IN THE PITCAIRN ISLANDS
SUPREME COURT

T 1/2011
(20 counts)

BETWEEN	**THE QUEEN**
AND	**MICHAEL WARREN**

Hearing:	14 to 18, 23, 25, 29 to 31 May 2012
Appearances:	Keiran Raftery for the Crown Tony Ellis for the Applicant
Judgment:	12 October 2012

JUDGMENT OF LOVELL-SMITH J

Solicitors:
Simon J Eisdell Moore, Director of Public Prosecutions, Meredith Connell, DX CP 24003, Auckland, for the Crown
Tony Ellis, Blackstone Chambers, PO Box 24 347, Wellington, for Applicant

Table of Contents

Introduction

[1] The applicant is charged with 20 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 possession of indecent articles.

[2] On 26 May 2010, Pitcairn Island Police executed two search warrants at the home and office of the applicant. The police located over 1,000 images and videos of child pornography on computer equipment in the applicant's bedroom.

[3] On 1 August 2011, after a preliminary hearing, the Magistrate's Court committed the applicant to this Court for trial. The applicant filed notice of a constitutional challenge, and referred to those matters in the joint plea and directions memorandum filed on 29 September 2011.

The course of the hearing

[4] On 7 October 2011, this Court allocated a fixture date of 12-14 December 2011 for various pre-trial issues to be argued.

[5] Orders were made under ss 15E and 15F of the Judicature (Courts) Ordinance that this pre-trial hearing be held at the District Court, Papakura, New Zealand.

[6] The pre-trial hearing on 12 December 2011 was adjourned, due to difficulties with the live video link, until February 2012. As a result of continuing difficulties with the video link at the February hearing, the application was set down for hearing on 14 May 2012.

[7] On 14 May 2012, the live video link was successfully established with only very short breaks in transmission. The applicant was present throughout the hearing sitting in the Pitcairn Island hall. To assist the applicant, a transcript of all submissions was provided to both counsel.

The issues

[8] The applicant appeals his committal to this Court as unlawful and raises challenges under s 25 of the Constitution of Pitcairn and the United Kingdom Bill of Rights 1688.

[9] He appears under protest to jurisdiction as he submits there is no jurisdiction for this Court to hear the matter (or for the Magistrate to remit the case to this Court).

[10] The applicant's challenge is against Pitcairn's legislative and executive arrangements. In relation to the criminal proceedings themselves, he also challenges:

(a) The independence of judicial officers involved in the present case and the institutional bias of the Pitcairn judiciary.
(b) The fact of committal and the procedures adopted by the Magistrate's Court.
(c) The Public Prosecutor's involvement in the setting up of the Pitcairn legal system.
(d) Acting Governor Silva was not lawfully appointed by the United Kingdom Secretary of State.
(e) The Acting Governor's decision to hold the proceedings in New Zealand was wrong.
(f) The applicant has a right of trial by jury.
(g) The search warrants used, and other issues relating to the search warrants.
(h) The applicant was not able to be properly advised by defence counsel following the execution of the search warrants.

Ultimately, the applicant seeks to stay the present proceedings.

[11] The Crown's position is that at this stage of the proceedings, recourse to s 25 of the Constitution of Pitcairn is inappropriate. In any event, the constitutional challenges the applicant has asked the Court to appraise and dismantle the structure of Pitcairn's legal system cannot succeed, however they are formulated.

[12] The Crown also rejects the applicant's arguments that relate to the specific trial issues.

Section 25 of the Constitution of Pitcairn

[13] Section 25 provides:

> **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—
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> (a) to hear and determine any application made by any person in pursuance of subsection (1); and
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> (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.
>
> (4) Without prejudice to the generality of subsection (2), where, in exercise of its powers under that subsection, the Supreme Court determines that one of the provisions of this Part has been breached in relation to any person, it—
>
> (a) may order the award to that person of such damages as the Supreme Court considers just and appropriate; or
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> (b) may direct the court which made the reference to it under subsection (7) ("the referring court") to order the award to that person of such damages as that court considers just and appropriate, within such limits (if any) as the Supreme Court declares.
>
> (5) An award of damages may not be made in pursuance of subsection (4) in respect of the making of any law but such an award may be made in respect of anything done 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.
>
> (6) Subsection (4) is without prejudice to section 7(5).

(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.

(8) If the effect of a provision of this Part is in issue in proceedings before the Supreme Court, the Court of Appeal or Her Majesty in Council, to which the Crown is not a party—

(a) the Attorney General may intervene; and

(b) the presiding judge must not hear and determine the proceedings until satisfied that the Attorney General has received notice of the proceedings and has had sufficient time to decide whether or not to intervene.

(9) Where any question is referred to the Supreme Court in pursuance of subsection (7), the Supreme Court shall give its decision on the question and the referring court shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal to the Court of Appeal or to Her Majesty in Council, in accordance with the decision of the Court of Appeal or, as the case may be, of Her Majesty in Council.

(10) An appeal shall lie as of right to the Court of Appeal from any final determination of any application or question by the Supreme Court under this section, and an appeal shall lie as of right to Her Majesty in Council from the final determination by the Court of Appeal of the appeal in any such case; but no appeal shall lie from a determination by the Supreme Court under this section dismissing an application on the ground that it is frivolous or vexatious.

(11) The Governor may by Ordinance confer on the Supreme Court such powers in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling that Court more effectively to exercise the jurisdiction conferred on it by this section.

(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.

(13) In determining any question which has arisen in connection with the interpretation or application of any of the foregoing provisions of this Part, every court shall take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights;

(b) decision of the European Commission of Human Rights ("the Commission") given in a report adopted under Article 31 of the Convention;

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention;

(d) decision of the Committee of Ministers of the Council of Europe ("the Committee of Ministers") taken under Article 46 of the Convention;

(e) judgment, decision or declaration of a superior court in the United Kingdom on the interpretation or application of the Convention,

whenever made or given, so far as, in the opinion of the court, it is relevant to the proceedings in which that question has arisen.

(14) In subsection (13), references to the Convention are references to it as it has effect for the time being, except that—

(a) the references in subsection (13)(b) and (c) to Articles 31, 26 and 27(2) are references to those Articles as they respectively had effect immediately before the coming into force of the Eleventh Protocol;

(b) the reference in subsection (13)(d) to Article 46 includes a reference to Articles 32 and 54 as they had effect immediately before the coming into force of the Eleventh Protocol; and

(c) the references in subsection (13) to a report or decision of the Commission or a decision of the Committee of Ministers include references to a report or decision made as provided by paragraphs 3, 4 and 6 of Article 5 of the Eleventh Protocol (transitional provisions).

(15) In subsections (13) and (14)—

"the Convention" means the European Convention on Human Rights;

"the Eleventh Protocol" means the protocol to the Convention (restructuring the control machinery established by it) agreed at Strasbourg on 11 May 1994; and

"a superior court in the United Kingdom" means any of the following—

(a) the High Court or the Court of Appeal in England;

(b) the High Court of Justiciary or the Court of Session in Scotland;

(c) the High Court or the Court of Appeal in Northern Ireland;

(d) the House of Lords or the Supreme Court; and

(e) the Judicial Committee of the Privy Council.

[14] The Part referred to in s 25(1) is Part 2 of the Constitution, which protects fundamental rights and freedom of the individual. Similar provisions appear in the constitutions of a number of other former British colonies and present British Overseas Territories. In particular, similar provisions appear in the Constitution of Trinidad and Tobago.

Dual executive and legislative powers in the hands of the Governor

[15] The applicant submits that a creation of the government in Pitcairn, where the Governor is both the executive branch and the legislative branch, is indistinguishable from tyranny and there is in effect no parliament.

[16] The applicant referred to Bradley and Ewing[1].

> **The doctrine of the separation of powers**
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> Within a system of government based on law, there are legislative, executive and judicial functions to be performed; and the primary organs for discharging these functions are respectively the legislature, the executive and the courts. A legal historian has remarked:
>
> > This threefold division of labour, between a legislator, an administrative official, and an independent judge, is a necessary condition for the rule of law in modern society and therefore for democratic government itself.
>
> While the classification of the powers of the state into legislative, executive and judicial powers involves some conceptual difficulties, in a system of government based on law it remains important to distinguish in constitutional structure between the primary functions of law-making; law-executing and law-adjudicating. If these distinctions are abandoned, the concept of law itself can scarcely survive.

[17] The applicant submits that "with respect, not only is there no democratic government on Pitcairn but the very concept of law itself is under threat. The patent failure to recognise and create a governmental system that recognises the well-known principle of the separation of powers is so seriously flawed it undermines the very essence of the concept of law itself".

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[1] A Bradley and K Ewing, *Constitutional and Administrative law* (15th ed, Pearson, Harlow, 2011) at 80.

Right to commence a s 25 constitutional challenge in this proceeding

[18] The applicant submits that various rights derived from English law, and later incorporated into Pitcairn law through s 42(1) of the Pitcairn Constitution, have been breached by the Constitution itself.

[19] Section 36 of the Constitution provides law making powers to the Governor of Pitcairn, or the power to act as the Island's legislature. In the applicant's submission, this power is illegal, irrational and procedurally unfair as it breaches Pitcairn's right of self-government contained in the United Kingdom's Bill of Rights 1688, as well as the rule of law, international human rights treaties, and the Westminster system of government.

[20] The applicant submits that he is, or has been, "detained" as a result of this criminal prosecution.

[21] The applicant contends that the Pitcairn Constitution Order 2010 created nothing more than a dictatorship and absolute monarchy (the Governor being the executive and parliament).

[22] For 400 years, citizens of England (and in Pitcairn since the reception of English law) have had the following rights:

> **Right to petition** – That it is the right of the subjects to petition the King and all commitments and prosecutions for such petitioning are illegal.
>
> **Freedom of election** – That election of members of parliament ought to be free.
>
> **Freedom of speech** – That the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.
>
> **Frequent parliaments** – And that for the redress of all grievances and for the amending, strengthening and preserving of the laws, parliaments ought to be held frequently.

[23] The Bill of Rights 1688 is in force in Pitcairn. The citizens of Pitcairn are equally entitled to frequent parliaments with free elections and free speech within. The applicant referred to *Fitzgerald v Muldoon*[2] as an illustration that the Bill of Rights applies to colonies such as New Zealand and therefore Pitcairn. Wild CJ held:

> It is graphic illustration of the depth of our legal heritage and the strength of our constitutional law that a statute passed by the English Parliament nearly three centuries ago to extirpate the abuses of the Stuart Kings should be available on the other side of the earth to a citizen of this country which was then virtually unknown in Europe and on which no Englishman was to set foot for almost another hundred years. And yet it is not disputed that the Bill of Rights is part of our law. The fact that no modern instance of its application was cited in argument may be due to the fact that it is rarely that a litigant takes up such a cause as the present, or it may be because governments usually follow established constitutional procedures. But it is not a reason for declining to apply the Bill of Rights where it is invoked and a litigant makes out his case.

[24] The applicant referred to the Privy Council decision in *Fuller v Attorney General of Belize,*[3] which held:

> **The constitutional principle of the separation of powers.**
>
> 38. The principle of the separation of powers has progressively become part of the, largely unwritten, constitution of the United Kingdom. Final steps in this progression have been taken by the enactment of the Human Rights Act and the Constitutional Reform Act 2005. Mr Fitzgerald has referred the Board to a number of cases where the Judicial Committee has considered the effect of the separation of powers as entrenched in the so-called Westminster model of written constitutions.
>
> 39. In *Ahnee v Director of Public Prosecutions* [1999] 2AC 294 the issue was whether, under the Constitution of Mauritius the Supreme Court had an inherent power to punish for contempt of court. Giving the judgment of the Board, Lord Steyn at p 302 stressed the importance of the structure of the Constitution of Mauritius, stating that it was on the Westminster model and referring to features that are equally to be found in the Constitution of Belize. At p 303 he set out the significance of this:
>
> > "First, Mauritius is a democratic state constitutionally based on the rule of law. Secondly, subject to its specific provisions, the Constitution entrenches the principle of the separation of powers between the legislature, the executive, and the judiciary. Under the Constitution one branch of government may not trespass upon the province of any other. Thirdly, the Constitution gave to each arm of government such powers as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary. Fourthly, in order to enable the judiciary to discharge its

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2 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 at 622

3 *Fuller v Attorney General of Belize* [2011] UKPC 23

> primary duty to maintain a fair and effective administration of justice, it follows that the judiciary must as an integral part of its constitutional function have the power and the duty to enforce its orders and to protect the administration of justice against contempts which are calculated to undermine it."

> 40. In *Director of Public Prosecutions of Jamaica v Mollison* [2003] UKPC6; [2003] 2 AC 411 the Board held that it was not compatible with the separation of powers, as entrenched in Jamaica's Constitution on the Westminster model, that the Governor General rather than the courts should have the function of determining when a young man convicted of murder should be released. At para 13, in giving the advice of the Board, Lord Bingham of Cornhill said:
>
> > "Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as 'a characteristic feature of democracies': *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 890-891 para 50."
>
> 41. In *State of Mauritius v Khoyratty* [2006] UKPC 13; [2007] 1 AC 80 the Judicial Committee upheld a finding by the Supreme Court of Mauritius that legislation that purported to deprive the court of the power to grant bail in a drugs case was incompatible with the separation of powers and the principle that fundamental rights should be protected by an independent and impartial judiciary.

[25] It is the applicant's submission that fundamental rights as to a parliament need to be protected by the judiciary; to deprive the citizens of such a constitutional organ as parliament is plainly a breach of the separation of powers.

[26] The applicant referred to arts 1 and 25 of the International Covenant on Civil and Political Rights (ICCPR). Article 1 provides:

> 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.
>
> …
>
> 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.

Article 25 provides:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in his country.

[27] In the applicant's submission, the United Nations Human Rights Committee has taken the view there should be a representative democratic government. The applicant refers to the following passage of Raic:[4]

> This view emphasizes the fact that the collective right of internal political self-determination in Article 1, and the individual political rights mentioned in Article 25 of the ICCPR are inextricably bound up with each other.
>
> ...
>
> Article 1 and Article 25 are identical but rather complementary, this view eventually leads to the conclusion that some of the 'details' laid down in Article 25 are *conditio sine qua non* for compliance with the right of internal self-determination, not only under the Covenant – a position to which anyone would most likely subscribe – but also under general international law. The rationale underlying this conclusion is that without providing for all citizens the opportunity to vote and to be elected in periodic elections, there can first be no democracy, and secondly there can be no free choice, the result of which is that there can be no question of a genuine exercise of internal self-determination.

[28] The reference to non-self-governing and trust territories in art 1 of the ICCPR refers to arts 1 and 73 of the United Nations Charter.[5]

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

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4 D Raic, *Statehood and the Law of Self-Determination, Developments in International Law*, vol 43, (Kluwer, The Hague, 2002).

5 Charter of the United Nations (24 October 1945)

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;

Article 73:

DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES

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.

[29] In the applicant's submission, the United Kingdom holds the non-self-governing territory of Pitcairn on a sacred trust to promote the interests of the Islanders, whose interests are paramount, and is required to hold periodic elections by universal suffrage.

[30] The applicant submits that the Governor of Pitcairn is a one-person parliament, who is not elected. Furthermore, Pitcairn's colonial masters never considered the

paramount rights of the Islanders, nor consulted with the Islanders as to the appointment of the Governor.

[31] The applicant submits that it is beyond dispute that the United Kingdom Government is bound by the ICCPR and the United Nations Charter, both treaties to which it has entered into. Hendry and Dickson[6] say:

> The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights have been extended for many years to all populated overseas territories, except Anguilla. The Government of Anguilla has agreed in principle to the extension.

[32] In the applicant's submission, Hendry and Dickson fail to mention the important point that the United Kingdom has not ratified the First Optional Protocol to the ICCPR allowing individual communications (cases) to go to the United Nations Human Rights Committee.

[33] In *Tavita v Minister of Immigration,*[7] the Court held:

> The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution
>
> If and when the matter does fall for decision, an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights, norms, or obligations, the Executive is necessarily free to ignore them.

[34] The applicant submits that the Governor, in her capacity as the legislature, received no instructions from the Secretary of State as to the jurisdiction for this Court, nor was there any urgent necessity that s 43(4) of the Pitcairn Constitution be brought into immediate operation. Therefore, the Governor could not make a law as to where the Court sits. The Governor must follow the provisions of that section and also the

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6 Ian Hendry and Susan Dickson, *British Overseas Territories Law* (Hart Publishing, Oxford, 2011) at 174.

7 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266.

international treaties by which the United Kingdom is bound, that is, the ICCPR and the United Nations Charter.

[35] 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.

[36] The applicant submits therefore that the Governor:

(a) Is not a valid parliament.

(b) Did not consider the ICCPR or United Nations Charter in respect of the paramount interests of the islanders.

(c) Did not follow the manner and form prescribed by the section (if valid – which the applicant denies) as she did not get advice from the Chief Justice (who must also provide that advice after considering the ICCPR and United Nations Charter).

(d) Failed to obtain advice from the Public Defender, as required by s 4(2) of the Public Defender in Criminal Proceedings Ordinance.

(e) Failed to apply natural justice.

[37] Consequently, in the applicant's submission, this hearing and the hearings in the Magistrates Court below were, firstly, unlawfully convened, and secondly, unlawfully convened in New Zealand, and that the committal was therefore unlawful.

[38] In addition, the applicant submits that the European Convention on Human Rights (ECHR) is in practice in effect, and Pitcairn Islanders have the right to enjoy these democratic rights.

[39] Part 2 of the Constitution is in similar terms to the ECHR, and the Constitution's s 25(13)(a) thus requires consideration of decisions of the ECHR.

Additionally, the ECHR is a treaty by which the United Kingdom is bound and therefore it is applicable in Pitcairn.

[40] Part 2 of the Constitution contains a number of references to the fact that an essential ingredient of a democratic society is the right to political participation:

> **Right to a fair trial**
>
> **8.**—(1) ... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society …
>
> **Right to respect for private and family life**
>
> **11.**—(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society …
>
> **Freedom of thought, conscience and religion**
>
> **12.**—(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society …
>
> **Freedom of expression**
>
> **13.**—(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society …
>
> **Freedom of assembly and association**
>
> **14.**—(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society …
>
> **Right to education**
>
> **17.**—(3) Nothing contained in or done under the authority of any law shall be held to breach subsection (2) to the extent that the law in question is necessary in a democratic society for the purpose of making provision requiring private schools …

[41] The paramount interests of the Islanders were not taken into consideration in:

(i) Creating a dictatorship;

(ii) Appointing a Governor (executive branch);

(iii) Appointing the Governor as parliament;

(iv) Appointing the judicial branch;

(v) Appointing where courts sit.

[42] For these reasons, the applicant submits that those parts of the Constitution not creating a democratic society must be struck down or declared ineffective.

[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".

Status of the Constitution of Pitcairn and the United Kingdom Bill of Rights 1688

[44] The applicant submits, when approaching the constitutional issues he has raised, that the Constitution is the supreme law of the land and automatically overrides local legislation.

[45] In the applicant's submission, a number of constitutional challenges at first sight might not appear to fit into Part 2 of the Constitution, such as the appointment of the Governor as the legislative branch or the appointment of an Acting Governor, which are in Part 3; however, they are inextricably linked with the right to a fair trial by an independent tribunal established by law, as set out in s 8 of the Constitution.

> **Right to a fair trial**
>
> **8.**—(1) In the determination of his or her civil rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> (3) Everyone charged with a criminal offence has the following minimum rights—

> (a) to be informed promptly, in a language which he or she understands and in detail, of the nature and cause of the accusation against him or her;
> (b) to have adequate time and facilities for the preparation of his or her defence;
> (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;
> (d) to examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
> (e) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court.

[46] The applicant submits that a court that sits in New Zealand, or any court which hears this case, is not established by law. Nor is a trial able to be held in New Zealand. Further, that the Governor acted unlawfully by investigating and obtaining evidence in breach of the Pitcairn Trials Act 2002 (NZ).

[47] The Magistrates Court wrongly declined to send these issues to this Court for what it considered want of jurisdiction. However, the Supreme Court has original jurisdiction.

[48] The applicant submits that if no constitutional challenge were permissible, and in the absence of a judicial review system, it would give truth to Lord Acton's famous dictum: power tends to corrupt and absolute power corrupts absolutely – as, indeed, the Governor would be beyond review. He submits that there is a right to challenge under the Bill of Rights 1688, the ICCPR, and arguably, the ECHR.

Extraterritorial jurisdiction

[49] The applicant submits that the Constitution of Pitcairn does not provide for any general extraterritorial extension. There are some specific extensions. He describes the constitutional provisions as "somewhat abstruse".

[50] The starting point is the Constitution, which reads:

> 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.

[51] Section 36(1) confers a territorial restriction on Pitcairn, which unlike the United Kingdom or New Zealand Governments, does not have full parliamentary sovereignty (or indeed any parliament).

[52] The applicant refers to Professor Philip Joseph:[8]

> In 1973 Parliament removed an extraterritorial limitation on its prima grant of law-making powers, and in 1986 it revoked the operation of the original 1852 Constitution Act but declared the continuance of the legislative powers it conferred ... Dicta of the Supreme Court (now High Court) prompted the 1973 development. In R v Fineberg Moller J cast doubt on Parliament's extraterritorial competence.
>
> A Special Law Reform Committee on Admiralty Jurisdiction reported that, on the authority of Fineberg the words "peace, order, and good government of New Zealand" in s 53 imposes a legislative limitation on statutes having extended extraterritorial operation. The committee inserted a clause in its draft Admiralty Bill to confirm the jurisdiction of the Admiralty Court, "notwithstanding any limitation express or implied in Section 53 of the Constitution Act 1852" ...
>
> The 1973 amendment Act repealed s 53 of the principal Act and substituted, for United Kingdom grant, a locally-enacted principle of legislative competence. Section 2 read:
>
> > The General Assembly shall have full power to make laws having effect in, or in respect of, New Zealand or any part thereof and laws having effect outside New Zealand.

[53] In the applicant's submission, Pitcairn is undemocratic with no free election of members of parliament of Pitcairn, which has only one appointed "member", the Governor, responsible to no Island electoral body or persons.

[54] For these reasons, the Order in Council setting up the Constitution is *ultra vires* the Bill of Rights 1688, in respect of the one-person legislature, and the provision of a one-person legislature must be declared unlawful, as it has effectively suspended the Bill of Rights 1688 itself.

[55] The applicant submits that the consequence of no elected parliament means the Constitution itself is internally inconsistent. Although it attempts to follow the standard separation of powers model, with separate executive, legislative and judicial branches,

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8 P A Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 470-471.

this is pure illusion, as there is no separation of powers. Fundamentally, there is no right to free election of at least one legislative chamber as "the executive and legislative branches are merged, and appointed by colonial masters".

[56] Furthermore, the rights inherent in a democracy are breached, including freedom of expression, assembly and movement

[57] The Bill of Rights 1688 applies to Pitcairn by virtue of the English laws in force by the provision in the Constitution:

> **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.

[58] When passing the Order in Council, no express repeal of the Bill of Rights 1688 was made.

[59] In the applicant's submission, the non-sitting of a parliament frequently prevents grievances being aired. The Constitution, by creating a non-elected parliament, clearly breaches the Bill of Rights 1688. Equally, the right of petition is very severely curtailed with no parliament sitting as required, which aggravates the breach.

[60] The applicant asks that those parts of the Constitution that offend should be declared unlawful; in particular, the appointment of the Governor. He submits that the legislature "is illegal, irrational and was procedurally unfair, as a breach of the Bill of Rights 1688, the Rule of Law, the fundamental underlying premises of international human rights treaties, and the Westminster system of Government".

[61] The applicant submits that it is undeniable that the Constitution envisages Pitcairn being a democratic society. He contends that "it is at best a benign dictatorship, or remnant from a feudal era with a supreme monarchy, with the clanking of mediaeval chains of the ghosts of the past".

The Crown's submissions

[62] The procedure in s 25 of the Constitution should not be a substitute for the ordinary procedures in place for an accused to raise and determine issues in a criminal trial. The Crown referred to *Jaroo v Attorney General of Trinidad and Tobago*[9] as authority for the principle that where there is another common law procedure or statutory procedure that an accused may more "conveniently" invoke, then a constitutional challenge under s 25 will be inappropriate. In *Jaroo* the Board noted that both practical and substantive justice is best served if issues that require factual determination are determined as soon as possible after the event.

[63] The Crown referred to *Durity v Attorney General (Trinidad and Tobago)*[10]. In that case, the Privy Council held that the "choice of remedy is not simply a matter for the individual, to decide upon as and when he pleases".

[64] Lord Diplock in *Harrikissoon v Attorney General of Trinidad and Tobago*[11] said that the value of the important safeguard that s 25 provides would be debased if it were misused as a general substitute for the normal procedures of a criminal trial.

[65] Sections 6 and 14 of the Constitution of Trinidad and Tobago allow for applications to the High Court for redress where a perceived breach of rights has occurred. Those sections read:

> SAVINGS FOR EXISTING LAW
>
> **6.-** 1. Nothing in sections 4 and 5 shall invalidate
>
> a. an existing law;

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9 *Jaroo v Attorney General of Trinidad and Tobago* [2002] UKPC 5
10 *Durity v Attorney General (Trinidad and Tobago)* [2008] UKPC 59 at 28
11 *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265

b. an enactment that repeals and re-enacts an existing law without alteration;

or

c. an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.

2. Where an enactment repeals and re-enacts with modifications an existing law and is held to derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right then, subject to sections 13 and 54, the provisions of the existing law shall be substituted for such of the provisions of the enactment as are held to derogate from the fundamental right in a manner in which or to an extent to which the existing law did not previously derogate from that right.

3. In this section-

"alters" in relation to an existing law, includes repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it;

"existing law" means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitutions, and includes any enactment referred to in subsection (1);

"right" includes freedom.

ENFORCEMENT OF THE PROTECTIVE PROVISIONS

14.- 1. For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.

2. The High 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 which is referred to it in pursuance of subsection (4),

and may, subject to subsection (3), make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

3. The State Liability and Proceedings Act, 1966 shall have effect for the purpose of any proceedings under this section.

> 4. Where in any proceedings in any court other than the High Court or the Court of Appeal any question arises as to the contravention of any of the provisions of this Chapter the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless in his opinion the raising of the question is merely frivolous or vexatious.
>
> 5. Any person aggrieved by any determination of the High Court under this section may appeal therefrom to the Court of Appeal and shall be entitled as of right to a stay of execution of the order and may in the discretion of the Court be granted bail.
>
> 6. Nothing in this section shall limit the power of Parliament to confer on the High Court or the Court of Appeal such powers as Parliament may think fit in relation to the exercise by the High Court or the Court of Appeal, as the case may be, of its jurisdiction in respect of the matters arising under this Chapter.

[66] The Crown submits that the principles of *Harrikissoon* prevent the applicant's attempts to invoke s 25(1) of the Pitcairn Constitution. The facts in that case were that Mr Harrikissoon was transferred by the Teaching Service Commission from his post, to which he objected after the fact. He commenced proceedings in the High Court using s 6(1) of the Constitution of Trinidad and Tobago, on the basis that the following rights were breached:

> (a) The right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.
>
> (b) The right of the individual to equality before the law and the protection of the law.

The Privy Council considered these grounds "manifestly untenable".

[67] Lord Diplock delivered the Board's judgment. He referred to a number of provisions in the Public Service Commission Regulations 1966 which were applicable to Mr Harrikissoon's transfer. These Regulations governed the manner that the Teaching Service Commission could transfer a teacher, in addition to the dispute resolution processes available to a teacher who objected to such a transfer. The Board

found Mr Harrikissoon should have used these procedures, rather than the review process of the Constitution. In the words of Lord Diplock,[12] the Regulations:

> ... define the legal rights enjoyed by the appellant in relation to his transfer from one post to another in the Teaching Service. It is in the exercise of these rights that he is entitled to the protection of the law.

[68] The Privy Council concluded that Mr Harrikissoon should not have commenced proceedings in the High Court using the Constitution. Lord Diplock said:[13]

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

[69] The Crown submits that the applicant has contravened *Harrikissoon's* principles by using s 25(1) of the Pitcairn Constitution, even though there are more adequate means of redress available to him. The Crown further criticises the use of s 25(1) in light of Lord Diplock's view that misuse of a Constitution's safeguard would devalue it. The Crown's criticisms also focus on the applicant's attempts to do so in the context of this criminal proceeding. In any event, in the Crown's submission, the applicant's challenges would have no merit even if brought to the Court at a more appropriate time.

[70] The Privy Council authorities cited by counsel all deal with the *Harrikissoon* principle. The constitutional challenges in these Privy Council decisions were raised independently of the proceedings that were alleged to have breached their constitutional rights. As a result, damages were sought by the applicant, not a stay of the proceedings.

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12 Ibid, above n 11 at p 3.
13 Ibid, above n 11 at p 1.

[71] The Privy Council in *Chokolingo v Attorney-General of Trinidad and Tobago,*[14] dealt with a s 6 constitutional motion from a news editor charged by a local Law Society with contempt of court. He had published a newspaper story which was said to have attacked the probity of the judiciary of Trinidad and Tobago. He was committed and sentenced, and chose not to appeal. Years later, Mr Chokolingo invoked s 6 of the Constitution of Trinidad and Tobago by reason that the Judge had erred in law by committing and sentencing him. The editor argued that his constitutional rights were breached, namely:

(a) The right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.

(b) Freedom of thought and expression.

(c) Freedom of the press.

[72] The High Court found that the Judge could have committed a minor procedural error which nevertheless did not breach any rights. The applicant then argued before the Privy Council that if he could persuade them that the committing Judge had "made an error in substantive law", this would entitle him to redress using s 6 for "his having been imprisoned by the State for exercising his constitutional rights of freedom of expression and freedom of the press". The Board held:[15]

> ... there is no difference in principle behind this kind of error and a misinterpretation by a judge, in the course of an ordinary criminal trial, of the words of the Act of Parliament creating the offence with which the accused is charged. If the former is open to collateral attack by application to the High Court under section 6(1) of the Constitution so must the latter be.
>
> Acceptance of the appellant's argument would have the consequence that in every criminal case, in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under section 6(1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative since the right to apply for redress under section 6(1) is stated to be "without prejudice to any other action with respect to the same matter which is lawfully available". The convicted person having exercised

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14 *Chokolingo v Attorney-General of Trinidad and Tobago* [1980] UKPC 27

15 Ibid, above n 14 at p 4.

> unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld, by making an application for redress under section 6(1) to a court of co-ordinate jurisdiction, the High Court. To give to Chapter I of the Constitution an interpretation which would lead to this result would, in their Lordships' view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine.

[73] Implicit in Lord Diplock's dicta is his application of the *Harrikissoon* principle that constitutional remedies under s 6 of the Constitution of Trinidad and Tobago are prohibited where an alternative remedy is available to the applicant.

[74] Lord Diplock's view was that constitutional remedies using ss 6 and 14 of the Constitution of Trinidad and Tobago are inappropriate where criminal proceedings form the backdrop of any alleged breach of constitutional rights, as criminal procedure generally provides an accused with rights of appeal. Allowing constitutional remedies in this context would compromise the administration of justice by encroaching on the finality of litigation:[16]

> It is fundamental to the administration of justice under a constitution which claims to enshrine the rule of law (Preamble, paras. (d) and (e)) that if between the parties to the litigation the decision of that court is final (either because there is no right of appeal to a higher court or because neither party has availed himself of an existing right of appeal), the relevant law as interpreted by the judge in reaching the court's decision *is* the "law" so far as the entitlement of the parties to "due process of law" under section I(a) and the "protection of the law" under section 1(b) are concerned.

[75] The Crown submits that the applicant is able to make a constitutional challenge, but only after the applicant's criminal appeal rights have been exhausted. Further, that *Harrikissoon* does not permanently preclude such challenges. This argument was implicitly endorsed by the Privy Council in their decisions. Constitutional challenges could not be laid where more natural alternative remedies were available at the time the challenge was made. In *Chokolingo* for instance, the fact that the right to appeal had become stale was irrelevant to the Privy Council as this right still existed at the time the constitutional challenge was made.

[76] The Privy Council in *Jaroo* considered the *Harrikissoon* principle in relation to constitutional challenges using s 14(1) of the Constitution of Trinidad and Tobago. The

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[16] Ibid, above n 14 at p 4.

applicant's motor vehicle had been suspected of being stolen and had been seized by the authorities. Repeated requests for its return were ignored and the applicant engaged the constitution procedures of s 14(1) for breach of his constitutional rights relating to:

(a) The right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law.

(b) The right of the individual to equality before the law and the protection of the law.

[77] The Privy Council emphasised that the "originating motion procedure under section 14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to fact". The Privy Council held:[17]

> Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it.

[78] The applicant had alternative remedies available to him, specifically his right under the common law to require delivery of his vehicle in detinue. His motion was rejected by the Board.

[79] The Privy Council decision in *Durity* clearly distinguishes between constitutional challenges under ss 6(1) and 14. In that case, a senior magistrate was suspended by the Judicial and Legal Services Commission for alleged misconduct. Many months elapsed before the Commission referred the matter to an investigator. The applicant objected to the way the Commission handled the investigation, particularly because he believed the charges laid against him were misconceived and the delay of 33 months was unfair. The constitutional rights he was concerned with included:

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[17] Ibid, above n 9 at 39.

(i) the right to the protection of the law;

(ii) the right to a fair hearing; and

(iii) the right to procedural safeguards.

[80] The Commission referred to *Harrikissoon* and objected to his application, arguing that the applicant always had access to the courts to challenge their decision to suspend and investigate by way of judicial review, something he did later on – albeit unsuccessfully.

[81] In deciding whether *Harrikissoon* could apply, the Privy Council examined whether judicial review proceedings could have afforded adequate relief to the applicant, separating out the issues of suspension and delay in investigating.

[82] The Privy Council decided that the decision to constitutionally challenge the suspension issue was wrong, and *Harrikissoon* applied. Judicial review of the decision to suspend was always available and should have been used instead. However, on the second issue, the Privy Council held that the applicant's constitutional right to natural justice demanded fairness in the investigation.[18] Fairness included having the allegation investigated and determined as quickly as possible, especially as the judicial officer had been suspended. The power to suspend was abused as the suspension was allowed to continue for an "unreasonably and unnecessarily long period". The Privy Council found that *Harrikissoon* did not apply because, importantly, judicial review of cases of delay was "an uncertain remedy". The Privy Council cited the Court of Appeal's decision in the same proceeding:[19]

> ... it must be open to question whether it could have afforded adequate relief for a past and irreversible event such as the allegedly unlawful continuation of a suspension.

[83] The Privy Council found that judicial review was not an adequate remedy for issues of delay, and therefore no alternative remedies were available to the applicant at the time he lodged his s 14(1) constitutional challenge.

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[18] Citing *Rees v Crane* [1994] 2 AC 173.

[19] *Durity v Attorney-General of Trinidad and Tobago* [2003] 1 AC 405 at [39].

[84] In relation to the issue of damages, the Privy Council noted[20] that the "purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right, not to punish the executive". The retrospective nature of relief that damages provide is a further indication of when a constitutional challenge should be lodged, that is, after the initial proceeding has concluded.

Conclusion

[85] In my view, the application of s 25 of the Pitcairn Constitution is inappropriate at this stage of this particular criminal proceeding. As the Crown has highlighted, the multitude of rights raised by the applicant have been formulated so that they are all reconcilable with his fair trial rights. The application of *Harrikissoon* makes the applicant's s 25 challenge an abuse of process, as the completion of the criminal proceeding and the exercise of any criminal appeal rights are the more natural relief available to the applicant at this time.

[86] Furthermore, as the Board noted in *Jaroo*, the "originating motion procedure under section 14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to fact".[21]

[87] At the pre-trial stage of this proceeding, with the applicant's trial yet to commence, it is inevitable that factual disputes that might support or negate his fair trial concerns will arise. The *Jaroo* principle confirms that this is the wrong venue to hear these s 25 challenges. Dealing with constitutional issues in this venue will unnecessarily complicate the criminal proceeding and may affect the applicant's right to a fair trial, given the inevitable factual disputes that will arise during the actual trial.

[88] The applicant's challenge under s 25 has been commenced before the criminal proceeding has finished. As the Crown has submitted, concerns for the applicant's fair trial rights are entirely speculative at this time. The practical benefit of the *Jaroo* principle is hindsight. A s 25 challenge after the entire proceeding is completed

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20 Ibid, above n 10 at 34.
21 Ibid, above n 9 at 36.

(including appeal) will allow the use of specific facts as evidence of breaches of the applicant's rights.

[89] Part 2 of the Pitcairn Constitution contains the constitutional rights that s 25 was envisioned to protect. The Privy Council judgments referred to the rights in dispute as being all rights prescribed in the Constitution of Trinidad and Tobago.[22] The applicant in *Harrikissoon* had difficulties reconciling his rights that were actually breached with the rights present in the Constitution of Trinidad and Tobago. Mr Harrikissoon's right not to be compelled to leave his teaching job against his will could not be reconciled with any of the rights in the Constitution of Trinidad and Tobago. This was one reason why his application was rejected by Lord Diplock.

[90] The applicant contends that by virtue of s 42(1) of the Pitcairn Constitution, all English law that is not inconsistent with Pitcairn law is incorporated into Pitcairn law. He submits that the Bill of Rights 1688, the ECHR, the Universal Declaration of Human Rights (UDHR) and the Human Rights Act 1998 (UK) are all part of Pitcairn law. However, the strict interpretation of s 25 prevents them from being used in a s 25 application. The rights to democracy cannot be used in a s 25 application, in particular:

(i) the right to frequent parliaments;

(ii) rights of expression;

(iii) rights of assembly;

(iv) rights to petition;

(v) rights to self-determination.

[91] I accept the Crown's submission that the relationship between these constitutional concerns and the applicant's right to a fair trial in s 8 of the Pitcairn Constitution is too remote from this criminal proceeding for the possession of child pornography and have no discernible connection to this proceeding. Furthermore, they unjustifiably challenge the United Kingdom legislature's sovereignty.

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22 *Durity, Jaroo, Chokolingo, Harrikissoon.*

Further challenges

[92] The applicant acknowledges that a number of challenges "at first sight might not appear to fit into Part 2 of the Constitution", but he seeks to overcome this by arguing that all of the issues raised necessarily engage the right to a fair trial.

[93] The following issues have been raised by the applicant as "constitutional challenges".

A. Governor's decision to hear proceeding in New Zealand wrong

[94] The applicant relies on ss 36 and 38 of the Pitcairn Constitution to challenge the Governor's decision to exercise her powers under s 43(4) of the Pitcairn Constitution to hear this pre-trial proceeding in New Zealand. The provisions read:

> **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.
>
> **Certain laws not to be made without instructions**
>
> **38.** The Governor shall not, without having previously obtained instructions through a Secretary of State, make any law within any of the following classes, unless such law contains a clause suspending its operation until the signification of Her Majesty's pleasure on it—
>
> (a) any law whereby any grant of land or money, or other donation or gratuity, may be made to the Governor;
>
> (b) any law affecting the currency of Pitcairn or relating to the issue of banknotes;
>
> (c) any law the provisions of which shall appear to the Governor to be inconsistent with obligations imposed on the United Kingdom by treaty;

(d) any law of an extraordinary nature and importance whereby Her Majesty's prerogative, or the rights or property of Her subjects not residing in Pitcairn, or the trade, transport or communications of any territory under Her Majesty's sovereignty may be prejudiced;

(e) any law containing provisions which have been disallowed by Her Majesty;

but the Governor may, without such instructions and although the law contains no such suspending clause, enact any such law (except a law of the class referred to in paragraph (c)) if the Governor is satisfied that an urgent necessity exists requiring that law to be brought into immediate operation; and in any such case the Governor shall forthwith transmit a copy of the law to a Secretary of State together with his or her reasons for so enacting it.

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.

[95] The location issue was determined by the Governor pursuant to s 43(4). Section 15E of the Judicature (Courts) Ordinance also allows the Supreme Court to determine its place of sitting, subject to the limitation that it is "in the interests of justice". Furthermore, as the Crown has highlighted, to date in this matter it is only the pre-trial proceeding that has been heard in New Zealand.

[96] Section 15E of the Judicature (Courts) Ordinance provides:

> **Place of sitting of Supreme Court and Magistrate's Court**
>
> **15E.**—(1) A judge of the Supreme Court or a magistrate may make an order that any proceeding, or any step in any proceeding, be held—
>
> (a) in the Islands; or
>
> (b) in the United Kingdom; or
>
> (c) in New Zealand.
>
> (2) An order under this section may be made—
>
> (a) on the application of any party or intended party to the proceeding, or
>
> (b) of the Court's own motion.
>
> and may be made either before or after the commencement of a proceeding.
>
> (3) In determining whether to make an order under this section, the Court must take into account:
>
> (a) the nature of the proposed step or hearing; and
>
> (b) the interests of justice; and
>
> (c) the interest in the efficient disposal of Court business.

[97] The Crown submits that counsel for either party is not entitled to give input when executive policy decisions are in issue and relies on *Christian v R (No 2)*[23] as authority on this point:

> [146] An associated submission was to the effect that there was unfairness arising from the fact that the Public Defender had been appointed later than the Public Prosecutor. The submission was that this had deprived the Public Defender of the opportunity to become involved at a stage when there was debate within Foreign and Commonwealth Office circles about whether there should be trials or whether an amnesty should be allowed. The Public Defender's submission was that as he had not been appointed, he was not available to attempt to tip the balance in favour of the appellants during these deliberations.
>
> [147] The Supreme Court concluded that there was a sense of unreality about this part of the argument because it thought it unlikely that counsel would have been admitted to that debate. In submissions before this Court, Ms Gordon for the Crown pointed out that this issue was resolved very rapidly over a period of about two weeks. Again, we are in agreement with the finding of the Supreme Court on this issue. It would be unusual for counsel for accused persons to be invited to be involved in what was a policy discussion conducted at government level.

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23 *Christian v R (No 2)* [2006] PNCA 1

Conclusion

[98] The applicant contends that his fair trial rights under s 8 of the Pitcairn Constitution have been infringed. In my view, the applicant has been given the opportunity to present his case in this proceeding. It cannot be said that the use of the video link has compromised his rights, and the applicant was given opportunities to consult his counsel before this proceeding.

[99] Sections 36(1) and 38 of the Pitcairn Constitution have no relevance to this issue as the Governor's decision cannot be construed as "making a law" in this situation.

[100] I accept there are significant practical benefits in having this matter heard in New Zealand. The judiciary and counsel are situated here. The court infrastructure here is considerably more advanced than in Pitcairn. Given the predominantly technical and procedural arguments that are involved in the present hearing, and that the fixture was set down and allocated judicial resources for some time, New Zealand is the most appropriate forum for the present step in the proceedings. The applicant could have but did not choose to exercise his right under s 15E(2)(a) of the Judicature (Courts) Ordinance to have this proceeding heard in Pitcairn.

[101] In conclusion, this issue cannot form the basis of a s 25 challenge as it does not relate to the applicant's fair trial rights under s 8, nor does it relate to any other rights in the Pitcairn Constitution.

B. Pitcairn judiciary has institutional bias

[102] The applicant has expressed concerns about the gender and nationality bias of the Pitcairn judiciary, without identifying the detriment he has suffered.

[103] The Crown referred to the New Zealand Court of Appeal in *Collier v Attorney General.*[24] In rejecting this type of submission, the Court said:

> [23] … the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 observed at para 25:

[24] *Collier v Attorney General* [2002] NZAR 257 (CA)

> It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances ...
>
> [24] To invoke membership of any association listed in the questions as a sufficient basis for disqualifying a Judge from sitting would also be inconsistent with the unlawful discrimination provisions of the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990.

[104] The Crown submits that whatever the applicant's argument is on this point, he faces a considerable challenge to overcome the case law.

[105] In my view, the applicant's submission is without merit. It is highly unlikely that the basis for the applicant's concerns would allow him any chance of success.

C. The Public Prosecutor was appointed before the Public Defender

[106] In the applicant's submission, his fair trial rights under s 8 of the Pitcairn Constitution are in issue as the Public Prosecutor was appointed before the Public Defender. In *Christian v R (No 2)*, this issue has already been considered and found to have no merit. The principle is also applicable in this case.

D. The Island Magistrate is not independent

[107] With regard to the independence of the Island Magistrate, while it can be said that he had "apparent bias" as he was the Deputy Mayor and therefore may have an incentive for the applicant to be prosecuted and resign, the applicant has not shown how this possible bias influenced the Island Magistrate's decision to issue the search warrants.

[108] In any event, the applicant remained Mayor after the warrants were issued. In a tiny island like Pitcairn, from which there are only a handful of adults to perform public

duties, issues such as apparent bias are inevitable. There is no merit in the applicant's submission.

[109] Section 25 cannot be used as there is no breach of s 8 of the Pitcairn Constitution or of any other Pitcairn Constitution rights.

E. The Governor was not lawfully appointed

[110] The applicant submits that Acting Governor Silva was not validly appointed, as she was appointed by a person with no power to do so and because her appointment was not published on Pitcairn.

[111] The Crown rejects this contention. Firstly, it notes that Andrew Allen was an official in the employment of a Secretary of State – a senior British Minister – and explicitly acted in that Minister's name when appointing Governor Silva. Notification was not required.

[112] Section 28 of the Pitcairn Constitution provides:

> **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.

[113] Nowhere in this provision does it require that the residents of Pitcairn receive notification of Governor Silva's appointment.

[114] I do not consider Governor Silva's appointment was unlawful. According to Wade and Forsyth:[25]

> When powers are conferred upon ministers who have charge of large departments, it is obvious that they will often not be exercised by the minister in person. Parliament is aware of this, and ministerial powers are therefore taken to be exercisable by officials of the minister's department acting in his name and in the customary way.

[115] However, as the appointment involved decision makers based in the United Kingdom (Her Majesty the Queen and the Secretary of State), the appropriate jurisdiction for these matters is the United Kingdom.

F. Summary Offences Ordinance bars more serious charges laid under the Criminal Justice Act

[116] The principle from *Christian and Others v The Queen*[26] that all English laws are incorporated into Pitcairn law, subject to local circumstances, applies here:

> 72. It appears too that many of the offences of which the appellants were convicted under the 1956 Act could have been charged against them under the Justice Ordinance 1966, although the sentences that could have been imposed would of course have been much more lenient and questions would have arisen as to whether the prosecutions were out of time.
>
> …
>
> 75. … One can infer that the decision to bring these prosecutions under the 1956 Act was reached out of a desire to deal even-handedly with all the offenders, and to root out the cultural trait once and for all by seeking convictions under legislation that would enable sentences to be imposed that gave full weight to the gravity of the crimes that had been committed.
>
> …
>
> 78. … 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,[27] 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

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25 Wade and Forsyth, *Administrative Law* (9th ed, OUP, Oxford, 2004) at 320.

26 *Christian and Others v The Queen* [2006] UKPC 47.

27 Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966).

> Pitcairn or in England which require the provisions of either section 1 or section 14 to be qualified in any way.

[117] Like the Sexual Offences Act (in the Christian proceedings), the Criminal Justice Act 1988 is a public general Act of the United Kingdom, and therefore it should be regarded as fully incorporated into local law under s 42(1) of the Pitcairn Constitution.

[118] Lastly, nothing precludes the Crown from laying indictable charges where summary charges are also available. The Crown's ability to lay its charges indictably would depend on whether the facts of the case match the legal elements of the offence under s 160 of the Criminal Justice Act.

[119] The applicant's submission is without merit. Further, s 25 cannot be used as there has been no breach of the applicant's rights under the Pitcairn Constitution.

G. Applicant is entitled to trial by jury

[120] The applicant submits that s 9 of the Judicature (Courts) Ordinance is a breach of his rights to be tried by a jury. He challenges this provision through s 25 of the Pitcairn Constitution. The relevant portion of s 9 reads:

> **Mode of trial**
>
> **9.**—(1) Trials before the Supreme Court in its civil or criminal jurisdiction shall be by a judge alone, provided that the Court may, if it thinks it expedient and practicable so to do, sit with assessors.

[121] This argument raises the same issue that the Pitcairn Supreme Court in *R v Seven Named Accused*[28] considered when it agreed that art 6 of the ECHR did not require a trial by jury. The courts were said to be bound by the ordinances properly legislated, lawfully providing for trial without jury.

[122] Further, the applicant has not been discriminated against unfairly on the basis of his national or social origin.

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[28] *R v Seven Named Accused* [2004] PNSC 1 at [196]–[206]

[123] There is no right to a jury trial in Part 2 of the Pitcairn Constitution; therefore it cannot form the basis of a s 25 challenge. The applicant's rights to a fair trial are not in peril, nor are any other rights under the Pitcairn Constitution.

H. Magistrate's Court erred in committing the applicant to the Supreme Court for trial

[124] The applicant argues that the Magistrate's Court failed to properly commit him for trial, as it did not consider whether prosecution witnesses should be bound by recognizance and because the Magistrate failed to advise him of the right under s 65C of the Justice Ordinance to object to written evidence at trial without further proof. The relevant sections read:

> **Right to object to written evidence at trial without further proof**
>
> **65C.**—(1) A person committed by the Magistrate's Court for trial shall have the right to object, by written notification to the prosecutor and the Supreme Court within 14 days of being committed, unless the Court in its discretion permits such an objection to be made outside that period, to a statement or deposition being read as evidence at the trial without oral evidence being given by the person who made the statement or deposition and without the opportunity to cross-examine that person.
>
> (2) Upon making a decision to commit the accused for trial, the Magistrate shall remind the accused in open court of the right to object conferred on him or her by subsection (1) of this section.
>
> **Procedure on committal for trial**
>
> **66.**—(1) Upon committing any accused person for trial before the Supreme Court, the Court shall, until the trial, either admit him or her to bail or remand him or her in custody and in such case the warrant of the Magistrate's Court shall be sufficient authority to the officer in charge of any prison appointed for the custody of prisoners committed for trial.
>
> (2) The Court shall bind by recognizance with or without sureties, as it considers necessary, every witness called on behalf of the prosecution to appear at the trial and to give evidence and also to appear and to give evidence if required at any further examination concerning the charge which may be held by direction of the Public Prosecutor.
>
> (3) If any person required to enter into a recognizance under the provisions of the last preceding subsection refuses to enter into the same, the Court may admit that person to prison until after the trial unless, in the meantime, he or she enters into such recognizance; but, if afterwards, from want of sufficient evidence or any other cause, the accused person is discharged, the Court shall order that any person so imprisoned shall also be discharged.

> (4) The Court shall, upon the application of the accused person (but not otherwise), take steps described in subsections (2) and (3) to secure the attendance of any witnesses called on behalf of the accused person at the trial to give evidence and to give evidence if required at any further examination directed by the Public Prosecutor and shall take the names and addresses of persons whom the accused person wishes to give evidence at the trial, other than those whose evidence has been recorded at the committal proceedings, so that they may be summoned to appear at the trial.

[125] The Crown submits that any oversight by the Magistrate can be dealt with by s 16 of the Judicature (Courts) Ordinance. If any error had been committed, it would not have resulted in a "substantial miscarriage of Justice":

> **Documents and proceedings not to be held invalid except where there has been a substantial miscarriage of justice**
>
> **16.**—(1) No information, charge, summons, conviction, sentence, order, bond, warrant or other document and no process or proceeding shall be quashed, set aside or held invalid by any Court or quasi-judicial authority by reason only of any defect, irregularity, omission or want of form unless the Court or authority is satisfied that there has been a substantial miscarriage of justice.

[126] I am satisfied that even if there are in fact errors or some oversight by the Magistrate's Court, no "substantial miscarriage of justice" has resulted. The applicant has not indicated which prosecution witness he wished to give oral evidence and to cross-examine under s 65C(2). Any miscarriage of justice is merely speculative.

[127] Furthermore, on the issues of the Magistrate's failure to obtain "recognizance" from prosecution witnesses, any miscarriage of justice is also speculative, as the applicant has not provided any evidence that any of the prosecution witnesses have the risk of repudiating their obligations to give evidence in court for the trial.

[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.

[129] Section 25 cannot be used as there is no breach of s 8 or of any other Pitcairn Constitution rights.

I. The Public Prosecutor is not independent and has corrupted this proceeding

[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.

[133] The applicant also argues that a fair trial cannot be achieved because of a lack of Pitcairn specific prosecution guidelines. The Crown refers to the Prosecution Guidelines of New Zealand as follows:

(a) Evidential sufficiency; and

(b) Public interest.

[134] In the Crown's submission, this essentially mirrors the guidelines set out in the United Kingdom's Code for Crown Prosecutors (CCP),[29] known as the "Full Code Test". The evidential test of the CCP requires prosecutors to be "satisfied that there is sufficient evidence to provide a realistic prospect of conviction". The "evidential test" in the New Zealand Crown Law Prosecution Guidelines requires that the "evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction".[30]

[135] The two elements of the Full Code Test are:

(a) Evidential sufficiency:

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[29] Crown Prosecution Service *The Code for Crown Prosecutors* (February 2010) at p 7.
[30] Crown Law Prosecution Guidelines at p 7.

(i) Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction.

(ii) A "realistic prospect of conviction" is an objective test based solely upon the prosecutor's assessment of the evidence and any information that he or she has about the defence that might be put forward by the suspect.

(iii) When deciding whether there is sufficient evidence, the prosecutor must consider whether the evidence can be used, and whether it is reliable.

(b) Public interest:

(i) A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against the prosecution which outweigh those tending in favour, or unless the prosecutor is satisfied that the public interest may be properly served, in the first instance, by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal. The more serious the offence or the offender's record of criminal behaviour, the more likely it is that a prosecution will be required in the public interest.

[136] The applicant's alleged offending, however, clearly justifies the exercise of the discretion here. The Crown argues that the New Zealand Prosecution Guidelines are met in this case. I agree. The Full Code Test has also been satisfied, in my opinion. No unfairness arises because of a lack of published Pitcairn guidelines, nor can it be said that the Public Prosecutor lacks independence in some way.

[137] Section 25 cannot be used as there is no breach of s 8 of the Pitcairn Constitution or of any other Pitcairn Constitution rights.

J. Unfairness in lack of consultation with the applicant or the Public Defender

[138] The applicant asserts that the Governor's powers and the decision to hear this proceeding in New Zealand is *ultra vires* as it offends against the requirement of natural justice and is disproportionate. The failure to consult the Public Defender about various issues is a breach of the Public Defender in Criminal Proceedings Ordinance.

[139] The applicant argues that he should have been consulted:

(a) On the question of the Note to the Constitution, as holding trials in New Zealand is plainly a matter of the practice and procedure and the administration or organisation of the business of the Courts.

(b) At the hearing of the ex-parte application to export the seized computer and related materials to New Zealand. Indeed, if the Prosecutor is right in that it is ex-parte, he should have been appointed amicus.

(c) Prior to the application made to the Governor on the question of holding this trial in New Zealand.

[140] The Public Defender in Criminal Proceedings Ordinance provides:

> **Powers and functions of Public Defender**
>
> **4.**—(1) The Public Defender shall be entitled to accept instructions from and to appear as counsel for the defendant in a prosecution or other proceeding for any criminal offence in any Court. The Public Defender shall be remunerated therefor in accordance with the Legal Aid (Criminal Proceedings) Ordinance, provided that a certificate for legal aid is granted to the defendant under section 3 whereupon the Public Defender shall be deemed to have been assigned to represent him or her under section 9.
>
> (2) The Public Defender shall have an advisory function on behalf of defendants in relation to criminal proceedings, whether potential or in being, concerning the practice and procedure and the administration or organisation of the business of the Courts. Every decision or matter significantly affecting the rights or interests of those defendants shall be referred by the Chief Justice or the Governor, as the case may be, to the Public Defender for advice.
>
> (3) The Public Defender may, in any criminal proceeding in which the defendant is not legally represented, be appointed by the Chief Justice to appear as *amicus curiae* to argue any question of difficulty or importance or other point touching upon the public interest, in order to assist the Court in

> determining it. The provisions of subsection (1) as to remuneration shall apply to an appointment under this subsection.
>
> (4) The Public Defender shall have such other powers or functions as the Governor may from time to time, after consultation with the Chief Justice, specify in writing to him or her.

[141] Nothing in the ordinance expressly or implicitly limits its application to the Operation Unique proceeding. Its purpose appears to be to:

(a) Establish the office of the Public Defender; and

(b) Set out its preliminary powers and functions in criminal proceedings.

[142] The Governor has the power to repeal any laws, according to s 63 of the Pitcairn Constitution:

> **Power to amend and revoke instruments, etc**
>
> **63.**—(1) Any power conferred by this Constitution to make any subsidiary instrument or to give any instructions or directions shall be construed as including a power exercisable in like manner to amend or revoke any such instrument, instructions or directions.
>
> (2) In subsection (1), "subsidiary instrument" means any proclamation, regulation, order, rule or other like instrument having the force of law.

[143] Given that the Governor has not revoked this ordinance, it must still be in force in Pitcairn. The ordinance established the Public Defender's office and it is doubtful that it applies solely to the Operation Unique proceeding.

[144] Section 4(2) requires that every decision or matter that "significantly affects" the rights or interests of a defendant shall be referred by the Chief Justice or Governor to the Public Defender for advice. The decision to transfer this proceeding to New Zealand has not significantly affected the applicant's fair trial rights. As defence counsel is based in New Zealand, the applicant's ability to consult with his counsel would not have changed if this proceeding were held in Pitcairn. On this basis, there is no obligation to notify defence counsel under s 4(2) as no significant effect to the applicant's rights or interests has arisen.

[145] Any obligation to appoint an *amicus curiae* under s 4(3) only arises where a defendant is unrepresented. At the time the decision to transport the seized articles to New Zealand was made, the applicant was already represented by counsel. Therefore, no *amicus curiae* needed to be appointed. Furthermore, counsel was notified of this decision and was given the opportunity in this proceeding to challenge the decision to transport the seized articles to New Zealand.

[146] The applicant's submission is without merit.

K. Pitcairn Islanders' rights to self determination have been infringed

[147] The applicant has not elaborated on his claim that the rights of the Pitcairn Islanders to self determination has impacted on his criminal trial on charges of possessing child pornography. I accept the Crown's submission that it is simply not relevant.

[148] Section 25 cannot be used as there is no breach of s 8 of the Pitcairn Constitution or of any other Pitcairn Constitution rights.

L. Pitcairn Islanders discriminated against

[149] The applicant argues that a trial without a jury is discriminatory to him and that, consequently, justice cannot be seen to be done. This argument is based on Sue Farran's article, *The case of Pitcairn: A small island, many questions,*[31] which was published prior to the introduction of the Pitcairn Constitution and discussed the way in which the Pitcairn court system developed in response to the needs of Operation Unique.

[150] Section 23(4) of the Pitcairn Constitution provides:

> 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.

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[31] (2007) 11(2) Journal of South Pacific Law 124 at 146.

[151] In *R v Seven Named Accused,*[32] the Court said:

> [201] All parties will be aware of the practical difficulties around constituting a jury of 12 people independent of the accused on Pitcairn, even if the law so provided.
>
> …
>
> [206] We are satisfied that in not providing for trial by a jury there is no breach of the European Convention for Human Rights. This Court is bound by the ordinances properly legislated, lawfully providing for trial of the defendants without jury.

[152] In *R (on the application of Misick) v Secretary of State for Foreign and Commonwealth Affairs,*[33] Laws LJ concluded that despite the esteem in which the jury trial is held, it must yield to the plenary powers of the West Indies Act 1962 (UK):

> 21. There is in my judgment no principle of law by which the suspension of jury trial promulgated for objective reasons can be said to be outwith or repugnant to the plenary powers given by section 5 of the 1962 Act.

[153] Furthermore, the applicant's argument that a trial without a jury by judge alone is per se unfair is without merit.

[154] Section 25 cannot be used as there is no breach of s 8 or of any other Pitcairn Constitution rights.

M. Attorney General erred in refusing access to documents

[155] The applicant contends that the Foreign and Commonwealth Office and the Attorney General have refused to release certain documents relating to legal advice given on the formulation of the Pitcairn Constitution, and that this has prejudiced his ability to pursue his case.

[156] This is not the case according to a letter dated 26 January 2012 to the applicant's counsel. As the Crown has submitted "the contents of this legal advice would be at best tangential to the current proceedings".

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32 *R v Seven Named Accused* [2004] PNSC 1.

33 *R (on the application of Misick) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWCA Civ 1549.

[157] This is a criminal trial. The Court has no power to look behind the words of the Constitution. This was made clear by the Privy Council in *Te Heuheu Tukino v Aotea District Maori Land Board.*[34] The Lebanese case referred to by the applicant, *In the matter of El Sayed* (Judgment) Special Tribunal for Lebanon, Appeals Chamber,[35] is not relevant to the present case.

[158] The Attorney General, in his letter to the applicant's counsel dated 2 February 2012, declines to provide certain material relative to the United Kingdom Freedom of Information Act 2000, and in particular to the provisions on the formulation of government policy and legal privilege.

[159] I agree with the Crown's submission that the Attorney General acted properly and in accordance with appropriate legal considerations. The claim by the applicant that this is "cultural oppression" on the part of the Attorney General is completely without any merit.

[160] There has been no breach of s 8 or of any other rights under the Pitcairn Constitution.

N. Use of Justice Ordinance forms was unfair

[161] The applicant submits that because the Chief Justice may advise the Governor to approve forms, such as that in which a search warrant may be issued, no fair trial is possible. The issue is whether the Chief Justice is so inherently biased that he would not be able to independently critique the search warrant form made by the Governor under s 20(d) Judicature (Courts) Ordinance. Section 20 reads:

> **Power to make rules**
>
> **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;

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34 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC).

35 *In the matter of El Sayed* (Judgment) Special Tribunal for Lebanon, Appeals Chamber, CH/AC/2011/01, 19 July 2011.

(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.

[162] The Crown submits that the United Kingdom has a similar arrangement by which the Criminal Procedure Rules Committee, which includes the Lord Chief Justice, is charged with reviewing criminal trial procedure.

[163] There is no merit in the applicant's submission. The validity of the forms of the Justice Ordinance are not affected by the Chief Justice's involvement.

[164] Section 25 cannot be used as there is no breach of s 8 or of any other Pitcairn Constitution rights.

O. Equality of arms compromised

[165] The applicant seeks a declaration that the non-admission of Mr Edgler has resulted in an inequality of arms between the prosecution and the defence.

[166] There is no merit in the applicant's argument, given that the Chief Justice's Minute recorded that it would be unusual to have two counsel represent a single accused and that the applicant's counsel is experienced and capable of handling preliminary hearings. The Chief Justice also recorded that he is prepared to consider the matter further in the event of a defended trial in the Supreme Court.

[167] There has been no breach of s 8 or of any other rights under the Pitcairn Constitution.

P. Failure to receive an authenticated copy produces unfairness

[168] The applicant contends that his not receiving an authenticated copy of the committal proceedings without delay after his committal is unfair.

[169] The Court receives a record of committal proceedings and the Crown an authenticated copy, pursuant to s 69 of the Justice Ordinance. The provision of an authenticated copy is required so that the Crown can undertake its prosecutorial role between committal and trial.

[170] There is no inequality of arms as the applicant has no role in this part of the criminal process and once the prosecutor decided to proceed, the applicant's counsel received a copy of the case against the applicant.

[171] The applicant's submission is without merit.

Q. Failure to pay expenses evidence of inequality of arms

[172] The applicant contends that as the executive has failed to pay the applicant and his mother's expenses to travel to New Zealand, this is inequality.

[173] There is no merit in this claim. The video link and written transcript are an adequate means of communication in these pre-trial proceedings. The applicant could have applied for a bail variation to travel to New Zealand for these proceedings.

Conclusion

[174] I accept the Crown's submission that the procedure s 25 of the Pitcairn Constitution allows is not a substitute for the ordinary ways in which an accused can raise and determine issues in a criminal trial. As the Privy Council in *Jaroo* made clear, where there is another common law or statutory procedure that an accused may more conveniently invoke, then a constitutional challenge under s 25 will be inappropriate.

[175] Furthermore, the Board noted that both practical and substantive justice are best served if issues that require factual determination and evidence to be called are determined as soon as possible after the event. Broader legal controversies, if they are unable to be determined by any other procedure, are suitable for a later determination.

[176] In *Durity*[36] the Board expressly affirmed the *Harrikissoon* principle, stating that:

> The choice of remedy is not simply a matter for the individual, to decide upon as and when he pleases.

[177] Lord Diplock noted in *Harrikissoon*[37] that the value of the important safeguard that s 25 provides would be debased if it were misused as a general substitute for the normal procedures of a criminal trial.

[178] If the applicant now wishes to challenge the Constitution under s 25, his remedy lies elsewhere other than in these criminal proceedings.

The Bill of Rights 1688

[179] The applicant argues that "the Constitution is *ultra vires* the Bill of Rights 1688". He argues that the Order in Council that enacted the Constitution did not repeal

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36 Ibid, above n 10 at 28.
37 Ibid, above n 11.

or amend the Bill of Rights 1688 and that the Bill of Rights applies because of s 42 of the Constitution which applies English Law.

[180] As the Crown has said, implicit in the applicant's submissions is the proposition that the Bill of Rights 1688 is superior to and offers superior protections than those provided by the Pitcairn Constitution.

[181] Both of these propositions are disputed by the Crown. First, clearly, in the Westminster system, Parliament is sovereign and it retains the power to repeal or amend any past law. The Bill of Rights 1688 is no exception. The House of Commons Standard Notes states this clearly:[38]

> [I]t 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 … Furthermore, changes in rules of UK constitutional law can be effected by ordinary legislation.
>
> The statement in the Bill of Rights shall remain the law forever cannot, then, be taken at face value.

[182] The Bill of Rights requires that laws be consented to by Parliament. When the British Settlement Acts were passed in 1887 and 1945, Parliament gave its consent. As the High Court said in *R (on the application of Misick) v Secretary of State for Foreign and Commonwealth Affairs:*[39]

> … The issue is not whether Parliament has consented … but what it has consented to. This is a matter of construction of the Act.

[183] The Privy Council has rejected a similar argument to the applicant's in *Boodram and Others v Cipriani Baptiste and Others (Trinidad and Tobago).*[40] The petitioners had been convicted of murder and were sentenced to death by hanging. Their counsel submitted that hanging constituted cruel and unusual punishment and was contrary to the Bill of Rights 1688 and to the common law. The Board concluded as follows:

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38 L Maer and O Gay *The Bill of Rights 1689* (SN/PC/0293, 2009) at 5.

39 *R (on the application of Misick) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1039 (Admin) at 20.

40 *Boodram and Others v Cipriani Baptiste and Others (Trinidad and Tobago)* [1999] 1 WLR 1709; [1999] UKPC 30.

> 5. The Constitution of Trinidad and Tobago recognises that certain rights are enjoyed by citizens of Trinidad and Tobago including a right not to be deprived of life except by due process of law. Section 5(2) of the Constitution expressly provides:-
>
> > "Parliament may not …
> >
> > (b) impose or authorise the imposition of cruel and unusual treatment or punishment ..."
>
> 6. Section 6(1) of the Constitution provides "Nothing in sections 4 and 5 shall invalidate – (a) an existing law …".
>
> An existing law is defined to mean a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of the Constitution.
>
> 7. Mr Fitzgerald's overriding submission is that the Bill of Rights is such an existing law. The provision in the Bill that no cruel and unusual punishment should be inflicted therefore in itself prevents hanging being adopted as the method of execution for the reasons which he has put forward and nothing in the Constitution invalidates that existing law.
>
> 8. It is to be remembered, however, that the Bill of Rights does not stand alone and it is accepted that, even though the Bill is a constitutional document creating fundamental rights, the Bill may be cut down by clear subsequent legislative provisions.
>
> …
>
> 11. It seems to their Lordships that these statutory provisions quite clearly must be read with the Bill of Rights, and that in Trinidad and Tobago they authorise hanging, not only as a method but as the only method of execution which may be ordered by the Court and the only method which may be carried out subsequent to the President's Order. That means that the Bill of Rights in itself is not a basis upon which the petitioners can put their case since it is to be read with subsequent legislation; the rules of the common law must be read also subject to those statutory provisions.

[184] In *Dreliozis v District Court in New Zealand,*[41] the Court rejected an argument very similar to the applicant's. In proceedings for judicial review, the applicant argued that the common law right to trial by jury born of the Bill of Rights 1688, the Magna Carta and other constitutional instruments, allowed him the right of a trial by jury for an offence created by the Summary Offences Act 1981.

[185] This argument was rejected by Barker CJ as follows:[42]

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41 *Dreliozis v District Court in New Zealand* [1994] 2 NZLR 198 (HC).

42 At pp 4 to 6.

> The submission of counsel for the second respondent was simple but correct; s.66 of the Summary Proceedings Act 1957, read together with such provisions as s.43 of the Summary Offences Act 1981 provides a code of the situations where trial by jury is to be allowed. In New Zealand, there is a statutory system of criminal law, there are no common law offences; the procedure for jury trials is set out by statute. More importantly, the occasions when a person may elect jury trial are defined only in the statutes to which I have referred.
>
> Although there may well be a common law right of trial by jury, such a right cannot be revived to provide for those occasions when the Legislature in its wisdom sees fit to redefine the circumstances when election of trial by jury will not be available.
>
> …
>
> I do not think there is any scope whatsoever for implying that the common law gives a right of jury trial in New Zealand today. It may well have done so before the progenitor of the Summary Proceedings Act 1957 s 66 was enacted. Like the learned District Court Judge, I consider Parliament was entitled to pass legislation overriding the common law when enacting s 43 of the Summary Offences Act. Really there is little else that can be said concerning the first submission of the plaintiff which is rejected.

Conclusion

[186] As the applicant acknowledged, the Constitution is the supreme piece of Pitcairn legislation. Those rights that the Bill of Rights 1688 and the common law provide must be read in light of it. Hendry and Dickson,[43] note that the protections the Constitution provides to Pitcairn Islanders are broader than those the Human Rights Act 1998 (UK) offers to the inhabitants of the British Isles.

[187] I have no power to strike down parts of the Constitution by reference to the Bill of Rights 1688.

Search and seizure

[188] The applicant challenges the validity of the search and seizure that underlies the alleged criminal offending.

[189] The issues identified by the applicant are as follows:

(a) The Island Magistrate did not have authority to issue the search warrants.

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[43] Ibid, above n 6 at 155.

(b) A search warrant cannot be issued for a summary offence. Consequently, the resulting search was unlawful.

(c) Were there reasonable grounds to apply for the search warrants.

(d) The search warrants failed to disclose the suspected offence and are insufficiently specific, hence the search was illegal.

(e) The Police and Criminal Evidence Act 1984 (UK) applies and there was no disclosure in this case of reasonable grounds for believing an indictable offence had been committed in accordance with this Act.

(f) The execution of the warrants was unreasonable by the excessive seizing of material.

(g) Transportation of evidence to New Zealand for analysis.

(h) The applicant did not have fair access to a lawyer.

The facts

[190] The two applications for search warrants of the applicant's home and office were made by Sergeant Medland, who gave evidence and was cross-examined.

[191] Sergeant Medland is a Sergeant in the New Zealand Police. In December 2009 he was appointed as a Community Police Officer for the Pitcairn Islands Group and maintained the rank of Sergeant. He was the officer in charge of the prosecution of the applicant for possession of items of child pornography.

[192] Sergeant Medland's appointment as a Pitcairn Island Police Officer is part of the assistance provided by the New Zealand Police to the Pitcairn Islands. This assistance is managed by the International Services Group of the New Zealand Police. The Superintendent in charge of the International Services Group is Superintendent Stu Wilden. Inspector Roly Williams is the Second-in-Command of that Group as Manager Overseas Assistance Programmes. Senior Sergeant Paul Sindlen is a Team Leader in charge of the assistance to the Pitcairn Islands.

[193] On or about 25 April 2010, Sergeant Medland received information in relation to the applicant and on or about 26 April 2010 he notified the New Zealand Police of the matter, which involved the possible possession of indecent or obscene articles, contrary to s 8 of the Pitcairn Summary Offences Ordinance.

[194] The allegations concern posts to the website www.getdare.com, involving persons who purported to be less than 16 years of age, and the use of a computer. Sergeant Medland was unable to investigate the true age and gender of these persons. He decided at an early stage in the investigation that specialist assistance would be required as there was no capacity on Pitcairn Island to undertake evidential forensic analysis of computer equipment.

[195] On or about 3 May 2010, after discussions with Senior Sergeant Sindlen and others, Sergeant Medland suggested it might be necessary to take any computer exhibits seized to New Zealand for forensic analysis. The New Zealand Police confirmed they had no issues with this proposed course.

[196] Detective Senior Sergeant Liam Clinton of the National Criminal Investigations Group's brief of evidence was read by consent. He was appointed on 10 May 2010 to provide Sergeant Medland with assistance. Most of this contact was by telephone and email. He assisted Sergeant Medland by reviewing his investigative work and providing general investigation advice where appropriate, including review of the search warrant applications in conjunction with the Public Prosecutor. The New Zealand Police Electronic Crime Laboratory (ECL) was asked to provide forensic assistance. He obtained authorisation and arranged a direct ECL contact to enable proper identification and handling of any electronic exhibits and information, logistical arrangements for the return of any forensic exhibits, and the need under the Island ordinances to obtain an order regarding the examination of exhibits. He also discussed a legal assessment around the execution of the warrants, media enquiries, and the need for confidentiality and privacy considerations for the applicant and his immediate family.

[197] Detective Clinton did not recall any special discussion with Sergeant Medland about advising the New Zealand Customs Service of any exhibit. He advised Sergeant

Medland that he and ECL staff could possess any photographic material seized in connection with their official duties.

[198] Detective Clinton met with an official from the British High Commission in Wellington and officers from the New Zealand Police International Services Group to brief them on the investigation on behalf of Sergeant Medland, including ECL involvement, logistical arrangements for investigation and exhibit examination and the need for the applicant's privacy to be a paramount consideration, given no charges had been laid at that stage.

[199] On or about 27 May 2010, Sergeant Medland advised him by email that search warrants had been executed and a number of exhibits seized. Subsequently, he confirmed the arrangements for his and that of the exhibits return to New Zealand.

[200] The supervising analyst of the ECL confirmed ECL's agreement to analyse exhibits in relation to the investigation on or about 23 May 2010.

[201] On 26 May 2010, Sergeant Medland met with the Island Magistrate, Simon Young, at about 13:30 hours at the Pitcairn Police Station and gave him the search warrant applications. Sergeant Medland advised Mr Young that if he had any questions about the search warrants he could use his telephone to discuss the matter with a Pitcairn Island Magistrate based in New Zealand, and gave him the telephone number of the Pitcairn Registrar, Graham Ford. Sergeant Medland then left him in the privacy of the bedroom to read through the applications.

[202] When Simon Young finished reading the search warrant applications he had some questions and wished to speak with the Registrar. Sergeant Medland left him in the privacy of the police office to have that conversation.

[203] On 26 May 2010, the Island Magistrate granted two search warrants to search Mr Warren's home and office. Sergeant Medland executed those warrants on the same day.

[204] On Wednesday, 26 May 2010, at approximately 2:59 pm, Sergeant Medland executed a search warrant at the Island Secretary's office. He was accompanied by Constable Brenda Lupton-Christian.

[205] On the same day, at about 3:24 pm, Sergeant Medland executed a warrant at the home of the applicant and his mother at Jack's Taty, Jack's Road, Adamstown, Pitcairn Island. He was accompanied by Constable Lupton-Christian and Rae Mutu, the Family Community Adviser.

[206] On arrival, Sergeant Medland spoke to the applicant's mother. He invited her to sit down so that he could explain their visit. At this point the applicant appeared at the front door. When everyone was seated in the lounge area, Sergeant Medland introduced himself and Constable Lupton-Christian by name, rank and police station, and said he was investigating an internet use matter that the police were treating seriously.

[207] Sergeant Medland explained that he had a search warrant for the house and planned to seize computer equipment that related to the police investigation. He said to the applicant that he and Constable Lupton-Christian had already executed a search warrant at the Island Secretary's office and had seized items, which were listed on a property record sheet. He gave the applicant a copy of that search warrant and invited him to sign property sheet 01/10, which he refused to do. Sergeant Medland then showed the applicant the search warrant for his home address, gave him a copy, and asked to see all his computer equipment.

[208] The applicant showed Sergeant Medland his bedroom, in which a large amount of computer equipment was stored.

[209] Sergeant Medland photographed the bedroom, noting a number of computer items which were of interest to his investigation, and examined computer work stations in the bedroom. He noted a new Hewlett Packard Premium series laptop sitting on the table top with a white USB stick plugged into it. It also had an iPod USB cable attached to it and next to the computer was a wireless keyboard. The items seized were the Hewlett Packard Premium series laptop, the white USB stick and a silver external

hard drive. Sergeant Medland then located three other hard drives and a printer sitting under a plastic cover. He conducted a search of a wardrobe in the applicant's bedroom, locating an IBM ThinkPad computer, a CD wallet containing 48 CDs, two Toshiba hard drives, a black CD wallet containing 36 CDs, a black CD wallet labelled "faith comes by healing" containing 16 CDs, a black CD wallet labelled "DSE" containing 21 CDs and a clear plastic lid with 15 CDs in it.

[210] Once Sergeant Medland had completed searching the bedroom, he told the applicant and his mother in the lounge the outcome of the search. He explained that the items that had been seized would be transported to New Zealand for forensic testing and that the investigation was ongoing. Sergeant Medland told the applicant he wished to conduct an interview with him at 5 pm when the power was on. He also explained the need for confidentiality as the applicant still had a role as Mayor to fulfil.

[211] At 4:20 pm Sergeant Medland went back to the Pitcairn Police Station and secured all exhibits into a lockable exhibit container. The applicant visited the police station at about 5 pm, declining to be interviewed, saying he was seeking legal advice.

[212] Sergeant Medland gave the applicant a list of seven lawyers admitted to practise in the Pitcairn Island jurisdiction.

[213] The following day on 27 May 2010 at about 9:22 am, the applicant came to the Pitcairn Island Police Station and advised Sergeant Medland in writing that Mr Tony Ellis of Wellington, New Zealand, would be acting for him. Sergeant Medland then advised the applicant:

> Michael I must caution you now. You do not have to say anything, but it may harm your defence if you do not mention something that you later rely on in court. Anything you do say may be given in evidence. Do you understand?

[214] Sergeant Medland advised the applicant he had already explained the caution. He repeated the caution to him and explained that there was an inference that a court or jury may draw from a late disclosure of any avenue of defence which would have been reasonable to disclose at the time of questioning. Sergeant Medland recorded in his notebook the following:

IS: This is the UK caution not the New Zealand caution. Do you understand?

HS: Yes.

IS: I would like you to consent to an interview?

HS: I'll have to talk to my lawyer.

IS: OK.

[215] The applicant then left the police station.

[216] On 30 May 2010 at about 5 pm, Sergeant Medland obtained a Court Order to move the police exhibits securely to a forensic laboratory in New Zealand through the Magistrate's Court of Pitcairn Island.

[217] On 1 June 2010 at about 5 pm, Sergeant Medland removed the CD-Roms contained in the seized CD wallets and the DSE stick drive from the locked exhibit container and, using a police computer laptop, he began an exhibit assessment to examine loose computer disks and return anything not of interest to the investigation.

[218] Sergeant Medland carried out the following exhibit assessments:

(a) Exhibit 01/10 02 the DSE stick drive, and exhibit 01/10 03 the two CD Re-writable disks. Sergeant Medland found that the stick drive contained certain Island Council documents and that the other two disks were blank.

(b) Exhibit 02/10/09, a black folder labelled "custom" containing 36 CDs. Sergeant Medland found these disks to contain the TV series "Friends" and various DVD movies.

(c) Exhibit 02/10 10, the black CD wallet containing 16 CDs labelled "faith comes by healing". Sergeant Medland found these disks to contain an audio bible drama with all religious content.

(d) Exhibit 02/10 11, the black CD wallet containing 21 CDs labelled "DSE". Sergeant Medland found these disks to contain documentaries, movies and other religious content.

(e) Exhibit 5, the black CD wallet containing 48 CDs labelled "custom". Sergeant Medland found it had a broken zip, the first six disks contained hundreds of images and videos of pornography. Some of the images were of girls of questionable age.

(f) Exhibit 02/10 13, the clear plastic CD lid containing 15 CDs. Sergeant Medland found the first disk to contain a video of a male.

[219] Sergeant Medland re-secured the items into the locked exhibit container.

[220] On 2 June 2010, Sergeant Medland visited the applicant's home address to serve a letter on him inviting him to participate in an interview. He explained that he would be returning some items seized from the applicant, but other items would be sent to New Zealand for analysis.

[221] Sergeant Medland then returned exhibit 01/10 02, the DSE stick drive, exhibit 01/10 03, the 2 CD RW blank disks, exhibit 02/10/09 a black folder labelled "custom" containing 36 CDs, exhibit 02/10 10, the black CD wallet containing 16 CDs labelled "faith comes from healing" and exhibit 02/10 11 the black CD wallet containing 21 CDs labelled "DSE".

[222] The applicant signed the back of the property record sheets and photographed the forms with his camera.

[223] On 6 June 2010, Sergeant Medland obtained a Bill of Lading from the Island Quarantine Officer, Simon Young, for the locked exhibit container. At about 4 pm on 5 June 2010, he took the locked exhibit container from the police station to The Landing.

[224] The container was secured by two different padlocks and Sergeant Medland retained the only keys.

[225] At about 5 pm the same day, the container was secured by Sergeant Medland on board the Claymore II shipping vessel, which was secured by the ship's Captain, John Brosnan, and Sergeant Medland in the ship owner's private quarters on the main deck.

The cabin was not in use as the owner was in New Zealand. Captain Brosnan was given a copy of the Bill of Lading and a copy of the Court Order for secure transport to New Zealand by Sergeant Medland.

[226] Sergeant Medland observed Captain Brosnan entering these details into the ship's records. A receipt was acknowledged for the container and forensic items by the Captain signing the property record sheets and Sergeant Medland's notebook. Sergeant Medland then instructed Captain Brosnan that the locked exhibit container was not to be opened under any circumstances.

[227] At about 12 noon on 30 June 2010, Sergeant Medland arrived at the Tauranga Port in New Zealand where the Claymore II shipping vessel was berthed. He uplifted the locked exhibit container and inspected it. He saw no signs of tampering or forced entry. He opened the container, nothing had been disturbed and the computer exhibits were still sealed in their respective bags. He loaded the exhibit container into a vehicle and transported it to Auckland. The same day, at about 3:30 pm, he delivered the exhibit container to the ECL at Harlech House in Otahuhu, Auckland. He opened the locked exhibit box and handed the exhibits to the ECL. The police exhibits were then issued with individual forensic laboratory exhibit numbers.

[228] Between 5 and 6 July 2010, a preliminary viewing of the police exhibits was conducted by Sergeant Medland with the assistance of Christopher Don at the ECL. The preliminary results identified in excess of 600 indecent photographs and videos of children and a large number of indecent and obscene images and documents.

Statutory provisions

[229] The procedure and grounds for the grant of a search warrant and the terms of any such warrant granted are governed by s 23 of the Pitcairn Justice Ordinance:

> **23**.—(1) Where the Magistrate is satisfied by evidence on oath that there is reasonable cause to believe that any thing upon, by or in respect of which an offence has been committed or any thing which is necessary to the conduct of an investigation into any offence, is in any building, ship, vehicle, box, receptacle or place, the Magistrate may issue a search warrant authorising a police officer to search the building, ship, vehicle, box, receptacle or place (which shall be named or described in the search warrant) for any such thing and, if any thing searched for is found, or any other thing which there is

> reasonable cause to suspect to have been stolen or unlawfully obtained is found, to seize it and bring it before the Court to be dealt with according to law.
>
> (2) Whenever any building or other place liable to search is closed, any person residing in or being in or being in charge of such building or place shall, on demand of a police officer and on production of the search warrant, allow him or her free ingress and egress and afford all reasonable facilities for a search.

[230] In *R v Coghill*,[44] the Court of Appeal accepted warrants that contained a description of the items to be the subject of the search:

> … as pornographic material which would provide evidence of "offences against the Crimes Act and the Indecent Publications Act relating to sexual offences against children and the printing of indecent documents", and its immediately subsequent description of the offences as "Indecent Assault and Printing an Indecent Document", did not offend against the requirement that there be reasonable definition of the nature of the suspected offences.

Search warrant for a summary offence

A. The issue

[231] The applicant challenged the issue of the search warrants in respect of summary offences as being in breach of his right to private life. He relies on s 11 of the Pitcairn Constitution, art 8 of the ECHR and art 17 of the ICCPR.

[232] Section 11 of the Pitcairn Constitution states:

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

Article 8 of the ECHR is identical:

> **ARTICLE 8**

---

44 *R v Coghill* [1995] 1 NZLR 675 (CA) at p 9.

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

Article 17 of the ICCPR:

> **Article 17**
>
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

[233] Section 21 of the New Zealand Bill of Rights Act 1990 is the nearest equivalent of these rights.

[234] The applicant submits that it is "not necessary in a democratic society that, for the prevention of crime, the state, whether through police officers, or any other organ of state power, is permitted to search the home and correspondence of an individual suspected of committing a summary offence. In this respect, the search warrant power contained in the Justice Ordinance is *ultra vires* to the extent that it permits this." He suggests that summary offences are not "crimes" as defined in the Pitcairn Constitution, the ECHR and the ICCPR.

[235] The equivalent search power in New Zealand contained in s 198(1) of the Summary Proceedings Act 1957 does not allow a search warrant to be issued for possession of an objectionable publication:

> **198 Search Warrants**
>
> (1A) Despite subsection (1), no search warrant may be issued under this section in respect of an offence against a provision of the Films, Videos, and Publications Classification Act 1993.

Analysis

[236] In my view, any infringement of the applicant's rights under the Pitcairn Constitution and the ECHR that resulted from the issue and use of these search warrants was justified "for the prevention of disorder or crime". Any interference with the applicant's rights under the ICCPR was not arbitrary and was lawful, as it obtained passive evidence of the applicant's breach of Pitcairn Island's laws relating to the possession of "indecent and obscene material" and "indecent photographs of children".

[237] I was referred by the Crown to a United Kingdom Supreme Court decision in *Norris v the Government of United States of America*,[45] where Lord Phillips, in his leading judgment, concluded:

> … In practice it is only in the most exceptional circumstances that a defendant would consider even asserting his article 8 rights by way of challenge to remand in custody or imprisonment: see *R(P) v Secretary of State of the Home Department* [2001] 1 WLR 2002, para 79, for discussion of such circumstances. Normally it is treated as axiomatic that the interference with article 8 rights consequent upon detention is proportionate.

[238] The Crown has properly highlighted the reason behind the absence of any power to search and seize objectionable material (as defined in the Films, Videos, and Publications Classification Act 1993) using s 198 of the Summary Proceedings Act, is because the Films, Videos, and Publications Classification Act has its own search and seizure regime in Part 7 of the Act.

B. The Island magistrate did not have authority to issue the search warrants

[239] The applicant submits that the word "offence" in s 23 of the Justice Ordinance is limited to offences within Pitcairn Island's Summary Offences Ordinance, particularly s 8 which reads:

> **Indecent and obscene material.**
>
> **8**.—(1) Any person who imports into the Islands, or who has in his or her possession, any indecent or obscene books, cards, photographs, casts, figures, pictures, lithographic or other engravings, cinematographic or other films or any other indecent or obscene article shall be guilty of an offence and liable to a fine not exceeding two hundred and fifty dollars or imprisonment for a term not exceeding one hundred days or to both such fine and imprisonment and any

[45] *Norris v the Government of United States of America (No 2)* [2010] UKSC 9 at 52.

such article may be confiscated and destroyed in such manner as the Court shall direct.

(2) Any person who without lawful excuse by means of any form of electronic technology transmits or receives visual images which are indecent or obscene shall be guilty of an offence and liable to a fine not exceeding two hundred and fifty dollars or imprisonment for a term not exceeding one hundred days or to both such fine and imprisonment and any electronic equipment used in the commission of such an offence may if the Court so directs be confiscated and forfeited to the Crown.

(3) No prosecution for an offence under this section may be commenced by any person without the consent of the Public Prosecutor.

[240] The applicant submits that the Island Magistrate had no jurisdiction to issue the search warrants used, as the warrants resulted in criminal charges being laid under s 160 of the Criminal Justice Act 1988 (UK).

The law

[241] Section 5(1)(b)(ii) of the Justice Ordinance states:

Jurisdiction of Island Magistrate

5.—(1) Subject to the provisions of this or any other ordinance, the Island Magistrate shall have jurisdiction—

…

(b) in criminal cases over all offences committed within the Islands or in the territorial waters thereof against the provisions of this or any other ordinance except insofar as the jurisdiction of the Island Magistrate is therein expressly excluded:

Provided that—

(i) the maximum penalty which the Island Magistrate may impose shall be a fine of [four hundred] dollars or imprisonment for one hundred days or both such fine and imprisonment; and

(ii) the Island Magistrate shall not hear or determine any offence unless the complaint relating to it is brought within six months from the time when the matter of such complaint arose; and

(iii) the Island Magistrate shall not exercise jurisdiction in respect of any offence arising only by virtue of the provisions of [section 42 of the Constitution of Pitcairn];

(iv) the Island Magistrate shall not exercise jurisdiction in any inquiry under Part VII of this ordinance;

[242] Section 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.

[243] The effect of s 42 is to extend the offences that the applicant has been charged with under s 160 of the Criminal Justice Act into Pitcairn law.

[244] The word "offence" has been defined in the Interpretation and General Clauses Ordinance as:

> "offence" includes any crime, unlawful act or contravention or other breach of, or failure to comply with, any provision of any law, for which a penalty is provided.

Conclusion

[245] The word "offence" has a broad definition in both the Justice Ordinance and the Interpretation and General Clauses Ordinance. The charges under s 160 of the Criminal Justice Act fall within this definition. First, the charges relate to a "crime, unlawful act or contravention or other breach of, or failure to comply with, any provision of any law". Section 42 of the Constitution imports the Criminal Justice Act into Pitcairn law. Secondly, s 160 of the Criminal Justice Act imposes a penalty of five years' imprisonment and/or a fine. Therefore, the "penalty" limb of the definition of "offence" is also satisfied.

[246] The scope of s 5(1)(b)(iii) of the Justice Ordinance is limited to the determination of the Island Magistrate's jurisdiction to try the applicant for the charges laid under s 160 of the Criminal Justice Act. This section merely establishes the fact that the Magistrate is not able to try him, as the charges are outside his jurisdiction. This is reflected in s 25 of Pitcairn's Summary Offences Ordinance, which states:

> Every offence against this ordinance shall be triable only summarily by the Magistrate's Court.

[247] The Crown, in any event, is not bound to charge a person only with the offences in relation to which the original search warrant was granted. The Crown, for example, may choose to include charges in an indictment materially different to those on which the defendant was sent or committed for trial.

[248] In my view, the Island Magistrate had the authority to issue the warrant that he did. There is no suggestion in s 23 of the Justice Ordinance that his power to grant search warrants is limited to offending that the applicant is ultimately charged with under the Summary Offences Ordinance.

[249] In conclusion, the section cannot be interpreted to limit the Magistrate's powers to issue a search warrant. Furthermore, the Magistrate's role in this proceeding is limited to the issuance of the search warrants.

C. Search warrants fail to specify suspected offence and consequently the resulting search was unlawful

[250] The search warrants are set out below:

> Justice Ordinance
> (Section 23)
>
> In the Pitcairn Islands Magistrate's Court — Criminal Case No 01/2010
> At Adamstown
>
> **SEARCH WARRANT**
>
> To all police officers authorised to act on behalf of Pitcairn Island
>
> Whereas I am satisfied by evidence on oath that there are reasonable grounds to believe that certain property, namely:
>
> - Any computers, central processing unit, external and internal drive and external storage equipment or media, terminals or video display units used by Michael WARREN, together with peripheral equipment such as keyboards, printers, scanners and modems.
>
> - Any and all computer or data processing software or data including, but not limited to, hard drive DVD players, hard disks, floppy discs, cassette tapes, video cassette tapes, magnetic tapes, integral RAM or ROM units and any other permanent or transient storage device(s) used by Michael WARREN.

- The following records or documents, whether contained on paper in handwritten, typed, photocopied or printed form or stored on computer printouts, magnetic tape, cassettes, discs, diskettes, photo optical devices or any other medium; access number(s), password(s), pass-phrase(s), personal identification numbers (PINS) and other items that relate to the possession or obscene articles by Michael WARREN.

- Any computing or data processing literature, including, but not limited to printed copy, instruction books, notes, papers or listed computer programs in whole or in part in the possession of Michael WARREN.

In respect of which an offence has been committed, and which is necessary to the conduct of an investigation into an offence is located at **Michael WARRENs workplace, in the Island Secretary's office, Town Square, Adamstown, Pitcairn Island.**

Occupied by Michael and Royal Louise WARREN

Now therefore you are hereby authorised forthwith with proper assistance to enter the said, **Michael WARRENs workplace, in the Island Secretary's office, Town Square, Adamstown, Pitcairn Island** by force if necessary, and there search for the property above-mentioned and, if anything searched for be found, or any other thing which there is reasonable cause to suspect having been stolen or unlawfully obtained be found, to seize it and bring it before this Court to be dealt with according to law.

Dated at Adamstown, Pitcairn Island this 26th day of May 2010.

[Signed]
Simon Young
Magistrate
Pitcairn Island

Justice Ordinance
(Section 23)

In the Pitcairn Islands Magistrate's Court
At Adamstown

Criminal Case No 01/2010

SEARCH WARRANT

To all police officers authorised to act on behalf of Pitcairn Island

Whereas I am satisfied by evidence on oath that there are reasonable grounds to believe that certain property, namely:

- Any computers, central processing unit, external and internal drive and external storage equipment or media, terminals or video display units used by Michael WARREN, together with peripheral equipment such as keyboards, printers, scanners and modems.

- Any and all computer or data processing software or data including, but not limited to, hard drive DVD players, hard disks, floppy discs, cassette tapes,

video cassette tapes, magnetic tapes, integral RAM or ROM units and any other permanent or transient storage device(s) used by Michael WARREN.

- The following records or documents, whether contained on paper in handwritten, typed, photocopied or printed form or stored on computer printouts, magnetic tape, cassettes, discs, diskettes, photo optical devices or any other medium; access number(s), password(s), pass-phrase(s), personal identification numbers (PINS) and other items that relate to the possession or obscene articles by Michael WARREN.

- Any computing or data processing literature, including, but not limited to printed copy, instruction books, notes, papers or listed computer programs in whole or in part in the possession of Michael WARREN.

In respect of which an offence has been committed, and which is necessary to the conduct of an investigation into an offence is located at **Michael WARRENs residence known as Jacks Taty, Jack Road, Adamstown, Pitcairn Island** occupied by Michael and Royal Louise WARREN

Now therefore you are hereby authorised forthwith with proper assistance to enter the said, **Michael WARRENs residence known as Jacks Taty, Jack Road, Adamstown, Pitcairn Island AND his workplace, the Island Secretary's office, Town Square, Adamstown, Pitcairn Island** by force if necessary, and there search for the property above-mentioned and, if anything searched for be found, or any other thing which there is reasonable cause to suspect having been stolen or unlawfully obtained be found, to seize it and bring it before this Court to be dealt with according to law.

Dated at Adamstown, Pitcairn Island this 26th day of May 2010.

[Signed]
Simon Young
Magistrate
Pitcairn Island

[251] The Police and Criminal Evidence Act 1984, particularly s 8(1), states:

8 Power of justice of the peace to authorise entry and search of premises.

(1) If on an application made by a constable a justice of the peace is satisfied that there are reasonable grounds for believing—

(a) that [an indictable offence] has been committed; and

(b) that there is material on premises [mentioned in subsection (1A) below] which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and

(c) that the material is likely to be relevant evidence; and

(d) that it does not consist of or include items subject to legal privilege, excluded material or special procedure material; and

(e) that any of the conditions specified in subsection (3) below applies,

he may issue a warrant authorising a constable to enter and search the premises [in relation to each set of premises specified in the application].

...

(3) The conditions mentioned in subsection (1)(e) above are—

(a) that it is not practicable to communicate with any person entitled to grant entry to the premises;

(b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the evidence;

(c) that entry to the premises will not be granted unless a warrant is produced;

(d) that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.

[252] The applicant submits that although the application for the search warrants was made for summary offences, the search warrants issued by the Island Magistrate "were much broader, issued in respect of no particular offence".

[253] The applicant argues that this contradicts the rule of law. He extends his argument by stating that even if it was ultimately appropriate to grant the search warrants, the warrants nevertheless failed to identify the offence that formed the basis for the issuing of the warrants: citing *Entick v Carrington*,[46] *Minister for Safety and Security v van der Merwe*,[47] and *Rosenberg v Jaine*.[48]

[254] Due to this failure to properly identify the offence, the search warrants were unlawful, and consequently the search was unlawful.

[255] The applicant refers to the New Zealand Supreme Court decision of *Hamed v R,*[49] where the Court considered s 30 of the Evidence Act 2006 and evidence obtained

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46 *Entick v Carrington* [1765] EWHC KB J98.
47 *Minister for Safety and Security v van der Merwe* CCT 90/10 [2011] ZACC 19 (Constitutional Court of South Africa).
48 *Rosenberg v Jaine* [1983] NZLR 1.
49 *Hamed v R* [2011] NZSC 101 (SC).

unlawfully. He submits that the Island Magistrate's search warrants would fail the test in s 30 of the Evidence Act in New Zealand.

[256] The Crown refers to two New Zealand Court of Appeal judgments, *R v Coghill*,[50] and *R v B*,[51] which refute the strict specificity that the applicant's counsel requires. The Crown further submits that the principle derived from *R v B* is that no warrant shall be held invalid by reason only of any defect, irregularity, omission, or want of form, unless the Court is satisfied that there has been a miscarriage of justice.

[257] This principle echoes s 16 of Pitcairn Island's Judicature (Courts) Ordinance, which reads:

> **Documents and proceedings not to be held invalid except where there has been a substantial miscarriage of justice.**
>
> **16.** —(1) No information, charge, summons, conviction, sentence, order, bond, warrant or other document and no process or proceeding shall be quashed, set aside or held invalid by any Court or quasi-judicial authority by reason only of any defect, irregularity, omission or want of form unless the Court or authority is satisfied that there has been a substantial miscarriage of justice;

[258] The Crown submits that the Island Magistrate's search warrants followed the prescribed form of Form 5 of Pitcairn's Justice Ordinance, which does not require the particular suspected offence to be named.

[259] In any event, the warrants, in their description of the items to be searched, clearly adverted to the "possession of obscene articles by Michael Warren".

[260] Sergeant Medland said that he had explained to the applicant at the time the warrants were executed the offences which were the subject of the warrants.

[261] Finally, the Crown submits that there is little doubt that the Island Magistrate, Simon Young, Sergeant Medland and the applicant knew the offence in respect of which the warrants had been issued.

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50 Ibid, above n 44, at [230].

51 Alt citation *R v Briggs* [1995] 1 NZLR 196 (CA).

[262] I am satisfied that the s 23 warrants are sufficiently broad and that s 8 of the Police and Criminal Evidence Act is redundant. New Zealand's Summary Proceedings Act 1957 search warrant regime under s 198 is similar, in that it is unnecessary to have distinctive search warrants for summary offences and indictable offences. I am also satisfied that in accordance with s 42(2) of the Constitution, the "local circumstances" of Pitcairn do not require a s 8 Police and Criminal Evidence Act search warrant. It would be unnecessary to incorporate it as there is a search warrant regime already available in s 23 of the Justice Ordinance.

[263] The search warrants followed the requirements set out by Form 5 of Pitcairn's Justice Ordinance. Form 5 does not require an offence to be stated on the warrant.

[264] Section 16 of Pitcairn's Judicature (Courts) Ordinance nevertheless applies to save any defects in the search warrants. I conclude that although neither the summary offence (s 8 of the Summary Offences Ordinance) nor the indictable offence (s 160 of the Criminal Justice Act (UK)) are referred to in the search warrants, the warrants' purpose is evident from the following:

(a) "possession of obscene articles by Michael Warren" is the written description on the warrants.

(b) The items suspected to contain those obscene articles were listed on the back of the warrants.

[265] I am satisfied that the applicant was sufficiently informed of items Sergeant Medland intended to seize. Sergeant Medland then seized equipment which was properly within the scope of the search warrants.

D. No disclosure of reasonable grounds for believing an indictable offence had been committed

[266] Sergeant Medland's evidence was that the information of the applicant's activity on the getdare.com website, and in particular his sexual dares of people who purported to be less than 16 years of age, spurred his investigation. He said he was unable to

investigate the true age or sex of these people. Further, Operation Unique formed the background of this investigation.

[267] The applicant's submission has no merit. Given the broad definition of "offence", the effect of s 23 of the Justice Ordinance is to make s 8 of the Police and Criminal Evidence Act unnecessary.

E. Excessive seizure

[268] The applicant submits that Sergeant Medland executed the search warrants unreasonably by excessively seizing material. The applicant argues that the Pitcairn Police did not have the power to "seize and sift" material as the Criminal Justice and Police Act 2001 (UK) does not extend to Pitcairn.

[269] In my view, there would not be any reason why the incorporation of the police "seize and sift" powers under s 50 of the Criminal Justice and Police Act would be dependent on whether Sergeant Medland had used a Pitcairn search warrant or a s 8 Police and Criminal Evidence Act search warrant.

[270] I have concluded that s 50 of the Criminal Justice and Police Act was not incorporated into local law. Section 23 of the Justice Ordinance gives the police the power of seizure:

> **23.**—(1) … or any other thing which there is reasonable cause to suspect to have been stolen or unlawfully obtained is found, to seize it and bring it before the Court to be dealt with according to law.

[271] In *Reynolds v Commissioner of Police of the Metropolis,*[52] it was held that in executing a search warrant the police have a common law power to remove potential evidence for sorting elsewhere, provided the search is carried out quickly and the documents which have no evidential value are returned promptly.

[272] Since the offending centred on the applicant's use of a computer, I find that the sergeant had "reasonable cause to suspect" that the mayoral computer also contained pornographic images of children that were "unlawfully obtained". Practically, it would

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[52] *Reynolds v Commissioner of Police of the Metropolis* [1985] 1 QB 881 (ICA).

be unreasonable to expect the sergeant to sift through the computer at the applicant's mayoral office, in light of the police protocols referred to by the sergeant that advise against it. Sergeant Medland carried out an initial screening of the material seized and, as a result, returned, at an early stage, certain items which he had identified as irrelevant to the investigation. The remainder were sent to New Zealand for analysis.

[273] The items listed by Sergeant Medland are consistent with the terms of the search warrants, as well as Sergeant Medland's conduct and discussion with the applicant at his house. Furthermore, Sergeant Medland identified at an early stage, and made available for collection, any evidence that was not relevant to the investigation, including the applicant's mayoral computer.

[274] If medical or other Island records were seized, it reflects the type of material that would likely be held on the computers of the mayor of a small community. I am satisfied there was no attempt to deliberately seize such material.

F. Transportation of the evidence obtained by the search warrant to New Zealand for analysis

Applicant's submissions

[275] Under s 25(2) of the Constitution, the applicant challenges the decision to export the seized material to the ECL, and alleges that the Prosecutor is in breach of the Magistrate's order to keep these items in safe custody pending further order of the Pitcairn Courts. He submits that no such order was made prior to the receipt of the material by the Prosecutor.

[276] The applicant referred to *Hamed v R*[53] and submits that neither the Pitcairn Courts nor the Pitcairn and New Zealand Police had the power to export, import, or arrange to import into New Zealand, the materials seized.

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[53] Ibid, above n 49 at [255].

[277] The applicant submits that the receipt of the material, its analysis, and the passing on of the analysis was unlawful under New Zealand and international law. The Government of Pitcairn, by its judicial branch, was a party to these illegalities as:

(a) Neither Senior Constable Medland, nor the ECL, had any power to receive objectionable publications from a foreign power for analysis, or any other purpose.

(b) Possession and/or importation of the material was in breach of New Zealand law, particularly ss 123, 124, 131 and 131A of the Films, Videos, and Publications Classification Act, as well as s 209 of the Customs and Excise Act 1996.

(c) Supply of the material to the crime lab, and thereafter to the Public Prosecutor at Auckland, were both in breach of New Zealand law.

(d) The ECL unlawfully used New Zealand public funds for the purpose of an analysis, and transportation of that analysis, without authorisation under s 6 of the Pitcairn Trials Act, and the Public Finance Act 1989.

Crown's submissions

[278] The Crown notes that on 22 July 2011, counsel for the applicant referred these allegations to the Attorney General. On 25 July 2011, the Attorney General responded in writing, confirming that he was satisfied there had been no breach of the order.

[279] The Crown submits that there is no need for the Court to revisit this issue. Sergeant Medland sought and received a formal order to authorise the transport of items seized for forensic analysis. The power to make such an order is conferred by s 23 of the Justice Ordinance, to which the Magistrate referred to when making his order. The section operates *ex parte* and the Crown submits that the order was made within the investigative context in which *ex parte* procedures are appropriate.

[280] In any event, the Crown submits that no unfairness arises from the secure transport of exhibits to the ECL for analysis. The ECL is the New Zealand entity designed specifically for dealing with the analysis of evidence related to prosecutions such as the present one. In the circumstances, and given the way material is electronically stored and collated, the removal of the seized material to New Zealand for analysis constituted a reasonable means of sorting it and identifying what was relevant. Such an analysis was impossible on Pitcairn Island itself.

[281] With respect to the applicant's claims that various Pitcairn and New Zealand authorities were in illegal possession of the material, the Crown submits that s 160(2) of the Criminal Justice Act 1988 (UK) provides a defence to a charge of possession of an indecent photograph if the person "had a legitimate reason for having the photograph or pseudo-photograph" in their possession. It is submitted that such a defence would apply here.

[282] In New Zealand, similar defences are provided in ss 131(4) and (5) of the Films, Videos, and Publications Classification Act for the most serious offences under this Act. The Crown also notes that the Attorney General's permission is required before any relevant prosecution may take place. The Crown submits that it is highly doubtful whether any New Zealand criminal offence had been committed.

[283] Lastly, the Crown submits that the exclusion test of s 78 of the Police and Criminal Evidence Act could be used to admit the material, in the event that the transportation and possession of the material in New Zealand was unlawful.

[284] Where evidence is obtained as a consequence of an unlawful search, the Court has a discretion, not an obligation, to exclude the evidence under s 78 of the Police and Criminal Evidence Act. In deciding how to exercise the discretion, the Court has to make an assessment as to what effect the admittance of the evidence has on the fairness of the proceedings, lack of bad faith, or a flagrant and deliberate breach of one of the codes of practice issued pursuant to the Act, or some matter affecting the quality of the evidence. The mere fact that evidence is discovered in the course of an unlawful search is unlikely to make the admission of the evidence unfair.

Analysis

[285] The Attorney General in his letter of 25 July 2011 sets out his findings on how the material was handled in reliance on the Magistrate's Order of 30 May 2010. He points out that he had consulted with the Registrar and Sergeant Medland, and that they had offered their account of how the material was handled. The Attorney General states:

(a) The material was transported to New Zealand for analysis at the Electronic Crime Laboratory operated by the New Zealand Police.

(b) Following such analysis, all items were transmitted by the New Zealand Police back to the Court, where they remain securely held by the Registrar.

(c) The material was not transmitted to the Pitcairn prosecution.

[286] I am satisfied that there can be no suggestion of any irregularities in the handling of the material to and from Pitcairn, via the ECL in New Zealand.

[287] If there were irregularities, the evidence would nevertheless be admissible after conducting the exclusion of evidence test under s of the Police and Criminal Evidence Act. The evidence was transported to New Zealand so that the Pitcairn Police could access technology that was otherwise unavailable on the Island. Thorough analysis of the evidence was necessary to ensure that the Pitcairn Police had all of the information available to them, as well as to safeguard the integrity of the evidence obtained. Nothing about the storage and transportation to and from the Island has had an adverse effect on the fairness of this proceeding. There was no bad faith apparent at any stage of this process.

[288] I am satisfied that the Pitcairn Police's possession of the material was lawful at all times, as they possessed it in accordance with the Magistrate's Order. With respect to the New Zealand Police, I also find that their possession of the material was lawful at all times, by virtue of ss 131(4) and (5) of the Films, Videos and Publications Classification Act.

[289] Any issue about the use of public funds in New Zealand is irrelevant.

G. The applicant did not have fair access to a lawyer

[290] The applicant contends that he did not have immediate access to a lawyer following the execution of the search warrants. The Crown accepts that Sergeant Medland did not follow the United Kingdom procedure of best police practice.

[291] However, in my view, the applicant did have fair access to a lawyer. There is no issue that following the execution of the warrants, Sergeant Medland invited the applicant to be interviewed at the Pitcairn Island Police Station. The applicant declined, as he wished to take legal advice first.

[292] Sergeant Medland then provided the applicant with a list of seven lawyers admitted in the Pitcairn jurisdiction. Although there were no defence counsel on Pitcairn at the time, this is not unusual. At previous proceedings the accused have taken the opportunity to speak to the Public Defender by telephone and/or email.

[293] The following morning the applicant informed Sergeant Medland that Mr Tony Elllis would represent him. When asked again if he would take part in an interview, the applicant advised he would have to consult with his counsel first.

[294] The applicant's counsel has had unimpeded access to the images in question and the fact that they were not available sooner reflects the exigencies of living on Pitcairn Island.

H. Sergeant Medland's offer to interview the applicant was unfair and unlawful

[295] The applicant submits that Sergeant Medland's offer to interview him was unfair and unlawful. The Crown submits that if the applicant had not been offered an interview, he could reasonably have said the failure to do so was unfair. The officer was obliged to give the correct caution and there was neither unfairness nor illegality in the way the matter proceeded.

[296] In my view, this issue has no merit. The applicant did not accept the offer of an interview, so he did not suffer any miscarriage of justice. He rightfully exercised his right to silence. Section 25 is irrelevant.

Conclusion

[297] None of the grounds on which the challenge to the admissibility of the evidence obtained pursuant to the search warrants are made out.

General Conclusion

[298] I accept the Crown's submission that s 25 of the Pitcairn Constitution should not be used as a collateral attack on criminal proceedings. The applicant's challenges under the Constitution cannot succeed, in my view.

[299] I decline to exercise my powers under s 25(2) of the Constitution and/or Bill of Rights 1688, on the grounds that I am satisfied there are adequate means of redress for the breaches the applicant alleges.

Result

[300] The applicant will therefore stand trial before this Court on all counts.

[301] The applicant is remanded to a nominal date of hearing, being 28 February 2013 (NZ), or to such other date, time and place as may be notified to him or his counsel.

[302] The applicant's existing bail will continue.

Lovell-Smith J