

*Privy Council Appeal No. 60 of 1998*

**(1) Darrin Roger Thomas and  
(2) Haniff Hilaire**

*Appellants*

v.

**(1) Cipriani Baptiste (Commissioner of Prisons)  
(2) Evelyn Ann Petersen (Registrar of the Supreme Court)  
and  
(3) The Attorney General**

*Respondents*

FROM

**THE COURT OF APPEAL OF TRINIDAD  
AND TOBAGO**

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REASONS FOR DECISION OF THE LORDS OF THE  
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,  
OF THE 27TH JANUARY 1999, Delivered the  
17th March 1999

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*Present at the hearing:-*

Lord Browne-Wilkinson  
Lord Goff of Chieveley  
Lord Steyn  
Lord Hobhouse of Woodborough  
Lord Millett

*[Majority Judgment to which Lord Browne-Wilkinson, Lord Steyn and  
Lord Millett are parties, delivered by **Lord Millett**]*

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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 27th 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 considered and determined before the sentence was carried out;

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.

#### The background.

The present Constitution of Trinidad and Tobago came into force on the 1st 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 (though 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* [1976] A.C. 239, 244.

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 Covenant. The Optional Protocol gave individuals right of access to the UNHRC.

On 28th 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 Commission”) and its judicial organ the Inter-American Court of Human Rights (“the IACHR”) to which the Commission could refer disputes. By ratifying the Convention the Government of Trinidad and Tobago recognised the Commission'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 IACHR 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 for Jamaica* [1994] 2 A.C. 1 this Board held that to carry out a sentence of death after a delay of 14 years would constitute inhuman punishment and would be unconstitutional under the law of Jamaica. The Board ruled at pages 34-35 that the aim should be to hear a capital appeal in Jamaica within 12 months of conviction and to complete the entire domestic appeal process within two years; that it should be possible to complete applications to the UNHRC “with reasonable despatch” and at the most within a further 18 months; and that where execution was to take place more than five years after sentence there would be strong grounds for believing that the carrying out of 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 Commission 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 13th 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 Commission. 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 26th May 1998 Trinidad and Tobago denounced the American Convention on Human Rights (as it was entitled to do) with effect from 26th May 1999. At the same time it denounced the Optional Protocol to the International Covenant with effect from 26th August 1998 and re-acceded to it subject to a reservation in respect of anyone who had been condemned to death.

#### The appellants.

The appellant Darrin Roger Thomas was arrested on 12th February 1993 and charged with murder. He remained in custody until trial. He was convicted and sentenced to death on 15th November 1995. The Court of Appeal of Trinidad and Tobago dismissed his appeal against conviction on 20th June 1997. His application for special leave to appeal to their Lordships' Board was dismissed on 11th March 1998.

On 31st March 1998, that is to say after the publication of the Instructions, Thomas lodged a petition with the Commission. 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 1st May 1998, the latest time provided for in the Instructions, the Commission had still not sought the Government's response to Thomas' complaints. Accordingly the Advisory Committee on the Power of Pardon ("the Advisory Committee") met on 12th June 1998. No reprieve was forthcoming, and on 25th June 1998 a warrant was read for Thomas' 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 27th June 1998. On 15th 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.

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

On 7th October 1997 Hilaire lodged a petition with the Commission. This was premature, as the Commission is incompetent to entertain a petition until the petitioner has exhausted his domestic remedies. Without withdrawing his petition to the Commission, Hilaire then proceeded to file a petition for special leave to appeal to their Lordships' Board, which was dismissed on 6th November 1997, that is to say, after the Instructions had been published. Thereafter the Commission 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 Commission before the date on which the Instructions were published.

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

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

The IACHR 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 Commission 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 Commission and the UNHRC (which was possible though unlikely), and laid down a series of successive time limits for the taking of the several steps which would be involved in the making of successive applications to both international bodies.

In their Lordships' view it was reasonable for the Government of Trinidad and Tobago to take action to ensure that lawful sentences passed by its Courts should not be frustrated by events beyond the Government's control. It was reasonable to provide some outside time limit within which the international appellate processes should be completed. The Instructions had the object of introducing an appropriate element of urgency into the international appellate processes. This object was in conformity with the policy laid down by the Board in *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1, 33 that:-

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

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

In their Lordships' view it was also reasonable to provide for the possibility of successive applications to the same or different bodies. They are, however, satisfied that the Instructions were disproportionate because they curtailed petitioners' rights further than was necessary to deal with the mischief created by the delays in the international appellate processes. It would have been sufficient to prescribe an outside period of (say) 18 months for the completion of all such processes. This could apply whether the petitioner made only one application or applied successively to more than one international body or made successive applications to the

same body. It was unnecessary and inappropriate to provide separate and successive time limits for each application 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 United States of America. The due process clauses in the Fifth and Fourteenth Amendments underpin the doctrine of the separation of powers in the United States and serve as a cornerstone of the constitutional protection afforded to its citizens. Transplanted to the Constitution of Trinidad and Tobago, the due process clause excludes legislative as well as executive interference with the judicial process.

But the clause plainly does more than this. It deliberately employs different language from that found in the corresponding provisions of the Universal Declaration of Human Rights and the European Convention on Human Rights. They speak merely of “the sentence of a court of competent jurisdiction”. The due process clause requires the process to be judicial; but it also requires it to be “due”. In their Lordships’ view “due process of law” is a compendious expression in which the word “law” does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by

civilised nations which observe the rule of law: see the illuminating judgment of Phillips J.A. in *Lassalle v. Attorney-General* (1971), 18 W.I.R. 379 from which their Lordships have derived much assistance.

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* (1915) 237 U.S. 309, 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 Commission were still pending. They seek a stay of execution until the petitions have been determined and the rulings of the Commission and IACHR have been considered by the authorities in Trinidad and Tobago. To this the Government make several objections. They invoke the fundamental principle that legal rights are neither created nor destroyed by executive action, and contend that the due process clause does not incorporate into domestic law rights created by an unincorporated treaty such as the Convention. They insist that rights granted by the executive may be withdrawn by the executive. They also rely 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* [1976] A.C. 239; *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)* [1979] A.C. 385; *Thornhill v. Attorney-General of Trinidad and Tobago* [1981] A.C. 61.

They point out that the Commission'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. They submit 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 or deprive the subject of existing legal rights unless and until enacted into domestic law by or under authority of the legislature. When so enacted, the Courts give effect to the domestic legislation, not to the terms of the treaty. The many 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 invoke. The right for which they contend is not the particular right to petition the Commission or even to complete the particular process which they initiated when they lodged their petitions. It is the general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by executive action. This general right is not created by the Convention; it is accorded by the common law and affirmed by section 4(a) of the Constitution. The 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) [1999] 2 W.L.R. 349. 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 Commission may make when considering whether or not to recommend a reprieve. This is not a legal process and is not subject to the constitutional requirement of due process: see *de Freitas v. Benny* [1976] A.C. 239; *Reckley v. Minister of Public Safety and Immigration (No. 2)* [1996] A.C. 527. The Government submit that the appellants can have no legal 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 Commission to the IACHR. The appellants are contending that their trials were unfair, and hope in due course to obtain binding rulings from the IACHR that their convictions should be quashed or their sentences should be commuted. For the Government to carry out the sentences of death before the petitions have been heard would deny the appellants their constitutional right to due process.

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 Commission 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)* (*supra*). 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 Commission and the IACHR 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 Commission 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 advance a number of reasons for rejecting the appellants' contention. They claim, 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. They submit 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 Commission; the Government responded to the Commission'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 C.L.R. 273. In this sense legitimate expectations do not create binding rules of law; see *Fisher v. Minister of Public Safety and Immigration (No. 2)* (*supra*) at p. 356B-D. The result is that a decision-maker is free to act inconsistently with the expectation in any particular case provided that he acts fairly towards those likely to be affected. But mere procedural protection would not avail the present appellants. Any legitimate expectation that their execution would be delayed until their petitions were heard, however long it might take, cannot have survived the publication of the Instructions. By the time they lodged petitions which the Commission was competent to entertain, they knew that they were subject to strict time limits which might expire before their petitions were determined: see *Fisher v. Minister of Public Safety and Immigration (No. 2)* (*supra*) at p. 356E. The appellants sought to answer this by relying on the fact that the Instructions were unlawful. Their Lordships do not think that this is an answer. The question is not whether their legitimate expectations were lawfully disappointed, but whether they were in fact disappointed.

#### 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 2 years and 8 months in custody before conviction and a further 2 years and 7 months after it, making a total of 5 years and 3 months before the warrant was read. Hilaire spent 4 years and 3 months in custody before conviction and a further 3 years and 2 months after it, making a total of 7 years and 5 months before the warrant was read. These periods can be compared with those in *Fisher v.*

*Minister of Public Safety and Immigration (No. 1)*, [1998] A.C. 673, 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 3 years and 5 months from arrest to conviction and a further 2 years and 6 months after it, making a total of 5 years and 11 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 3<sup>1</sup>/<sub>2</sub> 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' 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 *D.P.P. v. Tokai* [1996] A.C. 856 that the Constitution of Trinidad and Tobago affords the accused a right to a fair trial but not a right to a speedy trial or 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 18 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 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 C.J. 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 IACHR, which they understand holds that any breach of a condemned man's constitutional rights makes it unlawful to carry out a sentence of death. In their Lordships' view this fails to give sufficient recognition to the public interest in having a lawful sentence of the court carried out. They would also be slow to accept the proposition that a breach of a man's constitutional rights must attract some remedy, and that if the only remedy which is available is commutation of the

sentence then it must be adopted even if it is inappropriate and disproportionate. The proposition would have little to commend it even in the absence of section 14(2) of the Constitution, but it is clearly precluded by that section.

#### 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' 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] A.C. 290 for evidence of this practice.

In *Smith* the Court of Appeal set aside a conviction of murder and sentence of death and substituted a conviction of manslaughter and a term of 10 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 did reinstate 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 Commission have been determined and any report of the Commission or ruling of the IACHR has been considered by the authorities of Trinidad and Tobago. Subject thereto they dismiss the appeals of both appellants.

Similar considerations will apply in relation to other persons under sentence of death in Trinidad and Tobago who have lodged petitions with the Commission or the UNHRC. The Advisory Committee may, of course, take into account the delay occasioned by the slowness of the international bodies in dealing with such petitions. But in their Lordships view such delays should not prevent the death sentence from being carried out. Where, therefore, more than 18 months elapses between the date on which a condemned man lodges a petition to an international body and its final determination, their Lordships would regard it as appropriate to add the excess to the period of 18 months allowed for in *Pratt*.

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*Dissenting judgment in favour of dismissing the appeals  
delivered by Lord Goff of Chieveley and  
Lord Hobhouse of Woodborough*

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 judgment we will for convenience refer to the Republic of Trinidad and Tobago as the Republic. As appears from the judgment 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 these appellants have a constitutional right to have their applications to the Inter-American Commission on Human Rights 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 the majority judgment. 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 (No. 1)* [1998] A.C. 673). 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 v. The Queen* [1977] A.C. 195, 212 *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 and following). 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 A.C. 418, in particular per Lord Oliver of Aylmerton at pp. 499-500; *Reg. V. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696, in particular per Lord Bridge of Harwich at p. 747.)

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 26th May 1998 the Republic denounced these treaties. In the case of the Optional Protocol the denunciation took effect from 26th August the same year but in the case of the Inter-American Convention it did not take effect until 26th 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* [1976] A.C. 239, *Thornhill v. Attorney-General of Trinidad and Tobago* [1981] A.C. 61, *Attorney-General of Trinidad and Tobago v. Whiteman* [1991] 2 A.C. 240, *Fisher v. Minister of Public Safety and Immigration (No. 2)* [1999] 2 W.L.R. 349, 355-356. 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* 183 C.L.R. 273; *Reg. v. Secretary of State for the Home Department, Ex parte Ahmed and Others*, (unreported), 30th July 1998, Court of Appeal; *Fisher No. 2 (supra)*). But in the present case there was not at the material time any legitimate expectation. On this we agree with what is said in the judgment 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 the paragraphs (a) to (h) of the subsection. (See *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)* [1979] A.C. 385, 395.) 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 shall be 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". 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, volume 1, (1641) treated the two expressions as interchangeable. (Chapter 29 of 25 Edw. 1) 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 United States of America and its constituent states. The United States courts have continued to make clear that it has the same meaning as according to the "law of the land". (*Walker v. Sauvinet* (1875) 92 U.S. 90; *Hurtado v. State of California* (1883) 110 U.S. 516, particularly at p. 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* (1897) 169 U.S. 366) - and shows that it does not necessarily preclude reference in cross-examination to previous convictions. (*Adamson v. State of California* (1946) 332 U.S. 46). This approach of the courts of the United States 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 fulfills 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 W.I.R. 379. In this last case, Phillips J.A. summarised the requirement 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” (p. 391). 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, though 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 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 (*e.g.*, 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, they are 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 p. 359) 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 Inter-American Commission 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 13th 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 for Jamaica* [1994] 2 A.C. 1 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 judgment of the Board said, at p. 35:-

“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, subdividing 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* [1996] A.C. 397, 413 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 B.H.R.C. 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.

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 p. 356, that the decision there under attack was not *Wednesbury* unreasonable.

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

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*Dissenting judgment delivered by Lord Steyn*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 judgment is to state briefly my reasons for this view, leaving unaffected my concurrence in the remainder of the majority judgment 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 backdrop 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 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 for Jamaica* [1994] 2 A.C. 1 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 judgment in *Fisher v.*

*Minister of Public Safety and Immigration* [1998] A.C. 673, 686 other circumstances may have to be taken into account. I concluded at page 691:-

“Echoing language of Lord Griffiths in *Pratt v. Attorney-General for Jamaica* 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 3<sup>1</sup>/<sub>2</sub>-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 682E 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 5 year or 3<sup>1</sup>/<sub>2</sub> 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 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’ in width 12’ in length and 11’7” in height for 24 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 1 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 3 months. The judge concluded that “This has gone on for 2 years and 7 months”, i.e. 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.

The Chief Justice observed that a new maximum security prison has now been built. He said that “when it is commissioned [it] will serve to relieve much of the overcrowding and the understaffing that exists 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 29th 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 (Andy) v. State of Trinidad and Tobago*, (unreported), Nos. 6346 and 6347 of 1985. 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 are 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 3 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.



