IN THE PITCAIRN ISLANDS
SUPREME COURT

T 1/2011

IN THE MATTER	under the Constitution of Pitcairn and the Bill of Rights 1688
AND	
IN THE MATTER OF	a challenge to the vires of parts of the Pitcairn Constitution being ultra vires the Bill of Rights 1688
AND	
IN THE MATTER OF	a constitutional challenge and the refusal of the Magistrates Court to refer a constitutional challenge to the Supreme Court and the failure of the Supreme Court to consider an appeal from the Magistrates Court
AND	CP 1/2013
IN THE MATTER OF	a judicial review of the Attorney General and Governor
BETWEEN	**MICHAEL WARREN** Applicant/Appellant
AND	**THE QUEEN** Respondent
Hearing:	07 to 11 and 14 to 17 April 2014; 01 August 2014; 23 September 2014
Appearances:	Kieran Raftery and Simon Mount for the Crown Tony Ellis and Simon Park (on 23 September 2014) for Applicant/Appellant
Judgment:	28 November 2014

JUDGMENT OF HAINES J

This judgment was delivered by me on 28 November 2014 at 10 am
pursuant to the directions of Haines J

Deputy Registrar

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Introduction

[1] Mr Warren lives on Pitcairn Island. He is charged with twenty counts of possessing child pornography contrary to s 160 of the Criminal Justice Act 1988 (UK). He also faces five charges under the Pitcairn Summary Offences Ordinance for possessing indecent articles. The Criminal Justice Act charges are triable only in the Supreme Court.

[2] On 1 August 2011, Senior Magistrate RKM Hawk committed Mr Warren to the Supreme Court for trial. The Senior Magistrate rejected a submission by Mr Warren that he (the Senior Magistrate) had power to determine the admissibility of the evidence on which the Crown relied. He further rejected a submission that questions of admissibility should be referred to the Supreme Court pursuant to the provisions of s 5(7) of the Constitution of Pitcairn.

[3] In a document dated 19 August 2011, Mr Warren appealed the decision to commit him for trial. He also filed a number of other proceedings, some of which were dealt with by Lovell-Smith J in her judgment given on 12 October 2012. On 26 October 2012, Mr Warren filed a notice of appeal in the Court of Appeal. Some, but not all, of the grounds of appeal have been dealt with by the Court of Appeal in decisions given on 12 April 2013, 12 August 2013 and 21 August 2013.

[4] Apart from the matters yet to be determined by the Court of Appeal, there remain in the Supreme Court a number of proceedings and other matters which have not been resolved or addressed by the judgment given by Lovell-Smith J.

[5] Clarification of the issues thought to be outstanding and awaiting determination either in the Supreme Court or in the Court of Appeal was provided on 11 September 2013, when counsel filed in the latter court a joint memorandum. It recorded there were then eight applications before the Supreme Court which had either not been determined formally or not determined at all. One has since been abandoned by Mr Warren (it has been deleted from the list which follows), while the last four have since been added, leaving the following:

(a) Mr Warren's appeal dated 19 August 2011 against the Magistrate's committal decision.

(b) Mr Warren's application (undated but filed on 12 January 2012) for orders based on the Bill of Rights 1688.

(c) The Crown's application dated 10 April 2013 under s 70AA of the Justice Ordinance for a ruling on the admissibility of evidence.

(d) Mr Warren's application of 3 May 2013 for a stay of prosecution on the grounds of abuse of process.

(e) Mr Warren's application dated 3 May 2013 for a declaration that Blackie CJ, Lovell-Smith J and Senior Magistrate Hawk have not lawfully entered office or have vacated their office ("a Quo Warranto type application").

(f) In the alternative to (e), Mr Warren's application dated 3 May 2013 for an order of mandamus requiring Blackie CJ, Lovell-Smith J and Senior Magistrate Hawk to swear their oaths in open court.

(g) The application for a judicial review filed by Mr Warren on or about 11 September 2013 in this Court's civil jurisdiction. The procedure to be followed must now be determined and, in particular, whether leave to bring the proceedings is required.

(h) The submission dated 4 April 2014 that Haines J has a duty to resign.

(i) The oral submission made on 7 April 2014 that Mr Raftery and Mr Mount have not been properly appointed as prosecutors and have no standing before the Court.

(j) The second constitutional challenge and abuse of process challenge dated 29 May 2014.

(k) The third constitutional challenge and abuse of process challenge dated 8 August 2014.

[6] At different times during the hearing I expressed concern that some of the identified issues have either been addressed by Lovell-Smith J or are presently before the Court of Appeal. However, all counsel were in agreement that precise identification of the matters truly unresolved at Supreme Court level would be a difficult and

potentially contentious exercise. It was said the abuse of process claim in particular made it inherently difficult to identify with any degree of precision what had been argued and determined in the course of the earlier hearings. It was necessary that the hearing before me (and the eventual judgment) should canvass each of the issues listed above so that when the judgment is appealed to the Court of Appeal, that Court will be in a position to address all issues between the parties without having to request the Supreme Court to determine any matter inadvertently overlooked.

[7] Given the length of time which has passed since Mr Warren was committed for trial and the need to expedite an early hearing in the Court of Appeal, I acceded to the request that I deal with all the listed issues in preference to diverting potentially unproductive time to ascertaining that which may well be unascertainable, namely the precise reach of the previous decisions given by both the Supreme Court and the Court of Appeal. If, as a result, this decision trespasses on ground already traversed by those previous judgments, this explanation and an apology is offered.

[8] To complete this introduction, brief reference is made to the circumstances in which the last four of the listed applications were added. Subsequent to the hearing in April 2014, Mr Warren by notice dated 29 May 2014 raised further "fair trial" issues, claiming that (inter alia) because the Magistrate's Court, Supreme Court and Court of Appeal had all sat with Mr Graham Ford as Registrar, the independence of the Courts and of the Registrar had been compromised. On 10 June 2014 at Auckland a hearing was convened in Chambers. I granted the joint request of counsel that the hearing be reconvened so that oral argument could be heard on this second constitutional challenge and abuse of process challenge. A timetable for the filing of written submissions was agreed to. The hearing was reconvened on Friday 1 August 2014 for submissions, including submissions on cases and materials uncovered by my own research. Those cases and materials had earlier been disclosed to counsel by way of *Minute* dated 30 June 2014 and an opportunity given for written submissions to be filed.

[9] At the commencement of the hearing on 1 August 2014, Mr Ellis advised that a third constitutional challenge and abuse of process challenge was to come and would be filed in the following week challenging (inter alia) the independence of all Judges appointed under the Constitution of Pitcairn and claiming that the Island Magistrate (who issued various warrants) held irreconcilable positions, he at the relevant time being also the Deputy Mayor of Pitcairn (Mr Warren then being Mayor). By *Minute*

dated 6 August 2014, a timetable for the filing of written submissions was made and the hearing was reconvened on Tuesday 23 September 2014.

[10] Following the hearing on 23 September 2014, the parties were by *Minute* dated 7 November 2014 invited to file submissions on further material of potential relevance uncovered by my own research. Those submissions dated 10 November 2014 and 19 November 2014 have been taken into account in the preparation of this decision.

Course of the hearing

[11] The April 2014 hearing, as well as the additional hearings on 1 August 2014 and 23 September 2014, were held at Auckland and commenced with the making of orders under ss 15E and 15F of the Judicature (Courts) Ordinance 2000, particularly:

(a) An order under s 15E(1)(c) that the proceedings be held in New Zealand; and

(b) An order under s 15F that Mr Warren participate in the proceeding by way of live-link television.

Thereafter Mr Warren was present during the hearings for their entire duration, being the initial nine full days and the additional one day hearings on 1 August 2014 and 23 September 2014 respectively. Other members of the Pitcairn community also attended the town hall where the live-link had been set up.

[12] By agreement between counsel, both Mr Warren and the Crown were able to tender documents from the Bar, and some 45 documents were tendered by Mr Warren and 27 by the Crown.

[13] Mr Warren did not otherwise give or call evidence. The Crown called two witnesses, being Sgt GI Medland and Mr KJ Lynch. As will be seen, both witnesses are accepted as entirely credible witnesses.

[14] Sgt Medland arrived on Pitcairn Island on 10 December 2009 for a six month deployment as the Community Police Sergeant. It was he who on 26 May 2010 executed the two search warrants on Mr Warren's home and office on Pitcairn Island. Sgt Medland had previously given evidence at the hearing before Lovell-Smith J and by agreement that evidence was incorporated into the hearing before me.

[15] The second witness, Mr KJ Lynch, is Deputy Governor of the Pitcairn Islands. His evidence was given in two parts. In the first he addressed (inter alia) decolonisation in the context of the Pitcairn Islands, the background to the new governance structure which took effect on 1 April 2009, the consultation process leading to the Pitcairn Constitution Order 2010 and human rights training. In the second he addressed (inter alia) local governance on Pitcairn and the political participation of Pitcairn Islanders in their governance.

[16] At the April 2014 hearing the evidence occupied approximately nine hours. Mr Ellis then addressed submissions to the Court for approximately 28 hours, Crown Counsel taking approximately eight hours. The hearings on 1 August 2014 and 23 September 2014 occupied full days. Both parties have been given every opportunity to be heard.

[17] In the interests of publishing a decision of manageable length at an early date, it has not been possible to recite at length the written and oral submissions which have been received. Rather, it is proposed to address the gist of the relevant points, thereby minimising the repetition inherent in overlapping issues. It should be added that on more than one occasion during the April hearing it became necessary to point out that at times the submissions for Mr Warren were less than helpfully presented. There was no single, coherent set of submissions. Some points were developed over different documents and submissions prepared for other hearings in other Courts were also handed up. The consequent disjointed flow of the documents, the confusing numbering of paragraphs and cryptic cross-referencing has required considerable disentangling. The submissions for Mr Warren at times more closely resembled a jigsaw puzzle than a clear and coherent presentation of argument. Nevertheless, it is hoped that no significant aspect of his case has been overlooked.

[18] As to the order in which the issues are to be addressed, it will be observed that some points are narrow and specific, such as the question whether the Chief Justice is lawfully in office as well as the Crown application under s 70AA of the Justice Ordinance. Others, however, are framed in broad principles of international and constitutional law. These broader issues do from time to time intersect with the more narrow and focussed issues. In these circumstances, it is proposed to address the broader issues first, being the application for a stay of prosecution based on the claim to self-determination followed by the application for orders under the Bill of Rights 1688.

Thereafter, the more confined issues will follow, including the appeal against the Magistrate's committal decision, the Crown's application under s 70AA of the Justice Ordinance, the various challenges which relate to the judicial office of the Chief Justice, the further abuse of process arguments (including the second and third constitutional challenges), the submission that I should resign, and finally the question of the procedure to govern judicial review proceedings. However, because Mr Warren's case has been advanced incrementally, it has not always been possible to marshal the various points in logical order.

The application for a stay on the grounds of abuse of process – the self-determination claim

The submission

[19] Central to the abuse of process argument advanced by Mr Warren is the submission that the government of the United Kingdom has failed to recognise and facilitate the right of Pitcairn Islanders to self-determination (either under customary international law or via the Charter of the United Nations or via the International Covenant on Civil and Political Rights, 1966 (ICCPR)). It is said that the Executive, Legislative and Judicial branches of government were therefore not lawfully created, that there has been a breach of a sacred trust and no independent and impartial tribunal for the determination of the charges against Mr Warren has been created by law, thus contaminating the right to a fair trial. The outcome is that Mr Warren cannot receive a fair trial and the prosecution should accordingly be stayed.

[20] The submission is couched in highly abstract terms and, as will be seen, has tenuous foundation in law and even less in fact.

[21] It is intended to address first the right to self-determination in international human rights law before addressing the reality on the ground in Pitcairn.

The right to self-determination – sources

[22] For Mr Warren it is submitted that there is a consensus that the right to self-determination has both external and internal dimensions. External self-determination generally refers to the right of a people to determine their international status, for example, by becoming an independent State or integrating or associating with an

existing State. Mr Warren does not advance self-determination as so understood. Rather he relies on a right of "internal" self-determination understood as a locally elected legislature. It is submitted that this right is established by:

(a) A *ius cogens* right to internal self-determination.

(b) The treaty obligations of the United Kingdom under the United Nations Charter, under the ICCPR and under the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR).

[23] It will be seen that the right to a locally elected legislature is not to be found in these sources. Rather there are different levels of self-determination and the system of governance presently operating on Pitcairn is not in violation of the human rights instruments relied on by Mr Warren. Each of the sources he relies upon will be addressed in turn.

Ius cogens

[24] The discussion of peremptory norms (*ius cogens*) in Professor James Crawford's *Brownlie's Principles of Public International Law* (8th ed, Oxford, 2012) at 594 explains:

> Jurists have from time to time attempted to classify rules, or rights and duties, on the international plane by using terms like 'fundamental', or, with respect to rights, 'inalienable' or 'inherent'. Such classifications have not had much success, but have intermittently affected the tribunals' interpretation of treaties. But during the 1960s scholarly opinion came to support the view that there can exist overriding norms of international law, referred to as peremptory norms (ius cogens). Their key distinguishing feature is their relative indelibility. [Footnote citations omitted]

[25] According to the Vienna Convention on the Law of Treaties, 1969 (VCLT) Article 53, *ius cogens* is a peremptory norm of general international law if it is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character:

> *Article 53*
>
> *Treaties conflicting with a peremptory norm of general international law ("jus cogens")*
>
> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a

> peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[26] Thus for a norm to achieve *ius cogens* status, it must satisfy an exacting standard. First, it must be accepted by States as law and second, it must be accepted as having binding peremptory status by an overwhelming majority of States. This ensures that the norm meets the positivist demand for hard, provable consensus. That is, States must themselves agree the content of the norms which bind them.

[27] Mr Warren has called no evidence, expert or otherwise, as to whether there is a *ius cogens* right to internal self-determination and, if there is, the content of that right (and that it includes a locally elected legislature). At the hearing this omission was acknowledged by his counsel. The submissions for Mr Warren instead made reference to various texts. However, the "teachings of the most highly qualified publicists of the various nations" are only a subsidiary means for the determination of the rules of international law. See the Statute of the International Court of Justice, Article 38(1)(d). Furthermore, almost all commentators cited by Mr Warren agree that the right of self-determination is in a sense a controversial one. Mathew Saul in "The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?" (2011) 11 Human Rights Law Review 609, observes both in his Introduction as well as in his Conclusion that the right to self-determination "is one of the most unsettled norms in international law", both as to its legal content and as to its normative status. At 644 he states:

> It is apparent, then, that whether or not self-determination is a norm with *jus cogens* status, and which aspects therein, is hardly more settled than the questions that persist about its scope and content.

[28] Helen Quane in "The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?" in Allen and Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford, 2011) 259 at 260 states that the right to self-determination is "a notoriously elusive concept". On the other hand, James Crawford's *Brownlie's Principles of Public International Law* at 596 opines that the principal of self-determination is a peremptory norm, at least in its application to colonial countries and peoples or peoples under alien domination. However, at 646 he adds that in different contexts self-determination can mean different things and there is no universally

accepted definition. Alexander Orakhelashvili in *Peremptory Norms in International Law* (Oxford University Press, 2006) at 51, states that the right of peoples to self-determination is undoubtedly part of *ius cogens* because of its fundamental importance, even if its peremptory character is sometimes disputed.

[29] Even if this division of opinion in subsidiary sources of international law were to be set aside and it be assumed academic writing is of one voice in asserting that the principle of self-determination is *ius cogens*, Mr Warren's case is not assisted. Such agreement as there is relates to self-determination in the external sense. The critical weakness in Mr Warren's argument is twofold. First, the claimed *ius cogens* right to **internal** self-determination has not been established. Second, even if it be assumed there is a broad yet undefined "right" to **internal** self-determination having the character of *ius cogens*, the problem remains that there is no evidence of any agreement by States, or of a general practice accepted by them as law, as to the **content** of the asserted peremptory norm. As stated in *Brownlie's Principles of Public International Law* at 596, "more authority exists for the concept of peremptory norms than for its particular consequences". Specifically, there is no evidence that the norm (internal self-determination) requires a "democratic" form of governance (assuming, contrary to experience, it can be demonstrated that there is agreement among States as to what such term means), specifically a locally elected legislature. The evidence simply does not establish that the form of governance presently operating on Pitcairn fails to conform to a *ius cogens* standard.

[30] In these circumstances, it is misconceived to advance a fair trial objection based on the contention that because of a (claimed) *ius cogens* principle, the different branches of the government of Pitcairn were "not lawfully created".

[31] Mr Warren argues in the alternative that his objection finds support in the treaty obligations of the United Kingdom.

Internal self-determination – treaty obligations of the UK – the Charter of the United Nations

[32] The United Nations Charter is a treaty binding on the United Kingdom. Mr Warren relies on Article 1(2) and Article 55 which contain references to "the principle of equal rights and self-determination of peoples":

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

(a) higher standards of living, full employment, and conditions of economic and social progress and development;

(b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

[33] At first sight it might be thought that the "purposes and principles" of the United Nations do not impose legally binding obligations, but account must be taken of the fact that they do refer to binding principles of customary international law. See Dr Rüdiger Wolfrum "Article 1" in Simma and others *The Charter of the United Nations: A Commentary* (3rd ed, Oxford University Press, Oxford, 2012) 107 at 108:

> The 'purposes and principles' are designed to provide a guide for the conduct of the UN organs in fairly flexible manner. It is a matter of controversy whether the purposes of the United Nations as contained in Art. 1 of the Charter are meant to be legally binding. Their place in the Charter, taking into consideration the legislative history of Art. 1, points in the direction of qualifying the purposes as legally binding. However, the wording of Art. 1 is more appropriate for political objectives rather than for legally binding obligations. Account has to be taken of the fact that certain elements of Art. 1(1) and (2) are considered principles binding under customary international law (such as the prohibition of aggression, the prohibition of other breaches of peace, an obligation to settle disputes by

> peaceful means, respect for human rights, respect for equal rights, and self-determination of peoples). [Footnote citations omitted]

[34] Later in his chapter Dr Wolfrum at *op cit* 115 refers to the principle of self-determination as "[acquiring] its final shape through the practice of the UN" and that further development of the subject can be found in the chapter by Dr Stefan Oeter "Self-Determination" in the same text.

[35] If reference is then made to Dr Oeter's chapter "Self-Determination" in Simma and others *op cit* 313, the following points may be noted:

(a) It is "beyond doubt" that self-determination, as a purpose and principle of the UN Charter, constitutes a legally binding norm for all member States of the United Nations, as has been confirmed by a series of resolutions by the General Assembly and Security Council, but also in the jurisprudence of the International Court of Justice, and State practice in the process of decolonisation as well as in the cases of creation of new States in Europe after 1990 (*op cit* 316).

(b) Although Article 1(2), due to its programmatic character, cannot define in detail the content and scope of a right to self-determination, it sets forth beyond dispute that it forms part of the law of the Charter and is binding upon all members of the United Nations (*op cit* 316).

(c) Article 55 of the Charter is of declaratory character concerning the principle of self-determination. It does not guarantee it, but it presupposes its existence (*op cit* 316).

(d) The two 1966 Covenants (the ICCPR and ICESCR) not only transformed self-determination into a collective right under (positive) international law, by codifying it in the form of treaty obligation, but disconnected the right of self-determination from its strict coupling to the context of decolonisation. The systematic structure of the two Covenants makes clear that the right of self-determination is a general entitlement, and that the purpose of decolonisation is only a specific emanation of such general right (*op cit* 322).

(e) While the International Court of Justice in its jurisprudence has confirmed the existence of a right of self-determination in modern international law, the Court has not said anything in detail about the components and contents of such a right. Insights into the legal character and the content of the right of self-determination cannot be gained from the jurisprudence of the International Court of Justice (*op cit* 323-324).

(f) Internal self-determination guarantees the internal right of a given people to determine freely its internal political order (*op cit* 328).

(g) It cannot be said that there is a link between the right to self-determination and a right to democratic governance (*op cit* 331):

> It has been argued that there exists an intrinsic linkage between self-determination and principles of democratic governance. Historically, a good claim may be made in pointing to the inseparable coupling of the principles of national self-determination and peoples' sovereignty. Self-determination could only be argued on the basis of a political theory that departs from axioms of peoples' sovereignty. If the wish of the people is irrelevant, because human beings are bound to obey a "natural" or divine order, self-determination has no legitimate place in such an order. But does current international legal practice really point to the conclusion that the right of self-determination calls for democratic forms of government? An 'emerging right to democratic governance' was argued two decades ago – but has State practice really affirmed such a right? Most States at least pay lip-service to principles of democratic governance in their formal constitutions; but in political reality, most States of the World are undoubtedly far from any realisation of such a right. Democratic governance still remains the privilege of a few in today's world …

[36] In the present context the two most significant points are first, even if it is accepted (without deciding) that self-determination is a legally binding norm, the content of the right to internal self-determination is not settled by international law and second, international law makes no intrinsic linkage between internal self-determination and principles of democratic governance. These same two themes emerge from the earlier discussion of *ius cogens* and, as will shortly be seen, emerge also from the other treaties relied on by Mr Warren, namely the ICCPR and the ICESCR.

Internal self-determination – treaty obligations of the UK – the ICCPR

[37] In making his case that the system of governance on Pitcairn was not lawfully created, Mr Warren relies on Common Article 1 of the ICCPR and of the ICESCR which provides:

> **Article 1**
>
> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

[38] The obligations of the United Kingdom under the ICCPR applied to Pitcairn Island upon ratification of the ICCPR by the United Kingdom in May 1976. See Dino Kritsiotis and AWB Simpson "The Pitcairn Prosecutions: An Assessment of Their Historical Context by Reference to the Provisions of Public International Law" in D Oliver (ed) *Justice, Legality, and the Rule of Law: Lessons from the Pitcairn Prosecutions* (Oxford University Press, 2009) 93 at 121-122.

[39] While no distinction is made in Article 1 between external and internal self-determination, it can be said that the distinction does follow from the second sentence of Article 1. Joseph, Schultz and Castan in *The International Covenant on Civil and Political Rights: Cases, Materials, And Commentary* (2nd ed, Oxford, 2004) at [7.13] opine that internal self-determination refers to the right of peoples to choose their political status within a State, or to exercise a right of meaningful political participation. They add that the notion of internal self-development overlaps considerably with the rights guaranteed in ICCPR Articles 25 (right of political participation) and 27 (minority rights). At [7.15] the authors observe that there are various forms of internal self-determination:

> Self-determination is therefore a complex right, entailing an "internal" and an "external" form. The right can be conceptualized as a sliding scale of different levels of entitlement to political emancipation, constituting various forms of ISD up to the apex of the right, the right to ESD, which vests only in exceptional

> circumstances. Different "peoples" are entitled to different "levels" of self-determination.

[40] See also David Raič in *Statehood and the Law of Self-Determination* (Kluwer, The Hague, 2002) at 237, where the author offers the opinion that political self-determination denotes a right of a people to participate in the decision-making processes of the State – what he calls a right of participation:

> With respect to the meaning of self-determination, Brownlie observed the following:
>
> > … the principle [of self-determination] appears to have a core of reasonable certainty. This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives.
>
> It is evident that Brownlie refers to the application of self-determination within the framework of an existing State. Indeed, as was stated above, beyond the traditional colonial context and on the basis of the continuing character of the concept, the field of application and implementation of self-determination is first and foremost that of intra-State relations. Within that context, internal self-determination relates to the relationship between a people and its *own* State or government and particularly to the implementation or realization of self-determination of a people within the State in which that people resides. Against this background internal self-determination can generally be described as a mode of implementation of political self-determination which denotes a right of a people to participate (a right to have a say) in the decision-making processes of the State. In the following this will be referred to as the "right of participation". [Footnote citations omitted]

[41] Joining with Joseph, Schultz and Castan, Raič cautions at *op cit* 238-239 that the degree of participation in the decision-making process does not have to be the same in each and every situation. Several options of exercising self-determination within a State can be envisaged, ranging from direct participation in the central decision-making processes of the State to federalism and other forms of political autonomy.

[42] For Mr Warren, it is contended that a democratic system of governance is required by the claimed right of internal self-determination. In particular, there must be a locally elected legislature. Dr Oeter says that there is no such State practice (and therefore there can be no such peremptory norm). Raič is of the same view. At *op cit* 278 he points out that Western style democracy is not the only means for protecting human rights and human dignity. Representative democracy as defined by Western States must not be understood as an end in itself but rather as one of several means possible for realising certain ends and for protecting certain values:

> Thus, even if it would be accepted that a right to democratic governance is emerging, this would mean that peoples would be entitled to *choose* a Western styled democratic form of government *if they so wish*, and that States would be obliged to respect such a choice. It does certainly not mean that democratic government as perceived in the West now forms some sort of compulsory system of government for States, nations, peoples or their members.
>
> In some, under general international law internal self-determination seems to require the existence of a "representative" government, which arguably includes Western conceptions of representative democratic governance, but may also include other forms of government which are considered to be representative by the people concerned. In the assessment of the question of representativeness, the opinion of the relevant peoples should be the point of departure. A minimum requirement seems to be that the claim to representativeness by a non-oppressive government is not contested or challenged by (part of) the population. Thus, the notion of "representativeness" assumes that government and the system of government is not imposed on the population of a State, but that it is based on the consent or assent of the population and in that sense is representative of the will of the people, regardless of the forms or methods by which the consent or assent is freely expressed. [Footnote citations omitted]

[43] Mr Warren argues that the form of governance for Pitcairn is in breach of the treaty obligations assumed by the United Kingdom under the United Nations Charter and under ICCPR Article 1. But looking at his case in the most favourable light, all he has established is that there is a right to self-determination (which includes internal self-determination). He has singularly failed to establish that international law prescribes the legal character and content of the right to internal self-determination. In the absence of a binding international standard of governance, it cannot be said that the present system of governance for Pitcairn is in violation of an international norm or of a treaty obligation of the United Kingdom. It is necessary in this context to return to the point made by Joseph, Schultz and Castan (reinforced by Raič) that there is a sliding scale of different levels of entitlement to political emancipation, constituting various forms of internal self-determination. Different "peoples" are entitled to different "levels" of self-determination.

[44] The claim that a fair trial is not possible because the system of governance violates international law must accordingly fail.

[45] There is a further reason why the argument must fail. That reason is that the evidence establishes that the governance structure as now in place for Pitcairn has been determined in consultation with those who live on Pitcairn and does in fact confer on them a high degree of self-government. The system falls well within the broad range of

self-determination options available, bearing in mind the particular context which includes:

(a) The fact that Mr Warren expressly disavows any claim that the Pitcairn Islands have a right to external self-determination.

(b) It follows that the "colonial" status of Pitcairn, or rather its status as a British Overseas Territory, is a given against which the claim to internal self-determination must be assessed and given legal content. In particular, the fact that s 10 of the Pitcairn Constitution Order 2010 reserves to Her Majesty "full power" to make laws from time to time for the peace, order and good government of Pitcairn is the back cloth against which the content of internal self-determination must be assessed. So too must the fact that the executive authority of Pitcairn is vested in Her Majesty and that that executive authority is exercised on behalf of Her Majesty by the Governor, either directly or through officers subordinate to the Governor. See s 33 of the Constitution of Pitcairn:

> **Executive authority**
>
> **33.**—(1) The executive authority of Pitcairn is vested in Her Majesty.
> (2) Subject to this Constitution, the executive authority of Pitcairn shall be exercised on behalf of Her Majesty by the Governor, either directly or through officers subordinate to the Governor.
> (3) Nothing in this section shall preclude persons or authorities other than the Governor from exercising such functions as are or may be conferred on them by any law.

(c) The adoption of the Constitution of Pitcairn followed full consultation with the Island community, and the community was also fully involved in consultations leading to the setting up of a new governance structure on the Island in April 2009. During elections in 2010, Mr Warren was elected Mayor for a term of three years. The relevant evidence will be referred to shortly. The point is that as Pitcairn Islanders do not assert a right of external self-determination and as they have a representative form of local government (the 2010 Constitution) unanimously agreed to by the Island Council, internal self-determination, understood as a right of meaningful political participation, does exist.

[46] It is now intended to refer in greater detail to the extensive consultations over the present governance structure and over the 2010 Constitution. Those consultations and the governance structure are central to the determination of the factual question whether any breach of Common Article 1 has been established on the evidence.

Internal self-determination of Pitcairn Island – context

[47] The evidence given by Mr Lynch, Deputy Governor of the Pitcairn Islands, was that:

(a) Pitcairn is an overseas territory of the United Kingdom.

(b) Pitcairn's current population is approximately 50 people, including approximately 30 able-bodied adults in the workforce. The economy is predominantly subsistence fishing, gardening, and the sale of handicrafts and stamps. In practical terms, Pitcairn's economy relies almost completely on budgetary aid. In recent years, aid from the United Kingdom has supplied approximately 90% of Pitcairn's government expenditure.

(c) Pitcairn has a long history of loyalty to the Crown. That loyalty manifested itself on a number of occasions in the 20th Century in the context of broader discussions about decolonisation and self-determination. In June 1968 the Pitcairn Island Council issued the following declaration:

> **Declaration by the Pitcairn Island Council**
>
> The Pitcairn Island Council, having noted the discussions which have taken place from time to time in the United Nations Committee on Colonialism about the future status of the remaining smaller colonial territories and having also noted that the British Colony of the Pitcairn Islands is one of the territories considered by the Committee.
>
> The Council declares that it has no present wish to seek to change the nature of the relationship between the Government and people of Pitcairn and the Government and people of the United Kingdom; but if, at any time, change should be desirable, the Council has full confidence that this can and will be negotiated satisfactorily by free agreement between those whose sole concern it is.
>
> The Council further declares that independent statehood would be administratively and economically impracticable for the small, isolated island community of Pitcairn.

(d) In 1974, the United Kingdom referred this declaration to the United Nations Special Committee on the Situation with regard to the Declaration on the Granting of Independence to Colonial Countries and Peoples (the Committee of 24) adding:

> … that declaration has never been rescinded, nor have the Island Council expressed any wish for change in their status.

(e) In 1999, the government of the United Kingdom published a White Paper entitled *Partnership for Progress and Prosperity – Britain and the Overseas Territories* which set out a renewed partnership agreement between Britain and Pitcairn reflecting a greater focus on self-determination and self-government. The White Paper covered issues such as citizenship, the environment, the economy, good governance and human rights. The then Secretary of State for Foreign and Commonwealth Affairs stated in his Foreword:

> Overseas Territories are British for as long as they wish to remain British. Britain has willingly granted independence where it has been requested; and we will continue to do so where this is an option. It says a lot about the strength of our partnership that all the Overseas Territories want the Constitutional link to continue. And Britain remains committed to those territories which choose to retain the British connection.

[48] On occasions, the serving Mayor of Pitcairn, or his representative, has participated in various regional seminars on decolonisation.

The new governance structure which took effect on 1 April 2009

[49] On 1 April 2009 a new governance structure for Pitcairn took effect. Mr Lynch's evidence addressed in some detail the background to this new structure. In view of Mr Warren's claim that he cannot receive a fair trial because that structure is so fundamentally defective, it is necessary to record Mr Lynch's evidence at some length. The overarching point is that since at least 2007 Her Majesty's Government has aimed to facilitate greater autonomy for Pitcairn Islanders over their governance and to transfer significant governance functions to the Island in a progressive manner. The Island community was fully involved in consultations leading to the setting-up of the new governance structure on the Island in April 2009:

[50] Mr Lynch stated:

3.1 Following the completion of the Operation Unique trial process, the Commissioner for Pitcairn Island Mr Leslie Jacques spent six months on Pitcairn in 2007 to consult with the community in relation to a new governance structure.

3.2 The purpose of the project was to devolve more operational responsibility to the Island, and to develop a more self-governing model. In November 2007 the Commissioner called for expressions of interest from people interested in developing policies and procedures to assist in the proposed governance restructure.

3.3 As part of this process the Commissioner formed the Pitcairn Development Team (PDT). The group's terms of reference were among other things "*to build a governing structure that devolved operational responsibility to the Island, whilst recognizing its limited human resource*". Michele Christian, Jacqui Christian, Carol Warren and Heather Menzies formed the PDT with the then acting Mayor, Michael Warren. Heather Menzies was elected chair and Commissioner Jaques secretary.

3.4 The Council endorsed the Terms of Reference for the PDT on 10 March 2008.

3.5 The PDT released a *Governance Restructure Concept Document* on 28 May 2008. This was amended on 29 August 2008 after input from the Pitcairn Island Community, and approved by Council. The purpose of the Governance Restructure was:

- *To devolve operational responsibility for local governance to the community*
- *To create an organisational structure that supports effective local Governance*
- *To develop a self-sufficient local economic model which creates: full employment, better standards of living, increased discretionary spending and encourages repopulation*
- *To empower Council and government employees to operate strategically for the successful management and operations of the Government of Pitcairn Islands.*

3.6 The document included the following three stages of implementation: Restructure of Council; Employment Contracts and Salary Structure; and Pitcairn Law Review.

3.7 From the perspective of Her Majesty's Government (HMG), the restructuring project aimed to facilitate greater autonomy for Pitcairn Islanders over their governance, and to transfer significant governance functions to the Island in a progressive manner.

3.8 In June 2008 the PDT comprised Steve Christian, Shawn Christian, Michelle Christian, Jacqui Christian, and Leslie Jacques. The newly-elected PDT Chairperson Shawn Christian presented the proposed organisational structure to the Island Council on 17 June 2008.

3.9 On 27 June 2008 the Mayor and PDT discussed the proposals regarding organisational structure. Further consideration was deferred to allow Councillors time to consider the proposal.

3.10 On 19 August 2008 the Island Council held a Special meeting to discuss the PDT proposals. The PDT and Council discussed the potential functions of five departments and agreed a number of changes to the organisational concept, including:

3.10.1 departments to be renamed as divisions;
3.10.2 a total of five divisions;
3.10.3 five Council members to be allocated divisional portfolios.

3.11 The Governor's Representative facilitated a Good Governance Workshop for councillors and others on 26 August 2008.

3.12 On 29 August 2008 Deputy-Governor Silva, Commissioner Jacques and PDT representatives attended a special Council meeting to consider the Government Restructure Concept Document. The Council approved the document with some amendments, including:

3.12.1 Councillors to hold portfolios relevant to four divisions;
3.12.2 Council to consist of 7 voting members,
3.12.3 the Mayor to be elected for a 3-year term and Deputy Mayor for a 2-year term,
3.12.4 four elected Councillors for a 2-year term.

3.13 At a special Council meeting on 22 September 2008, Council provided further drafting feedback on the proposals. Council continued to work on the proposals on 13 October 2008, and reviewed the draft recommendations for the roles and responsibilities of Deputy Mayor, Mayor and Councillors. Council continued discussing the details of the proposals on 22 October 2008, and 10 November 2008.

3.14 On 13 November 2008 the Island Council approved the job descriptions for Operations, Natural Resources, Finance and Economics and Community Development Division Managers, with amendments.

3.15 The next day the Commissioner tabled a memorandum regarding the roll out of the Governance Restructure Concept Documents at a council meeting.

3.16 The new governance structure took effect on 1 April 2009.

3.17 On 8 January 2011 the United Nations decolonization committee noted the governance restructure:

> *The Island community was … fully involved in consultations leading to the setting up of a new governance structure on the Island in April 2009. This created four senior public sector posts (Division Managers) to boost local administrative capacity and introduced fair and transparent systems for government job selection and performance management. The process of devolving more functions and responsibilities to the Island is ongoing but will be a gradual one given limited human resource and appropriate skills in this tiny population. For the time being, some administrative functions will need to remain with the Pitcairn Islands Office in Auckland, New Zealand.*

3.18 Council reviewed the governance structure on 28 September 2010.

3.19 Good governance continues to be a focus for Pitcairn Island. In 2012 the Council developed a Strategic Development Plan, which is published on the Pitcairn Island Government website. The plan notes the structures set up by the Pitcairn Constitution and the allocation of increased responsibilities to the Island Council. One of the "Main Objectives" is to "Improve good governance and organizational practices on Island, based on increased self-reliance, transparency and accountability." [Footnote citations omitted]

[51] As to the new governance structure and the 2010 Constitution, the overall effect of the Pitcairn Constitution Order 2010 is that as from 4 March 2010 Pitcairn has had a written constitution which (inter alia) stipulates (in terms almost identical to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (ECHR)) the fundamental rights and freedoms of the individual (Part 2) and which makes provision for the following components of the Pitcairn government: the Governor (Part 3), the Executive (Part 4), the Legislature (Part 5), the Administration of Justice (Part 6), the Public Service (Part 7) and the Ombudsman (Part 9).

[52] The Governor is appointed by Her Majesty (Constitution of Pitcairn, s 27) and the executive authority of Pitcairn is vested in Her Majesty (s 33). Subject to the Constitution, the executive authority of Pitcairn is exercised on behalf of Her Majesty by the Governor, either directly or through officers subordinate to the Governor. Subject also to the Constitution, the Governor may make laws for the peace, order and good government of Pitcairn "after consultation with the Island Council" (s 36).

[53] The Island Council, originally constituted under the Local Government Ordinance 1964, is now established under Part 4 of the Constitution under the *chapeau* of "The Executive". It has such functions in relation to the government of Pitcairn as may be prescribed by law. Members of the Island Council are elected to office in free and fair elections held at regular intervals:

> **Island Council**
>
> **34.**—(1) There shall be an Island Council for Pitcairn, which shall be composed, and shall have such functions in relation to the government of Pitcairn, as may be prescribed by any law.
> (2) The members of the Island Council shall be elected to office in free and fair elections held at regular intervals in such manner as may be prescribed by any law.

[54] The Governor is not obliged to act in accordance with the advice of the Island Council but where the Governor acts contrary to the advice of the Council, any member of the Council has the right to submit his or her views to a Secretary of State (s 36(2)). The Governor can exercise his or her powers without consulting the Island Council whenever instructed to do so by Her Majesty through a Secretary of State (s 36(3)). The evidence of Mr Lynch was that to his knowledge, no such instruction has ever been given.

[55] The Island Council comprises the Mayor (elected for a term of three years), the Deputy Mayor (elected for a term of two years) and five Councillors (each elected for a two year term). See ss 3(1) and (6) of the Local Government Ordinance. All seven Island Officers are voting members of the Island Council. There are also four non-voting, ex officio members, being the Governor and his or her representatives (s 6(1)). Provision is also made for an Island Secretary (s 10) and the Government Treasurer (s 10(3)). The Mayor is also the chief executive officer of the Islands (s 10(1)).

[56] Subject to the orders and directions of the Governor, the Island Council has a duty to provide for the enforcement of all ordinances in force in the Islands and of any regulations made thereunder and has power to make regulations "for the good administration of the Islands, the maintenance of peace, order and public safety and the social and economic betterment of the islanders". See s 7 of the Local Government Ordinance:

> 7.—(1) Subject to the orders and directions of the Governor, it shall be the duty of the Council to provide for the enforcement of the provisions of this and all other ordinances for the time being in force in the Islands and of any regulations made thereunder and it may make, amend or revoke regulations for the good administration of the Islands, the maintenance of peace, order and public safety and the social and economic betterment of the islanders.
> (2) Without derogating from the generality of the provisions of the last preceding subsection the Council may make, amend or revoke regulations relating to—
>
> (a) public health and keeping the Islands clean;
> (b) town and country planning;
> (c) the use and control of public property;
> (d) [civic obligations];
> (Inserted by Ordinance No. 5 of 2010)
> (e) plant and animal quarantine;
> (f) the care and control of animals and wild life;
> (g) the care of children and aged persons;
> (h) the conservation of land, soil and food supplies;
> (i) fishing and fishing rights:
> (j) the prison;
> (k) the registration, use, care and demarcation of land;
> (l) the control of explosives and firearms;
> (m) trading by and between islanders and visits to ships; and
> (n) the appointment, powers and duties of such officers, boards and committees as the Council considers necessary for the efficient discharge of any of its duties or the implementation of any regulations made under the provisions of this or any other ordinance.
>
> (3) All regulations made under the provisions of this ordinance shall be signed by the Mayor and by the Island Secretary and publicly notified by affixing copies thereof to the public notice board and shall come into force on the day of such notification.
> (4) Copies of all regulations made under the provisions of this ordinance shall be sent forthwith to the Governor who may by order, to be publicly notified by

affixing a copy of the same to the public notice board, alter, vary or revoke any such regulations.
(5) Any regulations made under the provisions of this ordinance may provide for the charging of fees in respect of anything to be done thereunder and the imposition of penalties for offences against any of such regulations which penalties shall not exceed a fine of one hundred dollars or imprisonment for any term not exceeding forty days for each such offence.

[57] Pursuant to this provision, the Island Council has made the Local Government Regulations which in the Revised Edition 2012 address the following subjects:

> Public Health and Town and Country Planning (buildings, rubbish, water supplies, cisterns, wells and sanitary conveniences, burials, quarantine and powers of Medical Officer), Plant and Animal Quarantine, Animals and Wildlife (control of domestic animals, care of animals, wildlife), Public Work, Government Vessels, Machinery and Equipment (inter-Island voyages, general use and manning of public boats, maintenance of public boats, visits to ships by children), Public Telephone, Public Electricity, Prison, The Control of Firearms and Explosives, Control of Traffic.

[58] In his supplementary brief, Mr Lynch said that:

(a) To his knowledge, free and fair elections have occurred in Pitcairn throughout the modern period and certainly during his time as Deputy Governor. At Council elections, Council positions are strongly contested with multiple people standing for each role. Almost all eligible voters vote.

(b) Council meetings are open and are often attended by members of the public. Minutes and transcripts of Council meetings can be obtained by members of the public. In addition, the Mayor and Council hold relatively regular public meetings to keep the public informed of their activities and any governance matters.

(c) While the Governor holds the ultimate law-making power, the Island Council has an important role in law-making, and is in fact very active in the legislative process:

> (a) The Council must be consulted in the passing of Ordinances, as guaranteed under s 36(1) of the Constitution. This provides opportunity for debate of, and the raising of any opposition to, any

proposed Ordinance. The Council can also put any questions forward to the Governor through the Governor's Representative who attends Council meetings (but cannot vote). The Council makes recommendations on any proposed law to the Governor. Often this exchange goes back and forth over a number of Council meetings while divergences of views are resolved, questions answered, or the views of the wider community are sought. Debate in Council is usually very thorough; Council members and Council as a whole regularly raise questions about anything they are uncomfortable with in a proposed ordinance, and will note their approval or disapproval of any proposed Ordinance or specific provision therein. Council often debate new laws down to very fine levels of detail, questioning and making suggestions on the wording of individual provisions.

(b) Council can, and does, also participate in the law making process by proposing new Ordinances to the Governor, which may then ultimately become law. For example, last year an amendment to the Social Welfare Benefits Ordinance (to remove residency requirements for the payment of child benefits if that child was attending school in NZ) was suggested by Council, and was ultimately passed into law (No. 002 of 2013). In addition, proposals were made to change both the timing of elections (to fit better with the busy cruise ship season), and for changes to the process of finding replacements of Councillors during temporary absences (because of concerns about how this was taking place within Council). These changes were proposed by Council, and were brought in as legislation prior to the elections last year (No. 1 of 2013).

(c) While the Governor has the power under s 36(2) to pass an Ordinance against the advice of the Council, in such a case any Council member has a constitutionally guaranteed right to directly petition the Secretary of State (s 36(2)). This provides a further check and balance on legislative powers. To my knowledge this has never occurred.

(d) Council also has its own legislative function in relation to the passing of Regulations under the Local Government Ordinance and other Ordinances. This covers a broad range of law that is important in the day-to-day life of the island, such as safety on long boats, and traffic rules and offences.

(d) Mr Lynch also said that despite the distance between the Pitcairn Island Office (in Auckland, New Zealand) and Pitcairn, there are many opportunities for both elected representatives and the general public to petition government, to air grievances, and to share thoughts or feedback on any aspect of governance. In his opinion, the community on Pitcairn has extremely good access to its highest level officials:

(a) There is open debate both in Council and at public meetings, as mentioned above.

(b) The Mayor has regular private meetings with the Governor's Representative on Island, and also has regular teleconferences with the Governor in Wellington.

(c) Members of the public also can and do raise anything in person with the Governor's Representative, or alternatively can directly contact the Governor or Deputy Governor via phone or email. Direct phone and email contact details for the Governor, Deputy Governor, Attorney-General and Pitcairn Island Office are available to everyone on Island.

(d) There have been opportunities for Council members and representatives of Pitcairn to meet directly with the Minister of Overseas Territories, who represents the interests of the Overseas Territories in the British Parliament. For example, Simon Young [Deputy Mayor] met with the Minister at the Joint Ministerial Council meetings in 2012 and 2013. They can also write to him via email.

(e) Council members also have direct contact in relation to various matters with the Pitcairn Desk Officer in the Foreign and Commonwealth Office, and with the Department for International Development, which provides the majority of the funding for Pitcairn. This is therefore an additional open channel of communication, independent on the Governor, that can be used for airing grievances.

The new 2010 Constitution – consultations leading to

[59] The Pitcairn Constitution Order 2010 followed a long and extensive consultation process with Pitcairn Islanders. That process has a significant bearing on the evaluation of the claims made by Mr Warren and it is necessary that the evidence given by Mr Lynch be set out in full. That evidence follows.

4.1 At the time of Operation Unique, Pitcairn's Constitution was contained in the Pitcairn Order 1970 and the Pitcairn Court of Appeal Order 2000. Following Operation Unique, Governor George Fergusson proposed a review of the Constitution, including the incorporation of human rights standards based on the European Convention on Human Rights. This proposal coincided with a review of the constitutional arrangements in all United Kingdom Overseas Territories.

4.2 Governor Fergusson announced the review at a public meeting on Pitcairn Island in March 2009. The minutes describe the proposal as follows:

> *The Governor's Office and Pitcairn Government are working towards upgrading [the] Constitution as time has rendered part of [the 1970 Order in Council] irrelevant and a new Constitution would involve incorporating the principles of the European [Convention on] Human Rights into Pitcairn law. HMG wants to ensure that Pitcairn Constitution rises to a level on par with others, yet still apply to Pitcairn way of life. Work needs to be done tidying the structure of the Island. The two main seats of power would be Council, and the Governor's office. The PIO would work with both the*

Council and the Governor's office to support items that could not be handled on island or by the Governor's office.

4.3 In September 2009 Deputy Governor Ginny Silva, Deputy Commissioner Evan Dunn and a representative of the Department for International Development (DFID) Martin Rapley travelled to the island to observe the functioning of the new governance structure, and to discuss the review of the Constitution. They attended a special Council meeting on 4 September 2009 and, among other discussions, advised the Council that the Constitutions of all Overseas Territories were being reviewed, including Pitcairn's. The review process would involve full consultation with the Island Council; the draft Constitution would be available for the Council and all Islanders to comment on; and the process of adopting a new Constitution would take "as long as it takes".

4.4 On 21 September 2009 Governor George Fergusson and Deputy Governor Ginny Silva joined a Council meeting via video link from Wellington. Commissioner Jacques also joined via video link from Auckland. The Governor presented a paper entitled "Draft Consultation Document for Constitutional Review" and explained that one of the main changes to the Constitution would be to incorporate rights from the European Convention on Human Rights. He said this meeting was the launch of the draft Constitution, with the aim of having formal consideration of the draft at the Council meeting in November and an agreed document to be placed before the Privy Council by the 9th December. He said the consultation process could be extended should further time be required.

4.5 The Governor recommended that a copy of the document be placed on the website, including a plain English explanatory note. Any person could email the Governor or Deputy Governor. The Mayor was to write to the Foreign and Commonwealth Office (FCO) Minister and/or Governor with feedback, and the Council was invited to discuss the document with the human rights advisers (discussed below). The Governor offered to arrange a public video hearing if required.

4.6 Copies of the draft Constitution and explanatory note were circulated to all households on the Island. The documents were put on the Pitcairn Government and British High Commission websites, and copies were sent to Mayor Warren directly. HMG offered to provide legal advice to the Island Council regarding the Constitution.

4.7 On 12 October 2009 twenty islanders attended a public meeting to discuss the Constitution. The islanders agreed a Steering Group would meet to collate and consider the list of issues identified at the meeting. The group was interested to make a comparison to the St Helena Constitution, and that the Commonwealth Foundation (the human rights trainers discussed below) had identified several missing groups of rights: education, access to health and welfare services and free and fair elections.

4.8 There was another public meeting on 19 October to discuss the draft Constitution. Five Islanders were chosen to form a Constitution Steering Group, Kari Young, Jacqui Christian, Lea Brown, Simon Young and Michele Christian.

4.9 To avoid inhibiting discussion from an Island perspective, Governor's Representative Lucy Foster was not a member. Ms Foster emphasised

that any Islander should be able to take part in the Steering Group, and that queries could be directed to her if she could be of any assistance.

4.10 Jay Warren made a public announcement on the radio inviting any person to contribute to the Steering Group. The Steering Group met directly after the public meeting, and decided to allocate responsibility for five sub-areas, and to split the Island population among them to promote and encourage comments. There was concern that a December deadline for consultation would be too soon.

4.11 The following month the Governor's Office in Wellington and the Foreign Office in London held a Special Video Conference with Pitcairn Islanders to discuss the draft Constitution and questions from the Steering Group. The Steering Group's suggested amendments were agreed. The Governor's Office thanked the Steering Group for all their work in reviewing the draft and the amendments made. FCO added their thanks and stressed that the key was to get a Constitution that worked for Pitcairn.

4.12 The Steering Group made further recommended amendments over the following months in relation to matters including abortion, slavery, the title of the Attorney-General, the nationality of Judges and legal advisers, the right to education, discrimination, treatment of prisoners, and derogations in time of emergency. On approximately 14 Dec 2009, Simon Young emailed the Steering Group's proposed amendments to the Constitution.

> *Please find attached the latest development on the constitution from the steering group. We have progressed nicely. Following the vid link [amendments] we have 2 outstanding points on the revised draft, we also have what I would consider to be a final 3 new thoughts on changes, followed lastly by asking for the inclusion of some of the recommendations from the document provided by the Human Rights Advocacy trainers.*

4.13 In addition, the document attached to Mr Young's email stated:

> *The following points were asked to be communicated to the Governor from the steering group. These points were raised during our meetings as they evoked strong feelings from some members of the group. These points do not affect the draft constitution.*
>
> *1. There was concern raised regarding the Governors power to make laws without consultation.*
>
> *2. Does the Governor have any thoughts on how in the future we can achieve greater separation of powers with regards to the Executive, the Legislature and the Judiciary.*

4.14 On 29 December 2009 Deputy-Governor Ginny Silva responded to the Steering Group queries. Among other things she noted:

> *3. A final point on the power to make laws. The new draft Constitution introduces for the first time an obligation on the Governor to consult Council prior to making new laws. We expect this to be the norm and we see this as progress - we hope the Community does too.*

4.15 On 8 January 2010 Simon Young emailed the Steering Group's further suggested amendments to the Constitution.

4.16 On 12 January 2010 Governor George Fergusson responded to the Steering Group's feedback.

> *First let me say again that we and the team in London have been impressed with the careful consideration the steering group has given to this proposed draft Constitution. As we said at the outset, our aim is to agree a new constitution which better reflects the realities of Pitcairn today and general principles of international Human Rights instruments. Other constitutions are a good source material but we need to ensure Pitcairn's constitution makes sense for Pitcairn. As discussed during our videoconference, this is not the occasion for introducing new laws, amending them or getting bogged down in the detail of legislation. Changes to legislation, where needed, will have to follow a separate process. The decision on a new Constitution rests with Her Majesty in the Privy Council on the advice of the Foreign and Commonwealth Office (FCO). Before giving advice the FCO Minister, Chris Bryant, will seek the views of the Island Council. If there are remaining areas of disagreement, the Minister will decide whether or not he can recommend a particular request and explain why. If no agreement is reached on a recommendation, the Constitution will simply remain as it is i.e. the Pitcairn Order 1970.*

4.17 On 18 January 2010 after a Steering Group meeting, the chair emailed the Governor and FCO noting various points of agreement and requesting an updated draft prior to a video link with FCO. The email stated:

> *The steering group will attend this vid link, and although I personally have no questions I understand that there are some questions for Ian Hendry. I did request any members of the steering group with specific questions to send them to [me] by now, and I would have forwarded these on so Ian could be prepared. However, I have not received any. I can tell you that there were a couple of questions on the topics of Separation of Powers and the Pitcairn Bar. As of today I did ask if the steering group are prepared and ready to pass the draft with amendments listed above onto council. The outcome was split 3 to 3. Therefore we have agreed that as soon as the vid link is finished the steering group will meet and decide if they are happy to step away from the document and pass it to council.*

4.18 On 22 January 2010 Wellington and London held a meeting with Pitcairn via video link to discuss the draft Constitution.

4.19 On 2 February 2010 the Island Council approved the Constitution by unanimous vote. The Mayor of Pitcairn, Michael Warren, emailed the Governor and others as follows:

> *Council met today and have approved by unanimous vote the draft Constitution. The wording "Legal Advisor" needs to be amended to "Attorney General", which I believe you George are aware.*

> *I will now hand over to your guys to deal with the next necessary steps.*

4.20 On 10 February 2010 Her Majesty in Council approved the Pitcairn Constitution Order 2010. On 15 February 2010, Ian Hendry, former Deputy Legal Adviser to the Foreign and Commonwealth Office, and Constitutional Adviser on the Pitcairn Constitution, summarised the process, and wrote:

> *Above all, the enthusiasm of the islanders themselves to arrive at a constitutional settlement that would suit their circumstances and improve their lives was very impressive; they were determined, persistently enquiring, but always sensible. There can be no other Overseas Territory constitution in which a greater proportion of the local population was directly involved and contributed to the outcome.*

4.21 On 4 March 2010 the Governor held a Constitution Proclamation ceremony in the Adamstown main square. The Governor signed two copies of the document, and the Mayor placed one on the public noticeboard. Over 40 people attended a public meeting held in the same week to discuss various matters including the Constitution. At a special council meeting that week the Council recognised the high level of engagement on the Constitution.

4.22 DFID representatives presented an official copy of the Constitution to Mayor Warren in March 2010.

4.23 In the United Nations, the General Assembly:

> *Welcome[d] the entry into force of the Pitcairn Constitution Order 2010 in the Territory in March 2010, featuring a new constitutional framework and human rights provisions, and all efforts by the administering Power and the territorial Government that would further devolve operational responsibilities to the Territory, with a view to gradually expanding self-government, including through training of local personnel.* [Footnotes and citations omitted]

[60] Mr Lynch was cross-examined at some length on (inter alia) this evidence. Nothing in that cross-examination caused Mr Lynch to make any, or any significant, change to his evidence. I am satisfied he did his utmost to ensure that his evidence was accurate, candid and balanced.

The claim that the right to internal self-determination has been breached

[61] The submission that the United Kingdom is in breach of the asserted right of those on Pitcairn to internal self-determination has been articulated in different ways, but essentially the claim is that Pitcairn Islanders have been denied effective political participation. In Document G the submission at paras 446, 447 and 496 was that:

> 446 This self-determination ground engages with it the rights to have political participation, and for the Islanders to be involved in the "political" institutions and to be consulted on major decision making such as:
>
> a) Creation and Appointment of the Governor;
> b) Creation of Parliament;
> c) Creation of the Judicial System and Appointment of Judges;
> d) Determination of where courts sit.
>
> 447 No consultation ever occurred on any of these. Which is to say: *there was no self-determination*. [Emphasis in original]
>
> …
>
> 496 The failure of the UK government to recognise and facilitate the Pitcairn Islanders' right of self-determination (either under customary international law, or via the ICCPR, or the UN Charter) means that neither the Executive, Legislative or Judiciary branches of Government were lawfully created, and a breach of sacred trust and a failure to accord paramountcy have occurred inextricably contaminating the right to fair trial as any independent and impartial tribunal could not have been created by law.

[62] The reference in para 446 to the "appointment of judges" is a complaint that:

(a) The Pitcairn Courts have been "exported" to New Zealand or "to the world at large" and this is irrational and incompatible with self-determination and self-government. See para 461.

(b) A court system:

> … with five foreign Court of Appeal judges, four foreign Supreme Court Judges, and four foreign Magistrates, (leaving aside the Law Lords in the Privy Council) a total of 13 against one local magistrate, is irrational for a population of 50. (There cannot be any other state or colony with the equivalent of 26% of the population being judges, and not one of them indigenous) (para 462).

(c) There is no provision in policy to encourage Pitcairn Islanders to train in the law so they can eventually provide indigenous judges.

(d) A judicial system:

> … essentially determined by a non-elected legislative, of professionally trained judges, except for the limited jurisdiction of the Island Magistrate is plainly not the only model available for the Crown's smaller territories or dependencies. Indeed the provision of the current model perpetuates a system where self-government is not possible (para 478).

[63] Addressing on the facts the claim that Pitcairn Islanders have been denied effective political participation the Crown submissions emphasised the following:

(a) The United Nations General Assembly resolution adopted on 11 December 2013, which implicitly accepts that effective devolution of operational responsibilities is taking place in Pitcairn, along with the expansion of self-government.

(b) There was wide public consultation on the 2010 Constitution, which was agreed to and unanimously approved by the elected Island Council. That consultation with the Island community was recognised and welcomed by the United Nations General Assembly in the resolution referred to.

(c) The Constitution and the Local Government Ordinance provide for regular, free and fair elections to the Island Council. The high participation rate in elections indicates a strong engagement by the community in the democratic process.

(d) The Island Council has an important role in the legislative process. The Constitution provides for mandatory consultation with the Council in relation to all proposed Ordinances. In practice, this is reflected in thorough debate on new laws and genuine dialogue between the Island Council and the Governor.

(e) A further check and balance on legislative powers is provided by the constitutionally guaranteed right for Council members to petition the Secretary of State if the Governor makes an Ordinance contrary to the advice given by the Council.

(f) There is evidence that the people of Pitcairn are aware of the right to self-determination and the processes of the United Nations.

(g) The new governance structure for Pitcairn was designed to devolve responsibility to Islanders and to develop a more self-governing model. Islanders were substantially involved in this process through the Pitcairn Development Team.

(h) The Island Council can and does initiate law-making by proposing new ordinances.

(i) The Council has its own legislative function in making regulations.

(j) Council meetings are open to and attended by the public and records are available.

(k) Council, Division Managers and heads of department have practical governance functions on Pitcairn, including dealing directly with local and international bodies.

(l) The Mayor talks regularly with the Governor's Representative and Governor, and there is ample ability for other Pitcairn community members to have direct contact with the Governor's Representative, the Governor, the Deputy Governor, the Pitcairn Desk Officer in the Foreign and Commonwealth Office, the Attorney General and other officials.

Discussion – the evidence

[64] The submissions made on behalf of Mr Warren on the issue of internal self-determination are unsustainable, not only on the law (already addressed) but also on the evidence.

[65] As to the evidence, the Crown is correct in submitting that the uncontradicted evidence given by Mr Lynch was that from 2007 to March 2009 there were extensive consultations before the new governance structure took effect on 1 April 2009. That new structure involved a further devolution of operational responsibilities to the Islanders, with a view to gradually expanding self-government. The process was commented upon favourably by the Secretariat to the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (A/AC.109/2013/3) 11 February 2013:

> 3 The island community was also fully involved in consultations leading to the setting-up of a new governance structure on the island in April 2009. This created four senior public sector posts (division managers) to boost local administrative capacity and introduce fair and transparent systems for Government job selection and performance management. The process of devolving more functions and responsibilities to the island is continuing but will be a gradual one, given the limited human resources and appropriate skills in the tiny population. For now, some administrative functions will need to remain with the Pitcairn Islands Office in Auckland, New Zealand.

[66] The subsequent Resolution adopted by the United Nations General Assembly on 11 December 2013 welcomed the progress being made in expanding the degree of internal self-determination enjoyed by Pitcairn Islanders. The degree of devolution and

the speed of the process were not the subject of critical comment. To the contrary, recognition was given to "the unique character of Pitcairn in terms of population, area and access".

[67] A similar degree of intensive consultation and political participation preceded the Islanders' approval of the 2010 Constitution and its subsequent promulgation. The working paper prepared by the Secretariat to the Special Committee (A/AC.109/2011/4, 8 January 2011) described the process as "full consultation". This is in part borne out by the fact that the Constitution Steering Group, comprising five Pitcairn Islanders, secured amendments to the Constitution, and on 2 February 2010 the Island Council, by unanimous vote, approved the Constitution, which (inter alia) for the first time obliged the Governor to consult the Council prior to making new laws.

[68] The uniquely small size of the Island population meant that the consultation process described by Mr Lynch afforded to each Islander of voting age a form of direct participation which would be difficult to duplicate in larger populations. Ian Hendry, a Constitutional Adviser to the Foreign and Commonwealth Office and co-author of *British Overseas Territories Law* (Hart Publishing, 2011), who produced successive drafts of the Constitution, by memo dated 15 February 2010 summarised the process in the following words:

> Above all, the enthusiasm of the islanders themselves to arrive at a constitutional settlement that would suit their circumstances and improve their lives was very impressive; they were determined, persistently enquiring, but always sensible. There can be no other Overseas Territory constitution in which a greater proportion of the local population was directly involved and contributed to the outcome.

[69] Referring now to the complaint that the Pitcairn Courts have been "exported" and that the system is over-judicialised (by foreign judges), the majority decision in *Christian v R* [2006] UKPC 47, [2007] 2 AC 400 at [26] (joined in this respect by Lord Woolf) rejected out of hand a submission that judges of the Pitcairn Supreme Court should have come from the United Kingdom rather than New Zealand, observing that there was no suggestion of any lack of competence on the part of the judges or of a restriction on the Governor's power of appointment on grounds of nationality. The position under the 2010 Constitution is the same. See for example ss 47(4) and 52 (qualification for appointment) and s 46 (sitting outside Pitcairn), which is to be read with the Judicature (Courts) Ordinance 2000, ss 15E and 15F.

[70] The claim that there was no consultation in relation to these matters cannot be sustained in the face of the evidence. For example, the Constitution Steering Group recommended that the Constitution provide that "judges be British" and that lawyers be British also. The then Deputy Governor on 29 December 2009 pointed out that such provisions would be discriminatory and could not be agreed to. In addition, the proposal made little sense for logistical reasons. Whether Mr Warren is happy with the outcome is irrelevant. The point is that the claim that there was no consultation is untenable.

[71] The submission that the Pitcairn legal system is over-judicialised is ironic, given that it is advanced in support of a claim that Mr Warren cannot secure a fair trial by an independent and impartial tribunal created by law. Furthermore, the setting up of the claimed over-elaborate judicial system must be seen against the criticism that prior to the commencement of Operation Unique in 2000, and the subsequent prosecutions which culminated in the Privy Council decision in *Christian v R*, there was no effective civil authority presence on the Island and that the Pitcairn Supreme Court was a "paper work court", in that no judge had ever been appointed to it before the trials. See Dawn Oliver "Problems on Pitcairn" in Oliver (ed) *Justice, Legality and the Rule of Law: Lessons from the Pitcairn Prosecutions* 2 at 11-12. The submission made for Mr Warren can only be described as superficial, if not opportunistic. As Mr Hendry succinctly wrote of the new Constitution on 15 February 2010:

> The result is a far more modern constitutional arrangement which balances the rights and freedoms of the inhabitants, including their participation in government, with safeguards for independent judicial and legal process and the necessary means of political control from the United Kingdom.
>
> It might be thought that such arrangements are over-elaborate for a community of 54 people. But why should Tristan da Cunha, with a population of 246 and whose constitutional arrangements of 2009 the new Pitcairn Constitution resembles, be any more entitled to a modern constitutional settlement than Pitcairn? The UK Government is responsible for the good government of each of these remote territories, and is obliged by the UN Charter to ensure the well-being of their people. In the case of Pitcairn, a new Constitution is a clear demonstration of greater commitment by the UK Government, in contrast to the decades of intermittent interest (to put it generously) that recent history has demonstrated.

[72] Called in aid of Mr Warren's argument on internal self-determination were various articles by Mr MO Eshleman, an American attorney practising in Ohio. In these articles Mr Eshleman claims to set out the legal history of Pitcairn Island from 1790 to 2010 and, in addition, provides a critique of the 2010 Constitution. Mr Eshleman was

not called as a witness, his three journal articles being tendered from the Bar table. These untested opinion pieces were not accepted by the Crown as expert evidence, and indeed the Crown objected to the Court relying on the articles as providing a factual basis for any of the submissions advanced on behalf of Mr Warren. In these circumstances I do not intend placing any weight on the writings of Mr Eshleman, which in any event are at times conspicuously lacking in objectivity.

The self-determination claim – overall conclusions

[73] Mr Warren claims he cannot receive a fair trial because the structure for the governance of Pitcairn is so fundamentally defective no independent and impartial Tribunal for the determination of the charges has been created by law. This claim fails, for the reasons already given, because:

(a) Even if it is conceded (without deciding) that "self-determination" is a peremptory norm of international law, the **content** of the right to **internal** self-determination is far from settled and is not part of any peremptory norm.

(b) Articles 1 and 55 of the Charter of the United Nations do not add anything meaningful to the content of the right to internal self-determination, nor does the jurisprudence of the International Court of Justice.

(c) There is no intrinsic linkage between internal self-determination and principles of democratic governance.

(d) None of the gaps in Mr Warren's case are filled by Common Article 1 of the ICCPR and ICESCR.

(e) There is a sliding scale of different levels of entitlement to political emancipation, constituting various forms of internal self-determination. Different "peoples" are entitled to different levels of self-determination.

(f) In the absence of a binding international standard of governance, it cannot be said that the present system of governance for Pitcairn is in violation of an international norm.

(g) The claim that a fair trial is not possible because the system of governance violates international law must accordingly fail.

(h) On the evidence, it has been established that the governance structure as now in place for Pitcairn has been determined in consultation with those who live on Pitcairn and does in fact confer a high degree of self-government. The system falls well within the broad range of self-determination options available.

(i) On the facts, Pitcairn Islanders have a representative form of local government (the 2010 Constitution) which was unanimously agreed to by the Island Council. Internal self-determination, understood as a right of meaningful political participation, does exist on Pitcairn.

[74] Strictly speaking, these conclusions make it unnecessary to address the further difficulty faced by Mr Warren, which is that even if a breach of the United Nations Charter or of Common Article 1 of the ICCPR and ICESCR could be established, it does not necessarily follow that a remedy would be available from the court. This is because a treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual. See *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 476-477 and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61, [2009] AC 453 at [66]. This rule was applied in *Misick v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWCA Civ 1549 at [25]. That decision also addresses the relationship between Articles 1 and 25 of the ICCPR. The context was a claim based on the right to self-determination:

> [25] Article 25 of the ICCPR does not advance Mr Fitzgerald's argument. It only guarantees rights to be exercised in the context of a form of constitution or government that is in place. If that constitution is itself compatible with Article 1, as in my judgment is the case here, there can be no separate violation of Article 25 if the state citizens anyway enjoy such rights as the Article 1 Constitution confers. Moreover, the measures on which Mr Fitzgerald relies have not been incorporated into domestic law, nor is there a free standing principle of

customary law which may be said to be incorporated into our domestic law. In *Bancoult (No. 2)* Lord Hoffman said this at paragraph 66:

> "As for international law, I do not understand how, consistently with the well-established doctrine that it does not form part of domestic law, it can support any argument for the invalidity of a purely domestic law such as the Constitution Order."

[75] These statements have direct application to Mr Warren's case.

[76] Even if one were to assume that Mr Warren can overcome each of the difficulties referred to, the stark reality is that the evidence unmistakably establishes that since 2009 Pitcairn Islanders have freely expressed their assent to the current governance structure and to the 2010 Constitution. Their degree of political participation is more than meaningful. As Mr Hendry has observed, there can be no other Overseas Territory Constitution in which a greater proportion of the local population was directly involved and contributed to the outcome.

[77] In these circumstances the claim based on self-determination must fail.

The application under the Bill of Rights 1688

The submission

[78] Closely related to the internal self-determination argument is the claim that because the Pitcairn Constitution fails to provide for a democratically elected legislative chamber, the Constitution breaches the Bill of Rights 1688 in respect of the right to petition, freedom of election, absolute freedom of speech (in parliament) and the holding of frequent parliaments. The remedies sought are a declaration that the Pitcairn Constitution breaches the Bill of Rights 1688, an order prohibiting the Governor from continuing as the legislature and an order requiring a democratically elected legislature to meet.

[79] The relevant provisions of the Bill of Rights 1688 relied on are:

> *The Subject's Rights.*
> And thereupon the said Lords Spirituall and Temporall and Commons pursuant to their respective Letters and Elections being now assembled in a full and free Representative of this Nation takeing into their most serious Consideration the best meanes for attaining the Ends aforesaid Doe in the first place (as their Auncestors in like Case have usually done) for the Vindicating and Asserting their auntient Rights and Liberties, Declare
> …

> **Right to petition**–That it is the Right of the Subjects to petition the King and all Commitments and Prosecutions for such Petitioning are Illegall.
> …
> **Freedom of Election**–That Election of Members of Parlyament ought to be free.
> **Freedom of Speech**–That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.
> …
> **Frequent Parliaments**–And that for Redresse of all Grievances and for the amending strengthening and preserveing of the Lawes Parlyaments ought to be held frequently.

[80] The challenge by Mr Warren is based on the fact that Part 5 of the Pitcairn Constitution, particularly s 36, provides that the Legislature is the Governor "acting after consultation with the Island Council", advice which the Governor is not obliged to accept, and indeed the Governor may make laws without consulting the Island Council if so instructed by Her Majesty through a Secretary of State:

> **Power to make laws**
>
> **36**.—(1) Subject to this Constitution, the Governor, acting after consultation with the Island Council, may make laws for the peace, order and good government of Pitcairn.
> (2) The Governor shall not be obliged to act in accordance with the advice of the Island Council in exercising the power conferred by subsection (1), but in any case where the Governor acts contrary to the advice of the Council any member of the Council shall have the right to submit his or her views on the matter to a Secretary of State.
> (3) The Governor may exercise the power conferred by subsection (1) without consulting the Island Council whenever he or she is instructed to do so by Her Majesty through a Secretary of State.

[81] It is submitted that the positions should be reversed. Laws should be made by a democratically elected parliament, with those laws then assented to by the Governor.

Whether the Bill of Rights 1688 has application

[82] The submission by Mr Warren assumes that it is possible to deploy the Bill of Rights 1688 as the standard against which the validity of the Pitcairn Constitution is to be assessed. This submission fails for two reasons.

(a) The Pitcairn Constitution Order 2010 was on its face made under the British Settlements Acts 1887 and 1945. Those Acts authorise the Crown to set up a non-representative legislature. Being displaced, the Bill of Rights 1688 has no application.

(b) Even if the Bill of Rights 1688 can somehow be prayed in aid as part of the law of Pitcairn, it can be deployed only to the degree permitted by s 42 of the Constitution, that is, English law applies only so far as the local circumstances permit and subject to any existing or future Ordinance. Such Ordinances necessarily include the Local Government Ordinance 1964, read in context with the Pitcairn Constitution Order 2010.

The British Settlements Act 1887

[83] Addressing the first of these reasons, the British Settlements Act 1887, s 2 provides:

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

The 1945 Act is not materially relevant to the present discussion as it amended the number of delegates in s 3 of the 1887 Act from three to one.

[84] Section 2 of the 1887 Act is expressed in wide, comprehensive terms and was passed to enable the Crown to set up non-representative legislatures. See *Sabally and N'Jie v Attorney-General* [1965] 1 QB 273 at 294-295 per Denning LJ.

[85] Furthermore, the Crown's power to legislate for the peace, order and good government of a territory, whether under the prerogative or statute, is in practice not open to question in the courts other than in the most exceptional circumstances (none of which operate in the present case). See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61, [2009] AC 453. Lord Hoffmann said at [50]:

> … the words "peace, order and good government" have never been construed as words limiting the power of a legislature. Subject to the principle of territoriality implied in the words "of the territory", they have always been treated as apt to confer plenary law-making authority. For this proposition there is ample authority in the Privy Council (*R v Burah* (1878) 3 App Cas 889; *Riel v The Queen* (1885) 10 App Cas 675; *Ibralebbe v The Queen* [1964] AC 900) and the High Court of Australia *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1). The courts will not inquire into whether legislation within the

territorial scope of the power was in fact for the "peace, order and good government" or otherwise for the benefit of the inhabitants of the territory. ...

[86] Lord Rodger at [109] said:

> Assuming, then, that Her Majesty's constituent power can properly be described as a power to make "laws for the peace, order and good government of the territory", such a power is equal in scope to the legislative power of Parliament. As the statements in *Riel v The Queen* 10 App Cas 675, *Chenard & Co v Arissol* [1949] AC 127 and *Union Steamship Co of Australia Pty Ltd v King* 166 CLR 1 show, it is not open to the courts to hold that legislation enacted under a power described in those terms does not, in fact, conduce to the peace, order and good government of the territory. Equally, it cannot be 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 the peace, order and good government of BIOT. 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. In this respect, the legislation made for the colonies is in the same position as legislation made by Parliament for this country, as the High Court of Australia pointed out. In both cases, the sanction for inappropriate use of the legislative power is political, not judicial. ...

[87] For the following reasons, the Bill of Rights 1688 does not apply:

(a) The 1688 and 1887 statutes are products of entirely different historical contexts, separated by almost 200 years. The Bill of Rights 1688 was a product of the Glorious Revolution. It was an instrument which had as its purpose the deposing of James II for misgovernment, to determine the succession to the Throne, to curb future arbitrary behaviour of the monarch and to guarantee parliament's powers vis-à-vis the Crown, thereby establishing a constitutional monarchy. The British Settlements Act 1887, on the other hand, arose out of the need to provide for the government of colonies where a representative legislature was unsuitable. See also the discussion by Lord Denning in *Sabally and N'Jie v Attorney-General* at 293 to 294.

(b) To an almost unlimited degree the Crown can legislate for the peace, order and good government of a territory.

(c) Where statutory provisions are wholly inconsistent with each other and cannot stand together, the later in time impliedly repeals the earlier. See for example *Kutner v Phillips* [1891] 2 QB 267 at 272.

(d) While the penultimate paragraph of the Bill of Rights 1688 asserts that it shall "stand remaine and be the law of this Realme forever" the statute does not in fact have entrenched status and has been amended on several occasions. See the helpful analysis by Mayer and Gay *The Bill of Rights 1689* (House of Commons Library, Standard Note SN/PC/0293, 5 October 2009) <www.parliament.uk/documents/commons/lib/research/briefings/SNPC-00293.pdf> at 5:

> … it is sometimes mistakenly believed that the Bill of Rights cannot be amended. This is not the case. It is a fundamental principle of British constitutional law that no parliament can bind its successors and that any statute can be repealed; this doctrine was already established by the late 17th century. The principle of parliamentary sovereignty means that the UK Parliament can enact any law whatsoever on any subject whatsoever, (although there are now considerations of compatibility with European Union law, and it is arguable that the *European Communities Act of 1972* is "semi-entrenched". For as long as the UK remains a member of European Union that Act cannot be repealed.) Furthermore, changes in rules of UK constitutional law can be effected by ordinary legislation, (unlike the situation, for example, in the United States of America, where changes can only be made by a complicated process of constitutional amendment).
>
> The statement in the Bill of Rights that it shall remain the law forever cannot, then, be taken at face value. Lock expresses the view that the sentence was included "to add solemnity and weight". Although the greater part of the historic Bill of Rights remains on the statute book unchanged, a few sections have, in fact, been repealed or amended, as set out in Halsbury's Laws, eg –
>
> - the declaration against transubstantiation, by the *Juries Act 1825*
> - the declaration on accession to the throne, by the *Accession Declaration Act 1910*
> - various other sections by the Statute Law Revision Acts of 1888, 1948, 1950
>
> It is also worth noting that the line of succession laid out in the Bill of Rights was, in fact, altered just over a decade later by the Act of Settlement 1700. [Footnote citations omitted]

(e) Even though the Bill of Rights 1688 is a constitutional document creating fundamental rights, it may be cut down by clear subsequent legislative provisions: *Boodram v Baptiste* [1999] UKPC 30, [1999] 1 WLR 1709 (PC) at [8]. See also *Dreliozis v Wellington District Court* [1994] 2 NZLR 198 at 200-201.

[88] Alternatively, the two statutes can be read together, each dealing with separate subject matter. As mentioned, the British Settlements Act 1887 was enacted to enable

the Crown to provide for the government of possessions acquired by settlement, while the Bill of Rights 1688 was part of a political settlement which established a constitutional monarchy. It could never have been intended that the latter Act would have the effect of thwarting the incorporation into Pitcairn domestic law of the fundamental rights and freedoms guaranteed by the ECHR.

[89] In short, in relation to this first point, because the Pitcairn Constitution Order 2010 was on its face made under the British Settlements Acts 1887 and 1945, the Crown had full power and authority to set up a non-representative legislature. Being displaced, the Bill of Rights 1688 has no application.

[90] It is now necessary to consider (in the alternative) the operation and effect of the Bill of Rights 1688 as part of the domestic law of Pitcairn.

The application of English law in Pitcairn

[91] Addressing the second reason why the argument under the Bill of Rights 1688 cannot succeed, the starting point is s 42 of the Pitcairn Constitution. Subject to certain limitations, this provision incorporates the common law, the rules of equity and the statutes of general application in force for England into the law of Pitcairn:

> **Application of English law**
>
> **42.**—(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.

[92] If it is a statute of general application in force in and for England for the time being, the Bill of Rights 1688 is by virtue of s 42(1) also in force in Pitcairn unless s 42(2) applies. The issues are whether (a), the Bill of Rights 1688 is a statute of "general application", whether (b), there are "local circumstances" which do not permit such application or whether (c), there is any ordinance to which the Bill of Rights 1688 is subject.

[93] The predecessor to s 42 of the Constitution was s 14 of the Judicature Ordinance 1970. For present purposes, the two provisions are indistinguishable and reflect the "rule" that British subjects who settle abroad in territory not within the jurisdiction of any Power take English law with them. See Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens & Sons, London, 1966) 540-556. Commenting on this "rule", Roberts-Wray made the following observations of relevance to the present case:

(a) It is not the whole of the law that is taken. The "colonists carry with them only so much of the English law as is applicable to their own situation and the condition of [the colony]".

(b) A court may hold, in the light of the particular circumstances, that an English law is to be entirely rejected or that it must be applied with modifications. All the circumstances are to be taken into account, including the local relevance or otherwise of circumstances in England which explain a particular law.

(c) The expression "statutes of general application" is usually regarded as descriptive of Acts of Parliament which are of general relevance to the conditions of other countries and, in particular, not based upon politics or circumstances peculiar to England.

[94] The phrase "statutes of general application" in s 14 of the Judicature Ordinance was considered also by Lord Hoffmann (writing for the majority) in *Christian v R* at [12] to [13]. On the facts, the Sexual Offences Act 1956 (UK) was held to be a statute of general application:

> [12] [It was] submitted next for the appellants that the language of section 14 of the 1970 Ordinance was too imprecise to incorporate the 1956 Act as part of the law of Pitcairn. What was a statute "of general application"? And there could be much dispute over whether "local circumstances" made it appropriate for the law to apply. But this language has been used in legislation for British overseas possessions for many years without causing any difficulty. As Sir Kenneth Roberts-Wray said in his book on *Commonwealth and Colonial Law* (1966), p 545:
>
> > "It has been in use for many decades, it has been the subject of judicial interpretation, it does not appear to have given the courts serious trouble, and it has much the same effect as the common law rule. So a change of formula may do more harm than good."
>
> [13] Similar language was considered by the Court of Appeal in *Nyali Ltd v Attorney-General* [1956] 1 QB 1, where Denning LJ said, at p 17, that the task of

> making qualifications to English law to suit the circumstances of overseas territories called for wisdom on the part of their judges. But he described it, at p 16, as a "wise provision" and did not suggest that it was incapable of application. Their Lordships think that there can be no doubt that the 1956 Act is an Act of general application and that there are no local circumstances which make it inappropriate to apply the provisions about rape, indecent assault and incest.

[95] Lord Hope, after also addressing at [76] the meaning of statutes of general application in force in England, turned to the phrase "local circumstances". His observations are of assistance in the present case:

> [78] As for the qualification in section 14(2) that the law thus imported was to be in force only so far as "local circumstances" permit, Sir Kenneth Roberts-Wray said at pp 544- 545, that this amounted to no more than the rounding off of a common law rule and that all the circumstances are to be taken into account including the local relevance or otherwise of circumstances in England which explain a particular law. In *Nyali Ltd v Attorney-General* [1956] 1 QB 1, 16 Denning LJ, speaking about the common law, said that this qualification was a wise provision, and that it should be liberally construed as a recognition that the common law cannot be applied in a foreign land without considerable qualification:
>
> > "Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England."
>
> How statutes of general application in force in England are to be qualified in the light of local circumstances is less clear. Sir Kenneth notes, at p 548, that in a few cases the uncertainty has been reduced by legislative intervention locally. But none of these problems affect the provisions of the Sexual Offences Act 1956 which were invoked in this case. As I have said, it is a statute of general application. While some of the sections that it contains such as those about abduction and the keeping of brothels might have no relevance on Pitcairn, that is not so in the case of the sections under which these prosecutions were brought. There are no circumstances either locally on Pitcairn or in England which require the provisions of either section 1 or section 14 to be qualified in any way.

[96] Drawing on *Christian v R* and the text by Sir Kenneth Roberts-Wray, the following conclusions are reached:

(a) For the purpose of s 42(1) of the Pitcairn Constitution, the Bill of Rights 1688 is a statute of general application in force in England.

(b) However, the Bill of Rights 1688 is in force in Pitcairn only so far as the local circumstances permit (s 42(2)). The term "permit" means "reasonably permit".

(c) Local circumstances include the fact that Pitcairn is an Overseas Territory in relation to which Her Majesty the Queen in Council has

power under the British Settlements Act 1887 to make laws for the peace, order, and good government of Her Majesty's subjects.

(d) That power is both wide and comprehensive. It includes the power to set up non-representative legislatures.

(e) The Crown's power to legislate for the peace, order, and good government of an Overseas Territory is not open to question in the courts other than in the most exceptional circumstances (none of which exist in the present case).

(f) It necessarily follows that the provisions of the Bill of Rights 1688, which assume the existence of a parliament and therefore the right to petition parliament, the right to free elections for members of parliament, the right to freedom of speech in parliament and the right to frequent sitting of parliament are of no application. The reason is that Pitcairn has no parliament. The legislature which has been prescribed under the British Settlements Act 1887 via the Pitcairn Constitution Order 2010 comprises the Governor alone, albeit acting after non-binding consultation with the Island Council.

[97] For Mr Warren, substantial emphasis was placed on *R (Barclay) v Lord Chancellor and Secretary of State for Justice* [2009] UKSC 9, [2010] 1 AC 464. That case, however, concerned the right to free elections as set out in Article 3 of the First Protocol to the ECHR. It is a Protocol which has not been domesticated vis-à-vis Pitcairn. The historical and political factors operating within State parties to the ECHR are very different to those operating in Pitcairn.

[98] It was submitted for Mr Warren that "local circumstances" include "that the UK holds the Territory upon sacred trust and for the paramount interests of the Islands". The court, therefore, has power to strike down the provision that the Governor is the legislative branch as well as any laws made by the Governor under the 2010 Constitution. This is a novel submission and no precedent was cited. Fundamentally, it must fail because:

(a) The term "local circumstances" must be interpreted against the text, object and purpose of s 42 of the Pitcairn Constitution, namely, to

introduce into the Pitcairn legal system English law. If that law is in the form of a statute in force in England, it is a question whether the Pitcairn legal system can accommodate the statute without the need for modification of either the statute or of the law of Pitcairn so that the statute "fits". It is simply a recognition that ordinarily the common law, the rules of equity and statutes in force in England cannot be applied in a foreign land without qualification. See the decision of Denning LJ in *Nyali Ltd v Attorney General* [1956] 1 QB 1 at 16, cited with approval by Lord Hope in *Christian v R* at [78].

(b) Section 42(2) of the Pitcairn Constitution provides that statutes of general application in England are extended "subject to any existing or future Ordinance". The Local Government Ordinance 1964 is one such ordinance. The system of governance set up by that ordinance (which is now to be read alongside the Pitcairn Constitution) prevails over the asserted provisions of the Bill of Rights 1688, notwithstanding that the system of governance for which it provides is not one involving a representative parliament, although the Island Council has an undoubted representative character based on universal suffrage.

(c) The "sacred trust" on which the submission depends is a term taken from Article 73 of the United Nations Charter (declaration regarding non-self-governing territories). It provides:

> **Article 73**
>
> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> (a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
> (b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

> (c) to further international peace and security;
> (d) to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and
> (e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

This provision does not impose an obligation on a State party to create a form of governance in which there is a legislative assembly elected by universal suffrage. Rather, the obligation is to "promote" a series of goals to be progressively realised rather than immediately fulfilled. Article 73(b) refers only to the development of self-government. It imposes remarkably fewer obligations on colonial powers than are imposed on administering authorities towards trust territories. See Dr Ulrich Fastenrath "Article 73" in Simma and others *op cit* 1829 at 1830. The Article cannot be used to give the Bill of Rights 1688 leverage over the Constitution.

[99] For all these reasons, "local circumstances" cannot reasonably be interpreted to give to the Bill of Rights 1688 the effect of overturning the "legislature" provisions of the Pitcairn Constitution. This does not mean (as Mr Warren's argument appeared to suggest) that the entire system of government on Pitcairn is "undemocratic". Account must be taken of a broader range of factors beyond those listed in the Bill of Rights 1688 and addressed at length by Mr Lynch in his evidence, including (inter alia):

(a) The Local Government Ordinance 1964 confers a considerable degree of autonomy on Pitcairn Islanders in relation to their governance.

(b) Pitcairn Islanders have constitutionally guaranteed fundamental rights and freedoms enforceable by the Pitcairn Courts.

(c) The Island Council is constitutionally recognised. Members must be elected in free and fair elections at regular intervals, and must be

consulted by the Governor when making laws for the Islands (except when instructed to the contrary by the Secretary of State).

(d) Detailed provision is made by the Constitution for the Senior Courts and their judges, for magistrates and for an attorney general with exclusive prosecutorial powers. The independence of the judiciary is expressly provided for in s 44.

(e) The Constitution also requires arrangements to be made for a Code of Management for the public service, for the independent audit of the public accounts and for the appointment from time to time of an Ombudsman as circumstances demand.

(f) There is now also the Freedom of Information Ordinance 2012, which gives to Pitcairn Islanders rights of access to information held by public authorities.

[100] The challenge based on the Bill of Rights 1688 must accordingly fail.

[101] As the argument under the Bill of Rights 1688 fails in its entirety, it is unnecessary to address the question whether the Supreme Court has jurisdiction to grant the remedies sought by Mr Warren. In any event, the Court of Appeal decision in *Warren v R* (CA 1/2012, 21 August 2013) reserves the question of remedies under the Constitution for determination by that Court at a later date.

The appeal against the Magistrate's committal decision

Background

[102] The twenty counts of possessing child pornography contrary to s 160 of the Criminal Justice Act 1988 (UK) faced by Mr Warren are triable only in the Supreme Court.

[103] On 1 August 2011, Senior Magistrate RKM Hawk held a preliminary inquiry under s 58 of the Justice Ordinance 2000 for the purpose of determining whether there was sufficient evidence to put Mr Warren on trial by the Supreme Court.

[104] At that inquiry it was common ground that should the Senior Magistrate consider the evidence placed before him by the Crown was admissible, such evidence satisfied the terms of s 65A(1) of the Ordinance in that it furnished sufficient evidence to put Mr Warren on trial for the twenty alleged offences. Mr Ellis told the Magistrate that he (Mr Ellis) would not in that event invoke the provisions of s 65A(2) by requesting the Senior Magistrate to consider a submission that there was insufficient evidence to put Mr Warren on trial for the offences. See the decision of the Senior Magistrate dated 9 August 2011 at [5]. Section 65A provides:

> **65A.**—(1) The Magistrate's Court conducting a preliminary inquiry into an offence shall on consideration of the evidence—
>
> (a) commit the accused for trial if it is of the opinion that there is sufficient evidence to put him or her on trial for any offence triable by the Supreme Court on information; or
>
> (b) discharge the accused if it is not of that opinion and he or she is in custody for no other cause than the offence under inquiry
>
> but the foregoing provisions of this subsection have effect subject to the provisions of this and any other law relating to the summary trial of offences triable on information by the Supreme Court.
>
> (2) If the Magistrate's Court conducting a preliminary inquiry into an offence is satisfied that all the evidence tendered by or on behalf of the prosecutor falls within section 60(3) of this ordinance it may commit the accused for trial for the offence without consideration of the contents of any statements, depositions or other documents and without consideration of any other exhibits which are not documents, unless—
>
> (a) the accused or one of the accused has no legal representative acting for him or her in the case; or
>
> (b) a legal representative for the accused or one of the accused, as the case may be, has requested the Court to consider a submission that there is insufficient evidence to put the accused on trial for the offence and subsection (1) of this section shall not apply to a committal for trial under this subsection.

[105] Rather, the case advanced on behalf of Mr Warren at the preliminary hearing was twofold. First, that the Magistrate had power to determine the admissibility of the evidence on which the Crown relied. Submissions on admissibility were then addressed to the Senior Magistrate. Those submissions were a less sophisticated version of those later advanced in the Supreme Court and in the Court of Appeal. It was said that the Magistrate should himself consider what might loosely be called the constitutional challenges. If accepted, the submission would necessarily mean that the decision whether Mr Warren should be committed for trial would be postponed until after determination of those constitutional questions. Second, if the Magistrate did not accept the submission, he should refer the questions of admissibility to the Supreme Court

pursuant to s 25(7) of the Pitcairn Constitution. The Senior Magistrate rejected both submissions and it is from that decision Mr Warren now appeals.

[106] The Magistrate ruled that his only function at a committal hearing was to ensure that the witness statements purported to be signed by the persons who made them, that there was a properly completed warning to the witnesses regarding prosecution (should their statements be wilfully wrong) and that copies had been given to the defence. If all conditions were satisfied, committal for trial could take place without consideration of the content of any statement or exhibit unless a submission was made under s 65A(2) that there was insufficient evidence to put the accused on trial for the offence(s).

Whether a right of appeal

[107] There is no specific right of appeal against a decision under s 65A of the Justice Ordinance that an accused be committed for trial. However, s 14 of the Judicature (Courts) Ordinance 2000 provides that, subject to any rules of Court, an appeal lies to the Supreme Court in respect of any judgment, sentence or order of the Magistrate's Court:

> **14.** Subject to any rules of Court made under the provisions of section 20 of this ordinance, an appeal shall lie to the Supreme Court in respect of any judgment, sentence or order of the Magistrate's Court.

[108] As it would not be inappropriate to describe the committal of an accused for trial as an "order" of the Magistrate's Court, it would appear that there is a right of appeal. In this regard the Crown submissions assumed (without conceding) that there was jurisdiction for the Supreme Court to hear the appeal but submitted that no basis had been identified that would justify allowing the appeal. The Crown submissions (inter alia) stressed that there was clearly sufficient evidence to justify a trial and Mr Warren's admissions placed the position beyond doubt.

Whether appeal determined by Lovell-Smith J

[109] The appeal was one of the many matters argued before Lovell-Smith J at the May 2012 hearing and in the judgment given by Her Ladyship on 12 October 2012 the following determination was made:

> [128] The applicant contends that the Magistrate's Court was wrong to commit him for trial before referring his constitutional challenges to this Court. He seeks to appeal that decision. In rare cases, the decision to commit can be challenged

> but not by appeal. This is part of the applicant's present constitutional challenge and the applicant cannot say he is prejudiced.

[110] The Crown submits that the appeal from the committal was thereby dismissed. Mr Warren argues that the submissions made in support of his appeal were not addressed and therefore the appeal has not been determined. There is some force to this latter submission and in light of the request by the parties that I address any unresolved issues (even if only arguably unresolved), I have decided that it is appropriate for me to address and determine the appeal in this judgment.

Discussion – whether Magistrate has jurisdiction to determine admissibility of evidence

[111] It was properly agreed by the parties that this appeal to the Supreme Court is a general appeal in which the appellate Court has the responsibility of considering the merits of the case afresh. The weight to be given to the reasoning of the Court below is a matter for the appellate Court's assessment. A general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion.

[112] The narrow issue in the appeal is whether, at a preliminary inquiry, the statutory functions of the magistrate include the determination of the admissibility of the evidence tendered by the Crown.

[113] The answer is provided by the ordinance itself. It explicitly prescribes what evidence is admissible. It leaves the preliminary inquiry magistrate to determine only whether the **statutory preconditions to admissibility** have been established. The magistrate does not determine admissibility **as such**.

[114] Examining the issue in more detail, it is necessary to start with the statutory criteria for admissibility which are contained in ss 60 to 65A. It is not intended to address each of ss 60 to 65A. In the interests of simplicity, reference will be made only to the relevant provisions of ss 60, 61 and 65A.

[115] Section 60 unambiguously stipulates what evidence is admissible **at the preliminary inquiry**. To be admissible, the evidence must fall within subs (2) and "only that evidence shall be admissible by a magistrate inquiring into an offence":

> **60**.—(1) Evidence falling within subsection (2) of this section and only that evidence, shall be admissible by a Magistrate inquiring into an offence.
> (2) Evidence falls within this subsection if it—

(a) is tendered by or on behalf of the prosecutor; and
(b) falls within subsection (3) of this section.

(3) The following evidence falls within this subsection—
(a) written statements complying with section 61 of this ordinance;
(b) the documents or other exhibits (if any) referred to in such statements;
(c) depositions complying with section 62 of this ordinance;
(d) the documents or other exhibits (if any) referred to in such depositions
(e) statements complying with section 63 of this ordinance;
(f) documents falling within section 64 of this ordinance.

(4) In this section "document" means anything in which information of any description is recorded.

[116] As there is a cross-reference in s 60(3) to s 61, it is necessary that the former provision be set out as well. However, for present purposes the essential requirements are those in ss 61(1) and (2). It is not necessary that the balance of s 61 be addressed.

61.—(1) For the purposes of section 60 above, a written statement complies with this section if—
(a) the conditions falling within subsection (2) of this section are met; and
(b) such of the conditions falling within subsection (3) of this section as apply are met.

(2) The conditions falling within this subsection are that—
(a) the statement purports to be signed by the person who made it;
(b) the statement contains a declaration by that person to the effect that it is true to the best of his or her knowledge and belief and that it was made in the knowledge that, if it were tendered in evidence, he or she would be liable to prosecution if in it anything had been wilfully stated which the person making the statement knew to be false or did not believe to be true;
(c) before the statement is tendered in evidence a copy of the statement is given, by or on behalf of the prosecutor, to each of the other parties to the proceedings.

(3) The conditions falling within this subsection are that—
(a) if the statement is made by a person under 18 years of age, it gives his or her age;
(b) if it is made by a person who cannot read it, it is read to him or her before it is signed and is accompanied by a declaration by the person who so read the statement to the effect that it was so read;
(c) if it refers to any other document as an exhibit, the copy given to any other party to the proceedings under subsection (2)(c) of this section is accompanied by a copy of that document or by such information as may be necessary to enable the party to whom it is given to inspect the document or a copy of it.

(4) So much of any statement as is admitted in evidence by virtue of this section shall, unless the Court commits the accused for trial by virtue of section 65A(2) or the Court otherwise directs, be read aloud at the hearing; and, where the Court so directs, an account shall be given orally of so much of any statement as is not read aloud.

(5) Any document or other object referred to as an exhibit and identified in a statement admitted in evidence by virtue of this section shall be treated as if it had been produced as an exhibit and identified in Court by the maker of the statement.

> (6) In this section "document" means anything in which information of any description is recorded.

[117] The effect of these provisions is that evidence (and only that evidence) is admissible **at the preliminary inquiry** if:

(a) It is tendered by or on behalf of the prosecutor; and

(b) It is a written statement which complies with s 61, namely:

(i) The statement purports to be signed by the person who made it.

(ii) The statement contains a declaration by that person to the effect that it is true to the best of his or her knowledge and belief and that it was made in the knowledge that, if it were tendered in evidence, he or she would be liable to prosecution if in it anything has been wilfully stated which the person making the statement knew to be false or did not believe to be true.

(iii) Before the statement is tendered in evidence, a copy of the statement is given, by or on behalf of the prosecutor, to each of the other parties to the proceedings.

[118] As submitted by the Crown, these are the only relevant criteria which establish admissibility under Part VII of the Justice Ordinance. The magistrate has no power to hear oral evidence or to receive defence evidence in any form. The preliminary inquiry is a hearing on the papers. If on those papers there is sufficient admissible evidence (that is, admissible in terms of s 60) to put the accused on trial, there must be a committal.

[119] The ordinance is consistent with the common law position that all questions of admissibility are for the trial court, not the committal court. See *Neill v North Antrim Magistrates' Court* [1992] 1 WLR 1220 (HL), 1231:

> There are some very robust statements … to the general effect that examining justices stand in the position of the now defunct grand jury … and that accordingly the admissibility of evidence is for the trial judge and not for the justices.

[120] It is also consistent with the position under the analogous Canadian Charter of Rights and Freedoms. The Crown referred to *R v Hynes* [2001] 3 SCR 623, where the

accused alleged that statements had been obtained by the police in breach of the Charter. The Court held by a majority that a justice at the preliminary inquiry did not have power to exclude those statements. Chief Justice McLachlan, writing for the majority, stated at para 4:

> I conclude that the preliminary inquiry justice did not err in refusing to exclude the evidence for breach of the *Charter*. **The preliminary hearing is not a trial but simply a preliminary review to determine whether there is sufficient evidence to proceed to trial.** Whether admitting evidence obtained as a result of a *Charter* breach would bring the administration of justice into disrepute is best determined at the time of trial, when all the relevant circumstances can be weighed by the judge, as mandated by s. 24(2). **The accused's ability to apply for the exclusion of evidence under s. 24(2) at trial adequately safeguards his rights under the *Charter*.** [Emphasis added]

[121] The Court noted at [35] to [49] the following disadvantages in allowing questions of admissibility to be determined at a preliminary inquiry:

(a) It transforms the role of the preliminary inquiry. Instead of performing a preliminary screening function, the preliminary inquiry can become a forum for trying Charter breaches and awarding remedies. This function is remote from that envisaged by Parliament for preliminary inquiries.

(b) Assigning this new role to preliminary inquiry, justices might undermine the expeditious nature of the preliminary inquiry. That inquiry is not a trial and should not be allowed to become a trial. Because Charter challenges frequently involve an extensive and comprehensive inquiry, both parties would be compelled to present much fuller cases before the committing court. The preliminary inquiries would become longer and more complex. This in turn would increase the degree to which preliminary inquiry justices and trial judges duplicate each other's work, resulting in additional cost and delay. In all probability, the preliminary inquiry would become less preliminary and more like a trial.

(c) Trial courts are better situated than preliminary inquiry justices to engage in Charter determinations. The Supreme Court (of Canada) has repeatedly identified the trial court as the preferred forum for resolving Charter issues. The inquiry is potentially wide-ranging, and sometimes complex. It is the trial judge who will generally enjoy the fullest appreciation of all the circumstances relevant to the determination. At

the preliminary inquiry, where evidence may be incomplete and the full circumstances not known, the assessment may be difficult, or worse, erroneous. The result may be the exclusion of evidence that would have been admitted in the light of the fuller picture presented at trial. This in turn may lead to the premature dismissal of cases warranting prosecution at the preliminary stage.

(d) Charter litigation at the preliminary stage may ultimately have no practical effect beyond increasing the costs and delays associated with this process. If the preliminary inquiry justice excludes evidence but still commits the accused to trial, his or her conclusion on this issue does not bind the trial judge. When the Crown seeks to introduce the evidence at trial, the exact same matter will require litigation again.

[122] Many, if not all, of these factors operate also in the Pitcairn context.

[123] The conclusion that issues of admissibility cannot be determined at a preliminary hearing under s 58 of the Justice Ordinance is consistent with s 70AA of that ordinance. This provision permits pre-trial rulings on the admissibility of evidence. Such rulings can be given only by the court of trial which by definition cannot be a court holding a preliminary inquiry under ss 58 and 65A. Section 70AA permits both the prosecutor and the accused to apply for a pre-trial ruling. The only material restriction is that s 70AA vests that right in the person seeking to introduce the evidence, not in the person challenging its admission. The Crown can apply in relation to Crown evidence. The accused can apply in respect of the accused's evidence. But neither the Crown nor the accused can apply in relation to the opposing party's evidence.

[124] For all these reasons, it follows that the Senior Magistrate was correct in determining that at a preliminary inquiry all issues of admissibility are governed by s 60 and a magistrate has no jurisdiction to determine admissibility outside this provision and the related sections in Part VII of the Justice Ordinance. Shortly expressed, the "constitutional" issues sought to be advanced on behalf of Mr Warren are not matters over which a magistrate has jurisdiction in the context of a preliminary inquiry.

Discussion – the question of a reference under the Constitution

[125] The final issue is whether the Senior Magistrate was wrong to decline to refer admissibility issues to the Supreme Court under s 25(7) of the Pitcairn Constitution, which provides:

> (7) If in any proceedings in a subordinate court any question arises as to the breach of any of the provisions of this Part, the person presiding in that court may refer the question to the Supreme Court unless, in his or her opinion, the raising of the question is merely frivolous or vexatious.

[126] In my view, the Magistrate was correct not to exercise this power. The Court to which he committed Mr Warren for trial was the Supreme Court. It is that Court which, in its criminal jurisdiction, has full power to determine the admissibility objections sought to be raised by Mr Warren and it similarly has full jurisdiction to determine his complaint that the criminal proceedings are an abuse of process. The Supreme Court also has jurisdiction under s 25 of the Pitcairn Constitution to determine whether any of the fundamental rights and freedoms in Part 2 of the Constitution have been, are being, or are likely to be, breached. It follows that it was entirely superfluous for application to be made to the committing Magistrate that he refer questions of admissibility to the Supreme Court. The very fact of committal meant Mr Warren had full opportunity to raise in the Supreme Court each and every of the objections and complaints he wanted the Magistrate to refer to the Supreme Court. The application for a referral invited the Magistrate to engage in a pointless exercise.

[127] It could be added that a request to a Magistrate to make a constitutional reference to the Supreme Court when the Magistrate has just committed the individual to the Supreme Court for trial would be a wasteful and improper use of the Court's time and process. In that sense, the request could properly be stigmatised as "frivolous or vexatious" in terms of s 25(7). Had he chosen to do so, the Magistrate could have declined the reference application on that ground alone.

[128] It is now necessary to address the submission by Mr Warren that the word "may" in s 25(7) should be read as "must", and consequently the Magistrate had no discretion to decline the request for a referral. One must begin with the text and purpose of s 25 read as a whole. Subsection (7) only comes into operation where, in a subordinate court, a question arises as to the breach of any provision of Part 2 of the Constitution. Were this subsection the only pathway to a remedy for a breach of the

Constitution, there would be a strong case for a narrow reading of "may" or for relying on authorities such as *Julius v Bishop of Oxford* (1880) 5 App Cas 214 to interpret "may" as a power coupled with a duty to exercise that power in a particular way, as where such exercise is necessary to give effect to rights created by the Constitution.

[129] But that is far from the present case. Sections 25(1) and (2) expressly provide that the individual has direct access to the Supreme Court for redress. It is stated that the Supreme Court has "original jurisdiction" to hear and determine any application made to it under subs (1). Because there is a direct and unimpeded pathway to the Supreme Court, there is no need to read into s 25(7) a duty on the Magistrate to refer the breach to the Supreme Court. Particularly where, as here, the individual has been committed to the Supreme Court for trial and the "constitutional" complaints intended to be raised before the Magistrate are the same, or nearly the same, as those to be raised in the Supreme Court in any event. Briefly put, the context does not require "may" to mean anything other than a discretion, nor is there any need for that discretion to be read down so that "may" means "must".

[130] For all of these reasons, the appeal against the decision given by Senior Magistrate Hawk is dismissed.

The application by the Crown under s 70AA of the Justice Ordinance

Background

[131] The Crown case against Mr Warren largely rests on evidence obtained under two search warrants executed on Pitcairn by Sgt Medland on 26 May 2010. To forestall the use of that evidence, Mr Warren has challenged the lawfulness of the warrants, their manner of execution and the subsequent transfer of the seized evidence from Pitcairn to New Zealand. That challenge was at first framed as a breach of rights under Part 2 of the Constitution and he sought constitutional redress pursuant to s 25(1). That challenge failed before Lovell-Smith J, the application for redress being declined by Her Ladyship at [298] and [299]. That decision is currently the subject of an as yet undetermined appeal to the Court of Appeal.

[132] In preparation for the criminal trial, the Crown on 10 April 2013 filed an application for an order under s 70AA of the Justice Ordinance to the effect that the

evidence of Sgt Medland and all evidence arising from the searches (and the later analysis of that evidence) is admissible at trial. Section 70AA provides:

> **70AA**.—(1) Where any person is [to be tried for a criminal offence] and—
>
> (a) the prosecutor or the accused wishes to adduce any particular evidence at the trial; and
>
> (b) he or she believes that the admissibility of that evidence may be challenged—
>
> he or she may at any time before the trial apply to a [Magistrate or] Judge of the Court by or before which the [case] is to be tried for an order to the effect that the evidence is admissible.
>
> (2) The [Magistrate or] Judge shall give each party an opportunity to be heard in respect of the application before deciding whether or not to make the order.
>
> (3) The [Magistrate or] Judge may make an order under this section on such terms and subject to such conditions as he or she thinks fit.
>
> (4) Nothing in this section nor in any order made under this section shall affect the right of the prosecutor or the accused to seek to adduce evidence that he or she claims is admissible during the trial, nor the discretion of the trial [Magistrate or] Judge to allow or exclude any evidence in accordance with any rule of law.

[133] The Crown also invited Mr Warren to file an application alleging abuse of process to ensure that the matters earlier raised at the May 2012 hearing before Lovell-Smith J in constitutional form were determined in a manner consistent with the usual criminal processes. That is, that issues of admissibility are determined in the context of the criminal proceedings themselves, not in the context of a collateral constitutional challenge.

[134] In relation to the s 70AA application, it was agreed by the parties that I was not to revisit any of the matters heard and determined by Lovell-Smith J or to come to any different decision to her on the evidence or on the law. This meant that in the absence of any further challenge by Mr Warren, I would have been asked to make a formal order under s 70AA declaring the evidence admissible. To allow Mr Warren opportunity to decide whether there were indeed any further challenges, it was agreed that Sgt Medland would give evidence before me in relation to certain matters touching on his appointment, swearing in, training and independence. By consent, the evidence given by Sgt Medland at the hearing before Lovell-Smith J was treated as given before me as well.

[135] Arising out of Sgt Medland's supplementary evidence a further four challenges were made by Mr Warren, and it is now necessary that those challenges be addressed.

The four new challenges

[136] The four new challenges, as finally articulated orally during the course of the hearing, were:

(a) No written notice of appointment can now be found by which the Governor appointed Sgt Medland a Police Officer for the Pitcairn Islands.

(b) Because Sgt Medland was sworn in by the Governor and not by a Magistrate, he was not lawfully in office when the search warrants were executed.

(c) Sgt Medland lacked independence in the execution of his duties as a Pitcairn Police Officer.

(d) The oath of office taken by the Island Magistrate was administered by the Governor's Representative, not the Governor. The Island Magistrate was therefore not validly a Magistrate when almost five years later he issued the search warrants executed by Sgt Medland.

[137] Each of these challenges will be dealt with in turn.

Sgt Medland not validly appointed – no written notice of appointment

[138] Sgt Medland, a New Zealand Police Officer, was appointed a Pitcairn Police Officer by (then) Governor Fergusson. Sgt Medland cannot now locate a written "notice of appointment" but was notified of the appointment prior to his departure for Pitcairn Island, where he arrived on 10 December 2009. There he received an email from the Governor's office to which was attached the wording of the attestation for his intended swearing in as a Pitcairn Police Officer:

> I, Geoffrey Ian Medland of Pitcairn Island Police Service do solemnly and sincerely declare and affirm that I will well and truly serve the Queen in the office of constable, with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all people; and that I will, to the best of my power, cause the peace to be kept and preserved and prevent all offences against people and property; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law.

[139] On 21 January 2010, Sgt Medland set up a video-link between the Pitcairn town hall and the Governor's office in New Zealand. There were two purposes. First, for Sgt Medland to be sworn in as the Island Community Police Officer. Second, for the final consultation on the Pitcairn Constitution between the British High Commission and the Islanders.

[140] On establishing the video-link, Sgt Medland spoke with Governor Fergusson, who then administered the oath as set out above, thereby swearing in Sgt Medland as a Police Officer. In his evidence, Sgt Medland described holding the Bible in his right hand and reading the oath previously sent to him.

[141] This evidence thus establishes that at a ceremony held by way of video-link at the Pitcairn town hall, Sgt Medland was sworn in as a Police Officer. It is not disputed that the Governor had power to administer the oath under the Pitcairn Royal Instructions 1970, s 3. No requirement, either at common law or under statute law, has been cited by Mr Warren as authority to support the proposition that for the appointment to be valid the public attestation was required to be also founded on a written notice of appointment and that if the appointment is challenged, that that written notice of appointment must be produced. The authority of a member of a police force arises directly from his attestation and his status is derived from that of the common law constable. See *Halsbury's Laws of England* (5th ed, 2013) vol 84, Police and Investigatory Powers at [2]. For this reason, the submission must fail.

[142] However, Mr Warren relies on the concession by the Crown that it can be assumed that the now misplaced notice of appointment addressed to Sgt Medland was in the form of all earlier notices of appointment addressed to Sgt Medland's predecessors in office. The standard form reads:

> **Notice of Appointment**
>
> **IN EXERCISE** of the powers conferred by Section 2 of the Justice Ordinance, 1999, I hereby appoint
>
> [John Doe],
>
> as Police Officer for the Pitcairn Islands with effect from [Day/Month/Year].
>
> Dated at Wellington this [Day/Month/Year]
>
> .....
>
> G Fergusson
> Governor

[143] It is submitted that contrary to the narrative in the document, s 2 of the Justice Ordinance does not confer a power of appointment and by inference, no valid appointment can be made by an instrument couched in the above terms. Section 2 is a definition provision. The term "police officer" is defined in the following terms:

> "police officer" means any person from time to time appointed by the Governor to hold the public office of a police officer and includes any person duly appointed as an assistant to such police officer;

[144] As to this:

(a) As a written notice of appointment is superfluous and not a condition precedent to the validity of an attestation administered by the Governor to the Police Officer, such defects as there may be in the document cannot affect the validity of the appointment achieved by the personal and direct administration of the oath by the Governor.

(b) Infelicitously worded though the document may be, it is nevertheless capable of being sensibly read as a shorthand reference to the fact that the Governor is appointing the named person to the office of Police Officer as defined in s 2 of the Justice Ordinance, with the consequence that the person has the duties set out in s 79 of the Ordinance.

(c) As the Crown submitted, to the extent that any appointing document purports to refer to one particular power of appointment or other, there is a wealth of authority to the effect that so long as a person has the power to take certain action, it is immaterial that the person refers to the wrong power source in doing so. Courts are primarily concerned with whether a statutory power exists, not with whether the delegate knew how to locate it. See *British Columbia (Milk Board) v Grisnich* [1995] 2 SCR 895 at [20]. In *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 at [175] Crennan and Kiefel JJ stated that it is a settled principle that an act purporting to be done under one statutory power may be supported under another statutory power. A mistake as to the source of power does not render an act or decision invalid.

[145] For these reasons, the challenge to the appointment of Sgt Medland fails.

Appointment of Sgt Medland invalid as oath not administered by Magistrate

[146] It is submitted for Mr Warren that as a matter of law, for Sgt Medland to be validly attested as a Constable, the oath had to be administered by a Magistrate.

[147] This is an untenable submission as s 3 of the Pitcairn Royal Instructions 1970 explicitly provides to the contrary:

> 3. 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.

[148] In fairness, it is possible that this point was abandoned during exchanges between counsel on the last day of the April 2014 hearing but as the notes of evidence are ambiguous in this respect, it is best that the point be dealt with.

Sgt Medland not independent

[149] It is submitted that Sgt Medland acted under orders from New Zealand and/or English Police Officers and did not exercise "independence as required by law and his oath of office".

[150] The submission is based on the fact that while stationed on Pitcairn, Sgt Medland received assistance from the New Zealand Police. That assistance was managed by the International Services Group (ISG) of the New Zealand Police and is more fully described in the judgment given by Lovell-Smith J on 12 October 2012 at [190] to [198]. Some assistance was also provided by Police Officers in England. In addition, from time to time a highly restricted group of individuals in the Island Administration were notified of the investigations into Mr Warren and of Sgt Medland's intended actions.

[151] The need for Sgt Medland to have a support group was partly driven by the fact that as sole Police Officer stationed on a remote Island, he would be without a sounding board or the support and guidance usually considered to be best practice for the performance of a public office of this nature. More particularly, an investigation into serious allegations against the sitting Mayor (Mr Warren) so soon after the conclusion

of the Operation Unique trials and their somewhat bitter legacy further justified the need for a support group.

[152] On the Island the Governor's Representative was also the Child Protection Officer. She and the Governor needed to be advised of the investigation.

[153] On any view, the information received by Sgt Medland about Mr Warren, and the Sergeant's consequent investigation, posed real challenges not only in relation to the potential consequences to the Island community but also in respect of the conduct of the investigation itself. The work preparatory to the execution of the search warrant was challenging and there was a clear need to ensure that each investigative step, including the obtaining and execution of the search warrants, met the exacting standards of the criminal law. With few resources at his disposal on the Island, it was understandable that Sgt Medland would take advice from colleagues in New Zealand and England.

[154] A recurring theme in the cross-examination of Sgt Medland was that instead of exercising an independent judgment he acted on the "instruction" of the New Zealand and English Police Officers and on the instruction of the Governor and other officials.

[155] None of these submissions have a foundation in fact:

(a) Sgt Medland was emphatic that as a New Zealand Police Officer of seventeen years experience (prior to 2010) he was very well aware of the need to maintain constabulary independence. He was equally conscious of the fact that he had been sworn in as a Pitcairn Police Officer and that it was in that capacity that he was discharging his functions. He well knew that he was required to exercise an independent judgment in relation to all matters, but particularly in relation to the investigation of Mr Warren and the decisions leading up to the execution of the search warrants. His evidence in chief, not shaken in cross-examination, was:

> 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 times.
>
> 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.

(b) Much emphasis was placed by Mr Ellis on the fact that before Lovell-Smith J Sgt Medland had said that on one or more occasions he had acted "as instructed" by a member of the ISG. I am satisfied that whether or not the vocabulary was chosen with pedantic care in a long cross-examination, the reality is that Sgt Medland consistently painted a picture of receiving advice from the support group in a context in which it was clear that all understood that he (Sgt Medland) was required to exercise an independent judgment on any advice or "instruction" received from offshore.

(c) Having seen and heard Sgt Medland give evidence, I have no reason to doubt his integrity and honesty. His evidence was given in a forthright and frank manner. Without hesitation, I accept him as an entirely credible witness.

(d) The evidence of Sgt Medland is supported by contemporary emails. These documents show that Sgt Medland and all those concerned in the ISG, as well as all those in the Governor's office, were aware of and respected Sgt Medland's independence. The following are examples:

(i) In an email dated 27 April 2010, the Deputy Governor wrote to Sgt Medland and the members of the ISG explicitly recognising that any decision on the laying of charges was for Sgt Medland to determine:

> Dear Geoff [ie, Sgt Medland]
> …
> **It will be for you and the Prosecutor's Office to decide whether any charges are appropriate in this case**. But I should be grateful if you would keep me informed of progress bearing in mind the Governor's Office responsibility for child (and public) safety and the wider political aspects. [Emphasis added]

(ii) On 28 April 2010, Sgt Medland wrote to the ISG stating "I need **advice**". His final paragraph concluded:

> This is the initial document I sent to Ginny for her to refer to in discussions with the Governor. She has indicated now it is up to me and the prosecutor's office to decide whether charges be laid.

(iii) On 28 April 2010, Sgt Medland wrote to the ISG and the Governor's office reporting that he had taken **advice** from others.

(iv) On 3 May 2010, Sgt Medland reported to the ISG and the Governor's office that "**I have decided** to lay indictable a charge under the Sexual Offences Act 2003 …" [Emphasis added]

(v) On 4 May 2010, an email from a member of the ISG referred to "informal advice" and to "assistance" given to Sgt Medland.

(vi) On 4 May 2010, an email from a member of the ISG refers to "investigative support". Other emails dated 5 May 2010 refer to "advice" and to "recommendations". On the same day an email from the support group to Sgt Medland refers to the group organising "support structures" and states that:

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

[156] All of these contemporary documents clearly recognise that Sgt Medland was the decision-maker and that the role of others was to provide advice only.

[157] The only document which may not clearly and unambiguously recognise Sgt Medland's independence is an email dated 10 May 2010 from a member of the support group which contains a paragraph which states:

> Geoff [Sgt Medland] – as I understand it, to date you have drafted a search warrant for Simon Mount's consideration and at my request you have not taken any overt investigative action at this stage. I wanted to ensure that appropriate support/coordination arrangements were in place before the investigation was advanced.

[158] In the context of the other emails exchanged at this time, it is clear that Sgt Medland received only advice, not instructions from the various persons with whom he was communicating. In these circumstances, little significance can be read into the use in this one email of the phrase "my **request**". In context, the request was simply a request, not an instruction. In my view, there is nothing in these documents to show

that anyone interfered with or otherwise compromised the independent judgment exercised by Sgt Medland.

[159] For all these reasons, the submission that he lacked independence in the execution of his duties as a Pitcairn Police Officer is rejected.

[160] It follows that none of the actions by Sgt Medland and none of the evidence collected by him was "tainted" by any influence from the Pitcairn Island administration, including the Governor's office, or by any absence of constabulary independence.

Whether the Governor caused the oaths to be administered to the Island Magistrate

[161] The fourth and final challenge to the admissibility of the Crown evidence is the claim that the Island Magistrate (Simon Young), who issued the two search warrants on the application of Sgt Medland, was not lawfully in office at the time and therefore had no authority to issue the search warrants.

[162] The claim is based on the assertion that when Mr Young was appointed Island Magistrate, the oaths he took were not administered by the Governor. They were administered (on the Island) by the Governor's Representative, Richard Dewell.

[163] Addressing first the evidence, on 4 September 2005 the Governor appointed Simon Young to be Island Magistrate. Produced in evidence was the Notice of Appointment signed by the then Governor on that date:

> **Notice of Appointment of the Island Magistrate**
>
> In exercise of the powers conferred by sections 5 and 7 of the Pitcairn Order 1970 and by subsection (2) of section 11 of the Judicature (Courts) Ordinance (cap. 2) I hereby appoint
>
> SIMON YOUNG of Pitcairn Island.
>
> to be the Island Magistrate of the Pitcairn Magistrate's Court with effect from 5 September 2005.
>
> Dated this 4th day of September 2005
>
> "Richard Fell"
> Governor

[164] Magistrate Young took the oath of allegiance and judicial oath on 4 September 2005 in the Pitcairn town hall. The ceremony was witnessed by (then) Mayor J Warren,

Island Police Officer Brenda Christian, Police Officers John Harvey and Andy Nicholson and others.

[165] The oaths were administered by Mr Dewell as Governor's Representative. The following day (5 September 2005) Mr Dewell reported from the Island to the Governor what had transpired. His email of that date reads:

> I asked Simon Young to take both the oath of allegiance and the judicial oath at 17:45 on Sunday 4th September at the Public Hall. The ceremony was witnessed by Mayor J Warren, Island Police Officer Brenda Christian, MDPs John Harvey and Andy Nicholson, Shirley Young and Dr Michael Schmittmann.
>
> I gave Simon a copy of his notice of appointment as Island Magistrate, and placed another copy on the notice board outside the Public Hall. I will also hand a copy to the Island Secretary for filing.
>
> I enclose a photo of Simon (and others) at the event.
>
> Regards

[166] The swearing in of Magistrate Young was noted at the Island Council meeting on 7 September 2005. That meeting was attended by Magistrate Young who sat in the public gallery:

> **General Business:**
>
> 1. **Island Magistrate:** Richard noted that Simon Young had been sworn in as Island Magistrate as of September 5th 2005. Copy of notice of appointment handed to Island Secretary.

[167] The submission for Mr Warren turns on whether the Governor's Representative had authority to administer the oaths to Magistrate Young.

[168] As at 2005, the relevant legislation was the Pitcairn Royal Instructions 1970, s 3, which has already been set out in full but for convenience is reproduced again. Emphasis has been added to the last sentence.

> 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**.

[169] The question posed by the last sentence of this provision is whether the Governor "caused" the oaths to be administered to Mr Young by "some public officer in the Islands".

[170] With the distance of time no document, email or other form of written authority from the Governor to his representative on the Island can now be found. This, however, does not create a break in the chain of authority. The irresistible inference from the evidence is that the Governor did "cause" his representative on the Island to administer the oaths. There is no other rational explanation for the following sequence of events:

(a) By written instrument dated 4 September 2005, the Governor appointed Mr Young to the position of Island Magistrate.

(b) On the same day, a swearing in ceremony took place on Pitcairn presided over by the Governor's Representative.

(c) The Governor's Representative administered the oaths to Mr Young in the presence of the then Mayor, the then Island Police Officer, two other Pitcairn Police Officers and others.

(d) On the following day, the Governor's Representative sent to the Governor a report of the event together with a photograph of the occasion.

(e) Three days later the occasion was noted by the Island Council.

(f) It has not been (and could not be) suggested that the Governor's Representative and Mr Young arranged and participated in the ceremony as a frolic of their own.

(g) For the next four and a half years, up to the issue of the warrants on May 2010, Mr Young exercised the powers and functions of the Island Magistrate with the full knowledge of the various Governors and their staff.

[171] If the Governor had not caused his representative on the Island to administer the oaths, there was ample opportunity for the Governor and his successors to have intervened. The fact that there was no such intervention underlines the point that the only rational explanation for the accumulated circumstances is that the Governor "caused" his representative on the Island to administer the oaths to the very same person the Governor had that day appointed Island Magistrate.

[172] Furthermore, it could be said that on these facts and in accordance with the common law maxim that everything has been done to due form (*omnia praesumuntur rite esse acta*), the "causing" by the Governor is to be presumed. The fact that a person acted in an official capacity raises a rebuttable presumption of due appointment to that office, even though the appointment is required to be by deed and is directly in issue in the proceedings and even though it can only be shown that the person so acted on a single occasion, and the case is a criminal one. See *Halsbury's Laws of England* (5th ed, 2009) vol 11 Civil Procedure at [1103] and Oliver Jones *Bennion on Statutory Interpretation* (6th ed, LexisNexis, London, 2013) 1017 to 1019.

Overall conclusion on the Crown application under s 70AA of the Justice Ordinance

[173] The parties having agreed that I am not to revisit any of the matters heard and determined by Lovell-Smith J or to come to any different decision to her on the evidence or on the law, and I having found that none of the new objections raised by Mr Warren to the admission of the Crown evidence have any substance, it follows that the Crown application under s 70AA of the Justice Ordinance is granted. It is ordered that the evidence of Sgt Medland and all evidence arising from the search of Mr Warren's home and its analysis thereafter is admissible at trial.

The challenges relating to the judicial office of Chief Justice

[174] Mr Warren seeks a declaration that Blackie CJ has not lawfully entered office or has vacated his office.

[175] A number of grounds are advanced in support of this application. In essence, the claim is that the Chief Justice has not yet sworn the oath of office and cannot function as Chief Justice. It is contended that when the Chief Justice was sworn into office in 2000 it was done "in private, in New Zealand, by the Governor, an Executive not a Judicial Officer". It is submitted that to lawfully take office the Chief Justice must be sworn in by a judicial officer at a public court hearing held on Pitcairn.

[176] Of the many grounds advanced in support of this submission, one has already been determined by the Court of Appeal in *Warren v R* CA 1/2012, being the judgment delivered on 12 August 2013. The Court rejected a submission that because the instrument of appointment signed by the Governor of Pitcairn purported to be

retroactive for a period of some four months it was consequently a nullity. The Court concluded:

> [26] We are satisfied that Chief Justice Blackie was appointed by the document of 8 June 2000 and has been in office from the time that he swore the oaths of office. The generalised challenge to his holding office because it was expressed as including a retroactive aspect is unsustainable.

[177] The grounds now advanced have been articulated in various ways, but the essence seems to be the following:

(a) Because the Governor had no power to administer a judicial oath, the Chief Justice's oath was invalid.

(b) The oath of allegiance and judicial oath were required to be taken before a judicial officer in the context of a public court hearing held on Pitcairn. At the time the swearing in took place in June 2000 at Auckland, New Zealand, there was no legal authority for a Pitcairn Court to sit in New Zealand.

(c) The oath was taken before the instrument of appointment was sealed by the Governor.

(d) The Governor "proposed to temporarily suppress any announcement of [the] appointment" to those living on Pitcairn. This was a breach of the Rule of Law. If the Chief Justice was aware of the temporary suppression he participated in the breach.

(e) The Chief Justice should have been aware his appointment was invalid. If he was unaware, it showed "a reckless disregard for the law of Pitcairn on which he should have had a detailed knowledge and set an example".

(f) A number of further grounds were advanced, each premised on the success of the primary contention that the Chief Justice was not lawfully sworn into office:

> H. By being sworn in in such a fashion, His Lordship provided a precedent regrettably followed by others, including other Justices of the Supreme Court, Justices of the Court of Appeal, and Magistrates, which had the effect of undermining the administration of justice.

I. The Chief Justice failed from the date of his purported appointment to take a leadership role as expected of a Chief Justice, and failed to exhibit a proper and sufficient knowledge of Pitcairn (including English law applicable to Pitcairn) Law.

J. Since the swearing in of office on the fourth day of a hearing being conducted in the Court of Appeal, on 14 March 2013, where the Court adjourned and attended a hearing of the Supreme Court so that President Robertson, McGechan and Potter JJA took an oath of office before the Chief Justice, the Chief Justice has taken no steps to be sworn into Office, despite not having taken his oath correctly for over 12 years.

K. Has taken steps assuming the position of Chief Justice despite the constitutional prohibition in section 52(5) not to function as a Judge until his Oath has been taken.

(g) Other complaints made in relation to the Chief Justice are:

L. Failed to advise the Attorney-General and/or the Governor that the proposed constitution and actual Constitution of Pitcairn made by Order-in-Council in 2010 was unworkable as to the organs of Government, in that despite Article 1 and 25 of the International Covenant on Civil and Political Rights ("ICCPR") which provides for … And whereas Part 2 of the Constitution contains a number of references to a *democratic society* an essential ingredient of the right to political participation namely … Without considering self-determination, or paramount interests of the Islanders the Constitution provides for a non-democratic system of government, which is inherently contradictory with the democratic rights provided in part 2 … Also being ultra vires to the Bill of Rights Act 1688, requiring frequent Parliaments, and free speech in Parliament, and the European Convention of Human Rights which Part 2 is modelled upon.

M. The Chief Justice provided only oral advice rather than written advice to the Deputy Governor (contrary to the Rule of Law) purporting to be under s 43(4) of the Constitution which enabled the Governor to permit sitting of the Magistrates Court in New Zealand, without considering that no such position as Deputy Governor existed in law. And failed to advise the Deputy Governor that the Governor must as a prerequisite have consulted the Islanders as required by section 36(1) of the Constitution, and under international law as section 43(4) is subject to any other law.

N. The Chief Justice sat in a Court of Appeal hearing a bail variation application in respect of Mr Warren having unlawfully surrendered his precedence to the President of the Court of Appeal, in breach of the Senior Court Act section X.

O. The Chief Justice sat together with President Robertson on a joint sitting of the Court of Appeal, and the Supreme Court contrary to law, and the Rule of Law, and thereby compromising judicial independence.

P. The Chief Justice when on a trip to London to visit Baroness Scotland, an Under-Secretary of State, to discuss Pitcairn told her advisors that he planned to ensure no maverick lawyers were

appointed to the Pitcairn bar. One meaning of "Maverick" is independent, if the Chief Justice was using the term in that way, he further compromised judicial independence, and the entire credibility of the justice system.

Q. Such further and other grounds if any that may arise from an inspection of documents held at the Office of Attorney-General who has indicated counsel may inspect them at his offices.

R. Such further and other grounds if any that may arise from an examination of an Memorandum from the Chief Justice or cross-examination on any affidavit he files.

S. The issuing of a Joint Minute of this Court sitting jointly with the Court of Appeal dated 12 July 2013, should not have issued as in fact the Courts did not sit together, the issuing of the minute nevertheless wrongly provided the appearance of such an unlawful sitting, to which a recusal application of the three judges sitting in the Court of Appeal and the Chief Justice ensued. These events compound the appearance or actuality of the Chief Justice's failure to take a leadership role, by permitting such a minute to issue.

[178] The following matters have already been dealt with by the Court of Appeal:

(a) Ground N. See the judgment of the Court of Appeal given on 12 August 2013 at [40] – [51].

(b) Ground O. This was apparently withdrawn before the Court of Appeal, as recorded in the judgment given on 12 August 2013.

[179] It is not practicable to provide a detailed summary of the different formulations of Mr Warren's case or of the competing contentions advanced by the parties. It is sufficient to note that the Crown's response in relation to the validity of the appointment of the Chief Justice was twofold:

(a) The Chief Justice was validly appointed by the Governor and swore valid oaths. The purported requirements relied on by Mr Warren are not applicable.

(b) In any event, the application (for a declaration that the Chief Justice has not lawfully entered office or has vacated his office) must be brought as an application for judicial review, as must applications for mandamus or declaratory relief. There are currently no such applications before the Court.

[180] Before dealing with the grounds advanced by Mr Warren, it is necessary to first address the facts.

The facts relevant to the appointment of the Chief Justice

[181] The evidence establishes that:

(a) By Notice of Appointment dated 8 June 2000, the (then) Governor of Pitcairn appointed Charles Stuart Blackie to be the Chief Justice of the Supreme Court of Pitcairn, Henderson, Ducie and Oeno Islands with effect from 1 February 2000. The Notice recorded that the appointment was:

> IN EXERCISE of the powers conferred by sections 5 and 7 of the Pitcairn Order 1970 and by subsection (1) of section 5 of the Judicature (Courts) Ordinance 1999

(b) The swearing in ceremony was held at Auckland, New Zealand, on Friday 30 June 2000 and was conducted by the Governor, who administered the oath of allegiance and the judicial oath to the Chief Justice. Those oaths were in the following form:

> OATH OF ALLEGIANCE
>
> I, Charles Stuart Blackie, do swear that I will be faithful and bear true allegiance to Her Majesty QUEEN ELIZABETH THE SECOND, Her Heirs and Successors, according to law. So help me God.
>
> JUDICIAL OATH
>
> I, Charles Stuart Blackie, do swear that I will well and truly serve our Sovereign Lady QUEEN ELIZABETH THE SECOND as a judicial officer and will do right to all manner of people after the laws and usages of PITCAIRN, HENDERSON, DUCIE AND OENO ISLANDS, without fear or favour, affection or ill-will. So help me God.

(c) There was at that time no magistrate, judge of the Supreme Court or judge of the Court of Appeal in office in Pitcairn. An Island Magistrate, Lea Brown, appears to have been appointed on or about 1 February 2000.

[182] At a Chambers hearing before the Chief Justice held at Auckland on 1 October 2013, at which Mr Warren was represented by Mr G Edgeler (then junior counsel), the Chief Justice indicated a willingness to receive a memorandum from counsel for

Mr Warren detailing the factual issues relevant to Mr Warren's challenge to the validity of the appointment of the Chief Justice, and in respect of which the Chief Justice was requested to furnish a report to this Court. Mr Edgeler undertook to file such memorandum within seven days.

[183] That promised memorandum was not filed. Mr Ellis only became aware of this omission on Monday 7 April 2014, being the first day of the April 2014 hearing. On the following day, Tuesday 8 April 2014, Mr Ellis filed a memorandum explaining the reason for the default (his ill health) and the reason why the seven day period had de facto become six months. The memorandum then by 17 questions particularised the information sought to be included in the report from the Chief Justice. By Memorandum dated 10 July 2014, the Chief Justice answered the questions. The questions and answers follow:

> **A. What advice was given by Your Lordship under section 43 of the Constitution as to where Courts of Pitcairn may sit, and when?**
>
> I presume that Mr Ellis is referring to the current proceedings and not the proceedings styled "Operation Unique", which were before the Pitcairn Supreme Court for hearing both in New Zealand and on Pitcairn Island during the period 2003 to 2008. As to the current proceedings, I received a request for advice from the Deputy Governor, Ginny De Silva, in mid-2010. As I recall, that advice was sought by way of an email letter received on my computer at the Manukau District Court. I recall discussing the request for advice with Ginny De Silva on the telephone, in all likelihood during one of the breaks in my District Court sitting schedule. I recall confirming with her the necessity to approach the relevant officials and/or Minister of the New Zealand Government, seeking the approval to conduct hearings of the Pitcairn Courts in New Zealand, in a similar way as had been the case with Operation Unique. I recall receiving a copy of the letter sent to the New Zealand Government and also, although I cannot be certain, a copy of the response.
>
> **B. Is anything recorded in writing? If so, please supply.**
>
> In all likelihood, I will have copies of the correspondence from the Governor's office on file. However, all files that I have regarding Pitcairn Island affairs, including the trials, have had to be archived during the course of the reconstruction of the Manukau District Court. Although the reconstruction of the Judges' chambers is almost complete and the boxes of files returned, it would take me some time to sort through these boxes to obtain the letters concerned. All emails for the year 2010 on my Justice Department computer have been deleted in the routine office practice of culling emails to remove dated and excessive numbers accruing in computer folders and files.
>
> **C. What were the circumstances of Your Lordship's swearing in as Chief Justice: where, when and by whom was Your Lordship sworn in?**

I was sworn in as Chief Justice, Pitcairn Islands, on 8 June 2000. The ceremony took place at the then offices of the British Consulate-General at 151 Queen Street, Auckland City. I took the Oath of Office and the Oath of Allegiance before His Excellency Martin Williams, the then Governor. In addition to the Governor himself, I recall the others present as being the Consul-General, Mr Paul Treadwell (Legal Adviser), Mr Graham Ford, Mr Leon Salt (the Commissioner for Pitcairn) and other staff members at the Consular office.

D. What members (if any) of the Pitcairn public were present?

Mr Leon Salt, who was the Commissioner for Pitcairn, was present. I understand that he had been a school teacher on the Island and was of Pitcairn descent.

E. Were you consulted on the contents of your Oath, who it was to sworn before and/or where it was to sworn?

As I have stated, the Oath was sworn at the offices of the British Consulate-General in Auckland before the then Governor, His Excellency Martin Williams. I was not consulted on the contents of the Oath and saw no reason why I should be. The Oath of Allegiance that I took was in the same form as all other Oaths of Allegiance that I have taken to Her Majesty the Queen, including as a Judge in the New Zealand Court Martial Court and a Judge in the District Court. As I recall, the Oath of Office was identical to the Oath of Office of a New Zealand Judge but with Pitcairn modifications. It was in the same format as that utilised in the swearing in of all judicial officers since 2000.

F. Did Your Lordship accept a payment for "services" for the backdated period of 1 February 2000 & June 2000, or whenever you took your oaths?

I was not offered and, therefore, could not accept any payment for "services".

G. What services were performed that warranted backpay?

I performed no services. There was no back-pay.

H. Did Your Lordship, enquire as to what lawful authority the payment was made under? If not, did you Lordship believe there was some lawful authority, and if so what?

Judges of the New Zealand District Court who are also Judges of the Pitcairn Islands' Supreme Court receive only their New Zealand judicial salary. No additional payment is received for services to the Pitcairn Islands, even though many of those services have to be performed outside normal New Zealand Court sitting hours. There has been no cause to enquire as to the lawful authority for either myself or other Judges (also of the New Zealand District Court) with regard to payment.

I. Was Your Lordship aware there was a proposal not to publicise your appointment? If so, did you agree/disagree with this.

I was not aware.

J. What difficulties were there in your appointment? (See letter 20 March from Paul Treadwell to Leon Salt).

I have not seen this letter before. Principally, it relates to the appointment of Magistrates.

I am assuming that the reference to difficulty in appointing the Chief Justice related to the fact that my formal appointment was delayed on account of the need for approval to be obtained from the Chief District Court Judge for New Zealand, and also from the Attorney-General for New Zealand.

K. Was Your Lordship aware that the Public Prosecutor was recommending persons to be appointed as Magistrates, Registrar, and Defence Counsel?

I was not aware, neither was I asked to make any recommendations.

L. If so, what comment, (if any) did you make?

I was not asked for comment.

M. Why did Your Lordship discuss the Pitcairn proposed Bar with FCO officials?

I called at the Foreign Office during the course of a private family holiday in the United Kingdom in December 2000. I regarded it as a courtesy call and to familiarise myself with what might be expected following my appointment as the first Chief Justice of Pitcairn Island. I took no notes, neither did I receive a copy of any (minutes) taken as a result of the meeting. I had not seen the letter dated 20 December 2000 from Louise Savill to the Governor until a copy was exhibited by Mr Ellis. In all likelihood the establishment of a Pitcairn Bar would have been discussed. It would follow on from my letter dated 8 September 2000, attached to Mr Ellis' supplementary memorandum dated 6 May 2014. In my view, it would be difficult, if not impossible, to provide a system of justice to Pitcairn Island without the creation of a Bar of properly qualified barristers and/or solicitors.

N. Were you seeking approval from the British officials for your proposed actions?

No. I would simply have made mention of proposed actions. I received no approval, acknowledgement or comment on the proposed actions as a result of the meeting with Foreign Office officials.

O. What did Your Lordship mean by "maverick lawyers".

I do not recall if I used the words "maverick lawyers". They are words used in the letter authored by Louise Savill. As my letter of 8 September 2000 would indicate, I considered it important that the admission to practice at the "Pitcairn Island Bar" be carefully regulated. Historically, the word "maverick" is drawn from a Texan rancher by the name of Maverick, who refused to be regulated by having his cattle branded, as required by local law.

P. What discussions, or advice, (if any) did Your Lordship have with members of the British or Pitcairn Executives as to the proposed New 2010 Constitution?

I had no discussions and gave no advice to the British or Pitcairn Executive. From time to time, as a matter of courtesy, I was sent copies of the proposed Constitution as the drafting progressed. As a result, I may have had some informal discussions with the Attorney-General as to the appointment and tenure of Judges but I recall nothing specific.

Q. Please disclose any other information relating to the above matters that would be in the interests of justice.

I have no further comment to make.

[184] The factual basis on which the Court is to determine the challenges advanced by Mr Warren are the contents of the Memorandum from the Chief Justice, read together with those matters established by the evidence detailed earlier under this sub-heading.

Whether Chief Justice swore an invalid judicial oath – preliminary issues – the validity of his appointment and the form of the oaths

[185] Before addressing the submission that on 30 June the Chief Justice swore an invalid judicial oath because the Governor had no power to administer such oath, it is necessary to record that the Chief Justice was validly appointed in the sense that the Governor possessed the power to appoint him to the office of Chief Justice by virtue of the provisions cited in the Notice of Appointment, being ss 5 and 7 of the Pitcairn Order 1970 and s 5(1) of the Judicature (Courts) Ordinance 1999, which provided:

> **The Pitcairn Order 1970**
>
> 5(1) The Governor may make laws for the peace, order and good government of the Islands.
>
> (2) Without prejudice to the generality of the power conferred by subsection (1) of this section, the Governor may, by any such law, constitute courts for the Islands 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.
>
> …
>
> 7 The Governor may constitute all such offices as he may consider necessary for the purposes of this Order and may make appointments to any office so constituted, and any person so appointed, unless otherwise provided by law, shall hold his office during Her Majesty's pleasure.
>
> **The Judicature (Courts) Ordinance 1999**
>
> 5(1) The Supreme Court shall consist of the Chief Justice and such other judge or judges as the Governor shall from time to time appoint by instrument under the Official Seal in accordance with any instructions given by Her Majesty through a Secretary of State.

[186] In the present case, the Notice of Appointment dated 8 June 2000 bears the signature of the (then) Governor and the Official Seal. The Court of Appeal in *R v Warren* (12 August 2013) at [26] held that the Chief Justice was properly appointed by this document and has been in office from the time he swore the oath of office.

[187] As to the form of the oaths, the oath of allegiance was at that time (8 June 2000) prescribed by the Schedule to the Pitcairn Royal Instructions 1970. The oath of allegiance sworn by the Chief Justice conformed with that form. The form of the

judicial oath was not, however, prescribed by any law specific to Pitcairn. That omission, however, was filled by s 16(1) of the Judicature (Courts) Ordinance 1999, which provided that English law was to be in force subject to local circumstances:

> 16(1) Subject to the provisions of the next succeeding subsection, 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 the Islands.
>
> (2) All the laws of England extended to the Islands by the last preceding subsection shall be in force therein 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 the same 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 the same applicable to the circumstances.

[188] In June 2000, the relevant English law was contained in s 10(4) of the Supreme Court Act 1981 (UK) (now referred to as the Senior Courts Act 1981). The section (in its as enacted form) required the judicial oath to be in the form prescribed by the Promissory Oaths Act 1868 (UK):

> 10(1) Whenever the office of Lord Chief Justice, Master of the Rolls, President of the Family Division or Vice-Chancellor is vacant, Her Majesty may by letters patent appoint a qualified person to that office
>
> (2) …
>
> (3) …
>
> (4) Every person appointed to an office mentioned in sub-section (1) or as a Lord Justice of Appeal or puisne judge of the High Court shall, as soon as may be after his acceptance of office, take the oath of allegiance and the judicial oath, as set out in the Promissory Oaths Act 1868, **in the presence of the Lord Chancellor**. [Emphasis added]

[189] The Promissory Oaths Act 1868, s 4, provided:

> 4 The Oath in this Act referred to as the Judicial Oath shall be in the Form following; that is to say,
>
> "I do swear that I will well and truly serve our Sovereign Lady [Queen Elizabeth the Second] in the Office of , and I will do Right to all manner of People after the Laws and Usages of this Realm, without Fear or Favour, Affection or Ill Will. So help me God.

[190] The judicial oath sworn by the Chief Justice in June 2000 conforms with this form.

[191] The Crown formally accepts the English law specifying the form of the judicial oath was applicable in Pitcairn, despite the fact that Pitcairn does not have equivalent judicial roles corresponding to those set out in the Senior Courts Act 1981.

The manner in which the oaths were to be sworn

[192] The remaining issue is whether the Governor had power to administer both oaths.

[193] Addressing first the oath of allegiance, the Governor had power under the Pitcairn Royal Instructions 1970, s 3, to require any person in the public service of the Islands to make an oath or affirmation of allegiance:

> 3 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.

[194] The phrase "person in the public service of the Islands" was not defined in the Instructions or anywhere else in the then applicable ordinances. However, the words are to be interpreted purposefully and in context. See *Halsbury's Laws of England* (5th ed, 2012) vol 96, Statutes and Legislative Process, at [1115]. Context here includes:

(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":

> The Governor may … require any person in the public service of the Islands to make an oath … of allegiance … together with such other oaths … 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 cause them to be administered by some public officer in the Islands.

[195] These provisions must be interpreted as evidencing a unified purpose to constitute courts, to appoint judges and to administer the requisite oaths.

[196] There is no reason not to include judicial officers in the opening phrase "any person in the public service of the Islands", because the natural meaning of the phrase is broad enough to include judges, and the term "such other oaths" is unrestricted and includes the judicial oath.

[197] Furthermore, it is difficult to see how, in a practical sense, the judicial oath could ever be administered (as here) to the first person appointed Chief Justice (or the first person appointed as a Judge of the Supreme Court) if this could not be done by the Governor. The suggestion that because an Island Magistrate had been appointed some four months earlier somehow conferred on that person power to administer the judicial oath to the Chief Justice raises problems of its own in relation to how such authority came to be conferred on a judicial officer of that rank. By contrast, the Governor was vested with clear and explicit power to administer the judicial oath.

[198] Mr Warren submitted that because the later Pitcairn Constitution s 61 contains a definition of "Pitcairn Public Service" which specifically excludes judges and judicial officers, the earlier Pitcairn Royal Instructions 1970, s 3 (administration of oaths), did not empower the Governor to administer the judicial oath to the Chief Justice. This argument cannot succeed:

(a) The 2010 Pitcairn Constitution specifically disaggregates the judiciary and the Public Service, in that each is the subject of a specific Part of the Constitution. The Supreme Court and the appointment of the judiciary fall under Part 6 – The Administration of Justice – while the appointment of officers of the Pitcairn Public Service falls under Part 7 – Public Service.

(b) The Constitution's definitional exclusion of the judiciary from the Public Service was plainly necessary to ensure that a category of persons (the judiciary), who would ordinarily be understood to be included in the phrase "public service", were excluded for the purpose of the Constitution to ensure the distinct compartmentalisation of the organs of government was not frustrated by definitional muddlement.

(c) As submitted by the Crown, the "carve out" is to be seen as indicating that judges would otherwise be included in the term "public service". The term "Pitcairn Public Service" was a constitutional term of art, not a

continuation of "person in the public service" as used in the Pitcairn Royal Instructions 1970.

(d) No known rule of statutory interpretation would allow the terms of the 1970 Instructions (repealed by the Pitcairn Constitution Order 2010) to be read in the light of a definition contained in an Order made some 40 years later.

(e) Similarly, the requirement in s 52(5) of the 2010 Constitution of Pitcairn that every holder of a judicial office make the judicial oath in the form prescribed in the Schedule is of little assistance in ascertaining the requirements of the law in 2000.

[199] In these circumstances, it is concluded that in June 2000 the Governor had full power to administer both the oath of allegiance and the judicial oath to the Chief Justice.

Whether oaths required to be administered by a judicial officer in open court at a hearing held on Pitcairn

[200] For Mr Warren, it was submitted that to be valid the oaths were required to be administered by a judicial officer in the context of a public sitting of a court convened on Pitcairn Island.

[201] This argument draws on ss 10(1) and (4) of the Senior Courts Act 1981 (UK), the terms of which have earlier been set out. In its original (as enacted) form this provision stipulated that whenever a Lord Chief Justice was to be appointed, the oaths were to be taken by the appointee "in the presence of the Lord Chancellor". No stipulation was made that this take place in open court. Subsequently the Act was amended. In its current (amended) form, s 10 of the Senior Courts Act requires the person appointed to the office of Lord Chief Justice to take his or her oaths in the presence of the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division and the Chancellor of the High Court. Neither the "as enacted" nor the currently in force provisions had application to Pitcairn because, in terms of s 16(2) of the Judicature (Courts) Ordinance 1999, "local circumstances" did not permit:

(a) The Pitcairn constitutional and judicial arrangements in 2000 did not have (and presently do not have) an office known as Lord Chancellor. It is not possible, by making formal alterations to nomenclature, to re-conceive any position in the Pitcairn constitutional order (as it was in June 2000) as a "Lord Chancellor" position without affecting substance. On one view, the Governor could be said to have been the nearest Lord Chancellor equivalent in 2000 but that would be doing violence to the language of s 16 and is, in any event, an unattractive outcome for Mr Warren, given that the oaths were in fact administered by the Governor and therefore in his presence, thus complying with the Senior Courts Act.

(b) None of the offices now specified by the UK Act are found in the Pitcairn legal system.

[202] It follows that the Senior Courts Act cannot be deployed in support of an argument that the judicial oath could not be administered by the Governor to the Chief Justice.

[203] Next, Mr Warren relies on the Promissory Oaths Act 1868 (UK) and the Promissory Oaths Act 1871 (UK).

[204] As to the Promissory Oaths Act 1868, in its as enacted form the Act required the oath of allegiance and judicial oath to be taken by officers named in the Second Part of the Schedule. At that time (but not in June 2000) those officers included the Lord Chief Justice. Notably, the Act did not require the oaths to be taken in court or before a judicial officer.

[205] The Promissory Oaths Act 1871 (as enacted) required the oaths to be taken **either** before the Lord High Chancellor of Great Britain **or** "in open court":

> Be it enacted that each such officer shall take the said oaths before such persons as Her Majesty may from time to time appoint; or,
>
> In England, before the Lord High Chancellor of Great Britain, or in the Court of Chancery, Queen's Bench, Common Pleas, or Exchequer, in open court before one or more of the judges of such court, or in open court at the general or quarter sessions …

[206] The Promissory Oaths Act 1871 (as currently in force) continues to recognise a distinction between the "in open court and before a judge" category on the one hand and the "before the Lord Chancellor" category on the other. (It is to be noted that for Lord Chancellor one must now read "Lord Chief Justice" consequent on the transfer of most of the judicial functions of the Lord Chancellor to the Lord Chief Justice). For the latter category there is no requirement for the oath to be taken in open court:

> … each such officer shall take the said oaths before such persons as Her Majesty may from time to time appoint; or in England and Wales –
> (a) before the Lord Chief Justice of England and Wales, **or**
> (b) **in open court** before one or more judges of the High Court or before one or more Circuit judges … [Emphasis added]

[207] In view of the statutory provisions, it cannot be said it has been established that in England the judicial oath must in all circumstances be taken in open court.

[208] The argument for Mr Warren faces further difficulty in that by 2000 the Promissory Oaths Act 1871 did not in any event apply to the Lord Chief Justice, as that office had in 1981 been removed from the schedule of judges to whom the 1868 Act applied by the Senior Courts Act 1981, Schedule 7, page 120.

[209] In summary, as to the claim that it was a requirement in 2000 that the Chief Justice of Pitcairn take his oaths before a judicial officer in open court:

(a) No such requirement can be found in the Ordinances of Pitcairn. The obligation must come from English law.

(b) The Senior Courts Act 1981, s 10 (as enacted), required only that the oaths of office of the Lord Chief Justice be taken in the presence of the Lord Chancellor. It was not a requirement that the oaths be taken in court. In any event, s 10 did not apply to Pitcairn because of the "local circumstances" limitation in s 16(2) of the Judicature (Courts) Ordinance 1999. Pitcairn does not have a Lord Chancellor.

(c) The Promissory Oaths Act 1871 did not in 2000 apply to the office of Lord Chief Justice (UK).

(d) It has not been established that it is a requirement of English statute law or of the common law that the judicial oath must in every case be taken

in open court before a judicial officer. Such requirement applies to some, but not all judicial officers.

(e) In any event, any such requirement was, at June 2000, inapplicable to local circumstances in terms of s 16 of the Judicature (Courts) Ordinance 1999 because the English judicial officers to whom the requirement attached had no Pitcairn domestic analogue.

[210] These conclusions are in part reinforced by the judgment given by the Court of Appeal in *R v Warren* (12 August 2013) at [18], that the Promissory Oaths Act 1868 is not of general application as it does not by the Schedule apply to High Court or Court of Appeal Judges in the United Kingdom. By analogy, it does not have application to such Judges in Pitcairn.

[211] The overarching point, however, is that the circumstances of Pitcairn are unique. Its distance from the administrative base of the Governor in New Zealand, the logistical difficulties inherent in arranging sea passage to and from the Island and the small size of the population, make it impractical to swear in a senior judicial officer (the Chief Justice) on the Island in a court setting. 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. As stated by Sir Kenneth Roberts-Wray in *Commonwealth and Colonial Law* at 545:

> **A Court may therefore hold, in the light of the circumstances, that an English law is to be entirely rejected**. Or that it must be applied with modifications. All the circumstances are to be taken into account, including the local relevance or otherwise of circumstances in England which explain a particular law. [Emphasis added]

[212] The finding that it was not required that the Chief Justice take his oaths in court means that it becomes irrelevant that at June 2000 there was no legal mechanism for the Supreme Court of Pitcairn to sit in New Zealand. The Governor's powers referred to were not required to be exercised by the Governor on Pitcairn itself and no such limitation can be inferred, particularly when it was known at the time the instruments

were drawn that the Governor was (and of necessity would continue to be) based off-Island. What is important is the fact that the Chief Justice took his oaths, not the particular place or location in which that event took place. Mr Warren has cited no authority for the proposition that the Governor was required to exercise his powers in Pitcairn only and that the Chief Justice was required to take his oaths there in open court.

[213] It follows that Blackie CJ lawfully entered office and has not vacated that office. The application by Mr Warren for declarations to the contrary must be dismissed.

[214] Having held that the Chief Justice was lawfully appointed and lawfully sworn, it is not proposed to deal with the Crown's alternative submission that the issues raised by Mr Warren under this head of his case should have been brought under s 30 or s 31 of the Senior Courts Act by way of proceedings seeking an injunction or other form of declaratory relief. The making of the submission is, however, noted, as is the further submission that the application by Mr Warren dated 3 May 2013 (seeking a stay) be dismissed for not being in proper form. As it has been possible to address Mr Warren's arguments on the merits, it is not intended to address the "pleading" point. This should not be taken as condonation of the virtually formless procedure by which these challenges have been brought. There are limits to pragmatism. Properly drawn pleadings are an essential roadmap for the Court and the parties. They are the documents which establish the parameters of the case. Both the Court and the opposite party are entitled to be advised of the essential basis of a claim or defence, and all necessary ingredients of it, so that subsequent processes and the hearing itself can be conducted against recognisable boundaries. Neither the Court nor opposite parties should be placed in the position of having to deal with a proposition of whose substance adequate notice has not been given in the pleadings.

[215] The finding that Blackie CJ was lawfully appointed and that the oaths of office were properly taken means that a large number of the subsidiary grounds advanced by Mr Warren must fall away, particularly:

(a) The allegation that the Chief Justice should have been aware his appointment was invalid.

(b) Grounds H to K.

[216] In addition, the following matters have already been dealt with by the Court of Appeal:

> Ground N (the order of precedence) and Ground O (the joint sitting of the Supreme Court and Court of Appeal).

[217] It is therefore proposed to deal only with such points as remain.

Oath taken before Governor's seal attached to instrument of appointment

[218] Mr Warren submits that because it is not known whether the Governor's seal was attached to the instrument of appointment before the Chief Justice took the oath of office, the appointment was not properly executed.

[219] As to this, it can be seen that under the 2010 Constitution of Pitcairn the appointment of judges is addressed by s 52. It is provided that the appointment by the Governor (on instructions from Her Majesty given through a Secretary of State) is followed by the taking of the oath of allegiance and the judicial oath by the judge "[b]efore entering upon the functions of the office".

[220] However, in June 2000 there were no formal ordered steps of this nature. Section 5(1) of the Judicature (Courts) Ordinance 1999 merely provided that the Governor shall from time to time "appoint [the Chief Justice or other judge] by instrument under the Official Seal". There was no requirement, express or implied, that the oaths be taken before, contemporaneously with or after the sealing of the Notice of Appointment.

[221] In the present case, according to a letter dated 8 June 2000 from Mrs KS Wolstenholme, Deputy Governor, addressed to the then Honorary Legal Adviser for Pitcairn (Mr P Treadwell), the Governor signed and dated the Notice of Appointment on 8 June 2000 and it was intended that the seal be added once the oaths had been taken:

> The Notice of Appointment will be held here until it can be sealed after the oaths have been taken [on 30 June 2000].

[222] It is clear from the face of the Notice of Appointment and other evidence, that the oaths were in fact subsequently taken and that the Notice of Appointment was in fact stamped with the Official Stamp. The order in which these steps were taken is not known.

[223] There being no prescribed order of events, it is difficult to see why, in the circumstances, the particular order chosen by the Governor should lead to the conclusion that the appointment of the Chief Justice is somehow invalid. Form should not be allowed to triumph over substance.

The alleged suppression of the announcement of the appointment of the Chief Justice

[224] The letter dated 8 June 2000 sent by Mrs Wolstenholme to Mr Treadwell addressed not only the appointment of the Chief Justice but also the appointment of four named Magistrates. As to publication of the five appointments, Mrs Wolstenholme said:

> I am also sending copies of the four sealed Notices (relating to the Magistrates) with this letter to the Commissioner with the request that publication on Pitcairn is arranged. There may well be suspicions on Pitcairn that these appointments signal an imminent trial. We need to take care therefore to let the islanders know that they are a procedural result of the coming into force of the Judicial Ordinances signed by the Governor last September.
>
> I do not think we should publish the appointment of the Chief Justice until the oaths have been taken. (Presentationally it will be better if we do not appear to be "rushing" through all the appointments at once).

[225] In relation to the last paragraph and the intended delay in publishing the appointment of the Chief Justice until the oaths had been taken, Mr Warren submits:

> That the Legal Advisor, and Deputy Governor, and presumably the Chief Justice can keep quiet an appointment is extraordinary and must offend open justice, the Rule of Law, and the paramountcy of the Islanders.
>
> A sacred trust here is being broken.
>
> It must be relatively rare in a western society that such hole in the corner decisions are made.

[226] Notwithstanding the terms in which the submission is framed, the complaint is that the appointment of the Chief Justice should have been announced earlier than it was. But as to this, a rational reason for the "delay" (such as it was) was given and the appointment was notified to those on Pitcairn once the oaths of office were taken. No prejudice to Mr Warren or any other person has been claimed. The point has no merit, but more particularly, it is difficult to see how, on any view, it could affect the validity of the appointment of the Chief Justice.

Failure to advise Constitution "unworkable"

[227] Ground L is a complaint that the Chief Justice failed to advise the Attorney General and the Governor that the 2010 Constitution is (allegedly) "unworkable", provides for a non-democratic system of government and is "ultra vires" the Bill of Rights 1688.

[228] As to this claim:

(a) The source of this alleged duty has not been identified and the Court is not aware of any such duty.

(b) The giving of such advice would in any event be inappropriate, given the Constitutional redress provisions in s 25 of the Constitution and the real risk that the Chief Justice, in giving such advice, would compromise his judicial role.

(c) The assumptions of law made in the submission (that the Constitution is unworkable, the system of government non-democratic and ultra vires the Bill of Rights 1688) are in any event assumptions which, for reasons already given, have no foundation.

Constitution s 43(4) – oral but not written advice

[229] Ground M is a complaint that the advice given by the Chief Justice to the Governor under s 43(4) of the Constitution regarding the place where the Magistrate's Court can sit was given orally, not in writing.

[230] Section 43(4) of the Constitution provides:

> (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.

[231] The factual basis of the claim is that on 29 July 2010 the Governor issued a Notice pursuant to s 43(4) of the Constitution. It is in the following terms:

> **Notice under Section 43(4) of the Constitution of Pitcairn appointing places at which the Magistrate's Court may sit**

> Under the power conferred by s 43(4) of the Constitution of Pitcairn, and in accordance with the advice of the Chief Justice, I hereby appoint the following places as places at which the Magistrate's Court may sit:
>
> > Adamstown in Pitcairn
> > Any place within New Zealand
>
> **Victoria Treadell**
> **Governor of Pitcairn, Henderson, Ducie and Oeno Islands**
> **Date: 29 July 2010.**

[232] On an unspecified date in 2013, counsel for Mr Warren made a request for documents evidencing the advice given by the Chief Justice referred to in the Notice. Responding to that request, the Attorney General by letter dated 12 July 2013 stated:

> I am attaching herewith a copy of an email dated 15 July 2010 and a letter of the same date sent by Deputy Governor Ginny Silva to the Chief Justice (along with draft Notice under s 43(4)). The Chief Justice confirms, as the Notice attests on its face, that he gave the advice described prior to the Notice under s 43(4) being given to the Governor. Such notice was given orally in response to the letter of 15 July 2010, and to my knowledge no document was created other than the notice itself.

[233] The email dated 15 July 2010 from Ms Silva to the Chief Justice read:

> I should be most grateful if you were able to give early consideration to the attached request for advice which I am sending on behalf of the Governor.

[234] The attachment to the email, being a letter from Ms Silva to the Chief Justice dated 15 July 2010, was in the following terms:

> Dear Chief Justice,
>
> We are involved in contingency planning for two potential criminal proceedings. In both cases we are seeking the consent of the New Zealand Minister of Justice for the proceedings, or some of them, to take place in New Zealand under the terms of the Pitcairn Trials Act 2002.
>
> It is, of course, recognised that decisions as to where actual trials are to be held will be made by the judiciary. But the availability of New Zealand as a potential venue will allow that option to be taken when it is considered appropriate.
>
> The purpose of this letter is to deal specifically with the question of the Magistrate's Court sitting in New Zealand. On this point, section 43(4) of the Constitution of Pitcairn provides that the Governor may appoint the places at which courts created under s 43(3) may sit. (I am advised that the Magistrate's Court is to be regarded as a court so created, since it is a creature of Pitcairn Ordinances (specifically, the Judicature (Courts) Ordinance, Part III). Unlike the Pitcairn Supreme Court and Court of Appeal, the Magistrate's Court is not a creature of the Constitution.)
>
> The Governor is proposing to appoint "Adamstown" in Pitcairn, and "New Zealand", as places at which the Magistrate's Court may sit.

> Section 43(4) requires that any such appointment must be made "acting in accordance with the advice of the Chief Justice". I would therefore be grateful to receive your advice in the matter.
>
> I attach a possible form of notice setting out the proposed appointment of the places at which the Magistrate's Court may sit.
>
> As to the Supreme Court, I am advised by the Attorney-General that s 46(1) provides that the Supreme Court may sit outside Pitcairn in circumstances prescribed by Ordinance, and he will be in touch with you about that.
>
> I look forward to hearing from you.
>
> Kind regards
> Ginny Silva
> Deputy Governor

[235] Mr Warren advances two points:

(a) The Chief Justice provided oral, not written advice.

(b) The Chief Justice failed to draw attention to the need for the Governor to consult with Pitcairn Islanders as required by s 36(1) of the Constitution and under international law.

[236] As to the first point, s 43 of the Constitution does not require the advice of the Chief Justice to be given in writing. The contemporaneous documents show that his advice was sought by the Governor and such advice was given. The Notice on its face records that the appointment of places at which the Magistrate's Court may sit is in accordance with the advice of the Chief Justice. Nothing more is required and no authority has been cited by Mr Warren to the contrary.

[237] As to the second point, the obligation imposed on the Governor by Part 5 of the Constitution (The Legislature) to consult with the Island Council applies only to the "making" of laws for the peace, order and good government of Pitcairn. All such laws are required to be styled "Ordinances". See s 37(2) of the Constitution, which also prescribes a number of rules for the making of laws, as do s 38 (certain laws not to be made without instructions), s 39 (publication and commencement of laws), s 40 (laws to be sent to a Secretary of State) and s 41 (disallowance of laws).

[238] The exercise by the Governor of the power under Part 6 (The Administration of Justice) s 43, to appoint a place at which the Magistrate's Court may sit is not a "law" as understood by Part 5 of the Constitution, with the result that the duty under Part 5 to consult with the Island Council is not engaged.

[239] The alternative claim by Mr Warren that international law obliged the Governor to consult with Islanders is untenable:

(a) The term "law" in the opening phrase of Part 6, s 43(4) ("[s]ubject to any law") is admittedly wider in meaning than the phrase "may make laws" in s 36(1) under Part 5 of the Constitution and includes not only any law in the form of an Ordinance but also a wider spectrum of "law". This is because of the definition of "law" in s 61:

> "law" means law in force in Pitcairn, and "lawful" and "lawfully" shall be construed accordingly.

The term "law" as defined necessarily includes English law in force in Pitcairn by virtue of s 42 of the Constitution which, like s 43(4), is a Part 6 provision.

(b) But while under Part 6 the word "law" has a wider meaning than under Part 5, it does not have an unlimited meaning. Undefined "international law" as such is not a "law" incorporated into Pitcairn law under the Constitution.

(c) Beyond that is the insuperable obstacle that no "rule" of international law has been cited as authority for the proposition that there must be consultation with the Island Council over the question of where the Magistrate's Court might sit. To the degree that the argument cross-references to the broader contentions relating to the right of internal self-determination, the argument must fail as the United Kingdom is not in breach of the asserted right.

[240] Ground N also asserts that the position of Deputy Governor does not exist in law. Presumably, the argument is that the advice given by the Chief Justice under s 43(4) was given to the wrong person. This too is an untenable point. It is clear from the explicit terms of the letter dated 15 July 2010 from Ms Silva to the Chief Justice, that she was writing on behalf of the Governor and sought information for that office holder, not for herself as Deputy Governor.

The "maverick" point

[241] It is alleged that the Chief Justice said that he planned to ensure no maverick lawyers would be appointed to the Pitcairn Bar. Mr Warren argues that if by "maverick" the Chief Justice meant "independent", he compromised judicial independence and "the entire credibility of the justice system".

[242] The document relied on by Mr Warren is not a document written by, authorised or approved by the Chief Justice. He does not recall using the phrase which is found in a letter dated 20 December 2000 from Louise Savill of the Overseas Territories Department addressed to the then Governor of Pitcairn. The author of the letter states:

> In our separate meeting Judge Blackie … Blackie also outlined a proposal to create a Pitcairn Bar to reduce the risk of maverick lawyers seeking involvements in any proceedings.

[243] Even were it to be assumed (against the evidence) that the Chief Justice did use the phrase "maverick lawyers", the context does not permit the construction advanced by Mr Warren that the Chief Justice voiced an intention to prevent the appointment of independent lawyers to the Bar. As stated by the Chief Justice in his Memorandum of 10 July 2014, he recognised from the outset that it would be difficult, if not impossible, to provide a system of justice to Pitcairn Island without the creation of a Bar of properly qualified lawyers and that it was important that admission to the Bar be carefully regulated (as it is in most countries, including the United Kingdom, Australia, Canada and New Zealand). The vigorous defence of the Operation Unique accused and the equally vigorous defence of Mr Warren in the present case attest to the fact that the Pitcairn Bar is comprised of able and independent lawyers. The "maverick" point is nothing more than an artificial construct premised on a misreading of the evidence.

The *Joint Minute* of 12 July 2013

[244] Ground S alleges that the Chief Justice failed "to take a leadership role" by allowing a *Joint Minute* to issue from the Court of Appeal and Supreme Court on 12 July 2013. The submissions for the Crown point out that that *Minute* followed six applications filed in both the Supreme Court and Court of Appeal on 3 May 2013. The *Minute* stated:

> [1] The Judges have conferred concerning various applications outlined in a memorandum dated 3rd May 2013 and filed in the Court of Appeal by Mr Ellis of Counsel for the accused/appellant.

[2] At the hearing of the Court of Appeal on 20/21 August 2013 it will be determined which matters will be respectively dealt with by the Supreme Court & Court of Appeal.

[3] The matters for the Supreme Court will be set down for hearing in the week commencing Monday 30th September 2013 at a venue to be notified by the Registrar.

[245] The Crown properly submits that this *Minute* was a legitimate procedural response by the Courts to the simultaneous filing of multiple applications in both Courts. There was nothing objectionable about the *Minute*. It is impossible to see how the issuing of this *Minute* provides support for the contention that the Chief Justice has acted improperly or is not entitled to hold office.

Further challenges to the appointment and independence of the Pitcairn judiciary

[246] In support of the so-called "Third constitutional and abuse of process challenge" dated 08 August 2014, it is submitted the continuation of the proceedings against Mr Warren is an abuse of process because (inter alia):

(a) All judges of the Court of Appeal and Supreme Court appointed since 4 March 2010 (the day on which the Pitcairn Constitution came into force) have been appointed unlawfully:

(i) They sit part-time but the Constitution does not provide for part-time judges.

(ii) The appointments were made without community or judicial input and in circumstances in which the appointment and selection criteria were not made accessible to the general public. The appointments should have been in a manner which conformed with the appointment process which applies in England under the Constitutional Reform Act 2005 (UK).

(iii) The judges are drawn from a limited geographical region (New Zealand) and without consultation with those on Pitcairn Island.

(b) All judges, whenever appointed, are not independent because of systemic error in remuneration arrangements:

(i) Those judges of the Supreme Court of Pitcairn who are also judges of the District Court of New Zealand are paid "zero", whereas Haines J is paid at a daily rate while performing judicial duties. That rate is less than the legal aid rate. Both the "zero" rate and the daily rate are below the basic minimum level of remuneration required for the office of a judge.

(ii) It is impermissible for judges to engage in negotiations with the executive over remuneration.

(iii) In "relying on financial support from a foreign country", the Chief Justice and Lovell-Smith J have violated their independence as judges of Pitcairn.

(iv) Judges of the Supreme Court of Pitcairn who are also judges of the District Court of New Zealand are lacking in institutional independence as they rely on New Zealand "in a practical way", needing time off from their New Zealand positions to sit in a Pitcairn Court. They receive assistance in the assignment of courtrooms. Their offices plus computer facilities are provided by New Zealand. None of these "institutional" factors are "under the control of Pitcairn".

(v) Because all judges have an interest in the outcome of the challenge to the validity of their appointment and because their remuneration is at risk, they are disqualified from adjudicating on the challenge to their appointment.

[247] Substantial reliance was placed on the Bangalore Principles of Judicial Conduct and on the commentary to those principles. Reliance was also placed on *Reference re Independence and Impartiality of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, (1997) 150 DLR (4^{th}) 577 (the *Prince Edward Island* case).

[248] Some general comments on the Bangalore Principles and on the decision of the Supreme Court of Canada must necessarily preface discussion of the specific grounds advanced under their authority.

The Bangalore Principles

[249] The Bangalore Principles of Judicial Conduct were drafted by an informal group of chief justices and superior court judges (the Judicial Integrity Group) between 2000 and 2002. They were endorsed by the United Nations Human Rights Commission in 2003 and published with a commentary in 2007. As the Preamble to the Bangalore Principles declares, the intention of the Principles is to establish standards for ethical conduct of judges and are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. The principles are stated as six "values":

(a) Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

(b) Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

(c) Integrity is essential to the proper discharge of the judicial office.

(d) Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

(e) Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

(f) Competence and diligence are pre-requisites to the due performance of judicial office.

[250] Reference to the Bangalore Principles is made in *Hearing on the Report of the Chief Justice of Gibraltar* [2009] UKPC 43, where at [28] it is recorded that counsel for the Chief Justice of Gibraltar did not challenge the submission that the Bangalore Principles provided "guidance" to the standard of conduct to be expected of a judge and, at [224], the majority found that certain of the "values" had been breached by the Chief Justice. In *Hearing on the Report of the Tribunal to the Governor of the Cayman Islands – Madam Justice Levers (Judge of the Grand Court of the Cayman Islands)*

[2010] UKPC 24 at [48] it was said that the standard of behaviour to be expected of a judge is set out in the Bangalore Principles. In *Harabin v Slovakia* (Application no. 58688/11, 20 November 2012), the Third Section of the European Court of Human Rights referred at [107] to [108] to a number of international documents (including the Bangalore Principles) which address the need for the judiciary to be independent. All three of these decisions and the Bangalore Principles are referred to in the decision of the Court of Appeal of the Pitcairn Islands in *Warren v R* (CA 1/2012, 12 April 2013) at [37] and [38].

[251] It is accepted that the Bangalore Principles helpfully identify a number of "values" which assist in establishing standards of ethical conduct for judges, and that they provide guidance for individual judges and the judiciary in regulating judicial conduct.

[252] The "values", however, are not binding. They are statements of aspiration, not of prescription. As recognised in *Hearing on the Report of the Chief Justice of Gibraltar*, they are intended to provide *guidance*. The submissions for Mr Warren, however, proceeded on the basis that both the "values" **and** the commentary are of binding authority and that any deviation establishes an absence of independence. This, however, is not how the Bangalore Principles and the commentary are intended to be used. Furthermore, as the commentary makes clear at [18], the "values" need to be adapted to suit the circumstances of each jurisdiction.

[253] In similar vein, the decision of the Supreme Court of Canada in the *Prince Edward Island* case was cited as authority for a number of propositions as if those propositions were of universal and unqualified application throughout the common law world. In my view, helpful though the decision may be, it must be understood in its own particular factual and constitutional setting. The Supreme Court was concerned with provincial legislation which had reduced the salaries of provincial judges. The question was whether the courts thereby affected lost their status as "independent and impartial" tribunals in terms of s 11(d) of the Canadian Charter of Rights and Freedoms. In the case of Pitcairn, on the other hand, there is no such legislation and the remuneration and allowances and other terms and conditions of a judge cannot be altered to the disadvantage of the judge during his or her continuance in office (Pitcairn Constitution, s 53(2)).

[254] The constitutional setting of a large country like Canada (a federation composed of ten provinces and three territories and in which the provinces enjoy a substantial degree of autonomy) is very different to that of a remote British Overseas Territory with a population of approximately 50 persons. As stated by Gleeson CJ in *Forge v Australian Securities and Investments Commission* [2006] HCA 44, (2006) 228 CLR 45 at [33], the size of a court can matter. At [36] he also pointed out that there is no single ideal model of judicial independence, personal or institutional. He further observed at [42] and [43] that minimum standards of judicial independence are not developed in a vacuum. They take account of considerations of history and of the exigencies of government. Judicial independence and impartiality is secured by a combination of institutional arrangements and safeguards.

[255] In the same case, Gummow, Hayne and Crennan JJ made the following points:

(a) Overseas analogies do not necessarily provide sure guidance and may even mislead by obscuring the particular historical and government setting in which the issues must be decided. See [80]:

> Both those asserting invalidity and those supporting validity referred to various overseas sources in aid of their argument. In the end, however, overseas analogies provide little sure guidance to the resolution of the issues that must now be considered and such references may even be apt to mislead. First, they may serve to obscure the particular historical and governmental setting in which the issues that now arise in this Court must be decided. Secondly, they are, in many cases, the product of interpreting and applying the text of particular constitutional, legislative, or international instruments. To take only two of the several examples given in argument, the recorder system in England and Wales cannot be understood without paying adequate attention to the historical distinctions between the Royal Courts and the Quarter Sessions and other inferior courts in which, before the *Courts Act 1971* (UK), recorders sat. Nor can the several decisions made about the validity of appointment of temporary or part-time judicial officers in the Scottish judicial system be understood except as an application of the relevant European principles. The most that can be derived from overseas decisions is that impartiality and integrity are generally seen as essential characteristics of a court. Rather than examining those overseas decisions in detail, attention must be focused upon the consequences of the constitutional recognition in, and requirement of, Ch III, that there is and remain in each State the Supreme Court of that State.

(b) History reveals that judicial independence and impartiality may be ensured by a number of difference mechanisms, not all of which are seen, or need to be seen, to be applied to every kind of court. See [84].

(c) The size of a court is relevant. See [89].

(d) It is necessary to focus on substance, not form. See [90].

[256] In these circumstances, while the Bangalore Principles, as well as the decision of the Supreme Court of Canada, are relevant materials, they are not prescriptive of standards which, like a Procrustean bed, must be conformed to irrespective of constitutional and historical considerations and irrespective of the exigencies of government. The submissions for Mr Warren on judicial independence and impartiality must be determined within the context of the Pitcairn Constitution and within the context of the geographic isolation of Pitcairn and its small (and diminishing) population.

Judges who are "part-time"

[257] It was submitted there is no statutory authority for judges to sit part-time. Implicit in this submission is the claim that a judge who sits part-time lacks the independence required by the Constitution. This is not a submission which has found success in Scotland, England and Wales. See Gleeson CJ in *Forge v Australian Securities and Investments Commission* at [29] to [30].

[258] The reality is that since the Operation Unique trials the only criminal proceedings filed in the Supreme Court are those presently faced by Mr Warren. The various applications and challenges associated with his proceedings have led to a number of hearings in the Supreme Court, particularly before Lovell-Smith J (10 days) and before me (11 days). The judicial review proceedings filed by Mr Warren in CP 1/2013 appear to be the first since 2007. The only other proceedings filed in the Supreme Court have been under the Probate and Administration Ordinance. There have been six such proceedings in the period 2000 to 2014.

[259] Overall, judges of the Supreme Court have little to do until either a case involving multiple accused arises or a case such as Mr Warren's, where no stone appears to have been left unturned in the pursuit of every conceivable point, including

recusal applications. As the circumstances driving the need for judicial sitting time cannot be foreseen, the appointment of judges who will sit only when there are cases to be heard is a practical and sensible response to local conditions. When the Constitution was drafted and discussed with those on Pitcairn, it would have been assumed by all that such were the "exigencies" attaching to the appointment of Pitcairn judges. The point is perhaps captured by Gleeson CJ in *Forge v Australian Securities and Investments Commission* at [25]:

> In a perfect world, an executive government would appoint exactly the number of permanent judges required to enable all courts to operate efficiently and effectively, all courts would have consistent and predictable caseloads, there would be no temporary shortages of resources, there would be no need for delay reduction programmes, and the size of courts would expand to meet litigious demand. (What would happen in the event of a contraction of litigious demand is a question that raises its own problems.) No such world exists.

[260] As the Crown submitted, no Pitcairn judge has been appointed on a limited "part-time" basis as alleged. All Pitcairn judges have been permanently appointed without any restriction on their sitting hours. The workload of any individual judge is determined by the judicial work required to be performed, the availability of the judge and allocation decisions made by the Chief Justice. In light of the unpredictable workload of the court, it would be impracticable to preclude Pitcairn judges from holding positions in other jurisdictions, consistent with their role.

[261] Section 52(4) of the Pitcairn Constitution allows the appointment of judges "on such terms and conditions as the Governor may prescribe". There is nothing to indicate the Governor has in any way exceeded this broad constitutional mandate.

Community input in relation to judicial appointments

[262] Mr Warren complains there was no community or judicial input into the two post-2010 appointments (Haines and Tompkins JJ) and those appointments should have been made in a manner which conformed with the process which applies in England under the Constitutional Reform Act 2005 (UK).

[263] The short answer is that the Pitcairn Constitution does not require consultation with the Pitcairn community, nor does the Constitution make provision for a judicial appointments commission or similar body. The power conferred on the Governor by

s 52 to appoint judges is expressed in general terms without attempting to confine the circumstances in which it might be considered appropriate to exercise that power.

[264] Nor should sight be lost of the fact that under the Pitcairn Constitution (as in many countries), judges are appointed by the executive government in the exercise of powers conferred by parliament. Judges are not appointed by the judicial branch. See also Gleeson CJ in *Forge v Australian Securities and Investments Commission* at [19].

[265] As to the submission that the Constitutional Reform Act 2005 (UK) should be read into the Pitcairn Constitution, s 42 of the Pitcairn Constitution provides:

> **Application of English law**
>
> **42.**—(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.

[266] The insurmountable hurdle is that "local circumstances and the limits of local jurisdiction" do not permit the Constitutional Reform Act (UK) to apply in the Pitcairn context:

(a) The appointment of Pitcairn judges is already provided for in the Constitution and there is no "space" within which the UK statute can operate without displacing the provisions of the Pitcairn Constitution.

(b) The UK statute is specific to its own constitutional setting. See *Halsbury's Laws of England* (5th ed, 2010) vol 24 Courts and Tribunals at [602]:

> **602. Effect of the Constitutional Reform Act 2005.**
>
> Following concerns that the separation of powers between the executive and the judiciary was becoming increasingly blurred, the Constitutional Reform Act 2005 was passed. The Act has four main parts: Part 1 is about the rule of law; Part 2 sets out the main duties and powers of the reformed office of Lord Chancellor, the new role of the Lord Chief Justice of England and Wales as head of the judiciary, and other provisions relating to judicial leadership; Part 3 establishes the Supreme Court of the United Kingdom; and

> Part 4 deals with judicial appointments and discipline. These changes were designed to bring the institutional relationships between the judiciary and the other branches of government into line with the changing substantive role of the courts, in particular due to the expansion of judicial review and the development of EU law and devolution.
>
> Negotiations over the key principles and principal arrangements that should govern the new situation in which the Lord Chief Justice rather than the Lord Chancellor would be head of the judiciary were entered into in 2004 by the then holders of those offices. The agreement is known as the 'Concordat' and, although not statutory, is of great constitutional importance. [Footnote citations omitted]

(c) The Long Title to the Constitutional Reform Act 2005 (UK) underlines that its purpose was to amend the constitutional arrangements of the United Kingdom:

> An Act to make provision for modifying the office of Lord Chancellor, and to make provision relating to the functions of that office; to establish a Supreme Court of the United Kingdom, and to abolish the appellate jurisdiction of the House of Lords; to make provision about the jurisdiction of the Judicial Committee of the Privy Council and the judicial functions of the President of the Council; to make other provision about the judiciary, their appointment and discipline; and for connected purposes.

The "local circumstances" limitation in s 42 of the Pitcairn Constitution precludes the application of the 2005 statute to Pitcairn.

(d) The Bangalore Principles do not require a judicial appointments commission or similar and the record of the 2010 deliberations of the Judicial Group on Strengthening Judicial Integrity make only passing reference to such commission. There is no generally recognised principle that a commission of this kind must exist as a precondition to an independent judiciary. Nor is the concept of such commission an "off the shelf" product which can be adopted wholesale. It is a system that must be constructed to accommodate the particular legal, political and cultural conditions of the country. See Malleson "Creating a Judicial Appointments Commission: Which Model Works Best?" (2004) Public Law 102 at 102.

[267] Next it was submitted that as Mr Warren faces "English charges" (that is, under s 160 of the Criminal Justice Act 1988 (UK)), the Pitcairn judges hearing his case must

be appointed in a manner that satisfies "English independence standards". In other words, Pitcairn judges should be appointed by the same process as English judges, or at least by a process which satisfies English standards.

[268] This is an untenable argument. While s 160 of the Criminal Justice 1988 (UK) satisfies s 42 of the Pitcairn Constitution, the Constitutional Reform Act 2005 (UK) does not. It is fallacious to reason that because one English statute qualifies under s 42 as having application in Pitcairn that another statute which does not qualify applies also.

[269] The next argument advanced by Mr Warren was that it would be unfair for him to be tried by judges whose independence "is of a lesser standard than UK judges". As to this submission, it would be plain from the rejection of the premise on which this argument rests that it is not accepted that there is any difference in standards.

[270] Finally, account must also be taken of the fact that independence of the judiciary is specifically provided for in s 44 of the Pitcairn Constitution:

> **Independence of the judiciary**
>
> **44.** The judges and judicial officers appointed to preside or sit in any court of Pitcairn shall exercise their judicial functions independently from the legislative and executive branches of government.

The "limited pool" challenge

[271] Related to the "no consultation with Pitcairn Islanders" point is the fact that all Pitcairn judges have been appointed from the ranks of New Zealand judges, or in the case of Haines J, from the ranks of lawyers practising in New Zealand. It is submitted that a de facto system of appointing only New Zealand judges and lawyers has been implemented without lawful authority and this impacts on the right to a fair trial before an independent and impartial tribunal. It is said there is no authority to exclude Pitcairners or to limit the choice of judges to those qualified in New Zealand. While it is conceded the process of appointing from a New Zealand pool is "no doubt a practical solution", it is nevertheless submitted that the solution is an unlawful one.

[272] As it is conceded by Mr Warren that no Pitcairn Islander possesses the necessary qualifications required by ss 47(4) and 49(3) of the Pitcairn Constitution for judicial appointment, the modified submission is that Pitcairn Islanders ought to have been

notified of the intention to appoint and given an opportunity to either nominate qualified persons of their choosing or to alert those persons of the possibility of appointment.

[273] This is in essence a re-statement of the "judicial commission" and "community consultation" points which have already been dealt with and will not be further addressed, beyond pointing out that the Constitution does not impose the duty asserted by Mr Warren and no persuasive authority exists which would justify the reading of such obligation into the Constitution.

[274] Turning to the limited pool point, reference was made to the advertisement published by the Governor. While that advertisement did not limit expressions of interest to New Zealand judges and lawyers, it was published only in *LawTalk*, a fortnightly magazine published by the New Zealand Law Society. The advertisement was not placed in Pitcairn or in other countries. The appointment of Haines and Tompkins JJ followed.

[275] In my view, this is but a variation of the submission unsuccessfully advanced before the Privy Council in *Christian v R* that Supreme Court judges should have come from the United Kingdom rather than New Zealand. See the judgment at [26].

[276] The Governor's power under the Constitution to appoint the judiciary is not fettered by an implied requirement that the judiciary be drawn from a catchment necessarily comprising the United Kingdom, Ireland, the Commonwealth, or any other country or countries.

[277] The submission that judges and counsel should be drawn from all round the world, or at least from the Commonwealth and Ireland, may have a certain attraction should one be free to set aside the practicalities and expense of operating a judicial system where the separate components are fractionated in the manner argued for. But in the real world the cost, delay, inconvenience and difficulty in operating a system of this kind for a population of some 50 people on a remote island must be taken into account.

[278] It is difficult, in these circumstances, to find fault with the Governor's decision to anchor in Pitcairn and in New Zealand the Pitcairn administration of justice and to therefore appoint New Zealand judges and lawyers to the Court of Appeal and Supreme Court of Pitcairn. It is even more difficult to understand why such decision should diminish in any way the independence and impartiality of the judges so appointed.

The remuneration issue

[279] It is submitted by Mr Warren that all judges, whenever appointed, are not independent because of what is claimed to be systemic error in their remuneration arrangements. Briefly outlined, reliance is placed (inter alia) on the following:

(a) Those judges of the Pitcairn Supreme Court who are also judges of the District Court of New Zealand (Blackie CJ, Lovell-Smith and Tompkins JJ) receive no direct payment for the work they do as Supreme Court judges. To avoid "double-dipping" they receive only their New Zealand judicial salary. Produced in evidence by Mr Warren was a letter dated 5 August 2014 from the Attorney-General for New Zealand to Mr Ellis addressing (inter alia) the appointment and remuneration of New Zealand District Court judges who are appointed to judicial positions in other countries:

> *3. What arrangements if any are made for their salaries or other payments beyond their NZ salaries as NZ judges (if any)?*
>
> For many decades, New Zealand has made available its Judges – both serving and retired – to serve on overseas Courts. The payment arrangements vary.
>
> The current practice for serving New Zealand Judges is for the seconded Judges to continue to receive their New Zealand salary and principal allowances as determined by the Remuneration Authority. Travel, accommodation and associated expenses are met by the host country.
>
> Some secondments are made under New Zealand's official development assistance programme, administered by the Ministry of Foreign Affairs and Trade; while the costs of some other secondments are funded by the host Government.
>
> In some instances, other funding arrangements are available. Past examples include the United Nations Development Programme and the Australian Government's AusAID programme.
>
> Where the host Government pays or contributes towards the remuneration costs of the New Zealand serving Judge, the New Zealand Government requests that that payment is made directly to the New Zealand Government.

(b) Haines J is not a judge of the District Court of New Zealand. He is a barrister holding the rank of Queen's Counsel and is Chairperson of the New Zealand Human Rights Review Tribunal, a part-time appointment. As disclosed in the *Minute* dated 6 August 2014, his terms of remuneration as a Pitcairn judge are a daily rate of NZ$1,600 per day or

NZ$200 per hour, exclusive of GST, while performing judicial duties as a judge of the Pitcairn Supreme Court, including preparation and judgment writing.

(c) It is submitted by Mr Warren that it is "irrational" that judges receive "different rates for the same job". Some receive "zero" and others a "per diem stipend". This, it is said, compromises independence. Indeed, the receipt by some judges of "financial support from a foreign country" (that is, New Zealand) violates their independence as Pitcairn judges.

(d) Because New Zealand judges sitting as Pitcairn judges rely heavily on New Zealand in a practical way, they lack institutional independence.

[280] Referring to the rate of pay he characterises as "zero", Mr Warren asserts that there has been a "significant breach" of "judicial independence principles (b) and (c)" as set out in the Bangalore Principles and the following extract is cited in support:

> **Conditions for judicial independence**
>
> 26. In order to establish whether the judiciary can be considered "independent" of the other branches of government, regard is usually had, among other things, to the manner of appointment of its members, to their term of office, to their conditions of service, to the existence of guarantees against outside pressures, and to the question whether the court presents an appearance of independence. Three minimum conditions for judicial independence are:
>
> (a) Security of tenure: i.e. a tenure, whether for life, until an age of retirement, or for a fixed term, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.
>
> (b) Financial security: i.e. **the right to a salary and a pension which is established by law and which is not subject to arbitrary interference by the executive in a manner that could affect judicial independence.** Within the limits of this requirement, however, governments may retain the authority to design specific plans of remuneration that are appropriate to different types of courts. Consequently, a variety of schemes may equally satisfy the requirement of financial security, provided the essence of the condition is protected.
>
> (c) Institutional independence: i.e. independence with respect to matters of administration that relate directly to the exercise of the judicial function. An external force must not be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the constitution. [Footnote citations omitted]

The bolded passage in para (b) replicates the bolding in the written submissions for Mr Warren.

[281] The first point to make is that the passage in question is taken not from the Bangalore Principles, but from the commentary to Value 1 – Independence. That is, para [26] is not one of the Bangalore Principles. In fact the "value" to which [26] of the commentary refers does not mention payment.

[282] Furthermore, the passage highlighted in Mr Warren's submissions speaks of a right to a salary not in the context of benefiting the judge personally but in the context of ensuring judicial independence. That is, financial security is not an end in itself. It must be understood as an aspect of judicial independence. See in this regard the majority judgment in the *Prince Edward Island* case at paras 9 and 10:

> 9 Although these cases implicate the constitutional protection afforded to the financial security of provincial court judges, the purpose of the constitutional guarantee of financial security — found in s. 11(*d*) of the *Charter*, and also in the preamble to and s. 100 of the *Constitution Act, 1867* — is not to benefit the members of the courts which come within the scope of those provisions. The benefit that the members of those courts derive is purely secondary. Financial security must be understood as merely an aspect of judicial independence, which in turn is not an end in itself. Judicial independence is valued because it serves important societal goals — it is a means to secure those goals.
>
> 10 One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule. It is with these broader objectives in mind that these reasons, and the disposition of these appeals, must be understood.

[283] In the present case, those judges of the Pitcairn Supreme Court who are also judges of the New Zealand District Court have exactly that which the commentary to the Bangalore Principles recommends, namely financial security, a security which is not in the power of the Governor to affect. Judges who are not also judges of the New Zealand District Court enjoy similar financial security because the per diem rate is protected by s 53 of the Pitcairn Constitution, which stipulates that the remuneration agreed to with the Governor cannot be altered to the disadvantage of the judge during his or her continuance in office:

Remuneration

53.—(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.

[284] In addition to financial security, all judges within the Pitcairn judicial system enjoy security of tenure by virtue of s 44 of the Constitution. In this way, judicial independence is secured and the rule of law maintained. The fact that such independence is secured by a system with distinctive Pitcairn characteristics is no more than a recognition that there is no single ideal model of judicial independence, personal or institutional. See *Forge v Australian Securities and Investments Commission* at [36] per Gleeson CJ, and at [84] per Gummow, Hayne and Crennan JJ.

[285] Institutional independence is also enjoyed in respect of matters of administration which (in the words of the commentary) "relate directly to the exercise of the judicial function, that is matters directly and immediately relevant to the adjudicative function". The fact that courtrooms in New Zealand must be booked is no different to the "booking system" which most English and Commonwealth Courts operate to ensure hearing rooms are efficiently allocated for all categories of hearings. The fact that some of the Chief Justice's Pitcairn-related emails might periodically be deleted when the New Zealand Ministry of Justice removes dated and excessive emails from the system used by judges of the New Zealand District Court is of minor relevance. There is no evidence that anything of significance has been lost. It is surprising it is even argued that the loss of emails due to routine maintenance of support systems is symptomatic of an absence of independence.

[286] As emphasised earlier in this decision, the question whether s 8 of the Pitcairn Constitution has been violated must be judged as a question of substance, not form. See *Clark v Kelly* at [9].

[287] The submissions for Mr Warren also referred to the fact that the daily rate paid to his counsel on legal aid (NZ$225 per hour) is higher than that paid to Haines J (NZ$200), while Crown counsel are paid at the even higher rate of NZ$240 per hour. But in many legal systems it is not unusual for lawyers in private practice to earn more than judicial officers. It is difficult to see how the minor differences in the pay scales

referred to place in jeopardy the independence and impartiality of the Pitcairn judiciary or of any particular judge.

[288] Relying on the *Prince Edward Island* case, it was submitted that to avoid the possibility of, or the appearance of, political interference through economic manipulation, a body such as a judicial commission must be interposed between the judiciary and the other branches of government. Under no circumstances is it permissible for the judiciary to engage in negotiations over remuneration.

[289] The *Prince Edward Island* case must, however, be read in context. First, as previously mentioned, the decision concerned the reduction by certain provincial legislatures of the salaries of provincial court judges, a circumstance which cannot occur under the Pitcairn Constitution by reason of the bar in s 53(2). Second, the focus of the court was not on the nature of financial security required for **individual** judges to enjoy judicial independence, but on the collective or institutional dimension of financial security for judges of provincial courts faced with legislated diminution of their salaries. See the majority decision at para 3:

> *Valente* was the first decision in which this Court gave meaning to s. 11(*d*)'s guarantee of judicial independence and impartiality. In that judgment, this Court held that s. 11(*d*) encompassed a guarantee, *inter alia*, of financial security for the courts and tribunals which come within the scope of that provision. This Court, however, only turned its mind to the nature of financial security which is required for individual judges to enjoy judicial independence. It held that for individual judges to be independent, their salaries must be secured by law, and not be subject to arbitrary interference by the executive. The question which arises in these appeals, by contrast, is the content of the collective or institutional dimension of financial security for judges of provincial courts, which was not at issue in *Valente*. In particular, I will address the institutional arrangements which are comprehended by the guarantee of collective financial security.

[290] Third, the majority judgment records that the context in which the issues fell for consideration was the "serious strain" on the "proper constitutional relationship between the executive and the provincial court judges". See paras 7 and 8:

> 8 The task of the Court in these appeals is to explain the proper constitutional relationship between provincial court judges and provincial executives, and thereby assist in removing the strain on this relationship. The failure to do so would undermine "the web of institutional relationships . . . which continue to form the backbone of our constitutional system" (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 3).

It is this constitutional relationship which lies at the core of the judgment and renders problematic the "export value" of the decision.

[291] Fourth, the majority made it clear that when ruling against negotiations on judicial remuneration they were to be understood as addressing negotiations in the labour relations context. Nothing they said applied to "expressions of concern and representations by chief justices and chief judges of courts". Such could not be said to pose a danger to judicial independence:

> 188 When I refer to negotiations, I use that term as it is understood in the labour relations context. Negotiation over remuneration and benefits involves a certain degree of "horse-trading" between the parties. Indeed, to negotiate is "to bargain with another respecting a transaction" (*Black's Law Dictionary* (6th ed. 1990), at p. 1036). That kind of activity, however, must be contrasted with expressions of concern and representations by chief justices and chief judges of courts, or by representative organizations such as the Canadian Judicial Council, the Canadian Judges Conference, and the Canadian Association of Provincial Court Judges, on the adequacy of current levels of remuneration. Those representations merely provide information and cannot, as a result, be said to pose a danger to judicial independence.

[292] Mr Warren submitted the Chief Justice compromised his independence by negotiating with the Executive to come up with a salary. But as to this, the Crown properly points out that there is no suggestion in the memorandum from the Chief Justice dated 10 July 2014 that he "negotiated" salary with any member of the Pitcairn Executive. Nor could it be said that Haines J negotiated his remuneration in the sense understood in the *Prince Edward Island* case. See the exchange with counsel recorded at the Notes of Evidence at 699 and 711-713. It is impossible to see how, on this evidence, a danger to judicial independence was posed.

[293] In these circumstances, the *Prince Edward Island* case underlines the observations made by Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission* at [80], that overseas analogies provide little sure guidance and may even mislead, serving to obscure the particular historical and governmental setting in which the issues for decision arise. They are, in many cases, the product of interpreting and applying the text of particular constitutional or legislative instruments.

[294] As the Crown submits, s 53 of the Pitcairn Constitution is so drafted as to reflect the salary arrangements outlined by the Chief Justice for judges of the Supreme Court who are also judges of the New Zealand District Court. Section 53, in turn, allows a Pitcairn judge who is not a member of the New Zealand judiciary to be paid a salary. In short, Pitcairn judges are paid for their work and there is no evidence to suggest that

they are not paid a reasonable rate. The Operation Unique experience suggests the arrangement between Her Majesty's Government and New Zealand in relation to Pitcairn's judicial administration works well and that in no way has it compromised the fair trial of any accused. The Bangalore Principles are silent on arrangements between States to assist with judicial functions. All references to "government" or "the executive" are clearly directed at intra-State relations between the judicial and the executive. Above all, however, Mr Warren does not state how the remuneration arrangements could affect the fairness of his criminal trial. If anything, the salary arrangement for members of the Pitcairn judiciary who are also members of the New Zealand judiciary guarantees their independence: their services have been offered by the New Zealand Government which has no interest in any case before the Pitcairn Courts, especially a criminal prosecution. The judges enjoy financial security irrespective of the nature of any case they hear and irrespective of its outcome.

[295] For the reasons given, I do not accept that there has been a systemic error in remuneration arrangements. Nor is it accepted that there is an absence of judicial independence.

The disqualification point

[296] In submissions filed on 22 September 2014 (the day before the last hearing), Mr Warren submitted that as all Pitcairn judges have an interest in the outcome of the challenge to the validity of their appointments and because both their status and remuneration is at risk, all are automatically disqualified from hearing the challenge. The only solution is for the Governor to appoint an acting judge pursuant to s 47(3) of the Constitution to hear the point. While it was initially submitted that a single ruling be given on the recusal application to enable the point to be tested on appeal all the way to the Privy Council prior to the balance of the issues argued before me being determined by way of delivery of a judgment, this position was abandoned once the magnitude of the potential delay and of its consequences came to be appreciated by Mr Warren's counsel.

[297] As to the law, it is said there are some interests so clearly indicative of bias that the courts have automatically disqualified the decision-maker from taking part in the decision on the ground that public confidence would inevitably be shaken if the decision were allowed to stand. However, it has been questioned whether the doctrines of

automatic disqualification and apparent bias are actually separate doctrines. See the Rt Hon Lord Woolf and others (eds) *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, London, 2013) at [10-019]. It is not an issue which need be determined in the present case but see the discussion by Grant Hammond *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, Oxford, 2009) at 19-32.

[298] While the automatic disqualification rule is said to apply whenever the decision-maker has a direct pecuniary or proprietary interest in the outcome of the proceedings, it has always been subject to a number of exceptions, which can be grouped under the general heading of "trivial interests". See *De Smith's Judicial Review* at [10-027] to [10-028]:

> Although some cases have held that the rule of automatic disqualification applies however trivial the interest, disqualification will not attach if the connection between the pecuniary interests of the decision-makers and the issue before them is very tenuous, or if their pecuniary interest will arise only upon the occurrence of an improbable sequence of events. [Footnote citations omitted]

[299] In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 (CA) at [10] the formulation employed was a personal interest "so small as to be incapable of affecting [the judge's] decision one way or the other".

[300] The Crown cites *Bolkiah v State of Brunei Darusalam* [2007] UKPC 62 in support of the *De Smith Judicial Review* view that automatic disqualification is not a rigid and inflexible rule.

[301] In the present case, two "interests" are said to be in issue. First, the status of the decision-maker as judge and second, the judge's remuneration.

[302] As to status, no authority has been cited in which an interest of such kind has been recognised under the rubric of "direct pecuniary or proprietary interest". At best, the connection is tenuous. Account must also be taken of the fact that before entering upon the functions of the office, every judge takes the judicial oath (Pitcairn Constitution s 52(5)) and has tenure of office (Constitution, s 54). The personal interest of the judge in his or her status is negligible.

[303] As to the remuneration issue, judges are protected by s 53 of the Constitution. Once remuneration is agreed with the Governor, it cannot be altered to the disadvantage of the judge during his or her continuance in office, and those judges who are also

judges of the New Zealand District Court stand to gain (or lose) nothing as their New Zealand judicial salaries will continue irrespective of the outcome of the disqualification challenge. Furthermore, as judges sit only when required, any judge who is not also a judge of the New Zealand District Court has little financial interest in his or her position as judge of the Pitcairn Supreme Court. At its highest, the connection between the asserted pecuniary interest and the issue under consideration is tenuous.

[304] It follows it is my view that no automatic disqualification rule operates in the present case. Applying the apparent bias test expressed in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103], adopted in *Warren v R* CA 1/2012, 12 April 2013 at [41],

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

it is my conclusion such well-informed and impartial observer would not, in the circumstances advanced by Mr Warren, consider there was a real possibility that any judge of the Pitcairn Supreme Court was biased.

The application for a stay on the grounds of abuse of process – general

[305] The stay application has not been assisted by the absence of a clear, concise statement of the grounds on which it is advanced. It appears to be a catch-all application. Some of the grounds have been dismissed by the Privy Council in *Christian v R* at [26]:

> Finally, the appellants argued that (1) the legislation passed after the appellants had been charged to establish a suitably fair trial procedure and a right of appeal "compromised the appearance of even-handed justice" and suggested inequality of arms, (2) the Supreme Court judges should have come from the United Kingdom rather than New Zealand and the new laws should have been based on United Kingdom rather than, as they were, on New Zealand models, (3) the appellants were prejudiced by the appointment of a Public Defender some time after the appointment of a public prosecutor, resulting in a period before the trial when there was inequality of arms. It is hard to take any of these points seriously …

[306] Old grounds have been reformulated and new grounds incrementally added, including the grounds now advanced in the "challenges" dated 29 May 2014 and 8 August 2014 respectively.

Abuse of process – the law

[307] The law relating to abuse of process has been addressed in *Christian v R (No. 2)* [2006] PNCA 1 at [90] to [98] and in *Christian v R* [2006] UKPC 47, [2007] 2 WLR 120 at [19]. More recently the principles were reviewed in *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837 and applied in *Warren v Attorney General for Jersey* [2011] UKPC 10, [2012] 1 AC 22 at [22]. A stay is an extraordinary remedy, available only where a fair trial is no longer possible or where it would offend the court's sense of justice and propriety to try the accused in the particular circumstances of the case. In *Maxwell* Dyson JSC said at para 13:

> It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) 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. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will "offend the court's sense of justice and propriety" (per Lord Lowry in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 74G) or will "undermine public confidence in the criminal justice system and bring it into disrepute" (per Lord Steyn in *R v Latif and Shahzad* [1996] 1 WLR 104, 112F).

[308] As best can be understood, in the present case Mr Warren relies on both categories of abuse of process. As will be seen, none of the arguments advanced by Mr Warren, whether taken on their own or cumulatively, come even close to establishing either category. It has therefore not been necessary to consider the more particular cases relied on by the Crown.

[309] Insofar as the abuse of process issues are also characterised by Mr Warren as "constitutional challenges", they are to be addressed in the context of criminal proceedings. Because in those proceedings Mr Warren has an adequate means of redress, there is no need for the court to exercise its powers under s 25(2) of the Pitcairn Constitution. See s 25(3):

> **Enforcement of protective provisions**
>
> **25.**—(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.

(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.

(3) The Supreme Court may decline to exercise its powers under subsection (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.

A similar conclusion was reached by Lovell-Smith J in her judgment at [62] to [73] and [85] to [88].

The application for a stay on the grounds of abuse of process – the balance of the claims

The discrimination point

[310] Said to be linked to the right to a fair trial is, first, the absence of a locally elected legislature on Pitcairn and, second, the fact that "hearings to date" have been held in New Zealand. It is also contended that the absence of a right to trial by jury is an aspect of the abuse of process argument, but as the jury trial issue is addressed in the judgment given by Lovell-Smith J, a ruling on the first two points only is sought in the present proceedings. The "link" between these two points and the alleged abuse of process (tenuous as it may be) is said to lie in the fact that Mr Warren is being unlawfully discriminated against because he lives on an island where there is no local legislature and where he must attend his hearings in a foreign country by way of live-link television.

[311] On one view, all three points were determined against Mr Warren by the Court of Appeal in *R v Warren* (12 April 2013) at [133]:

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

[312] Nevertheless, the point was pressed again before me, albeit without notice to the Crown. Mr Raftery did not object, taking the view that it was best that I deal with

everything so that the Court of Appeal would have complete freedom over all issues once the case inevitably returns to that Court on appeal from the present decision.

[313] The discrimination argument is based, first, on the 2010 Pitcairn Constitution and, second, on ICCPR Article 26 together with the International Convention on Elimination of All Forms of Racial Discrimination, 1965 (CERD), Articles 1 and 5.

[314] Addressing first s 23 of the Constitution, this provision provides:

> **Prohibition of discrimination**
>
> **23.**—(1) Subject to subsection (4), no law shall make any provision which is discriminatory either of itself or in its effect.
> (2) Subject to subsections (4) and (6), no person shall be treated in a discriminatory manner by any organ or officer of the executive or judicial branches of government or any person acting in the performance of the functions of the Pitcairn Public Service or any public authority.
> (3) In this section, the expression "discriminatory" means affording different treatment to different persons on any ground such as sex, sexual orientation, race, colour, language, religion, age, disability, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
> (4) Nothing contained in or done under the authority of any law shall be held to breach this section to the extent that it has an objective and reasonable justification and there is a reasonable proportion between the provision of law in question or, as the case may be, the thing done under it and the aim which that provision or the thing done under it seeks to realise.
> (5) No person shall be treated in a discriminatory manner in respect of access to any of the following places to which the general public have access, namely, shops, hotels, restaurants, eating-houses, licensed premises, places of entertainment or places of resort; but the proprietor of such a place has a duty to provide amenities and equipment facilitating the access of disabled persons only to the extent provided by a law.
> (6) For the purposes of subsection (2), the exercise, in relation to a person, of any discretion to institute, conduct or discontinue criminal or civil proceedings in any court shall not in itself be held to breach this section.

[315] The point of significance to the present case is that because discrimination is defined in s 23(3) as the affording of "different treatment to different persons", a "comparator" group is a necessary component to the inquiry whether discrimination is established on the facts.

[316] Mr Warren contends that that comparator group is mainland citizens or residents of the United Kingdom. He says he is the victim of discrimination because citizens of the United Kingdom:

(a) Have an elected legislature.

(b) If charged with a criminal offence, are tried in the United Kingdom by courts of the United Kingdom.

(c) Do not have "two-week hearings by AVL".

(d) Are not tried by "foreign judges" or subjected to "judicial colonialism".

[317] The central flaw to this argument is that the asserted comparator group is legally impermissible. It is not possible to interpret s 23 of the Constitution in the manner asserted by Mr Warren. The comparator is necessarily to be drawn from inhabitants of Pitcairn. Sovereignty is territorial. That is, unless the contrary intention appears, an enactment applies to all persons and matters within the territory to which it extends but not to any other person and matters. See *Bennion on Statutory Interpretation* (*op cit* 339). The term "apply" in relation to an enactment refers to the persons and matters in relation to which it operates. As stated in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130 at 152, the question is:

> Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration?

[318] In the present case, Pitcairn is the exclusive focus of the s 23 prohibition on discrimination:

(a) The prohibition in s 23(1) applies to any "law" which is discriminatory either of itself or in its effect. Section 61 defines "law" as "law in force **in Pitcairn**".

(b) Section 23(2) applies to organs, officers of the executive and judicial branches of the **Pitcairn** government and persons performing the functions of the Pitcairn Public Service.

(c) The "objective and reasonable justification" and "reasonable proportion" provisions of s 23(4) are necessarily to be assessed within the specific context of Pitcairn.

[319] The answer to the question "who is within the legislative grasp, or intendment" of s 23 of the Pitcairn Constitution must necessarily be "those on Pitcairn". By no process of principled statutory interpretation can the comparator group be drawn from persons living outside the territorial jurisdiction of Pitcairn.

[320] The argument for Mr Warren is not assisted by the lengthy extracts cited from Farran "The Case of Pitcairn: A Small Island, Many Questions" Journal of South Pacific Law (2007) 11(2) 124. This article has as its focus the Operation Unique trials which culminated in *Christian v R* [2007] 2 AC 400 and was written years before the Constitution was enacted. It contains nothing of material relevance to Mr Warren's argument.

[321] In the alternative, Mr Warren relies on ICCPR, Article 26 and CERD, Article 1(1) and Article 5(a) and (c):

> **ICCPR**
>
> **Article 26**
>
> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> **CERD**
>
> **Article 1**
>
> 1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
>
> **Article 5**
>
> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
>
> (b) …
>
> (c) Political rights, in particular the right to participate in elections-to vote and to stand for election on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

[322] However, none of these provisions fill the hole in Mr Warren's argument and justify the introduction of a comparator group of the kind put forward. Nor can support be found for the argument in the international jurisprudence or commentary cited by Mr Warren.

[323] The overarching point is that Mr Warren cannot, on the facts, establish that he has been subjected to discrimination either as understood by s 23 of the Pitcairn Constitution or by the two international instruments referred to. The discrimination argument is entirely misconceived and based on a false premise. It adds nothing at all to the abuse of process claim.

The Deputy Governor point

[324] In his evidence Mr Kevin Lynch stated that he is the Deputy Governor of Pitcairn and produced in evidence an Oath for the Due Execution of Office of Deputy Governor sworn by him at Auckland on 1 February 2012 before the then Governor.

[325] Mr Warren submits that as the Constitution of Pitcairn makes no explicit provision for the office of Deputy Governor, Mr Lynch could not give his evidence in the capacity of Deputy Governor.

[326] It is correct that unlike the constitution of some British Overseas Territories, the Constitution of Pitcairn makes no explicit reference to the office of Deputy Governor, but every constitution must be interpreted in its own terms. In the present case, s 32 of the Constitution of Pitcairn gives express power to the Governor to constitute offices of Pitcairn:

> **Constitution of offices**
>
> **32.** Subject to this Constitution and any other law, the Governor, in Her Majesty's name and on Her Majesty's behalf, may constitute offices for Pitcairn.

[327] It was therefore well within the powers of the Governor under this provision to constitute the office of the Deputy Governor and to appoint Mr Lynch to that office. It is not a requirement of s 32 that the "office" be first created or recognised by the Constitution itself. The Constitution anticipates, via s 33, that the executive authority of Pitcairn will be exercised by the Governor either directly or through officers subordinate to the Governor:

> **Executive authority**
>
> **33.**—(1) The executive authority of Pitcairn is vested in Her Majesty.
> (2) Subject to this Constitution, the executive authority of Pitcairn shall be exercised on behalf of Her Majesty by the Governor, either directly or through officers subordinate to the Governor.
> (3) Nothing in this section shall preclude persons or authorities other than the Governor from exercising such functions as are or may be conferred on them by any law.

[328] Consistent with these constitutional provisions, the Governor also has power, under s 21 of the Interpretation and General Clauses Ordinance, to delegate.

[329] Reading these provisions together, Mr Lynch has been properly appointed Deputy Governor.

[330] Apart from the fact that Mr Warren's argument has no merit in law, the argument is perhaps most remarkable by reason of the fact that there is no suggestion that any specific act of Mr Lynch in his capacity as Deputy Governor (or even as Acting Governor) has any significance in relation to Mr Warren and the charges he faces. The decision in *Warren v Attorney General for Jersey* at [27] to [30] makes it explicit that there must be a connection between the illegality or misconduct and the trial or, as stated at [36], it must be shown that the misconduct had an influence on the proceedings. In the present case no such misconduct and no influence has been shown.

[331] Some criticism was made of the fact that Mr Lynch is also the person designated pursuant to s 28 of the Constitution to act as Acting Governor:

> **Acting Governor**
>
> **28.**—(1) During any period when the office of Governor is vacant or the Governor is for any reason unable to perform the functions of that office those functions shall, during Her Majesty's pleasure, be assumed and performed by such person as Her Majesty may designate for that purpose by instructions given through a Secretary of State ("the person designated").
> (2) Before assuming the functions of the office of Governor, the person designated shall make the oaths or affirmations directed by section 27(4) to be made by the Governor.
> (3) The person designated shall not continue to act in the office of Governor after the Governor has notified him or her that the Governor is about to assume or resume the functions of that office.
> (4) In this section "the Governor" means the person holding the office of Governor.

[332] Mr Lynch similarly swore the oath of allegiance and oath for the due execution of office of Governor on 1 February 2012 before the Governor. It was submitted that this was "ridiculous" in that Mr Lynch was "trying to be Governor, and Acting Governor, and/or Deputy Governor, all at the same time". This submission is a literal and decontextualised reading of the evidence:

(a) The designation of Mr Lynch as Acting Governor by the Secretary of State was to ensure that the office of Governor can function during any period when the office of Governor is vacant or the Governor is unable to

perform the functions of his or her office. The Diplomatic Telegram from the Foreign & Commonwealth Office dated 1 February 2012 was in the following terms:

> 1. In accordance with Section 28(1) of the Pitcairn Constitution, on behalf of Her Majesty, I hereby designate Kevin Lynch to assume and perform the functions of the office of Governor during any period when the office of Governor is vacant or the Governor is for any reason unable to perform the functions of his or her office.
>
> Hague

(b) It is clear from the terms of ss 28(1) and (3) of the Constitution of Pitcairn that the powers of the Acting Governor are activated only when the office of Governor is vacant or the Governor is for any reason unable to perform the functions of his or her office.

(c) The claim that there can be no prospective appointment implicitly means that the process of appointing an Acting Governor can only be activated after the office of Governor becomes vacant or after the Governor becomes unable to perform his or her functions of office. This will necessarily mean a vacuum between the event and the appointment while the administrative machinery is set in motion. In the meantime, executive authority could not be exercised otherwise than by Her Majesty. See s 33 of the Constitution. Good administration requires the avoidance of inconvenience of this kind and the consequential vacuum of office. Construed purposefully, s 28 of the Constitution provides for prospective appointment but with assumption of the functions of office occurring seamlessly when the office is vacant or when the Governor becomes unable to perform his or her functions.

[333] But once again, the point does not impact on the abuse of process claim because no connection to Mr Warren's trial has been demonstrated.

Whether Pitcairn Public Prosecutor properly appointed

[334] In March 2000, Mr MJ Williams was the Governor of the Pitcairn Islands. He was also the High Commissioner of the United Kingdom at the High Commission, Wellington. By letter dated 6 March 2000 addressed to Mr Simon Eisdell Moore, then

the Crown Solicitor at Auckland, he advised Mr Moore that Mr Moore was appointed to the office of Public Prosecutor of the Pitcairn Islands. The letter cautioned, however, that legislative drafting would be required to give effect to the appointment:

> My Legal Adviser will shortly undertake the necessary legislative drafting to give effect to your appointment and status.

The letter was signed by Mr Williams as "Governor, Pitcairn Islands", though the document was on the letterhead of the United Kingdom High Commission.

[335] Subsequently, on 26 January 2001, Mr Williams signed a Notice of Appointment of Public Prosecutor addressed to Mr Moore. The document was stamped with the seal of the Governor of Pitcairn and was in the following terms:

> **PITCAIRN, HENDERSON, DUCIE AND OENO ISLANDS**
>
> **NOTICE OF APPOINTMENT OF PUBLIC PROSECUTOR**
>
> IN EXERCISE of the powers conferred by section 7 of the Pitcairn Order 1970 I hereby appoint
>
> **SIMON JOHN EISDELL MOORE** of Auckland, barrister
>
> to be the Public Prosecutor for the Islands of Pitcairn, Henderson, Ducie and Oeno.
>
> Dated the 26th day of January 2001
>
> L. S.
>
> "MJ Williams"
>
> Governor

[336] Relying on the earlier 6 March 2000 document on the letterhead of the United Kingdom High Commission, Wellington, the submission for Mr Warren is that the Governor purported to appoint the Public Prosecutor "in his British capacity" and as the appointment was made by a "foreign diplomat", it was a nullity and of no effect. Consequently, there was no lawful prosecutor responsible for commencing the prosecution against Mr Warren.

[337] It is clear, however, that the letter dated 6 March 2000 was signed by Mr Williams in his capacity as Governor. The later 2001 Notice of Appointment was similarly signed by Mr Williams in his capacity as Governor. The attached seal is that of the Governor of Pitcairn. The submission by Mr Warren, therefore, depends entirely on the fact that the letter of 6 March 2000 was on the letterhead of the United Kingdom

High Commission in Wellington, though explicitly signed by Mr Williams as Governor of Pitcairn. It is difficult to see how the letterhead used could in any way affect the validity of an appointment made by the Governor in his declared capacity as Governor. It is even more difficult to see how the use of High Commission letterhead in March 2000 could affect the subsequent notice of appointment signed and sealed by the Governor on 26 January 2001. There is no merit whatsoever in Mr Warren's submission.

The Pitcairn Public Prosecutor and the "corruption" of the Pitcairn judicial system

[338] It is alleged that the Pitcairn Public Prosecutor "corrupted" the judicial system "because he recommended appointments of magistrates, defence counsel and the registrars". This point has arguably been disposed of by the judgment given by Lovell-Smith J on 12 October 2012:

> [43] In addition to the validity and jurisdiction of Pitcairn's organs of government being under attack, the applicant challenges the validity of the judicial system because of the involvement of the Public Prosecutor in recommending the appointment of defence counsel, Magistrates, the Registrar, and possibly Judges. The applicant submits that "this was the death knell of any independent judicial system".
>
> …
>
> [130] The applicant submits that public prosecutor Simon Moore's advice to Paul Treadwell, the then Attorney General, on potential candidates for roles within the Pitcairn defence bar and the position of registrars has compromised his independence.
>
> [131] The Crown argues that Paul Treadwell independently came to his decision on the appointment of counsel for Pitcairn. Moreover, as current defence counsel was not suggested by Mr Moore at the time, his independence cannot be questioned. I agree with the Crown's submission that any review of the history of the Operation Unique trials is sufficient to satisfy any concerns about the independence of the Pitcairn defence bar.
>
> [132] There is no merit in the applicant's submission.

[339] However, as the point was pressed again before me as an "abuse of process" point, my views follow.

[340] The charges in the Operation Unique trial were laid in the Pitcairn Magistrate's Court in April 2003. See *Christian v R* at [55] (Lord Hope). The investigation had spanned several years prior to that and according to the correspondence placed before me, the then Legal Adviser, Mr PJ Treadwell, was in February 2000 putting in place the

legal and administrative infrastructure required for such prosecutions as could potentially flow from the investigation. As Legal Adviser, Mr Treadwell was performing duties akin to those of Attorney General.

[341] It is not clear how far the correspondence tendered by Mr Warren in the current proceedings presents a complete and accurate picture of Mr Treadwell's discussions with Mr Moore and other parties, and no evidence on the point has been called. The Court is invited to draw its own inferences from the documents and surrounding circumstances.

[342] It must not be overlooked that the allegations that rapes had occurred on Pitcairn were investigated in September 1996 and Mr Treadwell had himself recommended that no prosecution be brought. See the account given by Lord Hope in *Christian v R* at [50] to [55]. It was understandable that following the further investigations carried out by the police, Mr Treadwell would seek expert advice and that this would involve the appointment of a senior barrister with extensive experience in prosecuting serious criminal offences. The administration of Pitcairn being based in New Zealand, and Auckland being by far the largest population centre in New Zealand, it was understandable that Mr Treadwell should approach the Auckland Crown Solicitor (Mr Moore) to ascertain whether he (Mr Moore) would be interested in appointment as the Pitcairn Public Prosecutor. Not only did Mr Moore have the requisite experience, he was also senior partner in a law firm (Meredith Connell) which has been the office of the Auckland Crown Solicitor for several decades. Mr Moore thus had available the resources of other partners and senior prosecutors to undertake what was then (correctly) anticipated to be a major undertaking.

[343] As the letter from Mr Treadwell to Governor Williams dated 8 February 2000 makes clear, Mr Treadwell also sought the views of Mr Moore on who, in Mr Moore's opinion, would be suitable for appointment as defence counsel, magistrates and registrar. That is, Mr Moore's letter dated 7 February 2000 was responding to a request for his views, not gratuitously imposing on Pitcairn his own "vision" of who should be appointed to the positions discussed with Mr Treadwell. Given Mr Moore's extensive prosecuting experience, his knowledge of the qualities of the Auckland Bar was possibly unrivalled and it is difficult to think of a person better placed for Mr Treadwell to consult. It is also clear that Mr Treadwell did consult more widely than with

Mr Moore because several of the subsequent appointees are not mentioned by Mr Moore in correspondence.

[344] Complaint has been made of the Auckland-centric nature of the law practitioners mentioned in Mr Moore's letter. The fault, if such it was, was understandable, given that Mr Moore practised in Auckland and indeed he himself made a point of saying in his letter that he had confined himself to Auckland and that other worthy inclusions could be found elsewhere in New Zealand.

[345] A fair reading of the correspondence shows that Mr Moore went out of his way to assist Mr Treadwell in difficult circumstances and that he was doing no more than expressing a personal opinion, drawing attention to those who, in his (Mr Moore's) long experience, could perform with integrity and to a high standard the various roles to which appointments would have to be made by the Governor on the recommendation of Mr Treadwell.

[346] The claim that the Public Prosecutor corrupted the Pitcairn judicial system is apparently advanced on the basis that it was wrong for Mr Moore to even mention to Mr Treadwell the names of potential candidates for appointment as magistrates, registrars and defence counsel. So extreme is this position that it underlines the artificiality of the submission. How Mr Moore corrupted the system in 2000 and made it impossible for Mr Warren in 2014 to receive a fair trial is not explained in rational terms and the submission has no foundation in fact. Nor can I find in the evidence any justification for the extravagant submission that Mr Moore's "involvement in appointments was the death knell of an independent bar, and therefore the judicial system".

[347] Account must also be taken of the fact that Mr Warren has had counsel (Mr Ellis) and junior counsel (Mr Edgeler and more lately Mr Park) of his choice appointed on legal aid and the Magistrate who committed Mr Warren for trial is not a person mentioned or referred to in Mr Moore's letter dated 7 February 2000.

[348] Rather than presenting a picture of a system "corrupted" by the Public Prosecutor, the evidence shows a process of responsible consultation carried out with due regard to the heavy responsibilities which would necessarily be assumed by whomsoever was ultimately recommended to the Governor by Mr Treadwell for appointment. It was a process which was understood by all would end with the

Governor making his own independent decisions. In this regard, Mr Treadwell's letter to Mr Moore dated 8 February 2000 made it clear that Mr Treadwell had already independently considered who should be appointed to the positions of magistrate and defence counsel. In addition, the Governor's letter to Mr Treadwell of the same date concludes with an expression of confidence that Mr Treadwell will offer "advice" only:

> I am sure you will offer advice in due course about how we should proceed on these.

[349] On the evidence, there is nothing to indicate that improper influence was exerted or that any appointments were made other than on merit and on the basis of proper considerations. There was no absence of independence on the part of Mr Moore or on the part of anyone else. The argument based on the alleged lack of independence of the prosecutor and his alleged corruption of the system is unsupported by the evidence and must fail.

The prosecution guidelines point

[350] On 28 February 2000, Mr Moore wrote to the then Commissioner for the Pitcairn Islands regarding the question whether the presence or absence of corroboration would be a relevant consideration in any decision to prosecute those on Pitcairn in respect of whom allegations of sexual abuse had been made at that time. In his letter Mr Moore referred to prosecution guidelines then applicable in England and Wales and also to guidelines then applicable in New Zealand.

[351] Mr Warren submits:

(a) In his letter Mr Moore claimed he was not subject to any formal set of guidelines and that "despite having been appointed a Public Prosecutor – an English concept – he was not bound by English rules when prosecuting under English law".

(b) This is "forum shopping on a grand scale" and that "to select a higher or lower standard because it suits the prosecution is unprincipled". No well-informed observer would consider Mr Moore either independent or impartial.

(c) Mr Moore's actions had "irretrievably compromised a fair judicial system in Pitcairn" and the appointment of "an Auckland clique of lawyers and judges for all positions in the Pitcairn structure regrettably leaves little opportunity for external observations, as in Pitcairn itself, insularity causes its problems". That a prosecutor "could believe he was not bound by a set of formal guidelines is even more worrying".

(d) No judge, let alone a well-informed independent observer, would regard as independent a prosecutor who has had a hand in the selection of defence counsel, magistrates or registrar and who cherry picks which guidelines to apply to ensure a better chance of conviction.

(e) The only logical solution to restore confidence is to "start afresh", that is, to recreate the entire Pitcairn judicial system.

(f) No fair trial for Mr Warren is possible and a stay should be entered.

[352] The submission, however, is based on a selected reading of Mr Moore's letter. The extract quoted in Mr Warren's submission omits two important statements by Mr Moore:

(a) That his decision would be a principled one; and

(b) The views he expressed were "unresearched, tentative expressions" and that he was undertaking a more detailed examination of the issues:

> It needs to be stressed that the views set out above are simply my own unresearched, tentative expressions. I am presently undertaking a more detailed examination of these issues the resolution of which is, obviously, critical before any further steps are undertaken.

[353] There is simply no basis to accuse Mr Moore of "forum shopping on a grand scale" or to suggest that a particular standard was chosen to suit the prosecution. The de-contextualised selection of words and sentences is inappropriate, to say the least, as is reliance on extracts from a letter which made it clear that the author qualified what he had written and added that he was undertaking a more detailed examination of the issues.

[354] Furthermore, Mr Moore was correct to say that as Public Prosecutor for Pitcairn he was not governed by any formal set of (Pitcairn) guidelines. But his letter does not suggest he did not feel bound by any guidelines. Rather, he would act in accordance with a set of guidelines, whether those were guidelines applied in New Zealand or those applied in England and Wales.

[355] The criticisms made by Mr Warren must also be seen against the background that in *Christian v R* Lord Hope at [87] referred to the "conspicuous fairness and sensitivity with which [the] proceedings [had] been conducted throughout by the Public Prosecutor".

[356] In these circumstances, it is difficult to see how a letter written ten years before the present prosecution was commenced against Mr Warren, and indeed before any charges were laid in the Operation Unique inquiry, prevents Mr Warren receiving "a fair and public hearing within a reasonable time by an independent and impartial tribunal" (Pitcairn Constitution, s 8).

[357] The more so when in November 2013 Mr Warren was provided with the decision of Mr Moore to lay the charges now faced by Mr Warren. I was told by Mr Raftery, without opposition from Mr Ellis, that Mr Moore made it clear in that letter that the decision to prosecute Mr Warren had been based on the contemporary and relevant English Code for Crown Prosecutors.

[358] There is no merit whatever in any of the points advanced in relation to Mr Moore or in relation to the alleged lack of independence of the Public Prosecutor. The attack on the judicial system is without foundation.

Challenge to the appointment of Mr Raftery and Mr Mount as prosecutors

[359] Mr Warren submits that Mr Raftery and Mr Mount represent the Crown unlawfully. This submission is based on the ground that no formal documents have been produced to evidence their appointment to act on behalf of the Pitcairn Public Prosecutor.

[360] This ground was asserted for the first time at the hearing before me in April 2014 and the Crown objects to the point being raised. The circumstances are that shortly before the hearing commenced on 7 April 2014, Mr Ellis made an oral request to

Mr Raftery and Mr Mount that they produce evidence of their appointment to represent the Pitcairn Public Prosecutor at the hearing. When told there was no letter of appointment, Mr Ellis submitted that this showed a "laxness" or "slackness" of the procedure adopted by "the Pitcairn administration" which Mr Ellis found "astonishing".

[361] Mr Raftery and Mr Mount stated from the Bar that they both have authority to represent the Crown in these proceedings, having been instructed both by the Public Prosecutor and by the Attorney General. Not having had notice of the point, there had been no opportunity to ascertain whether written authority could be found.

[362] I do not see anything in the complaint made by Mr Ellis. First, it is well established that when a barrister appears in court and states that he or she is instructed, the court will not enquire into his or her authority to appear. See *Halsbury's Laws of England* (5th ed, 2009) vol 66 Legal Professions at [1135]:

> A barrister's authority to appear in proceedings is conferred by his instructions. When a barrister appears in court and states that he is instructed, the court will not inquire into his authority to appear, nor as to by whom he is instructed, except when different barristers appear instructed by different solicitors claiming to represent the same party.

[363] Second, by virtue of s 19(3) of the Judicature (Courts) Ordinance, the Attorney General, the Public Prosecutor and the Deputy Public Prosecutor have ex officio the right of audience in all courts of the Islands:

> **19.**—(1) The functions and powers conferred upon the Attorney General of England in respect of civil or criminal causes or matters arising in England may be exercised by the [Attorney General] in respect of civil or criminal causes or matters occurring or arising in the Islands.
> (2) The Public Prosecutor shall have and may exercise the functions and powers of the Director of Public Prosecutions in England.
> (3) The [Attorney General], the Public Prosecutor and the Deputy Public Prosecutor shall have ex officio the right of audience in all Courts of the Islands and shall have the same protection and immunity from suit in respect of the performance of their duties as is conferred upon judicial officers by section 18 of this Ordinance.

[364] That right of audience (and immunity) cannot be restricted literally to the three office holders in person. It must, on any purposive and sensible interpretation, necessarily apply also to those law practitioners who are instructed to appear with them or who are instructed to represent them at a particular hearing or in particular proceedings. Otherwise it would mean that even in circumstances such as the hearing before the Privy Council in *Christian v R* (where the Public Prosecutor appeared in

person with "junior counsel"), the Public Prosecutor would have a right of audience and be protected by s 19(3) but not junior counsel (which in that case included Mr Raftery and Mr Mount).

[365] If, on the other hand, junior counsel have a right of audience and immunity when appearing with the required office holder, it is difficult to see why they do not similarly have a right of audience (and immunity) when appearing on the instructions of the office holder but not in his or her presence.

[366] In my view, the ex officio right of audience can be exercised by the named office holder in person or through counsel of his or her choice. It could not have been intended that the right be exercised only by the office holder in person.

[367] Furthermore, there is no legal requirement that counsel representing the Attorney General or the Public Prosecutor must hold written instructions to do so, and no authority to the contrary has been cited by Mr Warren. His submission assumes that it is self-evident that there is such a requirement. But how and why that should be so has not been explained, either on the law or on the facts. As the passage from *Halsbury's Laws of England* cited above attests, there is no such requirement at common law.

[368] Mr Warren's argument was based on the Prosecution of Offences Act 1985 (UK) which empowers the Director of Public Prosecutions (DPP) in England to appoint prosecutors and staff. Also cited in aid was *Halsbury's Laws of England* (5th ed, 2010) vol 27 Criminal Procedure at [37], which addresses the designation of members of the Crown Prosecution Service (CPS). Indirect support for this argument is found in the fact that s 19(2) of the Judicature (Courts) Ordinance stipulates that the Public Prosecutor shall have and may exercise the functions and powers of the DPP. The submission was that Mr Raftery and Mr Mount would have to be formally appointed as prosecutors as if they were in the CPS.

[369] Two points need to be made. First, there is no CPS for Pitcairn and the provisions governing appointments to the CPS in the UK have no application. It must not be forgotten that s 42 of the Constitution of Pitcairn requires the English legislation to yield to "local circumstances". This means that the appointment and designation provisions of the Prosecution of Offences Act (UK) have no application in Pitcairn.

[370] Second (and in any event), while the DPP is given powers of appointment by the 1985 Act, it is not explicitly required that that power be exercised in writing only – though in the context of a necessarily large prosecution service for England and Wales it is no doubt good practice for appointments to be in writing. But no authority has been cited for the proposition that the validity of an appointment turns on the existence of a written document of appointment. The *Halsbury* paragraph relied on by Mr Warren at fn 7 itself underlines the need for literalism to be avoided:

> However, the contention that s 1(6) [of the Prosecution of Offences Act 1985] confers the powers of the Director on Crown prosecutors only where they are acting on the express direction of the Director would produce absurd results: *R v Crown Court at Liverpool, ex p Bray* [1987] Crim LR 51, DC.

[371] In conclusion, even if the objection of the Crown as to notice is to be ignored, there is no merit to the challenge to the authority of Mr Raftery and Mr Mount to appear on behalf of the Public Prosecutor.

The "judicial colonialism" point

[372] In broad terms, the submission is that it is discriminatory and impossible to get a fair trial by "foreign judges, not being nationals of Pitcairn". While foreign judges may properly sit on appellate courts (particularly the Privy Council), trial courts "need to be imbibed with the local culture". The submission did not elaborate on what is asserted to be the distinctive nature of the "local culture" of Pitcairn.

[373] It is also complained that there are too many judges. There is some irony in this complaint given that it is advanced in support of a claim that Mr Warren cannot receive a fair trial.

[374] Be that as it may, it is submitted that British citizens are entitled to trial by British judges, not New Zealand judges and the provision of "a New Zealand-based judicial system is unjustified discrimination and unwanted judicial colonialism".

[375] The point has already been considered and rejected, first, by the Court of Appeal in *Christian v R (No. 2)* [2006] PNCA 1 at [75] to [88], and second, by the Privy Council in *Christian v R*. Lord Hoffman, who on this point was speaking for the entire Board, said at [26]:

> Finally, the appellants argued that … (2) the Supreme Court judges should have come from the United Kingdom rather than New Zealand and the new laws

> should have been based on United Kingdom rather than, as they were, on New Zealand models … It is hard to take any of these points seriously … There is no suggestion of any lack of competence on the part of the judges or a restriction on the Governor's power of appointment on grounds of nationality …

[376] Reference should also be made to the dismissal by the Court of Appeal of the "so many judges" point in *Warren v R* (12 April 2013) at [132].

[377] In these circumstances, it is not proposed to address the point in any detail. It is sufficient to refer to the earlier part of this judgment and to record my agreement with the following additional points made by the Crown:

(a) As to the complaint that there "should be some involvement of the Islanders in the legal system", there is such involvement. This includes the Island Magistrate (who issued the search warrants) and the ability for assessors to sit on criminal trials, including Mr Warren's trial should he make application. The reality, however, is that there is currently no legally-trained Pitcairn Islander qualified for appointment as a judge to deal with serious criminal or constitutional matters such as the present.

(b) As detailed in the evidence given by Mr Lynch, there was full consultation with the Islanders regarding the judicial system during the process leading up to the 2010 Constitution. It is useful to recall the 15 February 2010 memo by Ian Hendry cited earlier:

> Above all, the enthusiasm of the islanders themselves to arrive at a constitutional settlement that would suit their circumstances and improve their lives was very impressive; they were determined, persistently enquiring, but always sensible. There can be no other Overseas Territory constitution in which a greater proportion of the local population was directly involved and contributed to the outcome.

(c) The claim that the Island community is "over-judged" overlooks the following:

(i) The Constitution itself prescribes the Supreme Court and the Court of Appeal. The Judicature (Courts) Ordinance, s 3(1), sets a ceiling for Supreme Court judges, namely the Chief Justice plus up to four other judges. The Constitution, s 49, stipulates a President and "two or more Justices of Appeal" for the Court of Appeal. In the

result, at least eight judges are contemplated by the Constitution and it is difficult to see the grounds for objecting to the appointment of more than two judges of Appeal.

(ii) There are no full-time Pitcairn judges. The amount of time spent on Pitcairn duties is a small proportion of each judge's time, making it misleading to rely on the number of appointed individuals.

(iii) The amount of judicial time required for Pitcairn is determined by the amount of legal business before the courts, and the manner in which that litigation is conducted.

[378] As to the last point, it is to be recalled that the constitutional and other challenges brought by Mr Warren occupied ten hearing days before Lovell-Smith J in May 2012 and eleven hearing days before me in April, August and September 2014. In the meantime, three judgments of the Court of Appeal have been given (12 April 2013, 12 August 2013 and 21 August 2013). Recusal applications create the risk of further appointments and beyond that any judicial system must have flexibility of numbers to accommodate fluctuating caseloads and availability. The protracted nature of the various challenges and appeals mounted by Mr Warren creates the additional risk of judges reaching the prescribed retirement age. In these circumstances there is real doubt whether the claim of "too many judges" has any foundation in fact.

[379] The overarching point which remains, however, is that it is impossible to see how a system for the administration of justice constructed in compliance with the 2010 Constitution and adequately resourced by sufficient judges can be prayed in aid of an argument that the criminal proceedings faced by Mr Warren should be stayed because either it will be impossible for him to receive a fair trial or because the Court's sense of justice and propriety will be offended.

The complaint that the laws of Pitcairn are not accessible

[380] Next it was complained that the laws of Pitcairn are not accessible. The precise nature of Mr Warren's case on this question was never articulated with clarity. At its most general level, the submission was that while Mr Warren would expect the Pitcairn Summary Offences Ordinance to apply to the possession of indecent articles, he would

not expect the Criminal Justice Act 1988 (UK) to apply to his possession of child pornography. This is, in effect, a complaint about the "English law" provision in s 42 of the Constitution.

[381] Similar complaint was made in *Christian v R* but rejected by the majority. Lord Woolf most clearly addressed the point at [39]:

> However, Mr Perry relies on the fact that the Act of 1956 was never published on Pitcairn so he submits sections 1 and 14 never came into force on Pitcairn. I have no hesitation in agreeing with Lord Hoffmann and Lord Hope, that Mr Perry's submission that article 5 of the Pitcairn Order 1970 (and the 1952 Order) required all the laws of England or at least the Sexual Offences 1956 to be published on the Island before they came into force on the Island is incorrect. The proper interpretation of article 5 is that what are required to be published are the Judicature Ordinance and not all the laws of England incorporated by reference. This answer accords with the language of the Orders. In addition it is the only practical answer, if the Orders were to operate in a practical manner. The corpus of English law could not realistically be published on Pitcairn and even if it was attempted to achieve this by having, for example, all the volumes of Halsbury's Laws and Statutes gathering dust on the island, this would not be more than a meaningless gesture and not what the Orders intended. …

[382] As the decision of the Privy Council is binding on this Court, it is not open to Mr Warren to complain that he did not expect English law to apply where a local ordinance also has application.

[383] Then it was contended that some legislation enacted for Pitcairn was either deliberately or unintentionally not made available to the Islanders. It was alleged that there was "secret" legislation. This submission appears to be based on Mr Ellis' apparent inability to find the Pitcairn Court of Appeal Order 2012 (UK) on an unofficial legal website known as PacLII (Pacific Islands Legal Information Institute) or in the official two volume printed copy of the Laws of Pitcairn. Complaint was also made that because it was difficult to access earlier (historical) versions of particular ordinances it was not possible to access Pitcairn law.

[384] These submissions must be assessed against the evidence given by Deputy Governor Lynch on the topic of access to Pitcairn legislation. His evidence (in summary) was:

(a) In accordance with a direction made by the Governor under s 39 of the Constitution, all laws made by the Governor are put on a notice board opposite a shop in the Island square.

(b) All ordinances in force in Pitcairn are published officially in hard copy and issued in two bound volumes. Every year a complete and revised reprint of those laws is published. At one time the two bound volumes together with the revised reprint were sent to every person on Pitcairn, but approximately two years ago this system was changed because of the cost involved. Presently, the reprint sets are sent to those who ask for them. Produced in evidence was Document 13, being the distribution list "From July 2009" for the February/March 2014 shipment. It is not necessary to list each and every one of the persons on the Island on the distribution list. It is sufficient to note that there are some nine such individuals, including Mr Warren himself, along with the Mayor, the Island Magistrate and the Island Secretary. Copies are also provided to the Governor's Representative, who gives access to the volumes on an "open door" basis. A further three copies go to the Island library.

(c) The ordinances are also available online on the official Pitcairn Government website (www.government.pn).

(d) A copy of every new ordinance is sent to all the people on the distribution list.

(e) Those living on Pitcairn have internet access by satellite link. The cost is heavily subsidised by the British Government, which pays approximately NZ$15,750 per month to provide the satellite connection. Of this sum, approximately NZ$4,300 is recovered from Islanders through telephone and internet accounts. The scale of the subsidy provided is therefore substantial.

(f) The official Pitcairn Government website also provides access to United Kingdom Orders in Council. As at April 2014 the following narrative appeared on the "Laws of Pitcairn" page of the website:

> Links to United Kingdom Orders in Council made since 2006 and having effect in Pitcairn may be found here. A list of Orders in Council made from 2000 to 2005 and having effect in Pitcairn may be found here. All United Kingdom Orders in Council that have effect in Pitcairn may be found by searching at www.legislation.gov.uk. Use "advanced search" function to search for "Pitcairn" in content.

(g) It is accepted that the current hard copy of the reprint of ordinances does not include the Pitcairn Court of Appeal Order 2012 (UK), though it is available via the Pitcairn Government website.

(h) Assistance is readily available to help Islanders access the law, including historic laws. Mr Lynch said:

> Any Pitcairn Islander has phone and email access to the community lawyer … as well as direct access to the Attorney General. These people can both help access copies of laws, as well as clarify in lay terms what effect any law has. Contact details for these people are readily available – they are published on the public notice board, online and are available through Council members, the Governor's Representative, or other officials. The Attorney General has been contacted in this capacity from time to time. There is also a Freedom of Information Ordinance.

[385] In these circumstances, there is no substance to the claim that it would be an abuse of process for Mr Warren to be prosecuted because he was not aware that he could be charged under the Criminal Justice Act 1988 (UK) or because his counsel was unable to locate in the hard copy reprint of the Laws of Pitcairn or on an unofficial website (PacLII) the Pitcairn Court of Appeal Order 2012.

[386] This conclusion is in accord with that reached by this Court in the Operation Unique trials. That conclusion, in turn, was endorsed by Lord Woolf in *Christian v R* at [41]:

> … In addition, the Supreme Court came to the conclusion (paragraph 145) that "Pitcairn Islanders have had free access to information about their laws through the Government Advisor, the Commissioner and Legal Advisor". This was because the Supreme Court was left in no doubt that
>
> > "the British Administrators recognised and appreciated that because of Pitcairn's physical isolation and small population, the law significantly affected each individual's life and therefore dealt with even minor matters…if asked to assist. All Pitcairn Islanders had access to the law" (paragraph 147).
>
> The Court of Appeal was unimpressed by this finding (paragraph 108), but it appears to be justified by the evidence and of the greatest significance. As Lord Bridge of Harwich pointed out in this context in *Grant v Borg* [1982] 1 WLR 638, 646, if information is accessible, a defendant is deemed to know of it. This must be the appropriate approach. The problems of obtaining knowledge of the contents of the law in Pitcairn are not the same as those, for example, in a very different society such as England but in both there are problems. The sheer volume of the law in England, much of which would be inapplicable and have no application to Pitcairn, creates real problems of access even to lawyers unless they are experts in the particular field of law in question. 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.

[387] Lord Woolf went on to observe at [42]:

> … While the appellants needed to know that rape and indecent assault were contrary to the criminal law, they did not need to know of the precise provisions of sections 1 and 14 of the Sexual Offences Act 1956 which produced this result. It was sufficient that they could have obtained detailed information relating to the Act if they had wanted to do so. Obtaining that information could be a more protracted exercise on Pitcairn because of its inaccessibility, but the fact that information could be obtained suffices to make the appellants responsible for their conduct.

[388] In summary, I find on the evidence that the information was available to Mr Warren had it been sought. Similarly, information as to the history of any particular ordinance was available to Mr Warren's counsel, as was the Pitcairn Court of Appeal Order. In any event, the fact that counsel had difficulty locating the particular history of an ordinance or in finding the Pitcairn Court of Appeal Order cannot, by any stretch of imagination, be said to justify a stay of proceedings.

The committal hearing – whether lawful for Magistrate's Court to sit in New Zealand

[389] It was submitted by Mr Warren that the committal hearing held at Auckland before Senior Magistrate Hawk on 1 August 2011 was a nullity and there was no lawful committal to the Supreme Court for trial. The various grounds advanced in support of this submission were, in summary:

(a) Senior Magistrate Hawk had been unlawfully appointed because:

  (i) His appointment as Magistrate was backdated.

  (ii) His oaths of office were not taken on Pitcairn.

(b) No Magistrate's Court existed as at 1 August 2011.

(c) Because the Governor's Notice under s 43(4) of the Constitution is invalid, the committal hearing could not take place at Auckland, New Zealand.

[390] As to the facts, Senior Magistrate Hawk was appointed Magistrate by the Governor on 8 June 2000. The Notice of Appointment materially stated:

NOTICE OF APPOINTMENT OF MAGISTRATE OF THE MAGISTRATE'S COURT

IN EXERCISE of the powers conferred by sections 5 and 7 of the Pitcairn Order 1970 and by subsection (1) of section 11 of the Judicature (Courts) Ordinance 1999, I hereby appoint

RICHARD KEITH McLEOD HAWK

to be a Magistrate of the Magistrate's Court of Pitcairn, Henderson, Ducie and Oeno Islands with effect from the 1st day of February 2000

[391] The appointment points can be disposed of shortly:

(A) First, as to the four month period of retrospectivity, the judgment of the Court of Appeal in *Warren v R* (12 August 2013) at [22] to [25] rejected an identical challenge made in relation to the appointment of Chief Justice Blackie. The Court held that the Chief Justice had been lawfully appointed:

> [25] It is not contended that anything which occurred between 1 February and 8 June 2000 (or more importantly, the date upon which the Chief Justice took the oaths of office) is of any materiality in this case. If that were the case, an approach would be to consider the appointment as effective only from its date and the consequential taking of the oaths and not giving it force or effect during the prior period. That position is theoretical only on the facts in this case.
>
> [26] We are satisfied that Chief Justice Blackie was appointed by the document of 8 June 2000 and has been in office from the time that he swore the oaths of office. The generalised challenge to his holding office because it was expressed as including a retroactive aspect is unsustainable.
>
> [27] It is one thing for a Court to view retroactivity as undesirable but quite another to conclude that an authorisation which in part is expressed to have retroactive effect is consequently of no force or effect and an absolute nullity …

(b) As in the case of the Chief Justice, it is not contended in relation to the Magistrate that anything occurred between 1 February 2000 and 8 June 2000 (or more importantly, prior to the committal hearing on 1 August 2011) which is of any materiality in this case.

(c) As to the claim that the judicial oath was not taken on Pitcairn, I have already held in relation to the Chief Justice that there was no legal requirement for the oaths of office to be taken on Pitcairn and that ruling necessarily applies to magistrates as well.

[392] The submission that no Magistrate's Court existed on 1 August 2011 commences with a concession that the Magistrate's Court was lawfully established by Part 3 of the Judicature (Courts) Ordinance. However, it is said that when the Pitcairn Constitution Order 2010 came into force on 4 March 2010, the Magistrate's Court was disestablished because all of the courts of Pitcairn, with the exception of the Privy Council, had to be "established" afresh. Particular reliance is placed on ss 43(1) and (3) of the Constitution of Pitcairn:

> **The courts of Pitcairn**
>
> **43.**—(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.
> (2) The Pitcairn (Appeals to Privy Council) Order 2000(a) (as amended by this Order) shall continue to apply in relation to appeals to Her Majesty in Council from judgments of the Court of Appeal.
> (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.
> (5) Where a court sits, by virtue of subsection (4), in some place other than Pitcairn, it may there exercise its jurisdiction and powers in like manner as if it were sitting within Pitcairn, but anything done there by virtue of this subsection shall have, and shall have only, the same validity and effect as if done in Pitcairn.
> (6) The references in subsections (4) and (5) to a court sitting and exercising its jurisdiction and powers in any place include references to a judge or judicial officer or officer of the court exercising in that place any jurisdiction or powers or other functions vested in him or her as such by any law.

[393] The argument continues by pointing out that the Governor established the Supreme Court and Court of Appeal under Part 6 of the Constitution but not a Magistrate's Court. It follows, it is said, that since 4 March 2010 there has been no Magistrate's Court for Pitcairn and the purported committal of Mr Warren for trial was a nullity.

[394] Mr Warren's argument cannot survive in the face of the "saving" provisions of s 5 of the Pitcairn Constitution Order 2010. This provision explicitly provides that laws (including ordinances) which existed prior to 4 March 2010 continue to have effect on and after 4 March 2010 as if made under the Constitution:

> **Existing laws**
>
> **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.

[395] As the Judicature (Courts) Ordinance was an "existing law" within s 5 of the Order, it continued to have effect on and after 4 March 2010, and it follows that the Magistrate's Court is a subordinate court "established by law" in terms of s 43(1) of the Constitution. Only the Supreme Court and Court of Appeal, as superior courts of record, were required to be creatures of the 2010 Constitution.

[396] This, in turn, means that when the Governor on 29 July 2010 issued her Notice (the text of which is set out earlier in this decision) under s 43(4) of the Constitution appointing "[a]ny place within New Zealand" as a place at which the Magistrate's Court may sit, the Magistrate's Court was a lawfully constituted court of the Pitcairn Islands. The argument for Mr Warren must fail.

[397] So too, for the reasons given earlier in this decision, must the arguments that:

(a) The Notice was invalid by reason of the fact that the advice given by the Chief Justice under s 43(4) was oral, not in writing.

(b) There was a failure by the Governor and by the Chief Justice to consult with the Island Council and with others living on Pitcairn before the Notice was issued.

[398] For all these reasons, I find that it was lawful for the committal hearing to take place in New Zealand before Senior Magistrate Hawk.

Overall conclusion on abuse of process argument

[399] For the reasons given, none of the arguments advanced by Mr Warren in support of the application for a stay on the grounds of abuse of process have succeeded. The application is dismissed.

The second constitutional and abuse of process challenge

[400] The "Second constitutional and abuse of process challenge" dated 29 May 2014 overlaps with more than one of the grounds earlier advanced at the April 2014 hearing. To avoid needless repetition, it is intended to address here only those points which have not previously been discussed.

[401] Broadly speaking, and by way of summary, Mr Warren submits he will not receive a fair and public hearing by an independent and impartial tribunal (Pitcairn Constitution, s 8(1)) because:

(a) In mid-2000 the then Public Prosecutor, Mr Moore, "tainted" the independence of the Pitcairn judicial system by recommending individuals to the positions of defence counsel, registrar and magistrate.

(b) Specifically, the present Registrar (Mr G Ford) was appointed "on the recommendation" of Mr Moore. This destroyed the independence and impartiality of the Magistrate's Court.

(c) All magistrates (including the Island Magistrate) and every judge of the Supreme Court is "systematically compromised" in respect of independence because s 11(5) of the Judicature (Courts) Ordinance provides that every magistrate is at all times subject to the authority and directions of the Chief Justice and other judge of the Supreme Court. The compromise of independence occurs irrespective of whether any such directions are given.

(d) Because s 5(2) of the Justice Ordinance allows the Island Magistrate to seek the advice of a Senior Magistrate on any question of law, procedure or legal principle, a situation is thereby created wherein the Island Magistrate acts on the effective instruction of another judicial officer, "destroying independence". Such independence is destroyed even if the Island Magistrate does not use s 5(2).

(e) The Island Magistrate who presided at the alleged unlawful hearing on Sunday 30 May 2010 favoured his own personal interests, breached the judicial oath and acted as a judge in his own cause.

(f) The Registrar of all three courts (Court of Appeal, Supreme Court and Magistrate's Court) has "behaved in a non-independent manner" by participating in the alleged unlawful hearing of 30 May 2010 and by favouring the prosecution. This "infection" has been transmitted to the Supreme Court and to the Court of Appeal.

The Public Prosecutor point – tainting

[402] As the first two points have already been addressed it is not intended to repeat what has earlier been said in this judgment.

Independence compromised by legislation

[403] As to the third and fourth points, the Island Magistrate is required by s 11 of the Judicature (Courts) Ordinance to be appointed from among the permanent residents of the Islands and is not required to be professionally qualified in law. Magistrates other than the Island Magistrate, however, are required to be qualified in law. All magistrates, including the Island Magistrate, are subject at all times to the authority and directions of the Chief Justice or other judge of the Supreme Court:

> **11.**—(1) Subject to this section, the Governor may appoint any fit and proper person to be a magistrate of the Magistrate's Court.
> (2) A magistrate, to be known as the Island Magistrate, shall be appointed from among the permanent residents of the Islands, who shall not be required to be professionally qualified in law but who must have been resident in the Islands at the time of his or her appointment for not less than 5 years.
> (3) The Island Magistrate may exercise the jurisdiction and shall have the powers set out in Part II of the Justice Ordinance.
> (4) Magistrates of the Court, other than the Island Magistrate, shall be required to be qualified in law and to have practised in any Commonwealth country for not less than 5 years prior to the date of his or her appointment.
> (5) Every magistrate shall be subject at all times to the authority and directions of the Chief Justice or other judge of the Supreme Court and shall hold office on such terms as the Governor may prescribe.

[404] No direction under s 11(5) has been given in relation to Mr Warren or in proceedings to which he has been a party, but it is submitted the fact that s 11(5) gives such power violates the right in s 8(1) of the Constitution to a hearing by an independent and impartial tribunal.

[405] The submission fails for the following reasons:

(a) The objection is one based not on any factual circumstance, but on principle.

(b) At the level of principle, the power in s 11(5) to give directions must be read as a power to give **lawful** directions. That is, in a way which is compatible with the rights and freedoms set forth in Part 2 of the Constitution of Pitcairn. See s 26, which provides:

> **Interpretation of legislation**
>
> **26.** So 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 this Part.

[406] So read, s 11(5) of the Judicature (Courts) Ordinance does not "systematically comprise" the independence of magistrates and judges.

[407] The next claim by Mr Warren is that because the Island Magistrate may before or during the hearing of any proceedings consult with or seek the advice of any Senior Magistrate on any question of law, procedure or legal principle, the independence of the Island Magistrate is destroyed. The submission is based on s 5(2) of the Justice Ordinance which provides:

> (2) The Island Magistrate shall be entitled at his discretion, before or during the hearing of any proceedings, to consult or to seek the advice of any Senior Magistrate, whether within or outside the Islands, on any question or questions of law, procedure or legal principle, in accordance with the following conditions—
> (a) the Island Magistrate shall notify the parties in advance of his or her intention to do so and shall adjourn the proceedings if necessary for this purpose;
> (b) the Island Magistrate shall if possible conduct his enquiry by email or facsimile and seek a reply by the same means.
> (c) the resulting emails or facsimile messages, or if there are none the Magistrate's note of his or her exchanges with the Senior Magistrate, shall be shown to the parties and incorporated in the decision of the Court, so that in the event of an appeal to the Supreme Court they shall be taken to be part of the Island Magistrate's judgment.

[408] At no time did the Island Magistrate exercise the discretion under s 5(2) in proceedings involving Mr Warren. The objection is again based on the high ground of principle. It is said that the very existence of the discretion destroys the independence of the Island Magistrate.

[409] The submission fails for two primary reasons.

[410] First, it is well established that a lay justice or magistrate lacking any formal legal education or qualification (as here) will need to take advice and in so doing does not violate Article 6 of the European Convention on Human Rights, the functional equivalent of s 8 of the Pitcairn Constitution. See *Clark v Kelly* [2003] UKPC D1, [2004] 1 AC 681, at [4] to [9] per Lord Bingham, at [54] per Lord Hope and at [93] per Lord Rodger. As stated by Lord Hope at [54]:

> As I said earlier, no court can be expected to function without having to take decisions from time to time on matters of law, practice and procedure. The district court would be unable to administer justice according to the laws and usages of this realm if the lay justices lacked the guidance of their clerk on these matters.

In the present case, for "their clerk" one substitutes "any Senior Magistrate".

[411] The fact that s 5(2) requires disclosure of the advice received from the Senior Magistrate reinforces the fact that s 5(2) does not violate or diminish the rights in s 8 of the Pitcairn Constitution. See also *Clark v Kelly* per Lord Hope at [69] and [70] and Lord Rodger at [102] to [106].

[412] Second, whether s 8 of the Pitcairn Constitution is violated must be judged as a question of substance, not of form. See Lord Bingham in *Clark v Kelly* at para 9:

> The European Court of Human Rights has repeatedly emphasised that alleged violations of article 6 (and other articles) must be judged as questions of substance and not of form. So the question is whether, as a matter of substance, trial of the minuter before a court constituted and proceeding as described will violate his right to a fair and public hearing by an independent and impartial tribunal. In agreement with the High Court, and for the reasons given by my noble and learned friend Lord Hope as well as these reasons, I am of the clear opinion that it would not.

[413] The abstract and de-contextualised treatment of judicial independence in the so-called Bangalore Principles is of little assistance in this context. It should be noted, however, that the commentary on the Principles at [39] accepts that "picking the brain" of a colleague does not of itself compromise independence. In my view, the value of *Clark v Kelly* is that it is a contextualised recognition that a lay justice can receive advice on questions of law, procedure and legal principle without the surrender of independence.

Island Magistrate judge in own cause

[414] As to the fifth point, it is claimed that the Island Magistrate (Simon Young) lacked independence as he had a direct pecuniary interest in having Mr Warren removed so he (Mr Young, then Deputy Mayor) could assume the acting mayoralty. It is alleged he also had a political interest in obtaining the position of Acting Mayor. In addition, it is said he failed to hear Mr Warren on the question whether the computer exhibits should be sent to New Zealand for forensic analysis.

[415] This submission requires reference to the Local Government Ordinance.

[416] Under the Local Government Ordinance, mayoral elections take place every three years, while those for the office of Deputy Mayor and of the five Councillors take place every two years. See ss 3(1), 4(1), 5(1) and 11A. The Mayor, Deputy Mayor and the five Councillors are known as Island Officers. See s 3(1).

[417] The circumstances in which the Deputy Mayor can assume the office of Mayor are strictly circumscribed by the Local Government Ordinance:

(a) If any Island Officer is sentenced to imprisonment by any court in any part of the Commonwealth, the Governor may request such person to resign from his or her office. If the person fails to resign, the office is deemed to become vacant after the expiration of seven days. See s 3(2). "Commonwealth" is defined in s 2(1) of the Interpretation and General Clauses Ordinance as the Commonwealth of Nations and "country or territory of the Commonwealth" means any member of the Commonwealth or any country or territory for whose international relations any member of the Commonwealth is responsible.

(b) If any vacancy occurs in the office of Mayor by reason of the "death, resignation, permanent absence from the Islands or any permanent incapacity of the Mayor to perform his or her duties" the Deputy Mayor succeeds to the office of Mayor. See s 4(2) of the Local Government Ordinance.

(c) If the Mayor "by reason of illness, absence from the Islands or otherwise becomes temporarily incapable of performing his or her duties" the Deputy Mayor acts in the office of Mayor until such time as the Mayor

resumes his or her duties or the office of Mayor becomes vacant. See s 4(3).

[418] From these provisions it can be seen that a Deputy Mayor's succession to the office of Mayor depends not on the issuing of a search warrant or the giving of authority to transport seized exhibits to New Zealand for analysis, but on a request to resign by the Governor post-sentence to imprisonment, or on "death, resignation, permanent absence from the Islands or permanent incapacity of the Mayor". Being able to temporarily act in the office of Mayor depends on the Mayor's illness, absence from the Islands or temporary incapacity to perform the duties of Mayor.

[419] In these circumstances, I find it difficult to see how the making of an order authorising the transport of exhibits for forensic examination was either a "direct pecuniary interest", a "political interest" or a personal interest which engaged 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.

[420] It is even more difficult to see how the factual circumstances of the case satisfy the high threshold required before a court is justified in intervening on the grounds of abuse of process. A stay is an extraordinary remedy available only where a fair trial is no longer possible, or where it would offend the court's sense of justice and propriety to try the applicant in the particular circumstances of the offence. Even if the Island Magistrate did have an interest of some kind, in terms of s 8(3) of the Justice Ordinance the transport order simply facilitated independent forensic examination of the seized computer equipment. The examination could have exonerated or implicated Mr Warren. At their highest, the circumstances of the case fall within the "trivial" and "improbable sequence of events" categories discussed in *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, 2013) at [10028].

[421] As to the complaint that Mr Warren was excluded from the hearing of the application authorising transport of the exhibits, not every "hearing" engages the right to be heard. For example, it could not be realistically contended by Mr Warren that he had a right to be heard when application was made on 26 May 2010 for the search

warrants and no authority was cited in support of the proposition that a person from whom items are seized under authority of a search warrant has a right to be heard as to where, how and by whom the evidence is to be sorted and analysed. The sending of the seized computer equipment to an appropriate specialist crime laboratory was within the authority of the search warrant and those police common law powers which can be called in aid when a search warrant is executed. See *Reynolds v Commissioner of Police of the Metropolis* [1985] 1 QB 881 at 887 to 889. As Slade LJ at 895 observed, a process of preliminary sorting post execution of the search warrant is inevitable in order to carry out "the very object for which the search warrant was granted". In addition, as submitted by the Crown, until the material had been filtered and analysed, it could not be brought before the court to be dealt with according to law as required by the warrants and by s 23(1) of the Justice Ordinance.

[422] Neither the search warrant application nor the application of 30 May 2010 were hearings on the merits and did not give rise to a duty to hear Mr Warren. Neither occasion was an appropriate forum to challenge the validity of the search warrant or to engage in the merits of sending the seized equipment to a specialist crime laboratory in New Zealand. The appropriate forum for consideration of the warrant and of any evidence obtained pursuant to it is the criminal trial itself or its pre-trial stages. See for example *Gill v Attorney-General* [2010] NZCA 468, [2011] 1 NZLR 433 at [17], [19] and [27] to [29] cited by the Crown.

[423] While asserting that the "hearing" on 30 May 2010 was unlawful because he was not heard, Mr Warren does not specify how a fair trial is thereby not possible or should offend the court's sense of justice and propriety. In this regard, sight must not be lost of the fact that in the Joint Plea and Directions Memorandum dated 29 September 2011 Mr Warren admits to 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.

[424] As pointed out by Lord Bingham in *Clark v Kelly* at [9], the European Court of Justice has repeatedly emphasised that alleged violations of Article 6 must be judged as

questions of substance and not of form. The question is whether, as a matter of substance, trial of the individual will violate his or her right to a fair and public hearing by an independent and impartial tribunal. See also Lord Hoffmann at [19]. It will be apparent from what has been said earlier that in my view the clear answer to this question is "No".

[425] Whether the points taken by Mr Warren are viewed in isolation or taken together, I find that a fair-minded and informed observer having considered the facts would not conclude that there was a real possibility that the Island Magistrate was biased or lacking in independence. See *Magill v Porter* [2002] 2 AC 357 at [103].

Further allegations – overview

[426] Mr Warren submits that as the Island Magistrate (Simon Young) was simultaneously Island Magistrate and Deputy Mayor, the doctrine of separation of powers was violated. As a matter of law, both posts cannot be held at the same time. Two further submissions were made: No judicial officer (including the Island Magistrate) can sit part-time, and second, the appearance of justice is compromised because the Crown pays both the Island Magistrate and the Deputy Mayor.

The separation of powers issue

[427] It is said the separation of powers is a disputed concept and that no constitutional system supports a pure separation or "distinctness" of powers. See Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [8.1].

[428] Given that s 8 of the Pitcairn Constitution and Article 6 of the European Convention on Human Rights are indistinguishable, it is material to note that the European Court of Human Rights has held that neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the interaction between the executive and the judiciary. See *Agrokompleks v Ukraine* (Application No. 23465/03, 6 October 2011, Fifth Section) at paras 131 and 132:

> 131. Although the notion of the separation of powers between the executive and the judiciary has assumed growing importance in the Court's case-law (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV, and *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, § 46, 30 November

> 2010), neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the interaction between the two branches. The Court must clarify whether in each particular case the requirements of the Convention are met (see *Pabla Ky v. Finland*, no. 47221/99, § 29, ECHR 2004-V).
>
> 132. It is not the Court's task to analyse the soundness of the relevant constitutional arrangements in Ukraine. The sole question it is faced with is whether, in the circumstances of this case, the domestic courts had the requisite "appearance" of independence, or the requisite "objective" impartiality (see *McGonnell v. the United Kingdom*, no. 28488/95, § 51, ECHR 2000-II, and *Kleyn and Others*, cited above, § 193).

[429] In the present case, the Island Magistrate is required by s 11 of the Judicature (Courts) Ordinance to be appointed from among the permanent residents of the Islands and is not required to be professionally qualified in law. By contrast, magistrates other than the Island Magistrate are required to be qualified in law. The Island Magistrate has tenure (Pitcairn Constitution, s 55) and financial security (Constitution, s 53) but limited jurisdiction (Justice Ordinance, s 5). There is a right of appeal to the Supreme Court (Justice Ordinance, s 10).

[430] It has been further held by the European Court of Human Rights that as a matter of principle, a violation of Article 6(1) cannot be grounded on the lack of independence or impartiality of a decision-making tribunal or the breach of an essential procedural guarantee by that tribunal, if the decision taken is subject to subsequent control by a judicial body that has "full jurisdiction" and ensures respect for the relevant guarantees by curing the failing in question. See *De Haan v Netherlands* (84/1996/673/895, 26 August 1997) at paras 51 and 52.

> 51. The decisive feature of the case is that Judge S. presided over a tribunal called upon to decide on an objection against a decision for which he himself was responsible (see paragraph 47 above). It is also significant that the tribunal was composed of a professional judge assisted by two lay judges.
>
> Unlike in the Diennet case, there had been no intervening decision by a higher body.
>
> The situation is more akin to that obtaining in the case of Oberschlick v. Austria (no. 1) (judgment of 23 May 1991, Series A no. 204), in which a judge who had participated in the judgment at first instance also participated in the hearing of an appeal against the same judgment.
>
> Against this background the Court finds that the applicant's fears in this regard were objectively justified.
>
> 52. Nonetheless no violation of Article 6 § 1 could be found if the decision of the Appeals Tribunal was subject to subsequent control by a judicial body that had full jurisdiction and did provide the guarantees of Article 6 (see, *inter alia* and *mutatis mutandis*, the Albert and Le Compte v. Belgium judgment of 10 February

1983, Series A no. 58, p. 16, § 29; more recently, the British-American Tobacco Company Ltd v. the Netherlands judgment of 20 November 1995, Series A no. 331, pp. 25–26, § 78).

[431] Applying the case law of the European Court of Human Rights, the point taken by Mr Warren must fail, first, because a claim that there has been a violation of the notion of separation of powers will not, on its own, be sufficient and, second, even if there is a lack of independence or impartiality, decisions of the Island Magistrate are subject to the control of the Supreme Court, either on appeal or on judicial review or by way of an abuse of process challenge.

[432] There are further relevant considerations. First, the small size of the adult population of Pitcairn means that it is common, if not inevitable, for those involved in the administration of Pitcairn under the Local Government Ordinance to hold more than one "portfolio". It is legislatively recognised there may be potential conflicts and s 8(3) of the Justice Ordinance identifies the two circumstances in which the Island Magistrate is precluded from hearing a case: where he or she "is a party to or has any personal interest in any case". It is not possible for this Court to read into the Justice Ordinance further categories such as where the Island Magistrate is also a member of the Island Council.

[433] Second, as the Crown points out, it is not unusual for lay judicial officers to be drawn from "administrative" posts. In the United Kingdom the Courts Act 2003 (UK), s 41, specifically envisages local government councillors also being community magistrates and only excludes members of Parliament from appointment as a magistrate in certain circumstances. This is a continuation of a long tradition in England of Justices of the Peace having not only a judicial role but also a simultaneous role as local administrators. See, for example, the overview sketched by Lord Justice Auld in *Review of the Criminal Courts of England and Wales* (September 2001), Chapter 3, para 4 (available at www.nationalarchives.gov.uk). As noted by Lord Justice Auld in Chapter 4, para 66, there continues to be a significant overlap between Justices of the Peace and administrators, local councillors continuing to be a first port of call for filling the role of lay magistrate.

[434] The principal case on which Mr Warren relies is the decision of the High Court of Australia in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1996] HCA 18, (1996) 189 CLR 1. That case, however, is of little assistance as it

concerned the question whether a judge of the Federal Court could perform non-judicial functions notwithstanding Chapter 3 of the Commonwealth Constitution. The decision of the Supreme Court of India in *T Fenn Walter v Union of India* (Civil Appeal No. 3993 of 2002) is equally of little assistance. That case involved the appointment of a sitting judge of the High Court to a consumer disputes commission. Given that both cases are to be understood in their own particular constitutional settings and further given that both concerned judges of superior courts, they are of limited assistance in the context of a lay magistrate living in the small Pitcairn community. As observed by Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission* at [84] and [85], history reveals that judicial independence and impartiality may be ensured by a number of different mechanisms, not all of which are seen, or need to be seen, to be applied to every kind of court. Different mechanisms for ensuring independence and impartiality are engaged in respect of inferior courts from those that are engaged in respect of superior courts.

[435] For the foregoing reasons, I conclude there is no merit in the claim that in principle the Island Magistrate cannot simultaneously hold an "executive" position.

The "part-time judge" point

[436] The part-time judge point is addressed in greater detail elsewhere in this decision. It is sufficient to record here that the Island Magistrate was not appointed "to sit part-time" as claimed by Mr Warren. The Island Magistrate is appointed under s 55(1) of the Pitcairn Constitution "for life, or until the appointee reaches such an age as may be prescribed by Ordinance". As a matter of common sense, the Island Magistrate will sit only when there is occasion for him or her to so do. This cannot in any way affect the validity of the appointment. There is no merit in the point.

The "payment of money" point

[437] It is submitted by Mr Warren that the appearance of justice is compromised by "the appearance, and reality, of money changing hands. The Crown pays both the Deputy Mayor and the Island Magistrate".

[438] The point can only be described as novel. All judges in England and within the Pitcairn judicial system are paid by the Crown, which also appears before the same

judges in criminal and civil proceedings. Yet no authority has been cited in support of the claim that such payment affects the independence of the judges.

[439] Mr Warren relies on three decisions of the European Court of Human Rights but on even the most superficial examination, none is applicable to the present circumstances:

(a) *Pescador Valero v Spain* (Application No. 62435/00, 17 June 2003). In that case the applicant appealed his dismissal from the University of Castilla-La Mancha to the Higher Court of Justice. The judge who heard the case was an associate professor of law at that same University. As the Crown submitted, this would seem to be an obvious case of apparent bias.

(b) *Micallef v Malta* [2009] ECHR 1571. The Chief Justice presiding over Ms Micallef's case was a close relation of (two) counsel for the opposing party. This again would seem an obvious case of apparent bias.

(c) *Pétur Thór Sigurdsson v Iceland* [2003] ECHR 169. The husband of an Icelandic judge had been significantly in debt to an Icelandic bank. By mortgaging their properties, the couple were able to reach a compromise on this debt. The judge then sat on a case to which the bank was the defendant. Unsurprisingly, the European Court of Human Rights found there had been a violation of the applicant's right to an impartial tribunal.

[440] Whether viewed separately or cumulatively, the new points (violation of the separation of powers, "part-time judge" and "payment of money") do not impugn or undermine the independence and impartiality of the Island Magistrate. There has been no conduct by him and no facts which could raise doubt as to his independence and impartiality. Applying the apparent bias test expressed in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103], it is my conclusion that a well-informed and impartial observer would not consider there was a real possibility that the Island Magistrate was lacking in independence or impartiality or was biased.

The question of the Registrar's independence

[441] The Registrar's role on the occasion of the ex parte hearing on Sunday 30 May 2010 has been criticised as demonstrating a lack of independence. In summary, the evidence is:

(a) At about 5pm on Sunday 30 May 2010 (Pitcairn time) Sgt Medland sent an email to the Public Prosecutor's office in Auckland. Attached to the email was the signed application for an order that the items seized under the search warrants be transported to the Electronic Crime Laboratory in New Zealand for analysis.

(b) Attending at the Public Prosecutor's office were Mr Mount and the Registrar of the Magistrate's Court, Mr Ford. The application was handed by Mr Mount to Mr Ford, who then sent the application to the Island Magistrate by email via Sgt Medland with a memo which read:

> 31 May 2010
>
> To: Simon Young, Island Magistrate
> From: Graham Ford, Registrar
>
> I attach a copy of an application filed with me today. Should you be minded to grant the application I will draw up and seal a formal order.
>
> Sincerely,
>
> Graham Ford

(c) Sgt Medland printed out the memo and application, handed the documents to the Island Magistrate and explained what the application was about.

(d) The Island Magistrate read the application and having done so, signed an endorsement which read:

> I hereby make an order in terms of paragraph 3.1 above.
>
> Dated at Adamstown this 30th day of May 2010
>
> "Simon Young"
>
> .....
> Island Magistrate

(e) Sgt Medland then transmitted the signed document to Mr Ford who, on sighting the signature of the Island Magistrate granting the application,

sealed an order of the Magistrate's Court. This order was then transmitted to Sgt Medland by way of an email attachment.

(f) Mr Mount's involvement in the proceedings was merely to provide a facility for the Registrar to receive and send the documents. He took no part in the proceedings and did not speak to the Island Magistrate. Nor did he make written submissions. He did not hear any conversation between the Registrar and the Island Magistrate.

(g) Technically, the Island Magistrate and the Registrar needed access to scanning facilities and a software programme that allowed documents to be sent in portable document format. As neither the Island Magistrate nor Registrar Ford had convenient access to those facilities in an environment in which confidentiality could be assured (in Pitcairn and Auckland respectively), it was necessary for a work-around solution to be found.

[442] On these brief events, it is submitted by Mr Warren that the Registrar facilitated and participated in a hearing held in the absence of Mr Warren and that gave the appearance of favouring the prosecution. It is said that no well-informed independent observer would consider any court hearing thereafter, at any level, would be independent or impartial, or have that appearance, where a registrar recommended for appointment by the prosecution sat, and sat in the prosecutor's office and waived unlawfully the proper filing of documents to the prosecutor's advantage and the accused's disadvantage. The well-informed independent observer would consider the system "irremediably tainted". The Registrar's behaviour compromised the impartiality of the Court as well as its independence.

[443] These complaints are in addition to the further allegations:

(a) Mr Ford's appointment was "tainted" by the fact that he was (allegedly) appointed on the recommendation of Mr Moore.

(b) Because Mr Ford is Registrar of all three courts (Magistrate's Court, Supreme Court and Court of Appeal) and because all courts have sat with Mr Ford as Registrar, the independence of both the courts and of the Registrar have been compromised.

[444] Cited in support is *Clark v Kelly*. That was a case in which it was said that the guarantee of a fair trial in ECHR Article 6 would be infringed because the procedure in the district court was one which involved the clerk of the court, a qualified lawyer, tendering (in private) advice to the presiding justices (not legally qualified) on matters of law, practice and procedure. While the Privy Council held on the facts that Article 6(1) had not been breached, it nevertheless accepted that the function of the clerk was indeed of a kind which attracted some requirements of independence in order to make the trial a fair one. In the circumstances, however, it was found that the clerk had indeed been sufficiently independent to enable the procedure followed in the district court to satisfy the requirements of Article 6(1).

[445] In the present case, the Registrar of the three Pitcairn courts does not advise on matters of law, practice and procedure. His function is entirely administrative.

[446] Mr Ford was formerly Registrar of the High Court at Auckland for eleven years, and prior to that Registrar of the District Court at North Shore for some ten years. Mr Warren does not challenge Mr Ford's personal integrity.

[447] It is now intended to address the three circumstances from which the lack of independence is said to flow:

(a) As to the "tainting" point, I have found on the evidence that there is nothing to indicate improper influence was exerted by Mr Moore. He simply mentioned Mr Ford's name to Mr Treadwell. The decision to appoint was made by the Governor on the recommendation of Mr Treadwell. In making the appointment, the Governor acted independently on the basis of merit and without account being taken of any improper considerations.

(b) Next, it is submitted that lack of independence flows from the fact there is a single registrar for all three courts. The implicit submission appears to be that this inevitably impacts on the independence of the registrar and, in turn, on each of the three courts. However, nothing persuasive emerged from the argument as to why this should be so. It is simply asserted that a registrar can serve only one court without forfeiting his or her independence. No practice or authority has been cited in support of this proposition which, looked at another way, is a submission that while

there are too many judges, there are not enough registrars. In my view, the fact that the same person serves as registrar for all three courts does not inherently put into question the independence of either the office, the office holder or the courts. Nor has any evidence been referred to which might suggest that Mr Ford has throughout his tenure as Registrar of all three courts acted otherwise than with conspicuous attention to his duty to be an independent administrator of the courts' processes.

(c) As to the favouring the prosecution point, account must be taken of the fact that circumstances did not permit the Registrar to travel to Pitcairn for the hearing, given the distance and time involved. The best alternative was for him to attend by email and telephone link. The hearing took place on Pitcairn. The Registrar was not a participant in that hearing. His role was entirely administrative, namely, to receive the application and upon it being granted, to seal the order. Mr Mount was not a participant in the hearing either. There can be no suggestion that Mr Mount had ulterior motives such as an expectation that an improper advantage to the prosecution would thereby be gained. In terms of *Magill v Porter*, it is my finding that a fair-minded and informed observer having considered the facts would not conclude that there was a real possibility that either the Island Magistrate or the Registrar, or both, were biased or lacking in independence, either then or subsequently, owing to the manner in which the hearing was conducted on 30 May 2010. Furthermore, I do not accept that the abuse of process test is satisfied on these innocuous facts. There is no substance whatsoever to the allegation that the Registrar's actions brought the administration of justice into disrepute, let alone to the degree that the proceedings should be stayed. Mr Ford has at all times performed his duties as Registrar of the various courts with scrupulous regard to his independence and professional responsibilities.

The submission that the Presiding Judge resign

[448] Both in the Court of Appeal and in this Court, Mr Warren has advanced what is conceded to be a "novel submission", that the judges of the Supreme Court and of the

Court of Appeal should resign because, it is argued, they are confronted by a duty to enforce laws that are contrary to basic human rights and human dignity.

[449] It is submitted that the Pitcairn Constitution Order 2010 is "an insult" to Common Article 1 of the ICCPR and ICESCR and to the "sacred trust" in Article 73 of the United Nations Charter:

> It provided for no democratic legislative wing, no self-determination, and has further fundamental breaches of human rights particularly freedom of expression. It appoints the Governor, a servant of the British not the Islanders. No consideration of their wishes is taken into account on his/her appointment.

[450] It is said that the structure of the Constitution, while purporting to provide human rights, actually restricts the fundamental right to internal self-determination and democratic government. The Constitution sets up a judicial system where a Governor with "dictatorial-like powers" appoints judges. This system is claimed to be the "very antithesis of democracy and self-determination".

[451] For the reasons given at some length earlier in this decision, the underlying premise of this argument (that the laws of Pitcairn are contrary to basic human rights and human dignity) is not accepted, even if the duty to resign is to be assumed (an issue I expressly do not decide). If there is such a duty, it can only apply in extreme circumstances. The Constitution of Pitcairn and the circumstances of the present case are distant by some light years from such circumstances.

The judicial review proceedings – determining the procedure

Background

[452] On or about 11 September 2013 Mr Warren filed in the Supreme Court civil jurisdiction an application for judicial review (CP 1/2013). The statement of claim pleads issues identical to those already advanced before Lovell-Smith J and before me, both in the context of the challenge under the Constitution and in the context of the criminal proceedings. Shortly after the judicial review application was filed, Mr Ellis fell ill and the proceedings have not progressed beyond the filing of a memorandum by the third and fourth respondents (the Island Magistrate and the Pitcairn Magistrate's Court) advising that they will abide the decision of the Court, subject to any amendment of the substantive claim or any application for costs being made against them.

[453] In part, the lack of substantive progress is due to the fact that there is uncertainty as to the procedure to be followed. Both Mr Warren and the Crown apply for directions.

[454] The application by Mr Warren was prefaced with two observations. First, should Pitcairn-specific rules of civil procedure be promulgated there should be prior consultation with Pitcairn Islanders, or with a specialised "rules" committee, as to the content of those rules. Second, the question whether civil legal aid should be made available also needs discussion. It was recognised, however, that both these matters are better addressed by the Attorney General and by the Governor. The immediate need, in the context of the proceedings filed in CP 1/2013, is for the Supreme Court to determine what practice and procedure is to apply to those proceedings in the meantime.

[455] For the Crown it was submitted that in the absence of any specifically prescribed code of civil procedure, it was for the Court itself to determine its own procedures and it was not required to consult with the general population. The Crown submission was that the Court should adopt and apply the Civil Procedure Rules (UK).

Discussion

[456] There is ample power under the Pitcairn Constitution and under the Judicature (Courts) Ordinance for rules of civil procedure to be prescribed. None of these powers have been exercised to date.

[457] The relevant provisions of the Pitcairn Constitution follow:

(a) Section 25(12) contemplates the promulgation of rules specific to applications for redress under Part 2 of the Pitcairn Constitution. It provides:

> (12) The Chief Justice or the President of the Court of Appeal, as the case requires, may make Rules of Court with respect to the practice and procedure—
>
> (a) of the Supreme Court in relation to the jurisdiction and powers conferred on it by or under this section;
>
> (b) of the Supreme Court or the Court of Appeal in relation to appeals under this section from determinations of the Supreme Court or the Court of Appeal; and
>
> (c) of subordinate courts in relation to references to the Supreme Court under subsection (7), including provisions with respect to the time within which any application, reference or appeal shall or may be made or brought.

(b) Section 36(1) would allow the Governor to prescribe rules of court. It provides:

> **36.**—(1) Subject to this Constitution, the Governor, acting after consultation with the Island Council, may make laws for the peace, order and good government of Pitcairn.

(c) Section 43(3) makes more explicit the power of the Governor to make rules of procedure. It provides:

> (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.

[458] Because the powers in ss 25(12), 36(1) and 43(3) of the Constitution have not been exercised, it is necessary to turn to s 42 which incorporates English law, including statutes in force in and for England. Section 42 provides:

> **Application of English law**
>
> **42.**—(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.

[459] This provision is to be read alongside s 45(3), which states:

> (3) Without prejudice to the generality of subsection (2), the Supreme Court shall possess and may exercise in and in relation to Pitcairn, subject to this Constitution and to any other law, all the jurisdiction which is vested in, or is capable of being exercised by, Her Majesty's High Court of Justice in and in relation to England.

[460] The Senior Courts Act 1981 (UK) makes provision for mandatory, prohibiting and quashing orders (s 29), injunctions to restrain persons from acting in offices in which they are not entitled to act (s 30) and applications for judicial review (s 31). The Act is part of the law of Pitcairn because it falls within:

(a) Section 42(1), in that it is a statute of general application in force in and for England.

(b) Section 45(3), in that it is an aspect of the jurisdiction vested in, or is capable of being exercised by, Her Majesty's High Court of Justice in relation to England.

[461] In relation to the specific context of applications for judicial review, s 31(1) of the Senior Courts Act 1981 requires such applications to be made:

> … in accordance with rules of court by a procedure to be known as an application for judicial review.

The rules of court referred to are made under the Civil Procedure Act 1997 (UK) and are presently found in the Civil Procedure Rules, Part 54 (the judicial review procedure). These rules are to be read alongside *Practice Direction – Judicial Review* PD 54A and apply to all applications for judicial review commenced after 1 October 2000. See *Halsbury's Laws of England* (5th ed, 2010) vol 61 Judicial Review at [662]. Useful reference can also be made to the *Administrative Court Office Notes for Guidance*, the *Judicial Review Pre-Action Protocol* and the *Judicial Review Urgent Cases Procedure*, all of which are reproduced in Michael Fordham *Judicial Review Handbook* (6th ed, Hart Publishing, Oxford, 2012) at 696-714.

[462] By virtue of the Pitcairn Constitution, the Senior Courts Act 1981 (UK), the Civil Procedure Act 1997 (UK) and the Civil Procedure Rules (UK) apply to Pitcairn, subject to the limitations specified in s 42(2) of the Constitution. There is therefore within the laws of Pitcairn no lacuna in relation to the rules of court applicable to civil proceedings generally or to judicial review proceedings in particular. It follows that it would be inappropriate to accede to Mr Warren's submission that the Court apply the New Zealand judicial review provisions as set out in the Judicature Amendment Act 1972 (NZ) and the High Court Rules (NZ) scheduled to the Judicature Act 1908 (NZ).

[463] The same result flows from the application of the Judicature (Courts) Ordinance. Section 20 confers on the Governor (on the advice of the Chief Justice) the power to makes rules of court:

> **20.** The Governor may on the advice of the Chief Justice make rules of court for the purpose of carrying the provisions of this ordinance into effect and in particular for all or any of the following matters—
>
> (a) for regulating the sittings of the Supreme Court and the Magistrate's Court and the despatch of business therein;
>
> (b) for regulating the pleading, practice and procedure in the Supreme Court and the Magistrate's Court;

> (c) for regulating the hours of opening and closing of the offices of the Supreme Court and the Magistrate's Court;
> (d) for regulating the forms to be used in the Supreme Court and the Magistrate's Court and for all matters connected therewith;
> (e) for regulating the receipt of money paid into the Supreme Court or the Magistrate's Court or received or recovered under or by virtue of any process of execution or distress;
> (f) for regulating the payment out of the Supreme Court or the Magistrate's Court of all moneys to the persons entitled thereto;
> (g) for prescribing the books and forms of account to be kept and used in the Supreme Court or the Magistrate's Court;
> (h) for prescribing fees, costs and amounts for service and execution of process which may be demanded and received by officers of the Supreme Court or the Magistrate's Court in accordance with the practice and procedure of those Courts;
> (i) for prescribing the manner of acceptance, retention and disposal of fees and costs;
> (j) for providing for the taxation of the fees and costs of legal practitioners;
> (k) for regulating the professional practice, conduct and discipline of legal practitioners;
> (l) generally for regulating any matters relating to the practice and procedure of the Supreme Court or the Magistrate's Court or to the duties of the officers thereof or the conduct of proceedings therein.

[464] As there are no rules of court under s 20, s 17 can be deployed to fill the gap. It provides that in the absence of any rules, the Chief Justice or other Judge of the Supreme Court may give directions:

> **17.**—(1) Subject to this section, the practice and procedure of the Supreme Court, whether in civil or criminal matters, shall be as prescribed by rules of Court made under section 20 and subject to such rules or if there are no such rules governing the question, as the Chief Justice or other Judge of the Supreme Court may from time to time direct.
> (2) Directions given by the Chief Justice or other Judge of the Supreme Court under subsection (1) may be general or may be with respect to any particular step in particular proceedings; and any party to any proceedings before the Supreme Court (including the Crown or the accused person in any criminal proceedings) and any person seeking to institute such proceedings may at any time apply to the Chief Justice or other Judge of the Supreme court for particular directions.
> (3) In formulating any directions which he or she may give under subsection (2) and generally in the conduct of proceedings before the Supreme Court and of the business of that Court, the Chief Justice or other Judge shall be guided, so far as the circumstances of the Islands permit and so far as is appropriate to the circumstances of any particular proceedings in question, by the practice and procedure, in comparable circumstances, of the High Court of Justice in England or of the Crown Court in England or (where the Supreme Court is exercising an appellate or supervisory jurisdiction and if the case so requires) of the Court of Appeal in England; and in pursuing any proceedings in the Supreme Court any party thereto shall likewise (but subject always to any applicable rule of court and to any direction given under this section) be so guided.
> (4) For the purposes of their application in accordance with subsection (3), the practice and procedure of the High Court of Justice in England, of the Crown

> Court in England and of the Court of Appeal in England shall be interpreted with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary.

[465] These provisions of the Judicature (Courts) Ordinance are to be read in harmony with the Constitution, particularly s 42 (application of English law) and s 45 (constitution of Supreme Court).

Conclusion

[466] For the foregoing reasons, it is directed that in the particular circumstances of the present case the practice and procedure to be followed by the Pitcairn Supreme Court in relation to Mr Warren's proceedings in CP 1/2013 is to be that of the High Court of Justice in England in relation to judicial review and related proceedings under ss 29 to 31 of the Senior Courts Act 1981 (UK) and the Civil Procedure Rules, Part 54, subject to the qualifications contained in s 42(2) of the Pitcairn Constitution and in s 17 of the Judicature (Courts) Ordinance. As this direction is confined to practice and procedure, the judge of the Supreme Court of Pitcairn hearing the case will not be sitting as a judge of the UK Administrative Court (contrary to the submission by Mr Warren).

Overall Conclusion

[467] For the reasons given, none of the challenges mounted by Mr Warren have succeeded and they are dismissed.

[468] The application by the Crown under s 70AA of the Justice Ordinance is granted. It is ordered that the evidence of Sgt Medland and all evidence arising from the search of Mr Warren's home and its analysis thereafter is admissible at trial.

[469] In relation to Mr Warren's proceedings in CP 1/2013, the procedure to be followed by the Pitcairn Supreme Court is that of the High Court of Justice in England in relation to judicial review and related proceedings, subject to the qualifications contained in s 42(2) of the Pitcairn Constitution and in s 17 of the Judicature (Courts) Ordinance. The Registrar is directed to convene, at an early date, either a chambers hearing or a teleconference so that case management directions can be given.

Justice RPG Haines
Supreme Court
Pitcairn Islands

Solicitors:
Christine Gordon QC, Public Prosecutor for Pitcairn Islands, Meredith Connell, DX CP 24063, Auckland, for the Crown
Tony Ellis, Vulcan Building Chambers, PO Box 3320, Shortland St, Auckland 1140, for Applicant/Appellant