IN THE SUPREME COURT OF THE PITCAIRN ISLANDS

SC 1/2021
[2023] PNSC 4

BETWEEN	**MICHAEL WARREN** Applicant
AND	**THE ATTORNEY-GENERAL OF PITCAIRN** First Respondent
AND	**THE GOVERNOR OF PITCAIRN** Second Respondent

Hearing: 11 – 12 December 2022 on Pitcairn Island (via AVL)
12 – 13 December 2022 NZ

Counsel: A Ellis for Applicant
K Raftery KC for Respondents

Judgment: 26 May 2023

JUDGMENT OF HAINES J

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Introduction

[1] On 27 May 2019 at a hearing in Adamstown Mr Warren pleaded guilty to a charge (the 2019 charge) of behaving in an indecent manner in a public place, contrary to s 5 of the Summary Offences Ordinance. He was fined NZ $40 and ordered to enter into a recognizance for a 12 month period.

[2] In these amended proceedings dated 19 September 2022 brought under s 25(1) of the Pitcairn Constitution he now claims:

(a) The alleged failure to provide a right of appeal when a guilty plea has been entered in the Magistrate's Court breaches the right under s 8 of the Constitution to a fair trial.

(b) The alleged failure of the government to provide a system of civil legal aid is a failure to provide access to justice and a breach of the right to a fair trial under s 8 of the Constitution.

(c) Section 5 of the Justice Ordinance, which permits the Island Magistrate to seek legal advice from a current or retired Senior Magistrate, breaches the principle of judicial independence mandated by s 44 of the Constitution and the right to a fair trial.

[3] After further alleged offending by Mr Warren in 2020 three new charges of behaving in an indecent manner in a public place were laid against him. A plea of not guilty was entered but after a defended hearing Mr Warren was on 6 December 2021 found guilty on all three charges and fined NZ $50 on each charge. The earlier recognizance was not enforced. The 2021 convictions and sentence are currently under appeal on several grounds, including the alleged lack of independence and impartiality of the Island Magistrate, challenges to actions of the assessors and whether the Island Magistrate gave sufficient direction or consideration to freedom of expression in making his determinations of guilty.

[4] That appeal against conviction and sentence is yet to be heard by the Chief Justice in separate proceedings. Care must accordingly be taken to ensure that the constitutional points determined in these present proceedings in relation to the 2019 charge do not duplicate those raised in relation to the conviction and sentence appeal in

respect of the 2021 convictions. As noted by the Privy Council in earlier similar litigation by Mr Warren, being *Warren v R* [2018] UKPC 20 at [11] to [13], an application under s 25 of the Constitution should not be made if adequate means of redress are available in related criminal proceedings. This means, for example, that Mr Warren cannot in these present proceedings (SC 1/2021) request a determination whether nudism is protected by the constitutional right to freedom of expression.

[5] Before separately addressing each of the three grounds advanced by Mr Warren in his amended Application of 19 September 2022 two preliminary matters must be noted.

Place of hearing of present proceedings

[6] By *Minute (No 3)* dated 26 October 2022 a direction was made pursuant to ss 15E and 15F of the Judicature (Courts) Ordinance that the substantive hearing of the present proceedings scheduled to commence on 12 December 2022 take place in Pitcairn, with counsel, the Court Stenographer and the Judge participating from New Zealand by audio-visual link. The necessary arrangements were accordingly made by the Registrar. The ss 15E and 15F orders were repeated at the commencement of the December hearing.

The evidence before the Court – how received

[7] At the case management conference convened on 29 August 2022 Dr Ellis sought from the Attorney General details of all grants of legal aid made in the context of civil litigation before the Supreme Court of Pitcairn. The application was not opposed. A direction was accordingly made by *Minute (No 2)* dated 29 August 2022 that the Attorney General provide Dr Ellis with the requested information. Timetable directions were also made for the filing of an amended Application by Mr Warren and of the affidavits on which the parties intended to rely at the substantive hearing. Some timetable dates were subsequently adjusted by *Minute (No 3)* issued on 21 September 2022.

[8] It was in these circumstances the Crown by Memorandum dated 12 September 2022 filed the requested information together with a letter dated 12 September 2022 from Mr Evan Dunn, Head of the Pitcairn Islands Office, addressed to Dr Ellis. The terms of both the Memorandum and of the letter are set out later in this decision.

[9] No objection was taken by Mr Warren to the manner in which this evidence was filed or as to the admissibility of the Memorandum and its two attachments. See *Minute (No 4)* dated 26 October 2022 at [2].

[10] Nor was objection taken to the receipt into evidence of two documents included in the Crown bundle of authorities, being the transcript of the proceedings heard on 27 May 2019 and the recognizance order signed by Mr Warren on that date.

[11] While Mr Warren filed an affidavit sworn on 4 October 2022, the Crown filed no further evidence additional to the Memorandum and other documents to which reference has been made. However, further information in the Crown submissions relating to the two sets of charges was admitted by consent during the course of the hearing.

[12] It is now possible to address in turn each of the three causes of action relied on by Mr Warren.

POINT 1: NO RIGHT OF APPEAL AFTER A PLEA OF GUILTY

Background circumstances

[13] As mentioned, on 27 May 2019 Mr Warren pleaded guilty to a charge of behaving in an indecent manner in a public place, contrary to s 5 of the Summary Offences Ordinance. He was fined NZ $40 and ordered to enter into a recognizance for a 12 month period. A full transcript of that hearing was provided in the Crown's bundle of authorities together with a copy of the recognizance itself.

[14] On 29 January 2020 and on 8 June 2020 police received further complaints that Mr Warren was being seen naked in a public place. The next day, 9 June 2020, the police officer himself witnessed Mr Warren walking naked down the main road through Adamstown.

[15] On 23 July 2020 three charges were laid alleging behaviour in an indecent manner in a public place contrary to s 5 of the Summary Offences Ordinance. Mr Warren pleaded not guilty but the charges did not come to trial until 5 and 6 December 2021. On 6 December 2021 Mr Warren was found guilty and sentenced to a fine of NZ $50 on each charge.

[16] Although the first incident occurred within the 12 month period of the recognizance, it was not enforced.

[17] However, it would seem that not knowing such would be the outcome, Mr Warren, in advance of the December 2021 hearing, belatedly sought to challenge the outcome of the 25 May 2019 hearing when the recognizance was imposed.

[18] It was in these circumstances that two years after his guilty plea and sentencing on the 2019 charge and six months before his conviction and sentence on the three new charges, Mr Warren on 1 July 2021 filed in the Supreme Court the proceedings in SC 2/2021, being an application seeking leave to appeal out of time against the sentence imposed by the Island Magistrate on 29 May 2019.

[19] The application in SC 2/2021 was subsequently withdrawn on 19 September 2022. See the undated Memorandum filed by Dr Ellis on that date and the subsequent *Minute (No 3)* dated 26 October 2022 issued in SC 2/2021.

[20] At the same time Mr Warren on 19 September 2022 filed in the present proceedings (SC 1/2021) an amended Application seeking a declaration under s 25(1) of the Constitution that failure by the government to provide a right of appeal on a guilty plea is a breach of the s 8 fair trial provisions of the Constitution.

[21] The pleadings in the amended Application are regrettably less than clear. First, the distinct convictions separated by two and a half years are at times conflated. Second, in relation to the first hearing it is not clear what constitutes the alleged breach of the "fair hearing" standard mandated by s 8.

[22] Addressing the first point (conflation), the description given to the first cause of action unmistakably anchors this cause of action to the hearing on 27 May 2019 when Mr Warren entered a plea of guilty to a charge of behaving in an indecent manner in a public place. The heading reads: "Point 1 – the failure to provide a right of appeal, when a guilty plea has been entered, breaching the Constitution's fair trial right in s 8."

[23] Unhelpfully, the very next paragraph refers to a recusal application apparently made by Mr Warren in the subsequent criminal proceedings commenced two years later on 23 July 2020. No recusal application was made in the earlier proceedings of May

2019 in which a plea of guilty was entered and no fair trial rights could have been breached in that respect.

[24] Attached as it is to the three charges laid in July 2020, the lawfulness of any recusal decision made by the Island Magistrate must necessarily be determined in the context of the conviction and sentence appeal presently awaiting hearing and determination, as made clear by the Privy Council in *Warren v R* at [11] to [13].

[25] In all these circumstances it would be an abuse of process to allow the recusal issue to be determined in the context of the present proceedings in SC 1/2021.

[26] It is therefore difficult to see how the "no right of appeal" complaint can in this respect be made in relation to the May 2019 hearing.

[27] Addressing the second point (alleged breach not clear) no allegation is made by Mr Warren in the Application or in his supporting affidavit to suggest that the 27 May 2019 hearing was conducted otherwise than fairly. Instead the pleadings in the amended Application at paras 11 and 12 appear to be putting forward the case that had there been a right of appeal and had he in fact appealed, Mr Warren could have raised two issues:

(a) The decline of a recusal application (which was not made).

(b) The recognizance decision (about which no complaint has been articulated).

[28] Compounding these difficulties the issues are framed by the Application in highly abstract terms and do not disclose any particular complaint which might allow an understanding of just what was allegedly unfair. Rather the case is apparently advanced on the basis that the very absence of a right of appeal constitutes the breach of s 8, even though the amended Application itself at para 13 acknowledges Mr Warren has the possibility of judicial review or a constitutional challenge, or both.

[29] In these circumstances the Court is asked to determine the "no appeal" point in the absence of an actual recusal determination and in the absence of any articulated complaint regarding the recognizance order.

[30] There is also the fact that the recognizance was not enforced during its operative period and is no longer in force. Any question whether it can be appealed appears moot

and no good reason in the public interest justifying the hearing and determination of this cause of action has been articulated. See *Warren v Attorney-General* SC 2/2022, 17 May 2023, [2023] PNSC 3 at [122] to [126].

[31] These factors are determinative because the jurisdiction of the Court to grant a remedy under Part 2 of the Constitution is only enlivened under s 25(1) and (2) when a Part 2 provision "has been, is being or is likely to be breached". On the undisputed facts not one of these preconditions is satisfied in relation to the guilty plea hearing held on 27 May 2019.

[32] However, should I have misunderstood Mr Warren's case the complaint that there is "no right of appeal after a plea of guilty" will be addressed but in a manner necessarily limited by the abstract circumstances.

The restriction on the right of appeal

[33] Section 14 of the Judicature (Courts) Ordinance makes provision for an appeal to the Supreme Court in respect of any "judgment, sentence or order" of the Magistrate's Court:

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

[34] The apparently unconfined terms in which the right of appeal is framed are, however, limited by s 4 of the Judicature (Appeals in Criminal Cases) Ordinance which prohibits appeals from the Magistrate's Court following a plea of guilty except as to the extent or legality of the sentence:

> **PART II – APPEALS FROM THE MAGISTRATE'S COURT**
>
> **3.**(1) Save as hereinafter provided, any person convicted on a trial held by the Magistrate's Court may appeal to the Supreme Court against conviction or sentence or both.
>
> (2) An appeal to the Supreme Court may be on a question of fact as well as on a question of law.
>
> **4.** No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by the Magistrate's Court, except as to the extent or legality of the sentence.

[35] The Crown submits this restriction is ameliorated by three factors:

(a) The common law, which recognises an ability to appeal in additional limited circumstances.

(b) A decision of the Magistrate can be appealed by way of case stated.

(c) In some circumstances a decision of the Magistrate can be challenged by judicial review.

[36] As to the first submission, the Crown points out that by reason of s 108(1) of the Magistrates' Court Act 1980 (UK) a similar restriction exists in relation to appeals from the Magistrates' Court under English law:

> **108. Right of appeal to the Crown Court.**
>
> (1) A person convicted by a magistrates' court may appeal to the Crown Court—
>
> (a) if he pleaded guilty, against his sentence;
>
> (b) if he did not, against the conviction or sentence.

[37] The point made is that notwithstanding the statutory restriction, the English common law has in limited circumstances recognised an ability to appeal to the Crown Court following a plea of guilty. Those circumstances include where there is a question whether the plea was equivocal, where the plea was entered under duress or if the ground of a special plea in bar, such as autrefois convict, is raised. Reference is made to the summary in *Archbold* (200th anniversary ed, Thomson Reuters, London, 2022) at [2-143] to [2-148]. It is submitted these common law exceptions apply to appeals from the Pitcairn Magistrate's Court by virtue of s 42 of the Constitution (application of English law).

[38] As to the second submission, the Crown submits it is open to any party to appeal a decision of the Magistrate by way of case stated under s 27 of the Judicature (Appeals in Criminal Cases) Ordinance which provides:

> **27.** After hearing and determination by the Magistrate's Court of any summons, charge, information or complaint, either party to the proceedings before the Magistrate's Court may, if dissatisfied with the determination as being erroneous in point of law, or as being in excess of jurisdiction, apply in writing within thirty days after the determination to the Magistrate's Court to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the Supreme Court and such party (hereinafter called the "appellant") shall—
>
> (a) within fourteen days after receiving the case transmit the same to the Supreme Court; and
>
> (b) within thirty days after receiving the case serve a copy of the case so stated and signed on the other party to the proceedings in which the determination was given (hereinafter called "the respondent"):
>
> Provided always that no application shall be made under this section by a prosecutor other than the Public Prosecutor without the previous consent in writing of the Public Prosecutor.

[39] Citing the above passages from *Archbold* it is pointed out the case stated pathway is available where a party believes that the determination of the Magistrate's Court was erroneous in point of law or in excess of jurisdiction and is not limited to issues relating to sentence or otherwise restricted where there has been a plea of guilty.

[40] The submission for Mr Warren in response is that s 27 does not permit a case stated appeal where there has been a guilty plea. That submission is difficult to accept as it is not what the section says.

[41] Mr Warren's submissions referred also to the refusal of the Magistrate to state a case in respect of the subsequent three charges on the grounds that the intended appeal was frivolous. Mr Warren's response to this refusal was to apply to this Court for an order nisi directing the Magistrate to state a case. That application was overtaken by the subsequent extension of time to bring a general appeal under s 3 of the Judicature (Appeals in Criminal Cases) Ordinance. See *Minute (No 4)* issued by Heath CJ on 17 June 2022 in SC 1/2022 at [5]:

> [5] It was agreed, during the conference, that the preferable course was to dismiss the application for a *rule nisi* and, instead, for me to grant an extension of time to bring a general appeal under s 3 of the Judicature (Appeals in Criminal Cases) Ordinance. That would enable all questions that Mr Warren wishes to raise to be determined on the general appeal, including additional grounds foreshadowed in Dr Ellis' memorandum of 16 June 2022. To enable conviction and sentence to be addressed together, the current appeal against sentence will also be dismissed without prejudice to a second appeal for which I will grant an extension of time to file.

[42] While in this particular instance the procedural path of a case stated appeal may not have been as simple as Mr Warren might have initially hoped, an appeal by case stated was possible.

[43] As to the third submission, the procedure for judicial review proceedings was established by the decision of this Court in *Warren v R* [2014] PISC 1 at [452] to [466], approved in *Warren v R* [2015] PICA 1 at [233] to [235] and in *Warren v R* [2018] UKPC 20 at [18] to [21].

Discussion

[44] The Crown submissions are correct. The statutory restriction on an appeal where conviction has followed a plea of guilty is not absolute:

(a) Section 4 of the Judicature (Appeals in Criminal Cases) Ordinance expressly permits an appeal to the Supreme Court as to the extent or legality of the sentence.

(b) At common law an appeal is allowed in further circumstances. Those circumstances include where there is a question whether the plea was equivocal, where the plea was entered under duress or the ground of a special plea in bar, such as autrefois convict, is raised.

(c) A decision of the Magistrate can be appealed by way of case stated. This pathway is available where a party believes that the determination of the Magistrate's Court was erroneous in point of law or in excess of jurisdiction and is not limited to issues relating to sentence or otherwise restricted to where there has been a plea of guilty.

(d) In some circumstances a decision of the Magistrate can be challenged by judicial review. The amended Application itself at para 13 acknowledges Mr Warren has the possibility of judicial review or a constitutional challenge, or both.

[45] Significantly, while s 8 of the Constitution lists five minimum rights where a person is charged with a criminal offence, a right of appeal against conviction and sentence is not so listed or included as a requirement of a "fair and public hearing". A right of appeal is not in fact mentioned or referred to in s 8.

[46] The same observation must be made in respect of art 6 of the European Convention on Human Rights, 1950 (ECHR). This is of special significance given the fundamental rights and freedoms in Part 2 of the Pitcairn Constitution are modelled on the ECHR and s 25(13) of the Constitution requires the Court to take into account any relevant judgment or decision of the European Court of Human Rights (ECtHR):

> (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.

[47] Section 8 and ECHR art 6 are almost identical. Neither makes provision for or requires a right of appeal in criminal matters. Article 6 provides:

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, 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 understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he 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 and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[48] The absence of a right of appeal in criminal matters in the ECHR has been remedied by art 2 of Protocol No 7 (1984) which provides:

Article 2 – Right of appeal in criminal matters

1 Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

[49] In relation to this article the ECtHR in *Dorado Baulde v Spain* Application no 23486/12, 24 September 2015 at [15] reiterated that Contracting States have a wide margin of appreciation to determine how the right secured by art 2 of Protocol No 7 to the Convention is to be exercised:

> 15. The Court reiterates that the Contracting States dispose in principle of a wide margin of appreciation to determine how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. Thus, the review by a higher court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law (see *Krombach v. France*, no. 29731/96, § 96, ECHR 2001-II, and *Shvydka v. Ukraine,* no. 17888/12, § 49, 30 October 2014). In this regard, the Contracting States may limit the scope of the review by a higher tribunal by virtue of the reference in paragraph 1 of Article 2 of Protocol No. 7 to national law (see *Müller v. Austria (no. 2)*, no. 28034/04, § 37, 18 September 2008). In several member States of the Council of Europe such a review is limited to questions of law or may require the person wishing to appeal to apply for leave to do so (see *Pesti and Frodl v. Austria* (dec.), nos. 27618/95 and 27619/95, ECHR 2000-I (extracts)).

[50] Of relevance to Mr Warren's case the ECtHR in *Dorado Baulde v Spain* held at [18] that neither ECHR art 6 nor art 13 (right to an effective remedy) guarantees as such a right of appeal or a right to a second level of jurisdiction:

> 18. As regards the applicant's complaint under Article 13 in conjunction with Article 6 of the Convention, the Court recalls that neither Article 6 of the Convention nor Article 13 guarantees, as such, a right of appeal or a right to a second level of jurisdiction (see, *mutatis mutandis*, *Nurhan Yılmaz v. Turkey* (no. 2), no. 16741/04, § 21, 8 April 2008, and *Gurepka v. Ukraine*, no. 61406/00, § 51, 6 September 2005). In any event, the applicant's conviction was reviewed on cassation by the Supreme Court. The Court therefore rejects this part of the application as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

[51] Taking into account the limited scope of application of s 8 and of the mirror provision in ECHR art 6 and the judgment of the ECtHR in *Dorado Baulde v Spain*, it is to be concluded the limited grounds under Pitcairn law on which an appeal following a plea of guilty can be advanced is not a breach of the s 8 right to a fair and public hearing. In any event, Pitcairn law does in fact provide Mr Warren with the right to apply for appeal or review by the Supreme Court following a guilty plea in a range of circumstances.

[52] The submissions for Mr Warren endeavoured to find some support in the fact that the International Covenant on Civil and Political Rights, 1966 (ICCPR), art 14(5) does make provision for everyone convicted of a crime to have the right to the conviction and sentence being reviewed by a higher tribunal:

> 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

[53] However, there are several reasons why the ICCPR provision is distinguishable and of no assistance:

(a) Section 8 of the Pitcairn Constitution makes no provision for an appeal right. Nor does ECHR art 6 on its own and without supplementation by Protocol No 7.

(b) Whereas the Court is required to take into account decisions and judgments of the ECtHR, there is no equivalent requirement in relation to the ICCPR which does not, in any event, have a court equivalent to the ECtHR. Interpretative guidance is offered by the Human Rights Committee through its non-binding *General Comments*. But *General Comment No 32 (article 14: Right to equality before courts and tribunals and to a fair trial)* (23 August 2007, CCPR/C/GC/32) does not contain anything of real assistance to the present case because it necessarily addresses an article which already stipulates that a right of appeal against conviction and sentence is a component of a "fair" hearing. Such is not the case under s 8 of the Pitcairn Constitution.

(c) No authority has been cited which would justify the Court reading into the fair hearing right in s 8 a provision which in the case of the ECHR has required the adoption of a specific Protocol and in the case of the ICCPR has been expressly incorporated from the outset.

(d) There is also the underlying issue whether the obligations of the United Kingdom under the ICCPR have been domesticated and extended to Pitcairn.

Conclusion

[54] In relation to the right of appeal point, neither on the facts nor on the law has Mr Warren established that the fair and public hearing right in s 8 of the Constitution "has been, is being or is likely to be breached in relation to him". Nor has he established a breach of any other of the laws of Pitcairn.

POINT 2: FAILURE TO PROVIDE A SYSTEM OF LEGAL AID – FAILING TO PROVIDE ACCESS TO JUSTICE AND BREACHING THE FAIR TRIAL RIGHT IN SECTION 8

The submission

[55] The submission by Mr Warren is that by failing to provide a system of civil legal aid the government of Pitcairn is failing to provide access to justice and consequently breaching the fair hearing right in s 8 of the Constitution.

[56] It is stipulated by Dr Ellis this cause of action applies only to civil legal aid for public law challenges against the government of Pitcairn. It does not include civil legal aid for private law challenges between individuals or individuals and non-government corporations.

Background

[57] It is alleged by Mr Warren the government of Pitcairn has never made funds available for a challenge to its own decisions by judicial review or constitutional challenge. It has only made funds available for civil cases between non-government parties. The Crown disputes this claim on both the facts and the law.

[58] The evidence follows but it is first necessary to contextualise the claim which, taken at face value, might suggest the government uses the withholding of funding to insulate itself from accountability.

[59] Legal assistance in criminal cases is available under the Legal Aid (Criminal Proceedings) Ordinance. The office of Public Defender is also provided for by the Public Defender in Criminal Proceedings Ordinance.

[60] Over the years Mr Warren has been funded by criminal legal aid to engage in extensive litigation at all levels of the Pitcairn judicial system, up to and including the Privy Council. Judgments include, but are not limited to, *Warren v R* [2014] PISC 1, *Warren v R* [2015] PICA 1 and *Warren v R* [2018] UKPC 20. The breadth of the public and constitutional issues raised by Mr Warren in those proceedings was described by the Privy Council in *Warren v R* [2018] UKPC 20 at [2] in the following terms:

> 2. These proceedings were accompanied below by numerous applications in which it was maintained that, as a result of alleged flaws in the Pitcairn Islands Constitution ("the Constitution"), failures in administration, deficiencies and impropriety in the appointment of judges, judicial bias and lack of independence and other similar causes, there was systemic constitutional error. The proceedings

> gave rise to 21 defence applications, 2,000 pages of written submissions, 60 days of oral hearings and 30 judgments. The first Supreme Court judgment on pre-trial issues was delivered by Lovell-Smith J on 12 October 2012 and the second by Haines J on 28 November 2014. Appeals to the Court of Appeal resulted in decisions on 23 October 2015, upholding the pre-trial decisions of the Supreme Court, and on 6 July 2016, upholding the appellant's convictions.

[61] Mr Warren has also been granted criminal legal aid to defend the charges on which he was convicted in December 2021 and to conduct the resulting appeal which has yet to be heard.

[62] Mention must also be made of the extensive legal aid-funded litigation which accompanied the *Operation Unique* prosecutions.

[63] It is correct the system for criminal legal aid is governed by ordinance while civil legal aid on Pitcairn is provided by a less formal system outside the ordinance framework. The question is whether the absence of an ordinance-based system means Mr Warren will not receive a fair hearing in public law or constitutional proceedings brought by him.

Civil legal aid – the evidence – Crown

[64] The funding of civil litigation on Pitcairn was described by Mr Evan Dunn, Head of Pitcairn Islands Office, in a letter dated 12 September 2022 addressed to Dr Ellis. No challenge has been made to the admission of this letter into evidence and no affidavit has been required of Mr Dunn. See *Minute (No 4)* 26 October 2022 at [1] to [3].

[65] The principal points made by Mr Dunn include the following:

(a) The current adult population of the Pitcairn Islands is 28.

(b) Over the last approximately 20 years the Pitcairn government has provided financial assistance for legal advice in civil matters at times through a general People's lawyer service and at times on request, on an as required basis.

(c) The Pitcairn government has responded to all requests with the goal of ensuring access to justice. It has always sought to make sure Islanders have access to legal support when it is required.

(d) In the 18 years Mr Dunn has worked at the Pitcairn Islands Office, no request for legal assistance has been rejected. He cannot remember any time the government has been asked for legal assistance funding and has declined to make an offer.

(e) Typically the government has offered to fund legal assistance up to NZ $2,000 to an individual party, whether or not there has been any matter filed in court.

(f) In most circumstances these offers have not been drawn on or have only been drawn on to a small degree.

[66] The full text of the letter follows:

> **Information regarding financial assistance in civil litigation in Pitcairn**
>
> I understand from the Attorney General's Office that you have requested information regarding financial assistance provided by the Pitcairn Island Office to parties engaged in civil litigation on Pitcairn.
>
> I have reviewed my electronic files and correspondence on this topic and have summarised the practice of this office to the best of my recollection. I have not been able to review our hard copy financial records, which are kept off-site. We are also only required to keep financial records for a period of 7 years, so it is not possible to review financial records prior to then. The following summary is based on the review I have been able to complete in the time available.
>
> In summary, over the last approximately 20 years, the Pitcairn government has provided financial assistance for legal advice in civil matters at times through a general 'People's lawyer' service, and at times on request, on an 'as required' basis.
>
> The overarching point is that, as far as I am aware, in the 18 years I have worked at the Pitcairn Island Office, no request for legal assistance has been rejected. As I detail below, the Pitcairn government has responded to all requests with the goal of ensuring access to justice. The current population of Pitcairn Islanders is 28 adults and there tends to be very close communication between the Islanders and government officials including the administrator who is based permanently on Island, the Attorney-General's office, the Deputy-Governor based in Auckland, and this office. For that reason, actual or potential legal disputes tend to come to the notice of government officials quite quickly and in my experience the Pitcairn government has always sought to make sure Islanders have access to legal support when it is required.
>
> *People's lawyer*
> From February 2014 – February 2016, we engaged David James as a "People's Lawyer" for Pitcairn, to be available to provide initial consultation to answer any legal questions and concerns of local Pitcairn residents free of charge. He was paid an annual honorarium of $6,000, based on providing an estimated 20 hours' consultation and 7 hours administration. I am not aware of the details of any assistance he provided under this contract.
>
> In February 2015, Mr James informed us of a custody dispute involving Pitcairn children in which he had already provided initial consultation and advice under

his engagement as People's Lawyer. We were advised that the matter required further advice and potential representation and we agreed to pay for additional time on that matter at an hourly rate, up to a cap. The matter did not involve any litigation in the Pitcairn courts.

The People's lawyer position ceased after Mr James took up a position as Solicitor-General in the Cook Islands in early 2016. Mr James indicated to us that there had been little demand for his services during his appointment. For that reason, the office was not continued after Mr James' departure, and since then the needs of the Pitcairn community have continued to be recognised through legal assistance on an 'as required' basis.

Financial assistance for legal advice on an 'as required' basis
More recently, we have offered financial assistance for legal advice in civil disputes on request. We have received requests and made offers in relation to potential divorce proceedings, custody arrangements, and adoption matters. I can recall this type of offer being made on approximately 6 occasions over the last approximately 4 years. Requests have come to us via the Attorney General's Office or another member of the Pitcairn Public Service (such as the police officer or social worker). They are approved by me in consultation with the Deputy Governor. As above, I cannot remember any time we have been asked for legal assistance funding and declined to make an offer.

Typically, we have offered to fund legal assistance of up to $2000 to an individual party, whether or not there has been any matter filed in court. As noted, I have not been able to check financial records to note how much financial assistance has in fact been provided following these offers. My recollection is that in most circumstances these offers have not been drawn on, or have only been drawn on to a small degree.

2006 land proceeding
The Attorney General's Office have asked me specifically to address any financial assistance that was provided to parties involved in a 2006 land case. The correspondence that I have reviewed indicates that there was a land proceeding held on Pitcairn Island in or around 2006. I do not recall any payment at that time to fund lawyers for the parties to that proceeding, and as noted, we are unlikely to hold any financial records from that time. From my records of correspondence, it appears that we did fund the then-Chief Justice, Blackie CJ to travel to the island for the purposes of that hearing. I did not find any records of any lawyer traveling at that time, and it appears the parties were self-represented. In my view it is most likely that any funding applied at that time was for the travel of the Chief Justice and related court expenses, and not for legal assistance.

[67] The Crown memorandum dated 12 September 2022 provided the following additional information:

(a) Only a limited number of civil legal proceedings have resulted in litigation before the Pitcairn courts (outside those brought by Mr Warren in relation to criminal proceedings against him).

(b) To counsel's knowledge only four civil legal proceedings have been heard in Pitcairn courts over the last two decades, two of which were uncontested divorce proceedings in the Magistrate's Court.

[68] No challenge has been made to the admissibility of this evidence (*Minute (No 4)* at [3]) or as to its accuracy. The full text of the memorandum follows:

> **Introduction**
>
> 1 In minute (no 2) on this matter, your Lordship directed that the Attorney General provide Dr Ellis with the requested information regarding the financial assistance which has been given to parties engaged in civil litigation before the courts of Pitcairn.
>
> 2 At the Attorney General's request, Evan Dunn, head of the Pitcairn Islands Office, has provided Dr Ellis with a summary of financial assistance provided in civil legal matters. That summary is attached to this memorandum for the record of this court (attachment 1).
>
> 3 For the benefit of the Court, it is also noted that there has been only a limited number of civil legal proceedings that have resulted in litigation before the Pitcairn courts (outside of those brought on behalf of Mr Warren in relation to criminal proceedings against him). Further details will be available from the Courts' own records, but to counsel's knowledge, the only civil legal proceedings that have been heard in Pitcairn's courts over the last two decades are:
>
> (a) A 2006 review of a Lands Court decision, regarding a dispute about a land boundary between two adjacent properties (*Young v Christian* CA1/2006, Pitcairn Island Supreme Court, 23 June 2006, attached as attachment 2);
>
> (b) A current matter before the Supreme Court involving review of a Lands Court decision and matters of probate (*Christian v Lands Court* SC3/2021); and
>
> (c) Two uncontested divorce proceedings before the Magistrate's Court.
>
> 4 Counsel for the applicant has specifically requested information relating to the 2006 matter, and suggested that his understanding is that $50,000 may have been set aside to provide legal assistance to parties in that case. As is clear from Mr Dunn's letter and the (attached) judgment of Blackie CJ, all parties in that case were self-represented. Mr Dunn has stated that he found no record of any financial assistance for legal advice being sought or provided in that matter. Any costs involved would likely have been for the 2-day hearing and the travel by the Court to and from the Island.

[69] In written submissions the Crown acknowledged it may well be desirable to have the current civil legal aid system formalised in legislation or policy. Work to this end is underway. But the Crown submits there is no evidence of any particular decision-making being arbitrary or of any refusal to fund cases against the government.

Civil legal aid – the evidence – Mr Warren

[70] In an affidavit sworn on 4 October 2022 Mr Warren begins by making the general point that there is no legislated scheme for providing civil legal aid. After referring to the letter from Mr Dunn he adds:

(a) While Mr Dunn asserts that over the last 20 years funds have been provided by the government to fund civil disputes, no such funds have been provided or offered in the present proceedings. It is to be noted, however, that Mr Warren does not claim he has requested funding.

(b) In any event, NZ $2,000 would be grossly insufficient in a case of this nature.

(c) The hourly rate of a senior New Zealand lawyer is believed by Mr Warren to be not less than NZ $500 per hour. The hourly rate of employment on Pitcairn is NZ $10 to NZ $12 per hour and all jobs are currently part-time. A resident of Pitcairn could not afford to fund a case such as the present.

(d) The government funds its own lawyers, including Mr Raftery KC and the Attorney-General (also a KC). They have access to the Public Service and information Mr Warren does not have. The result is that access to justice is not on a level playing field and there is an inequality of arms.

(e) It is asserted by Mr Warren that "it is perhaps no coincidence that funds have never been made available to challenge the Government". As to this, Mr Warren appears to have overlooked the extensive challenges he himself has made to government, challenges made possible by government funding. As mentioned, he is also silent on the question whether he has asked for funds for the present proceedings. Beyond that, there is the diminished size of the Pitcairn population which substantially reduces demand for a formal system of civil legal aid.

(f) It is further asserted that holding the government to account in a court of law on Pitcairn "is very difficult, if not next to impossible" because

most, if not all Islanders do not have the financial means to do so. The government has effectively provided for itself immunity from any action.

(g) Mr Warren has no expertise in human rights law and it is unfair to expect him to match the skills of the King's Counsel retained by the government.

[71] Mr Warren feels aggrieved by his convictions presently under appeal. However, whatever grievances he may have in relation to those convictions fall to be resolved in the context of his appeal against conviction and sentence. It is impermissible for the present civil proceedings concerning the 27 May 2019 guilty plea and conviction to be used as a platform for a collateral challenge to his conviction and sentence on three different charges in December 2021.

Section 8 of the Constitution

[72] Mr Warren applies for a declaration under s 25(1) and (2) of the Constitution that the failure to provide a system of civil legal aid to fund challenges against the government breaches the s 8 fair trial provisions of the Constitution. Section 8 provides:

> **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.

[73] It can be seen s 8(1) stipulates that in the determination of civil rights and in the determination of any criminal charge there must be a fair and public hearing by an independent and impartial tribunal.

[74] Significantly, however, while s 8 is explicit as to the minimum safeguards which in criminal proceedings attach to the fair hearing guarantee, no such safeguards are attached to civil proceedings. The distinction is of significance because while s 8(3)(c) provides that in criminal proceedings free legal assistance is a minimum right if the interests of justice so require, there is no counterpart for proceedings which determine civil rights and obligations.

[75] If there is to be a similar right in civil proceedings it will have to be read into s 8 through the right to access to justice and the right to a fair hearing. It can be reasoned that because the content of the right to fairness will vary according to the demands of the particular case, should those specific demands so require, the duty on the government to provide free legal assistance may potentially be enlivened. But as in criminal proceedings (in the words of s 8(3)(c)) that duty may well be limited to "when the interests of justice so require".

[76] In resolving this issue interpretative guidance is to be found in ECHR art 6 which is duplicated in the Pitcairn Constitution by s 8. Section 25(13) of the Constitution requires nothing less:

> (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.

[77] Interpretative guidance is also to be found in the common law, a point of some significance given the terms of s 42(1):

> **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.

Article 6 of the ECHR – general

[78] The rich jurisprudence of the ECtHR is made accessible by a series of Guides on the Convention published by the court itself and which can therefore be assumed to provide a fair and accurate representation of the case law. The art 6 right to a fair hearing in both civil and criminal proceedings is addressed in separate Guides. Understandably both counsel in the present case cited as highly persuasive the 130 page civil guide, being the ECtHR *Guide on Article 6 of the European Convention on Human Rights – Right to a Fair Trial (civil limb)* updated to 31 August 2022 (hereafter the *Guide*).

[79] The civil/criminal distinction made by art 6 is addressed and summarised by the *Guide* at [92] and [327]:

(a) The court considers that the rights of persons accused of or charged with a criminal offence require greater protection than the rights of parties to civil proceedings. The requirements inherent in the concept of a "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations. Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases.

(b) Accordingly, the rights of a civil party in relation to the principles of equality of arms and adversarial proceedings are not the same as those of the defendant vis-à-vis the prosecutor.

[80] The "fairness" required by art 6(1) is procedural, not substantive fairness. Whether proceedings are fair is determined by examining them in their entirety: *Guide* at [334] and [379] and the cases cited therein.

Article 6 – legal assistance in civil cases

[81] It is firmly established in ECtHR jurisprudence that notwithstanding the absence from art 6(1) of an explicit obligation on the state to provide free civil legal assistance when the interests of justice so require, there will be circumstances when such an obligation is to be read into the article.

[82] The point of entry taken by this jurisprudence is the right of access to a court, a right not listed in the ECHR but which in the jurisprudence of the ECtHR has been developed out of art 6.

[83] The ECtHR first recognised this right in *Golder v United Kingdom* 21 February 1975, Series A no. 18 at [34] and [35]. In a clear application of the "effective rights" interpretation technique, it held that the detailed fair trial guarantees under art 6 would be useless if it were impossible to commence court proceedings in the first place. Mr Golder was detained in an English prison where serious disturbances broke out. He was accused of assaulting a prison officer and wished to bring proceedings for defamation in order to have his record cleared, but this was precluded by the Prison Rules. Though not without limitation, the ECtHR concluded that art 6(1) contained an inherent right of access to court, observing:

> And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts …
>
> The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles.

[84] In the subsequent decision of *Airey v Ireland* 9 October 1979, Series A no. 32, Mrs Airey wished to obtain a decree of judicial separation. Legal aid was not available for such proceedings, nor indeed for any civil matters. Her complaint was that while parties could conduct their case in person, statistics showed that in at least the six preceding years the petitioner had always been represented by a lawyer, attesting to the complexity of the then divorce law. She was not in a financial position to meet this cost.

[85] On the facts, the ECtHR concluded it "most improbable" that a person in Mrs Airey's position could effectively present her case.

[86] As to the law, the court at [20] to [26] affirmed art 6(1) embodies the right of access to a court for the determination of civil rights and obligations. The possibility that Mrs Airey might appear in person before a court did not provide her with an effective right of such access. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. The fact that there was no legal hindrance to Mrs Airey representing herself was not an answer. Hindrance in fact can contravene the Convention. Fulfilment of a duty under the Convention will on occasion necessitate some positive action on the part of the state. In such circumstances the state cannot simply remain passive. The obligation to secure an effective right of access to the courts falls into this category of duty.

[87] As to the fact that art 6 contains no provision regarding legal aid for civil litigation, the ECtHR at [26] emphasised that art 6(1) may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court.

[88] The ECtHR nevertheless cautioned it would be erroneous to draw general conclusions from its factual finding that the possibility of Mrs Airey appearing in person did not provide her with an effective right of access. Specifically, the outcome of Mrs Airey's case did not imply that the state must provide free legal aid for every dispute relating to a civil right. Much will depend on the circumstances of the particular case and the parties thereto.

[89] The *Guide* accurately summarises the ECtHR jurisprudence on civil legal aid at [157] to [164]. Although the extract which follows is long, it is necessary for the purpose of this decision that most of that summary be reproduced here given the reliance placed on it by both counsel:

> **C. Legal aid**
>
> **1. Granting of legal aid**
>
> 157. Article 6 § 1 does not imply that the State must provide free legal aid for every dispute relating to a "civil right" (*Airey v. Ireland*, 1979, § 26). There is a clear distinction between Article 6 § 3 (c) – which guarantees the right to free legal aid in criminal proceedings subject to certain conditions – and Article 6 § 1, which makes no reference to legal aid (*Essaadi v. France*, 2002, § 30). Guide on Article 6 of the Convention – Right to a fair trial (civil limb) European Court of Human Rights 44/130 Last update: 31.08.2022
>
> 158. However, the Convention is intended to safeguard rights which are practical and effective, in particular the right of access to a court. Hence, Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when

such assistance proves indispensable for an effective access to court (*Airey v. Ireland,* 1979, § 26).

159. The question whether or not Article 6 requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case (ibid.; *McVicar v. the United Kingdom*, 2002, § 48, concerning a defendant in proceedings instituted by the authorities, and see § 50; *Steel and Morris v. the United Kingdom*, 2005, § 61). What has to be ascertained is whether, in the light of all the circumstances, the lack of legal aid would deprive the litigant of a fair hearing (*McVicar v. the United Kingdom*, 2002, § 51), for example by putting him or her at a distinct disadvantage as compared with the opposing party (*Timofeyev and Postupkin v. Russia*, 2021, §§ 101- 107).

160. The question whether Article 6 implies a requirement to provide legal aid will depend, among other factors, on:

- the importance of what is at stake for the applicant (*P., C. and S. v. the United Kingdom*, 2002, § 100; *Steel and Morris v. the United Kingdom*, 2005, § 61), including whether a right protected by the Convention was at issue in the domestic proceedings (for example, Article 8 or 10, or Article 2 of Protocol No. 4 to the Convention: *Timofeyev and Postupkin v. Russia*, 2021, § 102).;
- the complexity of the relevant law or procedure (*Airey v. Ireland*, 1979, § 24), for example on account of special rules on the presentation of the parties' observations (*Gnahoré v. France*, 2000, § 40) or on the submission of evidence (*McVicar v. the United Kingdom*, 2002, § 54);
- the applicant's capacity to represent him or herself effectively (*McVicar v. the United Kingdom*, 2002, §§ 48-62; *Steel and Morris v. the United Kingdom,* 2005, § 61), which may concern the question whether the opposing party was provided with assistance throughout the proceedings and the difficulties encountered by the applicant in preparing his or her defence (*Timofeyev and Postupkin v. Russia*, 2021, §§ 104-107);
- the existence of a statutory requirement to have legal representation (*Airey v. Ireland*, 1979, § 26; *Gnahoré v. France*, 2000, § 41 in fine).

161. However, the right in question is not absolute (*Steel and Morris v. the United Kingdom*, 2005, §§ 59-60) and it may therefore be permissible to impose conditions on the grant of legal aid based in particular on the following considerations, in addition to those cited in the preceding paragraph:

- the financial situation of the litigant (*Steel and Morris v. the United Kingdom*, 2005, § 62);
- his or her prospects of success in the proceedings (ibid)

Hence, a legal aid system may exist which selects the cases which qualify for it and ensures that public money for legal aid in proceedings before the Court of Cassation is only made available to those whose appeals have a reasonable prospect of success (*Del Sol v. France*, 2002, § 23). However, the system established by the legislature must offer individuals substantial guarantees to protect them from arbitrariness (*Gnahoré v. France*, 2002, § 41; *Essaadi v. France,* 2002, § 36; *Del Sol v. France*, 2002, § 26; Bakan v. *Turkey*, 2007, §§ 75-76 with a reference to the judgment in *Aerts v. Belgium*, 1998, concerning an impairment of the very essence of the right to a court). It is therefore important to have due regard to the quality of a legal aid scheme within a State (*Essaadi v. France*, 2002, § 35) and to verify whether the method chosen by the authorities is compatible with the Convention (*Santambrogio v. Italy*, 2004, § 52; *Bakan v. Turkey*, 2007, §§ 74-78; *Pedro Ramos v. Switzerland*, 2010, §§ 41-45). There is no obligation on the State to seek through the use of public funds to ensure total

> equality of arms between the assisted person and the opposing party, as long as each side is afforded Guide on Article 6 of the Convention – Right to a fair trial (civil limb) European Court of Human Rights 45/130 Last update: 31.08.2022 a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary (*Steel and Morris v. the United Kingdom*, 2005, § 62).
>
> 162. It is essential for the court to give reasons for refusing legal aid and to handle requests for legal aid with diligence (*Tabor v. Poland*, 2006, §§ 45-46; *Saoud v. France*, 2007, §§ 133-36).
>
> 163. The *Dragan Kovačević v. Croatia* judgment, 2022, dealt with the question of legal aid in proceedings before a Constitutional Court and the vulnerability of an applicant who had been deprived of legal capacity (§§ 35-36, 79 and 81).
>
> 164. Furthermore, the refusal of legal aid to foreign legal persons is not contrary to Article 6 (*Granos Organicos Nacionales S.A. v. Germany*, 2012, §§ 48-53). Regarding commercial companies in general, see *Nalbant and Others v. Turkey*, 2022 (§§ 37-38).

[90] For the purpose of this decision the foregoing summary of ECtHR case law has been taken as a useful but not inflexible guide.

[91] It is not intended to address the Kyiv Declaration on the Right to Legal Aid (2007) annexed to Mr Warren's affidavit. It is explicitly confined to "best practices" from Africa, Asia and Eastern Europe. It provides nothing of assistance to a court required to take into account the rich and developed jurisprudence of the European Court of Human Rights. The document is in truth a declaration of aspiration by (primarily) human rights advocates from outside Europe and has little relevance in the present context.

Conclusions drawn from ECtHR decisions

[92] Notwithstanding s 8 of the Pitcairn Constitution makes no explicit provision for legal aid in civil litigation, two key principles identified by the ECtHR determine whether the government of Pitcairn may in some circumstances be required to provide such assistance. The first is that the government has a duty to ensure the right of access to a court and the second is that the Constitution is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.

[93] Neither of these principles imply that the government must provide free legal aid for every dispute relating to a civil right or obligation, judicial review or constitutional challenge. The *Airey* decision makes this abundantly clear in more than one passage. The assistance of a lawyer is to be provided when such assistance is indispensable for effective access to a court. In determining whether in the particular circumstances of the case s 8 requires legal assistance to be provided to a civil litigant it is permissible for account to be taken of the factors identified in the ECtHR *Guide* at

[157] to [164]. Civil cases involving public law challenges are not exceptional. The same principles apply.

[94] As recognised by the *Guide* at [161], the right in question is not absolute and the requirements inherent in the concept of a fair hearing are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in criminal cases.

[95] The ECtHR decisions also make clear states have greater latitude when dealing with civil cases and it may be permissible for conditions to be imposed on the grant of civil legal aid based on (inter alia) the financial situation of the litigant and his or her prospects of success in the proceedings. There is no obligation on the government to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary.

The common law

[96] While this conclusion has been reached by application of ECtHR jurisprudence (as required by s 25(13) of the Constitution) the same result is required by application of the common law (Constitution s 42(1)) which similarly recognises a right to practical and effective access to justice. Where fairness demands, the common law requires that a person be represented and legal aid provided as necessary. This principle has been applied in two relatively recent decisions of the then Queen's Bench Division.

[97] The first in time is *R (GR) v Director of Legal Aid Case Work* [2020] EWHC 3140 (Admin), [2021] 1 WLR 1483 at [57] and [58] where Pepperall J said:

> 57. It is of course fundamental that the state must provide access to justice. While the arguments before me were framed by reference to Article 6 of the Convention, such right is, as Lord Reed powerfully demonstrated in *R (Unison) v. Lord Chancellor* [2017] UKSC 51, [2017] 3 W.L.R. 2543, not some recent European import but deeply embedded in our constitutional law. Section 3 of the *Human Rights Act 1998* requires the court, in so far as it is possible to do so, to read and give effect to legislation in a way that is compatible with convention rights.
>
> 58. Here, Articles 6 and 8 are engaged. While Article 6 does not in terms require the state to provide legal aid, the European Court of Human Rights has recognised that the article can in certain circumstances require the provision of such support in order to guarantee fair access to a court since the Convention is not intended to guarantee rights that are "theoretical or illusory" but rights that are "practical and effective": *Airey v. Ireland* (1979) 2 EHRR 305, at [24].

[98] The second decision is *R (SPM) v Secretary of State for the Home Department* [2022] EWHC 2007 (Admin), [2022] 4 WLR 92 at [95] where Lang J said:

> 95. In the light of the judgments in *Howard* and *A*, I consider that the law has evolved since *Witham* and that a lack of legal aid provision can, in certain circumstances (for example, where a person is held in detention), constitute an obstacle to the fundamental common law right of access to justice.

Civil legal aid and Mr Warren

[99] For the reasons given (and at the risk of repetition) the essence of the ECtHR case law and of the common law is that a state is not required to provide legal aid for civil litigation as a matter of course. The assistance of a lawyer is to be provided only when such assistance is indispensable for effective access to a court and in making that determination a range of factors must be taken into account. The right is not absolute. What has to be ascertained is whether, in the light of all the circumstances, the lack of legal aid would deprive the litigant of the fair hearing mandated by art 6 and s 8.

[100] In this regard Mr Warren has provided no or no sufficient evidence. His objections are based largely, if not exclusively, on principle. Such points as he does make relate to the "system" in general. He complains there is no formal civil legal aid system but has not identified any proceeding in which he has sought or has been declined civil legal aid. In his affidavit sworn on 4 0ctober 2022 at para 10 he makes reference to his counsel assisting "my quest for access to justice in this and any further civil cases" without giving particulars. This vagueness and lack of specificity underlines the generalised and decontextualised complaints made in the amended Application and affidavit. This falls well short of establishing a claim that in Mr Warren's particular circumstances the government either had or presently has an obligation to provide free legal assistance for unspecified matters arising from or relating to the 27 May 2019 hearing.

[101] It is possible Mr Warren's argument is that the absence of a formal ordinance-based system of civil legal aid means he will not have practical and effective access to justice in unspecified public law or constitutional proceedings which he might possibly bring at some unspecified time in the future. The amended Application dated 19 September 2022 seeks:

> E. A declaration under section 25(1) and (2) of the Constitution that the failure to provide a system of civil legal aid to fund challenges against the

Government breaches s 8 the fair trial provisions of the Constitution, and the common law.

F. A declaration that the legal system as currently operated does not provide equality of arms, and is unlawful.

G. A declaration that the legal system as it currently operates is in breach of the rule of law, by denying practical and effective access to the Courts.

[102] Implicit in all these complaints is the contention that in civil litigation the right of access to justice and the right to a fair hearing **necessarily** requires that there be a formal, legislated system of civil legal aid. However, for the reasons given this premise is ill founded. Instead what has to be ascertained is whether the particular facts support the complaint that by reason of the absence of legal aid the individual will be denied effective access to justice and the right to a fair hearing. The complaint must be objectively justified and the fairness of proceedings is always to be assessed by examining them in their full context.

[103] In this regard Mr Warren pleaded guilty at the hearing on 27 May 2019 and nowhere in his affidavit sworn on 4 October 2022 does he articulate any complaint regarding the fairness of that hearing. The record shows that Mr Warren represented himself and when, at the commencement of the proceedings, the Island Magistrate inquired whether Mr Warren wished to seek legal advice or to apply for legal aid, Mr Warren answered "no". That answer related to criminal legal aid but the response underlines the absence of any unfairness which can be complained about in the civil context.

[104] The reference by Mr Warren in his affidavit to possible civil proceedings in the future is devoid of factual content and is incapable of being addressed.

[105] There is no suggestion in the ECtHR decisions that civil legal aid be necessarily provided through a formal, legislated system. Rather the duty of the government is to safeguard the right to effective access to a court and the right to a fair hearing. Provided that is done there is no inherent requirement that there be enacted for Pitcairn a formal civil legal aid ordinance. It is for each government to determine the means by which civil legal aid is to be delivered and administered. The absence of an ordinance-based system does not necessarily mean Mr Warren will not have effective access to justice or receive a fair hearing in public law or constitutional proceedings brought by him.

[106] In determining how civil legal aid is to be delivered on Pitcairn, local conditions must be taken into account including the fact that the present adult population of Pitcairn is a mere 28 adults and over the past two decades only four civil legal

proceedings have been heard in Pitcairn courts, two of which were uncontested divorce proceedings in the Magistrate's Court.

[107] There is also the evidence of Mr Dunn regarding the legal assistance scheme which has operated on Pitcairn for the past 20 years. The Pitcairn government has responded to all requests with the goal of ensuring access to justice. It has always sought to make sure Islanders have access to legal support when it is required. In the 18 years Mr Dunn has worked at the Pitcairn Islands Office, no request for legal assistance has been rejected.

[108] There is nothing in this evidence to suggest any distinction is made between those seeking assistance for private civil matters and those seeking assistance for a public law or constitutional challenge.

[109] At the level of principle the complaints by Mr Warren are not well-founded and by a substantial margin he has failed to show on the facts that any unfairness attaches to the (criminal) hearing of 27 May 2019 or to the other civil proceedings in which he has been involved or in which he may become involved. Further, any complaint regarding an alleged breach of s 8 arising out of the hearing and convictions of December 2021 is to be resolved in the context of the forthcoming appeal against conviction and sentence. See the decision of the Privy Council in *Warren v R* at [13].

The discrimination point

[110] The final complaint under the second cause of action is that "the legal system as it currently operates is a breach of s 13 of the Constitution by reason of unlawful discrimination". The formulation at para 37 of the amended Application is that the absence of a legal aid system has the effect of discriminating against Mr Warren by reason of "race, or national or social origin, political or other opinion, and other status (nudist)". It was submitted that while a foreign temporary resident on Pitcairn such as a doctor or police officer could afford a lawyer for public law challenges, Mr Warren, holding an unpopular political opinion as to nudism and the right to practise it, could not.

[111] The Crown submitted:

(a) There is no evidence the government of Pitcairn denies access to legal assistance in public law or constitutional challenges. The evidence of Mr Dunn is that no one on Pitcairn who has asked for it has ever been refused civil legal aid.

(b) There is no evidence to support the assertion that temporary residents on Pitcairn could afford to pay a lawyer without legal aid.

(c) Length of residence is not equivalent to "national or social origin". Many permanent Pitcairn residents have other national origins, for example New Zealand, Australia, United Kingdom, Cook Islands, and the fact some residents who have spent more time overseas may be wealthier does not amount to discrimination on this basis.

(d) Mr Warren has not established a group in comparison to which nudists on Pitcairn receive different treatment.

(e) There is no evidence the system of civil legal aid applies differently to nudists compared to any other group.

(f) The submissions made by Mr Warren regarding nudism, freedom of expression, discrimination and related constitutional issues, are all matters which must be addressed within the context of the appeal against conviction and sentence, an appeal for which criminal legal aid has been granted.

[112] In his oral reply submissions Dr Ellis advised the discrimination grounds of "race, or national or social origin" were abandoned with the result only the nudism point was being pursued. The discrimination was that there is no system of civil legal aid applying to a person of Mr Warren's political opinion (nudism), or any other political opinion, simply because there is "no lawful system of legal aid". Anybody holding a minority viewpoint could not by right seek a grant of legal aid.

[113] Asked by the Court to identify the evidence that Mr Warren was being discriminated against by the withholding of legal aid whether in an informal system or otherwise, because of his beliefs regarding nudism, Dr Ellis replied that Mr Warren could not apply for legal aid as there was no system or policy. When the Court pointed out that in that case Mr Warren was not being treated any differently to anyone else on Pitcairn, Dr Ellis conceded that was correct. See transcript page 82 line 13:

> Haines J: As I understand the point that's pleaded in the operative version of the application, it is that Mr Warren has been discriminated against by the withholding of legal aid. I'm not aware of any evidence that he's actually applied for a grant of civil legal aid, whether in an informal system or outside the informal system.
>
> Dr Ellis: He can't apply for legal aid because there isn't a system or a policy. I can't produce evidence of the negative, can I. There isn't a system that allows him to make an application.

Haines J: I see the point, but he is in this respect, on one view, not being treated any differently to anyone else on Pitcairn.

Dr Ellis: Well, yes, I guess that may be right. I suppose my larger proposition is that everybody's being treated unfairly. So, yes, I can see that that is a problem in terms of discrimination but that is the major wrong, that there needs to be a system of civil legal aid and there isn't, which is denying the access to courts.

[114] And again at transcript page 83 line 12:

Haines J: I think we're perhaps getting a little far away from the point. In the context of a claim that Mr Warren has been discriminated against by the withholding of legal aid, or has been discriminated against by the fact that there is an imperfect system of legal aid on Pitcairn, in the sense that there is no formal system of civil legal aid and that there is an informal system which ought to be improved. The question is if he runs an argument that he's being discriminated against by the systemic failures, isn't he in the same position as everyone else on Pitcairn. In other words where is the difference in treatment because of his views on nudism?

Dr Ellis: That's what I think I just said, that if there isn't any legal aid he's no different from everybody else, but the community attitudes expressed in "you're disgusting" and we want to increase the penalty for this offence to $5,000 are the atmosphere that he's operating in. Nobody else who wants legal aid for a land case or a divorce or whatever, faces those negative community attitudes. There's an atmosphere of discrimination.

No comparator

[115] Section 23 of the Constitution prohibits the treatment of persons in a discriminatory manner. The expression "discriminatory" is defined in subs (3) as affording different treatment to different persons on any of the enumerated grounds:

Prohibition of discrimination

23.(1) Subject to subsection (4), no law shall make any provision which is discriminatory either of itself or in its effect.

(2) Subject to subsections (4) and (6), no person shall be treated in a discriminatory manner by any organ or officer of the executive or judicial branches of government or any person acting in the performance of the functions of the Pitcairn Public Service or any public authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons on any ground such as sex, sexual orientation, race, colour, language, religion, age, disability, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

(4) Nothing contained in or done under the authority of any law shall be held to breach this section to the extent that it has an objective and reasonable justification and there is a reasonable proportion between the provision of law in question or, as the case may be, the thing done under it and the aim which that provision or the thing done under it seeks to realise.

(5) No person shall be treated in a discriminatory manner in respect of access to any of the following places to which the general public have access, namely,

> shops, hotels, restaurants, eating-houses, licensed premises, places of entertainment or places of resort; but the proprietor of such a place has a duty to provide amenities and equipment facilitating the access of disabled persons only to the extent provided by a law.
>
> (6) For the purposes of subsection (2), the exercise, in relation to a person, of any discretion to institute, conduct or discontinue criminal or civil proceedings in any court shall not in itself be held to breach this section.

[116] The two key elements of a discrimination claim under s 23 are therefore the affording different treatment to different persons and proof that such treatment was for reason of a listed characteristic. As the claim by Mr Warren fails at the first hurdle it is not intended to address the second.

[117] As noted by this Court in *Warren v R* [2014] PISC 1 at [315], s 23(3) requires identification of a comparator group:

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

[118] The discrimination submission advanced by Mr Warren cannot succeed. He says he has not sought civil funding for a public law or constitutional challenge because there is no formal ie ordinance-based system for such assistance to be provided by the government. But in this respect he is in the same position as any other Pitcairn resident. There is no different treatment, let alone different treatment based on a political or other opinion. There is no comparator.

[119] To this must be added the points correctly made by the Crown:

(a) There is no evidence the government of Pitcairn denies access to legal assistance in public law or constitutional challenges. The evidence is in fact the other way in that Mr Warren is in receipt of legal aid (criminal) in proceedings in which he will apparently advance a constitutional challenge based on nudism and the freedom of expression provisions in s 13 of the Constitution.

(b) Mr Warren has not established a comparator group in comparison to which nudists on Pitcairn receive different treatment.

(c) There is no evidence the system of civil legal aid described by Mr Dunn applies differently to nudists on Pitcairn compared to any other group on the Island.

Conclusion on civil legal aid point

[120] For the reasons given, neither on the facts nor on the law has Mr Warren established a failure by the government to provide a system of civil legal aid. Nor has he established a failure to provide effective access to justice. There has been no breach of the right under s 8 of the Constitution to a fair hearing.

POINT 3: JUDICIAL INDEPENDENCE – ORDINANCE PERMITTING ISLAND MAGISTRATE TO OBTAIN LEGAL ADVICE FROM A SENIOR MAGISTRATE

Background

[121] A Magistrate, to be known as the Island Magistrate, is required by s 11(2) of the Judicature (Courts) Ordinance to be appointed from among the permanent residents of the Islands and is not required to be professionally qualified in law. Magistrates other than the Island Magistrate, however, are required by s 11(4) to be qualified in law.

[122] The Island Magistrate is empowered by the Justice Ordinance s 5(2) to consult or to seek the advice of any Senior Magistrate or retired Senior Magistrate.

The requirement to be independent and impartial

[123] Section 8(1) of the Constitution provides that a hearing in which civil rights and obligations are determined must not only be fair, the tribunal making the determination must be "independent and impartial". This provision is to be read with s 44 of the Constitution which provides that judges and judicial officers (which includes Magistrates and the Island Magistrate) must exercise their judicial functions independently from the legislative and executive branches of government.

The submission

[124] Mr Warren's amended Application asserts that the mere passing of an ordinance that permits the Island Magistrate to obtain legal advice from a Senior Magistrate or from a retired Senior Magistrate is in breach of judicial independence.

[125] The objection is one based not on any factual circumstance, but on principle. No evidence has been provided to suggest that the Island Magistrate who conducted the hearing on 27 May 2019 consulted with or sought the advice of any Senior Magistrate (retired or otherwise). Nor has evidence been provided of any actual or perceived lack of independence or absence of impartiality.

[126] A not dissimilar submission by Mr Warren was rejected by this Court in *Warren v R* [2014] PISC 1 at [407] to [413]. That ruling does not appear to have been challenged in the subsequent appeals to the Court of Appeal and to the Privy Council.

[127] Before addressing the latest "in principle" objection now made by Mr Warren it is necessary to explain the legislative history and the earlier decision of this Court.

The legislative history

[128] The legislative provision in question is the Justice Ordinance, s 5(2). In its original form (as considered by this Court in *Warren v R* at [407] to [413]) it empowered the Island Magistrate, before or during the hearing of any proceedings, to consult with or to seek the advice of any Senior Magistrate on any question of law, procedure or legal principle. At that time the provision required the Island Magistrate to disclose to the parties both the intention to take such advice and the communications with the Senior Magistrate which followed. The original form of s 5(2) follows:

> (2) The Island Magistrate shall be entitled at his discretion, before or during the hearing of any proceedings, to consult or to seek the advice of any Senior Magistrate, whether within or outside the Islands, on any question or questions of law, procedure or legal principle, in accordance with the following conditions—
> (a) the Island Magistrate shall notify the parties in advance of his or her intention to do so and shall adjourn the proceedings if necessary for this purpose;
> (b) the Island Magistrate shall if possible conduct his enquiry by email or facsimile and seek a reply by the same means;
> (c) the resulting emails or facsimile messages, or if there are none the Magistrate's note of his or her exchanges with the Senior Magistrate, shall be shown to the parties and incorporated in the decision of the Court, so that in the event of an appeal to the Supreme Court they shall be taken to be part of the Island Magistrate's judgment.

[129] On 19 March 2019 subs (2) was amended by the Court Procedure (Remote Participation by Judges and Magistrates) Ordinance 2019, s 4. The changes of relevance to the present case are:

(a) The categories of persons from whom the Island Magistrate can take advice has been expanded. Newly included is a retired Senior Magistrate.

(b) The point of time at which advice can be taken has been expanded from "before or during" the hearing to "at any time".

(c) The disclosure steps are no longer particularised.

(d) A new subs (3) has been added stating that if consultation by the Island Magistrate does take place "the decision making power rests solely with the Island Magistrate".

[130] The amended text of s 5(2) and (3) follows:

> (2) The Island Magistrate shall be entitled at his or her discretion, at any time in relation to any proceedings or potential proceedings, to consult or to seek the advice of any Senior Magistrate or retired Senior Magistrate, whether within or outside the Islands, on any question or questions of law, procedure or legal principle, and may adjourn the proceedings if necessary for this purpose.
>
> (3) For the avoidance of doubt, notwithstanding any consultation pursuant to this section, the decision making power rests solely with the Island Magistrate.

[131] Attached to the amending ordinance of 2019 is an Explanatory Note and Legal Report by the Attorney General of Pitcairn which, while not part of the Ordinance, is helpful background material. It was referenced by both counsel in their submissions and is accordingly reproduced here:

> **Court Procedure (Remote Participation by Judges and Magistrates) Ordinance 2019**
>
> **Explanatory Note and Legal Report**
>
> This Draft Ordinance proposes to amend existing provisions governing Court procedure in Pitcairn to support proceedings being held on Pitcairn rather than off-shore in New Zealand or elsewhere.
>
> The purpose of the amendments is to both facilitate greater remote participation of off-shore judges and magistrates in proceedings by way of video-link, in order to allow hearings on Pitcairn to be held more efficiently; and also to strengthen the provision allowing the Island Magistrate to seek advice from an off-shore Senior Magistrate, to ensure the Island Magistrate is sufficiently supported and to improve the local administer of justice.
>
> …
>
> **Part III – Advice from Senior Magistrates**
>
> Part III deals with procedure in cases in which the Island Magistrate sits. The Island Magistrate is a lay magistrate, resident on Island, but without formal legal qualifications; while Senior Magistrates are legally qualified, and all currently resident in New Zealand.
>
> Under the Justice Ordinance, the Island Magistrate may seek advice from a Senior Magistrate, on or off Pitcairn. Due to the infrequency of Magistrate Court proceedings on Pitcairn, there have been only a handful of court proceedings before either the Island Magistrate or a Senior Magistrate over the last two decades.
>
> The proposed amendment slightly expands the pool of persons from whom the Island Magistrate can seek advice, to include also retired Senior Magistrates. This means there is a larger number of people who may be available to provide advice and support to the Island Magistrate should a case arise, and makes it

more likely to include Magistrates who can draw on personal experience of the environment on Pitcairn in giving that advice.

The proposed amendment also makes the following changes to remove some of the restrictions on the process of seeking advice:

- The limitation that advice may be sought only 'before or during the hearing of any proceedings' is amended to be 'at any time in relation to any proceedings or potential proceedings' to expand the times when advice may be sought;
- The requirements that an enquiry t*o* a Senior Magistrate must, if possible, be by email or facsimile and that parties be notified prior to seeking advice and provided with copies of exchanges, are removed to recognise the greater range of communication technology now available, and to facilitate advice being more readily sought.

This empowers the local Island Magistrate to seek advice at any stage throughout the process, including informally, ensuring better support for the Island Magistrate and promoting better decision-making. It recognises that the role of the Senior Magistrate is one of technical support and advice to the Island Magistrate, who is the decision-maker, which is stated for the avoidance of doubt in the new subsection (3) of section 5 of the Justice Ordinance. The fairness of the process will be maintained by the usual natural justice requirements as they apply to the decision maker, the Island Magistrate, by virtue of the common law, including natural justice requirement to ensure a party is sufficiently informed of and has a sufficient opportunity to answer the case against them.

Consistency with the Constitution

In my opinion, this Ordinance is consistent with the Constitution. It supports the entitlement of a fair and public hearing within a reasonable time, by allowing more efficient disposal of court business, and allowing more court sittings on Pitcairn.

In my opinion, the effect of amendments in Part III are neutral. They remove an express entitlement for parties to receive copies of the exchanges between the Island Magistrate and any advising Senior Magistrate, but as noted above, the Island Magistrate is required to uphold natural justice, which will include an obligation to ensure a party has a fair opportunity to respond to any case against them. Moreover, a decision of the Island Magistrate can be appealed to or reviewed by Supreme Court, which as a court of full jurisdiction, provides an additional layer of protection should any unfairness arise before the Island Magistrate.

The 29 November 2014 decision *Warren v R*

[132] The submission made on behalf of Mr Warren at the 2014 hearing was that s 5(2) of the Justice Ordinance (as it then stood) of itself destroyed judicial independence. See the decision of this Court in *Warren v R* [2014] PISC 1 at [401]:

> (d) Because s 5(2) of the Justice Ordinance allows the Island Magistrate to seek the advice of a Senior Magistrate on any question of law, procedure or legal principle, a situation is thereby created wherein the Island Magistrate acts on the effective instruction of another judicial officer, "destroying

> independence". Such independence is destroyed even if the Island Magistrate does not use s 5(2).

[133] This submission was rejected for the reasons explained in the judgment at [407] to [413]. Only two of those paragraphs are reproduced here:

> [410] First, it is well established that a lay justice or magistrate lacking any formal legal education or qualification (as here) will need to take advice and in so doing does not violate Article 6 of the European Convention on Human Rights, the functional equivalent of s 8 of the Pitcairn Constitution. See *Clark v Kelly* [2003] UKPC D1, [2004] 1 AC 681, at [4] to [9] per Lord Bingham, at [54] per Lord Hope and at [93] per Lord Rodger. As stated by Lord Hope at [54]:
>
> > As I said earlier, no court can be expected to function without having to take decisions from time to time on matters of law, practice and procedure. The district court would be unable to administer justice according to the laws and usages of this realm if the lay justices lacked the guidance of their clerk on these matters.
>
> In the present case, for "their clerk" one substitutes "any Senior Magistrate".
>
> …
>
> [412] Second, whether s 8 of the Pitcairn Constitution is violated must be judged as a question of substance, not of form. See Lord Bingham in *Clark v Kelly* at para 9:
>
> > The European Court of Human Rights has repeatedly emphasised that alleged violations of article 6 (and other articles) must be judged as questions of substance and not of form. So the question is whether, as a matter of substance, trial of the minuter before a court constituted and proceeding as described will violate his right to a fair and public hearing by an independent and impartial tribunal. In agreement with the High Court, and for the reasons given by my noble and learned friend Lord Hope as well as these reasons, I am of the clear opinion that it would not.

[134] At [413] it was concluded the value of *Clark v Kelly* [2003] UKPC D1, [2004] AC 681 lies in its contextualised recognition that a lay justice can receive advice on questions of law, procedure and legal principle without the surrender of independence.

[135] The independence issue does not appear to have been addressed in Mr Warren's subsequent appeal to the Court of Appeal and to the Privy Council.

The submissions for Mr Warren in the present case

[136] In his amended Application Mr Warren expressly states he does not take issue with the amended ordinance in respect of natural justice, legitimate expectation or relevant considerations. This statement was repeated by his counsel in written submissions and in oral argument.

[137] Rather the submission was that the provision of legal advice on questions of law, procedure or legal principle to the Island Magistrate by any off-shore Magistrate, whether retired or not retired, would be a breach of judicial independence. It was wrong in principle that any judicial officer could rely on the opinion of another judicial officer, let alone a retired officer. It gave the appearance of the Island Magistrate not being independent, created a structural inequality of arms (the accused could not get an opinion from a retired judicial officer but the court could) and compromised the right to a fair trial.

[138] It was further submitted a retired magistrate is not a judicial officer and the Island Magistrate cannot consult or take advice from such person. The opinion of a lay person, albeit a retired Magistrate, has no place in the structure of any proper legal system. It is or would be seen to be pressure or the appearance of pressure.

The submissions for the Crown

[139] The first point made by the Crown is that Mr Warren has not suggested any advice was in fact sought or obtained under s 5(2) of the amended ordinance at any time before, during or after the hearing held on 27 May 2019. The transcript of the hearing shows the court was adjourned for a total of six minutes during the entirety of the hearing, reinforcing the improbability that off-shore advice was taken. Mr Warren does not in fact allege s 5 caused any actual unfairness to him personally.

[140] Second, Mr Warren's objection being based on principle, not on a specific complaint, the Crown submissions thereafter necessarily emphasised the purpose of the amendments to s 5(2) as explained in the Attorney General's Explanatory Note, particularly:

(a) To ensure the Island Magistrate is sufficiently supported and to improve the local administration of justice on Pitcairn.

(b) The inclusion of retired Senior Magistrates was to expand the number of people available to provide advice and support to the Island Magistrate. It also made it more likely the pool of available support would include Magistrates able to draw on personal experience of the environment of Pitcairn in giving that advice.

(c) The mechanism for seeking advice from Senior Magistrates, retired or otherwise, does not in any way interfere with the guarantee of judicial independence in s 44 of the Constitution.

(d) The provision does not inherently breach fair trial rights of defendants, be it from lack of independence, equality of arms or otherwise, but rather promotes lawful decision making in a timely manner.

(e) There was no unfairness or breach of Mr Warren's fair trial rights arising from the existence of s 5(2).

(f) This Court in *Warren v R* has already held in relation to the previous version of s 5(2) that providing the Island Magistrate with the ability to receive advice on questions of law does not mean the Island Magistrate surrenders independence.

(g) It is difficult to see how seeking advice from another judicial officer, who also has security of tenure that protects him or her from interference from the executive branch, could compromise the ability of the Island Magistrate to exercise his or her judicial functions independently from other branches of government. The addition of retired Magistrates also does not compromise judicial independence. A retired Magistrate is simply a person with skills, experience and professional and practical understanding to be able to provide sound advice to the Island Magistrate on matters of law and process. As set out in the Explanatory Note, due to the infrequency of matters being heard before the Magistrate's Court, the inclusion of retired Magistrates simply increases the chance that a Magistrate with experience on Pitcairn and an understanding of the Pitcairn context, will be available to provide such advice when required. There is no structural or other reason to suggest that a retired Magistrate would be subject to influence from the executive or legislative branches of government in giving technical legal advice to the Island Magistrate.

(h) The claim as to inequality of arms cannot succeed as the principle of equality of arms applies as between the parties, not as between a party and the court.

[141] The final submission made by the Crown is that in his appeal against conviction and sentence relating to his three December 2021 convictions, Mr Warren's grounds of appeal include the alleged lack of independence and impartiality of the Island Magistrate. The Crown submits that taking the point simultaneously by way of constitutional objection is an abuse of process as identified by the Privy Council in its 30 July 2018 judgment.

Discussion

[142] It is not in doubt that judicial independence is a condition sine qua non for the right to a fair hearing under ECHR art 6 and under s 8 of the Constitution, a point underlined by s 44. See also the ECtHR decisions cited in the *Guide* at [254].

[143] Neither in the earlier proceedings determined by this Court in *Warren v R* (28 November 2014) nor in the present case did the Island Magistrate exercise the discretion under s 5(2) of the Justice Ordinance. In both instances Mr Warren's case has rested on the high ground of principle. It is submitted the very existence of the discretion to consult a Senior Magistrate (retired or otherwise) destroys the independence of the Island Magistrate.

[144] The submission advanced by Mr Warren has already been determined against him in the decision of this Court given on 28 November 2014 at [409] to [413]. While that decision related to the original form of s 5(2) of the Justice Ordinance, the response to the "in principle" objection by Mr Warren to the Island Magistrate consulting with an off-shore Senior Magistrate is unchanged. The expanded objection to the Island Magistrate consulting with a retired Senior Magistrate founders for the same reasons.

[145] Because the submissions for Mr Warren did not directly address the 28 November 2014 decision of this Court in *Warren v R* it is necessary to emphasise that that judgment followed and applied the decision of the Privy Council in *Clark v Kelly* where the circumstances were not dissimilar.

[146] In both Scotland and in England justices who lack any formal legal education or qualification and who sit in the district court are assisted by a legally-qualified clerk to the court whose responsibility it is to advise the justices on any question of law arising in the case. The clerk cannot offer any opinion on the facts of the case. The then practice (as discussed in *Clark v Kelly*) was for the clerk's legal advice to be given in private to the bench. The effect of that advice was then disclosed to the parties and

opportunity given for them to make submissions. The question was whether this process violated the art 6 right to a fair and public hearing by an independent and impartial tribunal. The Privy Council unanimously determined there was no such violation.

[147] Lord Hope at [65] recognised a balance must be struck between the rights of the defendant and the requirements of the court when it is seeking to administer justice. In finding that balance it was not the purpose of the rule of law to impede any further than is necessary the way in which an independent and impartial court goes about its business in order to achieve a result which complies with the law. The giving and understanding of advice offered by the clerk should not be unduly inhibited:

> 65. In my opinion a balance must be struck between the rights of the accused and the requirements of the court when it is seeking to administer justice. The rule of law lies at the heart of the Convention, and it is not its purpose to impede any further than is necessary the way in which an independent and impartial court goes about its business in order to achieve a result which complies with the law. It is obviously of prime importance that the justice, who has to take all the decisions, should understand the legal advice which the clerk is offering to him. The giving and understanding of that advice would be unduly inhibited if the entire conversation had to be carried out in public so that the accused could follow every word that was being spoken, and every question asked, on either side. The fact that the conversation takes place in private, and even in the retiring room if the justice thinks that this would be appropriate, is not in itself objectionable. What is objectionable is depriving the accused of his right to know what is going on during his trial, and in particular his right to know what legal advice is being given to the justice so that he can have the opportunity of commenting on it.

[148] Lord Bingham at [9] pointed out the ECtHR has repeatedly emphasised that alleged violations of art 6 must be judged as questions of substance and not of form:

> 9. The European Court of Human Rights has repeatedly emphasised that alleged violations of article 6 (and other articles) must be judged as questions of substance and not of form. So the question is whether, as a matter of substance, trial of the minuter before a court constituted and proceeding as described will violate his right to a fair and public hearing by an independent and impartial tribunal.

[149] On established authority the objection in principle made by Mr Warren must accordingly be contextualised. That context includes the following:

(a) The Island Magistrate is without formal legal education or qualification. He or she must be appointed from among the permanent residents of the Island. The current population is 28 adults. Senior Magistrates must, however, be legally qualified and all currently reside in New Zealand.

(b) There is little scope for the Island Magistrate to accumulate judicial experience. According to the Attorney General's Note there have been only a handful of court proceedings before the Island Magistrate or a Senior Magistrate over the last two decades.

[150] In these circumstances it is necessary that better decision making be promoted by ensuring the Island Magistrate is properly supported when discharging his judicial duties. Facilitating the taking of advice on questions of law, procedure or legal principle is such support and closely resembles the support given to lay justices in England, as described in *Clark v Kelly*. As noted by Lord Hope at [54] and [55], no court could function without having to take decisions from time to time on matters of law, practice and procedure and the district court would be unable to administer justice according to the laws and usages of the realm if lay justices lacked the guidance of the clerk on those matters. It did not follow that the court lacked the independence and impartiality required by ECHR art 6. The structure of the court must be looked at as a whole in the context of the procedures for appeal and for review of its decisions:

> 55. It does not follow from this, however, that the court lacks the independence and impartiality which article 6(1) requires. The structure of the court has to be looked at as a whole, and this must be done in the context of the procedures which are available for appeal and for the review of its decisions on the ground of an alleged miscarriage of justice.

[151] These observations have direct application to the case presently before the Court.

[152] As in Scotland and England, advice is taken from a person qualified in law. In the Pitcairn context a Senior Magistrate must be qualified in law (see Judicature (Courts) Ordinance, s 11(4)) and the fact of being so qualified is not altered by retirement, nor does the fact of his or her judicial experience on Pitcairn become of any less importance:

(a) The matters on which consultation and the seeking of advice can occur under s 5(2) of the Justice Ordinance are strictly limited to questions of law, procedure or legal principle. Excluded are the merits of the case, issues of fact and of credibility.

(b) These limitations are underlined and reinforced by s 5(3) of the ordinance itself which provides that notwithstanding any consultation, the decision-making power rests solely with the Island Magistrate:

> (3) For the avoidance of doubt, notwithstanding any consultation pursuant to this section, the decision making power rests solely with the Island Magistrate.

(c) The Senior Magistrate (retired or otherwise) who is consulted is detached from the decision made by the Island Magistrate.

(d) In both civil and criminal proceedings the discretion in s 5(2) must be exercised according to law, fairly and reasonably. There will be circumstances where disclosure steps similar to those formerly prescribed by the original s 5(2) will have to be considered by the Island Magistrate to ensure a fair hearing.

(e) In both civil and criminal proceedings there are rights of appeal, constitutional challenge or review.

(f) Just as Lord Hoffmann at [32] allowed that the clerk could be expected to act professionally, the same can be expected of Senior Magistrates, retired Senior Magistrates and the Island Magistrate.

[153] In this context there is no justification for distinguishing between retired and non-retired Senior Magistrates. Both have legal qualifications and experience. They are not lay persons. To borrow and adapt from Lord Bingham's judgment in *Clark v Kelly* at [6], the question whether Mr Warren's rights under art 6 of the Convention will be violated if he is tried before the Island Magistrate must be answered not by identifying a pigeon-hole into which a Senior Magistrate or a retired Senior Magistrate should be placed but by examining how, properly conducted, Mr Warren's trial will in practice proceed. There is no true dichotomy between retired and non-retired. The stated purpose of the amendment is to improve the local administration of justice and to provide the Island Magistrate with a broad panel of current and retired experienced Magistrates from whom he or she can draw to get the most appropriate advice and assistance on the three narrow subjects listed in s 5(2). This does not put in jeopardy the independence of the Island Magistrate, nor does it give the appearance of jeopardy.

[154] Beyond these general statements of principle will lie the facts of the particular case. The content of the duty to provide a fair and public hearing by an independent and impartial hearing will be determined by the circumstances of that particular case. It is not possible to uphold the "in principle" submissions made by Mr Warren and in particular the claim that the very existence of the discretion in s 5(2) of the Justice Ordinance destroys the independence of the Island Magistrate.

[155] The equality of arms submission is untenable as the principle applies as between the parties, not as between a party and the court: *Mort v United Kingdom* Application No 44564/98 (unreported), 6 September 2001, approved in *Clark v Kelly* by Lord Hoffmann at [21], Lord Hope at [54] and by Lord Rodger at [89] to [90].

[156] Also cited in submissions for Mr Warren were the Bangalore Principles. Those principles are discussed at [248] to [256] of the first judgment of this Court given on 28 November 2014. No submissions were advanced by Mr Warren at the December 2022 hearing to address these passages. I accordingly repeat and adopt what is said there. It is sufficient to reproduce here only the conclusion at [413] addressing the specific issue of judicial independence and s 5(2):

> [413] The abstract and de-contextualised treatment of judicial independence in the so-called Bangalore Principles is of little assistance in this context. It should be noted, however, that the commentary on the Principles at [39] accepts that "picking the brain" of a colleague does not of itself compromise independence. In my view, the value of *Clark v Kelly* is that it is a contextualised recognition that a lay justice can receive advice on questions of law, procedure and legal principle without the surrender of independence.

Conclusion

[157] For these reasons I conclude neither in its original form nor in its amended form does s 5 of the Justice Ordinance breach the principle of judicial independence or give the appearance of so doing.

OVERALL CONCLUSION

[158] For the reasons given, none of the challenges made by Mr Warren have succeeded and they are dismissed.

Costs

[159] As the question of costs has not been addressed by counsel, costs are reserved.

_____

Justice Haines
Supreme Court