Privy Council Appeals Nos. 60 of 1999, 65 of 1999
69 of 1999 and 10 of 2000

(1) Neville Lewis
(2) Patrick Taylor and Anthony McLeod
(3) Christopher Brown
(4) Desmond Taylor and Steve Shaw *Appellants*

v.

(1) The Attorney General of Jamaica and
(2) The Superintendent of St. Catherine District Prison *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 12th September 2000

Present at the hearing:-

Lord Slynn of Hadley
Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Lord Hutton

*[Majority Judgment delivered by **Lord Slynn of Hadley**]*

These six appellants have been sentenced to death in Jamaica after conviction of murder. The appeals have been heard together because they all raise two important points - put broadly (a) whether on a petition for mercy (after all other domestic attempts to set aside the convictions or to prevent execution have been exhausted) the appellants are entitled to know what material the Jamaican Privy Council had before it and to make representations as to why mercy should be granted and (b) whether they have a right not to be executed before the Inter-American Commission on Human Rights or the United Nations Human Rights Committee has finally

reported on their petitions. In addition the appellants contend that the passage of time and the several ways in which they were treated in prison constituted inhuman or degrading treatment within the meaning of the Constitution of Jamaica so that they should not be executed.

The Board has had the great advantage of full and carefully prepared arguments of principle on behalf of all the appellants and the Attorney-General of Jamaica. Moreover, exceptionally, because the Board was being asked to review the decisions of the Board in *de Freitas v. Benny* [1976] A.C. 239, and in *Reckley v. Minister of Public Safety and Immigration (No. 2)* [1996] A.C. 527, the Attorney-General of Trinidad and Tobago and The Bahamas were given leave to intervene as also were five petitioners from Belize. The Board is grateful to all counsel, and to the firms of solicitors who have conducted these appeals, for their assistance not only in the written cases and at the hearing but also in supplementary submissions sent by the respondents on 17th May 2000, by the interveners on 22nd May and by the appellants in reply on 26th May 2000. All these appeals come from decisions of the Court of Appeal of Jamaica on constitutional motions.

The Constitution

Section 13 of the Constitution contained in Schedule 2 to the Jamaica (Constitution) Order in Council 1962 (S.I. 1962 No. 1550) provides that every person in Jamaica is entitled to the fundamental right without discrimination, but subject to the rights and freedoms of others and the public interest, *inter alia* to "the protection of the law". Subsequent provisions of Chapter III "shall have effect for the purpose of affording protection to" such right.

By section 1(1) "'law' includes any instrument having the force of law and any unwritten rule of law".

By section 14(1): "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". By section 17(1): "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment".

By section 25 a person who alleges that "any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, ... may apply to the Supreme Court ... [which] may make such orders ... 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".

The chronology

Neville Lewis

Neville Lewis was convicted on 14th October 1994 of the murder on 18th October 1992 of Vic Higgs and was sentenced to death. His appeal against conviction was dismissed on 31st July 1995 and on 13th February 1996 the Jamaican Privy Council refused to recommend that the prerogative of mercy be exercised in his favour. On 2nd May 1996 he was refused special leave to appeal by the Board, and on 24th May 1996 he petitioned the United Nations Human Rights Committee. On 17th July 1997 the United Nations Human Rights Committee declared that articles 9(3) also 10(1) and 10(2)(a) of the International Covenant on Civil and Political Rights had been violated in his case. On 9th September 1997 a second petition for mercy was refused by the Jamaican Privy Council and on 12th September a warrant for his execution on 25th September was read to him but that was withdrawn three days later. On 2nd October 1997 he made an application to the Inter-American Commission on Human Rights which on 20th November 1997 asked Jamaica to stay Lewis' execution until it had a chance to investigate his case.

On 14th August 1998 a second warrant was issued this time for execution on 27th August but following his application under the Constitution (sections 13, 14, 17 and 24) a stay of execution was granted on 20th August. On 17th December 1998 the Inter-American Commission declared his application inadmissible but without prejudice to his right to resubmit it later.

The application under the Constitution was refused by the Supreme Court on 7th January 1999 and a third warrant for execution on 2nd February 1999 was issued on

20th January. On 3rd February the Court of Appeal granted a stay of execution until the determination of his appeal from the Supreme Court's decision. That appeal was allowed in part in that the Governor-General's instructions published on 7th August 1997 laying down a timetable for the conduct of applications to international human rights bodies were held to be unlawful. The Court ruled that the appellant was entitled to have his petition to the Inter-American Commission decided as part of his right to the protection of the law and the time limits laid down were in any event too short. The Court of Appeal held, however, that his rights under the Constitution had not been violated so that he was refused relief on the constitutional motion. On 21st September 1999 the appellant was granted leave to appeal to the Privy Council and his execution was stayed.

Patrick Taylor

On 25th July 1994 Patrick Taylor was convicted with his brother Desmond Taylor and Steve Shaw on four counts of non-capital murder on 27th March 1992 and he was sentenced to death because of the multiple murders. On 24th July 1995 his appeal against conviction was dismissed and on 6th June 1996 the Board refused him special leave to appeal. Following his application on 14th June 1996 the United Nations Human Rights Committee found violations of articles 6, 9(2) and (3), 10(1), 14(1) and (3)(c) of the International Covenant on Civil and Political Rights and held that he was entitled to commutation of the death sentence.

In 1998 on 10th July he was told by the Jamaican Government that the opinion of the United Nations Human Rights Committee would not be followed and that he would not be granted mercy. On 19th August his application to the Inter-American Commission was held inadmissible because he had already applied to another international body but the Commission asked Jamaica to commute the death sentence for humanitarian reasons.

In 1999 a warrant for his execution on 26th January was read to him on 15th January. He brought a constitutional motion on 22nd January but a stay of execution was refused initially by the judge on 25th January and then on

20th May by the Court of Appeal. On 14th June he was given conditional leave and on 25th October final leave to appeal to the Board and a stay was granted. The Court of Appeal which heard his appeal heard at the same time the appeals of McLeod and Brown.

Anthony McLeod

On 22nd September 1995 McLeod was convicted of the murder of Anthony Buchanan on 3rd December 1994 and sentenced to death. His application for leave to appeal against conviction was dismissed on 20th March 1996 his counsel having conceded, it is said erroneously, that there were no arguable grounds of appeal. In 1997 the Board refused him special leave to appeal on 16th January and on the same day a submission was made to the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights. The Committee's response was adopted on 31st March 1998. On 20th July 1998 a further submission was made to the Inter-American Commission on Human Rights but on 3rd August they replied that the submission could not be processed since an application had already been considered by another international organisation. They wrote however to Jamaica asking for the sentence to be commuted on humanitarian grounds.

In 1999 on 25th January a writ was issued claiming that it would be unlawful to execute him. His application for a stay of execution pending the determination of his constitutional action was dismissed by the trial judge and by the Court of Appeal. The latter however gave leave to appeal to the Board.

Christopher Brown

On 28th October 1993 Brown was convicted of the murder of Alvin Smith on 16th October 1991 and was sentenced to death. On 18th July 1994 his appeal was allowed and a retrial ordered at which on 23rd February 1996 he was convicted and sentenced to death. In 1997 on 23rd October his petition to the Board was dismissed and he lodged an application with the United Nations Human Rights Committee on 12th November. His further application on 3rd August 1998 to the Inter-American Commission on Human Rights was declared inadmissible

on 19th August because of his pending application to the United Nations Human Rights Committee. On 15th January 1999 a warrant for his execution on 28th January was read to him. On 26th January he brought a constitutional motion and asked for a stay of execution. This was refused save that execution was stayed until 2nd February to enable him to appeal to the Court of Appeal. On 20th May the Court of Appeal stayed execution until the Jamaican Privy Council had considered the United Nations Committee's report. The Jamaican Privy Council refused to exercise the prerogative of mercy but on 18th November 1999 he was given final leave to appeal to the Board.

Desmond Taylor

On 25th July 1994 Desmond Taylor was convicted with Patrick Taylor and Desmond Shaw of four murders on 27th March 1992. Like theirs on 24th July 1995 his appeal was dismissed and on 6th June 1996 he was refused special leave to appeal to the Board. He petitioned the United Nations Committee on 14th June 1996 and was told by the Governor-General's secretary that no steps would be taken to execute him while his petition was pending before the United Nations Committee. On 2nd April 1998 the latter body found violations of the International Covenant. On 10th July his solicitors were told that the Jamaican Privy Council had rejected the United Nations Committee's conclusion and refused to extend mercy. On 9th March 1999 the Inter-American Commission refused to admit the petition dated 5th June 1998 because it was substantially the same as that considered by the United Nations Committee.

On 6th April 1999 a warrant was read to Taylor for his execution on 13th April. On 12th April a constitutional motion was brought under section 25 of the Constitution; a stay of execution pending the hearing of the motion was refused both by the judge and the Court of Appeal but was granted pending an application for leave to appeal to the Board which was finally granted on 20th December 1999.

Steve Shaw

The chronology in respect of Steve Shaw is the same as Desmond Taylor's save that his petition to the United Nations Committee was presented on 6th June 1996 and his petition to the Inter-American Commission was presented on 3rd June 1998.

The constitutional motions

The grounds raised in these motions variously are as follows.

Lewis on 20th August 1998 challenged the Governor-General's instructions of 6th August 1997 as being contrary to sections 13, 14, 17 and 24 of the Constitution. He further contended that to issue the death warrant whilst his appeal was pending before the Inter-American Commission on Human Rights was contrary to the same sections of the Constitution and that his right not to be subject to torture or inhuman treatment was being violated.

Patrick Taylor and Anthony McLeod (on 22nd January 1999) and Desmond Taylor and Steve Shaw (on 9th April 1999) each claimed that because of the time he had spent in prison, because of the conditions in which he was kept and because of the failure to provide legal aid his execution would constitute inhuman and degrading treatment contrary to section 17 of the Constitution. Each further contended that his execution would violate (a) his right not to be deprived of his life save by due process of law contrary to section 13(a) and section 14(1) of the Constitution, (b) his right to the protection of the law under section 13(a) and (c) his right of equal treatment by a public authority under section 24(2) of the Constitution. Moreover his rights under section 13(a) and 14(1) were violated because he was denied natural justice when the Jamaican Privy Council considered his reprieve in that he did not know when they were to meet, what they had before them and because he was not allowed to make representations nor was he given reasons why the Jamaican Privy Council had not followed the recommendation of the United Nations Committee.

Christopher Brown claimed on 26th January 1999 that the time he had spent in prison and the conditions in which

he had been kept violated his rights under section 17 of the Constitution. He contended that the Governor-General's instructions of 6th August 1997 were unlawful and contrary to sections 13, 14, 17 and 24 of the Constitution and that in any event since he complied with time limits laid down in the Governor-General's instructions he had a legitimate expectation that the Governor-General and the Jamaican Privy Council would not refuse mercy or issue a death warrant whilst the United Nations Committee and the Inter-American Commission were considering his petition and further that when they came to exercise their functions under sections 90 and 91 of the Constitution they would take into account the recommendation and decision of those bodies.

All the appellants ask for consequential relief to annul or defer the carrying out of the orders for execution.

The judgments in the Court of Appeal

Neville Lewis.

The Supreme Court on 7th January 1999 dismissed the action. In the Court of Appeal Forte J.A. held that the right to "the protection of the law" in section 13 of the Jamaican Constitution covered the same grounds as a right to "due process of law" as 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'" he continued:-

> "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."

To require the Commission to complete its process in six months when the Commission regulation allowed a maximum period of 510 days was disproportionate. The Governor-General's instructions were therefore unlawful. Forte J.A. accordingly said that "I would be minded to uphold the contention of the appellant, and find that the death warrant should be stayed pending the result of the petition" before the Inter-American Commission on Human Rights.

Downer and Langrin J.J.A. agreed that the instructions were unlawful. They also agreed that section 13 of the Constitution conferred "a right of procedural fairness". This ruling as to the lawfulness of the instructions is challenged by the Attorney-General's cross-appeal.

Patrick Taylor, Anthony McLeod and Christopher Brown.

Downer and Panton J.J.A. (Ag.) rejected all the grounds advanced but granted a temporary stay of execution pending an appeal to the Board but in the case of Christopher Brown a stay pending the determination of his case before the United Nations Human Rights Committee and the Governor-General in the Privy Council of Jamaica was also granted. This did not apply to Patrick Taylor and McLeod since the United Nations Human Rights Committee had already stated its decision. In other respects they dismissed the appeal. Langrin J.A. (Ag.) held that the question whether there was a right to make representations was an arguable point which ought to be dealt with by the constitutional court. He found the Governor-General's instructions to be unlawful as disproportionate because of the majority judgment in *Thomas v. Baptiste* [1999] 3 W.L.R. 249. He accordingly would have allowed the appeal.

Desmond Taylor and Steve Shaw.

This was an appeal to obtain a stay of execution pending the determination of the Supreme Court on the constitutional motion. It was held that there was no argument to go before the constitutional court, the proceedings before the Jamaican Privy Council were not justiciable. Its function

was purely discretionary. There was insufficient evidence of ill-treatment during the post-conviction period and the period of five years had not been exceeded. A stay was however granted pending an application for leave to the Board.

The issues

The prerogative of mercy.

The Constitution provides in section 90 that:-

"(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf –

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

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

(d) remit the whole or part of any punishment imposed on any person for such an offence ...

(2) In the exercise of any powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council."

The Privy Council of Jamaica consists of six members appointed by the Governor-General, after consultation with the Prime Minister and at least two of the members of the Privy Council shall be persons who hold or have held public offices: (section 82). By section 87 the Governor-General "shall, so far as is practicable, attend and preside at all meetings of the Privy Council" and by section 88(3): "Subject to the provisions of this Constitution, the Privy Council may regulate its own procedure".

By section 91:-

"(1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy

> Council may advise him in accordance with the provisions of section 90 of this Constitution.
>
> (2) The power of requiring information conferred on the Governor-General by subsection (1) of this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion."

The only material which the Privy Council of Jamaica is expressly required by this section to have is thus a written report on the case from the trial judge and such information as the Governor-General on the recommendation of the Jamaican Privy Council may require. It is plain that in advising the Governor-General under section 90(2) the Privy Council must have regard to this material. The question is thus whether a person under sentence of death is entitled to see that material and to put further material before the Jamaican Privy Council and to comment on what they have. It is accepted that none of the appellants saw the material which was before the Jamaican Privy Council when it considered the petition for mercy, and that they did not make such representations. Although the contention that he was entitled to make representations was not raised initially by Neville Lewis it was raised before the Court of Appeal by the other appellants and it is right on this appeal that it should be considered in respect of all the appellants.

The Attorney-General contends that the appellants have no right to see the material nor do they have any right to make representations.

The Attorney-General relies principally on *de Freitas v. Benny* [1976] A.C. 239 and *Reckley v. Minister of Public Safety and Immigration (No. 2)* [1996] A.C. 527.

In *de Freitas v. Benny* Lord Diplock said at p.247:-

> "Except in so far as it may have been altered by the Constitution the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago

> remains the same as it was in England at common law. At common law this has always been a matter which lies solely in the discretion of the sovereign ... Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy."

He went on to say at pages 247-248 that although the Home Secretary in practice called for a report of the case from the trial judge and such other information as he thought helpful "it was never the practice for the judge's report or any other information obtained by the Home Secretary to be disclosed to the condemned person or his legal representatives".

Lord Diplock said at page 248 that the fact that the Governor-General was required to exercise a prerogative on the advice of a Minister designated by him:-

> "does no more than spell out a similar relationship between the designated Minister and the Governor-General acting on behalf of Her Majesty to that which exists between the Home Secretary and Her Majesty in England under an unwritten convention of the British Constitution. It serves to emphasise the personal nature of the discretion exercised by the designated Minister in tendering his advice."

The only novel feature was that the Minister in a death sentence case was required to consult with an Advisory Committee which although it saw the information that the Minister had required to be obtained "still remains a purely consultative body without any decision-making power". Lord Diplock concluded at page 248:-

> "In their Lordships' view these provisions are not capable of converting the functions of the Minister, in relation to the advice he tenders to the Governor-General, from functions which in their nature are purely discretionary into functions that are in a sense quasi judicial."

Accordingly the appellant had no right to see the material furnished to the Minister.

In *Reckley No. 2* Lord Goff of Chieveley giving the opinion of the Board considered first the submission that the prerogative of mercy was amenable to judicial review. He compared the provisions of the Constitution of The Bahamas with those of the Constitution of Trinidad and Tobago which were in issue in *de Freitas*. In the former the designated Minister who exercised the discretion received the advice of an Advisory Committee. This was seen as reinforcing Lord Diplock's analysis in *de Freitas* at pages 247-248. Lord Goff said:-

> "First of all, it is made plain that every death sentence case must be considered by the advisory committee. There is no question of such consideration depending on any initiative from the condemned man or his advisers. Second, despite the obvious intention that the advisory committee shall be a group of distinguished citizens, and despite the fact that the minister is bound to consult with them in death sentence cases, he is not bound to accept their advice. This provides a strong indication of an intention to preserve the status of the minister's discretion as a purely personal discretion, while ensuring that he receives the benefit of advice from a reputable and impartial source. Indeed it may be inferred that the reason why provision was made in the Constitution for an advisory committee was to provide a constitutional safeguard in circumstances where the minister's discretionary power was of such a nature that it was not subject to judicial review. Third, the material which has to be taken into consideration at the meeting of the advisory committee is, apart from the trial judge's report, 'such other information derived from the record of the case or elsewhere as the minister may require'. This provision, which is consistent with the practice formerly applicable in England in the consideration of death sentence cases by the Home Secretary, is inconsistent with the condemned man having a right to make representations to the advisory committee." (pp. 539-540)

Having said that the person charged had legal rights, namely trial before judge and jury, an appeal to the Court of Appeal and his right to the protection of the law even after sentence of death by constitutional motion under article 28 of the Constitution of The Bahamas if the delay was such

that to execute was inhuman or degrading treatment or because there had been "a failure to consult the Advisory Committee on the Prerogative of Mercy as required by the Constitution" he continued at p. 540:-

> "But the actual exercise by the designated minister of his discretion in death sentence cases is different. It is concerned with a regime, automatically applicable, under which the designated minister, having consulted with the advisory committee, decides, in the exercise of his own personal discretion, whether to advise the Governor-General that the law should or should not take its course. Of its very nature the minister's discretion, if exercised in favour of the condemned man, will involve a departure from the law. Such a decision is taken as an act of mercy or, as it used to be said, as an act of grace."

The second submission that the principle of fairness required that the petitioner should be entitled to make representations to the advisory committee and for that purpose to see the material which it had was also rejected at p. 542:-

> "Indeed it is clear from the constitutional provisions under which the advisory committee is established, and its functions are regulated, that the condemned man has no right to make representations to the committee in a death sentence case; and, that being so, there is no basis on which he is entitled to be supplied with the gist of other material before the committee. This is entirely consistent with a regime under which a purely personal discretion is vested in the minister. Of course the condemned man is at liberty to make such representations, in which event the minister can (and no doubt will in practice) cause such representations to be placed before the advisory committee, although the condemned man has no right that he should do so."

He attached considerable importance to the composition of the advisory committee:-

> "In this connection their Lordships wish to stress the nature of the constitutional safeguard which the introduction of the advisory committee has created. On the committee, the designated minister and the Attorney-General will be joined by a group of people

> nominated by the Governor-General. These will, their Lordships are confident, be men and women of distinction, whose presence, and contribution, at the heart of the process will ensure that the condemned man's case is given, and is seen by citizens to be given, full and fair consideration. Such people as these will expect to be provided with all relevant material, including any material supplied by or on behalf of the condemned man; and in the most unlikely event that the responsible civil servants do not place such material before them, they are perfectly capable of making the necessary inquiries. It is plain to their Lordships that those who drew the Constitution of The Bahamas were well aware of the personal nature of the discretion to be exercised by the minister and the consequent absence of any supervisory role by the courts, but also considered that, by introducing an advisory committee with the constitution and functions specified in the Constitution, they were providing a safeguard both appropriate and adequate for the situation."

In *Reckley No. 2* the Board found that the decisions in *Reg. v. Secretary of State for the Home Department, Ex parte Bentley* [1994] Q.B. 349 and *Burt v. Governor-General* [1992] 3 N.Z.L.R. 672 relied on by the petitioner as indicating a power in the courts to review the prerogative decisions there in question were not directly concerned with the exercise of the prerogative of mercy after sentence of death had been pronounced and therefore were not of assistance.

It is clear that there are differences between the procedures in Trinidad and Tobago at the time of *de Freitas v. Benny* and in The Bahamas at the time of *Reckley No. 2*. Further the appellants say that in Trinidad and Tobago a government minister is given the effective power to decide whether to commute or pardon which is "a highly personal decision" (Taylor and McLeod's case, para. 10) whereas in Jamaica the effective power is in the Jamaican Privy Council. The Trinidad and Tobago Constitution of 1962 in Schedule 2 to the Trinidad and Tobago (Constitution) Order in Council 1962 (S.I. 1962 No. 1875) required the minister to consult with the Advisory Committee of which he was a member and chairman but he was not required to follow its

advice (1962 Constitution section 72(3)). This is a consultative body with no decision-making power.

In The Bahamas the power of commuting rests with the Governor-General on behalf of Her Majesty. He must act in accordance with the advice of the designated Minister (article 90(2)) who in turn must consult with the Committee though he is not required to act in accordance with the Committee's advice (article 92(3)). Thus it was the personal character of the discretion which influenced the Board in *Reckley No. 2* to reject an argument in favour of the court having power to exercise judicial review.

In Jamaica on the other hand it is said that the Governor-General acts on behalf of Her Majesty but he must act on the advice of the Jamaican Privy Council (section 90(2)). Accordingly the decision is not a personal one but is the collective and collegiate decision of the Jamaican Privy Council over which the Governor-General presides. Moreover, whereas in Trinidad and Tobago and The Bahamas it is for the Minister to decide what further information should be provided, in Jamaica the Governor-General must act on the recommendation of the Jamaican Privy Council itself (section 91(2)). The role of the Jamaican Privy Council is wider than that of the Advisory Committee in the other two countries since it is not limited as they are to giving advice in relation to the prerogative of mercy. The Privy Council of Jamaica has other functions in respect of which there is no reason why it should not be subject to judicial review.

These differences have been forcefully put before the Board but without going so far as to say that the argument that these differences distinguish the present case from the decisions in *de Freitas v. Benny* and *Reckley No. 2* are "untenable" (as Downer J.A. considered in the case of Patrick Taylor, McLeod and Brown at page 31 of the transcript), their Lordships do not consider that the differences justify a distinction being drawn in this regard between the three countries. The position in each with respect to the right to make representations on a mercy petition should be the same. Their Lordships are accordingly compelled to consider whether they should follow these two cases. They should do so unless they are satisfied that the principle laid down was wrong – not least

since the opinion in *Reckley No. 2* was given as recently as 1996. The need for legal certainty demands that they should be very reluctant to depart from recent fully reasoned decisions unless there are strong grounds to do so. But no less should they be prepared to do so when a man's life is at stake, where the death penalty is involved, if they are satisfied that the earlier cases adopted a wrong approach. In such a case rigid adherence to a rule of *stare decisis* is not justified. See e.g. *Reg. v. Secretary of State for the Home Department, Ex parte Khawaja* [1984] A.C. 74 at page 125D-H per Lord Bridge of Harwich; *Reg. v. Parole Board, Ex parte Wilson* [1992] Q.B. 740 at 754F per Taylor L.J. and *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1 itself, the latter being a striking example of the Board reversing a previous but recent decision; see also the comments of Lord Bingham of Cornhill C.J. in *Reg. v. Governor of Brockhill Prison, Ex parte Evans* [1997] Q.B. 443 at p. 462, a case in which the Divisional Court held to be wrong the statutory interpretation adopted in other recent cases by that Court.

It is to their Lordships plain that the ultimate decision as to whether there should be commutation or pardon, the exercise of mercy, is for the Governor-General acting on the recommendations of the Jamaican Privy Council. The merits are not for the courts to review. It does not at all follow that the whole process is beyond review by the courts. Indeed it was accepted both by Lord Diplock in *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342, at p. 1346 and by Lord Goff of Chieveley in *Reckley No. 2* at page 539C-E that there is a right to have a petition for mercy considered by the Advisory Committee. The same must be true of the Jamaican Privy Council. There could in their Lordships' view be no justification for excluding review by the courts if it could be shown that the Governor-General proposed to reject a petition without consulting the Jamaican Privy Council, that the Governor-General refused to require information recommended to be obtained by the Jamaican Privy Council or that the Governor-General having required the information to be obtained, the Privy Council indicated that it refused to look at it. The same would be the position if it could be shown that persons not qualified to sit on the Jamaican Privy Council or who were not members of the Jamaican Privy

Council had purported to participate in one of the recommendations of the Jamaican Privy Council.

The fact that section 91 of the Constitution requires the Jamaican Privy Council to have the judge's report and such other information as the Governor-General, on the Jamaican Privy Council's recommendation, requires does not mean that the Jamaican Privy Council is precluded from looking at other material even if the right to have such material before the Jamaican Privy Council must be based on some other rule than the express provisions of the Constitution.

Whatever the practice of the Home Secretary in England and Wales and before the death penalty was abolished in 1965, the insistence of the courts on the observance of the rules of natural justice, of "fair play in action", has in recent years been marked even before, but particularly since, decisions like *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 (see e.g. *Lloyd v. McMahon* [1987] A.C. 625 at pages 702-703; *Reg. v. Secretary of State for the Home Department, Ex parte Fayed* [1998] 1 W.L.R. 763) though the long citation of authority for such a self-evident statement is not necessary.

On the face of it there are compelling reasons why a body which is required to consider a petition for mercy should be required to receive the representations of a man condemned to die and why he should have an opportunity in doing so to see and comment on the other material which is before that body. This is the last chance and insofar as it is possible to ensure that proper procedural standards are maintained that should be done. Material may be put before the body by persons palpably biased against the convicted man or which is demonstrably false or which is genuinely mistaken but capable of correction. Information may be available which by error of counsel or honest forgetfulness by the condemned man has not been brought out before. Similarly if it is said that the opinion of the Jamaican Privy Council is taken in an arbitrary or perverse way – on the throw of a dice or on the basis of a convicted man's hairstyle – or is otherwise arrived at in an improper, unreasonable way, the court should *prima facie* be able to investigate.

Are there special reasons why this should not be so?

In *Reckley No. 2* much importance was attached to the composition of the Advisory Committee on the Prerogative of Mercy. The experience, status, independence of the members is no doubt an important feature of the process. It provides a valuable protection and prevents the autocratic rejection of a petition by one person. Their Lordships do not however accept that this is a conclusive reason why judicial review should be excluded. They may unconsciously be biased, there may still be inadvertently a gross breach of fairness in the way the proceedings are conducted. In *In re John Rivas' Application for Judicial Review* unreported, 2nd October 1992, Supreme Court of Belize, Singh J. said at pages 12-13:-

> "The Solicitor-General also submitted that such 'august', 'unique' and 'powerful' institution as the Belize Advisory Council, should not be liable to have its decisions subject to the supervisory jurisdiction of the Supreme Court. With respect, I disagree. Unique or not, any institution, be it inferior court or superior tribunal, which deals with the legal and human rights of any subject, in any capacity whatsoever, must conform to the time-honoured and hallowed principles of fundamental rights and natural justice. Any allegation that there has been a breach of any of these principles in relation to any person must, in my view, be subject to inquiry by the Supreme Court, irrespective of the calibre of the institution in respect of which the allegation has been made."

See also *Reg. v. Lord Saville of Newdigate, Ex parte A* [1999] 4 All E.R. 860 at page 870E-G.

Although on the merits there is no legal right to mercy there is not the clear cut distinction as to procedural matters between mercy and legal rights which Lord Diplock's aphorism that mercy begins where legal rights end might indicate.

Is the fact that an exercise of the prerogative is involved *per se* a conclusive reason for excluding judicial review? Plainly not. Although in some areas the exercise of the prerogative may be beyond review, such as treaty- making and declaring war, there are many areas in which the exercise of the prerogative is subject to judicial review.

Some are a long way from the present case, but *Reg. v. Secretary of State for the Home Department, Ex parte Bentley* [1994] Q.B. 349, though it does not raise the same issue as in the present case, is an example of the questioning of the exercise of the prerogative in an area which is not so far distant. As the Divisional Court said at page 363:-

> "If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so."

See also *Attorney-General of Trinidad and Tobago v. Phillip* [1995] 1 A.C. 396 and the discussion in *Burt v. Governor-General* [1992] 3 N.Z.L.R. 672 per Cooke P. at pages 678-681; *Lauriano v. Attorney-General of Belize* (unreported), 20th September 1995 (Supreme Court) and 17th October 1995 (Court of Appeal). In *Yassin v. Attorney-General of Guyana* (unreported), 30th August 1996 Fitzpatrick J.A. said at p. 24:-

> "In this case justiciability concerning the exercise of the prerogative of mercy applies not to the decision itself but to the manner in which it is reached. It does not involve telling the Head of State whether or not to commute. And where the principles of natural justice are not observed in the course of the processes leading to its exercise, which processes are laid down by the Constitution, surely the court has a duty to intervene, as the manner in which it is exercised may pollute the decision itself."

Does the fact that this particular exercise of the prerogative is involved mean that judicial review must be excluded? In *Reckley No. 2* much stress is placed on the personal nature of the power conferred but despite this in their Lordships' view the act of clemency is to be seen as part of the whole constitutional process of conviction, sentence and the carrying out of the sentence. In *Burt* [1992] 3 N.Z.L.R. 672 although in that case it was not found necessary to extend the scope for judicial review the court accepted at p. 683 that:-

> "... it is inevitably the duty of the court to extend the scope of common law review if justice so requires ..."

Cooke P. said at page 681:-

> "For these reasons the claim that the Courts should be prepared to review a refusal to exercise the prerogative of mercy, at least to the extent of ensuring that elementary standards of fair procedure have been followed, cannot by any means be brushed aside as absurd, extreme or contrary to principle. For example, it is obvious that allegations in a petition, unless patently wrong, should be adequately and independently investigated by someone not associated with the prosecution: the court could at least check that this has happened."

This approach seems to their Lordships to be in line with what was said by Holmes J. in *Biddle v. Perovich* (1927) 274 U.S. 480, 486:-

> "A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."

The fact that the matters to be taken into account on the merits of the application for mercy go beyond, or are different from those relevant to, guilt or sentence does not lead to the conclusion that judicial review of the procedure is excluded.

Sir Godfray Le Quesne Q.C. on behalf of the interveners forcefully stressed that the process of clemency is unique. It amounts to a power to dispense with the normal application of the law – that is to carry out the prescribed death penalty – and it involves an exceptional breadth of discretion. These submissions are no doubt correct but in their Lordships' view they are not inconsistent with a court insuring that proper procedures are followed nor are they inconsistent with the Privy Council of Jamaica being required to look at what the condemned man has to say any more than they are in principle inconsistent with a duty to consider the judge's report. One is prescribed by statute the other is not. The question is whether the common law requires that other material than the judge's report be looked at.

The importance of the consideration of a petition for mercy being conducted in a fair and proper way is underlined by the fact that the penalty is automatic in capital cases. The sentencing judge has no discretion, whereas the circumstances in which murders are committed vary greatly. Even without reference to international conventions it is clear that the process of clemency allows the fixed penalty to be dispensed with and the punishment modified in order to deal with the facts of a particular case so as to provide an acceptable and just result. But in addition Jamaica ratified the American Convention on Human Rights 1969 on 7th August 1978 and it is now well established that domestic legislation should as far as possible be interpreted so as to conform to the state's obligation under such a treaty (*Matadeen v. Pointu* [1999] 1 A.C. 98, 114G-H).

Article 4 of the American Convention on Human Rights 1969 provides for the right to life. By paragraph 6:-

> "Every person condemned to death shall have the right to apply for amnesty, pardon or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority."

As to Article 4 of the American Convention the Inter-American Court in paragraph 55 of its Advisory Opinion OC – 3/83 (Restrictions to the Death Penalty) 8 September 1983 has said:-

> "Thus, three types of limitations can be seen to be applicable to states parties which have not abolished the death penalty. First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account".

Whether or not the provisions of the Convention are enforceable as such in domestic courts, it seems to their

Lordships that the States' obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subject to judicial review.

The procedures followed in the process of considering a man's petition are thus in their Lordships' view open to judicial review. In their Lordships' opinion it is necessary that the condemned man should be given notice of the date when the Jamaican Privy Council will consider his case. That notice should be adequate for him or his advisers to prepare representations before a decision is taken. It is not sufficient, as has happened in Patrick Taylor's case, for him to be asked to submit a petition after they had met and when either a decision had been taken, subject to revision, or a clear opinion or consensus formed. The fact that the Jamaican Privy Council is required to look at the representations of the condemned man does not mean that they are bound to accept them. They are bound to consider them. There is every reason to have a confident expectation that the Jamaican Privy Council will behave fairly but if they do not the court can say so. The fact that the man has a right to make representations as a matter of fairness does not, contrary to what has been said, necessarily open the floodgates to challenges before the court or to further delay.

When the report of the international human rights bodies is available that should be considered and if the Jamaican Privy Council do not accept it they should explain why. Whether they are bound to wait for the report of the international human rights body is a question to be considered separately. It is in their Lordships' view not sufficient that the man be given a summary or the gist of the material available to the Jamaican Privy Council; there are too many opportunities for misunderstanding or omissions. He should normally be given in a situation like the present the documents. Their Lordships attach importance to what was said in *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531 at page 563F-H:-

> "It has frequently been stated that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which,

> unless effectively challenged, will or may lead to an adverse decision. The opinion of the Privy Council in *Kanda v. Government of Malaya* [1962] A.C. 322, 337 is often quoted to this effect. This proposition of common sense will in many instances require an explicit disclosure of the substance of the matters on which the decision-maker intends to proceed. Whether such a duty exists, how far it goes and how it should be performed depend so entirely on the circumstances of the individual case that I prefer not to reason from any general proposition on the subject. Rather, I would simply ask whether a life prisoner whose future depends vitally on the decision of the Home Secretary as to the penal element and who has a right to make representations upon it should know what factors the Home Secretary will take into account. In my view he does possess this right, for without it there is a risk that some supposed fact which he could controvert, some opinion which he could challenge, some policy which he could argue against, might wrongly go unanswered."

Their Lordships have so far dealt with this matter on the basis that there is a right to put in "representations". These should normally be in writing unless the Jamaican Privy Council adopts a practice of oral hearing and their Lordships are not satisfied that there was any need for, or right to, an oral hearing in any of the present cases.

There was, however, in each of the present cases a breach of the rules of fairness, of natural justice, which means that the appellants did not enjoy the "protection of the law" either within the meaning of section 13 of the Constitution or at common law. In considering what natural justice requires, it is relevant to have regard to international human rights norms set out in treaties to which the state is a party whether or not those are independently enforceable in domestic law.

Petitions to International Human Rights bodies

Jamaica has allowed those sentenced to death to petition the Inter-American Commission and the United Nations Committee and the Jamaican Privy Council and to consider the recommendations of those bodies before deciding

whether the prerogative of mercy should be exercised. It is to be noticed that in the case of Christopher Brown the Court of Appeal granted a stay of execution "pending the determination of his case before the United Nations Human Rights Committee and the Governor-General in Privy Council" in addition to the stay to cover proceedings before their Lordships' Board. This seems to their Lordships to be in accordance with their international obligations. The question arises as to whether in addition to its international obligations the state can be obliged at the behest of a condemned man to await the decision of one or other of the international human rights bodies. If this decision is arrived at speedily, or even within the 18 months referred to in *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1, then there is no problem. The difficulty arises when, as currently happens, these bodies take far longer to arrive at a decision. The dilemma is obvious. The human rights bodies meet infrequently and are undermanned so that as things stand delays are almost inevitable. The state is entitled, if it so chooses, to retain the death penalty but it must carry it out within five years after the conviction and sentence (*Pratt v. Attorney-General for Jamaica*). In *Bradshaw v. Attorney-General of Barbados* [1995] 1 W.L.R. 936 the Board rejected suggestions that:-

> "... either the periods of time relating to applications to the human rights bodies should be excluded from the computation of delay or the period of five years should be increased to take account of delays normally involved in the disposal of such complaints." (p. 941E).

It added:-

> "The acceptance of international conventions on human rights has been an important development since the Second World War and where a right of individual petition has been granted, the time taken to process it cannot possibly be excluded from the overall computation of time between sentence and intended execution." (p. 941H).

Jamaica's dissatisfaction with the delays is readily understandable and it is obviously desirable that states concerned in dealing with these international petitions

should press for a more efficient and speedier system to be set up, at the very least that there should be a fast track for cases for persons under sentence of death. That has not yet happened and as early as 6th August 1997 the Governor-General gave his instructions as to how cases should proceed. In particular:-

> "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. ...
>
> 6. Where, after a period of six months, beginning on the date of despatch 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.
>
> 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 of 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."

The Supreme Court in the case of Lewis considered that there could be no legitimate expectation after the making of these instructions that Jamaica would await the response of the Inter-American Commission before execution and

that to proceed with the execution in view of the inordinate delay was not unreasonable.

The Court of Appeal on the other hand said that the first ground before it was "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".

Forte J.A. referred to the judgment in *Thomas v. Baptiste* [1999] 3 W.L.R. 249 where Lord Millett said at page 259:-

> "In their Lordships' view 'due process of law' [referred to in section 4(a) of the Constitution of Trinidad and Tobago] 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 civilised nations which observe the rule of law ... The clause thus gives constitutional protection to the concept of procedural fairness."

Lord Millett added at page 261:-

> "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."

Forte J.A. continued:-

> "In respect of all 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 v. Baptiste*]."

The difference between Trinidad and Tobago and Jamaica was that the latter had not, whereas the former had, accepted the jurisdiction of the Inter-American court. Jamaica had only accepted the jurisdiction of the Commission which makes a non-binding report to the Governor-General.

Forte J.A. continued:-

> "However, I would hold 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 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."

Further, on the basis of the Board's decision in *Thomas v. Baptiste* the Court of Appeal held that since the regulations of the Inter-American Commission required a maximum of 510 days to complete the process, for the Governor-General to require the Inter-American Commission to complete its process in six months was disproportionate and unlawful. Forte J.A. drew attention to the "ironic" result that since the Commission would not proceed until domestic remedies have been exhausted Lewis' case was not being processed.

Downer J.A. held that to limit the time to six months when *Pratt* recognised a period of almost 18 months was beyond the powers of the Governor-General and his instructions were invalid. Langrin J.A. referred to the Governor-General's submission that:-

> "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. This latter submission is not acceptable ... I am of the view that the expressed words in section 13 inferred the justiciable right of procedural fairness."

The Attorney-General challenges these conclusions in his cross-appeal in Lewis and is supported by the Interveners. His overriding contention is that the Convention has not been incorporated into domestic law: it is therefore not part of domestic law and no enforceable rights can arise under it. There is no ambiguity and "the legality of an execution, as a matter of domestic law, could not be affected by the terms of an international treaty not incorporated into domestic law" (respondents' case, para. 26B(v)).

Some of the interveners contend that the Court of Appeal's decision that there is a right to complete "international appellate process" is inconsistent with *Fisher v. Minister of Public Safety and Immigration (No. 2)* [2000] 1 A.C. 434 and *Higgs v. Minister of National Security* [2000] 2 W.L.R. 1368 and is an unwarranted extension of *Thomas v. Baptiste* [1999] 3 W.L.R. 249.

Much attention has been directed in argument to these three judgments of the Board. In *Fisher v. Minister of Public Safety and Immigration (No. 2)* [2000] 1 A.C. 434 the majority held that the provisions of article 16 of The Bahamas Constitution did not expressly provide that a person had a right to life pending a determination of a petition to the Inter-American Commission and that no such right was to be implied since The Bahamas was not a member of the Organisation of American States at the time the Constitution was adopted. Moreover since legitimate expectations did not create rules of law the government could act inconsistently with those expectations so long as it gave those affected an opportunity to put their case. Since the appellant was given notice that the government would not wait beyond the fixed date for the Commission to report they could no longer have a legitimate expectation that the government would wait for that report. The government had in all the circumstances of that case acted reasonably.

In *Thomas v. Baptiste* [1999] 3 W.L.R. 249 the majority held that the time limits fixed by the Government were unlawful because they were disproportionate, though it was reasonable to provide some time limit within which the international appellate processes should be completed. The majority again stressed the constitutional importance of the principle that international conventions do not alter domestic law unless they are incorporated into domestic law by legislation. The majority continued at pages 260-261:-

> "In their Lordships' view, however, the applicants' 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 to 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 applicants 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."

They said that this argument had been rejected in *Fisher No. 2* but considered that the Constitution of The Bahamas did not include a due process clause similar to that contained in section 4(a) of the Constitution of Trinidad and Tobago from which this case came.

In *Higgs v. Minister of National Security* [2000] 2 W.L.R. 1368 the Board stressed that domestic courts have no jurisdiction to construe or apply a treaty and that unincorporated treaties have no effect upon the rights and duties of citizens at common law or by statute.

They continued at page 1375:-

> "They may have an indirect effect upon the construction of statutes as a result of the presumption that Parliament does not intend to pass legislation which would put the Crown in breach of its international obligations. Or the existence of a treaty may give rise to a legitimate expectation on the part of citizens that the government, in its acts affecting them, will observe the terms of the treaty."

The Board accepted that there was no difficulty in implying that an execution should be carried out with regard to the due process of the law and general principles of fairness. They added at page 1379:-

> "But the majority of the Board in *Thomas's* case [1999] 3 W.L.R. 249 clearly did not regard this common law concept as having the power (absent specific language in the Constitution) to incorporate procedures having an existence only under international law into the domestic criminal justice system. It is not for their Lordships to say whether this was right or wrong."

They thought however that *Fisher No. 2* should be followed.

It is of course well established that a ratified but "unincorporated treaty", though it creates obligations for the state under international law, does not in the ordinary way create rights for individuals enforceable in domestic courts and this was the principle applied in *Fisher No. 2*. But even assuming that that applies to international treaties dealing with human rights, that is not the end of the matter. Their Lordships agree with the Court of Appeal in Lewis that "the protection of the law" covers the same ground as an entitlement to "due process". Such protection is recognised in Jamaica by section 13 of the Constitution and is to be found in the common law.

Their Lordships do not consider that it is right to distinguish between a Constitution which does not have a reference to "due process of law" but does have a reference to "the protection of the law". They therefore consider that what is said in *Thomas v. Baptiste* to which they have referred is to be applied *mutatis mutandis* to the Constitution like the one in Jamaica which provides for the protection of the law. In their Lordships' view when Jamaica acceded to the American Convention and to the International Covenant and allowed individual petitions the petitioner became entitled under the protection of the law provision in section 13 to complete the human rights petition procedure and to obtain the reports of the human rights bodies for the Jamaican Privy Council to consider before it dealt with the application for mercy and to the staying of the execution until those reports had been received and considered. Now that Jamaica has withdrawn from the Optional Protocol to the United Nations International Covenant only one petition will be allowed and it should be possible for the Inter-American Commission to deal with, and they should make every effort to deal with, the petitions within a period in the region of 18 months. The expectation expressed in *Pratt* that the petition could be dealt with within 18 months may, from what the Board has seen in subsequent cases, have been over-optimistic particularly where two petitions were allowed. It may be that a few months over the 18 months will have to be accepted (see *Thomas v. Baptiste*) though the shorter the domestic proceedings the more time will be left for the international petition to be dealt with in the five year period. In any event their Lordships see no justification to alter the period of five years referred to in *Pratt*. Accordingly their

Lordships are of the view that the time limits imposed by the Governor-General in his instructions of 6th August 1997 violated the rules of natural justice and were unlawful. Execution consequent upon the Jamaican Privy Council's decision without consideration of the Inter-American Commission report would be unlawful.

Prison conditions

All the appellants contend that their treatment in prison and the prison conditions in which they were detained amount to inhuman or degrading treatment so that it would be inappropriate to execute them. By way of illustration Desmond Taylor alleges that he was beaten, that he was denied adequate access to a doctor. Shaw says that he was beaten and shackled. Brown says that he was beaten, then his asthma inhaler was destroyed and he was refused adequate medical treatment. Patrick Taylor says that he was beaten and kept in handcuffs. He was frightened by beatings inflicted by wardens and other prisoners. He had to eat and drink from plastic bags because he had no utensils from which to eat. McLeod said that he was beaten and denied medical attention. Most of the allegations made are denied by the respondents and affidavit evidence was available to the Supreme Court and to the Court of Appeal.

The Court of Appeal in Patrick Taylor and McLeod and Brown set out affidavit evidence on both sides. In the case of Taylor Downer J.A. held that the facts even if true could not be a basis for delaying the execution. In respect of McLeod he considered that some of the complaints even if true could not justify him staying the warrant of execution, others were unlikely to be true. Panton J.A. (Ag.) held in respect of Taylor that "the prison conditions as alleged do not present any matter for argument to secure a commutation of the sentence of death" (transcript page 68).

In Lewis' case it seems that the contention that the conditions of incarceration amounted to inhuman and degrading treatment was not argued in the Court of Appeal (see the judgment of Langrin J.A.) though the matter was investigated on the basis of affidavits in the Supreme Court. The allegations were not accepted. Wolfe C.J. preferred the affidavit evidence put in by the Attorney-General and said "I am satisfied that the conditions which exist do not

constitute inhuman and degrading treatment". Cooke J. rejected the affidavit evidence:-

> "There is a palpable lack of sincerity on the part of the plaintiff in his fruitless endeavour to establish that he was a victim of 'inhuman and degrading treatment'."

Harrison J. after a very detailed analysis of all the evidence concluded that Lewis' credibility "has indeed been shattered ... I accept the evidence presented on behalf of the defendants. Albeit conditions in the prisons are not fully satisfactory, they do not amount in my view to inhuman and degrading forms of treatment and/or punishment".

Despite the fuller examination of the evidence in the Court of Appeal judgment in Lewis' case their Lordships conclude that the result is the same as in the other cases. There was as Cooke J. said no cross-examination and no "opportunity of any assessment based on a view of the demeanour of the persons who presented affidavits". It was also necessary for the court to take into account the mental suffering when three death warrants were read to Lewis and he was moved to the gallows block with all that entails. It was also necessary to bear in mind that the warrants were read before he had exhausted his domestic and international remedies and the January 1999 warrant was read despite a letter from his lawyer to the Governor-General showing that it was intended to seek leave to appeal. Their Lordships are not satisfied that without a further investigation these matters were properly taken into account.

It is obviously impossible for the Board to resolve the conflict as to what happened in the prison in these six cases. Their Lordships are however disturbed by the fact that these issues were decided on affidavit evidence without any investigation of the allegations in depth or challenge to the affidavit evidence. There are no findings of fact on the various allegations.

Accordingly whilst they are not prepared to say that these allegations are such that there was a violation of section 17 of the Constitution they consider that these are serious matters which ought to have been investigated. Had it been necessary to do so (which in view of their decision on the other matters raised it is not) they would have required these

allegations to be investigated to see whether (a) they were made out and (b) whether they were such as to aggravate the punishment of the death sentence so as to amount to inhuman and degrading treatment in the light of the Board's judgment in *Higgs v. Minister of National Security* and *Thomas v. Baptiste* (*supra*).

However for the reasons which they have given their Lordships will humbly advise Her Majesty that the appeals in all of the six cases should be allowed and that the cross-appeal in the case of Lewis should be dismissed.

Delay

It appears from the chronology that the periods of delay since initial conviction and sentence until August 2000 were:-

Neville Lewis	convicted 14th October 1994	5 years 10 months
Patrick Taylor	convicted 25th July 1994	6 years 1 month
Anthony McLeod	convicted 22nd September 1995	4 years 11 months
Christopher Brown	first convicted 28th October 1993	6 years 10 months
	conviction set aside 18th July 1994	
	second conviction 23rd February 1996	4 years 6 months
	(but under sentence of death on the first conviction) making a total of 4 years 8 months	3 months
Desmond Taylor	convicted 25th July 1994	6 years 1 month
Steve Shaw	convicted 25th July 1994	6 years 1 month

Thus in four of the cases the period of five years referred to in *Pratt* has already elapsed. In McLeod's case four years and eleven months and in Brown's case four years and eight months in prison following sentences of death have elapsed but it is inevitable that, by the time the appellants' advisers have been able to see the material which was before the Privy Council of Jamaica and to make representations on it in the light of this opinion of the Board, the period of five years will have elapsed. In Brown's case the overall length of time from the first conviction would make it inhuman treatment now to execute him in any event.

Their Lordships are therefore satisfied that the sentences of death should be set aside in all cases and commuted to ones of life imprisonment. Their Lordships will humbly advise Her Majesty accordingly.

Dissenting judgment delivered by ***Lord Hoffmann***

These appeals concern the legality of the sentence of death which, in accordance with the law of Jamaica, has been passed upon six prisoners convicted of murder. The questions raised are of the utmost importance, not only for the prisoners whose lives are at stake but also for the administration of justice in Jamaica and the other Commonwealth countries of the Caribbean. The Board sits as a supreme court of appeal to enforce their laws and constitutions. It is of course obvious to the members of the Board that they must discharge that duty without regard to whether they personally favour the death penalty or not. But the wider public may need to be reminded.

There are three questions which arise. The first ("the Jamaican Privy Council issue") is whether the Jamaican Privy Council, before deciding whether or not to recommend to the Governor-General that a sentence of death be commuted, is required to disclose to the prisoner the information which it has received pursuant to section 91 of the Constitution. The second ("the Inter-American Commission issue") is whether it would be unlawful to execute a sentence of death while the prisoner's petition remained under consideration by the Inter-American Commission on Human Rights. The third ("the prison

conditions issue") is whether the execution of the sentence of death can be unlawful because the prisoner, while in detention, has been subjected to treatment which is unlawful or unconstitutional but unrelated to his being under sentence of death.

All three of these questions have been considered and answered in recent decisions of the Board. The Jamaican Privy Council issue was decided in the negative in *Reckley v. Minister of Public Safety and Immigration No. 2* [1996] A.C. 527, when the Board decided not to depart from its earlier decision in *de Freitas v. Benny* [1976] A.C. 239. The Inter-American Commission issue was decided in the negative in *Fisher v. Minister of Public Safety and Immigration No. 2* [2000] 1 A.C. 434 and most recently in *Higgs v. Minister of National Security* [2000] 2 W.L.R. 1368. The prison conditions issue was decided in the negative in *Thomas v. Baptiste* [1999] 3 W.L.R. 249 and in *Higgs v. Minister of National Security* [2000] 2 W.L.R. 1368.

The Board now proposes to depart from its recent decisions on all three points. I do not think that there is any justification for doing so. It was appropriate in *Reckley v. Minister of Public Safety and Immigration No. 2* [1996] A.C. 527 for the Board to review its previous decision in *de Freitas v. Benny* [1976] A.C. 239. Twenty years had passed, during which there had been important developments in administrative law. In particular, the notion once entertained that an exercise of the prerogative was, as such, immune from judicial review had been repudiated by the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374. It was arguable that the reluctance of the courts to impose a general rule of *audi alterem partem* upon the exercise of the prerogative of mercy was a mere relic of outdated theory. But the Board decided in *Reckley No. 2* that there were still, in modern conditions, strong enough grounds for maintaining the old rule. In *Burt v. Governor-General* [1992] 3 N.Z.L.R. 672 Cooke P. similarly decided that although there were no conceptual obstacles to requiring the Governor-General to observe the principle of *audi alterem partem* in exercising the prerogative of mercy, pragmatic considerations in New Zealand pointed the other way. The Board in *Reckley No. 2* took the same

decision with the ideal of the rule of law", such as whether the previous rule is intolerable because not in practice workable, or whether at p. 855, related principles of law have developed "as to have left the old rule no more than a remnant of abandoned doctrine", or whether facts have changed "or come to be seen so differently, as to have robbed the old rule of significant application or justification". In the absence of such grounds, p. 864:-

> "the Court could not pretend to be reexamining the prior law with any justification beyond a doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest some special reason over and above the belief that a prior case was wrongly decided."

The opinion went on to cite Stewart J. in *Mitchell v. W.T. Grant Co.* (1974) 416 U.S. 600, 636:-

> "A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve."

Stewart J.'s reference to changes in the membership of the court prompts another reason why it is particularly important for this Board to be very careful in departing from precedent. The fact that the Supreme Court of the United States sits in *banc* means that, subject to infrequent changes in membership, there is a natural continuity in its views. But the Board hearing an appeal consists of five members drawn from the twelve Law Lords, occasional visiting judges from Commonwealth countries (though regrettably seldom from the Caribbean) and a number of retired Lords Justices of Appeal. It is possible for a Board to be constituted without anyone who was party to a recent governing precedent or to be composed largely of members who were previously in dissenting minorities.

Macaulay said of the constitution of the United States that it was "all sail and no anchor". I think that history

has proved him wrong. But the power of final interpretation of a constitution must be handled with care. If the Board feels able to depart from a previous decision simply because its members on a given occasion have a "doctrinal disposition to come out differently", the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.