TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2007-03406

CV2007-03881

CV2007-03399

HCA: 2548 of 2003

CV2007-04450

CV2008-01123

BETWEEN

ALLAN HENRY

NORBERT WILLIAMS

DESHAN RAMPHARRY

DEXTER LENDORE

EVANS XAVIER

VICTOR BAPTISTE

CLIVE SMART

Claimants

AND

THE ATTORNEY GENERAL
OF TRINIDAD AND TOBAGO

AND

THE COMMISSIONER OF PRISONS

Defendants

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Ms. Dana Seetahal S.C, instructed by Theresa Ms. Hadad-Maraj for the 1st Applicant.

Mr. Mark Seepersad, Mr. Gerald Ramdeen for the 2nd and 3rd Applicants.

Mr. Gregory Delzin for the 4th Applicant.

Mr. Desmond Allum S.C. leading Mr. Ravi Heffes-Doon and instructed by Sharlene Jaggernauth for the 5th Applicant.

Ms Theresa Hadad-Maraj instructed by Mr. Alvin Ramroop for the 6th Applicant.

Mr. Fyard Hosein S.C, Mr. Mitra Bhimsingh, Ms. Josefina Baptiste-Mohommed, Ms.Sheriza Mohommed-Ali, Ms. Marlene Ramroop, Ms. Savi Ramhit, Ms. Kalaya Nanhu instructed by Ms. Grace Jankey, Ms. Deborah Jean-Baptiste Samuel, Mr. Vinda Maraj and Ms. Renessa Tang Pack for the Defendants.

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Judgment

1. BACKGROUND

The Claims

The six (6) Claims herein have been selected as test cases, the eventual outcome of which will be determinative of the situation for the others **set out in the schedule** (see appendix A) hereto. They relate to several prisoners:

(i) who were convicted of murder,

(ii) who were initially sentenced to death,

(iii) who consequent upon the decision of the Privy Council in **Pratt v Morgan** Privy Council Appeal No. 10 of 1993 had their death sentences commuted by the then President:

(a) to imprisonment for the duration of their natural life (in the case of Allan Henry, Norbert Williams, Victor Baptiste and Evans Xavier),

(b) to imprisonment with hard labour for a period of 75 years in the case of Dexter Lendore,

(c) to imprisonment for 75 years in the case of Deshan Rampharry and Clive Smart.

After the commutations by the President were effected the then Honourable Chief Justice made orders pursuant to S.70 of the Criminal Procedure Act Chapter 12.02, giving effect to the commuted sentences, without a hearing being afforded to the applicants.

2. ISSUES

(1) Whether any legitimate expectation arises as a result of the disposition of matters involving other prisoners.

(2) Is the exercise of the President's discretion in relation to the commutation of the death sentence reviewable?

(3) Whether the principle of Separation of Powers was breached by

(a) The President's exercise of discretion under S.87 (2) c of the Constitution and s. 70 of the Criminal Procedure Act Ch. 12:02.

(b) Did the President have the power to order that the Claimants be imprisoned either:

(i) For any term at all - constituting an impermissible exercise by the Executive of a sentencing function,

(ii) If he did have such a power to order imprisonment did he exceed that power by commuting the sentences to terms unknown in law (for the duration of their natural lives, or 75 years or for 75 years with hard labour), amounting to arbitrary detention and

imprisonment and cruel and unusual treatment or punishment.

(4) Are "sentences" that the claimants be imprisoned either:

(i) for the duration of their natural lives

(ii) for 75 years,

(iii) for 75 years with hard labour,

unknown to law.

(5) Is the exercise of the President's power to commute sentence, if any, vitiated by a failure to take into account the applicant's individual circumstances.

(6) Were the claimants entitled to procedural due process including the opportunity to be heard prior to the purported commutations of their death sentences by-

(a) The Advisory Committee on the Power of Pardon (the Mercy Committee)

(b) The President

(c) The Chief Justice [is Section 70 Chapter 12.02 subject to Section 4 and 5 of the Constitution requiring an opportunity to be heard to be provided before the exercise of s. 70 jurisdiction?]

(7) In the event that the actions of the President, the Chief Justice or the Mercy Committee were unlawful were the detentions of the claimants post the order for commutation unconstitutional?

(8) Do Prison Rules 281 or 282 require that the applicants be entitled to a review of sentence every 4 years.

(9) Whether the Applicants were subjected to cruel and unusual treatment and punishment.

(10) If so what would be the appropriate remedies.

(i) Whether the orders for commutation and terms of imprisonment imposed should be quashed.

(ii) Whether the court can conduct a resentencing hearing.

(iii) Whether damages are awardable for post commutation detention.

3. DISPOSITION

In relation to the issues raised on the motions I conclude as follows:-

(1) No legitimate expectation arises as a result of the disposition of matters involving other prisoners.

(2) The exercise of the President's discretion in relation to the commutation of the death sentence is reviewable.

(3) The principle of Separation of Powers was not breached by the President's exercise of discretion under S.87 (2) c of the Constitution and s. 70 of the Criminal Procedure Act Ch. 12:02.

(4) The President did have the power under s. 87 of the Constitution to ameliorate the sentences of death on the applicants by ordering that the Claimants serve a term of imprisonment in lieu of execution of the sentence of death. Such did not constitute an impermissible exercise by the Executive of a sentencing function. He did not exceed that power by commuting the sentences to terms of imprisonment for the duration of their natural lives, or 75 years or for 75 years with hard labour.

(5) Orders that the claimants be imprisoned either (i) for the duration of their natural lives, (ii) for 75 years, or (iii) for 75 years with hard labour, did not result in terms of imprisonment or sentences unknown to law and did not amount to arbitrary detention and imprisonment or cruel and unusual treatment or punishment. The terms of natural life and 75 years were practically equivalent to a term of imprisonment for life. Such a term was one that known to law and was not therefore arbitrary or cruel or unusual.

(6) The exercise of the President's power to commute sentence was not vitiated by a failure to take into account the applicant's individual circumstances. Those were taken into account by the courts which sentenced them and which on appeal, upheld their sentences. In any event the circumstance common to each was taken into account, in accordance with the guidance of the Privy Council in **Pratt.**

(7) The commutations were valid at the time they were effected as at that time they were in keeping with the law as it then stood, which did not require the right to make representations or an opportunity to be heard. at the time of the commutations by

(a) The Advisory Committee on the Power of Pardon (the Mercy Committee)

(b) The President

(c) The Chief Justice

(8) Under s.70 of the Criminal Procedure Act Ch.12:02 the role of the Chief Justice was to give effect to any valid exercise of Presidential discretion under s.87 so as to render it equivalent to a sentence passed by a court. The role of the court under s.70 did not extend to a resentencing hearing as by that stage the court's sentencing powers had been exercised and were spent. The detentions of the claimants subsequent to the order for commutation were not unconstitutional and no damages are awardable for post commutation detention.

(9) Prison Rules require that the applicants be entitled to a review of sentence every 4 years. Reviews under the Prison Rules were carried out.

(10) The Applicants have not established that they were subjected to cruel and unusual treatment and punishment. There is insufficient evidence of prison conditions being such that continued detention of the applicants would be rendered cruel and unusual treatment.

(11) Even if the commutations were invalid, which they were not, the appropriate remedy would be for remission to the Advisory Committee for reconsideration of the decisions to commute, and not individual resentencing hearings by a court.

(12) The applicants' claims are dismissed with costs fit for senior counsel.

(13) For future guidance I grant a declaration in relation to reviews under the Prison Rules as follows:-

It is declared that in respect of reviews under the Prisons Rules:

(i) The prisoner should know that a review is being conducted in relation to him.

(ii) He should know and be provided with the material that is being considered.

(iii) He should have the opportunity to put forward representations by himself or his advisors in response.

(iv) He should have sufficient time available to do so.

(v) The opportunity to be heard need not be in writing, and

(vi) The specific procedures for review can be determined by the reviewer.

(14) The remaining motions which it was agreed would abide the outcome of the 6 representative actions are also dismissed with costs certified fit for senior counsel.

(15) I further order that there be liberty to apply.

4. FACTS

ALLAN HENRY

In the case of Henry, commutation of his death sentence was effected by the President on 31st December 1993 along with 46 others. The then Chief Justice, by order dated January 4th 1994 pursuant to S.70 of the Criminal Procedure Act Chapter 12.02, ordered that he be imprisoned for the rest of his natural life.

The Claimant, Allan Henry, filed a Constitutional Motion by way of Fixed Date Claim Form on the 17th September, 2007 together with an Affidavit in support.

NORBERT WILLIAMS

A similar procedure was adopted in the case of Williams. In the case of Williams the Mercy Committee met on December 8th 1994.

By letter dated December 31st 1993 from the office of the President to the Chief Justice the President on the advice of the Minister of National Security commuted the death sentence to one of imprisonment for the rest of his natural life.

On January 4th 1994 the then Chief Justice made the order under Section 70 of the Criminal Procedure Act Chapter 12.02 that the claimant be imprisoned for the rest of his natural life in the State Prison and that he be kept there during the whole of the said term of his imprisonment.

DEXTER LENDORE

It is not in dispute that:

(i) *On 23rd April, 1998, His Excellency the then Acting President, on the advice of the Honourable Minister of National Security, commuted the death sentence passed on Lendore purporting to commute the same to a term of imprisonment with hard labour for a period of seventy-five (75) years.*

(ii) By memorandum dated April 27th 1998 the Permanent Secretary, Ministry of National Security informed the Registrar of the Supreme

Court of this commutation. On April 29th 1998 an Order was made by the Honourable Chief Justice imposing such term of imprisonment, and further ordering that the said Applicant be kept in the State Prison of Trinidad and Tobago during the whole of the said term.

(iii) On or about the31st December 1993, his Excellency the President, on the advice of the Honourable Minister of National Security, commuted the death sentence passed on Xavier (and several others) to a term of imprisonment for the rest of his natural life.

(iv) On January 4th 1994 an Order was made by the Honourable Chief Justice imposing the abovementioned term of imprisonment, and ordering that the said applicant be kept in the State Prison of Trinidad and Tobago for the whole of the said term of imprisonment.

(v) Neither of the Applicants was notified in advance that the commutation of his sentence of death was being considered or of the sentence which was to be substituted or the Orders which the court proposed to made.

(vi) Neither of the Applicants was given any opportunity to be heard before the said decisions and orders were made

(vii) No reasons were given at the time for the imposition of the said terms of imprisonment.

VICTOR BAPTISTE

In the case of Baptiste, the procedure post commutation by the President was similar save that in the case of Baptiste his death sentence was commuted on January 4th 1994 and the order of the then Chief Justice pursuant to Section 70 of the Criminal Procedure Act was made on the same day.

DESHAN RAMPHARRY

In the case of Rampharry his death sentence was commuted to imprisonment for 75 years with hard labour by the then Acting President on April 1st 1998. On April 6th 1998 the then Honourable Chief Justice by order pursuant to Section 70 of the Criminal Procedure Act ordered that he be imprisoned for 75 years.

CLIVE SMART

The same procedure was adopted in the case of Smart. The commutations to imprisonment with hard labour for 75 years was effected by the then President on September 7th 1998. The then Chief Justice purported to give effect to those sentences by order pursuant to Section 70 of the Criminal Procedure Act dated January 4th 1994.

In addition complaints are made of the events subsequent to the commutation of his sentence and in particular whether there have been effective reviews of sentence under the Prison Rules.

In some cases as well complaints are made regarding prison conditions and allegations are made that these amount to cruel and unusual punishment or treatment.

In the case of some applicants they contend that the State has made concessions in other cases on the issue of the sentence of imprisonment for natural life that confer on them a legitimate expectation of similar treatment.

5. WHETHER LEGITIMATE EXPECTATION ARISES.

It is alleged that the State conceded before the courts in Constitutional Motions brought by persons similarly circumstanced that imprisonment for the duration of "natural life" was not a sentence known to law, and

(i) similar concessions were made in Constitutional Motions filed by Ramcharan Bickaroo (HCA No. 1088 of 2004) and Balkissoon Soogrim (HCA No. 1704 of 2000) both of whom were ordered to be resentenced on the 2nd April, 2007 and the 30th April, 2007 respectively and

(ii) the State is estopped from denying that the sentence of natural life is not a sentence known to law.

In ***Privy Council Appeal No. 45 of 2003 Mohanlal Bhagwandeen v The Attorney General of Trinidad and Tobago*** it was held that

"a claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons.."

It was contended that Ramcharan Bickaroo and Balkissoon Soogrim qualify as similarly circumstanced persons vis a vis the Claimant and there is no relevant distinguishing factor between the Claimant on one hand and Bickaroo and Soogrim on the other hand.

No credible evidence was submitted to establish that any concessions made were in respect of persons similarly circumstanced. There is no evidence to this effect before this court so as to permit a finding that the applicants are so similarly circumstanced as alleged.

No matters were cited where the High Court has determined this issue after full argument.

There is no evidence or even suggestion that any undertaking, promise, or representation was given or made to the applicants. See **Fordham Judicial Review 4th ed. Paragraph 4.12**. See also for example, **Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 A.C. 62**.

In fact it has been made clear that it is in these proceedings a determination is sought after full argument.

As these motions raise important issues of Constitutional interpretation it would be appropriate for the court to set out what it considers to be the framework and constitutional context in which such an exercise should be conducted.

6. PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

It is well established that the Constitution should be afforded a generous, liberal and purposive construction and, conversely, a court should not derogate from rights conferred by the Constitution by an unduly restrictive construction.

Rights now taken for granted were not at the time they were the subject of applications for constitutional redress, generally accepted as constitutional rights. Some examples of this are:

(a) The right to instruct and retain a legal adviser. **Thornhill v AG [1981] A.C. 61**. This was only confirmed as a constitutional right on appeal to Privy Council, upholding court of first instance.

(b) **Whiteman v AG** [1991] 2 A.C. 240. Right to be informed of right to retain and instruct legal adviser – Rejected by court of first instance. Confirmed as a constitutional right by the Court of Appeal and Privy Council.

It is therefore a permissible feature of constitutional law that the envelope be tested, and if the circumstances require, that constitutional interpretation be extended, regardless of the consequences e.g. **Earl Pratt and Ivan Morgan v AG for Jamaica PC Appeal No. 10 of 1993.**

As submitted by attorneys for Lendore and Xavier.

*(1) In **Worme v Commissioner of Police of Grenada** [2004] 2 A.C. 430, the Privy Council stated at paragraph 27. "Where possible, legislation should be interpreted in such a way that it is consistent with the Constitution"* per Lord Rodger of Earlsferry.

So where two possible constructions are reasonably available, the courts will choose that interpretation which is consistent with the constitution and reject the one which is not. Or as it was put by the Privy

Council in **Hector v Attorney General of Antigua** [1990] 2 A.C. 312, at p. 319:

> *….if it is possible to read the statutory language as subject to an implied term which avoids conflict with constitutional limitations, the court should be very ready to make such an implication.*

(2) *Provisions which seek to limit constitutional rights must be interpreted strictly. This principle was first stated in* ***State v Petrus*** *[1985] LRC (Const) 699, 720 d-f in the Court of Appeal of Botswana, where Aguda JA, referring to* ***Corey v Knight*** *(1957) 150 Cal App 2d 671, observed that "it is another well known principle of construction that exceptions contained in Constitutions are ordinarily to be given strict and narrow, rather than broad, constructions". In* ***R v Hughes*** *[2002] 2 AC 259, paragraph 35, Lord Rodger of Earlsferry applied this principle in giving a special savings law clause "a strict and narrow, rather than a broad, construction.*

I accept these as appropriate and relevant principles.

In the case of **Bernard Coard & Ors v The Attorney General Privy Council Appeal No. 10 of 2006** Lord Hoffman stated at paragraph 33

In Hinds v Attorney-General of Barbados [2002] 1 AC 854, 870 Lord Bingham qualified the principle stated by Lord Diplock in Chokolingo v Attorney General of Trinidad and Tobago [1981] 1 WLR 106 with this observation:

"It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument."

Further in **Charles Matthew v The State Privy Council No. 12 of 2004** at paragraph 42 of the dissenting judgment of Lord Bingham of Cornhill it was stated that:

"The correct approach to interpretation of a constitution such as that of Trinidad and Tobago is well-established by authority of high standing. In Edwards v Attorney-General for Canada *[1930] AC 124, 136, Lord Sankey LC, giving the judgment of the Board, classically described the constitution established by the British North America Act 1867 as "a living tree capable of growth and expansion within its natural limits".*

The provisions of the Act were not to be cut down "by a narrow and technical construction", but called for "a large and liberal interpretation". Lord Wilberforce spoke in similar vein in Minister of Home Affairs v Fisher *[1980] AC 319, 328-329, when he pointed to the need for a "generous interpretation",*

"suitable to give to individuals the full measure of the fundamental rights and freedoms referred to" in the constitution and "guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences". The same approach was commended by Dickson J, giving the judgment of the Supreme Court of Canada in Hunter v Southam Inc *[1984] 2 SCR 145, 155:*

"The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the Constitution like a last will and testament lest it become one'."

In Attorney-General of Trinidad and Tobago v Whiteman [1991] 2 AC 240, 247, Lord Keith of Kinkel, giving the judgment of the Board, said:

"The language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights.""

In his dissenting opinion Lord Nicholls of Birkenhead in **Charles Matthew** at Paragraphs 70 and 71 stated as follows:

"Self-evidently, an interpretation of the constitutions which produces this outcome is unacceptable. A supreme court of a country which adopts such a literal approach is failing in its responsibilities to the citizens of the country. A constitution should be interpreted as an evolving statement of a country's supreme law.

This is not to substitute the personal predilections of individual judges for the chosen language of the constitution. Rather, it is a recognition that the values underlying a constitution should be given due weight when the constitution falls to be interpreted in changed conditions. A supreme court which fails to do this is not fulfilling its proper role as guardian of the constitution. It is abdicating its responsibility to ensure that the people of a country, including those least able to protect themselves, have the full measure of protection against the executive which a constitution exists to provide.

In **Colin Edghill v Carol Mc Honey and AG, No. 3178 of 2004** at paragraph 40 per Gobin J expressed the approach to constitutional interpretation thus -

> *"Already, there have been signs of a willingness on the part of citizens to sacrifice or barter away constitutional principle on a promise of safety and relief from fear. This is as understandable as it is disturbing. The constitution remains our supreme law. It is what stands between the citizen including prisoners and the State and what protects against abuse and oppression. It is established that the court has a critical role in the constitutional process to protect and enforce rights of all citizens including those of prisoners. Their cause may be less than popular in the current environment but the court will not derogate from its duty to invoke the full extent of its judicial power to protect them. It is this commitment of the court which confirms the supremacy of the constitution and which ultimately guarantees the freedom of all citizens."*

It is with these observations and principles in mind that the issues need to be examined.

7. JUDICIAL REVIEWABILITY OF THE PREROGATIVE - OUSTER CLAUSES

Is the prerogative reviewable?

It was contended therefore that both because of the constitutional ouster clauses set out below as well as the recognition in the cases of CCSU, considered hereafter, that the prerogative of mercy was not at common law reviewable, and that, similarly, any

exercise of Presidential discretion regarding mercy under S.87 (2) (c) of the Constitution is not reviewable.

"By virtue of **Section 87(2)(c)** of the **Constitution Chap. 1:01 of the Laws of Trinidad and Tobago** (hereinafter referred to as "the Constitution") His Excellency the President is empowered to grant clemency.

Section 87 *provides as follows:*

> *"(1) The President may grant to any person a pardon, either free or subject to lawful conditions, respecting any offences that he may have committed. The power of the President under this sub-section may be exercised by him either before or after the person is charged with any offence and before he is convicted thereof.*
>
> *(2) The President may–*
>
> *(a) grant to any person convicted of any offence against the law of Trinidad and Tobago a pardon, either free or subject to lawful conditions;*
>
> *(b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;*
>
> *(c) substitute a less severe form of punishment for that imposed by any sentence for such an offence; or*

(d) remit the whole or any part of any sentence passed for such an offence or any penalty or forfeiture otherwise due to the State on account of such an offence.

(3) The power of the President under subsection (2) may be exercised by him in accordance with the advice of a Minister designated by him, acting in accordance with the advice of the Prime Minister.""

"Sections 38 (1) and 80 (2) of the Constitution provides as follows:

Section 38(1)

"Subject to section 36, the President shall not be answerable to any court for the performance of the functions of his office or for any act done by him in the performance of those functions."

I find this section irrelevant. No one seeks in these proceedings to make the President "answerable to any court for any act done by him". See also **Thomas & Paul v A.G**. - **HCA 6346/7 of 1985** @ pg. 51 per the Honourable Davis J and **Lincoln Smith v A.G. HCA 2475 of 2003** per the Honourable Dean Amorer J.

Section 80(2)

"Where by this Constitution the President is required to act in accordance with the advice of, or after consultation with, any person or authority, the question whether he has in any case so acted shall not be enquired into in any court.""

In the case of **Attorney General of Trinidad and Tobago v James Alva Bain H.C.A. No. 3260 of 1987** the Respondent was appointed by the then President, Mr. Ellis Clarke, as a member of the Public Service Commission and also as a member of the Police Service Commission. The Applicant attempted to challenge both appointments of the President on the ground that the said appointments were invalid since there was no compliance with the mandatory requirements of consultation imposed by sections 120(2) and 122(2) of the Constitution respectively. Mr Justice Ivol Blackman

"When one examines section 80(2), one cannot but come to the conclusion that the Constitution, which is supreme law of the land, has attempted to insulate the President and his official acts from attack in court proceedings. When section 38(1) of the Constitution is considered this view is strengthened.

In my opinion section 80(2) is so ample and clear that it leads to one conclusion, that is, that the Court is not to embark on an enquiry as to whether the President acted in the instant case after consultation or not with the Prime Minister.

Further, the President in appointing Mr. Bain under sections 120(2) and 122(2) of the Constitution to the Service Commission was performing an administrative or executive act and under section 80(2) the matter becomes non-justiciable.""

I find s.80 (2) of the Constitution irrelevant as the question of whether the President has acted in accordance with advice or after consultation is not in issue. Accordingly I find this decision is inapplicable to the issue here.

In the case of **Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 AER 935** (hereinafter referred to as "CCSU" at **page 942 paragraph b** Lord Fraser cited and applied the ratio in the case of **Attorney General v De Keyser's Royal Hotel Ltd. [1920] AC 508** and stated that:

"…the courts will enquire into whether a particular prerogative power exists or not and, if it does exist, into its extent. But once the existence and the extent of a power are established to the satisfaction of the court, the court cannot enquire into the propriety of its exercise."

At **page 948 paragraph. j CCSU** Lord Scarman stated that:

"…the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.""

At **page 956 (d-e)** of **CCSU** Lord Roskill stated:

"But I do not think that that right of challenge can be unqualified. It must, I think, depend on the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. ***Prerogative powers such as those relating to*** *the making of treaties, the defence of the realm,* ***the prerogative of mercy,*** *the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others* ***are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process."*** *(emphasis provided)."*

However the issue of reviewability of the prerogative has evolved since the decision in **Lewis v AG of Jamaica [200]1 2 AC 50** as demonstrated by the following statements

Page 77 b-c per Lord Slynn of Hadley

"Is the fact that an exercise of the prerogative is involved per se a conclusive reason for excluding judicial review? Plainly not. *Although in some areas the exercise of the prerogative may be beyond review, such as treaty-making and declaring war, there are many areas in which the exercise of the prerogative is subject to judicial review. Some are a long way from the present case, but R v Secretary of State for the Home Department, Ex p Bentley [1994] QB 349, though it does not raise the same issue as in the present case, is an example of the questioning of the exercise of the prerogative in an area which is not so far distant. As the Divisional Court said, at p 363:*

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

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

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

There is no reason therefore under the present state of the law to deem an exercise of the prerogative immune from challenge and unreviewable by the courts.

8. WAS THE PROCEDURE ADOPTED IN BREACH OF THE PRINCIPLE OF SEPARATION OF POWERS

SEPARATION OF POWERS

Whether breached by:

(a) The President's exercise of discretion under s.87 (2) c and s. 70 Criminal Procedure Act Ch. 12:02.

(i) By an impermissible exercise of a sentencing function.

(ii) By an imposition of punishment unknown to law.

(iii) By an impermissible failure to take into account the applicants' individual circumstances.

The Applicants contend that the impositions of their respective sentences were illegal in several respects, and summarise their argument as follows:

> *"In the exercise of his power of pardon to substitute a less severe form of punishment, namely imprisonment, for the death penalty, his Excellency the President does not have the power to determine the length of the term of imprisonment. That power is a sentencing power which is reserved under the Constitution for the Judiciary. Accordingly, the imposition of the sentences breached the Separation of Powers doctrine.*

Even if his Excellency does have such power then:-

a) *The imposition of the sentences breached the principles of Natural Justice.*

b) *The sentences as imposed were arbitrary and as a consequence cruel and unusual.*

On the basis that the exercise of the prerogative of mercy is justifiable it was submitted that the President acting on the advice of the Minister:

1. *exceeded the legitimate scope of his functions;*
2. *exercised the prerogative of mercy in an arbitrary manner;*
3. *imposed an unlawful condition on the condemned prisoners;*
4. *failed to consult with the condemned prisoners and/or secure their consent to the condition attached to their commutation (pardon);*
5. *failed to accord the condemned prisoners the right to be heard and to make representations to the Advisory Committee;*
6. *failed to fully disclose to the condemned prisoners the reasons for their incarceration for the duration of their natural life;*
7. *failed to fully disclose to the condemned prisoners the reasons for the departure from the recommendation made in* ***Pratt and Morgan v The AG (supra)****;*

8. *failed to accord the condemned prisoners the right to be legally represented before the Advisory Committee;*

9. *exercised the prerogative of mercy for an improper purpose including that of convenience and political expediency;*

10. *premised the exercise of the prerogative of mercy on irrelevant considerations such as convenience and political expediency;*

11. *contravened the rules of natural justice;*

12. *failed to consider the circumstances of each condemned prisoner and failed to communicate the commutation to each condemned prisoner individually in accordance with* ***Rule 280 of the Prison Rules.****"*

An interpretation of S.87 (2) (a) and (c) of the **Constitution** as well as s.70 of the **Criminal Procedure Act** is therefore necessary.

The Defendants contended that *"By virtue of* ***Section 87(2)(c)*** *of the* ***Constitution Chap. 1:01 of the Laws of Trinidad and Tobago*** *(hereinafter referred to as "the Constitution") His Excellency the President is empowered to exercise the prerogative of mercy and commute the death sentence passed on a person convicted of murder to a less severe form of punishment. This power may be exercised in accordance with the advice of the Minister of National Security see Section 87(3).*

Section 87 of the Constitution *provides as follows:*

> *"(1) The President may grant to any person a pardon, either free or subject to lawful conditions, respecting any offences that he may have*

committed. The power of the President under this sub-section may be exercised by him either before or after the person is charged with any offence and before he is convicted thereof.

(2) The President may–

(b) grant to any person convicted of any offence against the law of Trinidad and Tobago a pardon, either free or subject to lawful conditions;

(c) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;

(d) substitute a less severe form of punishment for that imposed by any sentence for such an offence; or

(e) remit the whole or any part of any sentence passed for such an offence or any penalty or forfeiture otherwise due to the State on account of such an offence.

(3) The power of the President under subsection (2) may be exercised by him in accordance with the advice of a Minister designated by him, acting in accordance with the advice of the Prime Minister.

This section may be read in the context of s.89 of the Constitution.

Section 89 *of the Constitution provides:*

(1) Where an offender has been sentenced to death by any court for an offence against the law of Trinidad and Tobago, the Minister shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Minister may require, to be taken into consideration at a meeting of the Advisory Committee.

(2) The Minister may consult with the Advisory Committee before tendering any advice to the President under section 87(3) in any case not falling within subsection (1).

(3) The Minister shall not be obliged in any case to act in accordance with the advice of the Advisory Committee.

(4) The Advisory Committee may regulate its own procedure.

(5) In this section "the Minister" means the Minister referred to in section 87(3)."

Section 70 of the **Criminal Procedure Act** Chap. 12:02 of the Laws of Trinidad and Tobago is the provision under which the Honourable then Chief Justice purported to act. It provides as follows:

"When any person is convicted of any crime punishable by death, if the President in the name and on behalf of the State intends to extend mercy to any such person upon condition of imprisonment*, and such intention of mercy is signified by the President to the court during the Criminal Sessions at which such person was convicted,* ***the Court shall allow to such person the benefit of a conditional pardon, and make an order for imprisonment, of such person****; and* ***where such intention of mercy is so signified to the Court at any time when the Court is not in session, the Chief Justice shall allow to such person the benefit of a conditional pardon, and make an order for the imprisonment of such person****, in the same manner as if such intention of mercy had been signified to the court during the Criminal Sessions at which such person was convicted;* ***and such allowance and order shall be considered as an allowance and order made by the Court****, and shall be entered on the records of the Court by the Registrar, and shall be as effectual to all intents and purposes as if such allowance had been made by the Court during the continuance of the same Criminal Sessions, and every such order shall subject the person to be so imprisoned." (Emphasis added)*

It is clear that while s.70 of the Criminal Procedure Act provides that the Chief Justice shall allow the person to whom mercy is extended, the benefit of a conditional pardon this does not necessarily imply that the President had granted a conditional pardon under s.87 (2) (a) of the Constitution.

It is equally consistent with an exercise of his power under s.87 (2) (b) or (c) of the Constitution for the convicted person to be allowed simply the benefit of such a conditional pardon, that benefit being the non implementation of the death penalty. Section 70 is a provision which by its terms allows the act of the President to be, or to be made equivalent to an order by the court, and accordingly gives effect to the exercise of s.87 discretion whether under s.87 (a), (b) or (c) of the Constitution.
It is common ground that S .87 (1) is not applicable.

The issue of securing the consent of the applicants to the alleged condition attached to their pardon would not even arise as a conditional pardon was not granted, and would not have needed to be granted in order for the benefit of a conditional pardon to have been allowed to them.

Even if a conditional pardon had been granted no convincing argument has been adduced to establish that a prisoner benefitting from a s.87 (2) (a) Presidential exercise of discretion must consent to the condition. It would appear to defy reason and logic if this were so as a prisoner would have to insist upon the original death sentence and reject imprisonment in lieu thereof if he did not accept imprisonment as a condition of removal of the sentence of death.

THE EFFECT OF S.87 (2) OF THE CONSTITUTION

S.87 (2) of the Constitution provides for a range of options namely

(a) a free pardon or a pardon subject to lawful conditions.

(b) a respite from execution of sentence - either for a specified period or an indefinite period.

(c) the substitution of a less severe form of punishment for that imposed by any sentence for such an offence.

(d) remission of the whole or part of any sentence passed (or any penalty or forfeiture otherwise due to the state).

It is clear:

(i) that all the options under S. 87 (2) apply after a sentence has been passed (save for 87 (2) (a) where it appears that in principle a pardon can be granted [possibly before sentence] to a person who has been convicted.)

(ii) that all the options under S. 87 (2) (and 87 (1) are for the purpose of alleviating, ameliorating mitigating or reducing a punishment previously imposed by a sentence . As a matter of construction of S.87 (2) of the Constitution it cannot be that President's powers under s. 87 (2) (c) are confined to simply changing the form of punishment e.g. from sentence of death to imprisonment without power to set a term. The language of s.87 does not bear such a strained construction.

Commutations of sentence by the President occurred subsequent to the decision in **Pratt and Morgan**. It is contended by the Applicants that:

(1) In so doing he exercised a sentencing function, and that exercise of such a function was a breach of the separation of powers.

(2) Further the President exceeded his powers under 87 (2) (c) of the Constitution in not only changing the form of punishment but in going further to express a term - natural life or 75 years.

(3) That in exercising his powers under S.87 (2) (c) and in not considering the individual circumstances of those to whom he extended mercy or in affording them an opportunity to be heard the President acted arbitrarily.

(4) The commutation was otherwise invalid as S.70 of the Criminal Procedure Act expressly recognised that judicial input into a sentence was necessary, requiring the reopening of an exercise of judicial discretion for sentencing an individual taking into account his own individual circumstances. Without such a judicial exercise of sentencing discretion the result would be sentencing by the Executive - in a clear breach of separation of powers. They have submitted that the rubber stamping of an executive sentence and not individually sentencing each applicant is acting unlawfully and therefore the applicants are entitled to resentencing.

(5) In any event the terms imposed were unknown to law, arbitrary and therefore unconstitutional and ultra vires. Sentences of natural life, or 75 years in those or any circumstances is invalid. They were not in accordance with **Pratt** and in fact a deliberate effort to evade **Pratt and Morgan.**

These arguments raise important constitutional issues.

No sentencing power of Executive

It needs to be emphasised that the Executive has no sentencing power. The time for sentencing the Applicants was at their High Court trial. At that stage it was determined by a court exercising its sentencing function that the penalty for murder was the mandatory death penalty. Sentencing is carried out upon conviction, after a full trial before judge and jury, with the additional safeguards of rights of appeal to the Court of Appeal and ultimately to the Judicial Committee of the Privy Council. All sentencing takes place after all the appropriate safeguards of due process of law.

It would not be correct therefore to say that the Executive up to that stage had anything to do with sentence.

This is clearly not a breach of separation of powers - The initial sentencing power was never removed from the Judicial arm. S.87 of the Constitution recognises the Executive's separate power to ameliorate and mitigate judicial sentences.

The exercise of S.87 constitutional powers by the executive can only result in a mitigation, amelioration, reduction, or removal of a lawful judicially imposed sentence.

GUIDANCE FROM THE PRIVY COUNCIL ON TERMS OF IMPRISONMENT ON COMMUTATION OF DEATH SENTENCE

In fact it was as a result of Pratt and Morgan (Privy Council) that it was determined that an across the board commutation of sentence to life imprisonment would recommended in Jamaica (and the same applies in this jurisdiction) in respect of those persons who benefitted from the application of the principle therein, that delay beyond stated time frames raised a presumption that the carrying out of the death penalty after such delay would be cruel and unusual punishment and therefore unconstitutional.

Further in **Charles Matthew v The State Privy Council Appeal No. 12 of 2004** the Privy Council similarly determined that an across the board resentence to life imprisonment would be applied to those persons who were awaiting execution but who had an expectation that because of the previous decision in **Roodal v The State Privy Council No. 18 of 2003** they would receive a resentencing hearing.

In Matthew, Pratt and **Lewis** the Privy Council did not contemplate individual resentencing and in fact recommended life imprisonment.

In **Pratt v Morgan** the Privy Council stated (at pp. 35-36):

"If, therefore, rather than waiting for all those prisoners who have been in death row under sentence of death for five years or more to commence proceedings pursuant to section 25 of the Constitution, the Governor-General now refers all such cases to the J.P.C. who, in accordance with the guidance contained in this advice, recommend commutation to life imprisonment, substantial justice will be achieved swiftly and without provoking a flood of applications to the Supreme Court for constitutional relief pursuant to section 17(1)."

Such sentences as were recommended by the Privy Council were not individual sentences taking into account the individual circumstances of each applicant but commutations of the sentence of death taking into account the circumstance common to each - namely time spent awaiting execution after the mandatory sentence of death was lawfully passed upon their convictions for murder.

In fact **Charles Matthew v The State Privy Council Appeal No. 12 of 2004 [2005] 1 AC 433** makes it clear that there is no sentencing discretion in the judge *save for the application of the sentence of life imprisonment*

In **Matthew** the Privy Council considered the constitutionality of the mandatory death penalty and overruled **Roodal v State of Trinidad and Tobago [2004] 2 WLR 652** wherein the death penalty had been held to be discretionary. As a result of the

decision in **Roodal (supra)** every person under a sentence of death in Trinidad and Tobago became entitled to be resentenced. The Privy Council, having overruled **Roodal** ***(supra)*** *in* ***Matthews (supra)*** *expressed the view that* they did not think it would be fair to deprive anyone presently sentenced to death of the benefit of the Roodal decision.

It was held that:

> *"it would be a cruel punishment for him to be executed when that possibility [of review] has been officially communicated to him and then been taken away"*

The Privy Council, in exercise of the powers contained in **s. 14(2) of the Constitution** allowed the appeal, set aside the sentence of death and imposed a sentence of life imprisonment. The Privy Council further expressed that the same considerations would apply to any person sentenced to death at the date of the decision in **Roodal (supra).**

And at paragraph 30 stated:

> *"…**the effect of their Lordships' decision today is that a judge would have no discretion to change a death sentence which has already been imposed according to law. Such a resentencing cannot therefore take place**." (emphasis supplied)*

In the instant situation the applicants' sentences were being commuted because **Pratt** applied but the principle is unaffected.

Consideration of individual circumstances

As in **Pratt**, **Matthew, and Lewis** their sentences were being commuted not because of any circumstance peculiar to each individual but because of the circumstances common to each, namely conviction of murder, imposition of the mandatory sentence of death and Pratt delay. It is clear those circumstances was considered.

In fact consideration of individual circumstances would have had the potential to produce unequal results. Any commutation which produced an unequal result in relation to persons similarly circumstanced as the applicants were, could well have been criticised as producing inequality and not reflecting equality of treatment.

The role of the Chief Justice under s.70 of the Criminal Procedure Act?

In fact to interpret S.70 of the Criminal Procedure Act as conferring other than administrative powers on the Chief Justice would itself give rise to an interference with and derogation from the prerogative of mercy wholly unjustified by the language of that provision.

This is because once the President has exercised the prerogative/power of mercy, to suggest that there is now a further sentencing function to be conducted by the

court would render that prerogative subject to modification or even veto by the courts after the court's power of sentencing is spent.

Under S.87 for example the President can remit a sentence in part - so he can consider a 15 year sentence and convert it to a 5 year sentence. It would obviously be inappropriate for a court to conduct a separate resentencing exercise under S.70 and impose a sentence of, for example, 10 years, - or even 4 years. It would render the S.87 powers meaningless.

But the language of S.70 does not require any such interpretation derogating from constitutionally enshrined provisions. The purpose of s.70 is to equate Presidential commutations with judicial sentences.

Whether the commutations were illegal by reason of breach of the principle of separation of powers –The Case law

Separation of Powers

The contention that the fact that the Executive and not the Judiciary determined sentence was a breach of the separation of powers was considered in **Matthew v The State** and rejected as follows:

In **Matthew v The State PCA 12 of 2004, (2005) 1 AC 433,** the Privy Council at paragraph 28 of its judgment stated as follows:

> *"As their Lordships observed in Boyce and Joseph v The Queen, the principle of the separation of powers is not an overriding supra-constitutional principle but a description of how the powers under a real constitution are divided.* ***Most constitutions have some overlap between legislative, executive and judicial functions…As the constitution itself makes express provision for the exercise of the power of commutation by the President and preserves the mandatory death penalty, their Lordships do not think there is some other principle by which laws these can be invalidated****." (emphasis supplied)"*

It matters not that in that case the issue was whether the imposition of the death penalty was a decision ultimately for the Executive arm of the State. In the instant case the exercise of the power of mercy is similarly exercisable under S.87 of the Constitution. Therefore the fact that the punishment actually imposed in amelioration of the sentence passed by the Judiciary, is imposed by the Executive, as provided for in the Constitution, similarly cannot be construed as a derogation from any principle of separation of powers.

Further a claim to resentence seeks to introduce the rejected result in **Balkissoon Roodal v The State Privy Council Appeal No. 18 of 2003** through the back door. It was open to the Privy Council in **Matthew** to suggest individual resentencing of those persons who were under sentence of death awaiting execution, instead of an across the board recommendation of commutation of their sentences to life imprisonment. Significantly, it chose not to do so.

The mechanisms for further consideration of sentence are those set out in the Constitution under s.87. They do not involve the court's further involvement in sentencing once s.87 powers have been lawfully exercised by the President.

I find that there is no right to individual resentencing at this stage.

JUDICIAL SENTENCING V EXECUTIVE ACT

In **Reyes v Queen** [2002] 2 A.C. 235, e Lord Bingham, (at p. 257):

> *It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function and the Advisory Council is not an independent and impartial court within the meaning of section 6(2) of the Constitution. Mercy, in its first meaning given by the Oxford English Dictionary, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of*

what punishment a transgressor deserves the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter an executive, responsibility. Appropriately, therefore, the provisions governing the Advisory Council appear in Part V of the constitution, dealing with the executive. It has been repeatedly held that not only determination of guilt but also determination of the appropriate measure of punishment are judicial not executive functions. Such was the effect of the decisions in Hinds v The Queen [1977] AC 195 at 226(D); R v Mollison (No. 2) (unreported) 29 May 2000, Appeal No. 61/97, 29 May 2000); Nicholas v The Queen (1998) 193 CLR 173, paras. 16, 68, 110, 112.

And at page 257f it was said *"The opportunity to seek mercy cannot cure a constitutional defect in the sentencing process."*

Here, unlike in the case of Belize, the mandatory nature of the death penalty does not create a constitutional defect in the sentencing process.

The later statement by Lord Bingham (at p. 258), that *"While the Board would be the first to acknowledge the importance of the role which the constitution has conferred on the Advisory Council, it is clear that such a non-judicial body cannot*

decide what is the appropriate measure of punishment to be visited on a defendant for the crime he has committed" is in the specific context of the unconstitutionality of the mandatory nature of the death penalty in Belize , and the fact that the exercise of a judicial discretion is required when the sentence of death is there applied. In Belize the Advisory committee's role is no substitute therefor.

THE LIMITS OF JUDICIAL SENTENCING

In **Jones v Attorney General of the Bahamas [1995] 1 WLR 891**, Lord Lane at pp 896-897:

> *"Is the punishment ordered in these cases to be inflicted on the applicants imposed by a court, as required by the Constitution, in particular article 16, or is it imposed by persons or bodies other than a court and therefore unlawful?*
>
> *The applicants contend that the latter is the case. Their argument is based on sections 3, 4 and 5 of the Capital Punishment Procedure Act, which are in the following terms:*
>
> *"3. So soon as conveniently may be after any sentence of death has been pronounced, the presiding judge shall forward to the minister his notes of the evidence taken at the trial with a report in writing containing any recommendation or observations on the case which he may think fit to make. The minister shall cause such report ... to be taken into consideration at a meeting of the Advisory Committee on the Prerogative of Mercy constituted under article 91 of the Constitution.*

"4. The Governor-General acting in accordance with the advice of the minister after consulting the said advisory committee in regard to the case shall communicate to the said judge or his successor in office a copy under his hand of any order he may make thereon, which order if the sentence is to be carried out shall state the place where and the time when the execution is to be had, and if the sentence is commuted into any other punishment shall state what punishment or if the person sentenced is pardoned shall state the fact. On receiving such order the judge shall cause the effect thereof to be entered on the record of the court.

"5 (1) If the sentence is to be carried out the Governor-General shall also cause a warrant under his hand and the Public Seal to be issued setting out the place where and the time when the execution is to be had as prescribed in the order aforesaid.

(2) Such warrant shall be called a death warrant ..."

The contention that these provisions in some way form part of the sentence is misconceived. ***The judicial function is at an end when the judge passes sentence of death. The provisions of sections 3, 4 and 5 are directed at the exercise of the prerogative of mercy.*** *When the decision has been taken as to whether or not the judge's sentence shall take effect, it is the duty of the judge as an administrative not a judicial act to cause the outcome to be entered on the court records. The sentence remains the sentence of a court." (emphasis supplied)*

THE VALIDITY OF THE 'SENTENCES' – NATURAL LIFE, 75 YEARS

WHETHER THE COMMUTED TERMS SENTENCES AT ALL

It was contended that any consideration of the terms imposed on the footing that they represented or were equivalent to a sentence was misconceived. However the authorities cited previously demonstrate that there was only one sentence - that passed by the courts at trial and upheld on appeal. The commutation of that sentence is an executive amelioration of that sentence, not a sentence itself. Hence the word "punishment" used in s. 87 (2) (c) to describe what the President imposes in contradistinction to the word "sentence" to describe what is being replaced. The one requirement of s. 87 is that it must result in an amelioration of the sentence imposed. Accordingly the issue of executive punishment does not arise under s.87. What does arise, as revealed by the cases previously referred to, is executive amelioration of a sentence judicially imposed after due process.

In the case of **Bhim Harry Ram** HCA 2278 of 2005 delivered May 4th 2007 the Honourable Justice Bereaux as he then was, stated that *any sentence which results in the preservation of life is to be preferred to a death sentence and is a less severe form of punishment (* than the death penalty, which it replaces.)

The terms of imprisonment imposed on the applicants do therefore constitute ameliorated or mitigated sentences.

However **section 70** of the **Criminal Procedure Act, Chap. 12:02** provides as follows:

> *"When any person is convicted of any crime punishable by death, if the President in the name and on behalf of the State intends to extend mercy on any such person upon condition of imprisonment, and such intention of mercy is signified by the President to the Court during the Criminal Sessions at which such person was convicted, the Court shall allow to such person the benefit of a conditional pardon, and make an order for imprisonment, of such person; and where such intention of mercy is so signified to the Court at any time when the Court is not in session, the Chief Justice shall allow to such person the benefit of a conditional pardon, and make an order for imprisonment of such person, in the same manner, as if such intention of mercy had been signified to the Court, and shall be entered on the records of the Court by the registrar, and shall be as effectual to all intents and purposes as if such allowance had been made by the Court during the continuance of the same Criminal Sessions, and every such order shall subject the person to be so imprisoned."*

The effect of s.70 is therefore to render equivalent the term of imprisonment substituted by Executive amelioration of sentence to a term imposed by judicial act.

I conclude therefore that nothing turns on the genesis of the term of imprisonment and the substance of the length of imprisonment must be examined, and not its characterization as a sentence or otherwise.

Whether the terms of imprisonment for natural life or 75 years, were unknown to law?

It is alleged that the terms resulting from the commutations were invalid for the reason that they represented terms of imprisonment not known to law and exceeded any previous known sentence, and specifically exceeded the sentence of life imprisonment which has come to mean 13 – 15 years imprisonment in this jurisdiction by settled practice, and not imprisonment for the whole of life. Accordingly imposition of such terms (imprisonment with hard labour for a period of seventy-five (75) years, or to a sentence of imprisonment with hard labour for the rest of natural life) was accordingly arbitrary, and cruel and unusual punishment.

The applicants contended that there have been sufficient judicial pronouncements to this effect to demonstrate that the term life imprisonment means something completely different from imprisonment for life, and that there is no such term as imprisonment for natural life.

It was accepted that a prison term is reduced by one third under the Prison Rules for good behaviour. Accordingly it was contended that if a life sentence had come to mean 20 years or thereabouts, then in practice life imprisonment would translate to

approximately 13-15 years, which would be equivalent to time served in the case of many of the applicants. Similarly therefore a term of 75 years is potentially a term of 50 years with remission for good behaviour.

It is difficult to ascertain any practical difference between a term of imprisonment for life and one of imprisonment for 75 years. However theoretically, a sentence of 75 years could be equivalent to time served of 50 years, and could in some cases be less than a sentence of imprisonment for natural life. In all other cases it can be equivalent to natural life. It can never be more than natural life as imprisonment must end upon the end of natural life. In other words there is a prospect of release no matter how remote, at the end of a term of 75 years, which, (putting aside for the time being the possibility of successful reviews or petitions for mercy in the interim) would not exist in the case of a sentence of imprisonment for natural life.

No distinction has been demonstrated between a sentence of imprisonment for life and imprisonment for natural life, and these are treated as equivalent concepts. The word "natural" adds nothing to the term.

It appears therefore that terms of imprisonment for natural life and for 75 years are practically equivalent, with the term of imprisonment for 75 years carrying the possibility, slight though it is, of being a less severe sentence than imprisonment for natural life.

The distinction sought to be drawn is between imprisonment for life and life imprisonment - which is acknowledged to be a term known to law, and which it is contended has acquired a special meaning. It is necessary to consider the law in this regard.

Judicial pronouncements on life imprisonment -Whether sentence is known to law.

In **R v Foy (1962) 2 All ER 246** the U.K. Court of per Lord Parker C.J. stated the facts and continued:

> *"It seems that the judge felt that the defendant was a man who ought to be shut up for a very, very long time, and was evidently worried that from a sentence of life imprisonment he might be released after a moderate number of years. No doubt the object of the judge was to ensure that if that did happen, or there was a chance of that happening, the defendant would have to serve 14 years more. The appeal against sentence has been abandoned, and therefore there is no jurisdiction in this court to substitute any sentence, but the court would like to say that they are quite satisfied that the sentence which the judge purported to pass in the present case was not a valid sentence.* ***Life imprisonment means imprisonment for life****. No doubt many people come out while they are still alive, but when they do come out it is only on licence, and the sentence of life imprisonment remains upon them* **until they die***. Accordingly, if the court makes any period of years consecutive to life imprisonment, the court is passing a sentence which is no sentence at all, in that it cannot operate* ***until the sentenced man dies****."*

It was contended on behalf of the applicants that:

(i) *There are cases in which the Court of Appeal has held that a life sentence generally amounts to 15 years, unless for good reason the Judge specifically orders a fixed term in excess of that* – ***C.A. Crim. 15/1999 Horace Stephen v The State.***

The qualification speaks for itself.

(ii) The meaning of life imprisonment was specifically considered in ***C.A. Crim. 34/1980 Edwin Farfan v The State*** *wherein it was held that in this jurisdiction a term of life imprisonment imposed by a competent court does not on average exceed 13 to 15 years and the sentence was accordingly reduced from 25 years to 14 years. In his judgment, the Honourable Chief Justice Bernard recommended that it would "enure to the betterment of the administration of justice if the expression "imprisonment for life" be expunged from the statutes." The Honourable Chief Justice Bernard appeared to place great reliance on a Report provided to him by the Commissioner of Prisons which stated that a term of life imprisonment does not on the average exceed 13 years to 15 years.*

The fact is the expression "imprisonment for life" is found in the statutes and mere judicial pronouncement even if it had some firm basis, cannot expunge it therefrom. In any event that period of 13-15 years no longer applies as demonstrated by the transcript [rough copy] of the hearing and evidence in the case of Chuck Attin provided by counsel for Norbert Williams. There the prison authorities clearly indicated to the Court of Appeal that a life sentence is not 13-15 years at this point and persons are in the [prison] system who have gone to 20-25 years or so.

(iii) ***Rule 281 of the Prison Rules made pursuant to the West Indies Prisons Act Chap. 11 No. 7*** *provides that "the case of every person serving a life sentence shall be reviewed by the Governor in Council at the 4th, 8th, 12th, 16th and 20th year of the sentence.*

By implication, it was contended a sentence of life imprisonment is recognized as not exceeding a period of 20 years. I do not accept this as it does not follow that a prisoner must be released after his 20th year even if he has been unsuccessful in his 20th year review of sentence.

(iv) *In* ***H.C. 68/1983 The State v Ian Seepersad and Roodal Panchoo,*** *on the review of their sentences whereby they were both detained at the Court's pleasure, the Honourable Madam Justice Soo-Hon recognized that whilst a term of imprisonment in the past did not go beyond 15 years, this did not mean that the*

Court did not have the power to impose penalties in excess of a term of 15 years if the circumstances so required. In this regard the Learned Judge relied on ***s. 69A*** *of the* ***Interpretation Act Ch. 3:01*** *wherein it is provided that the Court has the power to impose a life sentence and to declare at the same time a period before the expiration of which in its view that person shall not be released. In the latter case the Court fixed the minimum period for both applicants at 30 years to commence from the date of conviction."*

Again this does not support any argument that life imprisonment cannot exceed 20 years nor be equivalent to imprisonment for life.

(v) *In* ***C.A. Crim. 12/2004 Shawn Parris v The State.*** *Shawn Parris had pleaded guilty to a charge of manslaughter and was sentenced to life imprisonment, not to be released before the expiration of 30 years. The Court of Appeal upheld this sentence on the application of the basic principle of sentencing that a* ***maximum*** *sentence is reserved for the most heinous circumstances and that in the view of the Court, the circumstances of Shawn Parris' case qualified as "most heinous".*

It was contended that the Court of Appeal therefore recognized 30 years as the maximum term of imprisonment contemplated by the imposition of a life sentence."

But this argument is fallacious especially as Sean Parris had pleaded guilty to manslaughter - not murder. Further a sentence of " life imprisonment, not to be released before the expiration of 30 years," is a minimum sentence of 30 years imprisonment and in fact could be equivalent to a sentence of as much as 45 years imprisonment without such a condition.

The assertion by one Gaitree Pargass on affidavit of her understanding of the length life of sentence is too important an issue to determine on the basis of her mere assertion without any sufficient foundation, even if not specifically denied. Though not an expert she offers an opinion to which I ascribe little weight.

I find the basis of this assertion that it results in prisoner serving 10-15 years in jail is insufficient and of little weight especially when contrasted with the authorities referred to above.

It can readily be ascertained that in fact the authorities do not speak with one voice. They are contradictory and demonstrate that over time the meaning of life imprisonment has evolved, or at least changed.

Further they relate to sentences imposed on persons who have not been charged and convicted of murder.

The sentence of imprisonment for life

The fact is that applicants have been convicted of murder and any sentence of imprisonment is a reduction in the mandatorily prescribed death penalty. It is not open to them to contend that their crimes are equivalent and punishable to the same extent as persons convicted of lesser offences who may have been granted reprieves, reviews or earlier releases.

Farfan was a case of rape. **Sean Parris** was a case of a sentence after a plea of guilty of manslaughter. The rough transcript of the Court of Appeal hearing in **Attin** C.A No. 29 of 2004 demonstrates that the meaning of life imprisonment appears to have changed, suggesting it was never fixed to start with.

Even the range of years which life imprisonment was supposed to represent, and the recognition of exceptions in the case of heinous crimes and circumstances is inconsistent with there ever having been a settled meaning of the term life imprisonment.

R v Secretary of State for the Home Department [2001] 1 A.C. 410 demonstrates that life long incarceration is not prohibited in principle in the U.K. and it is not unknown to law there.

I have been referred to correspondence from the Governor of Trinidad in 1940. I find it inconsistent with any settled practice having been established in 1940 in relation to sentences of imprisonment to be served by prisoners who had their sentences of death commuted, save that it recognized and queried the practice in this Colony, (as it then was) that (though) cases of commutation of sentences of death to imprisonment for life were reviewed every 4 years, in certain cases the maximum term of imprisonment was fixed at the time of commutation by the Governor in Council. This was subsequently changed .I find this correspondence equivocal at best, and not helpful in relation to any settled practice as to the length of the sentence of life imprisonment.

Further the case of **Foy** clearly demonstrates that a sentence of life imprisonment means imprisonment for life, subject to any executive amelioration.

It cannot be said therefore that imprisonment for life is not known to law.

Further it is clear that it was long recognised by the Legislature in Trinidad and Tobago that if the death penalty could not be carried out then its substitute was in fact imprisonment for life. See the **Criminal Procedure Act Ch 12:02 section 62 (1)**

> *"Where a woman convicted of an offence punishable with death is found in accordance with this section to be pregnant, the sentence to be passed on her shall be a sentence of imprisonment for life instead of sentence of death"*

In addition there exist several statutes where the sentence provided has included imprisonment for natural life

(i) The Anti Terrorism Act No.26 of 2005

(ii) The Dangerous Drugs amendment Act No.44 of 2000

(iii) The Sexual Offences amendment Act 2000

For example in **Act No. 44 of 2000, An Act to Amend the Dangerous Drugs Act.**

Section 4 states as follows

Section 3 of the Act is amended—(a) in subsection (1)—

*" **"life" means the natural life of a person**;"; and..*

Act No. 26 of 2005, **Anti- Terrorism Act**

Section 2 (1) (l) states:

"imprisonment for life" in relation to an offender means imprisonment for the remainder of the natural life of the offender.

The distinction between life imprisonment and imprisonment for life or natural life therefore disappears.

The argument that a sentence of imprisonment for the whole of natural life is different from life imprisonment and any argument that a life sentence must be less

than 20 years are on balance unsupported by authority and the argument that life imprisonment has somehow come to mean 12 to 15 years is rejected.

The bottom line is that life imprisonment can and does exceed 12-15 years - (**Attin** transcript) and the implementation of Pratt, by commutation to terms of up to imprisonment for natural life is not invalid.

I deal briefly with certain observations in this regard by the Privy Council in **Privy Council Appeal No. 10 of 2006 Coard and Others v The Attorney General of Grenada** at paragraph 42. Coard and his fellow prisoners were sentenced to death following convictions for murder and their sentences were subsequently commuted by way of conditional pardon to imprisonment for the rest of their natural lives. It was argued that this "*was unknown to law and that it would be an inhuman punishment because it would preclude any account being taken of individual circumstances or progress in prison.*"

Their Lordships interpreted the warrants of commutation "as having been intended to do no more than substitute sentences of life imprisonment in accordance with the actual advice advanced by the Minister (to commute the sentences of death to life imprisonment –para. 8) to the Governor General which he was bound to follow. Their Lordships observed however, that if the condition attached to the pardon had been read literally, that is, if the natural life sentence had been imposed, then there

would have been much in what Mr. Fitzgerald said (paragraphs 13 and 14 of the Judgment delivered by Lord Hoffman).

But **Coard** was obiter and based on a submission that:

1. Imprisonment for natural life was unknown to law, and

2. It would preclude any account being taken of individual circumstances and progress in prison.

Neither applies here - Imprisonment for life and imprisonment for natural life are no different. In any event as set out above both are known to law in Trinidad and Tobago Individual circumstances and progress in prison can be taken into account under the mechanisms for review under the Prison Rules and on applications for clemency under s.87 of the Constitution.

I therefore accept the Defendants submissions that:

(i) S.87 (2) is not a sentencing provision nor does it provide for a sentence. It provides instead for a punishment which is less than the punishment imposed as a result of a lawful judicial sentence.

(ii) Therefore S.70 does not require any sentencing input from the court as the court's function is merely to implement the less severe punishment imposed under the prerogative of mercy as a result of a judicial sentence

- Instead of a sentence of death the applicants now are subject to imprisonment for life, a less severe form of punishment.

(iii) As recognised in **Matthew,** as the Constitution itself so provides for it does not and cannot breach the separation of powers principle.

(iv) Further **Lewis** was not law at the time that commutation took place.

(v) **Pratt** was merely guidance

(vi) There was no error in implementing the guidance

In so far as the effective commuted punishment by the President is imprisonment for natural life that is equivalent in practical terms to imprisonment for 75 years since imprisonment for natural life is the maximum possible term of imprisonment. Provided that imprisonment for natural life is no different from life imprisonment then the commutations in fact were in keeping with the guidance in Pratt.

9. THE EVOLUTION OF THE RIGHT TO BE HEARD

Were the claimants entitled to procedural due process including the opportunity to be heard prior to the purported commutations of their death sentences by-

(a) The Advisory Committee on the Power of Pardon (the Mercy Committee)

(b) The President

(c) The Chief Justice [is Section 70 Chapter 12.02 subject to Section 4 and 5 of the Constitution requiring an opportunity to be heard to be provided before the exercise of s. 70 jurisdiction?]

In the case of **Michael de Freitas v George Ramoutar Benny et al [1975] 27 WIR 318** Lord Diplock held that the royal prerogative of mercy in England is akin to the power of pardon contained in sections 70 to 72 of the **Trinidad and Tobago 1962 Constitution** (now sections 87 and 89 of the 1976 Constitution). At **page 322 para. j** Lord Diplock stated that:

> *"… the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the same as it was in England at common law. At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion…* ***In tendering his advice to the Sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function****." (Emphasis supplied)"*

In ***Reckley v Minister of Public Safety and Immigration and others (No. 2)*** **(1996) 1 All ER 562** at p.569-570 the Privy Council, applied its previous judgment in ***de Freitas v Benny*** **(1976) AC 239** as follows:

> *"It was claimed (in **Benny**) that the functions of the (mercy) committee were quasi-judicial in nature and accordingly that 'any failure to grant to the appellant the rights he claims would contravene the rules of natural justice and infringe his right not to be deprived of life except by due process of law'. The submission was rejected by the Judicial Committee in a judgment delivered by Lord Diplock. His judgment is so germane to the present case that their Lordships propose to take the exceptional course of quoting the relevant part in full. It reads as follows:*
>
> *'Except in so far as it may have been altered by the Constitution the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the same as it was in England at common law. At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom her Majesty delegates her discretion.* ***Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right***

even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. *In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function. While capital punishment was still a lawful penalty for murder in England it was the practice of the Home Secretary in every capital case to call for a report of the case from the trial judge and for such other information from such other sources as he thought might help him to make up his mind as to the advice he would tender to the sovereign in the particular case. <u>But it was never the practice for the judge's report or any other information obtained by the Home Secretary to be disclosed to the condemned person or his legal representatives.</u> Section 70(1) of the Constitution makes it clear that the <u>prerogative of mercy in Trinidad and Tobago is of the same legal nature as the royal prerogative of mercy in England.</u> It is exercised by the Governor-General but "in Her Majesty's name and on Her Majesty's behalf". By section 70(2) the Governor General is required to exercise this prerogative on the advice of the Minister designated by him, acting in accordance with the advice of the Prime Minister…It serves to emphasis the personal nature of the discretion exercised by the designated*

*Minister in tendering his advice. The only novel feature is the provision in section 72(1) and (2) that the Minister before tendering his advice must, in a case where the offender has been sentenced to death, and may, in other cases, consult with the Advisory Committee established under section 71, of which the Minister himself is chairman; but section 72(3) expressly provides that he is not obliged in any case to act in accordance with their advice…**In their Lordships' view these provisions are not capable of converting the functions of the Minister, in relation to the advice he tenders to the Governor-General, into functions that are in any sense quasi-judicial**." (emphasis supplied)*

After considering the forgoing the Privy Council held at p. 573 (d) the following:

*"Indeed it is clear from the constitutional provisions under which the advisory committee is established, and its functions are regulated, that **the condemned man has no right to make representations to the committee in a death sentence case**; and, that being so, there is no basis on which he is entitled to be supplied with the gist of other material before the committee. This is entirely consistent with a regime under which a purely personal discretion is vested in the minister. **Of course***

***the condemned man is a liberty to make such representations, in which event the minister can (and no doubt will in practice) cause such representations to be placed before the advisory committee, although the condemned man has no right that he should do so**." (emphasis supplied)*

In the case of ***Wallen v. Baptiste (No. 2)*** ***[1994] 45 WIR 405*** the issue arose as to whether the prerogative of mercy exercised by the President on the advice of the Minister of National Security in consultation with the Advisory Committee was a *quasi*-judicial act thus conferring on the Appellant a right to be heard before the Committee. In delivering judgment the Honourable Hamel-Smith JA cited the said speech of Lord Diplock in ***de Freitas*** and stated at **page 420 para. f** that the law relating to the effect and exercise of the prerogative of mercy had not undergone any "metamorphosis" as suggested by counsel for the Appellant and thus he had no right to be heard in the deliberations by this body. At **paragraphs g to h** of **page 420**, the Honourable Hamel-Smith JA stated:

"**Had it been the intention of the framers of the 1976 Constitution to modify or change the effect of the prerogative from a purely discretionary function to a *quasi*-judicial one or (as suggested by counsel) to a sentencing procedure whereby the prisoner was entitled to be heard at the Advisory Committee stage and then later by the Minister, it would have required, in our view, clear and completely different language to achieve this and not mere changes**

in nomenclature and composition. *To retain the language of the former Constitution…is a clear and positive indication of the retention of the discretionary power which it really is…" (Emphasis supplied)*

At ***page 425 paras. f and g*** *of* ***Wallen*** *Hamel-Smith JA concluded:*

"In the instant appeal, the subject matter of the decision is mercy which involves policy considerations. The function of the Advisory Committee is to advise the Minister and is without decision-making power. The executive function of the Minister is purely discretionary and of a personal nature (certainly not quasi-judicial as suggested by counsel for the appellants). As Lord Scarman and Lord Brightman stated in ***Riley v. Attorney General (1982) 35 WIR 279****, consistent with what Lord Diplock had said in* ***de Freitas (1975) 27 WIR 318*** *and in* ***Abbott (1979) 32 WIR 347****:*

"The condemned man, although the power exists for his protection as well as for the protection of the public interest, has no right to be heard in the deliberations…"

In our judgment, what has been said in ***de Freitas*** *and confirmed in* ***Abbott*** *remains good law. In the event, the appellants are not entitled to be heard as contended for and the trial judge was right so to find. This ground of appeal fails." (Emphasis added)*

In fact in 1996 in the case of **Reckley** the Privy Council expressly stated at pg. 573 (j) "...their Lordships are satisfied that the decision of the Privy Council in **De Freitas v Benny** [11976] A.C. 239 remains good law and….. is determinative of the advisory committee point."

It is necessary to examine the case of **Lewis v the Attorney General of Trinidad and Tobago [2001] 2 A.C. 50** in some detail to establish for the purposes of the present cases what principles are applicable. I note that the respondents expressly reserved their position on the meaning and applicability of **Lewis** in the event this matter were to proceed further.

Lewis v AG of Jamaica [2001] 2 AC 50 at page 65 b-f

RIGHT TO BE HEARD

In this case the Privy Council considered the issue of the prerogative of mercy and expressly did not follow earlier authority on the issue in the cases of **De Freitas v Benny** and **Reckly**. The applications in Lewis related to a petition to the Privy Council of Jamaica, (which is equivalent to the Advisory Committee on the Power of Pardon in this jurisdiction) in relation to the grant of mercy and the non implementation of the death penalty. It was the applicants' final opportunity to prevent the execution of the sentence of death, and it was held that in those circumstances there was no reason why the applicants should be deprived of a right to be heard/ make representations, before

the Jamaican Privy Council, and to have sight of the material that was to be considered by the Jamaican Privy Council.

The six applicants had been sentenced to death in Jamaica after conviction of murder. Their appeals which were heard together because they all raised two important points--As summarized by the Privy Council [Lord Slynn of Hadly-] *these were (a) whether on a petition for mercy (after all other domestic attempts to set aside the convictions or to prevent execution have been exhausted) the applicants were entitled to know what material the Jamaican Privy Council had before it and to make representations as to why mercy should be granted and (b) whether they had a right not to be executed before the Inter-American Commission on Human Rights or the United Nations Human Rights Committee had finally reported on their petitions. In addition the applicants contended that the passage of time and the several ways in which they were treated in prison constituted inhuman or degrading treatment within the meaning of the Constitution of Jamaica so that they should not be executed.*

…because the Board was being asked to review the decisions of the Board in de Freitas v Benny [1976] AC 239 and in Reckley v Minister of Public Safety and Immigration (No 2) [1996] AC 527, the Attorney General of Trinidad and Tobago and the Attorney General of The Bahamas were given leave to intervene as also were five petitioners from Belize.

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"The question is thus whether a person under sentence of death is entitled to see that material and to put further material before the Jamaican Privy Council and to comment on what they have. It is accepted that none of the applicants saw the material which was before the Jamaican Privy Council when it considered the petition for mercy, and that they did not make such representations.

The Attorney General contends that the applicants have no right to see the material nor do they have any right to make representations. The Attorney General relies principally on de Freitas v Benny [1976] AC 239 and Reckley v Minister of Public Safety and Immigration (No 2) [1996] AC 527.

In de Freitas v Benny Lord Diplock said, at p 247:

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

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On the face of it there are compelling reasons why a body which is required to consider a petition for mercy should be required to receive the representations of a man condemned to die and why he should have an opportunity in doing so to see and

comment on the other material which is before that body. This is the last chance and in so far as it is possible to ensure that proper procedural standards are maintained that should be done. Material may be put before the body by persons palpably biased against the convicted man or which is demonstrably false or which is genuinely mistaken but capable of correction. Information may be available which by error of counsel or honest forgetfulness by the condemned man has not been brought out before. Similarly if it is said that the opinion of the Jamaican Privy Council is taken in an arbitrary or perverse way--on the throw of a dice or on the basis of a convicted man's hairstyle--or is otherwise arrived at in an improper, unreasonable way, the court should prima facie be able to investigate.

The importance of the consideration of a petition for mercy being conducted in a fair and proper way is underlined by the fact that the penalty is automatic in capital cases. The sentencing judge has no discretion, whereas the circumstances in which murders are committed vary greatly. Even without reference to international conventions it is clear that the process of clemency allows the fixed penalty to be dispensed with and the punishment modified in order to deal with the facts of a particular case so as to provide an acceptable and just result.

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The procedures followed in the process of considering a man's petition are thus in their Lordships' view open to judicial review. In their Lordships' opinion it is

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

It is in their Lordships' view not sufficient that the man be given in summary or the gist of the material available to the Jamaican Privy Council; there are too many opportunities for misunderstanding or omissions. He should normally be given in a situation like the present the documents. Their Lordships attach importance to what was said by Lord Mustill in R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531 , 563:

"It has frequently been stated that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision. The opinion of the Privy

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

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Their Lordships have so far dealt with this matter on the basis that there is a right to put in "representations". These should normally be in writing unless the Jamaican Privy Council adopts a practice of oral hearing and their Lordships are not satisfied that there was any need for, or right to, an oral hearing in any of the present cases. There was, however, in each of the present cases a breach of the rules of fairness, of natural justice, which means that the applicants did not enjoy the "protection of the law" either within the meaning of section 13 of the Constitution or at common law.

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

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

It was contended that as a result of **Lewis** and even before, the applicants had a right to be heard before it was decided any decision was made to extend mercy to them, and failure to afford such opportunity therefore rendered the commutations void.

But before Lewis was decided as Lord Scarman and Lord Brightman stated in ***Reckley v. Attorney General (1982)* 35 WIR 279**, consistent with what Lord Diplock had said in **de Freitas** v Benny ***(1975)* 27 WIR 318**

> **"The condemned man, although the power exists for his protection as well as for the protection of the public interest, has no right to be heard in the deliberations…"**

and it was clearly established by those cases that the exercise of the prerogative or its constitutional equivalent was not reviewable. That has now changed.

It is necessary to consider the impact of **Lewis** on the decisions of the Advisory Committee, the President and the Chief Justice, which all occurred prior to its delivery, and in particular whether these decisions were retrospectively vitiated by the decision in **Lewis.**

RETROSPECTIVITY

Lewis dealt with the case of the right to due process before the Mercy Committee made its final recommendation as to whether or not the applicants would be executed. It made clear that in such a situation prerogative powers were not immune from judicial review, and that due process was required to be observed by the Jamaican Privy Council (equivalent to the Advisory Committee). **De Freitas v Benny** and **Reckley**, which held otherwise, were expressly not followed.

Such statements were clear. At the time of the commutations consideration of the commuted sentences did not require a right to be afforded to individual prisoners to place material relating to their individual circumstances before the Advisory Committee or to have disclosed material furnished to the Minister or the Advisory Committee and

the exercise of the constitutionally enshrined prerogative power was not subject to review. **De Freitas v Benny** represented the law until it was expressly not followed in Lewis.

Lewis specifically dealt with the situation where the Privy Council was considering whether the applicants there should be granted mercy or have the sentence of death executed. However there is no reason in principle why the exercise of that prerogative power should not equally be reviewable, nor why the requirements of due process should not be imported into the deliberations of the Advisory Committee when it is considering the exercise of clemency in relation to the liberty of the subject, as well as when it does so in relation to his life.

While in principle judicial decisions on the meaning of the Constitution may have retrospective effect as stated in **Coard (P.C. Appeal No. 10 of 2006**) that must necessarily apply only where there have been no previous judicial decisions by the Privy Council on the same point. Where as in the instant case there have been such prior decisions by the highest court but they are subsequently not followed in a later decision, it would offend logic and reason if decisions taken on the basis of the earlier decisions, prior to their being not followed, were held to be anything other in conformity with the law as it then stood, and anything other than lawful. There can be nothing unfair about this. Once the law has changed any subsequent situation can be determined on the basis of the law as subsequently declared. In the instant case the

applicants have always had the right to approach the Executive for clemency under s. 87 of the Constitution.

I have been directed in this regard to the following article and set out hereunder some of the matters discussed therein which shed light on this issue.

> ***"A time for everything under the law - Some reflections on retrospectivity" L.Q.R. 2005, Vol.121 (JAN), 57-79, Alan Rodger. @page 63***

"Traditionally, a fundamental principle of most legal systems, our own included, is that the legal consequences of situations should be judged according to the law in force at the time. This is part of a wider principle that people should be judged by their contemporaries and by contemporary standards and beliefs, rather than many years later by people with perhaps very different standards and beliefs. One of the aims of laws of limitation and prescription is to help secure this. By contrast, retroactive laws mean that situations are judged by different rules from those that people had in mind at the time. Hence the alarm of the Crown when defence counsel wanted to challenge trial judges' decisions and directions by reference to rules that they were not applying at the time. That would not only be unfair to all who took part in the trials, but would offend against another important legal policy, that there should be finality. As Lord Hoffmann noted in In re McKerr, if the Human Rights Act had made Art.2 of the Convention

retroactive, there would have been nothing to stop people calling for an investigation of the deaths by state action of the Princes in the Tower. [FN25]

But legal certainty is not what it was: in the British legal systems the principle has been weakened progressively over the last 50 years."

The encroachment into these fundamental principles especially arising from the impact of decisions of the European Court on Human Rights/Strasbourg Court is then discussed. But they remain fundamental principles. It is common ground that the law applicable at the time of conviction was set out in **De Freitas v Benny** and **Reckley** which had expressly held that the prerogative is unreviewable and that a person being considered for the exercise of mercy had no right to put material before the Advisory Committee or to see the material it considered in relation to him.

The argument was raised on behalf of some of the applicants that even at the time of **De Freitas v Benny** however the right to a hearing before the Advisory Committee existed by virtue of S.5 4 and 5 of the Constitution and by virtue of the common law principles of natural justice. This however is directly contradicted by **De Freitas v Benny.**

Carried to its ultimate conclusion a retrospective application of Lewis would render invalid and unconstitutional, every commutation ever granted under S.87 or its equivalent predecessor provisions, every failure to advise that the death penalty not be

implemented, every failure to advise that a sentence not be alleviated or ameliorated, and every failure to advise that a pardon be granted.

Such an interpretation of Lewis would not only be unworkable, and contrary to logic reason and common sense, but it is unnecessary. Further, it would violate the very principles recognised as fundamental by the Honourable Lord Rodger in the article referred to previously. While those principles are the subject of active encroachment which may provide fertile ground for a post graduate thesis, it is unnecessary in this case to depart from those fundamental principles. This is especially so as the decision to commute in respect of each applicant is not a once and for all determination.

There is no dispute that the applicants can always approach the Advisory Committee at any time separate and apart from the procedures under the Prison Rules which provide for review to which I return later -

There can be no dispute that the law as now set out in Lewis would be applicable to any such new application because, unlike at the time of their original commutation, Lewis now represents the law. It was contended that this fact is irrelevant and that the right to make a fresh approach to the Advisory Committee would not correct past illegality or unconstitutionality. That is so but I have found that there was no unconstitutionality at the time the time the decision to commute were taken. It was in keeping with the law as declared by the highest court and in accordance with the Constitution. It was not illegal and did not violate any separation of powers boundary

lines prohibiting sentencing by the Executive. It was not irrational as the applicants were all being treated similarly in accordance with the circumstance that was common, to all namely, conviction of murder, exhaustion of appeals and confirmation of the mandatory judicial sentence of death upon them. It was not procedurally improper as the right to a hearing did not then apply and 70 of the Criminal Procedure Act was merely an administrative provision.

Resentencing

The case of **Coard** [**loc. cit**] is instructive though distinguishable. The Privy Council ordered in the circumstances of that case that the applicants were entitled to a judicial resentencing.

In that case, like the instant ones, the applicants were sentenced to death. Those sentences were purportedly commuted by the Governor General. Unlike in the instant cases however, the mandatory death sentence in Grenada in 1986 was unconstitutional.

Accordingly it was held that any purported commutation of the initial invalid sentence, was invalid. The Privy Council was asked to hold that notwithstanding their unconstitutionality, the sentences were res judicata, and that they, (together with the commutations thereof to life imprisonment), should stand as the applicants were by this time several years later, out of the judicial system, leaving them to their remedy to petition for the exercise of executive clemency.

The Privy Council indicated that in the ordinary way there would be both logic and practical sense in this argument. However there were in the special circumstances of that case several reasons why the court should intervene and order a judicial resentencing hearing.

The first was that the legality of the death sentence imposed on those applicants had never been the subject of judicial decision. If it had been raised before the Court of Appeal in 1991 because of the principle that judicial decisions on the meaning of the Constitution have retrospective effect, the correct answer would have been that it was unlawful. But in practice it was unrealistic to expect that the argument would have succeeded in the court of appeal.

In the instant case there can be no doubt since **Matthew v AG** that the death sentences passed on the applicants, confirmed on appeal up to the Privy Council, were lawful.

Secondly, the applicants there **remained in detention without lawful authority as their initial sentences of death were invalid** (unlike the instant cases), and therefore the commutations of those sentences were equally invalid.

Thirdly, there had never been any judicial contribution to determining the sentences the applicants should serve. In the instant case, while there was no sentencing

discretion in the trial judge that was not unconstitutional under the law of Trinidad and Tobago.

Fourthly, there appeared to be no adequate mechanism for providing the applicants with the judicial sentencing procedure to which they were entitled. Here they are not so entitled since **Matthew**.

Fifthly, the politically charged atmosphere which still surrounded the applicants' fate in **Coard** is not a feature in the instant application.

None of those reasons applies to the instant situation.

I find there is no reason why the commutations should not be considered and treated as valid at the time they were effected, as there was no right to be heard or to make representations at the time of commutation of sentence, and under s.70 of the Criminal Procedure Act there was no separate provision for a sentencing hearing by the Chief Justice.

10. PRISON RULES - REQUIREMENTS FOR REVIEW

The Prison Rules.

Rule 281 of the Prisons Rules provides that "the case of every person serving a life sentence shall be reviewed by the Governor in Council at the 4th, 8th, 12th, 16th and 20th year of the sentence.

Under the Prison Rules prisoners under a life sentence can therefore expect to have a review of their sentences at least at 4 year intervals.

I consider that by virtue of s. 70 of the Criminal Procedure Act Ch12:02 the fact that the term of imprisonment-life - has been determined by the President, and is not a judicial sentence, is of no import in relation the reviews under the Prison Rules .The exercise of s.70 jurisdiction has the effect of rendering judicial sentences and sentences commuted by the executive equivalent for this purpose.

Some Applicants complain as follows:-

"The alleged “interview” does not sufficiently discharge the onus on the executive to accord the Claimant the right to be heard. Moreover, there is no evidence that the Claimant was given the opportunity to respond to the statements made by other persons in relation to his conduct and/or progress.. The Claimant has never received notice of the existence of the “Confidential Reports” and the entire process of review has therefore been conducted without his knowledge or participation and procedurally unfair, the Claimant has never received a “proper review” and his rights have therefore been infringed. The Court is also entitled to denounce the procedure by which said reviews are conducted and to refer the matter to the Minister of National Security for the revision of said procedure so as to bring it into alignment with the due process rights enshrined in the Constitution and the decision in **Lewis v The AG** (supra)."

RIGHT TO BE HEARD

It is clear that a prisoner has available to him at least 2 routes to access the exercise of the discretion to grant mercy/clemency.

The right to petition His Excellency the President for the exercise of that discretion under s.87 of the Constitution can be invoked by a prisoner at any time .This option can be referred to as an unscheduled review as he need not await the scheduled review every 4th year of his term.

If he chooses not to petition for mercy on his own accord there exist the scheduled reviews under the Prison Rules, where, should there be a favourable review, it is conceivable that it could culminate in a recommendation by the Minister of National Security to the President for the exercise of his jurisdiction to grant mercy under s.87 of the Constitution.

Since **Lewis**, it is clear that there is no reason why in the unscheduled review the right to procedural due process should not be available. Similarly there is absolutely no reason in principle why the right to procedural due process should not be available for the scheduled reviews, especially as both affect the liberty of the subject.

It goes without saying that such a review should accord with the basic principles of due process. At the very least

(i) The prisoner should know that a review is being conducted in relation to him.

(ii) He should know the material that is being considered

(iii) He should have the opportunity to put forward representations by himself or his advisors in response.

(iv) He should have sufficient time available to do so

As in **Lewis** hearings before the Mercy Committee or its equivalent, the opportunity to be heard need not be in writing, and the specific procedure can be determined by the reviewer. But the basic principles of a right to be heard are non negotiable, as without such procedural due process such reviews are rendered meaningless, or in a worst case scenario, subject to abuse.

Any reviews conducted without prisoners being aware that they were being conducted, or without being aware of the material being considered, or provided with sufficient or any opportunity to respond to adverse material in reports, or to supplement favourable material would not be in accordance with the law.

It is trite law that the common law would import such of the requirements of due process as to render such a review meaningful, moreso if such reviews are a prelude to the possible exercise of the prerogative of mercy.

As was stated in **Alladin Mohammed**'s case I consider it appropriate once again to refer to the dicta in the case of **Brennan v Governor of Porthouse Prison** [1998] 1 ECH 140, paragraphs 46-47:

> "In any particular community there should be a regime which is practical, fair known and reasonably certain. In default of this then injustice, whimsy, caprice and autocratic unfairness tend to flourish … If such a system of divergence between the rules and practice persists for any length of time then this becomes unfair in an institution in which the inmates are necessarily deprived of certain basic rights."

> It was alleged by some Claimants that they were not informed of the review or the results of the review. There is no evidence as to whether the Claimant was ever informed of the review or afforded the opportunity to make representations in any way. There is evidence however that part of the review process involved an interview with the applicant, and a medical examination. Further any disciplinary offences allegedly committed by the applicants were taken into account. I am not persuaded that the conduct of the reviews was so secret and concealed from the applicants as they portray.

I find that they have in some cases been less than forthcoming for example Henry concealed the fact that they had committed disciplinary offences. Smart actually received a medical examination in January 2007 which confirmed that he was physically fit though he claimed to have a medical condition [tuberculosis] which went untreated. See medical report dated January 2nd 2007. In any event, while I take the opportunity to clarify what the review process should entail in accordance with **Lewis**, I find that the applicants had at least some input into that process, in their knowledge of and participation in:

(i) the medical examination

(ii) the interview with a prison officer

(iii) their knowledge of their commission or non commission of prison disciplinary officers if any.

Based on the potential for reviews being less than effective and for future guidance I would be prepared to exercise the court's jurisdiction under s.14 of the Constitution and grant a declaration to above effect.

Accordingly it is declared that in respect of reviews under the Prisons Rules

(i) The prisoner should know that a review is being conducted in relation to him.

(ii) He should know and be provided with the material that is being considered

(iii) He should have the opportunity to put forward representations by himself or his advisors in response.

(iv) He should have sufficient time available to do so

(v) The opportunity to be heard need not be in writing, and

(vi) The specific procedure can be determined by the reviewer

I consider whether relief further to this is required in the circumstances and consider what other options are available? They range from

(1) quashing the reviews already conducted,
(2) remitting the reviews to the President for reconsideration,
(3) awarding damages in respect of any failure to afford a proper hearing,
(4) ordering resentencing of each applicant who can establish that he did not receive a review which accorded him procedural due process.

I consider that none of these options is suitable. The fact cannot be ignored that the applicants always had and still have the option to petition the President for mercy

even apart from the scheduled reviews. On such a petition the right to procedural due process exists. While the scheduled review was one option available to each prisoner it was within his power to take his own action.

In fact the unscheduled alternative route is more likely to be productive of a recommendation that mercy be extended in that it involves one step and a direct approach within the applicant's control.

Further, a breach of Prison Rules is remediable by judicial review - See H.C.A 2044/05 **Alladin Mohammed v Commissioner of Prisons** delivered March 20th 2008 per Rajkumar J where the court applied the case of **Hague v Deputy Governor of Parkhurst Prison and Others** [1991] 3 All England Reports 733 House of Lords where at page 752(h), (ibid) Lord Jauncey found that:

> *"He, (the prisoner), may also challenge any administrative decision of the Secretary of State or the Governor which he considers to contravene the provisions of the Act or the Rules by judicial review proceedings. In the case of a continuing wrong done to him, a prisoner could expect that a hearing in judicial review proceedings could be obtained with little delay. These public law remedies are additional to any private law remedies which would be available to him such as damages for misfeasance in public office, assault or negligence."*

The Hague case supra, therefore, recognises:

(1) The possibility of a right of action in negligence against prison authorities; and

(2) The possibility of public law remedies.

Judicial review is in principle available in a suitable case at the suit of a prisoner who claims there has been a continuing wrong done to him by a breach of the Prisons Rules.

If judicial review had been sought the procedural bars of alternative remedy and delay would probably have been invoked.

In those circumstances to grant other than declaratory relief would be disproportionate when:

(i) an effective alternative remedy was in the applicants' own hands and

(ii) the alleged breach was not pursued on a timely basis

11. Cruel and Unusual treatment or punishment

It was submitted that some applicants and similarly circumstanced prisoners occupy a *"no man's land" in the prison such that they are not permitted to enter into retraining programs since they are not due to be released but are obliged to attend the pre-release programs with other "lifers". It was submitted that the enforced*

participation of some applicants in the pre-release program amounts to cruel and unusual punishment when they has been repeatedly informed that they will remain in prison for the duration for their natural life and that they will not be released."

This argument is rejected as I find it has no merit.

The cases demonstrate that even far more serious complaints would not necessarily amount to cruel and unusual treatment.

In **Darrin Roger Thomas and Haniff Hillaire v Cipriani Baptiste et al Privy Council Appeal No. 60 of 1998** the Appellants appealed to the Judicial Committee of the Privy Council from the dismissal of their constitutional motions which dealt, inter alia, with the issue of cruel and unusual treatment and punishment. The appellants contended that they were detained in cramped and foul-smelling cells and were deprived of exercise and access to the open air for long periods of time. These conditions were in breach of the Prison Rules and were therefore unlawful and the appellants argued that this amounted to cruel and unusual treatment. Their Lordships rejected this argument.

At **page 17** of **Darrin Thomas** (supra) their Lordships stated,

"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 probably 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 minimize 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 would not be the appropriate remedy"

PRISON CONDITIONS

It therefore remains to be determined whether the Claimants Smart and Henry have been subjected to cruel and unusual punishment arising out of:

(a) The living conditions which pertain in the Maximum Security Prison;

In his Affidavit the Claimant Henry made the following observations on some of the conditions to which he has been subjected.

> *"On 23rd February 2007, I visited a skin clinic at Port-of-Spain General Hospital and they prescribed treatment which cost $170.00. I have no one to buy it for me and I had to use baby oil and disinfectant to treat my condition. I was never properly treated or supplied with the correct medication.*
>
> *The conditions in which I am forced to live in the Maximum Security Prison are horrible and degrading and potentially life threatening. The water that we consume and use to bathe is often dirty and inadequate for our needs. The rice and peas are often littered with weevils and on more than one occasion I have been forced to consume spoilt meat. The nutrition is inadequate and unbalanced and at least two meals per day consist of bread and butter and a cool ade or hot sweet water. The kitchen is located near to the toilets and there is a high incidence of disease carrying vermin in this area including both flies and*

rats…I have formed the view based on my experiences that such treatment is a breach of my rights. "

I find that in the context of the Darrin Thomas case dirty water, bad food and vermin do not constitute cruel and unusual treatment.

EQUAL PROTECTION OF THE LAW

It was claimed that on behalf of some Claimants they have also been deprived of the equal protection of the law in that his right to benefit from the ruling in **Pratt and Morgan v The AG (supra)** was unreasonably fettered by the unsolicited exercise of the prerogative power. Other prisoners initiated Constitutional Motions and thereby obtained commutations of their death sentences by Order of the Supreme Court and were thereafter resentenced. One such prisoner was Angela Ramdeen whose death sentence was commuted to life imprisonment by order of the Honourable Mr. Justice Jamadar **(H.C. 1090/1993 Angela Ramdeen v The Attorney General).** This decision was upheld on appeal **(C.A. CIV. 6/2004 The Attorney General of Trinidad and Tobago v Angela Ramdeen)** and Angela Ramdeen was resentenced by the Honourable Madam Justice Joan Charles to a term of years **(H.C. 258/1996 The State v Angela Ramdeen).**

It was submitted that the Claimant is similarly circumstanced to Angela Ramdeen, in that they were both entitled to commutation pursuant to the ruling in **Pratt**

and Morgan v The AG (supra), but he was not accorded the equal protection of the law.

This argument is untenable. Ramdeen's complaint was that she was not granted a commutation of her sentence. She approached the court to get the benefit of a commutation in the absence of the grant of such to her. It is absurd to contend that the applicants were somehow deprived of a benefit that Ramdeen obtained from the courts when the reason for her having to approach the courts in the first place was her death sentence remained unaltered, unlike that of the applicants. In any event the Court of Appeal ordered that she be resentenced in accordance with **Matthew v AG** i.e. to life imprisonment.

The relief sought by the Applicants Xavier and Lendore, largely mirror those of the applicants and are set out hereinafter.

A Declaration that the Applicants' rights guaranteed by the Constitution of Trinidad and Tobago have been breached, namely

a) *to life and liberty and the right not to be deprived thereof except by due process of law (section 4 (a) of the Constitution);*

I find no such breach. Due process of law was observed in relation to the law as it then stood.

b) to equality before the law and the protection of the law (section 4 (b) of the Constitution);

I find no such breach has been established

c) *not to be subjected to arbitrary detention and imprisonment (section 5 (2) (a) of the Constitution);*

I find no such breach has been established

d) *not to be subjected to cruel and unusual treatment or punishment (section 5 (2) (b) of the Constitution);*

I find no such breach has been established

e) *to be legally represented (section 5 (2) (c) of the Constitution);*

I find no such right existed in relation to the commutations.

f) *to a fair hearing in accordance with the principles of natural justice for the determination of his rights and obligations (section 5 (2) (e) of the Constitution);*

I find no such right existed in relation to the commutations.

g) *to a fair and public hearing by an independent and impartial tribunal (section 5 (2) (f) (iii) of the Constitution);*

I find no such right existed in relation to the commutations.

h) to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights (section 5 (2) (h) of the Constitution), such rights having been breached by the imposition upon the first Applicant of a sentence of imprisonment with hard labour for a period of seventy-five (75) years, and by the imposition upon the Second Applicant of a sentence of imprisonment for the rest of his natural life, each of the Applicants being so treated without regard to his individual circumstances, and in the same manner as many other persons who had also previously been sentenced to death.

I find that each applicant had the opportunity to have his individual circumstances considered at trial and on appeal to the Court of Appeal and Privy Council, and commutation to imprisonment for life or its practical equivalent was in fact in accordance with the guidance of the Privy Council and the practice followed subsequently in **Matthew v AG.** and **Lewis.** In any event it was in accordance with their relevant common individual circumstance, namely conviction of murder and Pratt delay requiring commutation of the mandatory sentence of death.

In so far as the following are sought namely:

(i) An Order that the Decisions of His Excellency the President, and/or the advices of the Honourable Minister of National Security, and/or the

Orders of the High Court, which imposed the said sentences, be quashed;

(ii) An Order providing for the commutation of each applicant's sentence of death in accordance with the law and the Constitution of Trinidad and Tobago;

(iii) An Order providing for all questions as to sentence which then arise to be determined in accordance with the law and the Constitution of Trinidad and Tobago.

(iv) Damages.

These would not arise.

It was contended that as the Claimants are at present detained under the Order of the Chief Justice once that Order is quashed, **t**here would be no longer any lawful order detaining the Claimant, **t**he Claimant's detention would have been unconstitutional from the date of the order of the Chief Justice, and in the circumstances the Claimants would be entitled to an appropriate declaration to reflect this together with a vindicatory award of damages. In the light of my findings this does not arise.

REMEDIES

Even assuming that the commutations were unconstitutional [which I have expressly found not to be the case] the remedy would not be resentencing by a court -

either by this court in the exercise of its constitutional jurisdiction or by a referral to a criminal court.

Logically the first step would to be to quash the commutations by declaration or otherwise.

That having occurred the position remains that the applicants were under sentence of death which could not be carried out by virtue of **Pratt** delay and they would be entitled to commutation of sentence to life imprisonment In the wholly exceptional circumstances created by the **Pratt** judgement by the Privy Council, the logical mechanism for implementing the Privy Council's recommendation that sentences of death be commuted to sentences of life imprisonment was via the exercise of the prerogative of mercy under S.87 of the constitution.

Quashing the commutations would have the effect of reinstating the original sentence of death with the Privy Council's proviso that it cannot be carried out and should be commuted to a sentence of life imprisonment.

Accordingly if **Lewis** were to be applied retrospectively the applicants would be entitled as their relief, to have their case remitted for reconsideration before the Advisory Committee in accordance with Lewis principles.

There would be nothing contrary to the Constitution or to principles of constitutional interpretation, even having regard to a liberal and purposive interpretation of the Constitution, in such a referral to the Advisory Committee, this time with a right to submit material and make representations on each applicant's individual circumstances.

It is a long way from this to assert that the applicants' remedies mandate a further judicial resentencing after sentencing at Assizes, confirmation of sentence at Court of Appeal and Privy Council, and further application of the principles and guidance in **Pratt** to persons in the applicant's situation. The case for a still further judicial resentencing, and a sixth consideration of punishment has not been made out. The role of the courts in sentencing these applicants is at an end.

In fact further resentencing by the courts at this stage introduces the possibility of differing sentences for persons who were all convicted of murder, sentenced to the mandatory penalty of death, and had their sentences judicially recommended by the Privy Council as being subject to consideration in masse, and commutable to life imprisonment. In the circumstances of **Pratt** the Privy Council by implication found nothing wrong with treating all persons on death row beyond the prescribed period in the same way, subject to the same reduced penalty of life imprisonment. This was obviously because they were all similarly circumstanced in the manner described above.

Resentencing by this court would reintroduce **Roodal** through the back door in defiance of the Privy Council's ruling in Matthew and would ignore the guidance of the Privy Council in **Pratt** as to what form the commutation of sentence should take. Any resentencing hearing under S.70 by the judiciary would be an erosion of the President's discretionary exercise of the power of pardon or clemency and would therefore itself be unconstitutional. A court interpreting the Constitution purposively and liberally cannot ignore these matters.

For all the above reasons these motions fail and must be dismissed with costs. For future guidance I grant the declaration referred to previously in relation to reviews under the Prison Rules.

Accordingly it is declared that in respect of reviews under the Prisons Rules:

(i) The prisoner should know that a review is being conducted in relation to him.

(ii) He should know and be provided with the material that is being considered

(iii) He should have the opportunity to put forward representations by himself or his advisors in response.

(iv) He should have sufficient time available to do so.

(v) The opportunity to be heard need not be in writing, and

(vi) The specific procedures for review can be determined by the reviewer.

The remaining motions which it was agreed would abide the outcome of the 6 representative actions are also dismissed with costs certified fit for senior counsel.
I further order that there be liberty to apply.

Finally, I wish to express the court's indebtedness to counsel for all parties and their teams for the diligence and industry which characterised their submissions and their invaluable assistance provided to the Court.

Dated this 1st day of December 2009.

Peter A. Rajkumar
Judge

APPENDIX A

LIST OF HIGH COURT ACTIONS DEALING WITH THE COMMUTATION OF THE DEATH SENTENCE

NAME	H.C.A NO.	ATTORNEY FOR THE CLAIMANT	CLASSIFICATION
1. Allan Henry	CV 2007-03406	Ms. Dana Seetahal, S.C. instructed by Ms. Theresa Hadad.	Natural Life
2. Norbert Williams	CV 2007-03881	Mr. Mark Seepersad and Mr. Gerald Ramdeen	Natural Life
3. Dexter Lendor	H.C.A 2548 of 2003	Desmond Allum S.C. leading Rajiv Persad.	75 years
4. *Deshan Rampharry*	CV 2007-03399	Mr. Mark Seepersad and Mr. Gerald Ramdeen	75 years
5. Evans Xavier	H.C.A 2548 of 2003	Douglas Mendes S.C. leading Gregory Delzin	Natural Life
6. Victor Baptiste	CV 2007-04450	Alvin Ramroop and Jagdeo Singh	Natural Life
7. Clive Smart	CV 2008-01123	Keith Scotland instructed by Mr. Daniel Khan	75 years
8. Jainarine Persaud	CV 2007-03814	Ms. Dana Seetahal, S.C. instructed by Ms. Theresa Hadad.	Natural Life- follows ***Allan Henry*** CV 2007-03406, ***Norbert Williams*** CV 2007-03881, ***Evans Xavier*** H.C.A 2548 of 2003, ***Victor Baptiste*** CV 2007-04450
9. Rajendra Krishna	CV 2007-03405	Ms. Dana Seetahal, S.C. instructed by Ms. Theresa Hadad.	Natural Life- follows ***Allan Henry*** CV 2007-03406, ***Norbert Williams*** CV 2007-03881, ***Evans Xavier*** H.C.A 2548 of 2003, ***Victor Baptiste*** CV 2007-04450
10. Deolal Sukhram	CV 2007 - 03861	Mr. Mark Seepersad and Mr. Gerald Ramdeen	Natural Life- follows ***Allan Henry*** CV 2007-03406, ***Norbert Williams*** CV 2007-03881, ***Evans Xavier*** H.C.A 2548 of 2003, ***Victor Baptiste*** CV 2007-04450
11. Fazal Amin Khan	CV 2007-03382	Mr. Mark Seepersad and Mr. Gerald Ramdeen	Natural Life- follows ***Allan Henry*** CV 2007-03406, ***Norbert Williams*** CV 2007-03881, ***Evans Xavier*** H.C.A 2548 of 2003, ***Victor Baptiste*** CV 2007-04450
12. Girijadat Sewpersaud	CV 2007-03861	Mr. Mark Seepersad and Mr. Gerald	Natural Life- follows ***Allan Henry*** CV 2007-03406, ***Norbert Williams*** CV 2007-

		Ramdeen	03881, ***Evans Xavier*** H.C.A 2548 of 2003, ***Victor Baptiste*** CV 2007-04450
13. Michael Bullock	CV 2007-03400	Mr. Mark Seepersad and Mr. Gerald Ramdeen	Natural Life- follows ***Allan Henry*** CV 2007-03406, ***Norbert Williams*** CV 2007-03881, ***Evans Xavier*** H.C.A 2548 of 2003, ***Victor Baptiste*** CV 2007-04450
14. Felix Dean	CV 2007-04449	Alvin Ramroop and Jagdeo Singh	Natural Life- follows ***Allan Henry*** CV 2007-03406, ***Norbert Williams*** CV 2007-03881, ***Evans Xavier*** H.C.A 2548 of 2003, ***Victor Baptiste*** CV 2007-04450
15. Lal Seerattan	Pre-action protocol CV 2007-04448	Mr. Mark Seepersad and Mr. Gerald Ramdeen Alvin Ramroop and Jagdeo Singh	Natural Life- follows ***Allan Henry*** CV 2007-03406, ***Norbert Williams*** CV 2007-03881, ***Evans Xavier*** H.C.A 2548 of 2003, ***Victor Baptiste*** CV 2007-04450
16. Godson Neptune	CV 2007-04179	Alvin Ramroop and Jagdeo Singh	Natural Life- follows ***Allan Henry*** CV 2007-03406, ***Norbert Williams*** CV 2007-03881, ***Evans Xavier*** H.C.A 2548 of 2003, ***Victor Baptiste*** CV 2007-04450
17. Oliver Forde	CV 2007-04182	Alvin Ramroop and Jagdeo Singh	Natural Life- follows ***Allan Henry*** CV 2007-03406, ***Norbert Williams*** CV 2007-03881, ***Evans Xavier*** H.C.A 2548 of 2003, ***Victor Baptiste*** CV 2007-04450
18. Ramesh Maharaj	CV 2007-04180	Alvin Ramroop and Jagdeo Singh	Natural Life- follows ***Allan Henry*** CV 2007-03406, ***Norbert Williams*** CV 2007-03881, ***Evans Xavier*** H.C.A 2548 of 2003, ***Victor Baptiste*** CV 2007-04450
19. Stephen Hyman a/c Junior Sealey	CV 2007-04183	Alvin Ramroop and Jagdeo Singh	Natural Life- follows ***Allan Henry*** CV 2007-03406, ***Norbert Williams*** CV 2007-03881, ***Evans Xavier*** H.C.A 2548 of 2003, ***Victor Baptiste*** CV 2007-04450