

the secret profits payment, to proceed with the damages claim even though it gave credit for the amount received. There is no such inequity in this case. The defendant did not make the payment under any misapprehension about the plaintiff's intentions. The belatedness of the plaintiff's choice did not prejudice the defendant.

The defendant sought to meet these points by submitting there is an inflexible rule of law whereby, irrespective of intention, satisfaction of what is due under one remedy is an irrevocable election to have that remedy. There is no later point at which a plaintiff can elect. Satisfaction, it was submitted, includes part satisfaction, as happened in the present case. Having accepted payment, it was not thereafter open to the plaintiff to proceed with a damages claim.

This submission is misconceived. As already noted, the function of satisfaction in this field is that complete satisfaction bars a plaintiff from subsequently pursuing any other remedy in respect of the same loss. He cannot recover more than the amount of his loss. That principle is not in point here. The payment of \$1,897,774 to the plaintiff on 26 June 1993 was not full satisfaction even of the profits which by that date were known to be due under the judge's order.

Clearly, in the ordinary way enforcement and acceptance of payment, even in part, confirms and reinforces an election made between alternative remedies at the time judgment was entered. But here no election was made at that time. So acceptance of the payment signifies nothing, given that the order had (wrongly) provided for the plaintiff to have both remedies and that the plaintiff was actively pursuing both.

It follows that in their Lordships' view the Court of Appeal fell into error in concluding that the plaintiff elected to take the remedy of an account of profits rather than damages. Since the plaintiff did not so elect, it is unnecessary to consider what would have been the consequences for the damages claim had the plaintiff elected. Their Lordships therefore express no view on the distinction between income and capital drawn by the Court of Appeal.

Their Lordships turn, therefore, to Master Woolley's order. As to this, their Lordships can detect no flaw or error in the master's clear and careful judgment. In particular, on the facts of this case there is no inconsistency between the awards of damages under heads A and B. The defendant was required to assign the 16 houses to the plaintiff free from incumbrances. He did not do this. Further, the houses were not in a good state of repair. This was not due to the fair wear and tear inseparable from any letting. The agreed surveyors' report stated that by far the majority of the defects were caused by the "extraordinary over-use" of the development. Houses intended for two or three people had been occupied by up to 13 elderly people. The houses had not been designed for such use and had deteriorated badly. There is nothing inconsistent in awarding damages for the loss sustained by this use of the property, including the loss sustained by the property not being handed over with vacant possession when the assignment was executed, and also awarding damages in respect of the market rents at which the plaintiff could have let the houses during the period Mr. Tang was using them.

The defendant also took a point on the form of the pleadings. The defendant submitted that it was not open to the plaintiff to claim damages under head B based on diminution in value, because in the statement of claim the only breaches of trust alleged were Mr. Tang's lettings and his failure to account for the rent or use of the houses. There is no substance in this point. The damages flowed from Mr. Tang having made these lettings. Further, the plaintiff's case on damages was spelled out with sparkling clarity in the particulars of damage served in April 1993, three months before the damages hearing took place. The defendant knew the case he had to meet. He was not prejudiced by the allegations in the particulars of damage not being carried into the body of the statement of claim.

Their Lordships will humbly advise Her Majesty that the defendant's appeal should be dismissed, the plaintiff's cross-appeal allowed, and the order of Master Woolley restored. The defendant must pay the plaintiff's costs before their Lordships' Board and in the Court of Appeal.

Solicitors: Edwin Coe; Kingsford Stacey.

S. S.

[PRIVY COUNCIL]

THOMAS RECKLEY PETITIONER
AND
F MINISTER OF PUBLIC SAFETY AND
IMMIGRATION AND OTHERS (No. 2) RESPONDENTS

[PETITION FOR SPECIAL LEAVE TO APPEAL FROM THE COURT OF APPEAL OF THE
COMMONWEALTH OF THE BAHAMAS]

G 1995 Dec. 4, 5, 6; Lord Keith of Kinkel, Lord Goff of Chieveley,
1996 Feb. 5 Lord Browne-Wilkinson, Lord Hoffmann
and Sir Michael Hardie Boys

*Bahamas, The—Constitution—Fundamental rights and freedoms—
Sentence of death for murder—Exercise of prerogative of mercy—
Whether petitioner's constitutional rights infringed—Whether stay
of execution to be granted—The Bahamas Independence Order 1973
(S.I. 1973 No. 1080), Sch., arts. 90(1)(c)(2), 92(1)(3)*

The petitioner was convicted of murder and sentenced to death. The Court of Appeal of The Bahamas dismissed his appeal against conviction and sentence, and the Judicial Committee of

Reckley v. Minister of Public Safety (No. 2) (P.C.)

[1996]

the Privy Council dismissed his petition for special leave to appeal. In accordance with article 92(1) of the Constitution of the Commonwealth of The Bahamas,¹ his case was considered by the Advisory Committee on the Prerogative of Mercy, which was established under article 91. Thereafter the designated minister advised the Governor-General, who by article 90(2) was obliged to act in accordance with the minister's advice, that the law should take its course. At 6.30 a.m. on Friday, 26 May 1995 a warrant for the execution of the petitioner's sentence at 8 a.m. on the following Tuesday was read to him. He applied by originating motion to the Supreme Court alleging that executing him pursuant to the warrant would contravene his constitutional rights on the ground that he had not been given the right to see the trial judge's report and any other material placed before the advisory committee by the minister or to make representations thereon before the committee advised the minister. He applied for a stay of execution until final determination of his constitutional motion, but the judge refused to grant a stay and the petitioner's appeal against that decision was dismissed by the Court of Appeal.

On the petitioner's application for special leave to appeal to the Judicial Committee:—

Held, dismissing the petition, (1) that the discretion of the designated minister in death sentence cases was a personal discretion, to be exercised after consultation with the advisory committee and, if exercised in favour of the condemned man, involved an act of mercy which was not the subject of legal rights and which was therefore not justiciable; that the act of the advisory committee in advising the minister was of the same character, and the condemned man had no right to make representations to the committee, although if he did so they could be placed before the committee; that fairness did not entitle the condemned man to disclosure of the material placed before the committee by the minister; and that, accordingly, the failure to provide the petitioner with the material, or the gist thereof, which the minister had caused the committee to take into consideration, or to give the petitioner an opportunity to make representations, had not infringed any of his constitutional rights (post, pp. 540D–F, 541A–B, 542C–E).

de Freitas v. Benny [1976] A.C. 239, P.C. and dictum of Lord Mustill in *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531, 556, H.L.(E.) applied.

Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374, H.L.(E.) considered.

Burt v. Governor-General [1992] 3 N.Z.L.R. 672 and *Reg. v. Secretary of State for the Home Department, Ex parte Bentley* [1994] Q.B. 349, D.C. distinguished.

(2) That since there was no settled practice in The Bahamas that a condemned man should be given not less than 21 days' notice of his execution, he had no constitutional right to such notice and, although the petitioner had been given less than four clear days' notice of his execution, in all the circumstances he had been given reasonable notice thereof; and that, since there was no

1 A.C.

Reckley v. Minister of Public Safety (No. 2) (P.C.)

arguable point in relation to the period of notice or the advisory committee, leave to appeal would accordingly be refused (post, pp. 535E, H–536A, 542H–543A).

Guerra v. Baptiste [1996] 1 A.C. 397 distinguished.

Per curiam. If it were proposed to execute a condemned man contrary to law because of a failure to consult the advisory committee as required by the Constitution of The Bahamas, he could apply to the Supreme Court for redress under article 28 (post, p. 540C–D).

Decision of the Court of Appeal of the Commonwealth of The Bahamas affirmed.

The following cases are referred to in the judgment of their Lordships:

Abbott v. Attorney-General of Trinidad and Tobago [1979] 1 W.L.R. 1342, P.C.

Burt v. Governor-General [1992] 3 N.Z.L.R. 672

Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1984] 3 All E.R. 935, H.L.(E.)

de Freitas v. Benny [1976] A.C. 239; [1975] 3 W.L.R. 388, P.C.

Guerra v. Baptiste [1996] 1 A.C. 397; [1995] 3 W.L.R. 891; [1995] 4 All E.R. 583, P.C.

Jones v. Attorney-General of the Commonwealth of The Bahamas [1995] 1 W.L.R. 891; [1995] 4 All E.R. 1, P.C.

Lauriano v. Attorney-General of Belize (unreported), 20 September 1995, Supreme Court of Belize

Pratt v. Attorney-General for Jamaica [1994] 2 A.C. 1; [1993] 3 W.L.R. 995; [1993] 4 All E.R. 769, P.C.

Reckley v. Minister of Public Safety and Immigration [1995] 2 A.C. 491; [1995] 3 W.L.R. 390; [1995] 4 All E.R. 8, P.C.

Reg. v. Secretary of State for the Home Department, Ex parte Bentley [1994] Q.B. 349; [1994] 2 W.L.R. 101; [1993] 4 All E.R. 442, D.C.

Reg. v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 A.C. 531; [1993] 3 W.L.R. 154; [1993] 3 All E.R. 92, H.L.(E.)

Thomas (Andy) v. The State (unreported), 29 July 1987, Nos. 6346 and 6347 of 1985, High Court of Trinidad and Tobago

Thornhill v. Attorney-General of Trinidad and Tobago [1981] A.C. 61; [1980] 2 W.L.R. 510, P.C.

The following additional cases were cited in argument:

Hanratty v. Lord Butler (unreported), 12 May 1971; Court of Appeal (Civil Division) Transcript No. 171 of 1971, C.A.

Kirklees Metropolitan Borough Council v. Wickes Building Supplies Ltd. [1993] A.C. 227; [1992] 3 W.L.R. 170; [1992] 3 All E.R. 717, H.L.(E.)

Reg. v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Everett [1989] Q.B. 811; [1989] 2 W.L.R. 224; [1989] 1 All E.R. 655, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Duggan [1994] 3 All E.R. 277, D.C.

PETITION for special leave to appeal by the petitioner, Thomas Reckley, from the judgment of Fountain C.J. (Ag.), sitting ex officio as a single judge of the Court of Appeal of the Commonwealth of The Bahamas, given on 30 May 1995 dismissing the petitioner's appeal against the refusal by Osadebay J. on 29 May, reasons having been given on 1 June, in the Supreme Court (Civil (Constitutional) Side) of the petitioner's application for a stay of the sentence of death passed on

¹ Constitution of the Commonwealth of The Bahamas, art. 90(1): see post, p. 536E–F.

Art. 90(2): "The powers of the Governor-General under paragraph (1) of this article shall be exercised by him in accordance with the advice of a minister designated by him . . ."

Art. 92: see post, pp. 536H–537B.

7 November 1990 after his conviction of murder in the Supreme Court at Nassau before Sawyer J. and a jury. The application for the stay had been made pending determination of his originating motion dated 26 May 1995 in which he had applied to the Supreme Court for redress for alleged infringements of his constitutional rights, those proceedings having been brought against the respondents, the Minister of Public Safety and Immigration, the Advisory Committee on the Prerogative of Mercy, and the Attorney-General of The Bahamas sued in a representative capacity on behalf of himself and the Governor-General of the Commonwealth of The Bahamas.

The facts are stated in the judgment of their Lordships.

Geoffrey Tattersall Q.C. and *Timothy Straker* for the petitioner. The Constitution, which is the supreme law of The Bahamas, provides for the protection of the fundamental rights and freedoms of the individual. [Reference was made to articles 15, 17, 28 and 90 to 92.] It is common ground that if the petitioner's constitutional motion raises any arguable issue a stay of execution should be granted since the petitioner can no longer be executed pursuant to the warrant: see *Reckley v. Minister of Public Safety and Immigration* [1995] 2 A.C. 491, 496.

The first issue is whether the activities of the advisory committee and the power of the Governor-General to commute the death sentence are susceptible to judicial process or are to be regarded as an exercise of the royal prerogative and incapable of being the object of judicial process.

de Freitas v. Benny [1976] A.C. 239 is no longer good law because the exercise of the prerogative of mercy is now justiciable. Accordingly, the petitioner was entitled to be told of the time when the advisory committee would meet and to have disclosed to him the information or gist thereof to be placed before it, and to be given an opportunity to make representations to the committee. The Constitution does not expressly give a condemned man the right to make such representations, but fairness and justice demand that such a right should be implied. [Reference was made to *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374; *Reg. v. Secretary of State for the Home Department, Ex parte Bentley* [1994] Q.B. 349; *Reg. v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Everett* [1989] Q.B. 811; *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342; *Guerra v. Baptiste* [1996] 1 A.C. 397; *Burt v. Governor-General* [1992] 3 N.Z.L.R. 672 and *Lauriano v. Attorney-General of Belize* (unreported), 20 September 1995, Supreme Court of Belize.]

The activity of the advisory committee is plainly justiciable. The prerogative power is not an arbitrary exercise of an unreviewable power, but is a legal power which appertains to the Crown and not its subjects. That constitutional power is subject to the constraints of fairness, and the condemned man must have at least the right to procedural fairness in relation to the way in which the prerogative of mercy is exercised. Standards of fairness are not immutable and may change with the passage of time. [Reference was made to *de Smith, Woolf & Jowell, Judicial Review of Administrative Action*, 5th ed. (1995), pp. 311-328, 401-406, 431-432; *Wade and Forsyth, Administrative Law*, 7th ed. (1994), pp. 248-249;

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A *Kirklees Metropolitan Borough Council v. Wickes Building Supplies Ltd.* [1993] A.C. 227 and *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531.]

Although the minister is not fettered when deciding what advice to tender to the Governor-General, he must take into account representations made by the condemned man. The minister must act reasonably and fairly in the context of the constitutional provisions, and must weigh all the information. The petitioner has legal rights even though he has been sentenced to death. Mercy does not begin only where legal rights end. As a matter of construction, if there is no right to make representations under article 91, difficulties arise in initiating the exercise of the prerogative of mercy in a non-capital case since there is no mandatory reference to the advisory committee as in a capital case under article 92(1).

C The second issue is whether the notice given to the petitioner of his execution was so inadequate as to contravene his constitutional rights. [Reference was made to *Guerra v. Baptiste* [1996] 1 A.C. 397.] The Capital Punishment Procedure Act (c. 87) does not provide for any period of notice of execution to be given but justice and humanity require that a man under sentence of death should be given reasonable notice of the time of his execution. It cannot be maintained that there was a settled practice in The Bahamas when the Constitution of 1963 came into force of giving condemned men not less than 21 days' notice of their execution. Since 1966 not less than 18 days' notice has always been given, so that the petitioner had a legitimate expectation that he would be given at least 18 days' notice. The period of his notice was so unreasonable as to amount to an infringement of his constitutional rights.

E If the Board concludes that the petitioner's constitutional rights have been contravened, it has jurisdiction to commute the petitioner's sentence: see *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1, 33-34. Alternatively, the Board may remit the matter to the Supreme Court of The Bahamas, which has power to commute the sentence.

F *Sir Godfray Le Quesne Q.C., Michael Hamilton*, Director of Legal Affairs, The Bahamas, *Bernard Turner*, Deputy Director of Legal Affairs, The Bahamas, and *Peter Knox* for the respondents. *de Freitas v. Benny* [1976] A.C. 239 is still good law. It was not a decision that prerogative powers in general were not open to review, but was concerned with the nature of the act of which review was sought. It was accepted in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374; *Burt v. Governor-General* [1992] 3 N.Z.L.R. 672 and *Reg. v. Secretary of State for the Home Department, Ex parte Bentley* [1994] Q.B. 349 that reviewability depended on the nature of the act. Statements in those cases that the exercise of prerogative power might be subject to judicial review had the qualification that the subject matter of the exercise of such prerogative power had to be justiciable. The power of commutation of a death sentence is by its nature not subject to judicial review.

H The activities of the advisory committee under article 92 in a death sentence case form part of the process whereby the Governor-General may exercise his power under article 90(1)(c) to commute a death sentence. Such activities cannot therefore be subject to judicial review. However, the decision of the advisory committee does not deprive anyone

of any benefit or advantage because article 92(3) expressly provides that the minister is not obliged to act in accordance with the committee's advice. The minister's decision takes into account all relevant matters, including matters which could not be urged before a court. Judicial review is incompatible with the exercise of the minister's power. The court, however, may compel performance of the procedural duties imposed on the minister and the advisory committee by article 92.

The law is that a defendant convicted of murder must be sentenced to death. The court can intervene only in exceptional circumstances to protect a condemned man's constitutional rights. Lord Diplock correctly stated, in *de Freitas v. Benny* [1976] A.C. 239, 247, that mercy was not the subject of legal rights but began where legal rights ended. The prerogative of mercy is entrusted by the Constitution to the Governor-General and his advisers to be exercised at their discretion. [Reference was made to *Hanratty v. Lord Butler* (unreported), 12 May 1971; Court of Appeal (Civil Division) Transcript No. 171 of 1971; *Burt v. Governor-General* [1992] 3 N.Z.L.R. 672; *Reg. v. Secretary of State for the Home Department, Ex parte Bentley* [1994] Q.B. 349 and *Reg. v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Everett* [1989] Q.B. 811.] *Lauriano v. Attorney-General of Belize* (unreported), 20 September 1995 is not relevant because no attention was paid to *de Freitas v. Benny* [1976] A.C. 239, and the provisions of the Constitution of Belize considered differed from those of the Constitution of The Bahamas.

Only the minister is given the right to place material before the advisory committee. The Constitution provides by article 92(1) that the only material which the minister must require the advisory committee to take into consideration in a death sentence case is a written report of the case by the trial judge. It cannot therefore be implied from the Constitution that the committee must take into consideration other matters, such as representations by the condemned man. The minister has a discretion as to any other material which he may require the committee to consider. He is not under an enforceable obligation to act fairly in relation to the information which he places before the committee. [Reference was made to *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531 and *Reg. v. Secretary of State for the Home Department, Ex parte Duggan* [1994] 3 All E.R. 277.]

When the Constitution of 1963 came into force there was no settled practice regarding the period of notice of the execution to be given to the condemned man. The petitioner could therefore have no legitimate expectation that he would be given 18 or 21 days' notice: see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 408, per Lord Diplock. Although the petitioner was given less than four clear days' notice, the notice was nevertheless reasonable. [Reference was made to *Guerra v. Baptiste* [1996] 1 A.C. 397.] However, there is now no possibility of his constitutional rights being infringed by reason of the length of his notice, since that notice was given more than six months ago, on 26 May 1995.

Tattersall Q.C. in reply. The concept of judicial review in present circumstances would not involve the court's view being substituted for that of the minister. If a decision-maker makes a decision which is so

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outrageous that it defies logic and sense the court can quash the decision and the decision-maker will then have to reconsider the matter. If the court is of the opinion that there is only one proper decision which can be made it says so, and that becomes the decision not of the court but of the decision-maker.

Cur. adv. vult.

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5 February 1996. The judgment of their Lordships was delivered by LORD GOFF OF CHIEVELEY.

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The petitioner, Thomas Reckley, was charged with murder on 4 May 1989. He was tried before Sawyer J. and a jury, and on 7 November 1990 he was sentenced to death. He appealed to the Court of Appeal against both conviction and sentence. His appeal was dismissed on 3 May 1991. He petitioned for special leave to appeal to the Privy Council; but his petition was dismissed on 12 March 1992. On 8 May 1992 lawyers acting for the petitioner wrote to the Advisory Committee on the Prerogative of Mercy established under article 91 of the Bahamian Constitution, drawing their attention to certain features of the petitioner's case. They received no acknowledgement of the receipt of that letter, or answer to it.

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At the time when the petitioner's petition to the Privy Council for leave to appeal was dismissed, there were pending before the Constitutional Court in The Bahamas proceedings (*Jones v. Attorney-General of the Commonwealth of The Bahamas*) in which a number of persons under sentence of death were claiming that the death sentence was contrary to the Bahamian Constitution and so unlawful. The Attorney-General indicated that no death sentence would be carried out until after the determination of those proceedings. The proceedings were finally determined on 11 April 1995, when the Privy Council [1995] 1 W.L.R. 891 dismissed an appeal from the decision of the Bahamian courts rejecting the challenge to the lawfulness of the death penalty.

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The advisory committee met to consider the petitioner's case on 18 May 1995, and following that meeting the minister decided to advise the Governor-General that the law should be allowed to take its course. On 25 May 1995 a warrant for the execution of the petitioner was signed by the Governor-General directing that the execution should take place at 8 a.m. on Tuesday, 30 May 1995. The warrant was read to the petitioner at 6.30 a.m. on Friday, 26 May. The warrant contained a statement to the effect that the petitioner's case had been considered by the advisory committee, and there is no evidence to suggest that the relevant paragraph was not read to him; but it appears that he may not have appreciated the contents of that paragraph, since it is recorded in manuscript at the foot of the warrant that he said that he had been told that they were going to consider his case in the committee. Apart from the reading of the warrant of execution itself, the petitioner was not himself directly informed of the fact that the advisory committee had considered his case until he received a letter from the Ministry of Public Safety and Immigration at about 10 a.m. on Monday, 29 May which, though delivered at the prison on the evening of Friday, 26 May, was not delivered to him until the Monday morning.

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However there is evidence that the contents of the letter in question were communicated to the petitioner's legal advisers on the evening of Thursday, 25 May; and on Friday, 26 May proceedings were commenced on behalf of the petitioner in the form of a constitutional motion in the Supreme Court, claiming that his execution pursuant to the warrant would be contrary to his constitutional rights. Two points were taken. First, it was said that, having regard to the time which had elapsed since the death sentence was passed upon him, to execute him would constitute inhuman and degrading punishment contrary to article 17 of the Bahamian Constitution, on the principle stated by the Privy Council in *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1. Second, it was claimed that the petitioner had not been afforded the right to see the judge's report and other material placed by the minister before the advisory committee, and to make representations to the committee with reference to that material before they tendered their advice to the minister; their Lordships will refer to this as "the advisory committee point."

On Monday, 29 May, an application was made to Osadebay J. for an order preventing the implementation of the sentence of death until final determination of the constitutional motion. In the evening of the same day, he refused the stay. His reasons for so doing (which were delivered on 1 June) were in brief as follows. First, since the delay in the petitioner's execution was due to the de facto moratorium imposed pending the outcome of the proceedings in *Jones v. Attorney-General of the Commonwealth of The Bahamas* [1995] 1 W.L.R. 891, his execution following such delay would not constitute a breach of constitutional rights, on the principle in *Pratt's* case [1994] 2 A.C. 1. Second, the advisory committee point was contrary to decisions of the Privy Council, including *de Freitas v. Benny* [1976] A.C. 239. Later in the evening of Monday, 29 May, an appeal from the decision of Osadebay J. was heard by the Fountain C.J. (Ag.), sitting as a single judge of the Court of Appeal. Early on the following morning he dismissed the appeal, and refused to grant a stay of execution pending a petition for leave to appeal to the Privy Council; but on the same day, Tuesday, 30 May, the Judicial Committee granted a stay of execution pending the hearing of a petition for leave to appeal. On Tuesday, 13 June, after a hearing on Thursday, 8 June, the Judicial Committee [1995] 2 A.C. 491, while expressing the opinion that there were no arguable grounds for an appeal on the *Pratt* point, nevertheless extended the stay of execution until after the hearing and determination of the appeal in the Trinidadian case of *Guerra v. Baptiste*, in which the Privy Council was being invited to reconsider the decision in *de Freitas v. Benny* [1976] A.C. 239. Judgment in *Guerra's* case [1995] 3 W.L.R. 891 was delivered on 6 November 1995, but their Lordships in that case decided that the advisory committee point did not arise for decision and so declined to deal with it. As a result the petition for leave to appeal from the refusal of a stay of execution in the present case was restored before the Privy Council on 9 November, when it was further adjourned for hearing on 4 December, the argument to be limited to two points, viz. (1) the advisory committee point; and (2) a second point, arising out of the decision in *Guerra v. Baptiste* [1996] 1 A.C. 397, that the period of notice of execution given to the petitioner

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was so short as to constitute a breach of his constitutional rights. Their Lordships declined to permit any further argument on the *Pratt* point. The stay of execution was extended until after the hearing and determination of the petition for leave.

On 4 December the petition for leave was restored for hearing before their Lordships, when argument was addressed to them on the two points. Their Lordships can deal with the second point briefly, since they are satisfied that there was no substance in it.

In *Guerra v. Baptiste* [1996] 1 A.C. 397 the Privy Council decided that justice and humanity require that a man under sentence of death should be given reasonable notice of the time of his execution. Such notice was required

"to enable a man to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself, as best he can, to face his ultimate ordeal:" see p. 418;

and also to "provide him with a reasonable opportunity to obtain legal advice and to have resort to the courts for such relief as may at that time be open to him:" see p. 420. It was also held in that case, restoring on this point the decision of Davis J. in *Andy Thomas v. The State* (unreported), 29 July 1987, Nos. 6346 and 6347 of 1985, that there was a settled practice in Trinidad and Tobago at the date when the Constitution came into force that a reasonable time for this purpose should be at least four clear days, including a weekend; and that, on the principle stated by Lord Diplock in *Thornhill v. Attorney-General of Trinidad and Tobago* [1981] A.C. 61, 71, such a settled practice was binding under the Constitution.

These were the principles which Mr. Tattersall sought to invoke on behalf of the petitioner in the present case. His first submission was that there was a settled practice in The Bahamas that a condemned man should be given no less than 21 days' notice of his execution. This submission however failed on the evidence before their Lordships, which provided no basis for any such settled practice. Certainly there was none before the coming into force of the Constitution in 1963. During that time, the evidence before their Lordships showed that the periods of notice of execution varied from one clear day (in 1955) to 13 clear days (in 1957). There appear to have been only two executions between 1963 and the Constitution of 1969; nothing of value can be derived from them. Since 1969, there were variations between seven days (for two cases in 1974, both concerned with the service of a second warrant) and 37 days (in 1981). No settled practice can be inferred from evidence such as this. Mr. Tattersall briefly attempted to retrieve his case on this point by recasting it as one of legitimate expectation; but their Lordships can see no substance in this argument.

Mr. Tattersall's alternative submission was that the period of notice given to the petitioner was in any event unreasonable. The period of notice given was in fact between 6.30 a.m. on Friday, 26 May and 8 a.m. on Tuesday, 30 May. This period was less than the four clear days which was the subject of the settled practice in Trinidad and Tobago, but in fact provided as much time for the requisite purposes as that settled practice

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did. Although the period of notice was short, their Lordships are unable to hold that it was so short as to be unreasonable in the circumstances. It follows that the submission on this point must in any event fail; and it is unnecessary for their Lordships to advert to the obvious difficulty which arises in relation to a point of this kind, which is that the date fixed for the execution will in fact have been vacated, so that the period of notice in question has ceased to be of relevance. Their Lordships wish to record that Mr. Tattersall also complained about the late delivery of the letter to the petitioner informing him of the decision of the minister, having consulted with the advisory committee, to advise the Governor-General that the law should take its course. While it is reprehensible that this letter was not delivered shortly after its receipt at the prison, their Lordships cannot see that its late delivery gives rise to any legal consequences in the present case.

For these reasons their Lordships are satisfied that no arguable point arose on this submission. They turn therefore to consider the advisory committee point, which was the substantial point raised before them. Their Lordships recognise that it is unusual for a point of this character to be considered upon an adjourned hearing of a petition for leave to appeal from a refusal of stay of an execution. Their Lordships have taken that exceptional course in the present case because it involves a challenge to a previous decision of the Privy Council and so could not have been successfully advanced in the Bahamian courts.

To address this point, it is necessary first for their Lordships to refer to articles 90, 91 and 92 of the Bahamian Constitution of 1973. Article 90(1) provides that 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 The Bahamas a pardon, either free or subject to lawful conditions; (b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence; (c) substitute a less severe form of punishment for that imposed by any sentence for such an offence; or (d) remit the whole or any part of any sentence passed for such an offence or any penalty or forfeiture otherwise due to Her Majesty on account of such an offence."

It follows that there are conferred on the Governor-General a very wide range of powers which, under article 90(2), are to be exercised by him in accordance with the advice of a designated minister. For present purposes the relevant power is that conferred by article 90(1)(c), viz., in the present case to substitute a sentence of life imprisonment for a sentence of death.

Article 91 makes provision for the Advisory Committee on the Prerogative of Mercy, and establishes its constitution, viz. the designated minister, the Attorney-General, and between three and five other members appointed by the Governor-General. Article 92 is concerned with the functions of the advisory committee, and provides:

"(1) Where an offender has been sentenced to death by any court for an offence against the law of The Bahamas, the minister shall cause a written report of the case from the trial Justice of the Supreme

Court, together with such other information derived from the record of the case or elsewhere as the minister may require, to be taken into consideration at a meeting of the advisory committee. (2) The minister may consult with the advisory committee before tendering any advice to the Governor-General under paragraph (2) of article 90 of this Constitution in any case not falling within paragraph (1) of this article. (3) The minister shall not be obliged in any case to act in accordance with the advice of the advisory committee. (4) The advisory committee may regulate its own procedure. (5) In this article 'the minister' means the minister referred to in paragraph (2) of article 90 of this Constitution."

Article 92(1) is directly in point in cases such as the present. The effect is that, in death sentence cases, the question of the exercise of the prerogative of mercy will automatically be considered by the advisory committee. This is to be contrasted with all other cases in respect of which it is provided, by article 92(2), only that the minister may consult with the committee. In neither case however is the minister obliged to act in accordance with the advice of the committee. An important feature of death sentence cases is that the minister is required to cause a written report from the trial judge to be taken into consideration at the meeting of the committee "together with such other information derived from the record of the case or elsewhere as the minister may require." On the face of this provision, therefore, there is (apart from the trial judge's report) no obligation on the minister to place any particular information before the advisory committee in death sentence cases. It was the submission of the respondents that these provisions reflected the essential nature of the exercise of the prerogative of mercy in death sentence cases, namely that this is a personal discretion vested in the minister to depart from the law, as a matter of grace.

Even so it was the first submission of Mr. Tattersall on behalf of the petitioner that the exercise of the prerogative of mercy was in the present case amenable to judicial review. His second submission was that, in any event, the principle of fairness required in a death sentence case that the convicted man should be entitled to make representations to the advisory committee; and since effective representations could not be made by him unless he or his advisers were aware of the nature of material before the committee antagonistic to his case, the gist of that material must be made known. In support of the latter part of that submission, reliance was placed in particular on the decision of the House of Lords in *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531.

Mr. Tattersall's submissions immediately face the difficulty that they are contrary to the decision of the Privy Council in *de Freitas v. Benny* [1976] A.C. 239. In that case, which arose by way of an appeal under the Constitution of Trinidad and Tobago, the appellant claimed, at p. 247, that he was entitled (1) to be shown the material which the designated minister placed before the advisory committee, and (2) to be heard by the committee in reply at a hearing at which he was legally represented. It was claimed that the functions of the committee were quasi-judicial in

nature and accordingly that "any failure to grant to the appellant the rights he claims would contravene the rules of natural justice and infringe his right not be deprived of life except by due process of law." The submission was rejected by the Judicial Committee in a judgment delivered by Lord Diplock. His judgment is so germane to the present case that their Lordships propose to take the exceptional course of quoting the relevant part in full. It reads, at pp. 247-248:

"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, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. 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. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function. While capital punishment was still a lawful penalty for murder in England it was the practice of the Home Secretary in every capital case to call for a report of the case from the trial judge and for such other information from such other sources as he thought might help him to make up his mind as to the advice that he would tender to the sovereign in the particular case. But it never was 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.

"Section 70(1) of the Constitution makes it clear that the prerogative of mercy in Trinidad and Tobago is of the same legal nature as the royal prerogative of mercy in England. It is exercised by the Governor-General but 'in Her Majesty's name and on Her Majesty's behalf.' By section 70(2) the Governor-General is required to exercise this prerogative on the advice of a minister designated by him, acting in accordance with the advice of the Prime Minister. This provision 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 is the provision in section 72(1) and (2) that the minister before tendering his advice must, in a case where an offender has been sentenced to death, and may, in other cases, consult with the advisory committee established under section 71, of which the minister himself is chairman; but section 72(3) expressly provides that he is not obliged in any case to act in accordance with their advice. In capital cases the advisory committee too must see the judge's report and any other information that the minister has

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required to be obtained in connection with the case, but it still remains a purely consultative body without any decision-making power.

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"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 any sense quasi-judicial. This being so the appellant has no legal right to have disclosed to him any material furnished to the minister and the advisory committee when they are exercising their respective functions under sections 70 to 72 of the Constitution."

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The decision in *de Freitas v. Benny* was concerned with the Constitution of Trinidad and Tobago; but the observations of Lord Diplock are equally apposite to the Constitution of The Bahamas.

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It is of some interest to observe that articles 90 to 92 of the present Bahamian Constitution first appeared in the Constitution of 1963, which came into force at a time before capital punishment was abolished in Great Britain in 1965. At that time, there can be no doubt that the status of the Home Secretary's discretion in death sentence cases in England was as described by Lord Diplock; and it appears that the statutory intention, when enacting articles 90 to 92 of the Bahamian Constitution of 1963, was to replicate that discretion, save that the designated minister was to be provided with the benefit of advice from an advisory committee. It was recognised by Lord Diplock in *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342, 1346, that section 89 of the Constitution of Trinidad and Tobago (identical to article 92 of the Bahamian Constitution) imposes duties upon the designated minister and the advisory committee arising under public law; and further that no warrant of execution should be issued

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"until after the advisory committee has considered the case and proffered its advice to the designated minister and the designated minister has tendered his own advice (which may differ from that of the advisory committee) to the President"—in The Bahamas, to the Governor-General.

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Even so, their Lordships consider that the introduction of the advisory committee, and the statutory provisions governing the exercise of its functions in death sentence cases, reinforce Lord Diplock's analysis in *de Freitas v. Benny* [1976] A.C. 239, 247-248. 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

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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.

The point can be placed in a broader context. A man accused of a capital offence in The Bahamas has of course his legal rights. In particular he is entitled to the benefit of a trial before a judge and jury, with all the rights which that entails. After conviction and sentence, he has a right to appeal to the Court of Appeal and, if his appeal is unsuccessful, to petition for leave to appeal to the Privy Council. After his rights of appeal are exhausted, he may still be able to invoke his fundamental rights under the Constitution. For a man is still entitled to his fundamental rights, and in particular to his right to the protection of the law, even after he has been sentenced to death. If therefore it is proposed to execute him contrary to the law, for example because there has been such delay that to execute him would constitute inhuman or degrading punishment, or because there has been a failure to consult the Advisory Committee on the Prerogative of Mercy as required by the Constitution, then he can apply to the Supreme Court for redress under article 28 of the Constitution. 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. As Lord Diplock said in *de Freitas v. Benny* [1976] A.C. 239, 247G: "Mercy is not the subject of legal rights. It begins where legal rights end." And the act of the advisory committee in advising the minister is of the same character as the act of the minister in advising the Governor-General.

Mr. Tattersall invoked a number of authorities in support of his argument; but in their Lordships' opinion, they did not assist him. First, he cited the leading case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374. That case recognised that the exercise of a prerogative power was not ipso facto immune from judicial review; but it certainly did not go so far as to suggest that every exercise of such a power was amenable to that jurisdiction. This was made plain in a number of passages from their Lordships' speeches in that case. To select just one example, Lord Scarman said, at p. 407:

"if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in

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A accordance with the principles developed in respect of the review of the exercise of statutory power."

See also Lord Diplock, at pp. 408-409, and Lord Roskill, at p. 418A-C. These passages are, in their Lordships' opinion, inconsistent with the submission advanced on behalf of the petitioner in the present case, in that the exercise of the prerogative of mercy in a death sentence case under the Bahamian Constitution is, for the reasons already given, not justiciable. Their Lordships were also referred to *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. Neither case was however directly concerned with the possibility of judicial review of the exercise of the prerogative of mercy in a death sentence case; and their Lordships did not for present purposes derive assistance from them. *Reg. v. Secretary of State for the Home Department, Ex parte Bentley* [1994] Q.B. 349 was concerned with the response of the Home Secretary to a campaign that a man, who had been executed for murder in 1953, should be granted a posthumous pardon. The Home Secretary considered that there were no grounds upon which he could recommend a free pardon. It was submitted to the Divisional Court that the Home Secretary had erred in law in not considering the possibility of granting a posthumous conditional pardon. The court accepted the submission and remitted the matter to the Home Secretary for further consideration in the light of their ruling. Their Lordships do not however consider that this decision which, as the Divisional Court itself recognised, was concerned with an exceptional situation, has any bearing on the present case. *Burt v. Governor-General* [1992] 3 N.Z.L.R. 672, a decision of the New Zealand Court of Appeal, contains a valuable though obiter discussion by Cooke P. on the exercise of the power of pardon. The discussion was however inconclusive; and it was inevitably coloured by its New Zealand context, in particular the impact of section 23 of the New Zealand Official Information Act 1982 (under which a petitioner has a right to information about a recommendation concerning him) and of the New Zealand Bill of Rights Act 1990. Moreover the views there tentatively expressed by Cooke P. were not directly concerned with the reviewability of the exercise of the prerogative of mercy in a death sentence case, still less with such a case governed by articles 90 to 92 of the Bahamian Constitution, including the provision relating to the functions of the advisory committee.

Their Lordships were also referred to the recent decision of the Supreme Court of Belize in *Lauriano v. Attorney-General of Belize* (unreported), 20 September 1995, which appears to be inconsistent with the conclusion reached by their Lordships in the present case. It is sufficient for present purposes to record that their Lordships found nothing in the reasoning in that case to dissuade them from their present course.

In their Lordships' opinion the petitioner faces similar difficulties in respect of the alternative submission advanced on his behalf, viz. that the principle of fairness required that he should be entitled to make representations to the advisory committee and, for that purpose, to see, or to be provided with the gist of, the material (including the trial judge's

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report) which had been placed before the advisory committee. In support of this proposition, reliance was placed on the decision of the House of Lords in *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531. That case was however concerned with a different subject matter, viz. the exercise by the Home Secretary of his statutory power to release on licence a person serving a sentence of life imprisonment. It was there held that the Home Secretary was bound to afford a prisoner serving a mandatory life sentence the opportunity to submit in writing representations as to the penal element in the sentence which he must serve, and further that, to enable those representations to be effective, he must make available to the prisoner the gist of the material upon which he will found when making his decision. What is important for present purposes, however, is that Lord Mustill (with whose speech the remainder of the Appellate Committee agreed) was careful, at p. 556G–H, to distinguish that case from a case in which the prisoner is “essentially in mercy” where there is “no ground to ascribe to him the rights which fairness might otherwise demand:” see p. 556H. That is precisely the present case. 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.

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.

For these reasons, their Lordships are satisfied that the decision of the Privy Council in *de Freitas v. Benny* [1976] A.C. 239 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

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A arguable point to justify the grant of leave to appeal from the decision of Fountain C.J. (Ag.) refusing a stay of execution, and such leave to appeal must therefore be refused.

B Their Lordships wish to conclude by stating that their opinion on the advisory committee point has been expressed solely with reference to death sentence cases, for which special provision is made in article 92(1). They have not addressed the question with reference to the exercise of the powers of the Governor-General in other cases arising under article 90(1), and do not therefore wish to be understood to have expressed any opinion on those cases.

Their Lordships will accordingly humbly advise Her Majesty that this petition ought to be dismissed.

C *Solicitors: Clifford Chance; Charles Russell.*

13 March. Following the dismissal by the Judicial Committee of the Privy Council (Lord Keith of Kinkel, Lord Browne-Wilkinson and Lord Mustill) of a petition for a stay of his execution the petitioner was executed.

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[HOUSE OF LORDS]

E REGINA APPELLANT

AND

BROWN (GREGORY) RESPONDENT

1995 Nov. 8;

Lord Goff of Chieveley, Lord Griffiths,

1996 Feb. 8

Lord Jauncey of Tullichettle, Lord Browne-Wilkinson
and Lord Hoffmann

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Crime—Computer misuse—Improper use of personal data—Police officer checking information on police national computer—Information retrieved and displayed on screen—Purpose other than that described in register entry—No further use made of information—Whether improper use of data—Data Protection Act 1984 (c. 35), s. 5(2)(b)

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The defendant, a police officer, was entitled to make use of the police national computer database for the registered purpose of policing as agent of his chief constable, who was a registered user under the Data Protection Act 1984.¹ On two occasions, in order to assist a friend who ran a debt-collection agency, the defendant caused checks to be made on vehicles owned by debtors from whom the agency had been engaged to recover debts. The information thereby obtained was displayed on a computer screen. On the first occasion the search did not reveal any personal data as defined by the Act since the vehicle was owned by a company.

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¹ Data Protection Act 1984, s. 5(2)(b): see post, p. 547F–G.