ADVANCE COPY

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CV 2 of 2005
BB Civil Appeal No 29 of 2004

BETWEEN

THE ATTORNEY GENERAL	**FIRST APPELLANT**
SUPERINTENDENT OF PRISONS	**SECOND APPELLANT**
CHIEF MARSHAL	**THIRD APPELLANT**

AND

JEFFREY JOSEPH	**FIRST RESPONDENT**
LENNOX RICARDO BOYCE	**SECOND RESPONDENT**

Before The Rt Honourable	**Mr Justice de la Bastide, President**
And The Honourables	**Mr Justice Nelson**
	Mr Justice Pollard
	Mr Justice Saunders
	Madame Justice Bernard
	Mr Justice Wit
	Mr Justice Hayton

Appearances

Mr Roger Forde QC and Mr Brian L St Clair Barrow for the Appellants

Mr Maurice Adrian King and Ms Wendy Maraj for the First Respondent

Mr Alair Shepherd QC, Mr Douglas Mendes SC, Mrs Peta Gay Lee-Brace and Mr Philip McWatt for the Second Respondent

20th and 21st June 2006

JUDGMENT
of
The Hon Mme Justice Bernard

Delivered on the 8th day of November 2006

J U D G M E N T

I have had the benefit of reading the joint judgment of the learned President and Saunders J., and agree with the conclusions reflected in it. My judgment relates only to the first issue concerning the justiciability of the exercise of the powers of the Governor General conferred under Section 78 of the Constitution of Barbados.

[1] Section 76 of the Constitution provides for a Privy Council which shall consist of such persons as the Governor General may appoint after consultation with the Prime Minister, and it shall have such powers and duties as may be conferred upon it by the Constitution. The Governor General by virtue of Section 77(1) presides over all meetings of the Privy Council, and the powers exercisable by him acting in accordance with the advice of the Privy Council are conferred under Section 78 (1).

The Ouster Clause

[2] The issue of justiciability of the exercise of the powers of the Governor General under *Section 78* is inextricably linked to Section 77(4) which is an ouster clause to the effect that the question whether the Privy Council has validly performed any function vested in it by the Constitution shall not be inquired into in any court.

[3] Ouster clauses fall within a category of protective and preclusive clauses which Governments insert in statutes and constitutions to inhibit challenges by courts to executive or administrative powers. Courts, however, over the years have not been deterred by such pre-emptive strikes against their authority, and frequently find the executive and administrative actions which the clauses seek to protect to be justiciable, for example, on the grounds of excess of jurisdiction or breach of natural justice.

[4] The approach by courts to these clauses has undergone progressive change since the case of *Smith v. East Elloe Rural District Council*[1] where such a clause in an Act was held not to give any opportunity to a person aggrieved to question the validity of a compulsory purchase order made under the Act on the ground that it was made or confirmed in bad faith. A trend towards change was observed in the landmark decision of *Anisminic Ltd. v. Foreign Compensation Commission and Another*[2], where the ouster clause was couched in almost similar language to the one in Section 77(4) and which are referred to as "not to be questioned" clauses. In summary the House of Lords held, inter alia, that the ouster clause did not protect a determination which was outside of jurisdiction, and that accordingly the court was not precluded from inquiring whether or not an order of the Commission was a nullity. The effect of this decision is that a "not to be questioned" clause prevents judicial review only for such errors as can be said to be within jurisdiction. It is, however, recognised that a tribunal may act within jurisdiction but yet act wrongfully thereby rendering its actions a nullity. Lord Reid in his judgment in *Anisminic (supra)* at page 171 expressed it this way:

> "….there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice".

[5] All of the cases decided in the English courts (except those of the Judicial Committee of the Privy Council) concerned the reviewability of ouster clauses in Acts of Parliament and other legislation. Professor Albert Fiadjoe in his book "Commonwealth Caribbean Public Law", 2nd Edn., pointed out that in the

[1] [1956] AC 736
[2] [1969] 2 AC 147

Caribbean the courts have been compelled to consider the effect of ouster clauses in constitutions which provide for unreviewability of acts of a Head of State or Service Commissions. Mention was made of the case of *Kemrajh Harrikissoon v. Attorney General of Trinidad & Tobago*[3] which concerned a "not to be questioned" clause in the Constitution of Trinidad & Tobago, but which the Board of the Privy Council found *per curiam* to be wide enough to deprive all courts of jurisdiction to entertain a challenge to its validity. Lord Diplock expressed the view that their Lordships did not find that that case provided an appropriate occasion for considering whether the section in the Constitution, despite its unqualified language, is nevertheless subject to the same limited kind of implicit exception as was held by the House of Lords in *Anisminic* (supra). He thought it was best left to be decided in some future case if one should arise.

[6] One did arise two years later in *Endell Thomas v. Attorney General of Trinidad & Tobago*[4] concerning the same clause in the same Constitution. Lord Diplock again had the opportunity to expatiate definitively on the issue, but because the Board did not find it necessary to analyse *Anisminic* since there was no breach of fundamental justice, he confined his comments to stating only that "it is plainly for the court and not for the commission to determine what, on the true construction of the Constitution, are the limits to the function of the commission". He went on to say:

> "If the Police Service Commission had done something that lay outside its functions, such as making appointments to the teaching service or purporting to create a criminal offence, Section 102 (4) of the Constitution would not oust the jurisdiction of the High Court to declare that what it had purported to do was null and void."

[3] (1979) 3 WIR 348
[4] (1981) 32 WIR 375

[7] What can be gleaned from the dicta in *Thomas* (supra) is that administrative acts of State tribunals or commissions committed clearly in excess of statutory powers or in contravention of the principles of fundamental justice are reviewable by the courts despite the constitutional and legislative protection from scrutiny which ouster clauses seek to provide. Lord Diplock in *Attorney General v. Thomas d'Arcy Ryan*[5] expressed it this way:

> "It has long been settled law that a decision affecting legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority."

The whole concept of fairness was reiterated later by Lord Woolf, M.R**.** in *Regina v. Secretary of State for the Home Department ex parte Al-Fayed*[6]**.** I am now of the view that it matters not whether such clauses are statutory or constitutional; the same principles are applicable with perhaps varying results depending on the power which the clause seeks to protect.

[8] In light of the above my conclusion is that despite the ouster clause contained in Section 77(4) of the Constitution of Barbados the functions of the Barbados Privy Council exercised by the Governor General under Section 78(1) are reviewable by the courts if in the exercise of these functions it acts in breach of the principles of fundamental justice thereby acting outside its jurisdiction.

The Prerogative of Mercy

[9] The powers conferred on the Governor General acting in accordance with the advice of the Privy Council involve the exercise of the prerogative of mercy as indicated by the side note to Section 78 (1) which reads as follows:

[5] [1980] AC 718, 730
[6] [1998] 1 WLR 763

"(a) grant to any person convicted of any offence against the law of Barbados a pardon, either free or subject to lawful conditions;

(b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;

(c) substitute a less severe form of punishment for that imposed on any person for such an offence; or

(d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence."

[10] The word "prerogative" suggests privilege exclusive to an individual, and historically prerogative powers resided solely in the Crown: See *Blackstone 1825, Book 1*. Dicey, however, expanded the prerogative to include much more than the powers exclusive to the monarch. He posited that the prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which is at any given time legally left in the hands of the Crown." (*Dicey 1959, p. 424-5*).

[11] Whichever theory one prefers the prerogative of mercy was one which the courts have held to be unsuitable for judicial review as it confers no rights on a condemned person, mercy being according to Portia in Shakespeare's "The Merchant of Venice" "enthroned in the hearts of kings". In the case of *de Freitas v. Benny*[7], Lord Diplock issued his oft-cited dicta that "mercy is not the subject of legal rights", and "it begins where legal rights end." He elaborated on this by stating that a convicted person has no legal right even to have his case considered in connection with the exercise of the prerogative of mercy.

[7] (1975) 27 WIR 318; [1978] AC 239

[12] Over the years the inviolability of the prerogative has been eroded, and it has now become the subject of judicial review as any other power which is abused. Lord Denning, M.R. in *Laker Airways Ltd. v. Department of Trade*[8] articulated it thus:

> "Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive."

[13] This represented a later change in his reasoning as a few years earlier in *Hanratty v. Lord Butler*[9] when an attempt was made to sue a former Home Secretary for negligence for a decision made while in office, he had concluded that the prerogative of mercy is "one of the high prerogatives of the Crown", hence, the court could not interfere in the exercise of this function.

[14] What a difference twenty years makes as time and attitudes change! In 1993 that same prerogative of mercy was considered in *R. v. Secretary of State for the Home Department, ex parte Bentley*[10] when judicial review was allowed of the Home Secretary's refusal to grant a posthumous pardon for a youth hanged for murder forty years earlier. Ultimately no order was made, but the fact that judicial review of the Home Secretary's discretion was allowed, indicated that the prerogative of mercy was no longer sacrosanct. This same approach was taken in *Burt v. Governor General*[11] where Cooke, P. in a case also involving the prerogative of mercy, expressed the view that "as to prerogative powers generally, it has become accepted in recent years that the mere fact that a decision has been made under the prerogative does not exempt it from review in the courts. The test is rather whether the subject matter of the decision is justiciable." These cases

[8] [1977] QB 643
[9] [1971] 115 SJ 386
[10] [1994] QB 349
[11] [1992] 3 NZLR 672

though not directly related to the death penalty marked a decided departure from the traditional approach to the prerogative of mercy.

[15] The test of examining the subject-matter rather than the source originated in the most significant decision on prerogative powers – *Council of Civil Service Unions v. Minister for the Civil Service*[12]**.** .It was held, per Lords Scarman, Diplock and Roskill**,** that the controlling factor in determining whether the exercise of the power was subject to judicial review was the justiciability of its subject matter rather than whether its source was the prerogative. This did not augur well for the prerogative of mercy which had been held ten years earlier in *de Freitas v. Benny (supra*) not to be justiciable as it was not the subject of legal rights. Lord Roskill opined in *CCSU* (supra) that "prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy …….. as well as others, are not susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process."

[16] *CCSU* was decided in 1984, and one wonders what was the rationale for concluding that the powers referred to by Lord Roskill were not susceptible to judicial review and not amenable to the judicial process. I apprehend that the reason for the prerogative of mercy falling into this category is its inherent character being based on the exercise of a discretion, and no legal right of a condemned man to have such a discretion exercised in his favour as was concluded by Lord Diplock in *de Freitas (supra*). However, modern thinking suggests that even where a statutory body or person exercises powers conferred by the executive the decisions of that body or person may attract judicial scrutiny if the basic principles of fairness are not observed. It was held per Lord Denning, M.R**.** in *Breen v. Amalgamated Engineering Union and others*[13] that "if a domestic body is set up and given a discretion, it is to be implied that the discretion must be exercised fairly; even though its functions are not judicial or

[12] [1985] AC 374
[13] [1971] 2 QB 175, 176

quasi-judicial but only administrative, still it must act fairly, and should it not do so the courts can review its decision." Mercy may not and perforce, cannot be regarded as a right, but when its exercise is formalised by the establishment of a tribunal with statutory powers, that subject matter (mercy) ceases to be a discretion capable of being exercised capriciously; it becomes a matter to be determined in accordance with rules of fundamental justice. The decision-making process of the exercise of the prerogative of mercy must be no different from the exercise of other prerogative powers when states create tribunals vested with constitutional powers and procedures to regulate the process of granting mercy.

[17] This leads me to consider whether tribunals such as the Barbados Privy Council are merely advisory or are decision-makers. The learned trial judge at first instance came to the conclusion that it was advisory whereas the Court of Appeal held that it was a quasi-judicial body and a decision-maker which tenders advice to the Governor General who is mandated under Section 78(2) of the Constitution to act in accordance with its advice.

[18] Much discussion has centred around what is meant by "quasi-judicial". We all know what are judicial acts; quasi-judicial acts are not always easy to define. I posit that both judicial and quasi-judicial acts involve the making of decisions. A judicial act involves making a decision based on proven facts and applying relevant legal principles; a quasi-judicial act also involves making a decision maybe based on proven or agreed facts, but applying and giving effect to administrative policy. One important element which is basic to all decision makers whether judicial or quasi-judicial is the requirement to act fairly. This view was expressed by Lord Loreburn as far back as 1911 in the case of *Board of Education v. Rice*[14] when he stated that the duty to act in good faith and listen to both sides is one lying upon every one who decides anything. Lord Denning, M.R. echoed similar sentiments in *Breen (supra).*

[14] [1911] AC 179

[19] I conclude that it matters very little whether the Barbados Privy Council is a quasi-judicial body. I agree with the finding of the Court of Appeal that it is a decision-making body, and not an advisory one. Were it advisory the Governor General could elect to ignore its advice, but as mentioned earlier Section 78(2) mandates him to act in accordance with its advice; further, he is an integral part of that decision-making process in that under Sections 77(1) and (2) he has the authority to summon meetings of the Council and preside at all such meetings.

[20] The character and functions of the Barbados Privy Council contrast sharply in material particulars with those of the advisory committees on the prerogative of mercy which were considered in *de Freitas (supra)* and in *Thomas Reckley v. Minister of Public Safety and Immigration and others (No. 2)*[15] and which emanated from the Constitutions of Trinidad & Tobago and the Bahamas respectively. Both of those committees were advisory in that it was expressly provided in the relevant sections of both Constitutions that the designated minister was not obliged in any case to act in accordance with advice tendered by the committees. In both instances they seem to have been based on the English common law where the granting of mercy was a royal prerogative exercised solely in the discretion of the sovereign who by constitutional convention exercised it on the advice of the Home Secretary: See *de Freitas (supra*). It is on this premise that Lord Diplock concluded that mercy is not the subject of legal rights. He observed that the relevant constitutional provision of Trinidad & Tobago was of the same legal nature as the royal prerogative of mercy, and was exercised by the Governor General in the name and on behalf of Her Majesty. He concluded that the Trinidad & Tobago advisory committee was a purely consultative body without any decision-making power.

[21] Similarly in *Reckley***,** Lord Goff of Chieveley, considered that the introduction of the advisory committee and the statutory provisions governing the exercise of its functions, reinforced Lord Diplock's analysis in *de Freitas*, and expressed the

[15] (1996) 47 WIR 9; [1996] AC 527

view in relation to the Bahamas advisory committee that "despite the obvious intention that the advisory committee shall be a group of distinguished citizens, and despite the fact that the minister is bound to consult with them in death sentence cases, he is not bound to accept their advice. This provides a strong indication of an intention to preserve the status of the minister's discretion as a purely personal discretion."

[22] The Barbados Privy Council clearly does not fall within the category of a purely consultative body; it is without doubt a decision-making one. The functions and nature of the Jamaica Privy Council were considered in *Neville Lewis v. Attorney General of Jamaica and another*[16] and the constitutional provision establishing that Privy Council mirror those of the Barbados Privy Council with a similar provision that in the exercise of the powers conferred on the Governor General he shall act on the recommendations of the Privy Council. Lord Slynn of Hadley in *Lewis* opined that "accordingly the decision is not a personal one but is the collective and collegiate decision of the Jamaican Privy Council over which the Governor General presides." This lends support for my view that the Barbados Privy Council is a decision-making body.

[23] One of the issues concerning reviewability of the Jamaica Privy Council in *Lewis* centred around defects in the procedures adopted in relation to the applicants' petitions for mercy which had resulted in a breach of the rules of fairness and of natural justice. In the instant appeal the Barbados Court of Appeal was required to decide whether the procedures adopted by the Barbados Privy Council in determining the exercise of the prerogative of mercy were fair and in conformity with the principles of natural justice. One complaint by the Respondents was that they were not afforded an opportunity to make oral representations to the Barbados Privy Council. However, this was rejected by the Court of Appeal who found that the Respondents were not entitled to make oral representations, and did not avail themselves of the opportunity to make written representations. In this

[16] (2000) 57 WIR 275; 2 AC 50

regard the Court of Appeal found that there was no procedural impropriety committed by the Barbados Privy Council.

[24] However, there is one troubling aspect of the conduct of the Barbados Privy Council in relation to the reading of the second warrant for the Respondents' execution. The record at paragraph [6] indicates that on 6th and 16th April, 2002 both Respondents were invited to submit written representations after the appeals to the Court of Appeal were dismissed, and a meeting of the Barbados Privy Council was fixed for the purpose of advising the Governor General as to the exercise of his powers under Section 78 of the Constitution which may have resulted in a warrant for their execution being read. It is admitted by the Respondents that they made no written representations to the Council. The record at paragraph [7] further indicates that the Respondents were informed that the Council would be meeting on 24th June, 2002, to advise the Governor General as to the exercise of the prerogative of mercy. No representations having been submitted by the Respondents, the Privy Council advised the Governor General against commuting the sentences, and death warrants were read to them. On 27th June, 2002 the executions were stayed by an order of court.

[25] On 13th September, 2004 after the Respondents' appeals to the Judicial Committee of the Privy Council were dismissed, following a lapse of over two years, the record indicates at paragraph [10] that the Barbados Privy Council met to consider the Order in Council of the Judicial Committee of the Privy Council, and advised the Governor General that a date for execution should be fixed. The Respondents were not informed of this meeting nor were they requested to make written representations. Due to the fact that over two years had elapsed since the first date of execution was fixed the question arises as to whether the Respondents ought not to have been invited to make written representations. They may have had a change of heart about insisting on oral representations or circumstances may have arisen during the interval of time which may have influenced the Barbados

Privy Council to advise the Governor General to exercise his powers favourably on their behalf.

[26] Sub-sections (5) and (6) which were added to Section 78 by virtue of the Constitution (Amendment) Act, 2002 came into effect on 5th September, 2002. Other sections were also amended under the Act, to wit, Section 15 of the Constitution. In relation to this Section by virtue of Section 5 of the amending Act it was specifically stated that the amendment made to Section 15 "does not apply in relation to a person on whom the sentence of death was pronounced before the coming into operation of this Act." The amendment in relation to Section 15 therefore did not apply to any person sentenced to death before 5th September, 2002, the date when the amendment came into effect. This section having been excluded (expressio unius exclusio alterius) I posit the view that Sub-sections (5) and (6) would apply to any condemned person awaiting the exercise of the powers of the Governor General or the Barbados Privy Council under Section 78 regardless of the date of sentence, in the absence of any provision excluding its application to persons sentenced to death prior to the commencement of the amending Act. The cases of *In re a Solicitor's Clerk*[17], *La Maachia v. Minister for Primary Industry*[18] and *Brosseau v. Alberta Securities Commission*[19] are supportive of such a statutory interpretation.

[27] The Respondents were accordingly given a constitutional right under Sub-section (5) to submit written representations to the Governor General or the Council before a death warrant was read. The Court of Appeal seems to have shared this view when they reasoned at page 267 of the record that "whereas the applicants were invited in April 2002 to submit representations in writing for the exercise of mercy, after 5 September, 2002, they were given a specific constitutional right to submit written representations".

[17] [1953] WLR 1219
[18] [1986] 72 ALR 23
[19] [1989] 57 DLR (4th) 458

[28] In my view the Respondents ought to have been informed that the Council was meeting for a second time. A sentence of death stands in a different category from any other sentence. A condemned man fights for his life until all hope is exhausted, hence he is entitled to explore all possible avenues available to him. One would expect that if a warrant for his execution is to be issued those responsible for authorising it to be issued ought to inform him of the date when this is proposed to be done and give him an opportunity to make written representations as he is entitled to do. In somewhat similar circumstances the learned Chief Justice of Belize in *Lauriano v. Attorney General and Another*[20] held that in order that the principles of natural justice be observed, a person sentenced to death was to be notified of the sitting of the council to consider his case; to be notified of his right to make representation in writing at its sitting, and to have disclosed to him where "other information derived from elsewhere" was supplied by the Attorney General and which was to be taken into consideration by the council at its meeting. That case was ultimately heard by the Court of Appeal of Belize on other grounds, but there was no appeal on the learned Chief Justice's finding in relation to this aspect of the case.

[29] There is no evidence on record that the Respondents were informed of this second meeting of the Council after their appeals to the Judicial Committee of the Privy Council were dismissed. In this regard the Barbados Privy Council acted without procedural propriety thereby rendering its decision subject to being set aside as an infringement of the rights of the Respondents to the protection of the law. As was stated by Fitzpatrick, J.A. in *Yassin & Thomas v. Attorney General of Guyana*[21] "justiciability concerning the exercise of the prerogative of mercy applies not to the decision itself but to the manner in which it is reached." If the process is flawed the decision is tainted, and must be set aside by the Court.

[20] (1995) 47 WIR 74; [1996] 2 LRC 96
[21] (1996) 62 WIR 98

[30] The whole concept of mercy is complex depending as it does on the exercise of a discretion inherent in some person or authority designated to dispense it. It appeals to instinctive values of conscience and fair play even in societies within the Caribbean where the incidence of criminal activity is beyond acceptable limits. In carrying out their mandates statutory mercy tribunals are expected to facilitate the process by procedures that are fair in all respects both to the public at large as well as the condemned person.

[31] Lord Mustill in *Regina v Secretary of State for the Home Department, Ex parte Doody*[22] at page 560 summarised the principles of acting fairly in administrative matters in this way:

> "(1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to producing its modification, or both."

[22] [1994] 1 AC 531

[32] The sixth principle is not relevant to the present situation, and need not be mentioned. The Constitution conferred on the Governor General and the Barbados Privy Council the power, inter alia, to grant a pardon to convicted persons, and it is presumed that these powers will be exercised in a fair manner. In the instant case the Respondents who were convicted and sentenced to death had all of their appeals dismissed, and so as a last resort may have cherished the hope of a favourable exercise in their favour of the powers of commutation of the sentence of death by the Governor General and the Barbados Privy Council. The exercise of such a power is exceptional and unique involving as it does a decision on the termination of life, and in this context there should be a scrupulous regard for fairness. In light of the principles of fairness enumerated by Lord Mustill in *Doody* I reiterate that fairness required that the Respondents be given an opportunity to make written representations to the Barbados Privy Council as was their right so to do, and having regard to the particular circumstances of a lapse of two years since the first warrant for their executions was read. I uphold the findings of the Court of Appeal at paragraph [70] of the judgment that the death warrants were improperly read to the Respondents both in 2002 and 2004 at times when they had not exhausted both their domestic and other remedies, and it was manifestly unfair being a denial of natural justice.

[33] However, a finding that the Barbados Privy Council acted with procedural impropriety will have no impact on the final outcome of this appeal in light of the fact that the Court of Appeal commuted the sentences of death imposed on the Respondents. One of the factors which influenced their decision to do so pertained to the same issue which I have raised, that is, that within an interval of two years the Respondents had two death warrants read to them, and it would be undesirable to expose them to a third reading and the likelihood of further court proceedings. They also noted the Barbados Government's failure to provide a report in compliance with an Order of the Inter-American Court on Human Rights dated 17th September, 2004, and expressed the view that in the circumstances it

was "highly unlikely that a report would be forthcoming within the time frame of *Pratt and Morgan*."[23]

[34] This leads me to make a short comment and to echo the views expressed by the learned President and Saunders, J in their judgment on the case of *Pratt* where due to the peculiar circumstances of that case, involving as it did a delay of approximately 14 years from conviction, the Judicial Committee of the Privy Council saw it appropriate to issue guidelines to the Governor General and the Jamaica Privy Council in circumstances where execution is to take place more than five years after sentence. The advice tendered by the Board was that the Governor General should refer all such cases to the Jamaica Privy Council who should recommend commutation to life imprisonment, thereby achieving substantial justice, and avoiding a flood of applications to the Supreme Court for constitutional relief. The reason for this was the conclusion of their Lordships that in any such case there will be strong grounds for believing that the delay is such as to constitute "*inhuman or degrading punishment or other treatment*."

[35] The impact of this advice reverberated throughout the Caribbean jurisdictions for which the Judicial Committee of the Privy Council was and still is the final appellate court. Several prisoners who were on death row for more than five years found themselves beneficiaries of commutation of sentences. Although the advice of the Judicial Committee of the Privy Council was intended to be guidance for constitutionally mandated committees exercising the prerogative of mercy in relation to persons under sentences of death, it resulted in some instances in renewed efforts being made to expedite trials and hearings of appeals at the domestic level. Undoubtedly in some jurisdictions delays had reached unacceptable levels, and in order to avoid a plethora of constitutional motions alleging inhuman or degrading punishment the process from conviction and sentence to completion of appeals had to be expedited. Of course, the guidelines and suggested time limits of *Pratt* are not immutable or carved in stone, even

[23] Pratt and Morgan v. The Attorney General of Jamaica (1993) 43 WIR 340; [1994] 2 AC 1

though most jurisdictions for which the Judicial Committee of the Privy Council is the final appellate court seem to regard them as such; they must be viewed in light of the extraordinary circumstances of that case.

[36] However I endorse the guidance and suggested time limits of *Pratt*, and commend them to the other jurisdiction of which this Court is currently the final appellate court. Delays which reach unacceptable levels can deny a condemned person the constitutional protection of the law which is the Gibraltarian rock on which every judicial system is built, and in which confidence of the public resides. This must not be confined only to the post-conviction stage of trials, but efforts must be made to expedite the pre-conviction process which in most constitutions guarantees to an accused person protection of the law.

[37] I agree with the learned President and Saunders, J that the Court of Appeal adopted the correct course in commuting the death sentences of the Respondents.

[38] As mentioned at the commencement of this judgment, I concur in the conclusions arrived at in the judgment of the learned President and Saunders, J in respect of the other issues which fell to be determined in this appeal, and I agree that the appeal be dismissed with costs to each of the Respondents certified fit for two Counsel.

s/ D.P. Bernard

D. P. Bernard