NMLJ

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 7/ 99

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**NEVILLE LEWIS**	**PLAINTIFF/APPELLANT**
AND	**ATTORNEY GENERAL FOR JAMAICA**	**1st RESPONDENT/DEFENDANT**
AND	**SUPERINTENDENT OF THE ST. CATHERINE DISTRICT PRISON**	**2nd RESPONDENT/DEFENDANT**

Richard Small and Helga McIntrye for appellant instructed by Daly, Thwaites and Company

Lennox Campbell, Senior Assistant Attorney General and Marc Harrison, Crown Counsel for respondents instructed by the Director of State Proceedings.

18th, 19th, 20th, & 21st May, 1999 , and 15th June, 1999

FORTE J.A.

This is an appeal from the judgment of the Constitutional Court dismissing an action brought by the appellant under Section 25 of the Constitution - alleging that his rights under Sections 13, 14, 17 and 24 of the said Constitution have been, are being/or are likely to be contravened by the issue of a death warrant by the Governor General which warrant was read to the plaintiff on the 27th August, 1998 . He claims the following reliefs:

(i) An order rescinding the decision of the Governor General to approve and promulgate instructions for dealing with applications to the Inter-American Commission on Human Rights (the "Commission") and the United Nations Human

(ii) Rights Committee by or on behalf of prisoners under sentence of death.

Further or alternatively a declaration that the said instructions dated August 6, 1997 are unlawful, void and of no effect as contravening sections 13, 14, 17 and/or 24 of the said Constitution.

(iii) An order rescinding the death warrant issued on/or about the 14th instant for the plaintiff's execution on the 27th instant.

(iv) A declaration that the issue of the said death warrant while the plaintiff's application is pending before Inter-American Commission on Human Rights for violation of the plaintiff's rights under the American Convention on Human Rights, the plaintiff's rights to equality before the law and the protection of the law guaranteed by sections 13, 14, 17 and/or 24 of the said Constitution, is null and void.

(v) An order staying the execution of the plaintiff

(vi) A declaration that the plaintiff's right not to be subjected to torture and inhuman or degrading punishment or treatment is being or is likely to be violated.

(vii) An interim order staying the execution of the sentence of death on the plaintiff or alternatively, a conservatory order directing the defendants not to carry out the execution of the plaintiff pending the determination of the plaintiff's application to the Inter-American Commission on Human Rights and/or pending the hearing and determination of this suit or any resultant appeals therefrom.

(viii) All such orders, writs and directions as may be necessary or appropriate to secure redress by the plaintiff for the contravention of his fundamental rights and freedoms which are guaranteed to the plaintiff by the Constitution of Jamaica.

The facts upon which the issues are to be decided will be dealt with in considering the two grounds of appeal which were argued before us. It is sufficient to say at this stage that the appellant, having been convicted for capital murder, and having thereafter completed all his domestic procedures, petitioned the United Nations Human Rights Committee (UNHRC) and was the beneficiary of a favourable report made to the Government of Jamaica, but upon which the

Government has failed to act. He next petitioned the Inter American Commission on Human Rights (IACHR) to which Jamaica is a signatory, and during the process of his petition being dealt with, a death warrant for his execution was issued. As a result of that, the appellant has brought this action in the Constitutional Court. The issues are sufficiently outlined in the Grounds of Appeal to which I now turn.

Ground 1

> "That the Full Court has misintrepreted the rights and obligations which flow from the convention and their legal effect on the domestic law and in particular on the rights and duties under the Constitution and in public law."

In advancing this complaint Mr. Richard Small for the appellant alleges a breach of the provisions of the Constitution which "are designed to ensure the protection of the law, its due process and the rule of law". Specifically the appellant complains that the conduct of the Governor General, in issuing the death warrant, while the petition of the appellant was still being considered by the IACHR (the "Commission") was a breach of the constitutionally protected rights of the appellant not to have the outcome of any pending appellate or any legal process pre-empted by Executive action.

The question for decision on Ground 1 is whether the appellant has a constitutional right to have his petition before the Commission, dealt with and any recommendation it may make to the State, considered, before the carrying out of the sentence of death upon him.

In his Statement of Claim, the appellant claimed the following:-

> "The plaintiff claims under Section 25 of the Constitution that his rights under Sections 13, 17 and or 24 of the said Constitution have been, are being, and/or are likely to be contravened by the issue of the death warrant by the

> Governor General which warrant was read to the plaintiff on the 27th August, 1998".

As Section 24 of the Constitution deals with "Protection from discrimination on the grounds of race etc." it is difficult to see its relevance in the context of this case. In any event, it has not been made an issue in this appeal and consequently no more need be said about it.

In so far as the breaches in respect of Sections 13 and 17 are concerned an examination will have to be undertaken of the Bahamian case of ***Trevor Nathaniel Fisher v The Minister of Public Safety and Immigration et al, No 2*** Privy Council Appeal No 35/98 delivered 15th October, 1998 (unreported), to determine what effect the decision of the Board would have in relation to an interpretation of the Jamaica Constitution, where the complaints are similar. Before doing so, however, the decision of the Board of Her Majesty's Privy Council in the case of ***Thomas and Hilaire*** P.C.A No60/98 delivered 17th March, 1999 (unreported), relied on by Mr. Small must also be considered.

In the ***Thomas and Hilaire*** cases, in dealing with the Trinidad Constitution, in respect of a similar complaint (death warrants having been issued to the appellants while their petitions were pending in the IACHR (the "Commission"), the Board had to interpret the provisions of Section 4 (a) of the Trinidad and Tobago Constitution dealing with the protection of fundamental rights and freedom. The section reads as far as is relevant:-

> "**4.** --It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not be deprived thereof except by due process of law: "

This section clearly declares the citizen's right to life and the right not to be deprived thereof except by due process of law. Consequently the learned Law Lords were at pains to determine the meaning of "due process of law" to ascertain how far the protection extended, and in particular, whether it extended outside of the domestic jurisdiction, into the international bodies in which by treaty the Government of Trinidad and Tobago had become a party.

There is no need here to examine in detail the conclusions of their Lordships who were in the majority, as to the meaning of those words. Here, however, is the opinion of their Lordships in the majority per Lord Millett as to the meaning of the words. "In their, Lordships view, 'due process of law' is a compendium expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather it involves the concept of the rule of law itself and the universally accepted standard of practice observed by civilized nations which observe the rule of law... The clause thus gives constitutional protection to the concept of procedural fairness." Their Lordships thereafter concluded in the words of Lord Millett who delivered the judgment (pg. 10) as follows:

> "In their Lordships' view, however, the appellants claim does not infringe the principle which the Government invoke. The right for which they contend is not the particular right to petition the commission or even complete the particular process which they initiated when they lodged their petitions. It is the general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by executive action. This general right is not created by the Convention; it is accorded by the common law and affirmed by section 4(a) of the Constitution. The appellants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution. By ratifying a treaty which provides for individual access to an international body, the Government made that process for the time being part of the domestic criminal justice system and thereby

> temporarily at least extended the scope of the due process clause in the Constitution".

Lord Millett, later continues (pg. 12):

> "This disposes of the argument that section 4 (a) does not extend to rights created after the enactment of the Constitution. All depends on the level of abstraction at which the right claimed is described. A Constitution embodies fundamental rights and freedoms, not their particular expression at the time of its enactment. The due process clause must therefore be broadly interpreted. It does not guarantee the particular forms of legal procedure existing when the Constitution came into force; the content of the clause is not immutably fixed at that date. But the right to be allowed to complete a current appellate or other legal process without having it rendered nugatory by executive action before it is completed is part of the fundamental concept of due process".

The obvious question which arises from the above dicta of Lord Millett is whether petitions to the Commission, whose report would have no legal binding effect on the State can be described accurately as "current appellate or other legal process". The report of the Commission would be a matter to be considered by the Advisory Committee in Trinidad and Tobago and the Governor General in Privy Council of Jamaica in the exercise of its powers under Section 90 of the Constitution i.e. the Prerogative of Mercy. It would not be considered by the Judiciary, but would fall to be considered by the Executive, per the Governor General, (in the case of Jamaica) in the exercise of the Prerogative of Mercy which, as was decided in ***Reckley v Minister of Public Safety and Immigration and others*** (No.2) ((1996) 1 All E.R. 562, is not justiciable.

This view seems to be supported by Lord Millett, as he considered a similar contention in the ***Thomas and Hilaire*** case. He stated (at pg.12):

> "Their Lordships see much force, as did the Court of Appeal, in the Government's objection that the Advisory Committee is not bound to take account of any report which the Commission may make when considering

> whether or not to recommend a reprieve. This is not a legal process and is not subject to the constitutional requirement of due process: see ***de Freitas v Benny*** [1976] A.C. 239; ***Reckley v Minister of Public Safety and Immigration*** (No. 2) [1996] A.C. 527. The Government submit that the appellants can have no legal rights to complete a process which merely leads to the making of the report which the Government is not bound to take into account. This submission, however, disregards the fact that the petitions may be referred by the Commission to the IACHR. The appellants are contending that their trials were unfair, and hope in due course to obtain binding rulings from the IACHR that their convictions should be quashed or their sentences should be commuted. For the Government to carry out the sentences of death before the petitions have been heard would deny the appellants their constitutional right to due process".

Indeed, Lord Millett seemed to have rested his conclusion on the basis that Trinidad and Tobago having, through the Treaty agreed to be bound by the decision of the Inter American Court on Human Rights would by virtue of the due process Clause in Section 4 (a) of its Constitution be in breach of the Constitution to terminate the life of the appellants while the petition was being heard, for the reason that the matter may be referred to the Court, whose decision would be binding on Trinidad and Tobago.

Returning to the appeal before us, Mr. Small contended that the reasoning in the decision of the majority in the ***Thomas and Hilaire*** case, (supra) ought to be applied to the provisions of the Jamaica Constitution in so far as it declares that on the ratification of the relevant Treaties by Trinidad and Tobago, the constitutional right to " due process of law " was extended beyond domestic or municipal law to "other legal process". i.e. petitions to international bodies. But the Jamaican Constitution is differently worded. Section 13 states:

> "**13.** –Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to

> respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) freedom of conscience, of expression and of peaceful assembly and association; and
>
> (b) respect for his private and family life,
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest".

Section 13 declares rights which existed at common law before the coming into being of the Constitution of Jamaica. It seeks to preserve the rights stated therein for the people of Jamaica. It has been argued that the Section is merely declaratory of the rights to which the citizen is entitled and does not itself afford protection for those rights and freedom, a privilege reserved for the ensuing sections 14 to 25. In that sense, it is argued, there can be no breach of Section 13 as is alleged in the pleadings. The breach alleged concerns the appellant's right to life, a right endowed by Section 14 of the Constitution, which is merely declaratory and confirmatory of a right that existed long before the advent of the Constitution. Section 13, however declares the citizens right to the protection of the law. It has been argued that the protection of law provision is exhausted by Section 20 of the Constitution which deals solely with domestic or municipal law. This is in my view cannot be correct. The expression "protection of the law" must be directed at a more widely applied concept than the provisions of Section 20 addresses.

In respect of all of the rights and freedoms guaranteed by Chapter III of the Constitution, the redress offered by its very provisions is founded on the right to the "protection of the law".

The words therefore like "the due process" clause, speak to the right to involve the judicial processes to secure the rights and freedoms declared in the Constitution. So in spite of Section 20 which deal with litigious matters i.e. criminal charges, and civil disputes, the citizen has the right to seek the assistance of the court in circumstances, where his constitutional rights and freedoms have been, are/or likely to be breached. In my view the protection of law, gives to the citizens the very right to the due process of law that is specifically declared in Section 4 (a) of the Trinidad and Tobago Constitution. You cannot have protection of the law, unless you enjoy "due process of the law" – and if protection of law does not involve a right to the due process of the law, then a provision for protection of the law, would be of no effect. In my opinion the two terms are synonymous, and consequently as in Trinidad and Tobago the people of Jamaica through the "protection of law" guarantee in Section 13 of the Jamaica Constitution are endowed with "constitutional protection to the concept of procedural fairness" [see the case of ***Thomas and Hilaire*** (supra)]

Having arrived at that conclusion, the question already asked in this judgment, must now be answered in relation to the particular circumstances of this case, and the relevant provision of the Jamaican Constitution . Jamaica it is agreed on both sides, is a signatory of the treaty only in so far as subjecting the State to the jurisdiction of the Inter American Commission on Human Rights as it did not accede to the Convention giving the Inter American Court on Human Rights jurisdiction in matters from Jamaica. It is argued that the recommendations of the Commission would not be binding on Jamaica, but would nevertheless form part of the consideration by the Governor General in Privy Council, in determining whether the exercise of his Prerogative of Mercy would be warranted.

In his examination of the meaning of "due process" in the case of ***Thomas and Hilaire*** (supra) (pg. 9) Lord Millett expressed the following:

> "Whether alone or in conjunction with section 5(2) their Lordships have no doubt that the clause extends to the appellate process as well as the trial itself. In particular it includes the right of a condemned man to be allowed to complete any appellate or analogous legal process that is capable of resulting in a reduction or commutation of his sentence before the process is rendered nugatory by executive action".

The only process that could have in that case, resulted in the reduction or commutation of the sentence, must have been the consideration by the Advisory Committee of the report of the Commission, and of course if the matter had been referred to the Court, by a decision of that Court which would have been binding on the State. In the former it could not be properly said that that would be as a result of a legal process, so it appears that Lord Millett in speaking of analogous legal process included considerations by the Advisory Committee.

In the case of Jamaica, which is only a party to the Convention in respect of the Commission any recommendation or report made by the Commission, could not be binding on the State, being a matter for the Governor General or the Privy Council in determining the exercise of the Prerogative of Mercy.

In the event, I would conclude that Jamaica not being a party to the Convention in relation to the Inter American Court for Human Rights the decision in ***Thomas and Hilaire*** is in that regard distinguishable from the instant case. However, I would hold that the appellant enjoys the "protection of law" which would give the appellant a constitutional right to procedural fairness. Although decisions of the Governor General in the exercise of the Prerogative of Mercy are not justiciable, nevertheless the Courts can in accordance with the procedural fairness guaranteed by the Constitution, require the Governor General to consider matters that by virtue of the law and the

Constitution, he is mandated to consider in coming to his decision. In those circumstances even though the recommendation of the Commission are not binding on the Governor General in the exercise of the Prerogative of Mercy, given the terms of the Treaty which the Government ratified, the Privy Council ought to await the result of the petition, so as to be able to give it consideration in determining whether to exercise the Prerogative of Mercy.

Before leaving this ground, I should return to the ***Fisher*** case (supra) upon which Mr. Campbell relied. This decision of the Board, effectively dealt with the allegations made in the Statement of Claim in the instant case except in so far as it alleged a breach of Section 13.

The Board in that case, disposed of the claim in respect of Article 16 of the Bahamian Constitution which is in similar terms to Section 14 of the Jamaican Constitution. Nothing needs to be added to the words of Lord Lloyd of Berwick who delivered the majority judgment. He said (pg. 6):

> "The appellant's primary case in reply was that his right to life is protected by Article 16 of the Constitution, and that the Government would be in breach of his constitutional rights under that Article if he were executed before the Commission has reached a decision and furnished a report for the consideration of the Advisory Committee under Article 92 of the Constitution".

Lord Lloyd then sets out the provisions of Article 16, and proceeded:

> "The difficulty with the appellant's argument under this head lies in the words 'save in execution of the sentence of the Court'. The reference to 'Court' is clearly a reference to the domestic courts of the Bahamas under Chapter VII of the Constitution. Mr. Davies nevertheless argues that Article 16 like other constitutional provisions, should be given a liberal construction, and that while a case is being considered by the Commission a right to life should be implied. The effect of such an implication would thus be to qualify the saving provision in Article 16(1).

> But at the time the Constitution was enacted, there could be no question of any implication for the Bahamas was not then a party to the Organisation of American States. It did not become a party until 1982. If Parliament had intended to introduce a constitutional qualification at that time, it would presumably have done so in express terms. In the circumstances it is difficult to see how a qualification can be implied. It would mean that the Government had introduced new rights into domestic law by entering into a treaty obligation, contrary to the principles stated in ***Secretary of State for Home Department ex parte Brind*** [1991] 1 A.C. 696".

Their Lordships also rejected a claim of breach in respect to Article 17 of The Bahamian Constitution (the equivalent of Section 17 of the Jamaican Constitution) which protects the citizen's rights against torture and inhuman or degrading treatment or punishment. As that argument, though, forming the subject of ground 3, has not been advanced in this appeal, no more need be said about it.

As the above cited dicta disposes of any argument in respect of a breach of Section 14, there is nothing that can be added, given the fact that this Court is bound by the decision. It must be said however, that the Board in that case was apparently not invited to, nor did the learned Law Lords address their minds to the effect of Section 15 of the Bahamian Constitution and the interpretation of the "protection of law" clause declared in that section. For those reasons, it was necessary in this judgment to examine this issue which was presented in this appeal, against the background of the later decision of the Board in the case of ***Thomas and Hilaire*** (supra).

I turn now to Ground 2 which reads:

> "That the Full Court has misunderstood the implication of the Governor General's Instructions and the effect on the Constitution".

The appellant was arrested on the capital charge on the 11th November, 1992 and was tried and convicted by the 14th October, 1994. His appeal to this Court was dismissed on the 31st July, 1995, and that to Her Majesty's Privy Council on the 2nd May, 1996. He thereafter, on the 24th May, 1996, petitioned the United Nations Human Rights Committee (UNHRC) and that body reported on the 17th July, 1997, finding certain violations, and recommending that compensation be paid to the appellant.

On the 17th August, 1997, in an effort to have the procedures conducted with expedition, and in order to ensure that all procedure be completed within the time specified in accordance with the case of ***Pratt & Morgan*** v ***AG. for Jamaica*** [1993] 4 All E.R. 769, the Governor General issued Instructions announcing certain time limits in respect of petitions to the international bodies. These Instructions appeared in the Jamaica Gazette of the 7th August, 1997 and to confirm the reasons for the Instructions, the preamble states:-

> "Whereas, the Government of Jamaica has resolved (that) those applications to the International Human Rights Bodies by or on behalf of Prisoners under sentence of death must be conducted in an expeditious a manner as possible".

After detailing time limits in which certain steps must be taken in respect of the first application made to either international body, the Instructions in para 6 states:

> "Where, after a period of six months, beginning on the date of desptach of such response, no recommendation has been received from the first International Human Rights body, the execution will not be further postponed unless intimation in writing is received by the Governor- General from the prisoner or on his behalf that he intends to make an application to the second International Human Rights body.

Thereafter, the Instructions sets out time limits in which certain steps should be taken and then concludes in para 10:

> "Where within the period of six months after the response to the second International Human Rights body by the Government of Jamaica –
>
> (a) a communication has been received by the government as to the outcome of the prisoner's application, the Government of Jamaica shall advise the Clerk to the Privy Council of the outcome of the application. The matter shall then be considered by the Privy Council who shall advise the Governor General. Unless the prerogative of mercy is exercised in favour of the prisoner, the execution will not be further postponed;
>
> (b) no such communication has been received, the execution will not be further postponed."

On the 12th September, 1997 just over a month after these Instructions were issued the appellant's Solicitors in England, advised the Governor General that the appellant had petitioned the Inter American Commission on Human Rights. On that same day, however, a letter was written enclosing a warrant for the execution of the appellant. The report of the Commission dated 17th December, 1998, to which reference will be made later, speaks to the petition being received by the Commission on the 2nd October, 1997. The Government of Jamaica was advised of the petition on the 31st October, 1997, and on the 20th November, 1997, the Commission requested the Government to stay the execution of the appellant. On the 2nd December, 1997, the Government responded to the complaints made in the petition. On the 5th January, 1998, the appellant responded to the Government's response. On the 11th July, 1998, the Commission requested another stay of execution, but on the 11th August, 1998 another warrant for the execution was issued and read to the appellant on the 14th August, 1998. It was as a result of

the issue of that warrant that the present proceedings were brought. The above dates confirm that the warrant was issued at about 10 months after the Commission received the petition. That the death warrant was issued in accordance with the Instructions is revealed in the following paragraph:

> "And whereas the application to the Inter-American Commission on Human Rights by Neville Lewis has not been definitely considered within the time limits set out in the Governor General's Instructions of August 6 (sic),1997".

The appellant contends that the Instructions issued by the Governor General are unlawful and invalid. The reason for the Government's seeking to limit the time within which these petitions ought to be considered, obviously has its genesis in the principle laid down by their Lordships in the case of ***Pratt and Morgan v A.G of Jamaica*** {1993] 4 All E.R. 769 the relevant passage of which is here taken from the case of ***Thomas & Hilaire*** (pg. 3):

> " In ***Pratt v Attorney-General for Jamaica*** [1994] 2 A.C.1 this Board held that to carry out a sentence after a delay of 14 years would constitute inhuman punishment and would be unconstitutional under the law of Jamaica. The Board ruled at pages 34-35 that the aim should be to hear a capital appeal in Jamaica within 12 months of conviction and to complete the entire domestic appeal process within two years; that it should be possible to complete applications to the UNHRC 'with reasonable despatch' and at the most within a further 18 months; and that where execution was to take place more than five years after sentence there would be strong grounds for believing that the carrying out of a sentence would constitute inhuman or degrading punishment or other treatment contrary to the Constitution of Jamaica".

In dealing with a similar complaint, their Lordships per Lord Millett speaking for the majority concluded that Instructions, similar to those issued by the Governor General were unlawful because they were disproportionate. Their Lordships recognised and understood the reasons for

the instructions i.e. because of ***Pratt and Morgan*** , the Instructions "had the object of introducing an appropriate element of urgency into the international appellate process".

Their Lordships felt that this object was in conformity with the following policy laid down by the Board in ***Pratt v A.G. for Jamaica*** (supra) at pg. 33:

> "A state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve...If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as part of our jurisprudence".

They were however, of the view that the Instructions were "disproportionate because they curtailed the petitioner's rights further than was necessary to deal with the mischief created by the delays in the international appellate processes" and concluded at pages 7-8:

> "It would have been sufficient to prescribe an outside period of (say) 18 months for the completion of all such processes. This could apply whether the petitioner made only one application or applied successively to more than one international body or made successive applications to
> the same body. It was unnecessary and inappropriate to provide separate and successive time limits for each application and for each stage of each application. This had the effect of drastically and unnecessarily curtailing the time limits within which the first body could complete the process".

In the instant case, the first international body (the UNHRC) had completed its process in about 14 months, leaving a mere 4 months of the allotted 18 months given by their Lordships'

Board for completion in the second International Body (the IACHR). However, the domestic process had been completed in approximately one year and seven months.

In respect to the petitions before the IACHR it is interesting to note the time factors allotted in the Regulations for the various steps in the procedure.

> Para 5: - The Commission shall request the affected Government to provide the information requested within 90 days after the date in which the request is made."
>
> Para 6: - allows the State to request a 30 days extension but extensions cannot be granted for more than 180 days.
>
> By Para 7: - in order to gain a better understanding of the case, the Commission may forward the documents supplied by the Government to the petitioner or his Attorney, requesting his comments within a period of 30 days. Such comments may thereafter be transmitted to the Government with the request that it submits final comments within 30 days.

These time limits reveal that the initial investigatory processes could take a maximum of 330 days. Then it is provided by Article 44 para 3 that "once the investigatory stage has been completed, the case shall be brought for consideration before the Commission, which shall prepare its decision in a period of 180 days. The Regulations therefore envisage a maximum period of 510 days in which to complete its process: a period, a little less than the 18 months which their Lordships' Board mandated for these processes in relation to both international bodies. The decisions of the Privy Council are binding upon us, and consequently the decision of ***Thomas and Hilaire,*** dealing with a similar situation and similar complaint, must be followed. Nevertheless I should add that Jamaica being a signatory of the Inter American Commission on Human Rights – consequently adhered to the Regulations which required a

maximum period of 510 days to complete its processes. In those circumstances, to issue Instructions calling upon the Commission to complete its process in 6 months or about 180 days, is in my view disproportionate, and consequently unlawful. In any event, the issuing of the Instructions, contrary to the period laid down in ***Pratt and Morgan*** (supra) infringes the doctrine of the Separation of Powers. A decision of the Privy Council cannot be over-ruled by the Instructions, and consequently, the latter must be invalid. As the five years mandated by Her Majesty's Privy Council is fast approaching I am consoled by the following dicta of the majority in ***Thomas and Hilaire*** (Pg 19):

> "The Advisory Committee may, of course, take into account the delay occasioned by the slowness of the international bodies in dealing with such petitions. But in their Lordships view such delays should not prevent the death sentence from being carried out. Where, therefore more than 18 months elapse(s) between the date on which a condemned man lodges a petition to an international body and its final determination, their Lordships would regard it, as appropriate to add the excess to the period of 18 months allowed for in ***Pratt'".***

In conclusion I would be minded to uphold the contentions of the appellant, and find that the death warrant should be stayed pending the results of the petition before the IACHR. It should be noted, however, that the Commission, has suspended its consideration of the appellant's petition pending the completion of this Constitutional action based on its own rules which require that all domestic procedures be exhausted before a petition to that body will be entertained. This decision of the Commission means that at the present time, the appellant's petition is not being actively pursued. The reasons for the decision, ironically means that the appellant will have to either accept the decision of this Court, or await the final disposition of the case by the Judicial Committee of the Privy Council, before it can re-submit its petition to the Commission. Consequently, though I would order that the execution of the appellant be stayed until the

petition is heard, and a report made by the Commission, no such stay can be granted, as the petition remains dormant pending the conclusions of these proceedings.

In the event, I would allow the appeal in part and make the following orders:

1) That the Instructions, dated 6th August, 1997, issued by the Governor General are unlawful.

2) That the execution of the appellant be stayed for 14 days pending an application for conditional leave to appeal to the Judicial Committee of the Privy Council or Petition for Special leave.

In the event that no application for conditional leave to appeal is filed, then within the same period of 14 days the appellant shall have liberty to apply for further stay upon proof that the Commission has been informed that all domestic proceedings have been exhausted and that the petition has been re-submitted to the Commission.

(3) All other remedies prayed for, are herewith refused.

(4) Liberty to apply.

(5) No order as to costs.

DOWNER, J.A.

Was the Constitutional Court (Wolfe, C.J. Cooke and Karl Harrison JJ) right to dismiss the action instituted by Neville Lewis where the principal prayer in his Statement of Claim dated 21st September, 1998 was for 'An Order rescinding the death warrant issued on incumbent the 14th instant for the plaintiff's execution on the 27th instant'? These dates refer to the month of August 1998 and to appreciate the context in which this prayer was made, it is necessary to refer to previous criminal proceedings and the interlocutory proceedings which granted stays of execution in this matter.

The History

The Statement of Claim gives an excellent summary of the history of this matter:

> "1. The plaintiff was arrested on or about the 11th November, 1992 for the murder of Victor Higgs on or about the 18th October, 1992 and was held in custody awaiting trial until October 1994 when he was tried and convicted of capital murder along with Peter Blaine on the 14th October, 1994 and sentenced to death.
>
> 2. On the 31st July, 1995 the Court of Appeal dismissed the plaintiff's appeal against conviction and on the 2nd of May, 1996 the plaintiff's petition for special leave to appeal against conviction was dismissed by the Judicial Committee of the Privy Council."

Then paragraph 17 reads:

> "17. On the 12th September, 1997 a warrant was issued for the execution of the plaintiff on the 25th September, 1997, and he was removed to the condemned cell which is reserved for prisoners whose date of execution has been fixed. His execution was subsequently stayed and he was removed from the condemned cells."

As this warrant is a central feature in this case it is important to refer to it as its terms and effects will have to be considered hereafter. It reads:

> "By His Excellency The Very Reverend Canon The Hon. Weeville Gordon, Commander of the Order of Distinction, Deputy Governor-General of Jamaica.
>
> WHEREAS in the Criminal Case of the Queen against Neville Lewis No. A81/94(3) before the Home Circuit Court, Neville Lewis then a prisoner confined in the Saint Catherine Adult Correctional Centre in the Parish of Saint Catherine on the 14th day of October, 1994 was convicted of the offence of capital murder, punishable under section 3 (1) of the Offences Against the Person Act, and was thereupon by the said Court sentenced for the said offence to suffer death:
>
> AND WHEREAS the said Neville Lewis appealed against the said conviction and sentence to the Court of Appeal:
>
> AND WHEREAS the Court of Appeal dismissed the appeal of the said Neville Lewis on the 11th day of July, 1995:
>
> AND WHEREAS the Judicial Committee of the Privy Council dismissed the Petition of the said Neville Lewis on the 15th day of May, 1996:
>
> AND WHEREAS on the 13th day of February, 1996 and 9th day of September, 1997 the Privy Council of Jamaica considered the case and the views of the United Nations Human Rights Committee respectively and on each occasion recommended that the Prerogative of Mercy should not be exercised in favour of Neville Lewis:
>
> AND WHEREAS the application to the Inter American Commission on Human Rights by Neville Lewis has not been definitively considered within the time limits set out in the Governor-General's Instructions of August 6, 1997:
>
> NOW THEREFORE these presents do authorise and command you to carry the said sentence into execution by causing the said Neville Lewis to suffer death in the manner authorised by law on Thursday, 27th day of August, 1998 at 8:30 a.m. at some convenient place within the Saint Catherine Adult Correctional Centre and for so doing this shall be your sufficient warrant:

AND THEREUPON without delay return you this Warrant to be endorsed with what you have done thereon.

Given under the hand of the Deputy Governor-General and the Broad Seal of Jamaica at King's House this 11th day of August in the Year of Our Lord One Thousand Nine Hundred and Ninety-eight in the Forty-seventh Year of the Reign of Her Majesty Queen Elizabeth II"

There are some inconsistencies as regards the dates averred in the Statement of Claim and the Warrant of Execution but nothing turns on them.

In the light of the date fixed for his execution Lewis filed a General Endorsed Writ in the Supreme Court on 20th August and at the same time sought from Walker, J. in the Supreme Court a conservatory order staying his execution pending the hearing of his constitutional action. Walker, J. dismissed Lewis' summons and as a result Lewis renewed his application to this Court (Rattray, P, Bingham, Harrison JJA): **Neville Lewis v The Attorney-General of Jamaica et al.** See SCCA No. 104/98 delivered December 18, 1998. The inference was that Walker, J. had before him the General Endorsed Writ of Summons together with an affidavit in support dated 20th August 1998, and an unamended Statement of Claim dated 20th August, 1998.

This Court on the 21st and 22nd of September when the renewed application was heard had the Amended Statement of Claim dated 21st September, 1998. It was a comprehensive document of some 26 paragraphs but the only amendments were paragraphs 9 and 10 which state:

"9. <u>During the pre-trial incarceration of the plaintiff, he was subjected to inhuman and degrading treatment and/or punishment contrary to Section 17(1) of the Constitution by virtue of the conditions of his incarceration.</u>

10. <u>Since the plaintiff's conviction on or about the 14th of October, 1994 the plaintiff has been imprisoned in a cell in Saint Catherine District Prison on "death row" in circumstances which it is contended are and/or continue to</u>

> be inhuman and degrading in breach of Section 17(1) of the Constitution including assaults on the plaintiff by warders and/or the malicious and wanton destruction of all of the personal possessions which the plaintiff was allowed to have on "death row."

To reiterate Walker, J. had refused a stay pending the hearing of the constitutional action, but gave a temporary stay of ten (10) days so that Lewis could renew his application before this Court. In granting a stay of execution pending the hearing of the constitutional action this Court said in **Neville Lewis** (supra):

> "Mr. Campbell advanced no argument in challenge.
>
> An applicant seeking an injunction in interlocutory proceedings, as a general rule need only show that he has a serious question to be tried, namely, 'a fairly arguable point.' Such proceedings are not intended nor equipped to deal with points of law and facts not yet clearly settled. These would require full and detailed arguments and evidence and mature and reasoned considerations by the court hearing the substantive issues.
>
> We are of the view that Walker, J. had before him several such arguable points on which he should have declined to make definitive findings and refer them instead to the Constitutional Court for determination."

There are four points which ought to be made on this important ruling. Firstly, if no stay is granted and the law takes its course then the situation is irreversible. So if a full stay is not granted either by the Court below or by this Court then the formula fashioned by the Privy Council of refusing a full stay but to accord the applicant a temporary stay, so that the matter can be tested in a higher court should be followed.

Secondly, a necessary implication of the ruling is that if the principle of law is settled then that is a good reason for refusing full stay. Such a situation exists when there are binding rulings from their Lordships' Board.

Thirdly, because of the unique features of a stay of execution in a case of capital murder a court at any stage ought to give a considered judgment because of the five year target laid down in **Pratt and Morgan v. The Attorney-General of Jamaica** [1993] 4 All ER 769 and the additional period permitted in **Thomas and Hilaire v. Cipriani Baptiste et al.** Privy Council Appeal No. 60 of 1998 delivered 17th March 1999. These I think were considerations which gave rise to two classic passages in **Reckley v Minister of Public Safety and Immigration and others** [1995] 4 All ER 8 where Lord Browne-Wilkinson at p. 12 said firstly:

> "Their Lordships accept that, if the constitutional motion raises a real issue for determination, it must be right for the courts to grant a stay prohibiting the carrying out of a sentence of death pending the determination of the constitutional motion. But it does not follow that there is an automatic right to a stay in all cases. If it is demonstrated that the constitutional motion is plainly and obviously bound to fail, those proceedings will be vexatious and could be struck out. If it can be demonstrated to the court from whom a stay of execution is sought that the constitutional motion is vexatious as being plainly and obviously ill-founded, then in their Lordships' view it is right for the court to refuse a stay even in death penalty cases. Since the decision of their Lordships in **Pratt v A-G for Jamaica**[1993] 4 All ER 769, [1994] 2 AC 1 the postponement of the carrying out of the death penalty can have a profound effect on the question whether it would be inhuman or degrading treatment or punishment to execute the convicted man given the lapse of time since conviction and sentence. As **Pratt** itself makes clear, delay caused by 'frivolous and time wasting resort to legal proceedings' by the accused provides no ground for staying execution after such delay infringes the constitutional right (see [1993] 4 All ER 783, [1994] 2 AC 1 at 29-30). However, their Lordships would emphasise that a refusal of a stay in a death penalty case is only proper where it is plain and obvious that the constitutional motion ***must*** fail. In cases where the motion raises a fairly arguable point, even if the court hearing the application for a stay considers the motion is ultimately likely to fail, the case is not appropriate to be decided under the pressures of time which always attend applications for a stay of execution."

Then later at page 14 His Lordship said:

> "Finally, their Lordships would add a word as to the procedure to be adopted in cases where application is made for a stay of execution in a death penalty case. If the first instance judge or the Court of Appeal reach the view that the constitutional motion is so hopeless that no stay should be granted, it does not follow that it is inappropriate to grant a short stay to enable their decision to be challenged on appeal. In the present case, great difficulty was encountered by the petitioner in convening a Court of Appeal in The Bahamas and a Board of the Privy Council with sufficient speed to deal with the appeals in the short time available before the time fixed for execution. In the view of their Lordships, even if a court decides in such a case not to grant a full stay until determination of the constitutional motion itself, the court should grant a short stay (a matter of days) to enable its decision to be tested on appeal. Execution of a death warrant is a uniquely irreversible process. It is neither just nor seemly that a man's life should depend upon whether an appellate court can be convened in the limited time available."

Be it noted that these reasons were given before the Petition was adjourned and additional reasons were given when the Petition was dismissed. Here are the reasons by Lord Goff of Chieveley for dismissing the Petition in **Reckley v Minister of Public Safety and Immigration and others (No 2)** [1996] 1 All ER 562 at 573:

> "For these reasons, their Lordships are satisfied that the decision of the Privy Council in **de Freitas v Benny** [1976] AC 239, [1975] 3 WLR 388 remains good law and, in a case arising under the Constitution of The Bahamas, is determinative of the advisory committee point. It follows that there is no arguable point to justify the grant of leave to appeal from the decision of the acting Chief Justice refusing a stay of execution, and such leave to appeal must therefore be refused."

Fourthly it is arguable that if Mr. Campbell counsel for the Crown had put the respondent's case as he did in **Taylor McLeod and Brown v. The Attorney-General and others** SCCA Nos. 13,15, 16/99 delivered 20th May, 1999 this Court (Rattray P, Bingham, Harrison JJA) would not have remitted this case to the Constitutional Court. In that case this Court demonstrated that if there were binding decisions by the Board,

this Court can and ought to conclude the matter in renewed applications for a stay of execution. Perhaps I should reiterate that there is no need for an application to this Court to seek leave to appeal from the judge at first instance or from this Court. He comes as of right. Harrison JA. said at page 7 of **Neville Lewis**(supra):

> "In addition, the guidelines contained in the said instructions approved and issued by the Governor-General setting a limit of six months from the date of response by the state to the Commission after which execution would not be postponed, meant that the second response having been submitted by the state on 10th February, 1998 execution was consequently fixed for 27th August 1998. This limiting period of six months for the determination by the international body of the complaint by the appellant seems to be in conflict with the recommended period of eighteen months adverted to by the Board in **Pratt et al vs Attorney-General et al** (supra) The Board (per Lord Griffiths) said, at page 361:
>
> > 'The final question concerns applications by prisoners to the IACHR and the UNHRC. Their Lordships wish to say nothing to discourage Jamaica from continuing its membership of these bodies and from benefitting from the wisdom of their deliberations. It is reasonable to allow some period of delay for the decisions of these bodies in individual cases but it should not be very prolonged. The UNHR does not accept the complaint unless the author 'has exhausted all available domestic remedies.' [Emphasis supplied]
> >
> > and at page 362:
> >
> > It therefore appears to their Lordships that, provided that there is in future no unacceptable delay in the domestic proceedings, complaints to the UNHRC from Jamaica should be infrequent and, when they occur, it should be possible for the committee to dispose of them with reasonable dispatch and at most within eighteen months."

It should be noted that Jamaica has now withdrawn from the Optional Protocol to the International Civil and Political Rights 1996. See **Taylor McLeod and Brown v.**

The Attorney-General for Jamaica unreported SCCA 13, 15, 16/99 delivered 20th May, 1999.

Then Harrison JA. continued thus:

> "The rationale of **Pratt's** case therefore, on this issue, is that within a period of eighteen months from the date on which the appellant had exhausted his domestic remedies in respect of his conviction, his complaint to the international body would have been made and its report completed. This said period of activity must fall within the period of five years from the date of his sentence because any intended execution beyond that date would attract the complaint of cruel and inhuman punishment. The appellant's petition in respect of his conviction having been dismissed on 2nd May 1996 any complaint to the Commission would have been expected to have been dealt with within the succeeding eighteen months expiring on 2nd November 1997. The appellant filed his petition with the Commission on 2nd October 1997. From this date the Commission, on the reasoning in **Pratt's** case, would have eighteen months to complete its work"

The additional sentence:

> "It is an arguable point therefore that the appellant could entertain the legitimate expectation that, any intended execution would await the Commission's report."

was superfluous. If the additional sentence was omitted it seems Harrison JA. saw the conflict between the six month period of the Instructions and the eighteen month period envisaged by **Pratt and Morgan.** That conflict should have been resolved by this Court on the basis of the reasonable time stated in **Pratt and Morgan.** There is one other aspect to be noted in this context by virtue of Mr. Campbell's failure to assist this court at the initial stage of the application for a stay of execution. Lord Goff's words in **Dwight Lamott Henfield v. The Attorney-General of the Commonwealth of the Bahamas and others,** Privy Council Appeals 26 and 37 of 1996, reported at [1996] 3

W.L.R. 1079, should be carefully noted by counsel for the respondents. At pages 7-8 of the Privy Council Appeals delivered 14th October, 1996, they read:

> "(2) He next submitted that the delay in the case of **Farrington** arose from the fact that it occurred in the shadow of the decision by the authorities not to carry out any executions pending the outcome of the constitutional proceedings in **Jones** [1995]1 W.L.R. 891. While those proceedings were continuing, no executions could be carried out; and those proceedings were prolonged by reason of the failure of the respondent authorities to take steps to curtail the serious delays in the applicants' conduct of the proceedings. If it had not been for this failure on the part of the authorities, he submitted, the proceedings in **Jones** would have occupied a far shorter time. The dismissal of Farrington's appeal by the Court of Appeal would have been rapidly followed by a reference to the Advisory Committee and the issue of a warrant for his execution, so that his petition for leave to appeal to the Privy Council would have been filed as rapidly as possible in order to obtain a stay of execution, and thereafter would have been disposed of without delay. It followed that the failure of the authorities to curtail the delays in **Jones** was the cause of a substantial part of the delay which occurred in the case of Farrington and in all the circumstances his execution would constitute inhuman punishment."

On the basis that this case ought not to have been remitted to the Constitutional Court and that the failure of counsel for the Crown to resist the appellant's submission was a substantial cause of the delay which followed, what was the duration of the delay? If December 18, 1998, is taken as the starting point, then the extra time spent in the Constitutional Court and again in this Court amounts to, at most, six months. This delay cannot assist the appellant as his application to the Inter-American Commission on Human Rights was lodged on October 2, 1997, and up to the hearing of this case, this body has not come to a decision on the appellant's case.

In **Patrick Taylor, Anthony McLeod and Christopher Brown v. The Attorney General of Jamaica and the Superintendent of St. Catherine District Prison** SCCA 13,15,16/99 delivered 20th May, 1999, this Court by a majority (Downer JA, and

Panton JA (ag.) and Langrin JA (ag.), dissenting, refused the prayer for a stay of execution because it considered that the issues were governed by binding authorities of the Privy Council and therefore unarguable. Unarguable in the context of an application for a conservatory order which seeks a stay of execution does mean the binding nature of an authority is eventually made clear. So that if after argument it is established that issues are governed by a binding authority it may be the duty of the court to decide and not to delay the decision for another judge or another panel of equal standing, especially where there is the safeguard of a temporary stay to test the matter in a higher court.

Perhaps this was the principle which guided the courts in The Bahamas in a case after **Reckley.** In **Ricardo Farrington v The Queen** Privy Council decision of 17th June 1996 or [1996] 3 WLR 177, 1997 A.C 395 Lord Keith of Kinkel said at p. 2 of the Privy Council decision:

> "On 3rd April the applicant submitted a motion under article 28 of the Constitution claiming, on the principle established in **Pratt v. Attorney General for Jamaica** [1994] 2 A.C. 1, that the delay in carrying out the execution in his case contravened his fundamental right to protection from inhuman and degrading treatment guaranteed by Article 17(1) of the Constitution. At the same time the applicant applied for an order staying his execution pending determination of his constitutional motion. Osadebay J. dismissed the application for a stay pending determination of the constitutional motion but granted a short stay pending appeal. In written reasons dated 9th April the judge concluded that the applicant's motion was "plainly and obviously bound to fail, 'being plainly and obviously ill-founded'. For this reason he dismissed the application. The applicant appealed. On 29th April the Court of Appeal dismissed the appeal. In written reasons dated 6th May the Court of Appeal treated the applicant's constitutional motion as doomed to fail since 'the period of three years and four months spent by the appellant on death row does not on the **Pratt** principle raise a presumption of inhuman or degrading treatment or punishment.' Nevertheless the Court of Appeal granted a short stay pending the submission of a petition for special leave to appeal to the Privy Council. That is

> the background against which the application for leave to appeal as a poor person came before their Lordships."

Then concluding on p. 3 Lord Keith said:

> "Having decided to grant special leave to the applicant their Lordships propose to say nothing about the merits or demerits of the appeal. On the other hand, for the avoidance of doubt their Lordships make clear that even in a case where an appeal lies as of right their Lordships consider that it would be inappropriate to grant special leave to appeal as a poor person where it is plain beyond rational argument that the appeal is doomed to fail."

To demonstrate that (Rattray P, Bingham and Harrison JJA.) regarded **Pratt and Morgan** as settled law as regards the period of eighteen months, here is how Harrison JA. put it in **Neville Lewis** SCCA 7/99 delivered 12th April 1999 when the application for a stay of execution was made after the Order was made in the Constitutional Court dismissing the action:

> "This Court held in a previous judgment, **Neville Lewis vs. The Attorney-General for Jamaica et al,** S.C.C.A. 104/98 delivered 18th December, 1998, at page 7:
>
> > "... the guidelines contained in the said instructions approved and issued by the Governor-General setting a limit of six months from the date of response by the state to the Commission after which execution would not be postponed, meant that the second response having been submitted by the state on 10th February, 1998 execution was consequently fixed for 27th August 1998. This limiting period of six months for the determination by the international body of the complaint by the appellant seems to be in conflict with the recommended period of eighteen months adverted to by the Board in **Pratt et al vs Attorney-Generral et al** (supra)".

After further citations from their earlier judgment the Court said at page 5:

> "We maintain the same view in the current case."

As previously stated this Court in the instant case granted a stay of execution pending the hearing of the action before the Constitutional Court.

The other issues raised in the initial application for a stay of execution

Because this was the first case of its type in this jurisdiction it was in the nature of a test case. It is therefore necessary to examine its progress at all stages in this appeal so that there might be speedier resolutions in the future bearing in mind the five year target laid down in **Pratt and Morgan**. This Court in **Neville Lewis** SCCA 104/98 delivered December 18, 1998, per Harrison JA. speaking for the Court said at pp 4-5:

> "He [Mr. Richard Small} submitted that those serious issues were, inter alia:
>
> "1. Whether or not the Constitutional Court had the power to restrain the state from a threatened breach of the Constitution
>
> 2. Whether or not the Instructions issued by the Governor-General laying down guidelines in respect of applications pending before the Inter-American Commission of Human Rights were in conflict with observations of the Judicial Committee of the Privy Council in **Pratt et al vs The Attorney-General** [1993] 43 W.I.R. 340 or otherwise.
>
> 3. The state having ratified the Inter-American Convention on Human Rights, did the appellant have a legitimate expectation that while his application was pending before the said Commission, the Governor-General would not exercise his powers under the Constitution without awaiting the Commission's determination within the guidelines in the said **Pratt** case and
>
> 4. Should the Constitutional Court recognize and protect his legitimate expectation."

I have already carried out an exhaustive analysis on 2 above and found that the conflict between the 18 months accorded by **Pratt** and the six month period of the Instructions ought to have been resolved in favour of the decision in **Pratt and**

Morgan. As for ground 1 the plain words of Section 25(2) of the Constitution and those in the Judicature Constitutional Redress Rules made it plain that the Constitution permits orders in respect of threats by the state to breach constitutional rights. However there are no averments of threats in the Statement of Claim. If the answer already given in ground 2 supra is correct it will be demonstrated later that the issues in 3 and 4 do not arise for consideration. As regard the issue raised in the Amended Statement of Claim they will also be dealt with later.

It is however useful to set out their Lordships' ruling on the issue of legitimate expectation in **Thomas and Hilaire** at page 14:

> "In their Lordships' view, however, the appellants' arguments based on legitimate expectation face an insurmountable obstacle. Even if a legitimate expectation founded on the provisions of an unincorporated treaty may give procedural protection, it cannot by itself, that is to say unsupported by other constitutional safeguards, give substantive protection for this would be tantamount to the indirect enforcement of the treaty: see **Minister for Immigration and Ethnic Affairs v. Teoh** (1995) 183 C.L.R. 273. In this sense legitimate expectations do not create binding rules of law; see **Fisher v. Minister of Public Safety and Immigration (No. 2)** (supra) at p. 356B-D. The result is that a decision-maker is free to act inconsistently with the expectation in any particular case provided that he acts fairly towards those likely to be affected. But mere procedural protection would not avail the present appellants. Any legitimate expectation that their execution would be delayed until their petitions were heard, however long it might take, cannot have survived the publication of the Instructions. By the time they lodged petitions which the Commission was competent to entertain, they knew that they were subject to strict time limits which might expire before their petitions were determined: see **Fisher v. Minister of Public Safety and Immigration (No. 2)** (supra) at p. 356E. The appellants sought to answer this by relying on the fact that the Instructions were unlawful. Their Lordships do not think that this is an answer. The question is not whether their legitimate expectations were lawfully disappointed, but whether they were in fact disappointed."

The Instructions were issued in August 1997. The Appellant Lewis petitioned the Inter-American Commission on Human Rights on 2nd October, 1997.

The hearing of the action in the Constitutional Court.

The Judicature Constitution Redress Rules govern the procedures invoking the jurisdiction of the Constitutional Court. Rule 3.(I) which provides for instituting proceedings by motion reads:

> "3. (i) An application to the Court pursuant to section 25 of the Constitution for redress by any person who alleges that any of the provisions of sections 14 to 24 inclusive, of the Constitution has been or is being contravened in relation to him, may be made by motion to the Court supported by affidavit." [Emphasis supplied]

Then the writ procedure in Rule 3 (ii) reads:

> "An application to the Court pursuant to section 25 of the Constitution for redress by any person who alleges that any of the provisions of sections 14 to 24 inclusive, of the Constitution has been, is being or is likely to be contravened in relation to him, may be made by filing a writ of summons claiming a declaration of rights and/or praying for an injunction or other appropriate order." [Emphasis supplied]

Be it noted that, it is the words it is likely which makes the procedure by writ mandatory. Then Rule (3) (v) and (vi) read:

> "(v) The Chief Justice may at any time direct that any application to the Court pursuant to section 25 of the Constitution whether commenced by motion or writ of summons, shall be heard and determined by a bench of Judges not exceeding three in number.
>
> (vi) The provisions of the Judicature (Civil Procedure Code) Law shall apply to all proceedings under these rules with such variations as circumstances may require."

Although the procedure in this case was by writ all the evidence in the Court below was by affidavit. There was no cross-examination, so it must be asked why was there resort to the more expensive and slower procedure when time was of the essence? All

the challenges relate to existing instruments as the death warrant, the Instructions. As for conditions complained of as inhuman or degrading punishment, they were either in the past or were existing. There were no threats (of constitutional infringements) which brought 'is likely' (to be contravened) a live issue in the case. Motions in the Supreme Court are on a fast track. Equally there is a fast track in this Court. Motions are always listed quickly and are the first cases on the Hearing List. For a writ to be heard quickly a special fast track has to be provided. So the puzzle remains why resort to the more expensive and slower procedure?

What were the reliefs sought on Appeal?

The orders sought at (1) and (2) read as follows:

> "**FOR AN ORDER**:
>
> (1) rescinding the decision of the Governor General to approve and promulgate instructions for dealing with applications to the Inter-American Commission on Human Rights ("The Commission") and the United Nations Human Rights Committee by or on behalf of prisoners under sentence of death.
>
> (2) further or alternatively a declaration that the said instructions dated August 6, 1997 are unlawful, void and of no effect as contravening sections 13, 14, 17 and/0r 24 of the said constitution."

These remedies are available in public law and the remedy of a declaration is available by motion as well as by writ. The complaints are against existing instruments. Turning to the Grounds of Appeal they read:

> "1. That the Full Court has misinterpreted the rights and obligations which flow from the convention and their legal effect on the domestic law and in particular on the rights and duties under the Constitution and in public law.
>
> 2. That the Full Court has misunderstood the implications of the Governor General's instructions and their effect on the Constitution and other rights of the citizens of Jamaica."

Here there ought to be mentioned a minor correction. Instead of the Full Court, the reference ought to be to the Constitutional Court.

Then to complete the orders sought, which dealt with the death warrants they read:

> "(3)rescinding the death warrant issued on/or about the 14th instant for the plaintiff's execution on the 27th instant;
>
> (4) staying the execution of the plaintiff"

It is appropriate to consider in the first instance whether orders which sought to have the Instructions declared void ought to be granted. It is therefore pertinent to examine how this issue was resolved in the Court below. Wolfe C. J. said in citing **Pratt and Morgan:**

> "It is useful to set out what their Lordships' Board said:
>
> > 'It therefore appears to their Lordships that provided there is in future no unacceptable delay in the domestic proceedings complaints to the UNHRC from Jamaica should be infrequent and when they do occur it should be possible for the committee to dispose of them with reasonable dispatch and at most within 18 months.'
>
> It is clear that their Lordships were not saying that the Government of Jamaica had to afford the Commission a period of 18 months to consider the petition. Jamaica, if it desires to speed up the process can require that the Commission complete the consideration within six (6) months.
>
> Jamaica, a sovereign state, has the right to determine under what circumstances it will allow its citizens the right to have petitions heard by international bodies. This has to be so to ensure the good governance of the Jamaican people.
> Further the rules and procedures contained in the Convention and the Regulations made thereunder are not binding upon Jamaica in so far as they have not been incorporated in the Domestic Law of Jamaica.
>
> The issuance of the Instructions by the Governor General cannot, in my view be impeached. To hold otherwise would be to forfeit the sovereignty of an Independent Nation."

Then Cooke J., said:

> "Firstly, the Board was not saying that a state must wait for eighteen months, Secondly, the eighteen months was no more than an outside estimate of a permissible waiting period. Thirdly, the Board in suggesting an eighteen-month period cannot be taken as saying that a decision-maker, a sovereign nation, cannot with justification reduce this period of eighteen months. Fourthly, in the instant case, the time limit prescribed by the Instructions is not inharmonious with the time frame of the Regulations. Article 44.3 of the Regulations states:
>
> > Once the investigatory stage has been completed, the case shall be brought for consideration before the Commission, which shall prepare its decision in a period of 180 days.
>
> In the Instructions the six months begins with the response of the Government. Generally speaking this would be the time when the investigatory stage would have been completed. It is from that time that the 180 days would start. There is little difference between 6 months and 180 days. Finally, the Government cannot be faulted in seeking to require expedition so that the law of the land is carried out. It cannot be said that there is any unreasonableness in the publication of the Governor-General's Instructions."

Karl Harrison J., held that:

> "I further hold that the instructions are not unlawful or void as they do not contravene sections 13, 14, 17 and/or 24 of the Constitution of Jamaica. Neither, is the issuing of the death warrant whilst the plaintiff's application is pending before the IACHR null and void."

A comment that might be made with respect to these passages is that firstly Karl Harrison J. recognised that Section 17 of the Constitution as well as the status of Instructions by the Governor-General in Privy Council were in issue. However, the learned judge did not acknowledge that Lord Griffiths had given an authoritative ruling on the matter of eighteen months which binds all courts within this jurisdiction. Secondly, Cooke J., recognised the issue from the standpoint of public law and focussed on the reasonableness of the period of six months. What was missing was

that Lord Griffiths had ruled that a reasonable time was at most eighteen months, so if that maximum period were curtailed by Instructions then it was fair to describe such Instructions as unreasonable.

With respect to Wolfe C.J., the issue was not the sovereignty of Jamaica. The Jamaican government had withdrawn from the Optional Protocol and could if it wished denounce the Inter-American Commission on Human Rights. The point to note is that the Ministry Paper 34/97 dated October 28, 1997 exhibited by the appellant Lewis demonstrated that the Executive saw the need to conform to **Pratt and Morgan** and that prompted the withdrawal. Three paragraphs from the Ministry Paper makes this clear:

> "2. The Government of Jamaica decided to withdraw from the Optional Protocol as a result of the ruling of the Judicial Committee of the Privy Council in the case of **Pratt and Morgan vs The Attorney General of Jamaica et al.**
>
> 8. The Government of Jamaica is in no way resiling from its hallowed observance of the due process of law, the right to a fair trial and to the protection of persons from inhuman, cruel and degrading treatment. These are provided for in our Constitution. Consequently, our judicial process is wide in scope and ensures the protection of these Constitutional rights.
>
> 9. The decision of **Pratt and Morgan** handed down by our highest Court further enforces the safeguard of these Constitutional rights."

In a constitutional democracy it is the law which is supreme and the Constitution enshrines the office of the Attorney-General in Section 79 as the principal legal advisor to the Government. It would be odd if this Court failed to pronounce correctly on the legality of the Instructions when it is obligatory to do so in conformity to Section 1 (9) of the Constitution and the binding precedent of **Pratt and Morgan** as well as the

pronouncement by this Court (Rattray P, Bingham and Harrison JJA.) in **Neville Lewis** when the initial application for the stay of execution was made.

There are two ways in which this matter of the illegality of the Instructions can be approached. Firstly, to expand on the method ably stated by Harrison JA in **Neville Lewis et al** (supra). Section 1(9) of the Constitution reads:

> "1(9)No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law."

Then in the Interpretation Section 1(1) states "law" includes any instrument having the force of law and any unwritten rule of law and "lawful" and "unlawfully" shall be construed accordingly. This Constitution enshrines judicial review or the supervisory jurisdiction of the Supreme Court as an essential feature of public law and the issue is whether the Instructions issued by the Privy Council by virtue of Section 88(3) of he Constitution are void, The relevant section reads:

> "88 (3) Subject to the provisions of this Constitution, the Privy Council may regulate its own procedure."

That this was the central issue was recognised by this Court on the application for a stay. See again **Neville Lewis v. The Attorney-General of Jamaica** SCCA 104/98 delivered December 18, 1998 at page 2 where to reiterate one of the important issues to be decided was stated thus:

> "2. Whether or not the said instructions issued by the Governor-General laying down guidelines in respect of applications pending before the Inter-American Commission on Human Rights were in conflict with the observations in the decision of the Judicial Committee of the Privy Council in **Pratt et al. vs. The Attorney-General of Jamaica** (1993) 43 WIR 340 or otherwise."

Once this issue was identified then this Court ought to have decided it and so conclude the matter and make provisions for its reasons to be tested in the Privy Council.

As for the purpose of the Instructions it reads:

> "WHEREAS, the Government of Jamaica has resolved (that) those applications to the International Human Rights Bodies by or on behalf of Prisoners under sentence of death must be conducted in as expeditious a manner as possible:
>
> NOW, THEREFORE, the following instructions which were approved by the Governor-General in Privy Council on the 6th day of August, 1997, setting the time periods which should apply to and the procedure for applications from or on behalf of prisoners under sentence of death to the United Nations Human Rights Committee and the Inter-American Commission on Human Rights where a petition or an appeal to the Judicial Committee of the Privy Council has been refused, abandoned, withdrawn or dismissed, respectively, are hereby published:-
>
> These instructions are in addition to the instructions issued by the Governor-General in Privy Council on the 14th day of August, 1962."

Then paragraph 1 reads:

> "In these Instructions-
>
> 'first International Human Rights body' means the first of the Human Rights bodies, being the United Nations Rights Committee or the Inter-American Commission on Human Rights, as the case may be, to which an application from or on behalf of a prisoner under sentence of death has been made:
>
> 'second International Human Rights body' means the second of the Human Rights bodies, being the United Nations Human Rights Committee or the Inter-American Commission on Human Rights, as the case may be, to which an application from or on behalf of a prisoner under sentence of death has been made."

The factual situation which prompted these Instructions is illustrated in this case where the appellant lodged his complaint with the Inter-American Commission on 2nd October 1997 and although on 17th July 1998 the Commission wrote to the

Government that **Lewis'** case would be considered at its Regular Session from September 28 to October 16, 1998 there has been no decision on this matter.

Then the crucial paragraphs in the Instructions read as follows:

> "3. Where, after a period of one month from the date on which proof of filing of application has been furnished pursuant to paragraph 2 no request by the first International Human Rights Body for a response and for A Stay of Execution has been received by the Government of Jamaica, the Execution will not be further postponed.
>
> 4. Where the first International Human Rights body has requested from the Government of Jamaica a response to any charges made by the applicant against the Government, the Government shall respond to that body within one month of the receipt of the request.
>
> 5. Where within the period of six months since the response to the first International Human Rights body by the Government of Jamaica a recommendation has been received by the Government as to the outcome of the prisoner's application the Government of Jamaica shall advise the Clerk to the Privy Council of the outcome of the application. The matter shall then be considered by the Privy Council who shall advise the Governor-General. Unless the prerogative of mercy is then exercised in favour of the prisoner, the execution shall not be further postponed unless intimation in writing is received by the Governor-General from the prisoner or on his behalf that he intends to make an application to the second International Human Rights body.
>
> 6. Where, after a period of six months, beginning on the date of dispatch of such response, no recommendation has been received from the first International Human Rights body, the execution will not be further postponed unless intimation in writing is received by the Governor-General from the prisoner or on his behalf that he intends to make an application to the second International Human Rights body."

Then as for the second international body the following paragraphs are relevant:

> "7. Where the Governor-General in Privy Council receives intimation given by the prisoner or on his behalf that he intends to apply to the second International Human Rights body, proof that the application has been filed in the office of the second International Human Rights body must be furnished to the

Governor-General in Privy Council within 3 weeks of the receipt of that intimation.

8. Where, after a period of one month from the date on which proof of filing an application has been furnished pursuant to paragraph 7 no request by the second International Human Rights body for a response and for a Stay of Execution has been received by the Government of Jamaica, the execution will not be further postponed.

9. Where the second International Human Rights body has requested from the Government of Jamaica a response to any charges made by the applicant against the Government, the Government shall respond within one month of that request to the second International Human Rights body. ...

10. Where within the period of six months after the response to the second International Human Rights body by the Government of Jamaica-

(a) a communication has been received by the Government as to the outcome of the prisoner's application, the Government of Jamaica shall advise the Clerk to the Privy Council of the outcome of the application. The matter shall then be considered by the Privy Council who shall advise the Governor-General. Unless the prerogative of mercy is exercised in favour of the prisoner, the execution will not be further postponed;

(b) no such communication has been received, the execution will not be further postponed."

When the Privy Council exercised its rule making powers which has the force of law they were in conflict with the unwritten law of **Pratt and Morgan** where Lord Griffiths said [1993] 4 All ER 769, 788:

" The final question concerns applications by prisoners to IACHR and UNHRC. Their Lordships wish to say nothing to discourage Jamaica from continuing its membership of these bodies and from benefiting from the wisdom of their deliberations. It is reasonable to allow some period of delay for the decisions of these bodies in individual cases but it should not be very prolonged. The UNHRC does not accept the complaint unless the complainant 'has exhausted all available remedies'. The UNHRC has decided in this case and in **Carlton-Reid v Jamaica** 250/1987, Annual Report of the

> Human Rights Committee, 1990 vol 2 GAOR, 45th Session, Supplement No 40, p 85 that a constitutional motion to the Supreme Court of Jamaica is not a remedy to which the complainant need resort before making an application to the Committee under the Optional Protocol. A complainant will therefore be able to lodge a complaint immediately after his case has been disposed of by the Judicial Committee of the Privy Council. If, however, Jamaica is able to revise its domestic procedures so that they are carried out with reasonable expedition no grounds will exist to make a complaint based upon delay. And it is to be remembered that the UNHRC does not consider its role to be that of a further appellate court:
>
> > 'The Committee observes that it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before domestic courts and to review the interpretation of domestic law by national courts. Similarly, it is for the appellate courts and not for the Committee to revise specific instructions to the jury by the judge, unless it is apparent from the author's submission that the instructions to the jury were clearly arbitrary or tantamount to a denial of justice, or that the judge manifestly violated his obligation of impartiality.' (See **DS v Jamaica** 304/1988, Annual Report of the Human Rights Committee, 1991111 GAOR, 46th Session, Supplement No. 40, p 281.)
>
> It therefore appears to their Lordships that provided there is in future no unacceptable delay in the domestic proceedings complaints to the UNHRC from Jamaica should be infrequent and when they do occur it should be possible for the committee to dispose of them with reasonable dispatch and at most within eighteen months." [Emphasis supplied]

See **Secretary for Education and Science v Tamesside Metropolitan Borough Council** [1977] A.C. 1014.

It is a cardinal rule in drafting that the draftsman takes into consideration the 'unwritten law' or judicial decisions so that there is harmony in the legal system. It is the judiciary who has the final say on what the law or the constitution means and if there is a conflict between the Instructions and a judicial decision on the same subject

then the judicial decision takes precedence. Moreover, the common law method of interpretation is developed case by case. As new facts emerge then while maintaining the same principle there are adjustment to take into account new facts. So in **Thomas and Hilaire** Lord Millett said at p. 19:

> **"Conclusion**
>
> Their Lordships have accordingly stayed the execution of the appellants until their current petitions to the Commission have been determined and any report of the Commission or ruling of the IACHR has been considered by the authorities of Trinidad and Tobago. Subject thereto they dismiss the appeals of both appellants.
>
> Similar considerations will apply in relation to other persons under sentence of death in Trinidad and Tobago who have lodged petitions with the Commission or the UNHRC. The Advisory Committee may, of course, take into account the delay occasioned by the slowness of the international bodies in dealing with such petitions. But in their Lordships view such delays should not prevent the death sentence from being carried out. Where, therefore, more than 18 months elapses between the date on which a condemned man lodges a petition to an international body and its final determination, their Lordships would regard it as appropriate to add the excess to the period of 18 months allowed for in **Pratt**." [Emphasis supplied].

In this context the following statement by Lord Slynn and Lord Hope in **Fisher v The Minister of Public Safety and Immigration et al.** Privy Council Appeal No 35 of 1998 delivered 5th October 1998, taken from their dissenting judgment is useful. It reads at p. 19:

> "In deciding what is reasonable we think that it is not right to compare the time taken for domestic proceedings with that taken by international bodies. It is apparent that proceedings even in the European Commission and Court of Human Rights can take five years, or occasionally even more. The I.A.C.H.R. only normally meets twice a year and its members act on a part-time basis."

Equally useful is their statement of principle on page 17 which is as follows:

> "It seems to us that the fact that the Government have participated in this procedure - they furnished the information requested by the I.A.C.H.R. after the Commission's receipt of Fisher's application, they responded to their initial comments and recommendations and they presented a statement of their position at the Friendly Settlement Meeting in Washington - has provided Fisher with a legitimate expectation that, if the I.A.C.H.R. were to recommend against the carrying out of the death sentence, their views would be considered before the final decision is taken as to whether or not he is to be executed. But any such recommendation would plainly be pointless if he were to be executed before the recommendation was made and communicated to the Government. For the Government to carry out the death sentence while still awaiting a recommendation which might, when considered, lead to its commutation to a sentence of life imprisonment would seem in itself to be an obvious violation of Fisher's right to life. But we think that it is proper also for this purpose to take into account not only that legitimate expectation but also the many months which Fisher has already spent in the condemned cell, following the completion of the domestic appeal process. This was for no other purpose than to await the recommendation of the I.A.C.H.R. In these circumstances the argument that for him to be executed before that recommendation is received would constitute "inhuman treatment' within the meaning of Article 17(1) appears to us to be unanswerable. It is hard to imagine a more obvious denial of human rights than to execute a man, after many months of waiting for the result, while his case is still under legitimate consideration by an international human rights body. If a legalistic interpretation of Article 17(1) leads to the conclusion that its provisions would not be violated in such circumstances, that interpretation must surely give way to an interpretation which protects the individual from such treatment and respects his human rights."

So the Instructions ought to be redrafted to take into account the decision in **Pratt and Morgan.** Further the Privy Council in their deliberations on whether they should exercise the prerogative of mercy, should add on to the eighteen months if necessary.

On the public law aspect some passages from **Anisminic Ltd. v. Foreign Compensation Commission** [1969] 2 A.C. 147 contain some useful dicta which explain the scope and limits of judicial review. Lord Pearce at page 194 said:

> "My Lords, the courts have a general jurisdiction over the administration of justice in this country. From time to time

> Parliament sets up special tribunals to deal with special matters and gives them jurisdiction to decide these matters without any appeal to the courts. When this happens the courts cannot hear appeals from such a tribunal or substitute their own views on any matters which have been specifically committed by Parliament to the tribunal.
>
> Such tribunals must, however, confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament. It would lead to an absurd situation if a tribunal, having been given a circumscribed area of inquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to inquire and decide as set out in the Act of Parliament."

Then Lord Wilberforce put it this way at p. 207:

> "In every case, whatever the character of a tribunal, however wide the range of questions remitted to it,, however great the permissible margin of mistake, the essential point remains that the tribunal has a derived authority, derived, that is, from statute: at some point, and to be found from a consideration of the legislation, the field within which it operates is marked out and limited. There is always an area, narrow or wide, which is the tribunal's area; a residual area, wide or narrow, in which the legislature has previously expressed its will and into which the tribunal may not enter."

Then on p. 208 Lord Wilberforce continued thus:

> "That the ascertainment of the proper limits of the tribunal's power of decision is a task for the court was stated by Farwell L.J. in **Rex v. Shoreditch Assessment Committee, Ex parte Morgan** [1910] 2 K.B. 859, 880 in language which, though perhaps vulnerable to logical analysis, has proved its value as guidance to the courts:
>
> 'Subjection in this respect to the High Court is a necessary and inseperable incident for all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure - such a tribunal would be autocratic, not limited - and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact'."

It is the principle derived from these passages which is important. The Constitution accords the Privy Council a limited rule making power and it is the Supreme Court and on an appeal that this Court has the duty to determine the limits of the rules the Privy Council may proclaim when it makes rules repugnant to the decision of the Board in **Pratt and Morgan**. Those rules must yield to judicial authority as ordained pursuant to Section 1(9) of the Constitution. The important point to note is that **Pratt and Morgan** in construing Section 17 of the Constitution decided that the reasonable time to allow for applications to the International Tribunals was at most eighteen months. It was therefore beyond the powers of the Governor-General in Privy Council to abridge that time to at most six months.

In Trinidad the same position was reached by resorting to the due process clause. This analysis is also applicable to Jamaica by virtue of section 1(9) of the Constitution. Here is how it was put by Lord Millett in **Thomas v Hilaire** at p. 8:

> "**Due Process**
>
> The due process clause in the Constitution of Trinidad and Tobago can be traced back to the confirmation of Magna Carta by Edward III in 1354, when the expression 'due process of law' replaced ;the law of the land' in Article 39 of the original version. Coke regarded the two expressions as synonymous. They protected the subject from absolute monarchy and the exercise of arbitrary executive power. This interpretation may have been appropriate in the absence of either a written constitution or a doctrine of the separation of powers and at a time when a sovereign legislature was in the habit of passing Acts of Attainder. But such expressions mean different things to different ages. The words 'due process of law' were introduced into a New York statute in 1787 for the purpose of protecting the individual from being deprived of life, liberty or property by act of the legislature alone. Madison had the same object in 1791 when he drafted what became the Fifth Amendment to the Constitution of the United States of America. The due process clauses in the Fifth and Fourteenth Amendments underpin the doctrine of the separation of powers

> in the United States and serve as a cornerstone of the constitutional protection afforded to its citizens. Transplanted to the Constitution of Trinidad and Tobago, the due process clause excludes legislative as well as executive interference with the judicial process.
>
> But the clause plainly does more than this. It deliberately employs different language from that found in the corresponding provisions of the Universal Declaration of Human Rights and the European Convention on Human Rights. They speak merely of 'the sentence of a court of competent jurisdiction'. The due process clause requires the process to be judicial; but it also requires it to be "due". In their Lordships' view 'due process of law' is a compendious expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilized nations which observe the rule of law: see the illuminating judgment of Phillips J.A. in **Lassalle v. Attorney-General** (1971), 18 W.I.R. 379 from which their Lordships have derived much assistance."

Then Lord Millett continues by citing Holmes J., in **Frank v Mangum** (1915) 237 U.S. 309:347 as follows to demonstrate procedural fairness:

> "Whatever disagreement there may be as to the scope of the phrase 'due process of law', there can be no doubt that it embraces the fundamental concept of a fair trial, with opportunity to be heard."

It is in this way that Section 1(9) of the Jamaican Constitution which enshrines judicial review which embraces natural justice, is a kindred spirit with Section 4(a) of the Trinidad Constitution which reads:

> "4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:-
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law."

It is now necessary to demonstrate how the Privy Council relied on another approach in **Thomas and Hilaire,** to declare the Instructions invalid. I shall cite the entire passage on this issue. Lord Millett said at pp. 6-8:

> **"The Instructions**
>
> The Government's case does not depend on the validity of the Instructions, but on the absence of any legal basis for the appellants' claim to be entitled to proceed with their applications to the Commission and to have them determined before sentence of death is carried out. The invalidity of the Instruction is, however, crucial to the success of the appellants' arguments, and it is convenient to deal with this question first.
>
> Their Lordships are satisfied that the instructions were unlawful. This is not because they were calculated to put Trinidad and Tobago in breach of the International Covenant or the Convention, for these had not been incorporated into and did not form part of the law of Trinidad and Tobago. But they were unlawful because they were disproportionate. They contemplated the possibility of successive applications to the Commission and the UNHRC (which was possible though unlikely), and laid down a series of successive time limits for the taking of the several steps which would be involved in the making of successive applications to both international bodies."

Then Lord Millett continued thus:

> " In their Lordships' view it was reasonable for the Government of Trinidad and Tobago to take action to ensure that lawful sentences passed by its Courts should not be frustrated by events beyond the Government's control. It was reasonable to provide some outside time limit within which the international appellate processes should be completed. The Instructions had the object of introducing an appropriate element of urgency into the international appellate processes. This object was in conformity with the policy laid down by the Board in **Pratt v. Attorney-General for Jamaica** [1994] 2 A.C. 1, 33 that:-
>
> > 'a state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence allowing a reasonable time for appeal and consideration of reprieve... If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that

> permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as part of our jurisprudence.'
>
> The Government of Trinidad and Tobago, which is concerned to maintain public confidence in the criminal justice system in Trinidad and Tobago, was entitled to take appropriate measures to ensure that the international appellate processes did not prevent lawful sentences passed by the courts from being carried out."

Then Lord Millett concludes thus:

> "In their Lordships' view it was also reasonable to provide for the possibility of successive applications to the same or different bodies. They are, however, satisfied that the Instructions were disproportionate because they curtailed petitioners' rights further than was necessary to deal with the mischief created by the delays in the international appellate processes. It would have been sufficient to prescribe an outside period of (say) 18 months for the completion of all such processes. This could apply whether the petitioner made only one application or applied successively to more than one international body or made successive applications to the same body. It was unnecessary and inappropriate to provide separate and successive time limits for each application and for each stage of each application. This had the effect of drastically and unnecessarily curtailing the time limits within which the first such body could complete its processes."

So on this aspect the appellant succeeds that the Instructions are invalid. On the basis that the Instructions are invalid what is the fault of the warrant? Must it be rescinded, executed or stayed or the offending clause severed? The clause in the warrant which reads:

> "AND WHEREAS the application to the Inter American Commission on Human Rights by Neville Lewis has not been definitively considered within the time limits set out in the Governor-General's Instructions of August 6, 1997."

must be severed in order to conform with **Thomas and Hilaire** which reads at page 16:

> "In allowing only 18 months to complete the international process, the Board can with hindsight be seen to have been

> unduly optimistic in **Pratt.** Their Lordships have considered whether a longer period should be substituted, but have come to the conclusion that this would not meet the case. Indeed, it might even encourage delays in the process in the hope that the time limits would be exceeded. Their Lordships observe that the ratio of **Pratt,** that a state which wishes to retain capital punishment must accept responsibility for ensuring that the appellate system is not productive of excessive delay, is not appropriate to international legal processes which are beyond the control of the state concerned. Prompt determination by human rights bodies of applications from men condemned to death is more likely to be achieved if delay in dealing with them does not automatically lead to commutation of the sentence."

Then Lord Millett continues thus at page 19:

> **"CONCLUSION**
>
> "Their lordships have accordingly stayed the execution of the appellants until their current petitions to the Commission have been determined and any report of the Commission or ruling of the IACHR has been considered by the authorities of Trinidad and Tobago. Subject thereto they dismiss the appeals of both appellants.
>
> Similar considerations will apply in relation to other persons under sentence of death in Trinidad and Tobago who have lodged petitions with the Commission or the UNHRC. The Advisory Committee may, of course, take into account the delay occasioned by the slowness of the international bodies in dealing with such petitions. But in their Lordships' view such delays should not prevent the death sentence from being carried out. Where, therefore, more than 18 months elapse between the date on which a condemned man lodges a petition to an international body and its final determination, their Lordships would regard it as appropriate to add the excess to the period of 18 months allowed in **Pratt."**

The principle stated here is very similar to that stated by Lord Slynn and Lord Hope in **Fisher No. 2** (supra).

This would be the appropriate relief rather than the order sought of rescinding the death warrant. However, the order sought of staying the execution was appropriate

in that the execution ought to be stayed temporarily pending an appeal to Her Majesty in Council or the continuation of the hearing before the I.A.C.H.R.

The foregoing analysis covers ground 2 in the Notice of Appeal. There was a third additional ground filed but not argued. Mr. Small specifically acknowledged that the binding authorities precluded him for arguing that ground before this Court. He however wished to reserve it for argument if permitted before their Lordships' Board. It is against this background that consideration must be given to Ground 1. The contention was that the Constitutional Court :

> "has misinterpreted the rights and obligations which flow from the convention and their legal effect on the domestic law and in particular on the right and duties under the Constitution and in public law"

It will suffice to cite the following passage from **Thomas and Hilaire** at page 10. It reads:

> "Their Lordships recognise the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The making of a treaty, in Trinidad and Tobago as in England, is an act of the executive government, not of the legislature. It follows that the terms of a treaty cannot effect any alteration to domestic law or deprive the subject of existing legal rights unless and until enacted into domestic law by or under authority of the legislature. When so enacted, the Courts give effect to the domestic legislation, not to the terms of the treaty. The many authorative statements to this effect are too well known to need citation. It is sometimes argued that human rights treaties form an exception to this principle. It is also sometimes argued that a principle which is intended to afford the subject constitutional protection against the exercise of executive power cannot be invoked by the executive itself to escape from obligations which it has entered into for his protection. Their Lordships mention these arguments for completeness. They do not find it necessary to examine them further in the present case."

The dissenting judgment of Lord Goff and Lord Hobhouse expressed a like view. They said at p. 21:

> "The treaty making power is an Executive power but its exercise does not alter the law of the Republic unless and until Parliament chooses to make laws which do so. The position is the same as it was in the United Kingdom before the passing of the European Communities Act 1972. **(J .H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry** [1990] 2 A.C. 418, in particular per Lord Oliver of Aylmerton at pp. 499-500; **Reg. V. Secretary of State for the Home Department, Ex parte Brind** [1991] 1 A.C. 696, in particular per Lord Bridge of Harwich at p. 747."

In the Constitutional Court Wolfe C.J. stated that:

> **"H. Lauterpacht in Oppenheim's International Law Vol. 1 (8th Edn.** 1955) in dealing with the theory of how international law and national law interact states:
>
> > 'If the Law of Nations and Municipal Law differ as demonstrated, the Law of Nations can neither as a body nor in parts be per se a part of Municipal Law. Just as Municipal Law lacks the power of altering or creating rules of International Law so the latter lacks absolutely the power of altering or creating rules of Municipal Law. If according to the Municipal Law of an individual state the Law of Nations as a body or in parts is considered to be part of the law of the land, this can only be so either by municipal custom or by statute, and then the respective rules of the Law of the Nations have by adoption become at the same time rules of Municipal Law.
> >
> > Wherever and whenever such total or partial adoption has not taken place, municipal courts cannot be considered to be bound by International Law, because it has, per se, no power over municipal courts. And if it happens that a rule of Municipal Law is in indubitable conflict with a rule of Law of Nations, municipal courts must apply the former.' (emphasis mine)
>
> The principle enunciated above applies to conventions and international treaties. Therefore, Jamaica not having incorporated the Convention into its domestic Law breaches of the Convention are not justiciable in the Courts of Jamaica."

Cooke J., put the position this way:

> "Let it be said at the outset that the fact that Jamaica is a signatory to the American Convention on Human Rights does not confer any individual rights to the plaintiff vis-a-vis that Convention. This is because this Convention has not been incorporated into the municipal law of Jamaica."

Then Karl Harrison J., said:

> "It is also a principle in public law that the provisions of an international treaty to which the State is a party do not form part of domestic law unless those provisions have been validly incorporated into its municipal law by statute. Counsel for the plaintiff in the instant case has agreed that the American Convention on Human Rights has not been incorporated into domestic law. But, the fact that the Convention has not been incorporated into municipal law does not mean that its ratification holds no significance for the State."

When these statements of principle are compared with the passages from the Privy Council cited previously it is difficult to understand how it could have been contended that the Constitutional Court erred in principle or in application on this aspect of the case.

Turning to Ground 3 it states:

> "3. That the Full Court erred in holding that the appellant had not been subjected to inhuman and degrading treatment and/or punishment contrary to the provisions of Section 17(1) of the Constitution by virtue of the conditions of his incarceration prior to and/or subsequent to his conviction."

This ground corresponds to paragraphs 9 and 10 of the Amended Statement of Claim.

To reiterate Mr. Small did not argue this ground but added it to reserve his submission for the Board. The implication is that he accepted the binding nature of the judgment of **Thomas and Hilaire** in this Court on this aspect of the matter. At page 14 Lord Millett said:

> **"Cruel and unusual treatment or punishment**
>
> The appellants, of course, would not be content with a stay of execution alone. They seek to have the sentences

> commuted. For this purpose, they invoke section 5(2)(b) of the Constitution, which prohibits the infliction of cruel and unusual treatment or punishment. They rely on the length of time during which they have been kept in prison, both before and after conviction, and on the conditions in prison, both separately and cumulatively."

Then Lord Millett continued thus:

> "Even if the prison conditions in themselves amounted to cruel and unusual treatment, however, and so constituted an independent breach of the appellants' constitutional rights, commutation of the sentence would not be the appropriate remedy. **Pratt** did not establish the principle that prolonged detention prior to execution constitutes cruel and unusual treatment. It is the carrying out of the death sentence after such detention which constitutes cruel and unusual punishment. This is because of the additional cruelty, over and above that inherent in the death penalty itself, involved in carrying it out after having exposed the condemned man to a long period of alternating hope and despair. It is the circumstances in which it is proposed to carry out the sentence, not the fact that it has been preceded by a long period of imprisonment which renders it cruel and unusual. The fact that the conditions in which the condemned man has been kept prior to execution infringe his constitutional rights does not make a lawful sentence unconstitutional."

Then stating an exceptional situation Lord Millett said:

> "It would be otherwise if the condemned man were kept in solitary confinement or shackled or flogged or tortured. One would then say: "enough is enough". A state which imposes such punishments forfeits its right to carry out the death sentence in addition. But the present cases fall a long way short of this"

Then the conclusion reads as follows:

> "Their Lordships are unwilling to adopt the approach of the IACHR which they understand holds that any breach of a condemned man's constitutional rights makes it unlawful to carry out a sentence of death. In their Lordships' view this fails to give sufficient recognition to the public interest in having a lawful sentence of the court carried out. They would also be slow to accept the proposition that a breach of a man's constitutional rights must attract some remedy, and that if the only remedy which is available is commutation of the sentence then it must be adopted even if it is inappropriate and

> disproportionate. The proposition would have little to commend it even in the absence of section 14(2) of the Constitution, but it is clearly precluded by that section."

Before parting I would like to thank Mr. Small for the appellant and Mr. Campbell for the respondents for their helpful submissions and comprehensive citation of authorities

Conclusion

So the appellant has succeeded in part as the Instructions have been struck down and an illegal term in the death warrant severed. Consequently the Order of the Court below should be varied.

It is necessary to advert to the proceedings before both International Tribunals before formulating the appropriate order in this case. The Report by the I.A.C.H.R. on **Neville Lewis** has made findings which must be taken into account. Paragraph 51 reads:

> "51. The claims raised concerning Mr. Lewis' due process guarantees under Article 8 and the other questions directly related to the death sentence issued against him have already been dismissed as duplicative of those previously examined by the UNHRC and need be considered no further. None of the remaining claims have been the subject of a final judgment of the Jamaican courts. For the purposes of analysis, these claims may be dealt with in two parts, the first concerning situations the petitioners maintain are ongoing, and the second concerning what are alleged to have been specific events. The former consists of the allegations concerning the Governor General's Instructions, and the lack of access to judicial guarantees resulting from the absence of legal aid. In each instance, the petitioners claim that Mr. Lewis' rights under the Convention have been and continue to be violated. While denying the substance of the claims, the State has not questioned the timeliness of their presentation."

Then paragraph 53 reads:

> "53. The second part of the analysis concerns, first, the allegations that Mr. Lewis' personal items were confiscated and destroyed by prison guards on March 5, 1997, and second, that the treatment accorded him when he was removed to the

condemned cell for two specific periods of time constituted a form of torture. The State reported that it was investigating the former allegations, and categorically controverts the substance of the latter. it has not challenged the timeliness of presentation of any of the claims raised. Given the dates of the several incidents alleged, March of 1997, September of 1997 and August of 1998; the September 29, 1997 filing of the petition before the IACHR; the information and arguments on record; and the fact that the claims regarding the confiscation of Mr. Lewis' personal items reportedly remain under investigation by the State, the Commission considers this complaint to have been timely filed."

Two more paragraphs are pertinent and they read as follows:

"60. Because the absence of legal aid may impede the invocation of a constitutional remedy to the extent that it is essentially unavailable to an indigent applicant, resort to that recourse may not have been required as a condition for admitting the present case. However, in view of the fact that the remedy has been invoked, apparently through the assistance of **pro bono** legal counsel, its potential efficacy must be evaluated. **See generally, IACHR, Velasquez Rodriquez Case Judgment of July 29, 1988.** In this regard, the Commission observes that it has no information on the record to show that this remedy is incapable of producing the results for which it was designed with respect to the two sets of claims identified above. Given that the barrier to exhaustion complained of has been surmounted; that these claims have not been raised before the Jamaican judiciary previously; and that there are no indicia of undue delay or other grounds for excuse on the record, the Commission concludes that it cannot admit the present case while the constitutional motion remains pending."

"V. CONCLUSIONS

61. In accordance with the foregoing analysis of the requirements of Articles 46 and 47 of the American Convention and the applicable provisions of its Regulations, the Commission concludes that it is unable to continue with the processing of this case at the present time. The claims concerning Articles 8 and 4 which relate to due process guarantees and the application of the death penalty in the case of Mr. Lewis are inadmissible due to the prohibition of duplication set forth in Article 47.d of the Convention."

It is not for this Court to anticipate what the Commission will do if Lewis wishes to continue his case before them. There are binding authorities referred to in this judgment which state that the type of complaint the IACHR is willing to consider cannot be the basis in law for commuting the lawful sentence of death imposed on Lewis. In any event the Commission is only empowered to make recommendations on the Prerogative of Mercy. What is relevant is that it is open to him to exhaust his domestic remedies by invoking the jurisdiction of the Board either by petition for special leave or by conditional leave. Any temporary stay of the warrant of execution must be relevant to proceedings before the Board. It is only if such proceedings are abandoned that it will be necessary to make provision at this stage for a stay pending the continued hearing before the IACHR. The effective use of the warrant to control the pace of proceedings is set out with clarity by Lord Goff in **Henfield and Farrington** P.C. Appeal Nos 26 and 37 delivered 14th October, 1996 at page 10. The passage ran thus:

> "It was submitted on behalf of Farrington that, steps had been taken by the authorities to keep the proceedings in **Jones** under control, they would have been disposed of before Farrington's appeal was dismissed by the Court of Appeal on 28th April 1994. If so, his case would then have been referred to the Advisory Committee (in accordance with the judgment in **Pratt,** delivered on 3rd November 1993 and a warrant for his execution would have been issued soon after. The effect of this would have been that Farrington's advisers would have to apply for a stay of execution, and would for that purpose have had to proceed with expedition with his petition for leave to appeal to the Privy Council, which would have been dismissed a few months later."

The other passage at page 14 states:

> "For if it is decided that the law should take its course, a warrant of execution can be issued and all further steps will require a stay of execution which should ensure that there is thereafter no delay on the part of those representing the condemned man; and there should in any event be no delay on the part of the authorities, such as the failure to curtail the delay which occurred in **Jones.**"

Now as to the order of this Court it should read:

"(1) Appeal in part allowed.

(2) The Instructions of the Governor-General in Privy Council dated 6th August 1997 are unlawful.

(3) The clause in the death warrant relating to the unlawful Instructions should be severed.

(4) Temporary stay of execution granted for 14 days pending application for conditional leave to Her Majesty in Council, or a petition for special leave.

(5) No order as to costs

(6) Liberty to apply."

LANGRIN J.A.

The appellant Neville Lewis claims relief under the Constitution of Jamaica asserting that (a) the issue of the said death warrant while the appellant's application is pending before the Inter- American Commission on Human Rights for violation of the appellant's rights under the American Convention on Human Rights contravenes the appellant's rights to equality before the law and the protection of the law guaranteed by Sections 13,14,17 and/or 24 of the said Constitution and is null and void; (b) the Instructions dated August 7, 1997 are unlawful, void and of no effect as contravening sections 13,14,17 and/or 24 of the said Constitution.

Section 13 of the Constitution which came into force immediately before August 6, 1962 provides that every person in Jamaica is entitled to the fundamental rights of "life, liberty, security of the person, the enjoyment of property and the protection of the law" but subject to respect for the "rights and freedom of others and for the public interest."

Section 14 provides:

> "**14.** -- No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted".

The obvious difficulty of advancing any argument under this section is that this Court is bound by the decision in ***Fisher vs The Minister of Public Safety and Immigration et al*** (No. 2) Privy Council Appeal No. 35/98 delivered 5th October, 1998. The reference to Court would be confined to the domestic Courts of Jamaica.

Section 17 provides:

> " (1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorise the infliction of any

> description of punishment which was lawful in Jamaica immediately before the appointed day".

Again it was decided in ***Fisher*** No. (2) (supra) that execution while a petition is pending does not constitute a breach of a constitutional right under Section 17. It was specifically stated therein that legitimate expectations do not create binding rules of law.

Section 24 provides protection from discrimination on the grounds of race, place of origin, political opinion, colour or creed. The appellant did not advance any arguments under this section which in my view has no relevance to the appellant's case.

The appellant was arrested on November 11, 1992 and charged for the murder of Victor Higgs. On the 14th October, 1994 he was convicted of capital murder. On the 31st July, 1995 the Court of Appeal dismissed his appeal against conviction. The appellant petitioned for special leave to appeal against conviction and his petition was dismissed by the Judicial Committee of the Privy Council on 2nd May, 1996. On the 24th May, 1996, the appellant petitioned the United Nations Human Rights Committee alleging violation of Articles 9 and 10, which entitled an arrested person to trial within a reasonable time or to release. That body on 17th July, 1997 found that the appellant had not been afforded a trial within a reasonable time and that he was entitled to an effective remedy, including compensation. The Jamaica Privy Council on 9th September, 1997 determined that the Prerogative of Mercy should not be exercised in favour of the appellant. A warrant was issued on the 12th September, 1997 for the execution of the appellant on the 25th September, 1997.

A directive was issued by the Governor General staying the execution and recalling the warrant. On the 7th August the Government had published Instructions dealing with the International Appellate process. On October 2, 1997, the appellant petitioned the Inter-American Commission on Human Rights. The following day, 3rd

October, 1997 the State withdrew from the Optional Protocol of the UNHRC. The Commission requested the Government to stay the execution. On the 14th August, 1998 another warrant for execution was issued. It was this warrant which gave rise to the filing of the Constitutional Writ on 21st August, 1998.

By section 25 (1) of the Constitution, if any person alleges a contravention of his fundamental rights "then without prejudice to any other action with respect to the same matter which is lawfully available that person may apply to the Supreme Court for redress."

Section 25 (2) provides that:

> "**25** – (2) the Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:
>
> Provided..."

The reliefs sought by the appellant are clearly stated as follows:

(i) An order rescinding the decision of the Governor General to approve and promulgate instructions for dealing with applications to the Inter-American Commission on Human Rights ("The Commission") and the United Nations Human Rights Committee by or on behalf of prisoners under sentence of death.

(ii) Further or alternatively a declaration that the said instructions dated August 6, 1997 are unlawful, void and of no effect as contravening sections 13,14,17 and/or 24 of the said constitution.

(iii) An order rescinding the death warrant issued on/or about the 14th instant for the plaintiff's execution on the 27th instant.

(iv) A declaration that the issue of the said death warrant while the plaintiff's application is pending before Inter-American Commission on Human Rights for violation of the plaintiff rights under the American Convention on Human rights, the plaintiff's rights to equality before the law and the protection of the law guaranteed by section 13, 14, 17 and/or 24 of the said constitution, is null and void.

(v) An order staying the execution of the plaintiff.

(vi) A declaration that the plaintiff's right not to be subjected to torture and inhuman or degrading punishment or treatment is being or is likely to be violated.

(vii) An interim order staying the execution of the sentence of death on the plaintiff or alternatively, a conservatory order directing defendants not to carry out the execution of the plaintiff pending the determination of the plaintiff's application to the Inter-American Commission on Human Rights and/or pending the hearing and determination of this suit or any resultant appeals therefrom.

(viii) All such orders, writs and directions as may be necessary or appropriate to secure redress by the plaintiff for the contravention of his fundamental rights and freedoms which are guaranteed to the plaintiff by the Constitution of Jamaica.

The Constitutional Court comprising Wolfe CJ. Cooke and Harrison JJ on January 7, 1999 dismissed the appellant's application for redress under the Constitution.

The grounds of appeal relied on by the appellant are stated as follows:

(1) That the Full Court has misinterpreted the rights and obligations which flow from the convention and their legal effect on the domestic law and in particular on the rights and duties under the Constitution and in public law.

(2) That the Full Court has misunderstood the implications of the Governor General's Instructions and their effect on the Constitution and other rights of the citizens of Jamaica.

(3) That the Full Court erred in holding that the appellant had not been subjected to inhuman and degrading treatment and/or punishment contrary to the provisions of Section 17(1) of the Constitution by virtue of the conditions of his incarceration prior to and/or subsequent to his conviction.

Mr. Small did not argue ground 3. Suffice it to say that the law is clearly stated in ***Thomas and Hilaire vs AG*** P/C Appeal 60/98. Lord Millett in delivering the majority opinion of the board on 17th March, 1999 said at pg. 17:

> "Even if the prison conditions in themselves amounted to cruel and unusual treatment, however, and so constituted an independent breach of the appellants' constitutional rights commutation of the sentence would not be the appropriate remedy. ***Pratt*** did not establish the principle that prolonged detention prior to execution constitutes cruel and unusual treatment. It is the carrying out of the death sentence after such detention which constitutes cruel and unusual punishment. This is because of the additional cruelty, over and above that inherent in the death penalty itself, involved in carrying out after having exposed the condemned man to a long period of alternating hope and despair. It is the circumstances in which it is proposed to carry out the sentence, not the fact that it has been preceded by a long period of imprisonment, which renders it cruel and unusual. The fact that the conditions in which the condemned man has been kept prior to execution infringe his constitutional rights does not make a lawful sentence unconstitutional."

The jurisprudential background to the fundamental rights and individual freedom in the Jamaican Constitution are the Universal Declaration of Human Rights 1948 and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1953.

The Government of Jamaica signed and ratified the American Convention on Human Rights on 7th August, 1978. By this act the Government gave an undertaking to respect the rights and freedoms recognised in the Convention and "to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms without any discrimination for reasons of race, color, sex or language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition".

It is common ground that the Convention was not enacted into municipal law. The Convention established two institutions the Inter American Commission on Human

Rights ("The Commission") and its judicial organ the Inter American Court of Human Rights ("the IACHR") to which the Commission could refer disputes. The Government of Jamaica did not accept the jurisdiction of the Court.

The essential issue for determination is whether the appellant has a constitutional right to have his application to the Inter American Commission on Human Rights considered and determined before his sentence is carried out.

Mr. Small boldly submitted that by ratifying the American Convention in 1978 the State added to the legal processes made available to the citizen to have his constitutional and common law fundamental rights adjudicated on and protected. By that process it was made part of the domestic criminal justice system and part of the citizen's right to protection of the law. To deprive the citizen of that right would be a limitation of the procedural fairness provisions which are fundamental to the constitutional protection contained in Chapter III of the Constitution.

He further submitted that there is the right of a condemned man to be allowed to complete an application or other analogous legal process that is made available for the protection of his fundamental rights. The arbitrary or unreasonable withdrawal or limitation of that access or the specific frustration of that protection is more than a particular withdrawal limitation or frustration. It is itself an infringement of the right itself and should be struck down by the Constitutional Court.

The respondents submitted that the Jamaica Constitution does not create for the condemned man any right to have his litigation which is not a domestic litigation determined as arising from the Constitution. Additionally, the "protection of law" clause in the Jamaica Constitution, founded on ***DPP v Nasralla*** [1967] 10 WIR 299, confines protection of law to municipal law and will not incorporate for the benefit of the Petitioner a right to take a petition pending under the Convention to an International Body.

This latter submission is not acceptable. The applicable principle maybe discerned from ***Bell v Director of Public Prosecutions*** [1985] 32 W.I.R.317 where Lord Templeman having pointed out that in ***DPP v Nasralla*** (supra) the Board was dealing with the rights which had long been recognised by the common law and to which well recognised principles were applied. He went on to say that if the common law did not provide for "a fair hearing within a reasonable time by an independent and impartial court established by law" it is quite plain that the expressed words of section 20(1) of the Constitution sufficed to confer such a right. Similarly, I am of the view that the expressed words in Section 13 confer the justiciable right of procedural fairness.

In the recent judgment of ***Thomas and Hilaire*** (supra) Lord Millett when dealing with the "due process clause" in the Trinidad & Tobago Constitution had this to say at pg. 10:

> "... It is the general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by executive action. This general right is not created by the Convention: it is accorded by the common law and affirmed by section 4(a) of the Constitution. The appellants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution. By ratifying a treaty which provides for individual access to an international body the Government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution".

The need to ensure that the constitutional protections in the Jamaica Constitution afforded to the citizens carry some meaning must necessarily embrace the right to complete a current appellate or other process without having it pre-empted by Executive action. It is even more significant when such a process is capable of resulting in some advantage to the appellant.

I accept the submission of Mr. Richard Small on behalf of the appellant that Section 13 of the Constitution of Jamaica confers a right of procedural fairness in Chapter III by the "protection of law" clause.

In the present case the "protection of law" clause found in Section 13 of the Constitution will in my view suffice in conjunction with the ratification of the treaty to confer such a right to the concept of procedural fairness which will allow the condemned man to complete the international appellate process.

Much guidance is derived from the reasoning of Lord Millett in ***Thomas v Hilaire*** (supra) when he concluded at pg. 9 of the judgment:

> "Whether alone or in conjunction with Section 5 (2) their Lordships have no doubt that the clause extends to the appellate process as well as the trial itself. In particular it includes the right of the condemned man to be allowed to complete any appellate or analogous legal process that is capable of resulting in a reduction or commutation of his sentence before the process is rendered nugatory by executive action".

While the arguments advanced in ***Fisher v the Minister of Public Safety*** (No. 2) Privy Council Appeal (supra) dealing with the Bahamas Constitution bear some similarity to the arguments advanced in the present case the protection of law clause dealing with procedural fairness was not argued in ***Fisher*** (No. 2). The Bahamas Constitution is quite similar to the Jamaica Constitution.

The present case affords a compelling example of the application of public law to ensure the protection of constitutional rights.

Let me now turn to the question of the validity of the Instructions. The Government of Jamaica has the responsibility of maintaining public confidence in the system of criminal justice and as a consequence is obliged to take appropriate measures to ensure that the International Appellate processes did not prevent the lawful sentences of Courts to be carried out.

Lord Griffiths in ***Pratt v AG*** [1993] 4 All E.R. 769 at 787 had this to say:

> "Their Lordships are very conscious that the Jamaican Government faces great difficulties with a disturbing murder rate and limited financial resources at their disposal to administer the legal system".

I fully endorse this statement and understand the Government's anxiety to deal with the problem. However, a close examination of the promulgation of the Instructions will reveal its invalidity.

The Instructions which were published in the Jamaica Gazette Extraordinary on Thursday, August 7, 1997 stated in part as under:-

> "10. Where within the period of six months after the response to the Second International Human Rights Body by the Government of Jamaica:
>
> (a) a communication has been received by the Government as to the outcome of the prisoner's application; the Government of Jamaica shall advise the Clerk to the Privy Council of the outcome of the application. The matter shall then be considered by the Privy Council, who shall advise the Governor General. Unless the Prerogative of Mercy is exercised in favour of the prisoner, the execution will not be further postponed;
>
> (b) no such communication has been received the execution will not be further postponed".

It is significant to note that the provisions of the Instructions are in direct conflict with the rules and procedures contained in the Convention and the Regulations as well as the 18 months period laid down in ***Pratt.***

However, in ***Thomas and Hilaire*** (supra) the Board of the Privy Council while dealing with similar Instructions published by the Government of Trinidad and Tobago had this to say at page 6 of that judgment:

> "Their Lordships are satisfied that the Instructions were unlawful. This is not because they were calculated to put Trinidad and Tobago in breach of the International Covenant or the Convention, for these had not been incorporated into and did not form part of the law of Trinidad and Tobago. But they were unlawful because they were disproportionate. They contemplated the possibility of successive applications to the Commission and the UNHRC (which was possible though unlikely), and laid down a series of successive time limits for the taking of the several steps which would be involved in the making of successive applications to both international bodies.
>
> In their Lordships' view it was reasonable for the Government of Trinidad and Tobago to take action to ensure that lawful sentences passed by its Courts should not be frustrated by events beyond the Government's control. It was reasonable to provide some outside time limit within which the international appellate processes should be completed. The Instructions had the object of introducing an appropriate element of urgency into the international appellate processes. This object was in conformity with the policy laid down by the Board in ***Pratt v Attorney-General for Jamaica*** [1994] 2 A.C. 1,33 that:-
>
> > 'a state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve... If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as part of our jurisprudence'.
>
> The Government of Trinidad and Tobago, which is concerned to maintain public confidence in the criminal justice system in Trinidad and Tobago, was entitled to take appropriate measures to ensure that the international

> appellate processes did not prevent lawful sentences passed by the courts from being carried out.
>
> In their Lordships' view it was also reasonable to provide for the possibility of successive applications to the same or different bodies. They are, however, satisfied that the Instructions were disproportionate because they curtailed petitioners' rights further than was necessary to deal with the mischief created by the delays in the international appellate processes. It would have been sufficient to prescribe an outside period of (say) 18 months for the completion of all such processes. This could apply whether the petitioner made only one application or applied successively to more than one international body or made successive applications to the same body. It was unnecessary and inappropriate to provide separate and successive time limits for each application. This had the effect of drastically and unnecessarily curtailing the time limits within which the first such body could complete its processes."

It is instructive to note that it is the issue of the current Instructions which gave rise to the warrant of execution, resulting in the constitutional legal process. The delay in the Commission's deliberations is a predictable consequence of this process since it is reasonable for the Commission to await the result of the Constitutional Hearing process.

The doctrine of the Separation of Powers approved in ***Hinds v DPP & AG*** (24 W.I.R 326) serves as a cornerstone to the constitutional protection afforded to the citizen. The Executive would therefore be excluded from interfering with the judicial process . This is particularly apposite since it is stated in the conclusion of the ***Thomas and Hilaire*** judgment at pg. 19 as follows:

> "Where, therefore, more than 18 months elapses between the date on which a condemned man lodges a petition to an international body and its final determination, their Lordships would regard it as appropriate to add the excess to the period of 18 months allowed for in ***Pratt***".

In my judgment the Instructions of the Governor General on August 7, 1997 is similarly disproportionate and therefore unlawful and I so hold. The limitation of the

access to the international appellate process is an infringement of the appellant's right to procedural fairness.

I now make reference to the proceedings before the International Body.

The report of the petition of Neville Lewis dated December 17, 1998 declared in its conclusion as under:

> "A.- To declare inadmissible the claims presented on behalf of Mr. Lewis with respect to Articles 4 and 8, concerning his right to due process and the application of the death penalty, on the basis that they essentially duplicate matters considered by the U.N.H.R.C. The other claims, which relate to Articles 5, 8, 21 and 24 <u>are inadmissible at this time due to the pendency of the constitutional motion filed on behalf of Mr. Lewis,"</u> (underlining mine).

In light of the Commission's conclusion, the appellant may re-submit his claim to the IACHR. In the event of a failure by the appellant to pursue an appeal to the Judicial Committee of Her Majesty's Privy Council or re-submit his claim to the IACHR. then he would have exhausted all his domestic remedies.

Accordingly, the order of the court should be stated as follows:

(1) Appeal allowed in part.

(2) The Instructions of the Governor General in Privy Council dated 6th August, 1997 are invalid.

(3) Stay of execution granted for 14 days pending an application for Conditional Leave to Her Majesty in Privy Council or Petition for special leave or re-submission of his claim.

(4) Liberty to apply.

(5) No order as to costs.

<u>FORTE J.A.</u>

Appeal allowed in part. It is ordered:

1) That the Instructions, dated 6th August, 1997, issued by the Governor General are unlawful.

2) That the execution of the appellant be stayed for 14 days pending an application for conditional leave to appeal to the Judicial Committee of the Privy Council or Petition for Special leave.

In the event that no application for conditional leave to appeal is filed, then within the same period of 14 days the appellant shall have liberty to apply for further stay upon proof that the Commission has been informed that all domestic proceedings have been exhausted and that the petition has been re-submitted to the Commission.

(3) All other remedies prayed for, are herewith refused.

(4) Liberty to apply.

(5) No order as to costs.