.[70]

[143] Most of the grounds of objection are particular to the issue and execution of the search warrant on the one hand or steps taken to have seized items forensically

---

[70] *Haines J Judgment*, above n 1 at [173].

examined in New Zealand on the other. However, claims that the Island Police Officer, Sergeant Medland, and the Island Magistrate were not independent and that Mr Warren did not have fair access to a lawyer are common to both and it is convenient to deal with them first.

Independence of Police Officer

[144] Sergeant Geoffrey Medland had been a New Zealand Police Officer for 16 years when he was appointed Pitcairn Island Police Officer by the then Governor. His appointment was part of the assistance provided by the New Zealand Police to Pitcairn. Sergeant Medland arrived in Pitcairn to take up his duties on 10 December 2009. He was sworn in as the Island Community Police Officer by video-link with the Governor's Office in New Zealand on 21 January 2010.

[145] In April 2010 an email from Lucy Foster, the Governor's Representative on Pitcairn, alerted Sergeant Medland to the possibility that Mr Warren may be using an email address under a false name. This led to Sergeant Medland undertaking an investigation and, ultimately, to his applying for search warrants which he executed at Mr Warren's workplace and house and which led to the charges now faced by Mr Warren.

[146] At an early stage of his investigation, Sergeant Medland sought the assistance of the New Zealand and English Police. In the course of the investigation he communicated with members of a group established by the New Zealand Police to provide assistance to the Pitcairn Islands, including the officer-in-charge, Superintendent Stu Wildon, his second-in-command, Inspector Roly Williams, and Senior Sergeant Paul Sindlen, who was the team leader. He was also referred to others for specialist advice, including Detective Senior Sergeant Liam Clinton of the New Zealand National Criminal Investigations Group, who assisted him to make the arrangements necessary for the computer exhibits to be forensically examined. He sought advice from a detective of the Hampshire Police Paedophile unit in England, Detective Sergeant Ian Mears. Sergeant Medland also consulted with the Governor's office and the Auckland Crown Solicitor, Mr Moore, who was at the time the Pitcairn Public Prosecutor.

[147] Before Haines J it was submitted that Sergeant Medland had acted under orders from New Zealand and English Police officers and failed to exercise the "independence" required by law and his oath of office. In evidence-in-chief before Haines J Sergeant Medland said:

> As a sworn New Zealand police officer I was well aware of the need for Police to exercise their investigative and prosecution functions independently of inappropriate influence, including for example political influence. I do not recall any specific training from Pitcairn authorities on this issue, but it is fundamental to my job to retain independence at all time.
>
> I carried out my duties in Pitcairn independently of any improper influence from the Pitcairn Island administration, including the Governor's office.
>
> From time to time in carrying out my duties in Pitcairn I sought advice from senior Police Officers in England and New Zealand. While I welcomed the support and advice from other officers, I remained independent in the exercise of my duties and functions.

[148] Haines J said that Sergeant Medland's evidence-in-chief was not shaken in cross-examination.[71] He found that contemporary documents supported Sergeant Medland's evidence. He said that there was nothing in the documents to show that anyone interfered with or otherwise compromised the Sergeant's independent judgment.[72]

[149] Relying on evidence given by Sergeant Medland in cross-examination and emails passing between Sergeant Medland and the New Zealand Police, Mr Ellis submits that Haines J's finding was wrong. Having carefully reviewed the evidence, we can find no error in Haines J's finding. We consider the evidence clearly establishes that at all stages Sergeant Medland acted as he had sworn to do, with diligence and impartiality.

[150] Mr Ellis placed particular reliance on emails written by Sergeant Medland at an early stage of the investigation, in which he referred to Mr Warren as "the offender" and said that he "would be prosecuting Mr Warren" on a charge of importing an indecent photo. Mr Ellis argued that this showed he did not approach the inquiry with an open mind. He also referred to emails in which Sergeant Medland was "strongly advised" by Superintendent Wildon "not to take overt investigative action" until such

---

71 At [155](a).
72 At [158].

time as the New Zealand and British Police, the Pitcairn Government and the Crown Solicitor (as the Pitcairn Public Prosecutor) had coordinated and agreed on the way forward. It was submitted that such an "instruction" and the involvement of the British authorities and Crown Solicitor showed that Sergeant Medland was not acting independently.

[151] When the emails are read in context, however, it emerges clearly that Sergeant Medland, while appropriately seeking advice from outside agencies, never surrendered and was never asked to surrender his responsibility to make all key decisions. This emerges from a reading of the email exchanges as a whole, and is also made explicit in emails written by those who were providing assistance. At an early stage the Deputy Governor of Pitcairn wrote to Sergeant Medland, who had provided an initial report to her. The letter concluded:

> It will be for you and the Prosecutor's Office to decide whether any charges are appropriate in this case.

[152] To similar effect, Senior Sergeant Sindlen, writing to Sergeant Medland on 5 May 2010 to advise that the Group was organising support structures for him, added:

> We have no intention of taking the lead away from you on this.

[153] We agree with Haines J that there is nothing in the evidence or the contemporary correspondence to suggest that Sergeant Medland's independence was compromised. He was entitled to seek and take such advice as was reasonably necessary to enable him to properly discharge his duties, provided that he did not surrender his ultimate decision-making powers. Indeed, it would have been remiss of him not to seek such advice as he was venturing into a specialised area of policing calling for specialist knowledge.

Independence of Island Magistrate

[154] As soon as Sergeant Medland had concluded his initial investigation he applied for warrants to search Mr Warren's home and office. Warrants were granted on 26 May 2010 by Island Magistrate Simon Young. Sergeant Medland executed the search warrant on Mr Warren's work premises first. He seized a number of items which he

listed on a property records sheet. He executed the search warrant on Mr Warren's home 25 minutes later.

[155] At the house, Sergeant Medland first showed Mr Warren the search warrant for his office and the property records sheet. He then showed him the search warrant for his house, gave him a copy and asked to see his computer equipment. He was directed to the bedroom where he found and seized three computers (one apparently disused) and associated components and records, including a USB stick, a number of external hard drives and numerous CD-roms in plastic wallets. He advised Mr Warren that the seized items would be transported to New Zealand for forensic testing. He then returned to the police station and secured all items.

[156] On 30 May 2010, Sergeant Medland applied to the Island Magistrate for an order that the items seized under the warrant be transported securely to New Zealand for the purpose of forensic analysis at the Electronic Crime Laboratory operated by the New Zealand Police. An order made by the Island Magistrate authorised the items to be securely transported to New Zealand for analysis and, following analysis, to be held securely pending further order of the Court. Following an initial examination of what was seized, Sergeant Medland returned a number of items to Mr Warren on 2 June 2010.

[157] The appellant submits that the decision of the Island Magistrate to issue the search warrants was invalid as he had a personal interest in the proceeding which disqualified him from hearing the application. At the time Mr Warren was the Mayor of Pitcairn and the Island Magistrate the Deputy Mayor. Mr Warren's case is that the grant of a search warrant would enhance his deputy's prospects of succeeding him and constituted a political interest and a direct pecuniary interest. The mayoralty itself and the salary associated with it were each said to give rise to a disqualifying interest or a perception that a fair minded and informed observer would conclude there was a real possibility of bias.

[158] The argument was rejected by both Lovell-Smith and Haines JJ. Both found that there was no disqualifying personal interest. Haines J also considered s 8(3) of the Justice Ordinance, which provides:

> (3) Where the Island Magistrate is a party to or has any personal interest in any case, whether civil or criminal, before the Court, he or she shall not hear such case and the fact that the Island Magistrate is a party to or has a personal interest in the case shall be deemed to be a good and sufficient reason within the meaning of subsection (1) for the appointment by the Governor of another fit and proper person to act as Island Magistrate for the purpose of hearing such case.

[159] Haines J found the Justice Ordinance was not engaged and there was no good and sufficient reason for the appointment of someone else to act as Island Magistrate.

[160] The opportunity for the Island Magistrate as Deputy Mayor to benefit from a successful prosecution of Mr Warren derives from the Local Government Ordinance. At the time the warrants were granted s 3(2) relevantly provided that if any Island Officer[73] was sentenced to imprisonment by any court in any part of the Commonwealth, the Governor could request the Island Officer to resign from office. If the person failed to resign, the office was deemed to become vacant after the expiration of seven days.[74] A conviction for the serious offending of which Mr Warren was suspected could accordingly give rise to the prospect of imprisonment and the loss of the mayoralty. A causal link between the issue of the search warrant and succession to the mayoralty can be seen to exist.

[161] The link is, however, tenuous at best, particularly when it is considered that the term of the mayoralty is three years. We were not told how much of the term had elapsed. Regardless, the possibility of the Island Magistrate succeeding to the mayoralty as a result of the successful investigation and prosecution of Mr Warren must be seen as remote and distant. We agree with the assessments of the Judges of the Supreme Court that the prospect of advancement was so heavily contingent as to render any personal interest of insufficient materiality to raise any concern of partiality.[75]

[162] Even if it could be said that the Island Magistrate would not have been recognised by the reasonable bias standard to be impartial,[76] we accept the Crown's submission that any concern of bias was cured by the independent oversight of the

---

73 A definition which includes the Mayor, Local Government Ordinance, s 3(1).

74 By ss 4(2) and 4(3) of the Local Government Ordinance the Deputy Mayor may also succeed to the mayoralty or become acting Mayor if the Mayor were to become permanently or temporarily incapacitated as the case may be.

75 See the discussion in Lord Woolf and others *De Smith's Judicial Review* (7th Ed, Sweet & Maxwell, London, 2013) at 10-028.

76 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)*, above n 11.

Supreme Court, acting with full jurisdiction to review the issue of the search warrant. In *De Haan v The Netherlands*, the European Court of Human Rights held that a violation of the right to an impartial tribunal under art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms would be cured if the decision of the relevant tribunal were subject to subsequent control by a judicial body that had full jurisdiction and provided the guarantees of art 6.[77] The Supreme Court has provided that oversight here.

[163] In response, Mr Ellis referred us to a later decision of the European Court of Human Rights, *Kyprianou v Cyprus*, in which the appellant, found guilty of contempt of court, complained that he had not received a hearing by an independent and impartial tribunal as secured under art 6 of the Convention.[78] The Government submitted that the Court on review had conducted a *de novo* hearing and provided a full review of the facts, the law and the sentence, and its decision upholding the conviction and sentence should be upheld. The ECtHR found that misgivings as to the impartiality of the original Court were justified. It acknowledged that a higher court might, in some circumstances, make reparation for such defects but the appellate Court, while having the power to quash the original decision on the ground that the Court had not been impartial, had failed to do so.

[164] We see no relevant distinction between the decisions of *De Haan* and *Kyprianou*. Both recognised the principle that a higher court may cure the partiality of a first instance court if it has full jurisdiction to review the merits of the decision. In both cases the appellate court had failed to do so. That is not the case here. Any partiality on the part of the Island Magistrate could be cured by the Supreme Court giving full consideration to the validity of the search warrant and upholding its issue by the Island Magistrate.

Access to Legal Advice

[165] In the Supreme Court, Lovell-Smith J rejected Mr Warren's contention that he did not have fair access to a lawyer. Mr Ellis had submitted he should have been given

---

77 *De Haan v The Netherlands* (84/1996/673/895) ECHR 26 August 1997.
78 *Kyprianou v Cyprus* (73797/01) Grand Chamber, ECHR 15 December 2005.

immediate access to a lawyer after the issue of the search warrants. Not to do so, he said, resulted in an inequality of arms and unfairness. He said that the situation could and should have been remedied by arranging for defence counsel to be present on Pitcairn at the time of execution of the search warrant and for counsel to have had access to what had been seized.

[166] The uncontradicted evidence of Sergeant Medland to the Supreme Court shows that in fact Mr Warren had access to legal advice at an early stage. Immediately following completion of the search of Mr Warren's home, Sergeant Medland told him he wished to conduct an interview at 5.00 pm later that day. When Mr Warren arrived at the police station he declined to be interviewed, saying that he was seeking legal advice. Sergeant Medland gave him a list of seven lawyers admitted to practise in the Pitcairn Island jurisdiction. The following morning Mr Warren returned to the police station, advised Sergeant Medland that Mr Ellis would be acting for him, and declined to agree to an interview until he had spoken to Mr Ellis.

[167] It has not been suggested that Mr Warren has not had full and unimpeded access to counsel of his choice since that time. Nor can it be suggested that he was prejudiced as a result of counsel not being present on the island. Even if counsel had been present on Pitcairn, despite the considerable logistical difficulties in arranging for that, he could not have sought access to the seized articles until computer records had been forensically examined.

Issue of search warrants

[168] We turn now to consider the grounds of objection specific to the issue of the search warrants.

Power to issue warrants

[169] Mr Warren appeals against the finding of Lovell-Smith J that the Island Magistrate had authority to issue a search warrant. He had argued that the Island Magistrate had no jurisdiction to issue a search warrant for offences under United Kingdom statutes.

[170] In fact, when applying for the search warrant Sergeant Medland did not rely on an offence under English law. He relied on the offence of possession of obscene articles under s 8(1) of the Pitcairn Summary Offences Ordinance. Mr Ellis says that it was nevertheless Sergeant Medland's intention to obtain evidence of offending under English law. He argued the Island Magistrate's jurisdiction was limited by s 5(1)(b)(iii) of the Justice Ordinance which provides:

> **5. Jurisdiction of Island Magistrate**
>
> (1) Subject to the provisions of this or any other ordinance, the Island Magistrate shall have jurisdiction—
>
> …
>
> (b) in criminal cases over all offences committed within the Islands or in the territorial waters thereof against the provisions of this or any other ordinance except insofar as the jurisdiction of the Island Magistrate is therein expressly excluded:
>
> Provided that—
>
> …
>
> (iii) the Island Magistrate shall not exercise jurisdiction in respect of any offence arising only by virtue of the provisions of section 42 of the Constitution of Pitcairn.

[171] As already discussed, s 42 of the Constitution imports English law into Pitcairn. It is not in dispute that s 5(1)(b)(iii) prohibits the Island Magistrate from exercising jurisdiction in relation to the English offences of which Mr Warren is accused. However, the scope of the Island Magistrate's power to issue a search warrant is not so circumscribed. Section 23(1) of the Justice Ordinance provides as follows:

> Where the Magistrate is satisfied by evidence on oath that there is reasonable cause to believe that any thing upon, by or in respect of which an offence has been committed or any thing which is necessary to the conduct of an investigation into any offence, is in any building, ship, vehicle, box, receptacle or place, the Magistrate may issue a search warrant authorising a police officer to search the building, ship, vehicle, box, receptacle or place (which shall be named or described in the search warrant) for any such thing and, if any thing searched for is found, or any other thing which there is reasonable cause to suspect to have been stolen or unlawfully obtained is found, to seize it and bring it before the Court to be dealt with according to law.

[172] "Offence" is widely defined in the Interpretation and General Clauses Ordinance as including "any crime, unlawful act or contravention or other breach of, or failure to comply with, any provision of any law, for which a penalty is provided". We

see no reason to exclude from the purview of s 23 offences which the Island Magistrate has no jurisdiction to try. As the Crown submitted, it is both practical and sensible to invest the Island Magistrate with such ancillary powers. That objective is served by other provisions of the Justice Ordinance. For example, it confers on the Island Magistrate the power to remand an accused person in custody for offending which the Island Magistrate would not have jurisdiction to try.[79]

Absence of reasonable grounds

[173] It was next submitted that the search warrants were invalid because the application failed to disclose reasonable grounds for believing that a "serious arrestable" (or indictable) offence had been committed. That is one of the grounds that must be made out on an application for a search warrant under the Police and Criminal Evidence Act 1984 (UK). Lovell-Smith J rejected the challenge, holding that the broad definition of "offence" under s 23 of the Justice Ordinance makes it unnecessary to rely on s 8 of the Police and Criminal Evidence Act.

[174] We agree. Whether or not s 8 of the Police and Criminal Evidence Act 1984 is in force in Pitcairn, the Island Magistrate was entitled to exercise the power under s 23 to issue the warrant. We agree with the Crown that there is no basis to read down or restrict the power in s 23 of the Justice Ordinance. It was sufficient for the applicant to provide reasonable cause to believe that a search would provide evidence of an offence under the Summary Offences Ordinance.[80]

Lack of candour

[175] In oral submissions to Lovell-Smith J, it was argued that the search warrants should be invalidated because the Police failed to make full and frank disclosure in the application. This was not directly addressed in her judgment, though impliedly rejected. The objection was renewed before us, Mr Ellis submitting that the application lacked the requisite level of candour because Sergeant Medland failed to disclose his intention to prosecute for an indictable offence. It will be recalled that the application

---

79 Justice Ordinance, s 5(1)(b).
80 *Lovell-Smith J Judgment*, above n 1 at [267].

referred only to the offence of possession of obscene articles under s 8(1) of the Pitcairn Summary Offences Ordinance.

[176] There is no doubt that it is incumbent on an applicant for a search warrant to make full and frank disclosure to the Court. A warrant will be set aside for non-disclosure if material was omitted which may well have led the Judge to issue a warrant which, had there been full disclosure, would not have issued.[81]

[177] Mr Ellis placed particular reliance on an email written by Sergeant Medland some three weeks before he applied for a warrant, in which he said that, having consulted with the Public Prosecutor, he had decided to lay an indictable charge under the Sexual Offences Act 2003. However, when asked about this in cross-examination, he explained that the criminal activity then being considered was causing or inciting a child to engage in sexual activity based on internet communications that had already been discovered. He explained that by the time he applied for the search warrant he had decided, following further discussions with the Public Prosecutor, that there was not enough evidence of that indictable offence.

[178] As we have previously noted, Haines J "without hesitation" accepted Sergeant Medland as "an entirely credible witness". There is no reason why his evidence on this issue should not be accepted.

Lack of specificity

[179] The search warrants were in the form prescribed in rules made by the Governor on the advice of the Chief Justice.[82] The form makes no provision for an offence to be particularised. The warrants made reference only to the possession of obscene articles by Mr Warren. They did not refer to s 8 of the Summary Offences Ordinance which prescribes the offence.

[180] In the Supreme Court it was submitted that the omission to refer to the statutory provision was fatal to the warrants. Lovell-Smith J held that the warrants were valid as

---

81 *R (Mills) v Sussex Police* (DC) [2014] EWHC 2523 (Admin), [2015] 1 WLR 2199 at [26].

82 Magistrate's Court (Forms in Criminal Cases) Rules, Schedule, Form 5.

they complied with the relevant rules. If there was any defect, she found it was cured by s 16 of the Judicature (Courts) Ordinance, which provides as follows:

> **16.—**(1) No information, charge, summons, conviction, sentence, order, bond, warrant or other document and no process or proceeding shall be quashed, set aside or held invalid by any Court or quasi-judicial authority by reason only of any defect, irregularity, omission or want of form unless the Court or authority is satisfied that there has been a substantial miscarriage of justice.

[181] Lovell-Smith J found there to be no miscarriage of justice as the offence itself was disclosed. The items suspected to contain the obscene articles were identified and Sergeant Medland sufficiently explained the purpose of the search.

[182] In challenging the finding of Lovell-Smith J, Mr Ellis relied primarily on a decision of the Constitutional Court of South Africa, *Minister for Safety and Security v van der Merwe*.[83] The Court held that what it described as the "common law intelligibility principle" required a search warrant to specify the offence which triggered the criminal investigation. It is not entirely clear whether this requirement will be satisfied by a sufficient description of the offence or whether a reference to the statutory provision is required. The mention by the Court of New Zealand as one of the countries which also require specification of the alleged offence in search warrants, and a reference to *Auckland Medical Aid Trust v Taylor*,[84] suggests that it is sufficient to specify the offence.[85]

[183] We were not referred to any English cases to support the proposition that there must be a reference to the relevant statutory provision, and New Zealand cases do not go that far. There is a helpful review of the cases in *R v Coghill* which makes it clear that the overriding requirement is for there to be sufficient particularity to enable both the officer executing the warrant and the owner of the premises to know the offence or offences in respect of which the warrant was issued and the permissible limits of the search.[86] In *R v Briggs* the description of the offence by the single word "receiving" was held to be sufficient.[87]

---

83 *Minister for Safety and Security v van der Merwe* Case CCT 90/10 [2011] ZACC 19, 7 June 2011.
84 *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA) at 736-737.
85 *Minster for Safety and Security v van der Merwe*, above n 83 at [52].
86 *R v Coghill* [1995] 1 NZLR 675 (CA).
87 *R v Briggs* [1995] 1 NZLR 196 (CA).

[184] In our view, the description of the offence was adequate to meet both the requirements of Pitcairn law and the overall objectives identified in the cases we have referred to. The explanation provided to Mr Warren by Sergeant Medland would have disposed of any residual uncertainty as to the scope of the warrant. There has been no suggestion that Mr Warren felt misled. If, contrary to the view we take, the statutory provision should have been included in the warrant, s 16 of the Judicature (Courts) Ordinance could have been invoked. The omission would have been equivalent to the "looseness" of description which the Court said in *Coghill* could have been cured by the New Zealand equivalent of s 16, s 204 of the Summary Proceedings Act 1957.[88]

Execution of search warrants

The search breached the Constitution

[185] Lovell-Smith J rejected a submission that the issue and execution of the warrants infringed Mr Warren's rights under the Constitution. He had relied on the right to respect for private and family life under s 11 of the Constitution, which provides:

> **11.—**(1) Everyone has the right to respect for his or her private and family life, his or her home and his or her correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of Pitcairn, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[186] Lovell-Smith J held that any infringement of Mr Warren's rights under the Constitution that resulted in the issue and use of the search warrants was justified "for the prevention of disorder or crime".[89]

[187] We agree. The execution of a valid search warrant is demonstrably in accordance with the law. In this case it clearly qualified as necessary for the prevention of disorder or crime. Mr Ellis complained that the Judge failed to analyse whether there was reasonable justification for the search and its necessity in a democratic

---

88 *R v Coghill*, above n 86 at 679.

89 *Lovell-Smith J Judgment*, above n 1 at [236].

society. His position is that Pitcairn is not a democratic society and the issue of infringement should have been analysed accordingly.

[188] We see any debate over the nature of Pitcairn's democracy as irrelevant. By invoking the standards prevailing in a democratic society, s 11(2) provides an objective means by which necessity can be measured. Lawful steps that would be seen as appropriate in a democratic society to achieve the specified objectives are a justified intrusion of the rights. The issue of a warrant for the purpose of detecting and preventing serious criminal activity plainly qualifies.

Excessive execution

[189] In the Supreme Court Lovell-Smith J rejected a submission that the police search pursuant to the warrant had been excessive.[90] Mr Ellis challenges her findings.

[190] As we understand it, his concern relates to the seizure of a computer, referred to as the Mayoral computer, one of the hard drives, a USB stick (seized from Mr Warren's workplace) and some of the CDs. All turned out to contain records and documents relating to Pitcairn affairs, including medical and financial records of Pitcairn residents. It seems to be suggested that the searches should have been more selective or checks carried out at the searched premises in order to exclude from seizure any irrelevant materials.

[191] We see no reason to depart from the view formed by Lovell-Smith J that the way in which the searches were carried out was unexceptional and unobjectionable. We reject as impracticable the suggestion that some preliminary vetting could have been carried out on site. The New Zealand Supreme Court recognised in *Dotcom v Attorney General* that computers have to be taken offsite to enable cloning and to search for relevant materials.[91] The obstacles to any other course were even greater on Pitcairn. When quizzed in cross-examination, Sergeant Medland explained that even taking a computer to Mr Warren's house would have required transporting it by quad bike over dusty roads. We are entirely satisfied that the searches were carried out

---

90 At [268]-[274].

91 *Dotcom v Attorney General* [2014] NZSC 199 at [206].

reasonably and to the extent Sergeant Medland was able to do so, any irrelevant materials were identified and returned at the earliest reasonable opportunity.[92]

Conclusion on search warrants

[192] We conclude that the search warrants were validly issued and lawfully executed.

Export of computer exhibits

The Court process was unlawful

[193] The hearing before the Island Magistrate of the application to authorise the export of the computer exhibits was co-ordinated by the Registrar of the Pitcairn Magistrate's Court in Auckland. Mr Warren contends his involvement invalidated the order for two reasons. First, he said an order should have been made under s 15E of the Judicature (Courts) Ordinance to authorise a hearing outside Pitcairn. Secondly, the particular role played by the Registrar is said to have compromised his independence.

[194] The hearing was facilitated by the Registrar from the Public Prosecutor's office in Auckland. He used the Public Prosecutor's office because he needed access to scanning facilities and a software programme that allowed documents to be sent in portable document format.[93] The signed application was emailed by Sergeant Medland to the Public Prosecutor's office and handed by the Public Prosecutor to the Registrar. The Registrar then emailed it to the Island Magistrate via Sergeant Medland, with a covering memorandum. The documents were printed out by Sergeant Medland and handed to the Island Magistrate. After Sergeant Medland had explained the purpose of the application, the Island Magistrate made the order by signing an endorsement on the application. Sergeant Medland then transmitted the signed document back to the Registrar, who issued a sealed order which was sent back to Sergeant Medland as an attachment to an email.

---

92 Further irrelevant material was discovered in the course of forensic analysis of the computer records in New Zealand. No request was made for its return. We were told that copies were available on the Island.

93 *Haines J Judgment*, above n 1 at [441](g).

[195] Section 15E(1) of the Judicature (Courts) Ordinance empowers a judge of the Supreme Court or a magistrate to make an order that any proceeding or any step in any proceeding be held in the Pitcairn Islands or the United Kingdom or New Zealand. For Mr Warren it is submitted that an order should have been made that the hearing of the application take place in New Zealand.

[196] The submission cannot succeed. As Haines J held, the Court sat in Pitcairn where the Magistrate was.[94] The fact that the Registrar was in New Zealand did not affect the *locus* of the Court. There was no need for an order.

[197] We also agree with Haines J that the way in which the Registrar discharged his functions was unobjectionable. As he said, the role of the Registrar was innocuous.[95] It was purely administrative and facilitative. His use of the Public Prosecutor's office was for logistical reasons only. The Public Prosecutor himself had no meaningful involvement in the proceedings. There is no ground for concern that the Registrar's independence was compromised or the process tainted by the means adopted to place the application before the Island Magistrate.

Island Magistrate's independence

[198] The order authorising transport to New Zealand was made at the police station on Pitcairn. Sergeant Medland explained in evidence that he telephoned the Island Magistrate and asked him to come to the police station, as the Island Magistrate did not have an office and Sergeant Medland did not think it appropriate to go to his house. Before making the order, the Magistrate asked to use the telephone to speak to the Registrar in New Zealand and did so in private.

[199] The circumstances in which the order was made are said to have further compromised the independence, or the appearance of independence, of the Island Magistrate. Haines J concluded, however, that a fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that the

---

94 At [447](c).
95 At [447](c).

Island Magistrate was biased or lacking in independence by virtue of the manner in which the hearing was conducted.[96]

[200] Again we find ourselves in agreement with Haines J. Of course, in normal circumstances a police officer seeking an order from a judicial officer would be expected to go to the tribunal where, ordinarily, the Registrar could be expected to be present. But in the unique circumstances in which the Pitcairn authorities are required to operate, departures from normal practice are inevitable. Any assessment of what is permissible or appropriate must be measured against what was practically achievable in local conditions. Judged in this context, we agree with Haines J that the hearing on Pitcairn raises no additional cause for concern about the Island Magistrate's independence.

Lawful authority

[201] For the first time in this Court the argument was advanced that the Pitcairn Magistrate's Court had no lawful authority to make the order authorising the transport of the computer exhibits to New Zealand for forensic examination. The argument presupposes that an order was required, something the Crown does not concede.

[202] The Court purported to make the order under s 23 of the Justice Ordinance.[97] Mr Ellis submitted s 23 merely provides a power to issue a search warrant and to bring the seized articles to Court. The order was accordingly *ultra vires* and invalid.

[203] The Crown's position is that the Magistrate's Court had power to make the order, arising either expressly or by necessary implication from s 23 of the Justice Ordinance. Mr Raftery submitted that such a power is necessary to enable the Court to exercise its criminal jurisdiction effectively. Without the power to facilitate the analysis of exhibits, he said the criminal law in Pitcairn would be severely compromised.

[204] We do not read s 23 as expressly conferring a power to deal with the exhibits. However, it plainly envisages that the Magistrate's Court will exercise a supervisory

---

96 At [447](c).
97 Set out in [171] above.

role as part of its criminal jurisdiction, which is the same as that of the Supreme Court.[98] The Supreme Court has all such jurisdiction in and in relation to Pitcairn as is necessary to administer the law of Pitcairn,[99] and also has the same jurisdiction as is vested in the High Court of Justice in England.[100] The laws of Pitcairn, and the principle that a court which is endowed with a particular jurisdiction has the powers necessary to enable it to act effectively within such jurisdiction, establish that the Pitcairn Magistrate's Court has the ability to do anything necessary to discharge its supervisory responsibilities under s 23.[101]

[205] While we are satisfied the Magistrate's Court had the power to make the orders, we do not think it was necessary for it to do so. In our view, the Police were entitled to retain custody of the articles seized until such time as they had completed their examination and determined which, if any, were relevant to the investigation. The examination of the CD-Roms and USB stick on Pitcairn for that purpose was not questioned. We do not see the transport of the remaining articles to New Zealand to enable the process to be completed as any different in principle. It is, moreover, commonplace for exhibits to be sent by enforcement authorities to other countries for analysis when specialist facilities or expertise are not available, as was the case here. It is an accepted part of the investigation process.

The process was unfair

[206] Mr Warren submits that he should have been given notice of the application and the right to be heard, and the failure to do so was a breach of natural justice. He said if the process were to be characterised as administrative, it had to be lawful, reasonable and procedurally fair, as guaranteed by s 20 of the Pitcairn Constitution.

[207] Haines J held there was no right to be heard.[102] He said the Police had the right to pursue the investigation by taking steps to have the seized evidence analysed. He

---

98 With the exception of specified crimes which have no application here: s 12 of the Judicature (Courts) Ordinance.
99 Pitcairn Constitution s 45(2).
100 Pitcairn Constitution s 45(3).
101 *Connelly v DPP* [1964] AC 1254 (HL).
102 *Haines J Judgment*, above n 1 at [421].

noted that Mr Warren would have the opportunity to challenge the steps taken and the admissibility of the evidence at or before trial, citing *Gill v Attorney General*.[103]

[208] We agree with Haines J. At the investigation stage, where the Police are engaged in the process of gathering and analysing evidence, a suspect normally has no right to challenge the process or special interest in doing so. There can be no suggestion that Mr Warren's fair trial rights were prejudiced by his not being heard at a point where an evaluation of the evidence had still to be completed. His ability to challenge the process and the admissibility of the evidence was unaffected.

Transport and analysis of computer exhibits

[209] Mr Warren submits the transport of the exhibits and their analysis in New Zealand was unlawful in the following respects:

(a) The Police and officials in Pitcairn and New Zealand committed offences against Pitcairn and New Zealand law by possessing, exporting and importing pornography.

(b) Pitcairn and New Zealand officials breached the Magistrate's order by providing the Public Prosecutor with copies of some of the images.

(c) The authorities failed to obtain permission from New Zealand Ministers under the Pitcairn Trials Act 2002.

(d) There was a breach of the Optional Protocol to the Convention of the Rights of the Child.

Actions of Pitcairn and New Zealand officials unlawful

[210] Lovell-Smith J found that the actions of Sergeant Medland in Pitcairn were lawful as they were authorised by the order of the Magistrate. She also accepted that he could avail himself of s 160(2) of the Criminal Justice Act (UK), which provides that it

---

[103] *Gill v Attorney General* [2010] NZCA 468, [2011] 1 NZLR 433 at [17], [19] and [27]-[29].

is a defence to a charge of possession of an indecent photograph that the person charged had a legitimate reason for having the photograph in his possession.

[211] Section 1 of the Protection of Children Act 1978 (UK) provides an equivalent defence for other offences of child pornography. In our view, s 8 of the Summary Offences Ordinance, which covers the possession and importation of indecent or obscene articles generally in Pitcairn, must be read as similarly exempting a police officer acting pursuant to his duty to investigate and prosecute offending under the Ordinance.

[212] Of course, while Sergeant Medland was in possession of the articles pursuant to the search warrant, no question of unlawfulness could arise. As we have previously said, we tend to the view that he was dealing with the articles under s 23 until he completed his investigation, and the court order authorising transport to New Zealand was unnecessary. Whichever view is correct, Sergeant Medland had the Court's sanction to hold and deal with the articles, and any acts necessary to facilitate the examination of the items in New Zealand cannot have constituted an offence.

[213] In New Zealand, police officers and other officials in possession of or importing, exporting, distributing and supplying objectionable publications are protected if acting in the course of their official duties. By s 131(1) of the Films, Videos and Publications Classification Act 1993 (NZ) it is an offence to be in possession of an objectionable publication without lawful authority or excuse. However, s 131(4) exempts persons who possess an objectionable publication for the purpose of and in connection with their official duties. Those listed include any constable and "any other person in the service of the Crown".[104] Section 124A extends the exemption to offences under ss 123 and 124, which make it an offence to import, export, distribute and supply objectionable publications.

Supply to Public Prosecutor

[214] The analysed results, with copies of the objectionable images, were provided to the Public Prosecutor. For Mr Warren, it is submitted that this was a breach of the

---

104 Films, Videos and Publications Classification Act 1993 (NZ), s 131(3)(h) and (l).

Magistrate's order. Relying on the results of an enquiry by the Attorney-General of Pitcairn, Lovell-Smith J found there had been no irregularities in the way in which the material was handled. She accepted that they had remained securely in police custody from the time they left Pitcairn until they were transmitted by the New Zealand Police to the Court where they remain in the custody of the Registrar.[105]

[215] We have been given no reason to differ from Lovell-Smith J's conclusion. All items in the schedule to the order were handled in accordance with the order. The Public Prosecutor was provided with copies of certain images in order to perform his functions under Pitcairn law, but the exhibits never left police custody.

Authorisation under Pitcairn Trials Act 2002

[216] The Pitcairn Trials Act 2002 (NZ) has the purpose of giving effect to New Zealand's obligations under an agreement between the Governments of the United Kingdom and New Zealand for the sitting and proper functioning of the Pitcairn Courts in New Zealand for the purpose of trials.

[217] Mr Warren contended that s 6 of that Act required New Zealand Ministers to give permission before the New Zealand Police could assist the Pitcairn Police with forensic analysis and that, in the absence of such permission, the order actioning the transport of exhibits to New Zealand was invalid and those involved in the handling and analysis of the exhibits in New Zealand could not claim to be acting in connection with their official duties.

[218] "Trial" is defined in s 5 of the Act as follows:

> In this Act, unless the context otherwise requires, *trial* means the trial or trials of a person in accordance with Pitcairn law and practice in respect of an offence or offences against Pitcairn law; and includes (without limitation) all or any of the following:
>
> (a) investigative steps involving a Pitcairn Court or a Pitcairn Magistrate or a Judge or Judges of a Pitcairn Court (for example, the issuing of a search warrant):
>
> (b) the institution of a criminal proceeding by the signing of a formal charge:
>
> (c) any preliminary proceedings (for example, committal proceedings):

---

105 *Lovell-Smith J Judgment*, above n1 at [258].

(d) the person pleading guilty, or not guilty, or a special plea (for example, a plea of previous acquittal, previous conviction, or pardon), and the entering of that plea:
(e) taking evidence:
(f) conducting or continuing a proceeding to determine guilt:
(g) giving judgment in a proceeding:
(h) sentencing or otherwise dealing with the person (whether or not the person pleads guilty):
(i) any appeals or review:
(j) any other associated matters.

[219] Mr Ellis argues that the forensic examination of the exhibits was an investigative step under s 5(a) which should not have been undertaken without the prior approval of the Minister of Justice, after consultation as required under s 6(4).

[220] We do not accept that what took place in New Zealand was an investigative step for the purpose of s 5(a). In our view, s 5 is plainly confined to hearings of a Pitcairn Court in New Zealand, or steps taken by a judge or magistrate of a Pitcairn Court in New Zealand. Actions which are ancillary to or consequential on such hearings or steps are not trials under s 5. The order authorising export of the exhibits was made at a hearing in Pitcairn. The Pitcairn Trials Act was not engaged.

[221] The investigations undertaken by the New Zealand Police were carried out under the Mutual Assistance in Criminal Matters Act 1992 (NZ). It is consistent with our reading of s 5 that s 14 of the Pitcairn Trials Act 2002 provides that nothing in that Act limits or affects the general use or application of the Mutual Assistance in Criminal Matters Act 1992.

Optional Protocol to the Convention on the Rights of the Child

[222] Mr Ellis criticised the omission of Lovell-Smith J to consider art 6 to the Optional Protocol on Child Pornography to the UN Convention on the Rights of the Child and complained that no lawful request was made to take investigative steps in New Zealand. He relied on paragraph 2 of the article, which provides:

> States Parties shall carry out their obligations under paragraph 1 of the present Article in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

[223] As it happens, the Optional Protocol has not been extended to Pitcairn. In any event, on our view of what occurred, the Pitcairn and New Zealand authorities co-operated in accordance with domestic law to protect and further the interests of children on Pitcairn, as intended under the Optional Protocol.

Conclusion as to admissibility

[224] All challenges which may have impacted on the admissibility of the evidence obtained pursuant to the search warrants and the subsequent analysis of the seized items accordingly fail.

Stay of proceedings

[225] We have traversed the grounds upon which Mr Warren supported his application for a stay of proceedings. Like the Supreme Court judges, and generally for the same reasons, we have not accepted any of Mr Warren's arguments. Moreover, even if we had been persuaded that some of them had merit, it is unlikely that a stay of proceedings would have been an appropriate remedy.

[226] It has been made clear in a series of authorities, beginning with the House of Lords in *R v Horseferry Road Magistrates' Court, ex parte Bennett* through to the Privy Council in *Warren v Attorney-General for Jersey*, that a prosecution may be stayed only in two classes of case:[106]

(a) where it will be impossible to give the accused a fair trial; and

(b) where it offends the Court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case.

[227] Nothing put before this Court suggests that Mr Warren cannot receive a fair trial, and nothing has occurred in relation to his case that goes anywhere close to creating a situation in which the Court's integrity would be tarnished if the case were to

---

[106] *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42 (HL); *Warren v Her Majesty's Attorney-General for Jersey* [2011] UKPC 10, [2012] 1 AC 22.

be tried. For instance, even if we had found that the removal of the computer exhibits to New Zealand were unlawful, it would not have followed that a stay would have been granted, given that the Police acted in good faith in the belief that they were authorised to take that action.

[228] The application for a stay was correctly dismissed by the Supreme Court.

Application under s 25 of the Constitution

[229] As well as raising in the criminal proceedings against him the challenges which we have already rejected, Mr Warren has also made three applications under s 25 of the Constitution alleging breach of his rights under ss 8 and 11 of the Constitution.[107] But those matters were able to be, and have been, fully addressed within the criminal proceeding. Had there been any merit in the allegations of breach of the Constitution, a remedy was available by way of the issuance of a stay, or other remedy proportionate to the breach, if that were appropriate. That being so, it is an abuse of process for the appellant also to resort to s 25, as the Privy Council has made clear in *Harrikissoon v Attorney-General of Trinidad and Tobago*, where Lord Diplock said in relation to parallel provisions in the Trinidad and Tobago Constitution:[108]

> The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

[230] *Harrikissoon* has been followed by the Privy Council in *Chokolingo v Attorney-General of Trinidad and Tobago* (a case of imprisonment for contempt) and more

---

[107] The applications also assert breach of other provisions not within Part 2 of the Constitution and so not within the scope of s 25.

[108] *Harrikissoon v Attorney-General of Trinidad and Tobago* [1980] AC 265 (PC) at 268.

recently in *Jaroo v Attorney-General of Trinidad and Tobago* and *Durity v Attorney-General of Trinidad and Tobago*.[109] In *Jaroo* Lord Hope said:[110]

> Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse.

Consistently with this, s 25(3) of the Constitution allows the Supreme Court to decline to exercise its powers under the section if satisfied that adequate means of redress are available under any other law, as they were here.

[231] The s 25 applications served no useful purpose other perhaps than providing an appeal as of right to this Court. Lovell-Smith J and Haines J dismissed the applications. We consider they were an abuse of process and uphold their decisions.

Result

[232] To the extent that leave is required under s 35DD and s 35E of the Judicature (Appeals in Criminal Cases) Ordinance, it is granted but the appeal is dismissed.

Judicial review

[233] In September 2013 Mr Warren made, in the civil jurisdiction of the Supreme Court, an application for judicial review. It pleaded issues that Haines J[111] described as identical to those already advanced before Lovell-Smith J and himself.[112] Both parties applied for directions as to the way in which the matter should proceed. In his judgment, which was unusually but pragmatically incorporated into his judgment in the

---

109 *Chokolingo v Attorney-General of Trinidad and Tobago* [1981] 1 WLR 106 (PC); *Jaroo v Attorney-General of Trinidad and Tobago* [2002] UKPC 5, [2002] 1 AC 871; and *Durity v Attorney-General of Trinidad and Tobago* [2008] UKPC 59.

110 *Jaroo v Attorney-General of Trinidad and Tobago*, above n 108 at [39].

111 At [452].

112 If so, the application would likely be an abuse of process.

criminal proceeding, Haines J considered whether English or New Zealand practices on judicial review should be followed. English practice of course requires that an applicant obtain the leave of the Court before commencing a judicial review proceeding. New Zealand practice does not.

[234] Haines J observed that by virtue of s 42 of the Constitution, the Civil Procedure Act (UK) and the Civil Procedure Rules (UK) apply in Pitcairn, subject to the limitations in s 42(2). He considered that the appropriate procedure was that of the High Court of Justice in England.[113]

[235] We see no reason to differ from that conclusion and dismiss Mr Warren's appeal against the direction given by Haines J. The civil proceeding is remitted to the Supreme Court where an application for leave can be heard if the appellant still wishes to pursue the judicial review.

_____

Potter JA (Acting President)

_____

Blanchard JA

_____

Hansen JA

---

[113] *Haines J Judgment*, above n 1 at [466].