IN THE SUPREME COURT OF THE PITCAIRN ISLANDS

[2023] PNSC 1

UNDER	Section 4 of the Legal Practitioners Ordinance
AND	
IN THE MATTER OF	Applications for Admission as a Legal Practitioner in the Courts of Pitcairn, Henderson, Ducie and Oeno Islands
	M 1/2020
	WILLIAM NEWTON FOTHERBY
	M 1/2021
	TYRONE-JAY BARUGH
	M 1/2022
	NICHOLAS GEORGE TAM
	M 3/2022
	JULIA FRANCES CHARLTON
	APPLICANTS

Hearing: (on the papers)

Judgment: 23 February 2023 (Pitcairn) / 24 February 2023 (New Zealand)

JUDGMENT OF HEATH CJ

Introduction

[1] Mr William Fotherby, Mr Tyrone-Jay Barugh, Mr Nicholas Tam and Ms Julia Charlton have each applied to be admitted to the Pitcairn Bar. Their applications are governed by ss 4 and 5 of the Legal Practitioners Ordinance of 2001 (the Ordinance):[1]

> **4.**—(1) Subject to this section, any person holding a practising certificate may, upon proof thereof, apply in writing to the Registrar of the Supreme Court to be admitted to practise as a legal practitioner.
> (2) *Every such application shall include a summary of the applicant's qualifications and experience together with any other information as may be relevant to his or her fitness to practise law in the Islands*.
> (3) The Registrar may obtain any such further information as may be required from the applicant or any other person or body.
>
> **5.**—(1) The application of any person under section 4 shall then be submitted to *the Chief Justice* who *shall in his or her absolute discretion decide whether or not the application should be approved*.
>
> (2) If the Chief Justice shall indicate his or her approval of an application, a certificate of admission shall thereupon be granted by the Registrar under the seal of the Supreme Court.
>
> (3) Every certificate of admission shall be issued to the applicant upon payment of such fee as the Governor may by order prescribe. On each anniversary thereof the applicant shall pay an annual practising fee as shall be prescribed by the Governor by order.
>
> (Emphasis added)

[2] Section 4(1) provides that a qualifying applicant must hold a "practising certificate". That term, as defined by s 2 of the Ordinance, means "a current certificate issued by the appropriate authority in any Commonwealth country entitling the holder to practise as a legal practitioner in that country".

[3] At the time of my appointment as Chief Justice in January 2022, there were two extant applications for admission. They had been made by Mr Fotherby and Mr Barugh. My predecessor, Blackie CJ, had deferred (but not dismissed) each of them, primarily on the ground that the existing Bar was sufficient to service the legal needs of

---

[1] As to interpretation, see clause 5 of the Pitcairn Constitution Order of 2010, arts 26 and 42 of the Pitcairn Constitution, discussed at paras [15]–[20] below.

the small population of Pitcairn.[2] His Lordship's decisions were conveyed in Minutes to the applicants in which no detailed reasons were provided to support his view that there was no need to increase the Pitcairn Bar at those times.

[4] In a Minute issued on 25 September 2020, in relation to Mr Fotherby's application, Blackie CJ said:[3]

> [2] Having read Mr Fotherby's application, together with his affidavit and supporting documentation, I consider him to be an ideal candidate for admission to the Pitcairn Islands' Bar.
>
> [3] That said, Pitcairn only has a population of some 50 souls. It already has an established Bar of both prosecution and defence counsel, originating from the Operation Unique trials and subsequent proceedings between 2002 and 2018.
>
> [4] At present, the situation is quiet on the litigation front.
>
> [5] Whereas I do not consider there is any need to extend the Pitcairn Bar at this time, I am, nevertheless, issuing this minute so that there is a record of Mr Fotherby's suitability for appointment should the need arise in the future. It is anticipated that, with the passage of time, a number of the practitioners currently admitted to the Bar will seek to retire or otherwise not wish to involve themselves in the Islands' affairs.

[5] In a separate Minute, issued on 18 October 2021 in relation to Mr Barugh, the Chief Justice said:[4]

> [2] In his detailed memorandum, Mr Barugh outlines the experience that he has gained in five years of practise, particularly in the areas of New Zealand property law and his research into Pitcairn Ordinances, with particular attention to land-related ordinances.
>
> [3] Mr Barugh notes the Court's reticence in increasing the number of practitioners beyond those already admitted to the Pitcairn Bar, including a number of Queen's Counsel. The island has a permanent population in the vicinity of fifty souls. Ove the years, with the exception of the criminal trials, litigation between Pitcairn Islanders has been rare. There have been some family matters and there is currently a review application arising out of a decision of the Island Lands Court. In that case, the parties are already represented.

---

2 See paras [26] and [29] below.
3 *Re Fotherby* (Supreme Court, M1/20, 25 September 2020) at paras [2]–[5].
4 *Re Barugh* (Supreme Court, M1/21, 18 October 2021) at paras [2]–[5].

> [4] Almost invariably, land issues are resolved on the Island through the Lands Court without the need for legal intervention.
>
> [5] Whereas Mr Barugh's credentials and his enthusiasm to practise in the field of Pitcairn Law is impressive, I do not consider there is a specific need to increase the numbers at the Pitcairn Bar at this time. That said, if Mr Barugh so desires, his name should be recorded on a list maintained by the Registrar of those practitioners with a specific field of expertise, should there be a need for Pitcairn Islanders to seek that type of assistance in the future.

[6] Mr Fotherby and Mr Barugh were invited to maintain contact with the Registrar in case opportunities arose that may justify admission. After I took office, further applications were received from Mr Tam and Ms Charlton. I decided to reconsider the applications made by Mr Fotherby and Mr Barugh in conjunction with those of Mr Tam and Ms Charlton.

[7] After reviewing the applications, I decided to issue a Practice Direction under s 17 of the Judicature (Courts) Ordinance to ensure guidelines for admission were published. I formed the view that public notification of relevant criteria would promote transparency in the admission process and guard against the possibility of any arbitrary exercise of the discretion.

[8] I asked the Registrar to solicit views on appropriate criteria from the Attorney-General and four senior Pitcairn practitioners: Mr Raftery KC, Mr Illingworth KC, Mr Dacre KC and Dr Ellis. Having considered their respective submissions, I issued a *Practice Direction* on 30 September 2022.[5] A copy of the *Practice Direction* was sent to each of the applicants, on the basis that I would determine their applications after receiving any further submissions.

The Practice Direction

[9] In the *Practice Direction*, after setting out the background to the consultative process, I stated:[6]

> 6. Any person applying, under section 4(1) of the Ordinance, for admission to the Pitcairn Bar shall provide the following to the Registrar:

---

5 The relevant parts of which are set out at para [9] below.

6 *Practice Direction – Admissions to Pitcairn Bar* (30 September 2022) published at pitcairn.gov.pn/Laws/index.php

(a) A statement of the jurisdiction in which the practitioner currently holds a practising certificate. The definition of "practising certificate" in section 2 of the Ordinance limits qualifying countries to those in the Commonwealth. A copy of the relevant Practising Certificate shall be provided to the Registrar.

(b) A statement indicating why admission to the Pitcairn Bar is sought. If applicable, this statement shall indicate whether admission is sought to appear in a specific case to be heard before a Court in the Pitcairn Islands and, if so, the nature of the case.

(c) A statement of

(i) the extent of the applicant's knowledge of custom and/or law of Pitcairn Islands; and
(ii) the extent of the applicant's knowledge of English law and practice that may, subject to local consideration, apply in Pitcairn; and
(iii) the areas of law in which the applicant may be able to provide particular assistance to Pitcairn Islanders.

Applicants can obtain information about relevant laws from the Pitcairn Government website: http://pitcairn.gov.pn/Laws/Index.php

(d) Evidence of his or her good character and fitness to practise law. In particular, a certificate should be provided from the issuer of the Practising Certificate in the relevant Commonwealth country confirming that there are no outstanding disciplinary charges against the applicant or, if any do exist, the nature of them.

7. On receipt of that information, the Registrar will refer the application to the Chief Justice under section 5(1) of the Ordinance for decision. *The discretion whether to grant or refuse the application will be exercised on a principled basis, having regard to the needs of the small population on the Pitcairn Islands for legal assistance.* Although New Zealand counsel form the nucleus of the Pitcairn Bar, an application from a practitioner in another jurisdiction will be determined on its own merits. *There will be no pre-disposition in favour of admission from the ranks of the New Zealand Bar*.

(Emphasis added)

[10] Having received a copy of the *Practice Direction*, Mr Fotherby, Mr Tam and Ms Charlton provided further submissions in support of their applications. I thank them for their assistance. While Mr Barugh maintains his application, I did not receive any further submissions from him. In relation to Mr Barugh's application, I rely on the material that he had put before Blackie CJ.

[11] Section 4(2) of the Ordinance establishes an applicant's "fitness to practise law in the Islands" as the predominant factor that the Chief Justice must consider under s 5(1).[7] I am satisfied that Mr Fotherby, Mr Barugh, Mr Tam and Ms Charlton are each fit and proper persons (both as to legal ability and character) to be admitted to the Pitcairn Bar.[8]

[12] The issue that has arisen on the present applications is whether, as a matter of discretion, it would be appropriate for me to refuse admission to an otherwise "fit" candidate because of the lack of an assessed need "of the small population on the Pitcairn Islands for legal assistance".[9] The issue can be framed as follows: is it appropriate for the Chief Justice to refuse an application for admission if the candidate were otherwise fit to practise law in the Pitcairn Islands?

[13] Given the importance of the point raised by counsel in relation to para 7 of the *Practice Direction*, I have decided to issue a formal judgment dealing with that issue. I have done so to ensure there is no misunderstanding in the future about the way in which this part of the *Practice Direction* is intended to operate. It will also avoid unacceptable delays of the type that have occurred on the present applications.

[14] After dealing with the point of principle, I shall determine the four applications on their own merits.

Statutory interpretation principles

[15] While the laws of Pitcairn are based on English law, they must be interpreted in a manner that takes account of local conditions. That is understandable, in the context of a territory that comprises approximately 50 people, compared with a population of about 56 million people in England.

[16] Section 5 of the Pitcairn Constitution Order (the Constitution Order), made by Her Majesty in Council on 10 February 2010, is the starting point for interpreting legislation (such as the Ordinance) enacted before the Constitution Order was

---

7 Sections 4 and 5 of the Legal Practitioners Ordinance are set out at para [1] above.

8 The nature of (what is called in New Zealand) the "fit and proper person" inquiry was recently discussed by its Supreme Court. The reasons given by members of the Court were informed by their survey of relevant overseas' jurisprudence. See *New Zealand Law Society v Stanley* [2020] 1 NZLR 50 (SC) at para [54] (William Young, O'Regan and Ellen France JJ), with whom (as to the test) the dissenting judges (Winkelmann CJ and Glazebrook J) agreed, at paras [105] and [106]. I have applied the approach taken by the Supreme Court in that case.

9 See para 7 of the *Practice Direction*, set out at para [9] above.

promulgated. The 2010 Constitution for Pitcairn (the Constitution) was annexed to the Constitution Order and brought into effect by it. Section 5 provides:

> **5. Existing laws**
>
> (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 Existing offices and officers Island Council Pending legal proceedings day.
>
> (Emphasis added)

[17] There are two constitutional provisions that are relevant to interpretation. They are articles 26 and 42:

> **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.
>
> …
>
> **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.
>
> (Emphasis added)

[18] Article 26 of the Constitution[10] emphasises the need, if possible, for legislation to be interpreted in accordance with the rights and freedoms bestowed by it. Article 26 appears in Part 2 of the Constitution. Relevantly, it states: "must be read and given effect in a way which is compatible with the rights and freedoms" set out in Part 2. It has been submitted that article 8 of the Constitution (also contained in Part 2) is relevant to a right of "counsel of choice; a right., it is said, of a fundamental character.

[19] A similar provision to article 42 of the Constitution was considered by the English Court of Appeal in *Nyali Ltd v Attorney-General*,[11] in relation to the protectorate of Kenya. Article 15 of the East Africa Order in Council 1902 provided (among other things) that a provision that the "common law, doctrines of equity and statutes of general application" in force in England became part of the law of the protectorate subject to "such qualifications as local circumstances render necessary".[12]

[20] Delivering the principal judgment of the Court of Appeal, Denning LJ described this provision as "wise" and held that it was one which should be construed "liberally". In a *dictum* approved by the Privy Council on appeal from Pitcairn in *Christian v The Queen*,[13] Denning LJ said that it was for the judges of the lands in which such qualifications were made to determine the extent of them.[14]

The admission jurisdiction

[21] It is contended that the decision whether or not to admit a legal practitioner to the Bar is one based solely on the fitness to practise. In *Attorney-General of The Gambia v N'Jie*[15] the Privy Council considered relevant legal principles in the context of an application to the Supreme Court of The Gambia to strike a particular barrister and solicitor from the roll of that court. The barrister and solicitor concerned was, at the time of the application, also a member of the English Bar. The English law discussed in *N'Jie* represents the position in Pitcairn prior to enactment of the Ordinance.

[22] After traversing relevant facts, Lord Denning, delivering the advice of the Board, explained the position as a matter of English law as follows:[16]

---

10 Article 26 is set out at para [17] above.
11 *Nyali Ltd v Attorney-General* [1955] 1 All ER 646 (CA).
12 Ibid, at 652–653.
13 *Christian v The Queen* [2006] UKPC 47, [2006] PNPC 1, at para 12.
14 *Nyali Ltd v Attorney-General* [1955] 1 All ER 646 (CA), at 653.
15 *Attorney-General of The Gambia v N'Jie* [1961] 2 All ER 504 (PC).
16 Ibid, at 508.

> By the common law of England, the judges have the right to determine who shall be admitted to practise as barristers and solicitors; and, as incidental thereto, the judges have the right to suspend or prohibit from practice. In England, this power has a very long time been delegated, so far as barristers are concerned, to the Inns of Court; and, for a much shorter time, so far as solicitors are concerned, to the Law Society. In the colonies, the judges have retained the power in their own hands, at any rate, in those colonies where the profession is "fused". The principle on which this rests was well stated by Lord Wynford in 1830 in *Re Antigua Justices* [(1830) 1 Knapp, at 268]:
>
> > "In the colonies there are no Inns of Court, but it is essential for the due administration of justice that some persons should have authority to determine, who are fit persons to practise as advocates and attornies there. Now advocates and attornies have always been admitted in the Colonial courts by the judges, and the judges only. The power of suspending from practice must, we think, be incidental to that of admitting to practise, as is the case in England with regard to attornies. In Antigua the characters of advocates and attornies are given to one person; the court therefore that confers both characters may for just cause take both away."

[23] As *N'Jie* makes clear, it is uncontroversial that the superior courts of the British Overseas Territories retain relevant supervisory jurisdiction. That role is a function of the Court's inherent jurisdiction to supervise the conduct of its "officers", which (in the Pitcairn context) includes a "legal practitioner".[17]

[24] The Supreme Court of the Pitcairn Islands is a "superior court of record" that is entitled to exercise (among other things) all jurisdiction possessed by His Majesty's High Court of Justice and in relation to England.[18] That includes the inherent jurisdiction of that Court.[19] The Supreme Court is empowered to admit and remove legal practitioners.[20] Undoubtedly, in the absence of any statutory provision to the contrary, it could exercise its inherent jurisdiction to suspend a practitioner.

---

17 The term "legal practitioner" is defined by s 2 of the Legal Practitioners Ordinance as meaning "a barrister or a solicitor". Section 4(1) of the Ordinance describes a candidate for admission as a "legal practitioner".

18 Constitution, art 45.

19 By way of example, using the New Zealand context, see *B v Canterbury District Law Society* (1999) 11 PRNZ 196 (CA) at 211 and *Auckland District Law Society v Neutze* [2006] 2 NZLR 551 (HC) at para [29]. In *B v Canterbury District Law Society*, at 201, the Court of Appeal made it clear that the jurisdiction was designed "to enable the Court to regulate the conduct of practitioners relating to the conduct of litigation and their status and responsibilities as officers of the Court".

20 Legal Practitioners Ordinance, ss 5(1) and 6.

The relevance of Pitcairn's "small population"

[25] I start with a description of the Pitcairn Islands, which provides the context in which the "population" issue falls to be determined.[21]

[26] The Pitcairn Islands are made up of four islands; Pitcairn, Henderson, Ducie and Oeno. They are situated in the Southern Pacific Ocean. In geographical terms, the Pitcairn Islands are extremely remote. The nearest substantial land masses are New Zealand and Peru, situated some 5,500 kilometres to the west and approximately 10,000 kilometres to the north east respectively.

[27] Pitcairn is the only inhabited island. Taking typical population fluctuations into account, approximately 50 people will generally live on a habitable area of about 4.6km^2 at any given time.

[28] Pitcairn is isolated not only by the tyranny of distance but also by general inaccessibility. There is no access by air: there is no airport or airstrip on Pitcairn. Nor is there any safe harbour in which vessels can anchor. Access by sea is completed by the collection of passengers or goods by long-boats operated by the islanders who ensure safe passage to Bounty Bay.

[29] Secondary schooling is almost invariably undertaken in New Zealand. There are no tertiary education facilities on the island. No lawyers reside on the island, so no organised profession is required or exists. For that reason, the condition precedent to an application for admission to the Pitcairn Bar is that a person holds a current practising certificate issued by an appropriate authority in any Commonwealth country that entitles him or her to practise law in that country.[22]

Analysis

(a) Context

[30] To date, most of the litigation on Pitcairn has involved the criminal law; in particular, the historical sexual abuse trials with which the Privy Council was

---

21 This summary is drawn from observations made in *Warren v R* [2015] PNCA 1, *Christian v The Queen* [2006] PNPC 1; [2006] UKPC 47, *Warren v The State* [2018] PNPC 1; [2018] UKPC 20 and *Christian v Lands Court* [2022] 1 PNSC 1.

22 Legal Practitioners Ordinance, ss 2 (definition of "practising certificate") and 4.

concerned in *Christian v The Queen*[23] and a prosecution of Mr Warren for possessing indecent publications, resulting in a final appeal to the Privy Council in *Warren v The State*.[24] More recently, there has been a significant case involving land rights, which is ongoing: see *Christian v Lands Court*.[25] In that case, the Court has appointed an *amicus curiae* from the ranks of existing members of the Pitcairn Bar to ensure the views of non-parties on some constitutional questions are heard. In addition, a divorce proceeding has recently been finalised before a Magistrate. With the exception of the admission of a junior counsel to assist in the land case, the existing pool of admitted legal practitioners has proved sufficient to deal with all of those cases.

[31] The effect of the submissions is that if a person can demonstrate that he or she is fit (both as to legal competence and character) to be admitted to the Pitcairn Bar, the nature of the islands and their small population should not be taken into account as a countervailing factor when the discretion whether to grant or refuse a particular application is exercised.

[32] Reference was made to views expressed by Jonathan Crow KC, in a foreword to the first edition of the text, *British Overseas Territories Law*.[26] Mr Crow is an acknowledged expert on the law relating to British Overseas Territories. He said, with particular reference to South Georgia, the South Sandwich Islands, Pitcairn and the British Antarctic Territory:[27]

> … and in any event, the mere size of a territory's civilian population bears no relation to the frequency with which legal problems may come before the courts, nor the complexity of the constitutional issues which they may raise.

[33] I do not disagree with the views expressed by Mr Crow. A number of complex cases have emerged from Pitcairn notwithstanding its small population. Indeed, Pitcairn islanders have had access to the Privy Council, as Pitcairn's final appeal court, on three occasions: in 2005, 2006 and 2018.[28] There are currently four

---

23 *Christian v The Queen* [2006] PNPC 1; [2006] UKPC 47.
24 *Warren v The State* [2018] PNPC 1; [2018] UKPC 20.
25 *Christian v Lands Court* [2022] 1 PNSC 1.
26 Hendry & Dickson, *British Overseas Territories Law* (2nd 2018).
27 Ibid.
28 *Six Named Accused v The Queen* [2005] PNPC 1; [2005] UKPC 42, *Christian v The Queen* [2006] PNPC 1; [2006] UKPC 47 and *Warren v The State* [2018] PNPC 1; [2018] UKPC 20.

extant proceedings before the Supreme Court, most of which (in some respects) can properly be described as raising unusual legal issues or complex.

(b) Is there a fundamental right of "counsel of choice"?

[34] A common feature of the submissions is that if the Court puts too much emphasis on Pitcairn's small population, it will create an undesirable artificial ceiling on the size of the Pitcairn Bar. It is said that such a ceiling would constrain the ability of a Pitcairner to engage counsel of choice. Some of the candidates submit, based on article 8(3) of the Constitution, that Pitcairn islanders have a right to counsel of choice, particularly in civil cases. In *Maltez v Lewis*,[29] the "right" of choice of counsel was described by Neuberger J as "fundamental".

[35] Article 8(3) appears in Part 2 of the Constitution and is one of the fundamental rights against which the laws of Pitcairn fall to be interpreted: see article 26 of the Constitution.[30] Article 8(3) states:

> **Right to a fair trial**
>
> **8.** …
>
> (3) Everyone charged with a criminal offence has the following minimum rights—
>
> …
>
> (c) to defend himself or herself in person or through legal assistance of his or her own choosing or, if he or she has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> ….

[36] In my view, article 8(3) of the Constitution does not support the right of a Pitcairn islander to instruct counsel of choice in civil cases.[31] There are two reasons why that is so:

> [a] The right to "counsel of choice", conferred by article 8(3), is limited to criminal cases;

---

29 *Maltez v Lewis* [1999] All ER (D) 425 (ChD).
30 Article 26 is set out at para [17] above.
31 See paras [34] and [35] above.

[b] The right to choose counsel must be limited to those who have been admitted to the Pitcairn Bar, or who the Chief Justice is prepared to admit for the purpose of a particular case.

[37] In any event, article 8(3) of the Constitution does not create an absolute right to counsel of choice. In that regard, it is instructive to consider what was said by Neuberger J, in *Maltez v Lewis.* *Maltez* was a civil claim in which both parties were legally aided. The Legal Aid Board had assigned representation to the parties. While acknowledging that it had always been a fundamental right of every citizen to be represented by an advocate of his or her choice, the Judge made it clear that the right was not absolute: it was subject to "circumstances [that] may cut it down". Neuberger J referred in particular to legal aid proceedings in which the Legal Aid Board had the right to choose to fund a particular legal representative rather than one chosen by the party concerned.

[38] In Pitcairn, legal aid is limited to criminal cases. Typically, counsel is assigned by the Registrar[32] from a list of available counsel prepared and maintained in accordance with the directions of the Chief Justice.[33] No form of civil legal aid is available.

(c) Relevance of "local circumstances"

[39] I hold that s 5(1) of the Ordinance[34] should be interpreted in a manner that takes account of the small population of Pitcairn as a "local circumstance" that is relevant to interpretation.[35]

[40] While it is fair to suggest that a decision to refuse admission having regard to the small population of Pitcairn could create an undesirable and artificial ceiling on the number of available legal practitioners, the other side of that coin is the need to ensure that the size of the Bar does not get out of all proportion to the population of the Island. While I acknowledge the *bona fides* of each of the present applicants and their reasons for wanting to be admitted to the Pitcairn Bar, it is possible that some might seek that status with no intention of making themselves available to undertake work; particularly

32 Legal Aid (Criminal Proceedings) Ordinance, s 12.
33 Ibid, s 9.
34 Set out at para [1] above.
35 See article 42(2) of the Constitution, set out at para [17] above.

when the Governor has not set any annual fees to retain a practising certificate under s 5(3) of the Ordinance.[36]

[41] Although not strictly necessary, I touch on another point to which some reference was made and which can also be seen as an incident of "local circumstances". Some concern was expressed that almost all lawyers who have been admitted to the Pitcairn Bar are from New Zealand. A similar point has been raised in other Pitcairn cases, albeit in the context of Judges drawn from New Zealand.

[42] In *Christian v The Queen*[37] an argument was advanced in the Privy Council to the effect that Judges of the Supreme Court of the Pitcairn Islands should have been drawn from the United Kingdom rather than New Zealand. Delivering a plurality opinion, Lord Hoffmann described it as "hard to take [that point] seriously". His Lordship added that there was "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".[38]

[43] The point was revisited in *Warren v The Queen*.[39] Counsel for Mr Warren submitted that there was some constitutional irregularity in all judges being drawn from New Zealand. In the Supreme Court, Haines J (equating the position of Judges and counsel) had said:[40]

> [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*.
>
> (Emphasis added)

[44] Haines J's approach was not criticised in the subsequent appeals to the Court of Appeal[41] and Privy Council.[42] In addressing the argument by reference to Judges

---

36 Set out at para [1] above.
37 *Christian v The Queen* [2006] PNPC 1, [2006] UKPC 47.
38 Ibid, at para [26].
39 *Warren v The Queen* [2014] PNSC 1 (SC).
40 Ibid, at para [277].
41 *Warren v The Queen* [2015] PNCA 1.
42 *Warren v The Queen* [2018] PNPC 1; [2018] UKPC 20.

only, the Court of Appeal adopted Lord Hoffmann's view in *Christian*.[43] The Privy Council, in *Warren*, did not expressly deal with the point. Rather, the Board described the submission as one "totally lacking in merit" in respect of which it "simply [adopted] the full reasons given by the Court of Appeal".[44]

[45] While, for the purposes of an admission application, I consider that Haines J's approach (grounded in a need for proportionality) is appropriate, I acknowledge there are real advantages to those living on Pitcairn in having available counsel who have experience in English law, and more generally in its application in the various British Overseas Territories. This issue was addressed indirectly in para 7 of the *Practice Direction*, which states that there would be "no predisposition in favour of admission from the ranks of the New Zealand Bar".

(d) What weight should be given to the "population" issue?

[46] I acknowledge that the discretion to reject an application for admission must be made on a principled basis. It is necessary to articulate the basis upon which the needs of the small population may impact upon exercise of that discretion. I explain my approach as follows.

[47] Two points can be made immediately:

[a] First, s 5(1) of the Ordinance[45] confers an "absolute discretion" on the Chief Justice to determine whether an application for admission should or should not be approved. I do not accept that an "absolute discretion" limits its exercise to cases where the statutory prerequisite of "fitness" to practise is not made out.

[b] Second, it is appropriate to consider exercising the discretion not to approve admission where a "local circumstance", properly relevant to the application, exists to support that decision in any particular case.[46]

[48] As to the first of those points, a decision as to whether a person is fit to practise in the Pitcairn Islands is evaluative in nature. The person either does or does

---

43 *Warren v The Queen* [2015] PNCA 1 at para [127]. See also para [42] above, where what was said in *Christian v The Queen* is discussed.

44 *Warren v The Queen* [2018] PNPC 1; [2018] UKPC 20 at para [14].

45 Set out at para [1] above.

46 See paras [39]–[45] above.

not pass that threshold. There is no element of discretion in that decision. If the decision to grant or reject an admission application was based solely on "fitness" to practise, it would not have been necessary for the discretion to have been conferred in such broad terms.

[49] As to the second, I emphasise that the *Practice Note* does not articulate the "population" point as a factor to take into account in determining whether admission should be granted or refused. Rather, it indicates that other factors should be considered "having regard to the needs of the small population on the Pitcairn Islands for legal assistance".[47] The relevance of the "local circumstance" involving the population of Pitcairn represents the context in which the discretion conferred by s 5(1) of the Ordinance falls to be exercised.

[50] Given the income earned by Pitcairn islanders, criminal cases will often be dealt with on legal aid,[48] in respect of which counsel will be assigned by the Registrar from a special list compiled from those enrolled as legal practitioners in Pitcairn.[49] Those living on Pitcairn are unlikely to have the means to engage counsel in civil cases. Where such cases arise, they are generally conducted by legal practitioners who are prepared to act on a *pro bono* basis, or (in more complex cases) through the appointment of *amicus curiae* where the litigant is in person. However, while compliance with the rule of law requires competent counsel to be available, I do not consider it necessarily follows that the Bar must comprise legal practitioners who have such narrow fields of expertise as to render it unlikely that their services will be required.

[51] The needs of those on Pitcairn will necessarily change from time to time. Of the practitioners currently admitted, many were appointed between 2002 and 2005 when there was a need for experienced criminal lawyers to prosecute and defend historical sexual abuse trials. From 2005, those admitted to the Bar have had experience in constitutional, civil and criminal law. It is not beyond the realms of possibility that someone with particular expertise, such as a maritime or environmental lawyer might be required should an unexpected event occur at sea which might result in damage to the vessel or structure or serious environmental damage, such as oil pollution. However, it is conceivable that a legal practitioner's range of skills would be so narrow as to provide minimal benefits to the Islanders if admitted.

---

47 See para 7 of the *Practice Direction*, set out at para [9] above.
48 Legal Aid (Criminal Proceedings) Ordinance of 2001.
49 Ibid, ss 9 and 12.

[52] Each case must be judged on its own merits. In summary, an application for admission cannot be rejected simply on the basis that the size of the Bar should be limited. To reject an application on this ground, there must be a causal connection between the needs of Pitcairn islanders and the absence of any legal expertise that they are likely to require in their particular local circumstances.

Determining the applications

(a) Mr Fotherby

[53] Mr Fotherby holds a current practising certificate as a barrister and solicitor of the High Court of New Zealand and therefore qualifies for admission on the basis of his right to practise as a legal practitioner in a Commonwealth country. I have found that he is fit to practise in the Pitcairn Islands.[50]

[54] Mr Fotherby worked for the Public Prosecutor for Pitcairn between 2011 and 2014 and was engaged in the *Warren* prosecution for possession of indecent publications. He also assisted the then Attorney-General in responding to constitutional challenges made by Mr Warren, and a subsequent judicial review application. In 2014, Mr Fotherby provided advice to the Foreign and Commonwealth Office in London on the application of the Extradition Act 2003 (UK) to Pitcairn. While undertaking a Masters degree at the University of Cambridge, Mr Fotherby wrote a thesis on public law in the British Overseas Territories, with particular focus on Pitcairn, the British Indian Ocean Territory and the Turks & Caicos Islands. An abridged version of that thesis was subsequently published in the Oxford Journal of Commonwealth Law.[51]

[55] I am satisfied that Mr Fotherby brings particular knowledge and expertise of the Pitcairn Islands which justify his admission as a legal practitioner. Mr Fotherby's application is granted.

(b) Mr Barugh

[56] Mr Barugh holds a current practising certificate as a barrister and solicitor of the High Court of New Zealand and therefore qualifies for admission on the basis of his

---

50 See para [11] above.

51 William Fotherby, *The Overseas Territories and the British Courts* (2016) 16:2 Oxford University Commonwealth Law Journal 292–322.

right to practise as a legal practitioner in a Commonwealth country. I have found that he is fit to practise in the Pitcairn Islands.[52]

[57] Mr Barugh's expertise lies in property law. He has been involved in the centralised "legal services team" at Land Information New Zealand. In that capacity, he has become familiar with customary law issues and codes such as the Property Law Act 2007 (NZ). Mr Barugh recognises that the Court may be concerned at the prospect of large numbers of practitioners seeking to join the Pitcairn Bar with no real intention of providing services to the islanders. He has undertaken, in his personal capacity, to offer at least 20 hours per week legal services to Pitcairn residents at no cost during any period he is enrolled.

[58] The nature of the land case currently before the Supreme Court has illustrated the types of property disputes that could arise in the future.[53] Not all of the difficulties encountered with the Land Tenure Reform Ordinance of 2000 are likely to be resolved within the current proceeding. In those circumstances, I consider that Mr Barugh will bring a particular skill to the Bar that might well be of benefit to Pitcairners, in the provision of legal services. I grant Mr Barugh's application for admission.

(c) Mr Tam

[59] Mr Tam holds current practising certificates for the Supreme Court of Victoria, the High Court of Australia, the Supreme Court of Norfolk Island and the High Court of New Zealand. He is also admitted to the Hong Kong Bar. As a result of holding current practising certificates in Australia, Norfolk Island and New Zealand, Mr Tam qualifies for admission on the basis of his right to practise as a legal practitioner in a Commonwealth country. I have found that he is fit to practise in the Pitcairn Islands.[54]

[60] Mr Tam says that he has sought admission to the Pitcairn Bar because of "a deep personal, professional and intellectual interest in Pitcairn, the British Overseas Territories and the wider Commonwealth of nations". He has discussed a number of areas in which residents of the Pitcairn Islands may need legal assistance that he would be qualified to provide. Since 2018, Mr Tam has been employed by the Hong Kong office of Ogier, an international law firm that offers services in a number of British Overseas Territories, but notably the British Virgin Islands and Cayman Islands. As

52 See para [11] above.
53 *Christian v Lands Court* [2022] PNSC 1.
54 See para [11] above.

such, Mr Tam has a knowledge of English law that applies to a number of the Territories in which he has had experience that New Zealand practitioners who are currently members of the Pitcairn Bar do not possess.

[61] I am satisfied that Mr Tam brings qualities to the Bar that will enhance the ability of Pitcairn Islanders to access legal services. I grant Mr Tam's application for admission to the Pitcairn Bar.

(d) Ms Charlton

[62] Ms Charlton currently resides in Hong Kong but holds a practising certificate as a solicitor in England and Wales and the British Virgin Islands. As such, she qualifies for admission on the basis of her right to practise as a legal practitioner in a Commonwealth country. I have found that she is fit to practise in the Pitcairn Islands.[55]

[63] Ms Charlton has a particular interest in British Overseas Territories and Pitcairn, in particular. She brings knowledge of English law which will be of benefit to those on Pitcairn if civil cases arise where principles of common law or equity require consideration.

[64] However, Ms Charlton's application is more finely balanced than the others. Her areas of special expertise (focussing on corporate law) is not likely to be of assistance to islanders in the foreseeable future but her knowledge of English law weighs in her favour, as does the gender diversity she will bring to the Bar.

[65] In those circumstances, I am satisfied that Ms Charlton's application for admission to the Pitcairn Bar should be granted.

Orders

[66] For those reasons, I approve each of Mr Fotherby's Mr Barugh's, Mr Tam's and Ms Charlton's applications for admission as a legal practitioner in the Pitcairn Islands. The Registrar may now proceed to complete necessary steps in terms of s 5(2) and (3) of the Ordinance to complete the admission process.

---

55 See para [11] above.

[67] I express my thanks to the candidates for the helpful and comprehensive review of relevant authorities that was provided to me for the purpose of determining the four applications.

_____

Paul Heath
Chief Justice