Court of Appeal of Pitcairn Islands

Queen v 7 Named Accused [2004] PNCA 1; CA 1-7 2004 (5 August 2004)

IN THE PITCAIRN COURT OF APPEAL

CA 1-7/2004

IN THE MATTER of applications for leave to appeal by seven named accused

BETWEEN

THE QUEEN

AND

SEVEN NAMED ACCUSED

Hearing: 26, 27 and 28 July 2004

Coram: Henry P
Barker JA
Neazor JA

Counsel: Mr K Raftery for the Crown
Mr P Dacre (Public Defender), Mr A Cook QC (of the New South Wales Bar) and Mr A Roberts, for the Applicants

Judgment: 5 August 2004

JUDGMENT OF THE COURT

[1] The applicants, all inhabitants of Pitcairn Island, have been committed for trial in the Supreme Court on various charges brought under United Kingdom criminal statutes. Following committal they applied

jointly to the Supreme Court by way of a document headed "Preliminary Applications". Although so described, those in issue would seem not to come within that description. Essentially they seek either review or declaratory relief. For the hearing of the applications the Supreme Court comprised Blackie CJ, Lovell-Smith and Johnson JJ sitting as a Full Court. A number of separate issues were addressed in the judgment of the Supreme Court which was delivered on 19 April 2004. In seeking the leave of this Court to appeal, the applicants pursued only the following applications, on which we heard substantive argument:

1. Declaring that the Orders in Council from 1859 onwards insofar as they purported to apply to Pitcairn were unlawful, illegal, invalid, null and void and. had no force or effect so that it follows that any purported ordinances or legislation based on those Orders in Council could not justify any action as being legal.

2. The following were unlawful, illegal, invalid, null and void and had no force or effect:

   a. The purported appointment of the Supreme Court Justices and the Magistrates;

   b. The deposition hearings purporting to commit the 7 named accused for trial.

[2] In addition this Court was asked to declare the decision of the Supreme Court invalid because the Judges sat as a Full Court, a course to which unsuccessful objection had been taken.

[3] As stated in the Supreme Court judgment, the early and interesting history of the remote territory known as Pitcairn Island is well known as a consequence of it having been settled in 1790 following the mutiny on HMAV *Bounty*. It is unnecessary for us to review that history except to the brief extent appropriate for the purposes of these leave applications and in the context of particular issues. The Supreme Court judgment contains detailed references to some of the historical matters, and repetition would be superfluous. It is sufficient for our purposes to consider them in summary form only.

[4] We now consider the respective points of the leave applications.

Validity of the Pitcairn laws

[5] The laws under which the applicants have been charged and committed for trial, and the constitution of the Courts which administer those laws, have as their source ordinances made by the Governor pursuant to powers delegated to him by Orders in Council. The validity of those ordinances is under challenge. The basis of the challenge is that the Orders in Council upon which they rely are themselves invalid. Effectively, the submission is that the United Kingdom has neither sovereignty nor jurisdiction over Pitcairn Island, which is an independent state, although one which has had and still has what was described as some kind of special relationship with the United Kingdom.

[6] The proposition is somewhat startling, when it is beyond question that the United Kingdom has, without protest from any quarter until the present challenge was mounted by these applicants on their own behalf, expressly claimed Pitcairn Island as one of its possessions and exercised jurisdiction and governance over it as such since, at the very latest, 1898. Perhaps not surprisingly, the Supreme Court

rejected this challenge, notwithstanding the wealth of historical material presented to it resulting from comprehensive and painstaking research by counsel for the applicants.

[7] As we understood it, the basic submissions were: (a) that the British Settlements Acts of 1887 and 1945 (UK) had no application to Pitcairn Island, (b) because the Orders in Council purported to be made under those Acts, as subordinate legislation they had no lawful basis, with the consequence that all ordinances made under them were also invalid, and (c) the inclusion in 1898 of Pitcairn Island in the earlier 1893 Order in Council was invalid for the same reason. The relevant provisions of the 1887 Act are the preamble and ss 2, 3 and 6. They read:

> *Whereas divers of Her Majesty's subjects have resorted to and settled in, and may hereafter resort to and settle in, divers places where there is no civilised government, and such settlements have become or may hereafter become possessions of Her Majesty, and it is expedient to extend the power of Her Majesty to provide for the government of such settlements, and for that purpose to repeal and re-enact with amendments the existing Acts enabling Her Majesty to provide for such government:*
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> .....
>
> *2. It shall be lawful for Her Majesty the Queen in Council from time to time to establish all such laws and institutions, and constitute such courts and officers, and make such provisions and regulations for the proceedings in the said courts and for the administration of justice, as may appear to Her Majesty in Council to be necessary for the peace, order, and good government of Her Majesty's subjects and others within any British settlement.*
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> *3. It shall be lawful for Her Majesty the Queen from time to time, by any instrument passed under the Great Seal of the United Kingdom, or by any instructions under Her Majesty's Royal Sign Manual referred to in such instrument as made or to be made, as respects any British settlement, to delegate to any three or more persons within the settlement all or any of the powers conferred by this Act on Her Majesty in Council, either absolutely or subject to such conditions provisions, and limitations as may be specified in such instrument or instructions.*
>
> *Provided that, notwithstanding any such delegation, the Queen in Council may exercise all or any of the powers under this Act: Provided always, that every such instrument or instruction as aforesaid shall be laid before both Houses of Parliament as soon as conveniently may be after the making and enactment thereof respectively.*
>
> .....
>
> *6. For the purposes of this Act, the expression `British possession' means any part of Her Majesty's possessions out of the United Kingdom and the expression `British settlement' means any British possession which has*

> *not been acquired by cession or conquest, and is not for the time being within the jurisdiction of the Legislature, constituted otherwise than by virtue of this Act or of any Act repealed by this Act, of any British possession.*

[8] By the 1945 Act, the reference in s 3 to three or more persons in the settlement was substituted by a reference to any specified person or persons of authority.

[9] The Pacific Order in Council 1893, based in part on the 1887 Act, provided for the constitution of courts and a High Commissioner, the application of general law and a variety of other matters. It defined the limits of its application in very wide terms, and then designated the territories and particular areas to which it initially applied. Pitcairn Island did not come within any of those initially designated areas. In 1898, pursuant to articles 4 and 6 of the Order in Council, the Secretary of State directed that jurisdiction under it was to be "exercisable in relation to the British Settlement known as Pitcairn Island". As an additional ground of invalidity, it was submitted that the 1898 Instruction purported to amend the Order in Council and was therefore outside the power of the Secretary.

[10] The Pitcairn Order in Council 1952 revoked the 1893 Order in Council insofar as it applied-to Pitcairn Island and provided for the appointment of a Governor of the Island, with powers to make laws for the peace, order and good government of Pitcairn Island. In turn the 1952 Order in Council was superseded by the Pitcairn Order of 1970 which also made provisions of a like nature. Under both Orders in Council, laws promulgated were to take the form of ordinances.

[11] There is a jurisdictional difficulty which faces the applicants' primary contention that Pitcairn Island was not at any relevant time a British settlement. To that we now turn.

Acts of state conclusive as to status

[12] As we have noted, the whole basis of the challenge to validity lies in the contention that Pitcairn Island was not and is not a British possession nor, more particularly, a British settlement. The difficulty for the applicants lies in the simple proposition that an assertion by the Crown of jurisdiction over a territory is an act of state, not susceptible to challenge. A long line of cases establishes this proposition.

[13] In *Sobhuza II v Miller* [1926] AC 518, the appellants in the Privy Council sought to invalidate an Order in Council which had declared that certain lands in Swaziland had been appropriated to the Crown to the extinguishment of the use and occupation by the indigenous people under native law. It was submitted that the Order in Council was not within the powers recognised by a convention between Great Britain and the then Republic of South Africa, which had made Swaziland a protectorate. The Privy Council held that an assertion of power over a territory by Order in Council was an "act of state" unchallengeable in any British Court.

[14] The *Sobhuza* case followed a judgment of the English Court of Appeal in *R v Earl of Crewe* [1910] 2 KB 576. There, by Order in Council, the High Commissioner for South Africa had been authorised to provide in the Bechuanaland Protectorate "for the administration of justice and for the peace, order and good government of all persons within that Protectorate, and the prohibition and punishment of all acts tending to disturb the public peace". A tribal chief was detained in custody under a proclamation

purporting to have been made by the High Commissioner under the powers conferred by the Order in Council. The chief applied for *habeas corpus* in the English Courts against the Secretary of State for the Colonies. It was held the Protectorate was a foreign country and the proclamation was validly made. It was further held that the detention was justified as an act of state.

[15] In the *Southern Rhodesia* case, [1919] AC 211, the Judicial Committee held that a manifestation by Orders in Council of the intention of the Crown to exercise full dominion over unallotted lands was sufficient for the establishment of complete power.

[16] Viscount Haldane said at p 525 of *Sobhuza*:

> *Both of these cases imply that what is done may be unchallengeable on the footing that the Order in Council, or the proclamation made under it, is an act of State. This method of peacefully extending British dominion may well be as little generally understood as it is, where it can operate, in law unquestionable.*

[17] In *Nyali Ld v Attorney General* [1956] 1 QB 1, the English Court of Appeal considered an Order in Council dealing with jurisdiction within the Protectorate of Kenya. This territory was under the sovereignty of the Sultan of Zanzibar, but administered by British officials under the control of the Government of the Colony of Kenya. Denning LJ, at p 15, stated that the Court:

> *... must look at, not the agreement with the Sultan, but at the Orders in Council and other acts of the Crown so as to see what jurisdiction the Crown has in fact exercised; because they are the best guide, indeed they are conclusive, as to the extent of the Crown's jurisdiction.*

[18] Morris LJ said, at p 22:

> *But, in the ordinary course, it is not for the court to accept an invitation to investigate whether the power and jurisdiction of the Crown results from treaty or from grant or from usage or from sufferance or from other lawful means: nor is it for the court to permit any challenge to the pronouncement of the Crown which has power and jurisdiction within certain territories.*

[19] Parker LJ said, at p 33:

> *All that they [the Courts] can do is to look at the instrument manifesting the exercise of the jurisdiction to see whether it has been lawfully exercised, according to the law in force.* (Referring to *Sobhuza's* case.)

[20] Statements to similar effect are to be found in *The Fagernes* [1927] P 311 and in *Coe v Commonwealth* [1979] HCA 68; (1979) 24 ALR 118 (per Gibbs J). The clearest statement is perhaps that of Diplock LJ in *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, at 753:

> *The Queen's Courts, upon being informed by Order in Council or by the appropriate Minister or Law Officer of the Crown's claim to sovereignty or jurisdiction over any place must give effect to it and are bound by it.*

[21] Relying therefore on these authorities, it: is very clear that the Court will not go behind the 1952 and 1970 Orders in Council which declare Pitcairn to have been a British settlement and which then proceed to give powers to the Governor to make ordinances for the good government of the Island. The weight of authority is overwhelmingly against the proposition advanced by the applicants.

[22] For the same reason, the 1898 Instruction of Secretary of State Chamberlain cannot be challenged. It was, in Diplock LJ's words, a statement by the appropriate Minister of the claim of the Crown to sovereignty or jurisdiction over Pitcairn.

[23] In colonial times, such as 1898, the Secretary of State for the Colonies was the adviser to the Queen in colonial matters. See *Mighell v Sultan of Johore* [1894] 1 QB 149, 158. There it was argued that the Judge should not have been satisfied with a letter about the status of the Sultan from the Secretary but should have informed himself from historical or other sources as to the status of the Sultan. The Court of Appeal rejected this submission and held that the letter was conclusive as to the status of the Sultan as an independent sovereign.

[24] We note that counsel for the applicants did not seek to distinguish the cases cited in this section of the judgment or to present argument contrary to the clear legal proposition they establish. Mr Cook, very faintly, appeared to argue that "act of state" was not a defence to a claim by a British subject. He referred us only to an academic article without greater precision. We find no help for his proposition in that article.

[25] We are also satisfied that the administrative assertion of sovereignty in 1898 to include Pitcairn within the 1893 Order in Council was *intra vires* the Order in Council. The 1893 Order in Council asserted British jurisdiction in the Pacific and nominated various islands in the Pacific contained within a "box" of latitude and longitude. It is agreed that Pitcairn was neither named in the Order nor situated within this box. In 1898 the Secretary of State for the Colonies, Joseph Chamberlain, purported to extend the effect of the 1893 Order in Council to "include the British Settlement known as Pitcairn Island". We think he was entitled to do so because of the proviso to article 6 of the 1893 Order in Council which reads in part:

> *Provided that the Secretary of State from time to time, by any instructions given to the High Commissioner, and published as the Secretary of State thinks fit, may direct that jurisdiction under this Order may be exercised in relation to any parts of the limits of this Order not herein specified, or that any part of the limits of this Order shall, until otherwise directed, be excepted from the application of this Order.*

[26] Article 4 in the 1893 Order was stated to apply to the Pacific Ocean and the Islands and places therein, including islands and places which are for the time being British settlements. It was not necessary for there to have been an amending Order in Council to include Pitcairn. The right was given to the Secretary of State in the proviso to article 6 to nominate additional places which would be subject

to the Order, provided they came within the broad limits stated as the Pacific Ocean and islands and places therein which were for the time being British settlements. Pitcairn Island came within that description.

[27] Mr Cook's argument that the 1898 Instruction was redefining the limits of the order cannot be accepted. The Instruction does not purport to do that.

[28] We consider that Pitcairn, being in the Pacific Ocean and being a British settlement, could lawfully have been the subject of a particular inclusion in the 1893 Order in Council made at the initiative of the Secretary of State. Consequently, the 1893 Order in Council applies to Pitcairn: The fact the 1898 Instruction was apparently made to facilitate the trial of a Pitcairn resident for a serious criminal charge is irrelevant. If anything, that fact strengthens the view that Pitcairn was a British settlement.

Jurisdiction to review validity

[29] Mr Raftery also submitted as an additional bar that the validity of the 1898 Instruction and the two Orders in Council could only be challenged through the English Courts, with the Pitcairn Supreme Court having no jurisdiction to entertain any such challenge. To strike down United Kingdom statutory instruments, it was said, would be the exercise of extra-territorial jurisdiction and require express conferral.

[30] Although at first sight the submission may seem to have some attraction, we doubt its correctness. The jurisdiction of the Pitcairn Supreme Court is to administer and apply the laws of Pitcairn. Section 6 of the Judicature (Courts) Ordinance provides:

> *The Supreme Court shall, subject as in any law provided, possess and exercise all the jurisdiction, powers and authorities which are for the time being vested in or capable of being exercised by the High Court and by the Crown Court of England [and Wales] or by any judge of those courts.*

[31] Section 16 of the same Ordinance provides:

> *(1) Subject to the provisions of 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 the Islands.*
>
> *(2) All the laws of England extended to the Islands by subsection (1) shall be in force therein so far only as the local circumstances and the limits of local jurisdiction permit and subject to any existing or future ordinance and for the purpose of facilitating the application of the said laws it shall be lawful to construe the same with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.*

[32] Applying those provisions, it seems reasonably clear that the British Settlements Acts, being

statutes of general application and in force in England, are in force in Pitcairn and form part of its law. It would follow that subsidiary legislation based on those Acts also forms part of Pitcairn law. For example, if a provision in such an Order in Council clearly could not be said to come within the words "necessary for the peace, order and good government", then it would seem appropriate for the local Court to so declare. It would be able to determine what was and what was not Pitcairn law. An example of the limits of the wide words "necessary for the peace, order and good government" can be found in *R (Bancoult) v Secretary of State for Sovereign and Commonwealth Affairs* [2001] QB 1067, where the English Court of Appeal struck down an ordinance which required the forcible removal of the inhabitants of a territory. But here the only challenge is to the status of Pitcairn Island as a British settlement and, as we have held, that challenge is not justiciable.

[33] The question of forum would also appear to be inconsequential. Even if the challenge to the Order in Council could only be made in a British Court, the authorities make it clear that the result would have been the same as it would be in the Pitcairn Court: namely, that the Court cannot question an Order in Council making a claim by the British Crown of jurisdiction or sovereignty.

Pitcairn Island a British settlement

[34] Although not necessary to the disposal of these leave applications, in deference to the provision of the substantial volume of documentary material presented to the Court resulting from the industry of counsel, we propose to consider briefly the historical basis relating to the United Kingdom claim of sovereignty over Pitcairn Island and its status as a British settlement, insofar as that can be done from that material.

[35] It was first submitted that the mutineers ceased to be British subjects following the commission by them of what were described as acts of treason and piracy, particularly the seizure and later burning of HMAV *Bounty*. Therefore it was said the settlement of the Island in 1790 was by individuals who were not then British subjects. We do not find the submission sustainable. The duty of allegiance owed by the mutineers was never broken, either by their own acts or any act of the King. When they established a settlement they remained British subjects. In *Joyce v Director of Public Prosecutions* [1946] AC 347, at p 366, Lord Jowitt LC observed:

> *The natural-born subject owes allegiance from his birth, the naturalized subject from his naturalization, the alien from the day when he comes within the realm. By what means and when can they cast off allegiance? The natural-born subject cannot at common law at any time cast it off.* 'Nemo potest exuere patriam' *is a fundamental maxim of the law from which relief was given only by recent statutes.*

[36] Insofar as the preamble to the 1887 Act has significance in relation to the interpretation of that Act, or to the application of facts to it, as Pitcairn Island had no civilised government when the settlement occurred, the initial provisions of the preamble apply. The mutineers, as British subjects, resorted to and settled in a place which had no civilised government. It was *terra nullius*. In contrast, the requirement of being a British possession is to be determined at the time the power to provide for government is exercised. Section 6 makes that clear when it speaks of "for the time being".

[37] Between 1830 and 1838 the Island was visited by British warships, providing on occasions practical

assistance and reporting to the Admiralty. The only inference to be drawn is that they were so acting in accordance with instructions coming from the Admiralty. In 1837 the Captain of HMS *Actaeon* visited the Island and recorded in his report to the Admiralty:

> *... having assembled the whole of the inhabitants informed them I had been sent by the British government to examine into and settle differences existing between them.*

[38] In 1838 Captain Elliott, in command of HMS *Fly*, arrived at the Island. The inhabitants referred to the need for some means of internal government and for protection from "lawless strangers". They instanced a claim by an American vessel that they (the Islanders) were not under British protection. Captain Elliott noted that the Islanders were flying a merchant Union Jack. He recorded:

> *Apprehending that my duty required some decisive step in this unlooked for contingency I considered I should best afford protection to these people, and least involve my Government of whose intentions in respect to the Pitcairn Islanders I am ignorant, by conferring the stamp of Authority on their election of a magistrate or Elder to be periodically chosen from amongst themselves, and answerable for his proceedings to Her Majesty's Government for whose information he is to keep a Journal.*
>
> *I accordingly drew out a few hasty regulations to be observed, under my authority in the election of this Officer marked No. 6, which with a formal attestation of his being sworn in before me, and an Union Jack which I supplied them with, will I trust insure them against any renewed insults from foreigners. By their unanimous voice, they selected for the situation Edward Quintal a most able and superior senior of their number.*
>
> *I trust, Sir, you will consider my assumption of the power to confer this authority was warranted by the urgency of circumstances and the difficulty of reference, and that you will be able to approve of the view I have taken of my duty.*

[39] On receipt by the Admiralty the report was approved.

[40] Captain Elliott was responsible for drawing up a form of constitution and a series of laws which were adopted by the Islanders. Under them, it can be noted that serious crimes were to be referred to the captain of the next visiting warship and the Magistrate was required to swear an oath of loyalty to the Queen.

[41] The visits by Royal Navy ships continued, with reports on the Island being sent to the Admiralty. In 1852 a revised constitution, prepared by Rear-Admiral Moresby was adopted. In 1878 the Rear-Admiral as Commander in Chief, reporting from HMS *Shah*, recorded the perceived need by the Chief Magistrate for proper authorisation from Her Majesty's government of his office, and referred to the Island as "a portion of British territory".

[42] In 1893 Captain Rookes of HMS *Champion* drew up a comprehensive new set of laws and regulations which were adopted by the Islanders. In 1898, as earlier mentioned, Pitcairn Island was brought under the umbrella of the Pacific Order in Council 1893. Under that umbrella, in 1904 revised laws were laid down by the Deputy High Commissioner for the Western Pacific. Under those provisions,

civil and criminal matters of a serious nature, for which punishment was not provided in the local rules and regulations, were to be dealt with by the High Commissioner's Court for the Western Pacific in Pitcairn. Then in 1940, instructions in the form of regulations were promulgated under the authority of the High Commissioner. These regulations included provisions that criminal proceedings were to be taken in the name of the King, and that all cases not within the jurisdiction of the Island Court were to be heard and determined in the High Commissioner's Court for the Western Pacific. The 1952 and 1970 Orders in Council then followed, with a large number of ordinances being enacted under each, including; the establishment of a separate Court system.

[43] The above is a brief summary of the exercise by the United Kingdom of sovereignty and jurisdiction over Pitcairn Island. In its judgment, the Supreme Court has dealt with historical matters in a far more detailed and comprehensive manner, and in this regard we simply endorse, without repeating, what is there set out.

[44] There was also evidence placed before the Supreme Court demonstrating ongoing recognition by foreign states, by the European Union, and by the United Nations, of the United Kingdom's sovereignty over Pitcairn Island, which we find unnecessary to detail. It is comprehensive. Neither Halsbury nor academic writings cast doubt on the Island's status as a British possession. There is also an unbroken pattern of evidence in many forms of continuing recognition by the inhabitants themselves of United Kingdom sovereignty, right through from the early 19`h century to the present time. Expressions of loyalty, stamps, coinage, the assignment of an armorial ensign and the holding of British passports by Islanders, including the applicants, are but examples.

[45] It is also relevant that Mr Cook was unable to refer us to any example which could possibly be construed as a denial by the Islanders of their status as British subjects under the dominion of the Crown. Mr Cook did, however, place some relevance on statements made in 1842 and 1879 by the then Secretaries of State to the effect that Pitcairn Island was not a colony. The context of the first is not clear.

It was apparently information conveyed to the Church Missionary Society, and the second was in the context of endeavouring to ascertain the appropriate person to whom to forward a letter of appreciation from the Islanders, addressed to the Queen. We fail to see how either statement can have any significance in the light of the clear and unequivocal expressions in the 1898 Instruction and the subsequent Orders in Council. In any event, they would have to be weighed against what in fact occurred over the years, and also a similarly "authoritative" statement in 1898, prior to the giving of the Instruction, that Pitcairn Island was a British settlement. There is nothing else to indicate a denial by the British government of its sovereignty over the Island. The response on behalf of the Secretary of State in 1854 to a Memorial addressed to the Queen requesting a document declaring Pitcairn Island as a British possession cannot possibly be so construed. It confirmed there was no doubt as to sovereignty.

[46] It is not necessary to define with accuracy the time at which Pitcairn Island did become a British possession. Sometimes there may be a gradual extension of jurisdiction over a territory, as was recognised in *Attorney General for British Honduras v Bristowe* (1880) 6 App.Cas 143. British Honduras was formally annexed in 1862, but there were grants of land by the Crown made as early as 1817. The Privy Council held that sovereignty was acquired on or before that earlier year. Similarly, a formal act of acquisition is not required. It is the intention of the Crown, gathered from its own acts and surrounding circumstances, that determines whether a territory has been acquired for English law

purposes. The same principle applies in the resolution of international disputes as to sovereignty.

[47] It was not suggested that an unauthorised settlement by British subjects could prevent the territory concerned from later becoming a British possession. The available material establishes acquisition as a British possession, probably as far back as 1838. The provision and acceptance then of the Union Jack and the establishment of a Chief Magistrate required to take an oath of loyalty and to be accountable to the Queen, are significant factors. Traditionally, this date has long been regarded as the time when Pitcairn Island had its definitive origin as a British possession. As to the contention that as at the time of any claimed acquisition no British subjects remained on Pitcairn Island, for the reasons expressed by the Supreme Court, we agree there was no break in British settlement when the last of the mutineers died in 1829. The Islanders have always been regarded as, and regarded themselves as, British subjects.

[48] We are quite unable to accept Mr Cook's "fallback" submission that there may have been acquisition by cession in 1898 when the Pacific Order in Council 1893 was invoked to process an Islander accused of murder. The purpose of that submission was an endeavour to take Pitcairn outside the ambit of the 1887 Act, which excluded possessions acquired by cession. The acquisition was by neither cession nor conquest. It occurred before the 1.898 Instruction was issued, and there is nothing to suggest that either the issue of the Instruction, or the subsequent processing of the accused person, was an assumption of jurisdiction not earlier exercised, whether in the eyes of the government or in the eyes of the Islanders. We also note that where there is an issue as to whether a territory was ceded or settled, that issue is to be determined as at the time the territory becomes subject to the Queen's dominion. (See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (supra) at 1102.

[49] There was a further alternative submission that the 1887 Act did not apply because at the relevant times Pitcairn was "under the jurisdiction of a Legislature, constituted other than by virtue of (the 1887 Act), of any British possession". It was argued that Pitcairn was under its own independent legislature. We cannot agree. This of course presupposes that Pitcairn was a British possession. But it had no legislature in 1898, and in 1952 and 1970 the legislature was constituted by the 1887 Act. Prior to the 1898 Instruction, as a British possession, Pitcairn was not competent to make laws. After that, any legislature was constituted by virtue of the 1887 Act. The nature of a legislature in this context is described in Halsbury:

> **The Legislature.** *In each British overseas territory there is an authority, other than the United Kingdom Parliament or Her Majesty in Council, which is competent to make laws for the peace, order and good government of the territory. Such an authority, whether it be the Governor acting alone or the Governor acting in conjunction with a body or bodies of other persons, is styled the legislature of that territory, and in the absence of express restrictions has various powers*. (Halsbury's Laws of England, 4th ed, Reissue Vol. 6 para 838.)

[50] Neither do we see any significance in the move of the inhabitants from Pitcairn Island to Norfolk Island in 1856 and the return of some of them in 1859, followed by others in 1864. That move to Norfolk Island, which was made possible and effected by the British Government, cannot be viewed in isolation and divorced from what subsequently occurred. It is also relevant that the Governor of New South Wales was instructed by the Crown as to the way in which the Pitcairn Islanders were to be treated and allowed to govern themselves internally. Following the return of the Islanders and their

resumption of occupation, Royal Navy ships continued to visit, assist and report to the Admiralty from 1860 onwards. No other state claimed sovereignty and there was no suggestion from the Islanders themselves that Pitcairn was not under British dominion.

[51] In support of the submission that Pitcairn was independent through to and including the promulgation of the 1940 regulations, Mr Cook contended that the Islanders were self-governed because they had formulated their own laws and rules. We do not think that submission assists the argument. Settlers can be expected to adopt rules and regulations governing their community where those do not already exist, and that is not in any way inconsistent with the concept of dependency. In the case of Pitcairn that was demonstrably so. The: inhabitants were reliant on and acted on the advice of visiting Royal Navy officers to formulate their laws. The existence of those laws did not in any way inhibit Great Britain from invoking statutory authority at a later date to impose a legislature. Where no legislature has been established by Great Britain, the adoption of local laws by settlers who are British subjects does not prevent a settlement from becoming a British possession, nor does a British possession lose its status as such because local laws are adopted from time to time. Settled colonies have rights of their own at common law and the powers of the Crown differ from those available in respect of colonies acquired by cession or conquest. That is why the 1887 legislation enlarging the authority of the Crown was enacted. In respect of Pitcairn, that authority was not exercised until 1898. The adoption of the 1893 Rookes initiated laws were no more than an exercise of common law rights. They did not establish an independent legislature and there is no evidence to suggest that that was their intention or that such a result was recognised by the Islanders, Great Britain, or any other state, as having come about. Although the later 1904 revision and the 1940 regulations were also formally adopted by the Islanders, in both cases the adoption was clearly under the direction of British authority and in recognition of the application of the 1893 Order in Council.

[52] For completeness, we refer to Halsbury's Laws of England (4th ed, 2003 Reissue), Vol 6 para 800, which notes that colonies are treated for the purposes of constitutional law as either: (i) settled, or (ii) conquered or ceded. Each colony must be assigned to one or other of these two classes:

> *... the classification is one of law, and once made by practice or judicial decision will not be disturbed by historical research. The basis of distinction is the stage of civilisation considered to have existed in the territory at the time of acquisition: if there was no population or no form of government considered civilised and recognised in international law, possession was obtained by settlement; where there was an organised society to which international personality was attributable, acquisition rested on cession or conquest.*

[53] As we have discussed, we agree with the Supreme Court that, on the facts, Pitcairn was a British possession acquired by settlement. There was at the time of acquisition no organised society to which international personality could have been attributed. Pitcairn was hardly in the same situation as Malta, which was peacefully ceded to the British Crown in circumstances described in the Privy Council judgment of *Sammut v Strickland* [1938] AC 678.

[54] As Halsbury notes, categorisation of a colony cannot be disturbed once made by practice. The "practice" of categorising Pitcairn as a settled colony goes back at least to the 1898 Instruction issued under the 1893 Order in Council. It was restated in different forms many times subsequently, as we have earlier discussed. There was ample evidence of the "practice".

[55] For the above reasons, which essentially are the same as those expressed in the Supreme Court, on the whole of the material made available and drawn to our attention, we find it impossible to conclude other than Pitcairn Island was a British settlement within the meaning of the 1887 Act when the Orders in Council of 1952 and 1970 were made. To contend that Pitcairn Island is independent, that it is not a British possession, and that the United Kingdom does not have sovereignty over it, is palpably unreal. Sovereignty was acquired by settlement or occupation and that sovereignty pertains today.

[56] The submission that there is an onus on the Crown to establish sovereignty beyond reasonable doubt is misconceived. That principle applies to the elements of an offence which has been charged against an accused person. The application for a declaration of invalidity is effectively invoking the power of judicial review to set aside subordinate legislation. What is at issue here is the validity of the laws which constitute the establishment of the Pitcairn Courts and the charged offences.

Validity of Supreme Court judgment

[57] Following advice from the Supreme Court that it intended to sit as a Court of three Judges, the applicants sought a direction that the applications be heard by a single Judge. In declining that application, the Supreme Court invoked its inherent jurisdiction, holding that there was no statutory impediment to that exercise.

[58] The Crown submitted that there is no right to seek leave to appeal given under s 35DD(1) of the Judicature (Appeals in Criminal Cases) Ordinance in respect of the decision of the Supreme Court to sit as a Full Court. Pre-trial appeals, under that section, are restricted to decisions of the Supreme Court:

> *[b] to make or to refuse to make an order staying the proceedings on the ground of abuse of process or any other ground; or*
>
> *[c] to give or refuse to give any other interlocutory judgment having the effect of bringing the proceedings to an end.*

There are other rights to seek leave to appeal certain pre-trial rulings given by s 35E of the same Ordinance, but none of these is relevant in the present context. The applicants do not rely on any other provision.

[59] Clearly, there was a right to apply for leave to appeal in respect of the applications to stay the proceedings on the grounds that the Supreme Court lacked jurisdiction. If successful, judgment would have the effect of bringing proceedings to an end. These grounds have been considered by this Court in this judgment. We hold that there is no right to seek leave to appeal in respect of the "Full Court" ground. If this ground of appeal were to succeed, then the whole argument about jurisdiction would have to be recycled in front of a single Judge. Reversal of the decision to sit as a Full Court would not have brought the proceedings to an end. The decision of the Supreme Court to sit as a Full Court did not come within s 35DD(1)(b).

[60] However, in deference to the detailed submissions we have heard on the point, we offer our views. Although there may not have been a right of appeal pre-trial, should there ever be appeals against

conviction, then the question of the legitimacy of the Full Court sitting might then be raised as a ground of appeal.

[61] The Supreme Court recorded its reasons for constituting itself as a Full Court. The basic ground was the matters raised on the applications were novel and complex and merited the fullest possible consideration. All three Judges of that Court were likely each to hear one or more of the criminal trials, should they proceed.

[62] This Court agrees with the Supreme Court that the convening of a Full Court to consider matters as complex and detailed as the current applications was indeed a sensible one. The accused had the benefit of their arguments being considered by three judicial officers instead of one. The question is whether this procedure was forbidden by Pitcairn law.

[63] In respect of the substance of the challenge, Mr Dacre relied on ss 6, 9 and 16 of the Judicature (Courts) Ordinance ("the Ordinance"). Where relevant, they provide:

> *6. The Supreme Court shall, subject as in any law provided, possess and exercise all the jurisdiction, powers and authorities which are for the time being vested in or capable of being exercised by the High Court and by the Crown Court of England [and Wales] or by any judge of those courts.*
>
> .....
>
> *9. (1) Trials before the Supreme Court in its civil or criminal jurisdiction shall be by a judge alone, provided that the Court may, if it thinks it expedient and practicable so to do, sit with assessors.*
>
> .....
>
> *16. (1) Subject to the provisions of 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 the Islands.*
>
> *(2) All the laws of England extended to the Islands by subsection (1) shall be in force therein so far only as the local circumstances and the limits of local jurisdiction permit and subject to any existing or future ordinance and for the purpose of facilitating the application of the said laws it shall be lawful to construe the same with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.*

> *(3) No information, charge, summons, conviction, sentence, order, bond, warrant or other document and no process or proceeding shall be quashed, set aside, or held invalid by any Court or quasi judicial authority by reason only of any defect, irregularity, omission or want of form unless the Court or authority is satisfied that there has been a substantial miscarriage of justice.*

[64] Counsel then argued that because the Supreme Court Act 1981 (UK) ("the UK Act") provided that the jurisdiction of the High Court was to be exercised only by a single Judge (s 19(3)) and proceedings in the Crown Court by a single Judge (save for the presence of justices of the peace in some circumstances) (s 73(1)), the Pitcairn Supreme Court could sit only with a single Judge.

[65] We do not think s 9 assists - it is speaking of a trial situation and not an application which was in reality an application for a declaratory judgment. There is some difficulty in applying the English statutory provisions. As regards s 19(3) of the UK Act, it contains an express provision for a divisional court where rules of court or statutory provisions so require, but there is no provision in the Pitcairn ordinances for a divisional court. Neither do the ordinances provide for the Supreme Court to sit with justices of the peace, so to that extent s 73 of the UK Act would appear to have no application. Absent any other provision, there would therefore appear to be merit in the Supreme Court's decision to invoke its inherent jurisdiction to deal with matters for which there is no direct provision in the ordinances or the English statutes.

[66] However, even if the applicants' argument could be sustained, in the circumstances we are satisfied that it would be quite inappropriate effectively to declare the Supreme Court hearing a nullity. Section 16(3) of the Ordinance must apply.

[67] Section 16(3) is in similar terms to s 204 of the New Zealand Summary Proceedings Act 1957, except that the latter section speaks only of "a miscarriage of justice", not a "substantial miscarriage of justice", as does the Pitcairn one. Section 204 applies only to criminal procedures in a District Court.

[68] Counsel did not rely on it, but the provision is mandatory when it applies (and in Pitcairn law it applies to all Courts, not only the Magistrate's Court). We cannot pass it by.

[69] The authorities under s 204, such as *Rural Timber Ltd v Hughes* [1989] 3 NZLR 178, 184, show that the Court, when deciding whether to invoke the section, must apply "a commonsense judgment against the statutory background". See also *Hall v Ministry of Transport* [1991] 2 NZLR 53, 57-8.

[70] New Zealand authorities have held that interpretation of the provision is to give full effect to the ordinary and natural meaning of the language (*R v Kestle* [1973] 2 NZLR 606 (CA)) and that, when applicable, it is mandatory to apply the section. There can be cases where what has been done is so radically in error that it has to be treated as a nullity and in such a case the section will not apply to what has been done. In *Hall v Ministry of Transport* it was said by the Court of Appeal at p 57 that:

> *The Court is slow, however, to reach such a drastic conclusion, even where there are*

> *substantial deficiencies; see, for example,* Hemapala v R [1963] AC 859, 867, *where the judgment of the Privy Council was delivered by Sir Kenneth Gresson;* re Kestle (No. 2) [1980].2 NZLR 353, 359.

[71] A similar provision exists in s 11 of the New Zealand Insolvency Act 1967.

Of that section, the Court of Appeal said in *Best v Watson* [1979] 2 NZLR 492, 494:

> *In our view the section has to be given its full meaning and is not to be read subject to any limitations not required by the statutory language. There must, of course, be proceedings before the Court before rectification may be directed under s 11. So if the document is so defective that it is a nullity there is nothing before the Court capable of rectification. The distinction between nullity and irregularity is well recognised in other areas of the law (see, for instance,* New Zealand Institute of Agricultural Science Inc v Ellesmere County [1976] 1 NZLR 630, *particularly at p 636; and* Police v Thomas [1977] 1 NZLR 109). *In that latter case Cooke J, referring to s 204 of the Summary Proceedings Act 1957 which is in essentially the same terms as s 11 of the Insolvency Act, said at p 121: 'No doubt s 204 is unavailable if a defect is so serious as to result in what should be stigmatised as a nullity'. He went on to observe that 'nullity or otherwise is apt to be a question of degree'.*
>
> *We think that the same considerations apply, under s 11. That provision may be invoked in any case where the proceedings are defective and however the defect may be characterised. It will always be a question of degree whether or not it can be said that, notwithstanding failure to comply with an apparently mandatory requirement of the Act or of the Rules, there is before the Court what can fairly be described as proceedings under the Act; and that question should not be approached in a mechanical or technical way.*

[72] In this case:

> [a] the Supreme Court had unquestionable jurisdiction to decide the merits of the application;
>
> [b] any one Judge of the Supreme Court had jurisdiction to do so;
>
> [c] all three of the Judges of the Supreme Court considered the applications;
>
> [d] the only possible detriment to the applicants suggested is that one or other of the Judges sitting alone may have had and held to a different view. That is not a real detriment because all of the Judges agreed in the judgment.

[73] Applying the commonsense judgment approach, we cannot see any miscarriage of justice - let alone a substantial miscarriage of justice - to the applicants caused by the constitution of a Full Court to hear their applications. Arguably, such a course was to their benefit. The defect or irregularity (if any) of convening a Full Court must be excused under s 16(3) of the Ordinance.

Appointment of Supreme Court Judges

[74] At the time when the applications to the Supreme Court were made, the terms of appointment of the Supreme Court Judges under the relevant Ordinance were that they were to hold office during pleasure. Some days before the hearing of the applications, an amending Ordinance was made which guaranteed tenure to the Judges until age 65 and provided (a) for non-reduction of salaries during office and (b) for machinery for removal of Judges only on the grounds of disability or misconduct. The Judges of the Supreme Court heard the substantive argument under these conditions of tenure. Prior to the amending Ordinance, they had made timetable and other procedural directions in advance of the substantive argument.

[75] Mr Dacre submitted that the lack of tenure during the procedural orders somehow tainted (in some unspecified way) the substantive hearing of the application by the Full Court.

[76] This argument is quite untenable. The Judges were then exercising administrative functions which did not form part of the trial.

[77] Archbold's Commentary (Ch 16, Section IV 1 2003) states: "Article 6 [of the Convention] does not necessarily apply to preliminary hearings concerning trial arrangements and matters of procedure". The authority cited, *X v UK* 5 EHRR 273, confirms the proposition. In that case the procedure in question had merely concerned a procedural step of appointing fresh solicitors to defend the accused. There was no determination of any charge. Here, there was likewise no determination either of any charge or of any argument on a pre-trial legal matter.

[78] In any event, the situation must come within the exempting power of s 16(3) discussed in the section on the constitution of a Full Court.

[79] We specifically note that Mr Dacre, when asked to indicate his position, expressly made no challenge to the members of this Court based on similar grounds.

Validity of committal

[80] The applicants' contention is that their committal to the Supreme Court for trial should be held to be invalid because it was an aspect of their trial on the charges carried out by a tribunal which was not an "independent and impartial tribunal established by law".

Right of appeal

[81] Again, there would appear to be no right of appeal under the only provision relied upon, s 35DD(1) of the Judicature (Appeals in Criminal Cases) Ordinance, which we have already discussed in respect of the Full Court issue.

[82] If the applicants were to succeed on the merits on this ground, the decision would not have the effect of bringing the proceedings to an end. The proceedings would have been started by the formalities involved in laying of informations. Nothing that the Magistrate did at the committal stage affected the informations, and nothing else has been submitted to do so. The appropriate remedy, if the applicants

succeeded on this point, would be to send the matter back for the committal process to be recommenced.

Merits

[83] The reference to such a tribunal arises from article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Article 6(1) provides:

> *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.....*

[84] The Convention became applicable as part of British domestic law by way of the Human Rights Act 1998 (UK). There is no suggestion that that Act or the Convention have been directly applied to Pitcairn Island. The Crown, while not accepting that either provision had direct application, did accept that the human rights provisions were relevant to the Islands and that the concept of a fair trial was known to the common law. Mr Raftery submitted, however, that the Human Rights Act 1998 (UK) is subject to local conditions and the limits of local jurisdiction.

[85] The United Kingdom Act and the Convention can be related to the Islands by s 16 of the Judicature (Courts) Ordinance:

> *(1) Subject to the provisions of 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 the Islands.*
>
> *(2) All the laws of England extended to the Islands by subsection (1) shall be in force therein so far only as the local circumstances and the limits of local jurisdiction permit and subject to any existing or future ordinance and for the purpose of facilitating the application of the said laws it shall be lawful to construe the same with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.*

[86] The provisions which affect generally or particularly the appointment of Magistrates in the Islands are -

Clause 7 of the Pitcairn Order 1970 (1970 No. 1434):

> *The Governor may constitute all such officers as he may consider necessary ... and may make appointments to any office so constituted, and any person so appointed, unless otherwise provided by law, shall hold his office during Her Majesty's pleasure.*

Section 11 of the Judicature (Courts) Ordinance:

> *(1) Subject to this section, the Governor may appoint any tit and proper person to be a Magistrate of the Magistrate's Court.*
>
> .....
>
> *(4) Magistrates of the Court, other than the Island Magistrate, shall be required to be qualified in law and to have practised in any Commonwealth country for not less than 5 years prior to his or her appointment.*
>
> *(5) Each Magistrate shall be subject at all times to the authority and direction of the Chief Justice or other Judge of the Supreme Court and shall hold office during her Majesty's pleasure on such terms as the Governor may prescribe.*

In this case we are concerned with a Magistrate other than the Island Magistrate. We have not been advised what terms have been prescribed by the Governor under subsection (5); the argument has proceeded on the basis of the section itself.

[87] Sections 11A and 11B of the ordinance providing for remuneration of Magistrates and protection of that remuneration from reduction during the continuance of appointment, for the terms and conditions of service during such continuance, for a retirement age and specific power of the Governor to remove from office for inability or misbehaviour, were added by Ordinance No. 11 of 2003. They were not in effect when the committal was made. They do not therefore affect the present application.

[88] The Magistrates' position is a part-time one, and beyond what is required by that office all appointed to date live and practice as barristers in Auckland (as indeed do the Public Prosecutor and the Public Defender).

[89] There has been no suggestion of any action or inaction on the part of the committing Magistrate which could amount to a lack of impartiality or independence on his part or could show such a lack. He did not have to resolve any dispute about the content of the evidence or about whether the accused should be committed to trial, but he was exercising the determination provided for under s 65A of the Justice Ordinance as to whether the accused should be committed or discharged. We accept that the decision to commit was a judicial one which was part of the trial process. To this extent we disagree with the view expressed by the Supreme Court.

[90] The argument focused on the lack of security of tenure of the Magistrate, which was submitted to be a breach of the Convention. For the applicants reliance was placed on *Starrs v Ruxton* [1999] ScotHC 242; [2000] SLT 42, *Millar v Dickson* [2002] 1 WLR 615, *Campbell and Fell v UK* [1984] ECHR 8; (1984) 7 EHRR 165, *Findlay v UK* [1997] ECHR 82; (1997) 24 EHRR 221, *Labgborger v Austria* (1989) 12 EHRR 415 and *Belilos v Switzerland* (1988) 10 EHRR 466. If the applicants' argument is right, as the ordinance stood before amendment there could never have been a valid committal for trial before the Supreme Court of Pitcairn Island, or a valid trial for a serious offence as a consequence of such a committal.

[91] The Public Prosecutor relied on *Campbell and Fell* and *Eccles McPhillip and McShane v Ireland*

(1988) 59 DR 212, E Comm HR, and submitted that in the circumstances of this case the Magistrate did have sufficient security of tenure to be regarded as independent. It was submitted that the Magistrate was dealing with the matter at a stage when no determination adverse to the accused could be made other than that they should be committed to the Supreme Court for trial, a conclusion that was undisputed on the merits.

[92] The nub of the argument is concisely expressed in *Findlay v UK* at para 73:

> *In order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.*
>
> *As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.*

[93] This statement was relied on in *Starrs v Ruxton*. A comparable statement of the principle is to be found in *Campbell and Fell v UK* - a decision of the European Court of Human Rights, at para 78, and the decision in *Starrs v Ruxton* formed the basis (without opposition) of the judgment in *Millar v Dickson*.

[94] *Starrs v Ruxton* related to trials conducted by temporary sheriffs in Scotland. There were a number of temporary sheriffs who did the same work in criminal cases as permanent sheriffs, but were appointed on different terms. The attack in the proceedings was made on the basis that the prosecutor's act in bringing a proceeding before a temporary sheriff instead of a permanent sheriff in respect of whose tenure of office there was not suggested to be any complaint, was a breach of the prisoner's right.

[95] The temporary sheriffs' appointments were for a term of one year, unless previously recalled by the Secretary of State. Various considerations in respect of appointees were canvassed in the judgments: they were able to continue in private practice when not required to sit, but not to sit in the area where they practised. It was accepted that some temporary sheriffs would wish in due course to receive a permanent appointment, and that a temporary appointment would give an opportunity to the appointing authority to form a view as to the suitability for permanent appointment. Re-appointment, if it was wanted by the temporary sheriff, would normally be expected so long as the temporary sheriff was under 65, had done a minimum of 20 days' work during the year and there were no adverse circumstances relating to fitness for the office. No commission had been recalled during its currency for a couple of years. A temporary sheriff could be "sidelined" simply by not being allocated any work until his year's appointment expired.

[96] Substantial considerations leading to the conclusion that a temporary sheriff was not an independent and impartial tribunal were:

> [a] the power of recall without qualification as to the circumstances in which it could be exercised, in. other words a power which was exercisable at pleasure;

[b] the other circumstances, ie, length of appointment, the question of re-appointment, the availability of work, which might be seen to give a temporary sheriff an interest in the goodwill of the Executive and to be inconsistent with the appearance of independence;

[c] the possibility of promotion in the sense of appointment as a permanent sheriff.

[97] Light is cast on the objective test by another passage from *Findlay v UK* (at p 236):

> *In addition, an objective test must also be applied, that is ascertaining whether sufficient guarantees exist to exclude any legitimate doubt in this respect. It must be determined whether there were ascertainable facts, particularly of internal organisation, which might raise doubts as to impartiality. In this respect, even appearances may be important: what is at stake is the confidence which the court must inspire in the accused in criminal proceedings and what is decisive is whether the applicant's fear as to a lack of impartiality can be regarded as objectively justifiable.*

[98] In all of the judgments to which counsel have referred regard has been had to the circumstances of the particular case in relation to the appearance of independence and whether there is legitimate doubt about: impartiality and independence. In *Starrs*, for example, all the circumstances relating to tenure, renewal of tenure, the hope of promotion and the like, were taken into account.

[99] In Campbell and Fell v UK (a prison visitors' Board considering disciplinary charges) appointment by the Home Secretary, the ability of the Home Office to issue guidelines to the Board, holding office for three years or such less period as the Home Secretary might appoint, lack of regulation governing removal of members and lack of guarantee of irremovability did not bring the Court to the conclusion that the Board was not independent.

[100] *Findlay v UK* related to a Court Martial. The convening officer had various roles: directing what the charges were to be, deciding on the type of the Court Martial, and convening it. All members of the Court were of subordinate rank to the convening officer and under his overall command, and the president was selected by the convening officer and was on his staff. Even weighed against other factors, those considerations provided an objective justification for fears of lack of independence in the Court Martial, so that it did not constitute an independent or impartial tribunal.

[101] In *Eccles, McPhillip, and McShane v Ireland* the members of a special criminal Court were appointed and could be removed at will by the Government; they were to be Judges of the High Court or Circuit Court, Justices of the District Court, or legal practitioners of not less than seven years' standing or an officer of the Defence Forces not below the rank of Commandant; their remuneration (which could be at different rates) was fixed by the Minister.

[102] An objection under article 6 of the Convention that the Court was not independent because removal at will meant that the Judges did not enjoy judicial tenure and because their salary could be diminished by the Executive was not upheld. In assessing the issue of independence the Commission

said:

> *Regard must be had not only to the legal provisions concerning the composition of the Court but also how these provisions are interpreted and how they actually operate in practice. In so doing the Commission must look at the realities of the situation.*

The Commission took into account the possibility of judicial review of the Special Courts, rights of appeal from them and the lack of any evidence in fact of executive interference with the Court in the performance of its functions. It was held that the Court was an "independent" Court within article 6.

[103] In the instant case there is no history to look at to assist in forming an objective view of the Magistrate's impartiality and independence. Nothing has been put forward beyond the statutory provision that the Magistrate holds office during pleasure. We agree with the Supreme Court that the appointment is indefinite in term but accept that nevertheless it could, as one held at pleasure, be legally terminated at any time so far as the statute is concerned.

[104] As the cases show, the fact that office is held at pleasure can be a very significant factor in relation to this issue, but it is not of itself definitive.

[105] The conditions in which the Magistrate acts are relevant. Pitcairn is a small, remote island, difficult of access, with a population now of 47 people. It has had, on the submissions made to us, no major crime between 1898 and what is now alleged. The Magistrate who deals with a preliminary enquiry into an offence must be other than the Island Magistrate (s 59 Justice Ordinance). Because of the requirement of legal qualification and practice, the Magistrate will inevitably be a non-resident of the Island and so not subject to any local pressure. The history of the Island shows that appointments for the prosecution and trial of serious criminal cases are likely to be, in effect, *ad hoc*.

[106] The Magistrate in this case is not in any respect able to be influenced by prospects of re-appointment (it does not arise) or promotion (there is no demonstrated relationship between his holding his office and appointment to any other office). He is not subordinated to the Governor in any way comparable with the position with members of a Court Martial to the convening authority; the only authority to which he is particularly subject its that of the Supreme Court Judges, which is by no means to be equated with authority of the Executive over him; he is not in any relationship of significance with the Pitcairn prosecuting authority; it is not suggested that his private practice could be enhanced in any way by his Pitcairn Island judicial decisions. There is nothing which suggests that there is any incentive for the Magistrate to be influenced in his decisions by policy-driven wishes of the Governor.

[107] Looking at all the circumstances, we are not persuaded that there is any basis for a conclusion to be drawn reasonably that the Magistrate was other than an independent and impartial tribunal. Objectively, the committals could not reasonably be seen as an infringement of the rights of the applicants. This ground of appeal would therefore fail on the merits.

Result

[108] Having heard substantive argument on the issues raised in the applications pursued on appeal, in respect of each we grant leave to appeal but dismiss the appeal. We also decline to declare the decision

of the Supreme Court delivered on 19 April 2004 invalid.
