West Indian Reports/Volume 54 /Thomas and Another v Baptiste and Others - (1998) 54 WIR 387

(1998) **54 WIR 387**

Thomas and Another v Baptiste and Others

COURT OF APPEAL OF TRINIDAD AND TOBAGO

DE LA BASTIDE CJ, SHARMA AND HAMEL-SMITH JJA

4 AUGUST 1998

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

LORD BROWNE-WILKINSON, LORD GOFF OF CHIEVELEY, LORD STEYN, LORD HOBHOUSE OF WOODBOROUGH AND LORD MILLETT

5 OCTOBER 1998; 27 JANUARY, 17 MARCH 1999

Criminal law - Sentence - Death sentence - Petition by condemned person to international human rights body - 'Instructions relating to applications from persons under sentence of death' issued by Trinidad and Tobago Government - Instructions laying down time limits for petitions - Instructions disproportionate and invalid

Fundamental rights and freedoms - Due process of law - Death sentence - Right to pursue appellate or analogous procedures before execution of sentence for reduction or commutation of sentence - Meaning of 'due process of law' - Constitution of Trinidad and Tobago, section 4(a)

Fundamental rights and freedoms - Cruel and unusual treatment or punishment - Death sentence - Warrant for execution read before determination by international human rights body - Sentence not thereby rendered cruel and unusual - Constitution of Trinidad and Tobago, section 5(2)(b)

Natural justice - Legitimate expectation - Convicted person petitioning international human rights body - Time scale for processing of petition in existence - Time scale held to be unlawful - No legitimate expectation that execution of death sentence would be delayed pending petition

Fundamental rights and freedoms - Cruel and unusual treatment or punishment - Prison conditions under which persons held - Whether capable of constituting cruel and unusual treatment or punishment - Constitution of Trinidad and Tobago, section 5(2)(b)

Fundamental rights and freedoms - Cruel and unusual treatment or punishment - Prison conditions under which persons held - Effect of such conditions when constituting cruel and unusual treatment or punishment - Constitution of Trinidad and Tobago, section 5(2)(b)

(1998) 54 WIR 387 at 388

Criminal law - Sentence - Death sentence - Prerogative of mercy - Exercise of - Factors influencing exercise of prerogative - Restoration of death sentence after its commutation

The appellants T and H had both been convicted of murder and sentenced to death. They had exhausted all possible avenues of appeal. In October 1997, the Government of Trinidad and Tobago issued 'Instructions relating to applications from persons under sentence of death' establishing a series of successive time limits for petitions to the Inter-American Commission of Human Rights (the 'IACHR') and the United Nations Human Rights Committee by persons who had been condemned to death. These were intended to restrict

the time following the passing of sentence of death which might be taken up by petitioning these bodies. The appellants both petitioned the IACHR. Subsequently, and before the IACHR had concluded its procedures, warrants were read for the execution of the appellants. Both appellants (in separate proceedings) issued constitutional motions. The appellant T's motion was heard by Jamadar J who allowed it, vacated the sentence of death and ordered that the appellant be held in custody at the President's pleasure. The motion of the appellant H was dismissed by Kangaloo J. The Prison Commissioner in the case of the appellant T and the appellant H appealed to the Court of Appeal, and their appeals were heard consecutively. The Court of Appeal allowed the appeal in the case of the appellant T (in effect reinstating the death sentence) and dismissed it in the case of the appellant H; the court gave leave to appeal to the Privy Council in both cases. In reaching its decision, the court ruled that the appalling conditions in which the appellants had been detained in prison, although in breach of the Prison Rules, did not constitute a breach of their constitutional rights not to be subjected to cruel and unusual treatment or punishment (cf Constitution of Trinidad and Tobago, section 5(2)(*b*)). On the appeal to the Privy Council, the appellants argued that they had a constitutional right to have their petitions to the IACHR determined before their sentences were carried out, and that the conditions under which they had been held in prison constituted a breach of section 5(2)(*b*) entitling them to a commutation of sentence. Further, the appellant T argued that, following its decision, the Court of Appeal had had no power to impose or to reinstate the death sentence.

Held (Lord Goff of Chieveley and Lord Hobhouse of Woodborough dissenting) advising that the appeals be allowed and the execution of the death sentences be stayed:

(1) The 'Instructions relating to applications from persons under sentence of death' issued by the Government in October 1997 were

disproportionate, in that they provided separate and successive time limits for each application and for each stage of each application and thereby unnecessarily curtailed the time limit within which the first such body could complete its processes; accordingly, they curtailed petitioners' rights further than was necessary to deal with the mischief created by delays in the procedures before the international bodies and were unlawful.

(2) In the Constitution of Trinidad and Tobago (cf section 4(*a*)), the 'due process' clause, which was derived ultimately from the Magna Carta rather than from any international convention or declaration, (*inter alia*) excluded legislative and executive interference with the judicial process; the phrase 'due process of law' was a compendious expression invoking the concept of the rule of law and universally accepted standards of justice accepted by civilised nations which observed the rule of law, and the phrase was as applicable to appellate processes as to trial proceedings; accordingly, the right to 'due process of law' entitled a condemned man to be allowed to complete any appellate or analogous legal process that was capable of resulting in a reduction in or commutation of his sentence before the process was rendered nugatory by executive action; and the invalidity of the Instructions precluded the Government relying on them to justify carrying out the death sentences.

Lassalle v Attorney-General (1971) 18 WIR 379 applied.

Fisher v Minister of Public Safety and Immigration (No 2) (1998) 53 WIR 27 distinguished.

(3) Nevertheless, that the appellants' argument that to execute a condemned man whilst his petition to the IACHR was outstanding amounted to cruel and unusual treatment or punishment (section 5(2)(*b*) of the Constitution) could not be upheld.

Fisher v Minister of Public Safety and Immigration (No 2) (1998) 53 WIR 27 followed.

(4) That (Lord Goff and Lord Hobhouse concurring) the appellants' argument based on their legitimate expectation that their executions would be delayed whilst their petitions to the IACHR were heard could not have survived the publication of the Instructions, which (albeit in the result unlawful) made it clear to the appellants in fact that the time limit for petitions might expire before their petitions were determined.

Fisher v Minister of Public Safety and Immigration (No 2) (1998) 53 WIR 27 applied.

(1998) 54 WIR 387 at 390

(5) That the Board would not depart from the view of the Court of Appeal that the conditions under which the appellants were in fact held in prison did not constitute cruel and unusual treatment (section 5(2)(*b*)); even had it done so, however (Lord Goff and Lord Hobhouse concurring, and Lord Steyn dissenting), save in the most exceptional circumstances (and contrary to the approach of the Inter-American Court of Human Rights) commutation of sentence would not have been an appropriate remedy.

(6) That the Court of Appeal, having set aside the order commuting sentence made by the judge on the constitutional motion brought by the appellant T, the mandatory sentence of death passed on the appellant T stood; but it had neither been imposed nor reinstated by the Court of Appeal, and the fact of the restoration of the death sentence might be a factor for consideration in relation to the exercise of the prerogative of mercy.

Director of Public Prosecutions v Smith [1961] AC 290 considered.

Cases referred to in the judgments of the Court of Appeal

de Freitas v Benny (1975) 27 WIR 318, [1976] AC 239, [1975] 3 WLR 388, PC.

Director of Public Prosecutions v Jaikaran Tokai (1996) 48 WIR 376, [1996] AC 856, [1996] 3 WLR 149, PC.

Fisher v Minister of Public Safety and Immigration (1997) 52 WIR 1, [1998] AC 673, [1998] 3 WLR 201, PC.

Guerra v Baptiste (1995) 43 WIR 439, [1996] AC 397, [1995] 4 All ER 583, [1995] 3 WLR 891, [1996] 1 Cr App Rep 533, PC.

Henfield v Attorney-General, Farrington v Minister of Public Safety and Immigration (1996) 49 WIR 1, [1997] AC 413, [1996] 3 WLR 1079, PC.

Jones, Meadows, Neely, Poiter, Heastie, Hamilton v Attorney-General (1995) 46 WIR 8, [1995] 4 All ER 1, [1995] 1 WLR 891, PC.

Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, [1995] 3 LRC 1, Australia High Court.

Pratt v Attorney-General (1993) 43 WIR 340, [1994] 2 AC 1, [1993] 4 All ER 769, [1993] 3 WLR 995, PC.

Rayner (J H) (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, [1989] 3 All ER 523, [1989] 3 WLR 969, HL.

Reckley v Minister of Public Safety and Immigration (No 2) (1996) 47 WIR 9, [1996] AC 527, [1996] 1 All ER 562, [1996] 2 WLR 281, PC.

Riley v Attorney-General (1982) 35 WIR 279, [1983] 1 AC 719, [1982] 3 All ER 469, [1982] 3 WLR 557, PC.

Sieuraj Sookermany v Director of Public Prosecutions (1996) 48 WIR 346, Trinidad and Tobago CA.
(1998) 54 WIR 387 at 391

Soering v United Kingdom (1989) 11 EHRR 439, European Court of Human Rights.

Thornhill v Attorney-General (1979) 31 WIR 498, [1981] AC 61, [1980] 2 WLR 510, PC.

Other cases referred to in the reasons and dissenting opinions of the Privy Council

Adamson v State of California, 332 US 46 (1946), US Supreme Court.

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, [1947] 2 All ER 680, England CA.

Attorney-General v Whiteman (1991) 39 WIR 397, [1991] 2 AC 240, [1991] 2 All ER 924, [1991] 2 WLR 1200, PC.

Director of Public Prosecutions v Smith [1961] AC 290, [1960] 3 All ER 161, [1960] 3 WLR 546, 44 Cr App Rep 261, HL.

Fisher v Minister of Public Safety and Immigration (No 2) (1998) 53 WIR 27, [1999] 2 WLR 349, PC.

Frank v Mangum, 237 US 309 (1915), US Supreme Court.

Hinds, Hutchinson, Martin, Thomas v R (1975) 24 WIR 326, [1977] AC 195, [1976] 1 All ER 353, [1976] 2 WLR 366, PC.

Holden v Hardy, 169 US 366 (1897), US Supreme Court.

Hurtado v State of California (1883) 110 US 516 (1883), US Supreme Court.

Johnson v Jamaica (1996) 1 Butterworths Human Rights Cases 37.

Lassalle v Attorney-General (1971) 18 WIR 379, Trinidad and Tobago CA.

R v Secretary of State for the Home Department, ex parte Ahmed (1998) (unreported) 30 July, England CA.

R v Secretary of State for the Home Department, *ex parte Brind* [1991] 1 AC 696, [1991] 1 All ER 720, [1991] 2 WLR 588, HL.

Ramesh Lawrence Maharaj v Attorney-General (No 2) (1978) 30 WIR 310, [1979] AC 385, [1978] 2 All ER 670, [1978] 2 WLR 902, PC.

Reckley v Minister of Public Safety and Immigration (No 2) (1996) 47 WIR 9, [1996] AC 527, [1996] 1 All ER 562, [1996] 2 WLR 281, PC.

Thomas (Andy) v The State (unreported) actions 6346 and 6347 of 1985, Trinidad and Tobago.

Walker v Sauvinet, 92 US 90 (1875), US Supreme Court.

Appeals

Cipriani Baptiste, the Commissioner of Prisons, Evelyn Ann Petersen, the Registrar of the Supreme Court, and the Attorney-General appealed to the Court of Appeal of Trinidad and Tobago (civil appeal 177 of 1998) against the decision of Jamadar J on 15 July 1998 (with a detailed judgment handed down on 21 July 1998) allowing the constitutional motion of Darrin Roger Thomas, vacating the sentence of death which had been imposed on him following his conviction for murder, and

ordering that he be held in custody during the President's pleasure (in effect, awaiting the outcome of Thomas's application to the Inter-American Commission of Human Rights, the 'IACHR'). Thomas cross-appealed. Haniff Hilaire appealed to the Court of Appeal (civil appeal 178 of 1998) against the decision of Kangaloo J on 23 July 1998 dismissing his constitutional motion for relief against the sentence of death which had been passed on him for murder; Cipriani Baptiste, Evelyn Ann Petersen and the Attorney-General were the respondents to this appeal. The Court of Appeal heard the two appeals consecutively. The facts and the grounds of appeal are set out in the judgment of de la Bastide CJ.

Marten Daly SC, *Russell Martineau SC*, *Mrs Mira Dean-Armorer*, *G Armorer*, *Ms D Sirjusingh*, *Ms N Aimes* and *Jonathan Walker* for the appellants in Thomas's case.

C Hamel-Smith and *Gregory Delzin* for the applicants Thomas and Hilaire.

Marten Daly SC, *Russell Martineau SC*, *Ms Haynes* and *Mr Sheppard* for the respondents in Hilaire's case.

Cur adv vult.

4 August 1998. The following judgments were delivered.

de la Bastide CJ read the following judgment. We heard these appeals one immediately after the other as, apart from three features which counsel for Hilaire said distinguished his case from that of Thomas, the same issues fell to be decided in both appeals. These were substantially argued in Thomas's appeal which was the first to be heard. I will address these common issues and then deal with the features in Hilaire's case which were said to distinguish it from Thomas's.

Both appeals are from judgments given in constitutional motions brought by persons under sentence of death to whom death warrants had been read. Both applicants claimed that it would be a breach of their constitutional rights to carry out the death sentence on them. In the case of Thomas, the application was successful and Jamadar J ordered that the sentence of death passed on him be vacated and he be held at a State prison or in other place of incarceration at the President's pleasure. In Hilaire's case, Kangaloo J dismissed the motion and upheld the constitutionality of the carrying out of the sentence.

It is unfortunate that there is no procedure, or at least none has ever been resorted to so far, for determining whether there is any constitutional bar to the carrying out of a death sentence without and prior to the reading of the death warrant to the person affected. The result is that tremendous pressure is put on the attorneys on both sides and on the judges to deal with the matter with great expedition. Such expedition

seems to be necessary because the mental anguish suffered as a result of delay in the carrying out of a death sentence must surely be greatly increased once the warrant for a person's execution has actually been read to him. Moreover, if the matter were raised in this way, the doctrine of *res judicata* would more certainly preclude the possibility of successive motions by the same person on different grounds.

In the case of Thomas, Jamadar J announced his decision on 21 July 1998 and handed down a careful and detailed judgment. In the case of Hilaire, Kangaloo J gave a much shorter oral judgment more or less at the conclusion of the hearing on 23 July 1998. We heard these appeals from 29 to 31 July 1998 and are delivering this judgment four days later. For reasons that are unnecessary to set out here, the only practical alternative to this schedule would have been to hear the appeals after the re-opening of term in mid-September. We are grateful to counsel on both sides for the assistance they provided both in their written arguments and orally within the time constraints which we were compelled to impose. As a result, these constraints have not left us at any disadvantage in receiving and considering the arguments on both sides on all relevant issues and in coming to a decision on them. The only disadvantage we have suffered will be reflected in the imperfections in the expression of my reasons in this somewhat hastily composed judgment.

It would be convenient here to set out certain pivotal dates in tabular form.

	Thomas	*Hilaire*
Date of conviction	15 November 1995	20 May 1995
Dismissal of appeal	6 June 1997	7 November 1996
Dismissal of petition to PC	11 March 1998	6 November 1997
Proof of filing IACHR	1 April 1998	7 October 1997
Mercy Committee meeting	12 June 1998	6 July 1998
Warrant read	25 June 1998	9 July 1998
Proposed date of execution	30 June 1998	14 July 1998.

The applicants, in addition to relying on what has been called 'raw' delay in the carrying out of the death sentences pursuant to the decision of the Privy Council in *Pratt v Attorney-General* (1993) 43 WIR 340, have raised two other matters on the relevance and effect of which the Privy Council has not yet pronounced. They are, firstly, the conditions and the treatment which they have endured in prison since their conviction

and, secondly, the denial to them of the opportunity of having their petitions to the Inter-American Commission on Human Rights ('IACHR') considered by that body and obtaining its recommendations.

'Raw' delay

The period between Thomas's conviction and the reading of the warrant to him was two years and seven months. The judge held that

this delay of itself was not sufficient to render the carrying out of the death sentence cruel and unusual. It appears from the advice of the Privy Council in *Henfield v Attorney-General*, *Farrington v Minister of Public Safety and Immigration* (1996) 49 WIR 1, that when there is no access by the convicted person to any international body, the presumption of unconstitutionality will not arise unless three years and six months have elapsed since conviction.

In this case, Trinidad and Tobago is a signatory to and has ratified the IACHR Convention. Thomas filed a petition with the IACHR on 31 March 1998 and proof of filing of it was provided to the State on 1 April 1998. In accordance with the Instructions relating to applications of persons under sentence of death which were issued by the Government of Trinidad and Tobago and gazetted on 13 October 1997 (to which fuller reference will be made later in this judgment), the time allowed for the request for the IACHR to communicate to the State party a request for a response and a stay of execution, was one month from notification of proof of filing the petition. This therefore would have expired on 1 May 1998. No such request was received until 26 June 1998.

In the meantime, Thomas's case was considered by the Mercy Committee on 12 June and the death warrant read to him on 25 June 1998. In these circumstances, it seems that the State could legitimately claim to have added to the three year and six month period which has the relevance mentioned above in cases where there is no access to international bodies, the period of approximately seven weeks between the date of the dismissal of the petition for special leave to appeal to the Privy Council and 1 May 1998 which can be properly treated as the period allowed to Thomas for purposes of access to the IACHR. This brings the two years and seven months that expired in this case even further away from what may be described as the outer limit.

The submission for Thomas was that the target of two years for domestic appeals having been exceeded in his case, albeit only by some four months, there was an onus on the State to explain why the target had not been achieved and no such explanation had been forthcoming. The presumption therefore was that the exceeding of the target was something avoidable for which the State should be held accountable. I do not agree that such a presumption would be reasonable on the basis of facts that are so notorious that we are entitled, in my view, to take judicial notice of them. Fact number one is that at the time when *Guerra v Baptiste* (1995) 43 WIR 439 was decided, or at least at the time when his appeal against conviction was determined by the Court of Appeal, delays of the order experienced in that case, ie four years, between conviction and the hearing and determination of the appeal by the Court of Appeal, were the norm rather than the exception. Fact number two is that these delays were due in large measure to the inadequacies of the system of recording and transcribing evidence and summations in capital cases.

These shortcoming could not be corrected overnight. Obviously, it was an exercise which took time and has produced a progressively improving performance to the extent that, currently, appeals in capital cases in the Court of Appeal are usually determined well within the target period of one year. In those circumstances I do

not accept the submission that, in the absence of an explanation by the State, the time taken for the domestic appeals in this case bespeaks some culpable lack of application or efficiency on the part of some agency or arm of the State which renders the delay unconscionable. Accordingly, the judge was right to reject the argument based on raw delay.

Conditions and treatment in prison

Before dealing with the facts here, I will address the more fundamental issue of whether this is a factor that is capable of rendering the carrying out of a death sentence unconstitutional and, if so, in what circumstances. I would begin by expressly stating that I am directing myself by certain well-established and often repeated principles. One is that constitutional rights must be interpreted in a broad and generous manner and, in construing them, one must avoid the austerity of tabulated legalism. It is also a principle that is not perhaps too obvious to state, that a person who has been convicted of murder and sentenced to death does not forfeit any of his constitutional rights and freedoms, save and except to the extent necessary for the due and proper carrying out of the sentence of death. A third principle is that, if the breach by the State of a person's constitutional rights is established, a plea of lack of resources will not excuse the breach or save the State from the consequences of it, nor persuade the court to withhold the appropriate remedy. On the other hand, I think it important to issue to myself the following direction. Section 4 of the Offences against the Person Act provides as follows: 'Every person convicted of murder shall suffer death'. This provision has been in our statute book almost from time immemorial. Section 6 of the Constitution provides that: 'Nothing in section 4 or 5 shall invalidate (*a*) an existing law; (*b*) ...'. The conjoint effect of these provisions is that the death sentence is in a sense buttressed by the Constitution and rendered immune from attack on the ground that it constitutes cruel and unusual punishment. It is important therefore that one should not by some form of judicial engineering derogate from this immunity by being astute to find collateral reasons for preventing the State from inflicting a form of punishment which is to many people repugnant.

It seems to me that the underlying principle of *Pratt* and the other cases like *Guerra v Baptiste*, which followed in its wake, is the conclusion that, given the delay that has occurred, to execute the prisoner would amount to cruel and unusual punishment. It is the act of hanging the man that is rendered cruel and unusual by the lapse of time. I do not understand the reasoning of their lordships to be that the State is being penalised for its tardiness by being prevented from carrying out the

sentence of death. Undoubtedly, the anguish that the convicted person has suffered during the delay is a key factor, but this is because it renders the carrying out of the sentence repugnant to basic standards of humaneness. Delay in carrying out a sentence of death also has this unique feature. It cannot sensibly be suggested that it is open to the person under sentence to take steps to put an end to the cause of his complaint by asking for his own execution to be hastened.

This is palpably not the case when the cause of complaint is not delay but inhumane treatment in prison. There is not in this case the same *nexus* between the abuse complained of and the death sentence as exists between delay in carrying out the death sentence and the actual carrying out of it. It is not apparent to me why it should be regarded as unreasonable at least to acknowledge and take account of the possibility that someone who is subjected to inhumane treatment while in prison may seek from the court an appropriate remedy to terminate and possibly compensate him for such treatment, whether or not he is under sentence of death, especially if the treatment in question not only contravenes the Prison Regulations themselves but has also crossed the threshold of cruel and unusual treatment.

Inhumane treatment in prison may be said in a sense to make worse any other punishment that follows, in the sense that it is in addition to it, but I do not see why it should for that reason so change the quality of what follows, be it hanging, flogging or simply more imprisonment, as to render it unconstitutional. If the

argument is that to permit the punishment that follows the inhumane treatment in prison is to impose a double penalty, this proves too much, for the person who has been subjected to the inhumane treatment should then be freed of any further punishment and be released.

I am very conscious that in the recent case, *Fisher v Minister of Public Safety and Immigration* (1997) 52 WIR 1, the majority in the Privy Council accepted that pre-trial delay might in exceptional circumstances be capable of being taken into account in determining whether it would be unconstitutional to carry out a sentence of death, presumably by way of a reduction in the extent of delay which is regarded as acceptable. Lord Goff of Chieveley expressed this view in these words (at page 11):

> 'Their lordships are unwilling, in a case concerned with constitutional rights, to impose any hard-and-fast limit on the matters to be taken into account when considering whether a right of this kind, especially one so fundamental as that in article 17(1) of the Bahamian Constitution, has been infringed. They are unwilling therefore to exclude the possibility that pre-trial delay, if sufficiently serious in character, may be capable of being taken into account for this purpose.'

No doubt their lordships will, possibly if and when these cases reach them, indicate whether the quality of treatment which convicted

persons receive in prison may also affect the length of acceptable delay in hanging them. For my part I would not so extend the principle in *Pratt.* Such an extension seems to me neither logical nor warranted. One notes that in the majority opinion in *Fisher* the range of possible matters to be considered in applying the *Pratt* principle was, at least, not expressly, extended beyond delay.

I do not rule out the possibility that the court might, in truly exceptional circumstances and in exercise of the very wide power it enjoys under section 14 of the Constitution to make orders for the purpose of enforcing the constitutionally-protected rights, prohibit the State from carrying out a sentence of death if because of the intransigence of the relevant authorities that appeared to be the only effective way of inducing them to respect the right of prisoners not to be subjected to cruel and unusual treatment or punishment while in prison. Suffice it to say that there is nothing to suggest that such a situation exists at present, whatever view one takes of Thomas's complaints.

I turn now to consider the judge's finding that the treatment of Thomas in prison and the conditions under which he was kept are to be categorised as cruel and unusual. The principal complaints on which this finding was based, were: (i) the infrequency and randomness of Thomas's 'airings', ie the occasions when he was taken from his cell into the open air in the exercise yard; (ii) the hot, stuffy, cramped conditions in his cell in which there was often a foul smell emanating from the slop pail and an electric light was kept on round the clock; and (iii) the handcuffing of the prisoner while he was being 'aired'.

With regard to the 'airings', there was ultimately agreement by both sides in respect of the occasions when this occurred in 1998, based on what was contained in the occurrence book and certain weekly returns. These were as follows: three in January; one in February; three in March; three in April; two in May and six in June, for a total of eighteen. What is not without significance, in my view, is that it was also agreed that he was offered, but refused, airings on three dates in April. No reason was offered for these refusals. In respect of the period prior to 1998, the judge accepted Thomas's evidence in preference to that of Prison Officer Watson, and with that I find no fault.

With regard to the question of exercise, it seems to me that the governing regulation for condemned prisoners is regulation 296(5), and this makes the provision of exercise subject to the discretion of the superintendent. Be that as it may, by no stretch of the imagination could the airings which were provided be regarded as sufficient in the reasonable exercise of any one's discretion. Consistent with the principle already stated, the explanation offered by Watson of lack of adequate staff provides no acceptable excuse for this shortcoming, although it would serve (so far as that is relevant) to rule out any question of ill-will or vindictiveness as the reason for this shortcoming.

(1998) 54 WIR 387 at 398

So far as the handcuffing during airings is concerned, there is a more formidable justification put forward, ie security. Whether justified or not, it would certainly cause discomfort and hinder the prisoner's ability to exercise.

With regard to the conditions in the cell, there was a good deal about which there was no serious dispute. The dimensions of the cell were 6 feet by 12 feet by 11 feet high. There was evidence that there was at the top of the wall an opening (2 foot, 4 inches, by 1 foot, 3 inches) but the judge found that there was no natural light penetrating the cell. With regard to the slop pail and the smell emanating from it, the evidence of Watson, which does not appear to have been challenged or contradicted, was that the prisoner was allowed to empty it three times a day and 'on reasonable request'. In addition, on mornings the prisoner was allowed, during the time when he was let out of the cell for washing, access to the toilet. This too was not challenged.

It is true that in determining whether treatment is cruel and unusual one is to have regard to the likely effect rather than the actual effect. Nevertheless, it has also been recognised that evidence of actual effect is virtually essential in order to establish the likely effect. In this context, I consider the evidence of the prison doctor, Dr Chen, to be significant. He said that he examined condemned prisoners three times a week and visited the 'death row' cells once a week in order to determine whether they were clean and hygienic. In relation to Thomas he swore as follows:

> 'I have examined the applicant's medical records at the Port-of-Spain prison, and have found no record of any complaints made by him of suffering from depression, nervousness or claustrophobia. In fact when last I examined the applicant on 21st April 1998 he told me that he had no medical and physical problems and he was doing fine. I found him to be physically fit and in good health. Basically, the extent of the applicant's complaint consisted of a request for a change of diet and vitamins. However, on 22nd November 1995 I treated the applicant for a sore on the left corner of his mouth. On 18th November 1996 I referred him to a dentist after he complained of having a toothache.'

Dr Chen was cross-examined, but his evidence as given above does not appear to have been challenged and the trial judge accepted it. Complaint has been made about the refusal of the trial judge to accede to a request by Thomas's counsel that he be examined by a psychiatrist. Without underestimating the potential results of such an examination, it strikes me as unlikely that, given the impact of the reading of the death warrant to Thomas, it would have been possible for a psychiatrist (however skilful) to reconstitute an accurate picture of the effects which the conditions of Thomas's imprisonment had on him during the period of his earlier

(1998) 54 WIR 387 at 399

incarceration. Certainly, it is difficult to conceive of such evidence negating the impact of Dr Chen's contemporaneous observations.

I do not think that it was justified to treat the conditions under which Thomas was kept to be tantamount to

solitary confinement. Apart from the occasions when he was allowed to leave his cell in the mornings for his ablutions and his meals, the unchallenged evidence was that the prisoners could talk among themselves at will. There was a radio played in the cell block which they could hear. They had access to books and newspapers. In addition, they could receive visits from their family and friends twice per week and from their legal advisers at any time between 8.00 am and 4.00 pm, Monday to Friday.

It is very difficult to remove the subjective element from any assessment or characterisation of these conditions. On much the same evidence two judges in these cases reached opposite conclusions. Lord Goff of Chieveley, in giving the advice of the Privy Council in *Henfield v Attorney-General, Farrington v Minister of Public Safety and Immigration* (1996) 49 WIR 1, stressed the importance of raising the matter of prison conditions in the court of first instance so that their lordships would have the benefit not only of evidence touching this matter but also the views of the judges in the jurisdiction. In respect of the relevance of conditions of imprisonment before trial and after sentence of death, he said (at page 13):

> '... both these points were raised for the first time before their lordships, neither having been taken before the courts below ... First, these are points upon which findings of fact by the judge at first instance are essential. Second, in the case of both points an assessment both by the judge of first instance and by the Court of Appeal, taking full advantage of their knowledge and experience of local conditions, would have been of greatest assistance to their lordships.'

Presumably, the term 'local conditions' includes, if it does not mean, living conditions that exist locally outside prison. It is not my view that prison conditions need not exceed the lowest conditions under which people in the society subsist but at the same time I do not think that we should put out of our minds the knowledge that we all have, for instance, that there are substantial numbers of people in this country who live in premises that are very cramped and overcrowded, and do not have the benefit of plumbing or electricity. It is by no means uncommon for those who have plumbing to be without a supply of water for considerable periods. Of course, happily, the number of people who have to endure such hardships has been and continues to be reduced. By the same token it is well known that a new maximum security prison has been completed and when it is commissioned will serve to relieve much of the overcrowding and the understaffing that exist now in the prison system.

(1998) 54 WIR 387 at 400

I do not consider that the conditions under which condemned prisoners are now kept in the State prison are satisfactory or acceptable. What is particularly disappointing is that it appears from the disparity between Watson's affidavit evidence and the documents that established the actual number of airings in Thomas's case that the more senior officers are not even aware of some of the shortcomings. Nevertheless, having given the matter my best consideration, I find that the conditions under which Thomas was kept and the treatment he received after his conviction and sentence, fall far short of what could properly be described in the context of local conditions as cruel and unusual treatment or punishment. In coming to this conclusion I have sought on the one hand to give some meaning to the word 'unusual', but at the same time to construe it in a way that would not stultify the protection intended to be afforded by section 5(2)(*b*) of the Constitution.

I have already made it clear that, even if I am wrong about this and Thomas was treated in a cruel and unusual manner while awaiting the carrying out of the death sentence, he is not entitled to the remedy of commutation of his sentence. It follows that if, although harsh, this treatment falls short of cruel and unusual, I do not think it can be relied on in conjunction with other factors such as delay, to provide the basis for commutation.

Denial of access to the international bodies

Before dealing with the various arguments based on the failure of the applicant to have his day in court before the IACHR, it would be as well to examine how the applicant might or could have benefited from any recommendation from that body. He could only have done so to the extent that the Mercy Committee and/or the Minister, in whom the prerogative of mercy is effectively vested by section 89 of the Constitution, considered and was influenced by the recommendation. The Privy Council has recognised that the exercise of the prerogative of mercy is not a *quasi*-judicial function, but is purely a discretionary act on the part of the Minister. The special character of the Minister's exercise of the prerogative of mercy was first highlighted in *de Freitas v Benny* (1975) 27 WIR 318 and was re-affirmed in the recent case, *Reckley v Minister of Public Safety and Immigration (No 2)* (1996) 47 WIR 9. Lord Goff of Chieveley, in delivering the advice in the latter case, quoted extensively from the opinion of Lord Diplock in the former and emphasised the unique character of the exercise of the prerogative as 'an act of grace' which was not subject to judicial review. The particular consequence with which that case was concerned was the lack of any entitlement of a condemned person to make representations to the Mercy Committee. In the course of his advice Lord Goff said (at page 19):

> 'A man accused of a capital offence ... has of course his legal rights ... he is entitled to the benefit of a trial before a judge and jury ... After

> conviction and sentence, he has a right to appeal to the Court of Appeal and, if ... 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 ... 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 Minster'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, an act of grace. As Lord Diplock said in *de Freitas*: "Mercy is not the subject of legal rights. It begins where legal rights end".'

It would be surprising if the failure of the Minister to allow himself the opportunity to consider the report of the IACHR cannot be made the basis for judicial review of his decision not to exercise the prerogative of mercy in favour of the applicant but could provide a basis for declaring unconstitutional the carrying out of the sentence of death which by his decision he had failed to commute. Presumably, the results of a successful application for judicial review, had it been available, would have been simply the quashing of the Minister's decision and a direction to postpone making his decision until the IACHR had made its recommendation. The case for the applicant however, depends on visiting the Minister's failure with a far more drastic sanction, that is the vacation of the sentence of death.

I turn now to deal with the various arguments that were advanced based on the denial of access to the international bodies. It was argued that, as a result of the accession of Trinidad and Tobago to the treaty and its ratification thereof, the due process requirement for the carrying out of the death sentence involved the State permitting the applicant the access to the IACHR which it had promised to afford him. This argument was rejected by the trial judge and I think rightly so. The argument was repeated before us, but I am afraid that it created no greater impression on me than it did on the trial judge. I do not understand how either the fact of the entering into the treaty or the contents of the treaty can assist in the interpretation of the phrase 'due process'. I do not consider that, however widely one interprets 'due process', it requires compliance by the State with obligations it has undertaken by treaty that are admittedly not enforceable by individuals under

domestic law because they have not been incorporated by statute in that law. I cannot see how the fact that a treaty that concerns human rights, a subject that is also dealt with by the Constitution, renders the State's international

obligations any more enforceable at the behest of the individual citizen. It seems to me that whatever the subject matter of the treaty, the governing principle remains the same as that stated by Lord Templeman in *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, in these words (at page 476):

> 'A treaty is a contract between the Governments of two or more sovereign States. International law regulates the relations between sovereign States and determines the validity, the interpretation and enforcement of treaties. A treaty to which Her Majesty is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights at the behest of a sovereign Government or the behest of a private individual.'

Counsel for Thomas relied heavily on the Australian case, *Minister for Immigration and Ethnic Affairs v Teoh* [1995] 3 LRC 1, for the proposition that the ratification of the treaty by the Trinidad and Tobago Government could be called in aid to assist in the interpretation of the expression 'due process' since that expression was ambiguous. In *Teoh* the question was whether a person who had been refused residence and against whom a deportation order had been made, could challenge those decisions on the ground that the decision-making authority had failed to treat the best interests of his children as the primary consideration in accordance with an international treaty, the Convention on the Rights of the Child, which the Government of Australia had ratified. The panel that made the decision against the applicant in that case took account of the compassionate force of the plight in which his deportation would leave his wife and children, but held that this did not outweigh the fact that he had been previously convicted for a serious drug offence.

The High Court of Australia held in effect that the panel ought to have attributed greater weight to the interests of the children in deference to the provisions of the treaty which was in existence at the time when the relevant legislation affecting residence had been enacted. To my mind that is a very long way from the facts of Thomas's case and the contention of his counsel that the ratification of the convention in 1991 has the effect of making compliance with the terms of that treaty by the Government of Trinidad and Tobago a requirement of due process under section 4(*a*) of the Constitution. I would also draw attention to the order made by the court in *Teoh* which was not that the applicant be granted residence but that the panel's decision to refuse the applicant residence be set aside and the application be referred to the Minister for reconsideration according to law. Further, that the deportation order be stayed until the Minister reconsidered the application.

Another line of argument pursued unsuccessfully before the judge below and also before us pursuant to Thomas's cross-appeal which challenged the judge's findings on all the issues resolved against him, was that the ratification of the treaty gave rise to a legitimate expectation in the applicant that he would not be executed until the IACHR had considered his petition and made its recommendations on it. The judge dealt very fully and, in my respectful view, adequately with this argument and I agree with his rejection of it for the reasons he gave. Assuming that any legitimate expectation could have been created by the ratification of the treaty, I do not see how such an expectation could have survived publication of the Instructions, in so far as such expectation extended to access to the IACHR free from the time limits specified in the Instructions. I would also indorse the judge's reasoning based on section 89 of the Constitution.

I would take the opportunity, however, to question the route by which the legitimate expectation relied upon must travel in order to lead us to the conclusion that the sentence of death be vacated. Legitimate expectation, as far as I am aware, is a concept born in the context of judicial review and its original purpose was limited to correcting procedural improprieties, although it appears to have been extended beyond that initial limitation. It has not always been clear to me in the course of this appeal how legitimate expectation was being used to support an allegation of breaches of constitutional rights. Presumably the argument must be that either that failure to satisfy a legitimate expectation constituted a breach of due process or rendered the carrying out of the death penalty cruel and unusual treatment or punishment.

I also raise the query of how far the Minister can be fettered in the exercise of his discretion in exercising the prerogative of mercy by legitimate expectation and to what extent, if at all, the court can review his exercise of that discretion and invalidate it on the ground that he has failed to satisfy a convicted person's legitimate expectation.

Yet another argument advanced unsuccessfully in the court below and repeated before us, was that Thomas had a legitimate expectation that he would have been allowed to have his petition considered by the IACHR in the same way as five other condemned persons (referred to as the 'death row five') were permitted to have their petitions considered prior to their cases being referred to the Mercy Committee. Again, the trial judge, carefully and in my view correctly, demonstrated that Thomas's case was quite different from those of the 'death row five' because of the failure in his case of the international body to make the appropriate request of the Government within the period of one month prescribed by the instructions.

Another off-shoot of the due process argument was the issue of whether the principle enunciated by Lord Diplock in *Thornhill v Attorney-General* (1979) 31 WIR 498 and re-affirmed by Lord Goff of

Chieveley in *Guerra* could be invoked by the applicant in order to elevate a settled practice by the Government to allow persons sentenced to death access to the international bodies before carrying out such sentence into a constitutional right recognised and protected by section 4. The argument before the trial judge proceeded on the basis that the obligation of the Government to permit access to the IACHR came into existence with the ratification of the treaty in 1991. Before us, however, it was argued that even prior to that date that obligation existed as a result of this country's membership of the Organisation of American States. This would mean that the obligation was undertaken prior to the commencement of the present Constitution. A careful reading of the opinions of Lord Diplock and Lord Goff in *Thornhill* and *Guerra*, respectively, has left me convinced that, in order to qualify as a right under the doctrine they were applying, a settled practice must have existed at the commencement of the Constitution in force. It is clear from the evidence that there was in fact no attempt by any person condemned to death to petition the IACHR until after the ratification of the treaty in 1991. I find it unnecessary to decide whether or not the new contention advanced by counsel for Thomas that the right of access existed *de jure* prior to 1991 is correct. The fact is that if such a right did exist, no-one appears to have recognised its existence and there was no attempt to exercise it. In that setting it seems to me impossible to talk of any settled practice prior to 1991. For these reasons I agree with the trial judge's rejection of the submissions of counsel for Thomas under this head.

I come now to the arguments based on the Instructions. This was two-pronged. Firstly, counsel for Thomas submitted that the Instructions were arbitrary and unreasonable. The trial judge held that they were not. Secondly, counsel argued that they were applied to Thomas in a way that rendered his execution cruel and unusual treatment or punishment. That submission the trial judge accepted, and it formed one of the three elements combined with raw delay and prison conditions that led him to vacate the death sentence on the grounds that to carry it out would constitute cruel and unusual punishment.

With great respect to the trial judge, there seems to me to be some inconsistency in holding that the Instructions were not arbitrary or unreasonable but that, although they were applied in the case of Thomas in accordance with their terms, such application was arbitrary and unreasonable and resulted in a breach of Thomas's constitutional rights. The ground on which he made this latter finding was that the relevant time limit was applied inflexibly and neither Thomas nor the IACHR was allowed an opportunity to get Thomas's petition 'back on track'. But the objection to the Instructions *per se* which the trial judge rejected was based largely, if not solely, on their inflexibility in that no provision was made for any extension of the time limits in appropriate cases. It was not suggested that there was any special feature of Thomas's case or the failure of the IACHR to meet the relevant

deadline in his case that justified an extension of that deadline. The absence of any provision in the Instructions themselves for an extension would not of course preclude the State from allowing one in an appropriate case. Accordingly, if these were relevant questions for the court to answer, I would hold that not only was there nothing arbitrary or unreasonable about the Instructions in terms of the way in which they were formulated but I would also hold that there was nothing arbitrary or unreasonable about the way in which they were applied in this case.

There is, however, the more fundamental question of how do these questions become relevant to alleged breaches of the applicant's constitutional rights. What is the juridical basis on which the court is entitled to review these Instructions and pass on their reasonableness or arbitrariness and what remedies is the court entitled to give based on the results of such an examination? There are two points to be noted here. First, just as the ratification of the treaty was a matter of international relations and not of domestic law and therefore not subject to the purview of the courts, so too it seems to me is the abridgement of the treaty obligations which was effected by the issue of the Instructions. Secondly, as has already been pointed out, we are here in the realm of the exercise of the prerogative of mercy. I do not see how the type of review that the trial judge undertook of the application of the Instructions in this case can be reconciled with the personal, discretionary and unfettered quality of the exercise by the Minister of the prerogative of mercy recognised and respected in *de Freitas* and *Guerra*. For my part, I would hold that it was not open to the judge to review the application of the Instructions in this case in the way in which he did. Nor was it open to him to take the adverse view that he took of such application the basis or part of the basis for finding that Thomas's constitutional rights had been breached and making an order vacating the sentence of death passed on him.

Other arguments

There were one or two other arguments advanced by Thomas's counsel in the court below which were rejected by the trial judge and were the subject of the cross-appeal. One was that statements by the Attorney-General had given rise to a legitimate expectation in Thomas that, because the two-year time limit had not been met in his case, he would not be hanged. Another was that other people who were similarly circumstanced had received commutation of their sentences. As a result, he had been either disappointed in a legitimate expectation which he held or a victim of unequal treatment. I would respectfully agree with and adopt the reasons of the trial judge for rejecting these arguments.

Hilaire

It was suggested by counsel for Hilaire that there were three features of his case that were different from that of Thomas. The first was that

the period of delay between conviction and reading of the warrant was longer than in Thomas's case, ie three years and one month, as compared with two years and seven months. The fact that this brought the case closer to the outer limit of three years and six months rendered more cogent the arguments advanced in Thomas's case on the question of raw delay. In Hilaire's case, however, the failure of the IACHR to comply with the time limits in the Instructions occurred when it failed to complete its consideration of the case within six months from the filing of the proof of the petition. Assuming that one reckons that time from the date of the dismissal of his petition by the Privy Council on 6 November 1997, the relevant period would have expired on 6 May 1998. Clearly, this represents a period of delay that was attributable to Hilaire's taking advantage of his right of access to the IACHR and should, as in Thomas's case, be added to the outer limit of three years and six months. I do not consider, seen in that light, that there is any basis for making a distinction between Hilaire's case and Thomas's case in so far as raw delay is concerned.

The second difference from Thomas's case is that Hilaire relied on pre-trial delay and sought to throw into the balance a period of four years and three months which he spent on remand prior to conviction. The majority of the Privy Council in *Fisher* did not exclude the possibility of taking into account pre-trial delay in exceptional cases. The evidence, however, does not disclose anything exceptional that would justify account being taken of his period of confinement prior to conviction. I am happy to say that, while the time he spent awaiting trial was probably not unusual at the time, it is no longer typical of the elapsed time under current conditions between the arrest of a person on a capital charge and his trial. Also, it is anticipated that the overcrowding of cells of which Hilaire complained will soon be relieved by the commissioning of the new prison.

I would also draw attention to the fact that the effect of pre-trial delay in this jurisdiction has been considered by this court and by the Privy Council in *Director of Public Prosecutions v Jaikaran Tokai* (1994) 48 WIR 412 and *Sieuraj Sookermany v Director of Public Prosecutions* (1996) 48 WIR 346, and guidelines have been established by the Privy Council for dealing with such delay when it is relied upon as a ground for preventing a person from being tried. If delay is not such as to render a trial of a person a breach of his constitutional rights, it is difficult to see how the same delay can render unconstitutional the carrying out of a sentence lawfully passed upon him after he has been properly tried and convicted.

The third point of difference from Thomas's case was that Hilaire filed his petition with the IACHR on 7 October 1997, one week before the Instructions were issued. It was argued therefore that the Instructions could not operate retrospectively to destroy the legitimate expectation which he held, *viz* that his access to the IACHR would not

be impeded by the imposition of time limits. It is not in dispute that, at the time when he filed his petition with the IACHR, his application for special leave to appeal to the Privy Council was still pending. It is also expressly stated in the treaty that a petition to the IACHR is not admissible unless all domestic remedies have been exhausted. It was argued, however, that at the time when he filed his petition Hilaire had already been advised by counsel that his application for special leave was hopeless and that counsel only attended before the Privy Council when it was called as a matter of courtesy, and not for the purpose of presenting any argument. It was further urged that the Instructions did not purport to have retrospective effect and the presumption must be that they were intended to apply prospectively.

It seems to me that the crucial question is what is the material point in time at which it was relevant to consider what legitimate expectation Hilaire had. It is clear to me that the material time is when it was first open to Hilaire to petition the IACHR, ie after the dismissal of his application for special leave. By that time, of course, the Instructions had been published. It seems to me wrong in principle to hold that Hilaire could improve his position by filing his petition to the IACHR prematurely at a time when he clearly was not entitled to do so. In my view, it is irrelevant whether or not the IACHR itself made a ruling that his petition was

premature. It is manifest from the provisions of the treaty that it was.

Before ending this judgment, I would like to draw attention to one feature of these cases. In *Pratt* the Privy Council very helpfully assisted the Jamaican Government in reducing the number of constitutional motions that their courts would face by indicating a five-year period beyond which commutations could be granted without the need for court proceedings. Subsequent cases have provided further guidance which has helped to indicate to the relevant authorities where the line is to be drawn between those cases in which the sentence of death may be carried out and those in which it should be commuted, all of this by reference to the extent of and the reasons for delay in carrying out the sentence of death after conviction. To the extent that new factors are introduced into the equation, such as prison conditions, pre-trial delay and the extent to which access to international bodies is permitted or impeded, this will render it extremely difficult, if not impossible, to determine, without full scale constitutional proceedings contested to the highest level, whether or not it is constitutionally proper to carry out a death sentence in any particular case. I do not suggest that this can by any means be a governing consideration but, in practical terms, it seems to me sufficiently important to be worthy of mention.

For the reasons I have given I would allow the appeal of the appellant in Thomas and dismiss the cross-appeal. Consequently, I would set aside the orders made by Jamadar J and dismiss the constitutional motion.

(1998) 54 WIR 387 at 408

In the case of Hilaire, I would dismiss the appeal and affirm the order of Kangaloo J, save in relation to costs. I would make no order for costs either here or in the court below in both appeals.

Sharma JA. I agree with the judgment of de la Bastide CJ, and the orders he proposes, however, in view of the importance of this appeal, I would like to add a few words of my own.

Cruel and unusual punishment

Sections 4 and 5 of the Constitution of Trinidad and Tobago ('the Constitution') provide:

> '4. It is hereby provided recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist ... the following fundamental human rights and freedoms, namely--(*a*) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law; ...
>
> '5. (1) Except as is otherwise expressly provided in this chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared. (2) Without prejudice to subsection (1), but subject to this chapter and to section 54, Parliament may not-- ... (*b*) impose or authorise the imposition of cruel and unusual treatment or punishment; ...'

Jamaica

The landmark decision in *Pratt v Attorney-General* (1993) 43 WIR 340 ('*Pratt and Morgan*') constituted a watershed in our constitutional jurisprudence.

It is not necessary here to rehearse the facts and circumstances of that case as the *ratio decidendi* is

sufficiently explicit. In that case, it was held, allowing the appeal of the appellants, that a prolonged delay of fourteen years between sentence of death and proposed execution constituted inhuman punishment and was unconstitutional. It was further held that section 17(2) of the Constitution of Jamaica authorised various punishments, but did not prevent the courts investigating the circumstances in which the executive intended to carry out the sentence. Execution should take place as soon as reasonably practicable after sentence, allowing a reasonable time for appeal and consideration for reprieve, and that (in the circumstances of that case) a delay of fourteen years would constitute inhuman punishment, contrary to section 17(1) of the Jamaican Constitution.

Before referring to the proliferation of constitutional motions which followed in the Commonwealth Caribbean, all with the same destination (ie the Privy Council) I wish to make some observations.

(1998) 54 WIR 387 at 409

Firstly, in deciding as it did, the Privy Council did not follow the majority decision in *Riley v Attorney-General* (1982) 35 WIR 279, which held that delay in the execution of a death penalty was not an infringement of rights guaranteed by the Constitution if that punishment was lawful under that Constitution. The philosophy underlying the opinion in *Pratt and Morgan* may be found where Lord Griffiths, speaking for the Board, said (at pages 359, 360):

> 'In their lordships' view, a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The 'death row' phenomenon must not become established as part of our jurisprudence ...
>
> 'To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment within the meaning of section 17(1). In the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case ... The delay in this case is wholly unacceptable ...'

The message was loud and clear. If a State wished to retain and enforce capital punishment, it had to pay a price. Either it had to overhaul its judicial system in such a way as to accommodate a time frame to ensure that the death penalty was swiftly carried out or it would not be permitted to do so.

It is clear from that opinion that, in spite of the social and economic constraints prevailing in Jamaica, they did not play a pivotal part in the decision in that case and there is no reason to believe that these factors will be considered relevant if they resulted in breaches of the prison conditions in Trinidad and Tobago. Moreover, it may be said that in a case like this the maintenance of human dignity does not require much by way of resources; that in many cases it will be essentially a matter of common civility and decency that is required.

Clearly, this would be a wake-up call for the executive and the prison authorities to realise that condemned murderers do not cease to have human rights within the prison walls. Some would obviously be curtailed, but there is no reason to dehumanise a man, nor is he to be subjected to the whims and fancies of those in authority. It is not to the point that he has committed a heinous crime in barbaric circumstances. If a

(1998) 54 WIR 387 at 410

condemned murderer has to suffer death by hanging, it is not right that he should be tortured physically before he is hanged.

It is a cardinal principle of our jurisprudence that a man must not be punished twice for the same offence and

this will be so whether it is mental (*Pratt and Morgan*) and/or physical torture. It makes no difference. Of course, it will be for our courts to determine whether the treatment could be so regarded and a lot would depend on local conditions.

I do not subscribe to the view that physical ill-treatment and prison conditions whether before and/or after conviction may not be relevant in determining what relief should be granted. There is no reason why the decision in *Pratt and Morgan* should be seen as a barrier given our approach to fundamental rights.

In my respectful opinion, the distinction made by counsel for the State that in the case of appalling prison conditions the remedy is in the hands of the condemned man, while in the case of mental torture, it is not realistically so (since to pursue any remedy would seemingly hasten the carrying out of the sentence), is not one that is juridically sound to me. In my respectful opinion, if there are any such allegations by the condemned man, it would really be a matter of weight, not of the exclusion of his evidence. If he does not complain nor seek redress until it is convenient for him to do so, a court would have little difficulty in rejecting his allegations. There is a strong societal element in determining what is cruel and unusual punishment, and no-one can convince the underclass, the under-privileged, who lack basic amenities of food, shelter and basic facilities for personal hygiene, that the behaviour complained of in this case is capable of constituting cruel and unusual punishment.

The fact that a State chooses to retain corporal punishment and hanging for murder (the former of which is ordered quite frequently by the courts, and the latter which the majority of the population have openly declared and insisted must be carried out) provides us with some guidance as to how cruel and unusual punishment should be defined in our society.

It is true that cruel and unusual punishment is a highly subjective matter and is capable of generating all sorts of esoteric and philosophical arguments. Be that as it may, one could hardly dispute that, whatever the relative values, basic requirements should be met and a fair balance struck between dehumanising a prisoner and discipline, order and institutional security so necessary in a prison.

Returning to the instant appeal, I do not think that the allegations made by the appellant, if true, can amount to cruel and unusual punishment. It would be ludicrous to suggest and farcical to accept that such behaviour on the part of the prison authorities is capable of constituting cruel and unusual treatment or punishment when more than half of the law-abiding citizens have, by barricading their homes with iron bars, created their own prisons in order to keep the likes of

the applicant out. The timing of the complaints of the applicants does a lot to discredit at least some of his allegations.

There is no indication in either of the judgments that the relevant sections of the Constitution were subjected to much attention or any deep forensic analysis in relation to the facts of this case. It is important to note that the words 'cruel and unusual' are used conjunctively, and they are not to be regarded as synonymous; that treatment or punishment can be cruel but not unusual, and *vice versa*.

It may very well be that, if a proper analysis were conducted, in view of the narrow factual issues, the trial judge in the Thomas appeal would not have come to the conclusions which he did. I feel particularly confident about this because of what he himself said in his judgment 'in so far as the applicant [Thomas] claims that he has become a nervous wreck'; I find no merit in this. The evidence of Dr Chen, unchallenged and undisturbed in any material way, is that the medical records of the applicant reveal no complaints made by the applicant of suffering from depression, nervousness or claustrophobia. In fact, Dr Chen says that he

last examined the applicant on 31 April 1998 and found him to be fit and in good health. On that occasion the applicant told him 'that he had no medical or physical problems and he was doing fine'. Indeed, as it was virtually agreed by both counsel, the facts of this case have to do with 'airing and exercise of the applicant'.

In view of what I have said, I am of the respectful view that the conduct complained of fell far short of what would constitute cruel and unusual treatment or punishment and, at most, might have constituted breaches of the Prison Rules.

Delay: cruel and unusual punishment

In the cases which followed *Pratt and Morgan*, it was made clear that the five-year period laid down in that case was merely a guideline: the underlying principle being that execution should follow as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. Lord Griffiths speaking for the Board said (at page 360):

> 'In the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case and there may be difficult ... decisions to be made ... The delay in this case was wholly unacceptable and this appeal must be allowed.'

In Trinidad and Tobago

The next important relevant case in the chronology was *Guerra v Baptiste* (1995) 43 WIR 439, a case from our own jurisdiction.

The facts. Guerra had been sentenced to death for murder in May 1989 and had exhausted all domestic appeals by November 1993. He

appealed to the Privy Council contending about (*inter alia*) delays in the appeal process. In allowing the appeal, the Privy Council held that domestic appeals should be heard within one year and any application to the Privy Council should follow as soon as possible, the aim being to complete the entire process within two years of sentence. In this case, the domestic appeals had not been completed until four and a half years after sentence due to the failure to release the judge's papers from the original trial, and this delay of four and a half years was contrary to sections 4(*a*) and 5(2)(*b*) of the Constitution.

In the Bahamas

Henfield v Attorney-General, Farrington v Minister of Public Safety and Immigration (1996) 49 WIR 1.

The facts. Henfield and Farrington, who had been sentenced to the death penalty upon conviction for murder, appealed against the dismissal of their motions that the delay in execution amounted to inhuman punishment in terms of the Constitution of the Bahamas, article 17(7). The delay in *Farrington's* case was three years and four months, while in *Henfield's* case the execution had been delayed for six years and eight months, largely due to the testing of the legality of the death penalty in *Jones, Meadows, Neely, Poiter, Heastie, Hamilton v Attorney-General* (1995) 46 WIR 8.

In allowing the appeals and substituting life sentences, the Privy Council held that, whilst the delay in *Farrington's* case was just short of the three and a half years (which amounted to inhuman punishment within the terms of article 17(1) of the Constitution), the limit was not a rigid one and the court could take account of

the circumstances of each case. It was further held, while a delay beyond the norm could be justified to allow suspensions of executions during constitutional proceedings on the death penalty, the proceedings in *Jones et al* had been lengthened by the Attorney-General's failure to take steps to rectify delay on the part of the applicant. In the result, the delay in *Henfield's* case must be regarded as excessive and unconstitutional.

The opinion of the Board in this case was delivered by Lord Goff of Chieveley and he had this to say (at page 16):

> 'But ..., having given the matter careful consideration, [we] have concluded, taking into account an appropriate period of time for the domestic appeals available to condemned men in their own interest, that a period of three and a half years in prison awaiting execution, with all the agony of mind which that entails, would in all the circumstances be so prolonged a time as to render execution cruel or inhuman punishment.'

In view of the decisions to which references have been made, it is now clear that a period of between two years and three and a half years would be considered acceptable if the death sentence is to be carried out.

(1998) 54 WIR 387 at 413

It may very well be that since we are approaching an acceptable threshold it may be timely for the Privy Council to determine once and for all a specific period. If this approach were to be adopted, it would in my respectful opinion diminish, at least in some small measure, the agony of the mind of all those who are now on 'death row' for a period between two and three and a half years.

Further, in referring to *Soering v United Kingdom* (1989) 11 EHRR 439 in *Pratt and Morgan*, the Privy Council was determined that the 'death row' phenomenon should not become established as part of our jurisprudence. In that case the applicant, a West German national, alleged that the decision by the Secretary of State for the Home Department to extradite him to the USA to face trial in Virginia on a charge of capital murder would, if implemented, give rise to a breach by the United Kingdom of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), which provides that no-one may be subjected to torture or to inhuman or degrading punishment.

The USA had applied to the United Kingdom to extradite the applicant to stand trial in the State of Virginia on a charge of capital murder. The European Court of Human Rights recognised that the 'death row' phenomenon in Virginia, where prisoners were held for a period of six to eight years before execution, arose from repeated applications by the prisoner for a stay of execution, but nevertheless held that such a long period of delay might go beyond a threshold set by article 3.

In my judgment, it is quite clear that from an examination of the law reports *Pratt and Morgan* has spawned countless constitutional motions in which condemned murderers have raised all kinds of constitutional issues. The adage 'while there is life there is hope' is truer than ever. In my respectful view, if an appropriate period is not determined now, it would undoubtedly bring us perilously close to the 'death row' syndrome which the Privy Council was determined to exclude from our constitutional jurisprudence.

It is true that the trial judge in Thomas's case held that it was a combination of the delay and the neglect in allowing the applicant to have adequate air and exercise, together with arbitrary and unreasonable application of the Instructions, which constituted cruel and unusual treatment. I have, in the course of this short judgment, sought to treat the complaints of cruelty and mental agony separately and cumulatively in order to demonstrate that, however viewed, whether separately or cumulatively, a case for cruel and unusual treatment or punishment has not been made out.

To suggest that since the delay was *not* prolonged enough and to reason that if to that could be added the

physical ill-treatment complained of, that would constitute cruel and unusual punishment is a syllogistic argument which I find simplistic.

(1998) 54 WIR 387 at 414

The powerful statement of Lord Griffiths in *Pratt and Morgan* provides us with some guidance in approaching this difficult problem, His lordship said (at page 356):

> 'There is an instinctive revulsion against the prospect of hanging a man after he has been sentenced to death for many years. What gives rise to this instinctive revulsion? The question can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.'

While it is true to say that his lordship was speaking in the context of prolonged delay in that case, I respectfully maintain that it is equally apposite in the instant case.

Is there an instinctive revulsion on the facts of this case? The delay in this case can hardly be described as prolonged, nor can it be said that either separately or cumulatively, with the allegations of physical ill-treatment, they constitute conduct that is repulsive to our humanity.

Pratt and Morgan was decided against a factual background in which the executive sought to carry out the death sentence some fourteen years after it was imposed. Their lordships in the Privy Council had held that it was inhumane to do so because of all the agony and suffering and the uncertainty the condemned man would have undergone, and therefore it was wrong to hang him.

In view of the decision in *Pratt and Morgan*, and the determination of the executive in the various Caribbean States to carry out the death penalty within a realistic period, much of the rationale which underpinned the decision in *Pratt and Morgan* has disappeared. For instance, there is no question of uncertainty any more as condemned prisoners now know what to expect once their sentences have been imposed. The philosophy to which the decision in *Pratt and Morgan* is tied remains the same, but the circumstances have radically changed both from the point of view of the executive and of the condemned man, and it is in this light a decision must now be given.

In view of what I have said, I am of the respectful view that neither Thomas nor Hilaire has made out a case for cruel and unusual sentence or punishment under the Constitution.

Hamel-Smith JA. I have read in draft the judgment of de la Bastide CJ, and I agree with it. I also agree with the orders proposed by him.

Appeal allowed in Thomas's case.

Appeal dismissed in Hilaire's case.

(1998) 54 WIR 387 at 415

Appeal

Darrin Roger Thomas and Haniff Hilaire appealed to the Judicial Committee of the Privy Council (appeal 60 of 1998) with leave of the Court of Appeal of Trinidad and Tobago against the orders made by that court on 4 August 1998. The respondents to the appeal were Cipriani Baptiste, the Commissioner of Prisons, Evelyn Ann Petersen, the Registrar of the Supreme Court, and the Attorney-General of Trinidad and Tobago. The Board announced on 27 January 1999 that it would

advise that the executions of the appellants should be stayed pending the determination of their petitions to the Inter-American Commission of Human Rights. Their lordships reserved their reasons. The reasons of the majority of the Board were delivered by Lord Millett.

Nicholas Blake QC, *Keir Starmer*, *Quincy Whittaker* and *Gregory Delzin* (instructed by Simmons & Simmons) for the appellant Thomas.

James Guthrie QC and *Julian Knowles* (instructed by Lovell White Durrant) for the appellant Hilaire.

Sir Godfray le Quesne QC, *Marten Daly SC*, *Russell Martineau SC*, *Mrs Natalie Aimes Darmanie*, *Mrs Mira Dean-Armorer*, and *Howard Stevens* (instructed by Charles Russell) for the respondents.

Their lordships took time for consideration.

17 March 1999. The following judgments were delivered.

Lord Millett delivered the reasons of the majority of the Board. These appeals are brought with the leave of the Court of Appeal of Trinidad and Tobago from the dismissal of the appellants' constitutional motions which claimed that in the events which had happened it would be unlawful to carry out the sentences of death passed on them for murder. On 27 January 1999, their lordships announced their decision to grant a stay of execution pending the determination of the appellants' current petitions to an international body. They now give their reasons for their decision, and for their refusal to accede to the appellants' claim that the death sentences be commuted.

Two main issues arise for decision by their lordships: whether at the relevant time a condemned man under sentence of death had a constitutional right to have his application to the Inter-American Commission on Human Rights ('IACHR') considered and determined before the sentence was carried out; and whether the carrying out of a death sentence lawfully imposed can be rendered unconstitutional by the inhuman conditions in which the condemned man has previously been detained and the manner in which he has been treated while in detention.

(1998) 54 WIR 387 at 416

The background

The present Constitution of Trinidad and Tobago came into force on 1 August 1976. Among other things, it affirms the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof 'except by due process of law' (section 4(*a*)). It also prohibits the imposition of 'cruel and unusual treatment or punishment' (section 5(2)(*b*)). Their lordships observe that the fundamental rights and freedoms enshrined in the Constitution (although not section 4(*a*) which has an English and remoter ancestry) are framed in the light of the Universal Declaration of Human Rights 1948 and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1953 (Cmd 8969). They also observe that, like the previous Constitution, the 1976 Constitution proceeds on the assumption that the human rights and fundamental freedoms which it affirms and entrenches were already secured to the people of Trinidad and Tobago by the common law; see *de Freitas v Benny* (1975) 27 WIR 318 at page 320.

The Government of Trinidad and Tobago ratified the International Covenant on Civil and Political Rights ('the International Covenant') in 1978. It acceded to the Optional Protocol to the International Covenant in 1980. The International Covenant, which was adopted by the General Assembly of the United Nations in 1966 and came into force in 1976, constitutes a commitment by the States which are parties to the covenant to observe certain fundamental norms of conduct to be supervised by international institutions. The United

Nations Human Rights Committee ('the UNHRC') is the institution charged with supervising the conduct of the State parties to the International Covenant. The Optional Protocol gave individuals right of access to the UNHRC.

On 28 May 1991, the Government of Trinidad and Tobago ratified the American Convention on Human Rights 1969 ('the Convention'). The Convention established two institutions, the Inter-American Commission on Human Rights ('the IACHR'), and its judicial organ, the Inter-American Court of Human Rights, to which the IACHR could refer disputes. By ratifying the Convention, the Government of Trinidad and Tobago recognised the IACHR's competence to entertain petitions from individuals complaining of violations of the Convention and to make reports and recommendations in respect thereof. It also recognised the compulsory jurisdiction of the Inter-American Court of Human Rights to give binding rulings on the interpretation and application of the Convention. This was subject to a reservation which was primarily designed to preserve the legitimacy of the death penalty but which in other respects their lordships are satisfied is not material to these appeals.

In *Pratt v Attorney-General* (1993) 43 WIR 340, this Board held that to carry out a sentence of death after a delay of fourteen years would constitute inhuman punishment and would be unconstitutional under

the law of Jamaica. The Board ruled at page 361 that the aim should be to hear a capital appeal in Jamaica within twelve months of conviction and to complete the entire domestic appeal process within two years; that it should be possible to complete applications to the UNHRC 'with reasonable despatch' and at the most within a further eighteen months; and that where execution was to take place more than five years after sentence there would be strong grounds for believing that the carrying out of the sentence would constitute inhuman or degrading punishment or other treatment, contrary to the Constitution of Jamaica.

By 1997, a significant number of persons who had been convicted of murder and sentenced to death in Trinidad and Tobago were petitioning the UNHRC or the IACHR complaining of violations of their rights under the Convention. It appeared to the Government that the proceedings of these institutions were being conducted with an insufficient degree of urgency, and despite its attempts to do so it was unable to persuade the international bodies to deal with complaints more speedily. The Government became concerned that even if the petitions were dismissed they would not be dealt with in time to allow the sentences to be carried out within the time limits contemplated in *Pratt.*

Accordingly, on 13 October 1997 the Government published 'Instructions relating to applications from persons under sentence of death' ('the Instructions'). These prescribed strict time limits and procedures for applications by prisoners under sentence of death to the UNHRC and the IACHR. This was an attempt to achieve three objectives which, as events later showed, proved to be irreconcilable. They were (i) to respect the mandatory death sentence for murder under the law of Trinidad and Tobago, (ii) to comply with the time limits laid down in *Pratt,* which also formed part of the law of Trinidad and Tobago, and (iii) to co-operate with the international human rights institutions. The Instructions did not, however, achieve the desired effect. There appeared to be no prospect of obtaining a prompt response to petitions presented by persons awaiting execution in Trinidad and Tobago. Accordingly, on 26 May 1998 Trinidad and Tobago denounced the American Convention on Human Rights (as it was entitled to do) with effect from 26 May 1999. At the same time it denounced the Optional Protocol to the International Covenant with effect from 26 August 1998, and re-acceded to it subject to a reservation in respect of anyone who had been condemned to death.

The appellants

Darrin Roger Thomas was arrested on 12 February 1993 and charged with murder. He remained in custody

until trial. He was convicted and sentenced to death on 15 November 1995. The Court of Appeal of Trinidad and Tobago dismissed his appeal against conviction on 20 June 1997. His application for special leave to appeal to their lordships' Board was dismissed on 11 March 1998.

(1998) 54 WIR 387 at 418

On 31 March 1998, that is to say after the publication of the Instructions, Thomas lodged a petition with the IACHR. In his petition he alleged that his human rights had been violated (*inter alia*) by the excessive delay in bringing him to trial, the inadequacy of his legal representation at trial, and the inhuman conditions in which he had been detained in prison both before and since conviction. By 1 May 1998, the latest time provided for in the Instructions, the IACHR had still not sought the Government's response to Thomas's complaints. Accordingly, the Advisory Committee on the Power of Pardon ('the Advisory Committee') met on 12 June 1998. No reprieve was forthcoming, and on 25 June 1998 a warrant was read for Thomas's execution.

On the following day, Thomas filed a motion for constitutional relief. On the same day, the IACHR requested information in connection with his petition and asked for his execution to be stayed. The constitutional motion came before Jamadar J on 27 June 1998. On 15 July, he acceded to the motion, vacated the sentence of death, and ordered that Thomas be held in custody during the President's pleasure. The Court of Appeal allowed the respondents' appeal and dismissed the constitutional motion. The effect was to reinstate the sentence of death.

Haniff Hilaire was arrested on 14 February 1991 and charged with murder. He remained in custody until trial. He was convicted and sentenced to death on 29 May 1995. The Court of Appeal dismissed his appeal against conviction on 7 November 1996.

On 7 October 1997, Hilaire lodged a petition with the IACHR. This was premature, as the IACHR is incompetent to entertain a petition until the petitioner has exhausted his domestic remedies. Without withdrawing his petition to the IACHR, Hilaire then proceeded to file a petition for special leave to appeal to their lordships' Board, which was dismissed on 6 November 1997, that is to say after the Instructions had been published. Thereafter the IACHR accepted his petition without requiring it to be re-submitted. Their lordships are unable to accept a submission on behalf of Hilaire that the Instructions were applied retrospectively to his petition. It is true that, at the date when the Instructions were published, he had decided not to pursue any further domestic remedy. But, as later events showed, he was free to change his mind and did so. In these circumstances, it is self-evident that Hilaire had not exhausted his domestic remedies and was not in a position to lodge an effective petition with the IACHR before the date on which the Instructions were published.

By 11 June 1998, the latest time provided for in the Instructions, the IACHR had not reported on Hilaire's petition and had not referred it to the Inter-American Court of Human Rights. Accordingly, the Advisory Committee met on 6 July 1998. No reprieve was forthcoming, and on 9 July 1998 a warrant was read for Hilaire's execution.

(1998) 54 WIR 387 at 419

On the following day, Hilaire filed a motion for constitutional relief. The constitutional motion came before Kangaloo J and was dismissed by him on 23 July 1998. Hilaire's appeal was dismissed by the Court of Appeal on 4 August 1998.

The Inter-American Court of Human Rights has made orders requiring the Government of Trinidad and

Tobago to refrain from carrying out the death sentences pending its determination of the petitions. Despite this, the Government proposes to carry out the death sentences in defiance of these orders.

The Instructions

The Government's case does not depend on the validity of the Instructions, but on the absence of any legal basis for the appellants' claim to be entitled to proceed with their applications to the IACHR and to have them determined before sentence of death is carried out. The invalidity of the Instructions is, however, crucial to the success of the appellants' arguments, and it is convenient to deal with this question first.

Their lordships are satisfied that the Instructions were unlawful. This is not because they were calculated to put Trinidad and Tobago in breach of the International Covenant or the Convention, for these had not been incorporated into and did not form part of the law of Trinidad and Tobago. But they were unlawful because they were disproportionate. They contemplated the possibility of successive applications to the IACHR and the UNHRC (which was possible, although unlikely), and laid down a series of successive time limits for the taking of the several steps which would be involved in the making of successive applications to both international bodies.

In their lordships' view it was reasonable for the Government of Trinidad and Tobago to take action to ensure that lawful sentences passed by its courts should not be frustrated by events beyond the Government's control. It was reasonable to provide some outside time limit within which the international appellate processes should be completed. The Instructions had the object of introducing an appropriate element of urgency into the international appellate processes. This object was in conformity with the policy laid down by the Board in *Pratt v Attorney-General* (1993) 43 WIR 340 at page 359 that:

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

> "death row" phenomenon must not become established as part of our jurisprudence.'

The Government of Trinidad and Tobago, which is concerned to maintain public confidence in the criminal justice system in Trinidad and Tobago, was entitled to take appropriate measures to ensure that the international appellate processes did not prevent lawful sentences passed by the courts from being carried out.

In their lordships' view it was also reasonable to provide for the possibility of successive applications to the same or different bodies. They are, however, satisfied that the Instructions were disproportionate because they curtailed petitioners' rights further than was necessary to deal with the mischief created by the delays in the international appellate processes. It would have been sufficient to prescribe an outside period of (say) eighteen months for the completion of all such processes. This could apply whether the petitioner made only one application, or applied successively to more than one international body, or made successive

applications to the same body. It was unnecessary and inappropriate to provide separate and successive time limits for each application and for each stage of each application. This had the effect of drastically and unnecessarily curtailing the time limits within which the first such body could complete its processes.

Due process

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

But the clause plainly does more than this. It deliberately employs different language from that found in the corresponding provisions of

the Universal Declaration of Human Rights and the European Convention on Human Rights. They speak merely of 'the sentence of a court of competent jurisdiction'. The 'due process' clause requires the process to be judicial; but it also requires it to be 'due'. In their lordships' view 'due process of law' is a compendious expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather, it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law; see the illuminating judgment of Phillips JA in *Lassalle v Attorney-General* (1971) 18 WIR 379, from which their lordships have derived much assistance.

The clause thus gives constitutional protection to the concept of procedural fairness. Their lordships respectfully adopt the observation of Holmes J in *Frank v Mangum*, 237 US 309 (1915) at page 347:

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

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

The appellants contend that their constitutional right to due process would be infringed if they were to be executed while their current petitions to the IACHR were still pending. They seek a stay of execution until the petitions have been determined and the rulings of the IACHR and the Inter-American Court of Human Rights have been considered by the authorities in Trinidad and Tobago. To this the Government makes several

objections. It invokes the fundamental principle that legal rights are neither created nor destroyed by executive action, and contends that the 'due process' clause does not incorporate into domestic law rights created by an unincorporated treaty such as the Convention. It insists that rights granted by the executive may be withdrawn by the executive. It also relies on the principles, well settled by decisions of this Board, that constitutional protection does not extend to rights created after the Constitution came into force, and that it is limited to the rights set out in section 5(2), or rights analogous thereto; see *de Freitas v Benny* (1975) 27 WIR 318, *Ramesh Lawrence Maharaj v Attorney-General (No 2)* (1978) 30 WIR 310, and *Thornhill v Attorney-General* (1979) 31 WIR 498. It points out that the IACHR's only function is to make a report, which the Advisory Committee may (but is not obliged to) take into account when recommending whether

there should be a reprieve. It submits that the appellants cannot have a constitutional right to complete an international appellate or analogous process which merely leads to a report which the Government of Trinidad and Tobago is not under any legal obligation to take into consideration.

Their lordships recognise the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The making of a treaty, in Trinidad and Tobago as in England, is an act of the executive Government, not of the legislature. It follows that the terms of a treaty cannot effect any alteration to domestic law nor deprive the subject of existing legal rights unless and until enacted into domestic law by or under authority of the legislature. When so enacted, the courts give effect to the domestic legislation, not to the terms of the treaty. The many authoritative statements to this effect are too well known to need citation. It is sometimes argued that human rights treaties form an exception to this principle. It is also sometimes argued that a principle which is intended to afford the subject constitutional protection against the exercise of executive power cannot be invoked by the executive itself to escape from obligations which it has entered into for his protection. Their lordships mention these arguments for completeness. They do not find it necessary to examine them further in the present case.

In their lordships' view, however, the appellants' claim does not infringe the principle which the Government invokes. The right for which they contend is not the particular right to petition the IACHR 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 appellants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution. By ratifying a treaty which provides for individual access to an international body, the Government made that process for the time being part of the domestic criminal justice system and thereby, temporarily at least, extended the scope of the 'due process' clause in the Constitution.

Their lordships note that a similar argument was rejected in *Fisher v Minister of Public Safety and Immigration (No 2)* (1998) 53 WIR 27. They observe, however, that the Constitution of the Bahamas which was under consideration in that case does not include a 'due process' clause similar to that contained in article 4(*a*) of the Constitution of Trinidad and Tobago.

Their lordships accept the general proposition that the executive may withdraw rights which it has granted. But this principle is not without

exception. Executive action may give rise to a settled practice, and this in turn may found a constitutional

right which cannot lawfully be withdrawn by executive action alone. Even when executive action falls short of this, as it does in the present case, it may confer a right for the time being which cannot be withdrawn retrospectively without infringing the due process clause. Their lordships do not doubt the right of the Government of Trinidad and Tobago to denounce the Convention, for even if the Convention formed part of the domestic law of Trinidad and Tobago the right to invoke it would be subject to the power of denunciation. They are content to assume, without deciding, that the Government is entitled to curtail such rights of access or prescribe conditions for their exercise for the future. But they are satisfied that section 4(*a*) of the Constitution prevents the Government from doing so retrospectively so as to affect existing applications. In the present case, the Instructions were published before either appellant lodged a competent petition, but the invalidity of the Instructions means that the Government cannot rely on them to justify carrying out the death sentences.

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

Their lordships see much force, as did the Court of Appeal, in the Government's objection that the Advisory Committee is not bound to take account of any report which the IACHR may make when considering whether or not to recommend a reprieve. This is not a legal process and is not subject to the constitutional requirement of due process; see *de Freitas v Benny* (1975) 27 WIR 318 and *Reckley v Minister of Public Safety and Immigration (No 2)* (1996) 47 WIR 9. The Government submits that the appellants can have no legal right to complete a process which merely leads to the making of a report which the Government is not bound to take into account. This submission, however, disregards the fact that the petitions may be referred by the IACHR to the Inter-American Court of Human Rights. The appellants contend that their trials were unfair, and hope in due course to obtain binding rulings from the Inter-American Court of Human Rights that their convictions should be quashed or their sentences should be commuted. For the Government to carry out the sentences of death before the petitions have been heard would deny the appellants their constitutional right to due process.

(1998) 54 WIR 387 at 424

Their lordships note for completeness an alternative argument advanced by the appellants based on section 5(2)(*b*) of the Constitution. This asserted that to execute a condemned man while his petition to the IACHR was still outstanding would amount to cruel and unusual treatment or punishment. The argument has no merit; a similar argument was firmly rejected by the Board in *Fisher v Minister of Public Safety and Immigration (No 2)*. In any case, it is difficult to see how the argument can help the appellants. If they succeed on due process they do not need to rely on section 5(2)(*b*); while if they fail on due process they must necessarily fail on section 5(2)(*b*) for the same reasons.

It follows that the executions should be stayed until the appellants' petitions are finally disposed of and the rulings of the IACHR and the Inter-American Court of Human Rights have been considered by the relevant authorities.

Legitimate expectation

The appellants contend that the Government's ratification of the Convention gave rise to a legitimate expectation on the part of the appellants that they would not be executed before their petitions to the IACHR

were finally determined. The contention is an alternative to the argument based on the 'due process' clause, and accordingly can be disposed of quite shortly.

The Government advances a number of reasons for rejecting the appellants' contention. It claims, for example, that ratification is a private process which is not attended by public notice and that the ratification of the Convention was a transaction between the Government of Trinidad and Tobago and the Organisation of American States. There was no public statement that the Government had ratified the Convention and the appellants were not informed of the fact. It submits that ratification of an unincorporated treaty is incapable of raising a legitimate expectation that the Government will comply with the provisions of the treaty; or that it raises at best a legitimate expectation that the Government will introduce appropriate legislative measures to give effect to the treaty.

The short answer to this is that the appellants do not rely on the Government's ratification of the Convention alone. They rely on the fact that the Government implemented the Convention, which did not need the introduction of any legislative measures to bring it into operation. Condemned men were allowed to petition the IACHR; the Government responded to the IACHR's requests for information; and confirmed the position by publishing the Instructions.

In their lordships' view, however, the appellants' arguments based on legitimate expectation face an insurmountable obstacle. Even if a legitimate expectation founded on the provisions of an unincorporated treaty may give procedural protection, it cannot by itself, that is to say unsupported by other constitutional safeguards, give substantive

protection, for this would be tantamount to the indirect enforcement of the treaty; see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. In this sense, legitimate expectations do not create binding rules of law; see *Fisher v Minister of Public Safety and Immigration (No 2)* (1998) 53 WIR 27 at page 36. The result is that a decision-maker is free to act inconsistently with the expectation in any particular case, provided that he acts fairly towards those likely to be affected. But mere procedural protection would not avail the present appellants. Any legitimate expectation that their execution would be delayed until their petitions were heard, however long it might take, cannot have survived the publication of the Instructions. By the time they lodged petitions which the IACHR was competent to entertain, they knew that they were subject to strict time limits which might expire before their petitions were determined; see *Fisher v Minister of Public Safety and Immigration (No 2)* at page 36. The appellants sought to answer this by relying on the fact that the Instructions were unlawful. Their lordships do not think that this is an answer. The question is not whether their legitimate expectations were lawfully disappointed, but whether they were in fact disappointed.

Cruel and unusual treatment or punishment

The appellants, of course, would not be content with a stay of execution alone. They seek to have the sentences commuted. For this purpose, they invoke section 5(2)(*b*) of the Constitution, which prohibits the infliction of cruel and unusual treatment or punishment. They rely on the length of time during which they have been kept in prison, both before and after conviction, and on the conditions in prison, both separately and cumulatively. In addition, Thomas submits that it was inhumane and accordingly unconstitutional for the Court of Appeal to reinstate the sentence of death after it had been commuted by Jamadar J.

Delay

Thomas spent two years and eight months in custody before conviction and a further two years and seven months after it, making a total of five years and three months before the warrant was read. Hilaire spent four

years and three months in seven years and five months before the warrant was read. These periods can be compared with those in *Fisher v Minister of Public Safety and Immigration* (1997) 52 WIR 1, where the Board held that pre-trial delay could not be taken into account save in exceptional circumstances. In that case the Board affirmed the sentence despite the passage of three years and five months from arrest to conviction and a further two years and six months after it, making a total of five years and eleven months.

Their lordships do not accept that the periods of detention with which they are concerned have been so prolonged that it would now

be unconstitutional to carry out the death sentence in the case of either appellant. Taking post-conviction delay first, in neither case was the three and a half year period allowed for in *Pratt* exceeded. By the time the death warrants were read Thomas had spent about the same time on 'death row' as Fisher, and Hilaire only a few months more. As for the pre-trial delay, Thomas's trial was not unreasonably delayed, and the total time which he spent in custody was less than that spent by Fisher. Hilaire's trial by contrast was unduly delayed, and no explanation for the delay has been forthcoming. Their lordships are, however, constrained to repeat what was laid down by the Board in *Director of Public Prosecutions v Jaikaran Tokai* (1996) 48 WIR 376, that the Constitution of Trinidad and Tobago affords the accused a right to a fair trial, but not a right to a speedy trial nor to a trial within a reasonable time. Where the delay would render the trial unfair, the trial judge has power to stay the proceedings; and where he does not do so he is bound to direct the jury with regard to all matters arising from the delay which are favourable to the defence. Any failure on his part to do so may be corrected on appeal, constitutional redress being reserved for the exceptional case where the measures available to the trial judge, including his power to order a stay, are insufficient to ensure the fairness of the trial. There is no evidence that the long delay in bringing Hilaire to trial made his trial unfair, and accordingly it is impossible to conclude that it contravened his constitutional rights.

In *Fisher v Minister of Public Safety and Immigration,* the Board drew attention to the logical difficulty in simply aggregating the periods of delay before and after trial when the state of mind of the accused is different during the two periods. Their lordships add that, if pre-trial delay is ever relevant to the inhumanity of carrying out the death sentence, it must nevertheless be because of the total period that has elapsed before and after conviction. This in itself is sufficient to dispose of this issue on the facts of the present case.

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

Prison conditions

The appellants were detained in cramped and foul-smelling cells and were deprived of exercise or access to the open air for long periods of time. When they were allowed to exercise in the fresh air they were handcuffed. The conditions in which they were kept were in breach of the Prison Rules and were thus unlawful. It does not follow that they amounted to cruel and unusual treatment. (It is rightly accepted that they did not amount to additional punishment.) In a careful judgment, de la Bastide CJ found that they did not.

The expression is a compendious one which does not gain by being broken up into its component parts. In their lordships' view, the question for consideration is whether the conditions in which the appellants were kept involved so much pain and suffering or such deprivation of the elementary necessities of life that they amounted to treatment which went beyond the harsh and could properly be described as cruel and unusual. Prison conditions in third-world countries often fall lamentably short of the minimum which would be acceptable in more affluent countries. It would not serve the cause of human rights to set such demanding standards that breaches were commonplace. Whether or not the conditions in which the appellants were kept amounted to cruel and unusual treatment is a value judgment in which it is necessary to take account of local conditions, both in and outside prison. Their lordships do not wish to seem to minimise the appalling conditions which the appellants endured. As the Court of Appeal emphasised, they were and are completely unacceptable in a civilised society. But their lordships would be slow to depart from the careful assessment of the Court of Appeal that they did not amount to cruel and unusual treatment.

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

It would be otherwise if the condemned man were kept in solitary confinement or shackled or flogged or tortured. One would then say:

'enough is enough'. A State which imposes such punishments forfeits its right to carry out the death sentence in addition. But the present cases fall a long way short of this.

Their lordships are unwilling to adopt the approach of the Inter-American Court of Human Rights, which they understand holds that any breach of a condemned man's constitutional rights makes it unlawful to carry out a sentence of death. In their lordships' view, this fails to give sufficient recognition to the public interest in having a lawful sentence of the court carried out. They would also be slow to accept the proposition that a breach of a man's constitutional rights must attract some remedy, and that if the only remedy which is available is commutation of the sentence then it must be adopted even if it is inappropriate and disproportionate. The proposition would have little to commend it even in the absence of section 14(2) of the Constitution, but it is clearly precluded by that section.

Reinstatement of the death sentence

The appellants submit that it was beyond the power of the Court of Appeal to reinstate the death sentence in Thomas's case. Alternatively, they claim that it was formerly the convention in England to exercise the prerogative of mercy in such circumstances; and they rely on *Director of Public Prosecutions v Smith* [1961] AC 290 for evidence of this practice.

In *Smith*, the Court of Appeal (in England) set aside a conviction of murder and sentence of death and substituted a conviction of manslaughter and a term of ten years' imprisonment. The House of Lords allowed an appeal by the prosecution and restored the conviction for murder and the sentence of death. In the course

of the hearing, counsel for the prosecution told the House that, if the appeal were allowed, the Crown would grant a reprieve.

The case does not support Thomas since the House of Lords reinstated the death sentence. It had no power to do anything else, since it was restoring a conviction for an offence for which the death sentence was mandatory. It is no answer for Thomas to say that a court hearing a constitutional motion is in a different position from a court hearing a criminal appeal. Thomas was convicted of murder and sentenced to death. He brought a constitutional motion. The Court of Appeal held that there was no basis for the motion, set aside the judge's order which commuted the sentence, and dismissed the motion. With the constitutional challenge thus disposed of, the sentence passed by the trial judge stood. Although the effect of the Court of Appeal's order was to restore the sentence of death, the Court of Appeal did not 'impose' or 'reinstate' it. The sentence is still the mandatory sentence passed by the trial judge, the order vacating it having been set aside in turn.

The fact that sentence of death was passed and commuted before being restored may, however, be thought to be a powerful ground for exercising the prerogative of mercy. Their lordships respectfully draw

this factor to the attention of the authorities in Trinidad and Tobago, while emphasising that this must be a matter for them.

Conclusion

Their lordships have accordingly stayed the execution of the appellants until their current petitions to the IACHR have been determined and any report of the IACHR or ruling of the Inter-American Court of Human Rights has been considered by the authorities of Trinidad and Tobago. Subject thereto they dismiss the appeals of both appellants.

Similar considerations will apply in relation to other persons under sentence of death in Trinidad and Tobago who have lodged petitions with the IACHR or the UNHRC. The Advisory Committee may, of course, take into account the delay occasioned by the slowness of the international bodies in dealing with such petitions. But, in their lordships' view, such delays should not prevent the death sentence from being carried out. Where, therefore, more than eighteen months elapses between the date on which a condemned man lodges a petition to an international body and its final determination, their lordships would regard it as appropriate to add the excess to the period of eighteen months allowed for in *Pratt*.

Lord Goff of Chieveley and **Lord Hobhouse of Woodborough** delivered the following dissenting opinion. These appeals raise a question of the construction of the Constitution of the Republic of Trinidad and Tobago of 1976 and, in particular, section 4(*a*) of the Constitution which affirms (*inter alia*) the right of individuals to life, and the right not to be deprived thereof 'except by due process of law'. In this opinion we will for convenience refer to the Republic of Trinidad and Tobago as 'the Republic'. As appears from the reasons prepared by Lord Millett, the majority of their lordships would allow the appeals to the extent of granting a limited stay of execution on the ground that the appellants have a constitutional right to have their applications to the Inter-American Commission on Human Rights ('IACHR') considered and determined before the sentences of death properly passed upon them are carried out. It is on this aspect of the case that we find ourselves unable to agree with reasons of the majority. We agree that the carrying out of the death sentences will not be unconstitutional by reason of the conditions in which the appellants have been held or their treatment in custody (*Fisher v Minister of Public Safety and Immigration* (1997) 52 WIR 1). We also agree that the doctrine of legitimate expectation is of no assistance to the appellants on the facts of the present cases. The points which we have to address are therefore limited to those directly bearing upon the

issue arising under section 4(*a*).

The appellants' actions are brought under section 14 of the Constitution, which provides a specific remedy by way of originating

motion in the High Court for any contravention of the provisions of Chapter 1 of the Constitution and requires the High Court to grant appropriate relief for the purpose of enforcing or securing the enforcement of any of the provisions of the chapter to the protection of which the appellants are entitled. That is the jurisdiction which the appellants have invoked. Similarly, the jurisdiction of their lordships' Board in this matter is derived solely from the provisions of the Constitution, section 109 in Chapter 7. This Board is sitting as a court of the Republic. It is the laws of the Republic alone which their lordships are under a duty and at liberty to apply. It is upon those laws alone which the appellants are entitled to rely in support of their motions under section 14 of the Constitution. The appellants are not entitled to rely upon any broader principle, unless it has been recognised by and forms part of the law of the Republic.

The Constitution follows what has come to be called the 'Westminster model'. It provides (*inter alia*) for the separation of powers (*Hinds, Hutchinson, Martin, Thomas v R* (1975) 24 WIR 326 at pages 341 et seq). Thus, the Constitution vests the executive power in the President as Head of State (Chapters 3 and 5) and a Cabinet and Ministers answerable to the Parliament (sections 75 et seq). The legislative power is vested in the Parliament (Chapter 4). The judicial power is vested in the judicature (Chapter 7). It thus adopts the familiar scheme that only the Parliament can make and unmake laws. The treaty-making power is an executive power, but its exercise does not alter the law of the Republic unless and until Parliament chooses to make laws which do so. The position is the same as it was in the United Kingdom before the passing of the European Communities Act 1972 (*J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, in particular *per* Lord Oliver of Aylmerton at pages 499, 500, and *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, in particular *per* Lord Bridge of Harwich at page 747).

The Republic was, at the start of 1998, a party to the International Covenant on Civil and Political Rights, including the Optional Protocol, and the American Convention on Human Rights. The Republic's ratification of these treaties post-dated the enactment of the Constitution. On 26 May 1998, the Republic denounced these treaties. In the case of the Optional Protocol, the denunciation took effect from 26 August in the same year but in the case of the Inter-American Convention it did not take effect until 26 May 1999.

These treaties included undertakings by the Republic that it would respect and give effect within its territory to the individual rights set out in the treaties. The treaties also set up international agencies to provide mechanisms whereby the individuals intended to be protected could lodge complaints asserting that their States had not fulfilled their undertakings and obtain declarations to that effect which the States then further undertook to recognise and honour. These international

structures do not as such give rise to problems if the State parties to the treaties comply with their undertakings to give effect to the treaty provisions in their municipal legal systems. But, if a State does not do so, there will inevitably exist a divergence between, on the one hand, the international obligations of the State under the treaties and the 'rights' which are so provided for and, on the other hand, the obligations of the organs of the State within its own municipal and constitutional law.

In a liberal democracy such as the Republic (and other States using the 'Westminster model' Constitution), the making of law is the exclusive right and capacity of the elected legislature. The executive has no right or capacity to make law (save through powers properly and expressly delegated by the legislature). Similarly, the law which the judicature is under a duty to apply is exclusively the law made by the legislature. Law purportedly made by the executive (save under delegated powers) is not law. The law which the courts of the

State are obliged to apply is properly termed municipal law, in order to distinguish it from the unincorporated international law created by treaties. It will thus be seen that the references to 'law' in the Constitution of the Republic must be and are references to municipal law. Many cases have been decided on this basis; *de Freitas v Benny* (1975) 27 WIR 318, *Thornhill v Attorney-General* (1979) 31 WIR 498, *Attorney-General v Whiteman* (1991) 39 WIR 397, and *Fisher v Minister of Public Safety and Immigration (No 2)* (1998) 53 WIR 27 ('*Fisher No 2*') at page 36. Because the Constitution of 1976 was in continuation of earlier constitutional provisions, it contains definitions which continue the laws previously in force, but this in no way alters the fact that the law referred to is the municipal law; sections 3 and 6. The phrase 'due process of law' is a reference to the law of the Republic as provided for in the Constitution, that is to say the municipal law of the Republic as in force at the date of the Constitution or enacted by Parliament since that date.

It follows that, in principle, the terms of the two unincorporated human rights treaties (and the protocol) to which the Republic is a party were not capable of conferring upon the appellants any rights which the courts of the Republic were obliged or at liberty to enforce at the suit of the appellants. The treaties cannot as such be invoked by the appellants as a basis for alleging an infringement of the Constitution. We accept that treaty obligations assumed by the executive are capable of giving rise to legitimate expectations which the executive will not under the municipal law be at liberty to disregard (*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, *R v Secretary of State for the Home Department, ex parte Ahmed* (1998) (unreported), and *Fisher No 2*). But in the present case there was not at the material time any legitimate expectation. On this we agree with with what is said in the reasons of the majority.

As has been observed in previous decisions of this Board upon the Westminster model, Chapter 1 of the Constitution is drafted in a

particular way. Section 4 is a declaration of the rights which already exist and are to continue to exist in the Republic. Section 5 prohibits the making of any law which would abrogate, abridge or infringe those rights and, by subsection (2), specifically precludes the legislature from passing new laws having the effect listed in any of paragraphs (*a*) to (*h*) of the subsection (see *Ramesh Lawrence Maharaj v Attorney-General (No 2)* (1978) 30 WIR 310 at pages 316, 317). The existing law of the Republic included provision for what should constitute the crime of murder and how those charged with criminal offences shall be tried; by section 4 of the Offences against the Person Act, the punishment for those convicted of murder is death. Appellate procedures, including the right to petition their lordships' Board, are provided for. The appellants have been tried in accordance with the law of the Republic; they have been convicted of murder under that law; they have been condemned to death under that law; they have fully exercised and exhausted their rights of appeal under that law. There has been no want of due process of law. All that has occurred has been in accordance with the due process of law.

The phrase 'due process of law' has a long history, being first found in English legislation some six and a half centuries ago. It is derived from the use of the words in article 39 of the Magna Carta: 'but by the lawful judgment of his peers or by the law of the land' (cf 25 Edw 1, c 29). The expression 'due process of law' came to be used as a synonym for the expression 'law of the land'. Thus 'due process of law' was used instead in later legislation and Coke in his *Institutes*, Part 2, Vol 1 (1641) treated the two expressions as interchangeable. Due process of law was also the expression used in various charters granted to the American Colonies in the 17th and 18th centuries and it is by that route that it then came to be used in the constitutional documents of the USA and its constituent States. The US courts have continued to make clear that it has the same meaning as according to the 'law of the land' (*Walker v Sauvinet*, 92 US 90 (1875), and *Hurtado v State of California,* 110 US 516 (1883), particularly at pages 521 et seq). It is the law of the land which gives the concept of due process its broader meaning (for example, the principles of natural justice, burden of proof etc; *Holden v Hardy*, 169 US 366 (1897)) and shows that it does not necessarily preclude reference in cross-examination to previous convictions (*Adamson v State of California*, 332 US 46 (1946)). This approach of the courts of the USA is fully consistent with the approach adopted by the Constitution of the Republic and those of other Caribbean countries. The due process of law provision fulfils the basic

function of preventing the arbitrary exercise of executive power and places the exercise of that power under the control of the judicature. It also limits the power of the legislature to legislate so as to derogate from that requirement; the *Hurtado* and *Adamson* cases provide instances of this, as did the Trinidadian case to which we were referred *Lassalle v Attorney-General* (1971) 18 WIR 379.

(1998) 54 WIR 387 at 433

In this last case, Phillips JA summarised the requirement (at page 391) as being '(i) reasonableness and certainty in the definition of criminal offences; (ii) trial by an independent and impartial tribunal, [and] (iii) observance of the rules of natural justice'. The authorities show that the requirement is that rights and liabilities, criminal and civil, be determined in accordance with the law of the land as a matter of both substance and procedure. The laws of the Republic apply this principle. The understanding that the law referred to is the municipal law is confirmed to be correct; indeed, no authority has been cited to contradict this. The rights which are protected are those set out in the Constitution, including those previously existing in the law of the Republic. This does not include (without more) expectations raised by treaties entered into by the executive which have not been incorporated into the law of the Republic, although in such cases the municipal law doctrine of legitimate expectation may, where appropriate, be invoked by individual citizens.

This conclusion will disappoint those who contend for the application of unincorporated international human rights conventions in municipal legal proceedings so that such rights will be *directly* enforced in national courts as if they were rights existing in municipal law. The widest possible adoption of humane standards is undoubtedly to be aspired to. But it is not properly to be achieved by subverting the Constitutions of States nor by a clear misuse of legal concepts and terminology; indeed, the furthering of human rights depends upon confirming and upholding the rule of law. Suppose that an international treaty declares certain conduct to be criminal wherever committed (and such examples exist), unless and until the legislature of a State party to the treaty has passed a law making such conduct criminal under its municipal law, it would be contrary to due process (and in the Republic, contrary to section 4 of the Constitution) for the executive of the State to deprive any individual of his life, liberty or property on the basis of the international treaty. It would be a clear breach of that individual's constitutional rights. An unincorporated treaty cannot make something due process; nor can such a treaty make something not due process, unless some separate principle of municipal law makes it so.

In the face of these difficulties, the appellants have also presented their argument in a modified form. They submit that due process of law should be construed so as to encompass *any* remedy provided by the State whereby the individual obtains the opportunity of achieving a commutation by executive act under domestic law; or, more seductively, by arguing that by ratifying a treaty which provides for individual access to an international body, the Government, that is to say the executive, made that process for the time being part of the domestic criminal justice system of the Republic and thereby temporarily at least extended the scope of the phrase 'due process of

(1998) 54 WIR 387 at 434

law' in section 4 of the Constitution. Whilst it is of course correct that the content of what is 'due process of law' may change from time to time (eg the reduction or the extension of the right to trial by jury), the change must derive from a change in the law of the Republic. If the 'remedy' or 'process' was one derived from the law of the Republic or was recognised by the Constitution, the conclusion might follow. But for the executive to interfere with the proper implementation of the law of the land is not an option open to the executive; the executive is bound by the law of the land as is the judicature. It is the legislature that has the power to change the law.

The alternative argument therefore disguises (but does not remove) the flaw in the primary argument. The alternative argument is also not assisted by the invocation of an analogy between the rights of appeal granted by municipal law and the right under the international treaty to complain to the relevant Human Rights Commissions. There is an analogy. But, as with all analogies, it is only valid and useful if the points of similarity and difference are apt to the purpose for which the analogy is being used. The procedural right

being asserted has to be a legal right, otherwise it has no relevant existence for the purpose of section 4. The appellants may be at *liberty* to complain to the Human Rights Commissions but they have no right to do so. If the treaty purports to confer such a right, it has only done so for the purpose of international law and not for the purpose of the law of the Republic (*Fisher No 2* at page 40). It is accordingly our opinion that, in asserting that the right which the appellants invoke is the right not to have the outcome of any pending appellate or other legal process pre-empted by executive action, the majority are, with all respect, assuming what they have to prove, *viz* that the opportunity to invoke the jurisdiction of the UNHRC and the IACHR constitutes a legal right and therefore part of the legal process of the Republic.

Here again, the argument of the appellants has involved a disguised but unacceptable contradiction. The very points upon which the appellants wish to rely before the IACHR are points upon which they relied or were entitled to rely when they previously petitioned their lordships' Board. The Board ruled upon them and decided that the convictions should be upheld. For the purposes of the Constitution and the law of the Republic, that decision is conclusive and determinative of the rights of the appellants. But suppose that the appellants were relying upon some ground which was not open to them before the Court of Appeal or the Board, that would by definition be a ground which provided no legal basis for setting aside the convictions or sentences. The claimed assertion of a constitutional right turns out to be a contradiction of the constitutional right.

In our opinion therefore the appellants' appeals should be dismissed. But there is a further point, essential to the success of their appeals, to which we must briefly refer. The Instructions of 13 October 1997 were an attempt by the Government of the Republic to address the consequences of the decision of their lordships' Board in *Pratt*

v Attorney-General (1993) 43 WIR 340, having regard to the delays experienced when those sentenced to death sought to take advantage of the procedures of the two Human Rights Commissions. The Republic, in common with other Caribbean countries, found itself in an impossible position. The Privy Council had decided that delay in carrying out a sentence of death on a man beyond a certain time rendered his subsequent execution inhuman punishment and was therefore unconstitutional. Lord Griffiths delivering the advice of the Board said (at page 361):

> 'The final question concerns applications by prisoners to the IACHR and UNHRC. Their lordships wish to say nothing to discourage Jamaica from continuing its membership of these bodies and from benefiting from the wisdom of their deliberations. It is reasonable to allow some period of delay for the decisions of these bodies in individual cases but it should not be very prolonged. The UNHRC does not accept the complaint unless the author "has exhausted all available remedies".'

The good faith of those drafting and issuing the Instructions is not questioned. But it is submitted that in contemplating that the relevant person under sentence of death would wish to obtain the support of both bodies and recognising that the applications to them had to be successive not simultaneous and, therefore, sub-dividing the appropriate permissible period into two sub-periods for such successive applications, the Cabinet acted unlawfully and therefore invalidated the whole of the Instructions so that they have to be disregarded altogether. The principle invoked is proportionality. It is true that, with the benefit of hindsight, it *might* have been better to have allocated a single undivided period within which the relevant person could make such use as he could of the procedures of either or both bodies. But there were at the time arguments favouring the approach adopted by the draftsman which included a structure of responses within a detailed time table by the authorities in the Republic. It can now be seen that the attempt to reconcile the law as laid down in *Pratt* and reiterated in *Guerra v Baptiste* (1995) 43 WIR 439 at pages 451, 452, with the practices of the Commissions will rarely be successful. The Commissions espouse a policy of discouraging capital punishment wherever possible and, in accordance with that policy, appear to see postponement of an execution for as long as possible as an advantage since it may improve the chances of commuting the

sentence or quashing the conviction (see also *Johnson v Jamaica* (1996) 1 Butterworths Human Rights Cases 37). There is thus a direct conflict between the policy of the Commissions and the enforcement of the law of the Republic. The Commissions appear to be unable or unwilling to alter their practices to accommodate the countries' requests for more speedy procedures.

(1998) 54 WIR 387 at 436

But to proceed from this conclusion to the conclusion that the Instructions were unlawful and disproportionate is in our view seriously mistaken. The Government of the Republic could not ignore *Pratt*. What it did was consistent with a loyal attempt to do what Lord Griffiths had suggested. To hold the Instructions unlawful would in truth be a disproportionate response to the failure of the Government's attempt to reconcile the treaties and the law. In our opinion the Instructions were not unlawful. Our view is also in harmony with the decision in *Fisher No 2*, at page 36, that the decision there under attack was not *Wednesbury* unreasonable (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).

For these reasons, it is our opinion that these appeals should be dismissed and the stay refused.

Lord Steyn delivered the following dissenting opinion.

On commutation of the death sentences

In my view the correct disposal in law of the appeals of Thomas and Hilaire would be to commute the death sentences and to substitute terms of life imprisonment. The purpose of this dissenting opinion is to state briefly my reasons for this view, leaving unaffected my concurrence in the remainder of the majority reasons delivered by Lord Millett, and in particular my concurrence in their lordships' decision that the execution of the death sentences imposed on Thomas and Hilaire be stayed pending the determination of their appeals by the Inter-American Court of Human Rights and consideration of the reports of the IACHR by the relevant authorities in Trinidad and Tobago.

The governing principle

More than 400 years ago in his famous essay on 'Cruelty', Montaigne wrote:

> 'As for me, even in the case of justice itself, anything beyond the straightforward death penalty seems pure cruelty, and especially in us Christians who ought to be concerned to dispatch men's souls in a good state, which cannot be so when we have driven them to distraction and despair by unbearable tortures.'

Something like this idea is to be found in the Constitution of Trinidad and Tobago which was framed against the backcloth of the Universal Declaration of Human Rights 1948 and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1953. Under the Constitution the sentence of death by hanging for murder is preserved. But by section 5(2)(*b*) of the Constitution the infliction of cruel and unusual treatment or punishment is prohibited. It follows that

(1998) 54 WIR 387 at 437

the State may not superimpose upon the inevitable consequences of a death sentence inhuman treatment in the sense of additional unnecessary and avoidable agony and suffering. *Pratt v Attorney-General* (1993) 43 WIR 340 is the most frequently encountered application of this principle; adding to the agony of the condemned man by inordinate post-conviction delay may justify commutation. But, as I attempted to show in some detail in my dissenting opinion in *Fisher v Minister of Public Safety and Immigration* (1997) 52 WIR 1 at page 15, other circumstances may have to be taken into account. I concluded (at page 20):

> 'Echoing the language of Lord Griffiths in *Pratt v Attorney-General,* I would say that a State that wishes to retain capital punishment must accept the responsibility of ensuring that condemned men are confined in conditions that satisfy a minimum standard of decency. In considering whether a lesser period than the five year or three and a half year norms may be sufficient to render a proposed execution unlawful it must be permissible to take into account that the anguish of the condemned man has been greatly increased by his incarceration in appalling conditions. Our humanity permits no other answer to this question.'

In the same case (at page 11), the majority were unwilling to impose 'any hard-and-fast limit on the matters to be taken into account' and to exclude 'the possibility that pre-trial delay, if sufficiently serious in character, may be capable of being taken into account'. The reason for these reservations is obvious. There are irreducible minimum standards of treatment of condemned men which a State must observe. Those obligations fall into two categories. First there are negative obligations. Thus prisoners may not be assaulted. Secondly, there are positive obligations. Thus there is an obligation on the State to ensure that even a condemned man is afforded necessary medical care. A clear breach would be the placing of a condemned man on a starvation diet or depriving him of reasonable supplies of water. Adding to the torment of condemned men by such inhuman treatment is prohibited by the Constitution of Trinidad and Tobago. To the extent that such inhuman treatment inflicted on condemned men substantially increases their torment it must be relevant to the question whether a lesser period than the five year or three and a half year norms may be sufficient to render a proposed execution unlawful.

The facts: Thomas

From the date of the imposition of the death sentence on Thomas he was persistently deprived of his legal right to exercise in the open air daily. The Prison Rules require that condemned men should be allowed to take exercise in the open air daily for an hour. This provision confers legal rights on such prisoners. Jamadar J held that the purpose

of the provision was to protect the health of the prisoners. The judge was faced with a conflict of evidence as to the extent to which Thomas was deprived of his right to exercise. He rejected the evidence of the acting Commissioner of Prisons as 'just not true'. The judge accepted the evidence of Thomas, which was supported by an occurrence book for the period from January to June 1998. The judge found that, except when rarely Thomas was allowed to be 'aired' or exercised, Thomas was confined in a cell 6 feet in width 12 feet in length and 11 feet, 7 inches, in height for twenty-four hours a day. There was no internal sanitation in the cell; it always had a foul smell. The judge found that on average Thomas was permitted only one hour of exercise (or access to fresh air) every two weeks. Sometimes Thomas was not allowed any exercise or access to fresh air for long periods. One such period lasted three months. The judge concluded that 'This has gone on for two years and seven months', ie for the entire period since Thomas was sentenced to death. Moreover, the judge found that Thomas was unnecessarily and arbitrarily handcuffed on every occasion that he was allowed to exercise or given access to fresh air. The judge concluded that the prolonged detention of Thomas in such circumstances amounted to cruel and unusual punishment or treatment. He quashed the death sentence imposed on Thomas.

In restoring the death penalty, the Court of Appeal placed some reliance on the evidence of a prison doctor that he found 'no record of any complaints made by him of suffering from depression, nervousness or claustrophobia'. It is unsurprising that Thomas, circumstanced as he was, did not suggest that he was suffering from such clinical symptoms. Moreover, given that the judge had refused to admit psychiatric evidence about the mental state of Thomas, the weight placed on the prison doctor's statement does not seem fair or warranted. In any event, this item of evidence was before the judge. And the primary facts as to the way in which the prison authorities deprived Thomas of his right to exercise are not in doubt. The Court of Appeal further observed that the judge was wrong to describe the conditions as tantamount to solitary confinement. This is no more than a semantic point; it does not affect the primary findings of fact. The Court of Appeal also observed that substantial numbers of people in Trinidad and Tobago live in very cramped and overcrowded conditions. Since the people concerned (unlike condemned men) are free to take exercise in

open air as they wish, this observation does not meet the finding that Thomas was systematically deprived of the right to exercise. Contrary to the view of the Court of Appeal, there is no tenable argument based on cultural relativism. There was a fundamental breach of irreducible minimum standards of treatment of prisoners recognised among civilised nations. And I count Trinidad and Tobago among those nations.

de la Bastide CJ observed that a new maximum security prison has now been built. He said (at page 399, *ante*) that 'when it is commissioned

[it] will serve to relieve much of the overcrowding and the understaffing that exist now in the prison system'. Jamadar J found, however, that *no* reasons were advanced to justify the persistent breach of the Prison Rules. Indeed, the acting Commissioner of Prisons said that Thomas 'should have had more opportunities to be "aired"'. The persistent failure to allow Thomas to take daily exercise is the more lamentable since on 29 July 1987 a High Court judge in two cases severely criticised the prison authorities for failing to allow condemned men to exercise in accordance with the Prison Rules; *Thomas v The State* (unreported). There was no appeal against that decision. The irreducible minimum standards of treatment of prisoners have therefore been recognised in Trinidad and Tobago.

The result of the decision of the Court of Appeal is that in law and in fact a condemned man has no effective remedy for a complete or virtually complete denial of his rights to take exercise for one hour daily. The relevant provision in the Prison Rules is plainly motivated by a desire to protect health and welfare standards even of condemned men. It was not included in the rules so that the prison authorities could decide whether to obey the rules or not as they preferred. That is exactly what they have done; the approach has been 'We are the law here'. The time has come to make clear that the law extends even to condemned men. It needs to be demonstrated that unlawful behaviour by prison authorities towards condemned men in countries maintaining the death sentence will not be tolerated. Thomas had legal rights under the Prison Rules. By denying Thomas the opportunity to exercise those rights, the prison authorities have subjected Thomas to cruel and unusual treatment. Given that Thomas was subjected to such inhuman treatment over a prolonged period, the only effective redress is now to quash the sentence of death. In my judgment the trial judge was right to quash the sentence of death and the Court of Appeal erred in reversing his decision.

Hilaire

In this case, Kangaloo J has not made the necessary findings of fact. A possible course is to remit the matter for findings of fact. I do not, however, think this is necessary. The evidence was that all 'death row' prisoners are treated in the same way. The judge did not reject Hilaire's evidence. Indeed, he reminded the authorities that the Prison Rules were there to be obeyed. And it will be recollected that in the case of Thomas Jamadar J had rejected the evidence of the acting Commissioner of Police. One can safely assume that during more than three years on 'death row' Hilaire was also deprived of his rights under the Prison Rules in the same way as Thomas.

Disposal of the appeals

It is, of course, true that these are not cases of torture. I also accept that no additional punishment was inflicted. But the protection

afforded by the Constitution is much wider. I have no doubt that prolonged 'cruel and unusual treatment' was imposed on these two men. Given the extreme facts of the inhuman treatment inflicted on these men, the additional agony and torment suffered by them as a result of the unlawful and unconstitutional behaviour of the prison authorities must have been enormous. They have committed terrible crimes. But they are entitled as a matter of law to the full measure of the protection of the Constitution. The only appropriate remedy is to quash the sentences of death.

Advice that executions be stayed pending determination of appellants' petitions to the IACHR.

Refusal of plea that death sentences passed on the appellants be commuted.