Supreme Court of Judicature Court of Appeal of Barbados
Civil Appeal No 29 of 2004
March 2, 4 y 11 and May 31, 2005

Jeffrey Joseph and Lennox Ricardo Boyce (Appellants) v. Attorney-General, Superintendent of Prisons and Chief Marshal (Respondents)

BEFORE: The Honourable Colin A. Williams, The Honourable Frederick L.A. Waterman and The Honourable Peter D.H. Williams, Justices of Appeal

I. INTRODUCTION

[1] This appeal raises two main issues: first, whether it is a breach of the appellants' constitutional rights to carry out the death sentence for murder prior to receiving final reports from human rights bodies and those reports being considered by the Privy Council of Barbados ("BPC"); secondly, whether the BPC, in deciding on its advice to the Governor-General on the exercise of the prerogative of mercy, complied with the rules of fairness and of natural justice. These and the other issues raised in the proceedings are of high constitutional importance to the fundamental rights and freedoms of the individual and, in the case of the appellants, are determinative of their right to life.

[2] The appellants, Jeffrey Joseph ("Joseph") and Lennox Ricardo Boyce ("Boyce"), were convicted of the murder of Marquelle Hippolyte on 2 February 2001, and sentenced to death by ***Payne J*** as he was mandated to do by statute. This Court dismissed their appeals against conviction and sentence on 27 March 2002. Death warrants were read to them on 26 June 2002, notifying them of their impending executions, which were scheduled for 2 July 2002. On 27 June 2002, the appellants filed originating motions in the High Court to stay their executions pending the hearing of their appeals to the Judicial Committee of the Privy Council ("JCPC") on the ground that the mandatory death penalty was unconstitutional. On 25 July 2002, the appellants petitioned the JCPC for special leave to appeal and their appeals were heard and dismissed on 7 July 2004. Thereafter, death warrants were read to the appellants for the second time on 15 September 2004, notifying them of the new date for their executions, 21 September 2004. On 16 September 2004, the appellants filed originating motions in the High Court to stay

their executions pending their petition to the Inter-American Commission on Human Rights ("IACHR") and to determine their rights under the Constitution. The 2002 motions were consolidated and heard with the 2004 motions. On 22 December 2004, ***Greenidge J*** dismissed the motions. It is from his decision that the appellants have appealed.

II. BACKGROUND

[3] Marquelle Hippolyte was brutally beaten with pieces of wood by four assailants on 10 April 1999, and sustained serious injuries from which he died five days later on 15 April. Included in the many fractures and other injuries sustained by Hippolyte was a fracture of the left parietal region of the skull. A diagnosis of traumatic brain injury was made. Surgery was performed, but he did not recover. At the time of his death he was 22 years old. The enormity of this crime cannot be overlooked.

[4] Romaine Curtis Bend and Rodney Ricardo Murray were also charged with the murder of Hippolyte. The events leading up to the death of Hippolyte arose out of an altercation between Hippolyte and Murray at the place where they worked. The evidence was that the four accused pursued and attacked Hippolyte while he was playing basketball near his home. At the beginning of the trial of the four, the Crown accepted pleas from Bend and Murray on the lesser charge of manslaughter and ***Payne J*** sentenced them both to 12 years' imprisonment. However, Joseph and Boyce rejected the prosecution's offer to accept a plea of guilty of manslaughter because, according to their affidavits, they claimed that the evidence against Bend and Murray was stronger than the evidence against them. We should add that the attorneys-at-law who now appear for Joseph and Boyce did not represent them at their trial.

[5] After this Court dismissed the appeals on 27 March 2002, Mr. Andrew Pilgrim, attorney-at-law, on the following day, 28 March, prepared and had signed the necessary documents indicating Joseph's intention to petition for special leave to appeal to the JCPC *in forma pauperis*. Mr. Pilgrim by letter dated 2 April 2002, informed the BPC that arrangements were being made to apply for special leave to appeal and formal notice of the petition was served on the BPC on 5 April 2002. The letter requested that Joseph should not be executed until he had exhausted his right of appeal. The letter further stated that if it was the intention of the BPC to consider

whether the sentence should be commuted, all documentation and information should be made available to Joseph so that his instructions on the same could be taken.

[6] A notice dated 6 April 2002 from the BPC was sent to Joseph informing him that a meeting of the BPC would be held to advise the Governor-General as to the exercise by him of his powers under section 78 of the Constitution in relation to the prerogative of mercy. He was invited to submit, within 21 days of receipt of the notice, representations in writing for the exercise of mercy in his favour. He was informed that those representations may be made by him or on his behalf by a friend or an attorney-at-law. On 16 April 2002, the BPC forwarded copies of the following documents to Mr. Pilgrim: (1) Report of the Trial Judge, (2) Court of Appeal Decision, (3) Record of Criminal Appeals, (4) Report of the Superintendent of Prisons, (5) Report of the Medical Officer of the Prison, (6) Report of the Chaplain of the Prison and (7) Antecedent History from the Commissioner of Police. A further letter dated 4 June 2002 from the BPC to Mr. Pilgrim drew his attention to the notice dated 6 April 2002 and that no written representations had been made on behalf of Joseph.

[7] On 16 April 2002, Boyce was also given notice of his right to make written representations and provided with the documents referred to in the preceding paragraph. On 16 April 2002, Mr. Alair Shepherd Q.C., on behalf of Boyce, prepared similar documents to those of Joseph, indicating Boyce's intention to petition for special leave to the JCPC *in forma pauperis* and notice thereof was served on the BPC on 17 April 2002. Mr. Shepherd addressed to the BPC similar correspondence to that of Mr. Pilgrim. By letter dated 3 May 2002, he requested that the BPC make no decision on execution prior to Boyce exhausting his domestic remedies and being afforded the opportunity to petition human rights bodies. However, he did not object to a preliminary decision being made, provided that decision was to commute the sentence. The appellants' London solicitors advised that they had until 26 July 2002, to file an application for special leave to appeal and the BPC was made aware of this date. On 3 June 2002, the BPC wrote to Mr. Shepherd in similar terms to the letter of 4 June to Mr. Pilgrim. There was no response to the letters. The Clerk of the BPC informed the appellants' attorneys-at-law that the BPC would be meeting on 24 June 2002, to advise the Governor-General as to the exercise of the prerogative of mercy. No representations were submitted by the appellants nor were any submitted by their attorneys-at-law on their

behalf. The BPC advised the Governor-General against commuting the sentences and death warrants were read to the appellants.

[8] On 27 June 2002, pursuant to section 24 of the Constitution, originating motions were filed on behalf of the appellants requesting a stay of their executions pending the hearing and determination of their appeals to the JCPC or until further order. The motions were supported by affidavits of the appellants, which outlined the facts. On 28 June 2002, ***Colin Williams CJ (Acting)*** made an order that the executions be stayed for 28 days pending the filing of the applications for leave to appeal to the JCPC. There was no stay of the executions after the said 28 days and no further action was taken on the originating motions.

[9] The appeal to the JCPC was against sentence. The sole ground of appeal was that the judge wrongly thought that the sentence of death was mandatory: ***Boyce v. R. [2004] 3 WLR 786*** at ***page 790F ("Boyce and Joseph").*** On 10 December 2003, the hearing of the appeal to determine whether the mandatory death penalty was compatible with the appellants' right not to be subjected to inhuman or degrading punishment, as provided by section 15(1) of the Constitution, was adjourned to be re-argued before an enlarged Board of nine judges together with cases from Jamaica ***(Watson)*** and Trinidad and Tobago ***(Matthew),*** to arrive at a definitive ruling on the interrelationship of constitutional savings clauses and powers of modification, as stated at ***page 789B*** of ***Boyce and Joseph.*** On 7 July 2004, the JCPC held in ***Boyce and Joseph*** by a majority of one, that as the law decreeing the mandatory death penalty for murder was in force when the Constitution came into effect, it was an "existing law" for the purposes of the savings clause in section 26 of the Constitution and therefore could not be held to be inconsistent with or in contravention of section 15(1). ***Lord Hoffmann*** concluded the position at ***page 790*** as follows:

"6 The result is that although the existence of the mandatory death penalty will not be consistent with a current interpretation of section 15(1), it is prevented by section 26 from being unconstitutional. It will likewise not be consistent with the current interpretation of various human rights treaties to which Barbados is a party."

[10] On 9 July 2004, London solicitors acting for the appellants advised the Government's London solicitors that the appellants

intended to file an application to the IACHR and requested that the executions be stayed until that application was heard. By letter dated 29 July 2004, Mr. Shepherd informed the BPC that the appellants were applying to the IACHR for consideration of their cases and that in the circumstances it would be premature for the BPC to convene. The letter requested that, before any final decision was taken in respect of the appellants' death sentences, they be given "proper notice, disclosure and an opportunity to make informed representations". The Clerk of the BPC by letter dated 5 August 2004, replied indicating "that it would appear that the ***Pratt and Morgan*** case sets out clearly the procedure to be adopted in cases such as those, where the BPC has been convened and taken a decision soon after the matter has been dealt with by the Barbados Court of Appeal". On 3 September 2004, the application to the IACHR was filed on behalf of the appellants by London solicitors. Mr. Shepherd by letter dated 4 September 2004, informed the BPC of the filing of the applications. Nevertheless, on 13 September the BPC met to consider the Order in Council of the JCPC and advised the Governor-General that a date for execution should be fixed for the second time. On 15 September, the BPC informed Mr. Shepherd that warrants had been issued to the appellants for their executions.

[11] On 16 September 2004, the appellants filed originating motions for relief, pursuant to section 24 of the Constitution, including a stay of the executions pending the hearing and determination of their applications to the IACHR. On 17 September 2004, ***Payne J*** ordered that the executions be stayed pending the determination of the motions, which were to be heard between 29 September and 5 October 2004. However, on 5 October 2004 ***Payne J*** ordered a further stay until the determination of the motions. The respondents filed affidavits in reply to the Clerk of the BPC, the Superintendent of Prisons and a Foreign Affairs Officer. The hearing did not take place until 11 October and concluded on 15 November 2004.

III. THE HIGH COURT DECISION

[12] The judgment of ***Greenidge J*** sets out the background and facts, the applications, and the questions raised by the applications. The trial judge considered the following questions: (i) whether the appellants were entitled to a stay of execution pending the determination of their applications to the IACHR; (ii) whether they were entitled to be heard before the BPC to urge a commutation of

their death sentence; (iii) whether they were entitled to receive notice that the BPC intended to meet again after dismissal of their appeal by the JCPC and before the decision of the IACHR had been received; (iv) whether they were entitled to have counsel funded at public expense to appear before the BPC; and (v) whether there was any breach of the appellants' alleged constitutional rights entitling them to the relief of commutation of their death sentences.

[13] The judge held that he was "not satisfied that the BPC must wait until whenever (if ever) the IACHR reached its decision"; that the appellants had "chosen not to send written representations asking instead for the right to be heard, (but) they never had such a right"; that "the BPC met again only after the exhaustion of the applicants' domestic appeals in September 2004 … it has acted in conformity with the Constitution"; that "there was no right to public funding"; and that the appellants were not entitled to the relief claimed.

[14] The judge granted a continuation of the stay of execution for six weeks from 22 December 2004 pending the filing of an appeal. On 18 January 2005, this Court ordered that execution of the death sentence pronounced against the appellants be stayed until the appeal is heard and decided or until further order.

IV. GROUNDS OF APPEAL AND RELIEF SOUGHT

[15] On 29 December 2004, Joseph and Boyce appealed from the decision of ***Greenidge J*** seeking an order that it be reversed and that they be granted the declarations and orders sought in the originating notices of motion. The grounds of appeal filed are summarised as follows:

> *1. The judge erred in law in that he:*
>
> 1.1. Incorrectly construed the effects of section 11 (fundamental rights and freedoms of the individual), and/or section 12 (protection of right to life), and/or section 13 (protection of right to personal liberty), and/or section 15 (protection from inhuman or degrading punishment or other treatment), and/or section 18 (provisions to secure protection of law), of the Constitution in relation to the appellants.
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> 1.2. Wrongly held that the reading of the warrants when the

appellants had indicated their intention to appeal to the JCPC, did not infringe the appellants' rights as enshrined in the Constitution.

1.3. Wrongly held that the reading of the warrants when the appellants had filed a complaint to the IACHR, did not infringe the appellants' rights as enshrined in the Constitution.

1.4. Wrongly failed to apply the decision of the JCPC in ***Lewis v. Attorney-General of Jamaica [2001] 2 A.C. 50***.

2. Wrongly failed to hold that:

2.1. The BPC was obliged, when meeting to consider the appellants' cases pursuant to section 78 of the Constitution, to take into consideration the results of the appellants' recourse to all legal remedies including their right to complain to all such international agencies which the Government of Barbados has recognised and to give due weight and respect to any recommendation made by those agencies.

2.2. The appellants were entitled to adequate funding in order that they could be properly represented at the hearing before the BPC.

2.3. The appellants had a right to be given notice of the material and/or information which the Governor-General required the BPC to take into consideration under section 78 of the Constitution.

2.4. The appellants had a right to be given an opportunity to be heard by and/or to make representations to the BPC and to be given notice of the advice tendered to the Governor-General.

2.5. The decisions of the BPC in respect of the appellants are null and void and unconstitutional against the background that the Crown failed to provide adequate funding for counsel to represent the appellants.

2.6. Any decisions of the BPC in respect of the appellants are null and void on the grounds that the BPC

should convene itself and advise on the exercise of mercy only after the appellants have exhausted all of their rights of appeal and other remedies available to them.

V. ISSUE ONE –REPORTS FROM HUMAN RIGHTS BODIES

(a) Introduction

[16] The first issue, which is the substantial ground of appeal that we have to determine, is whether it is a breach of the appellants' rights to execute them prior to the BPC's receiving and considering the reports from the IACHR.

[17] In conformity with established practice, no application was made to the IACHR prior to the exhaustion of the appellants' domestic criminal appeals, which concluded with the JCPC's decision on 7 July 2004. The application filed on 3 September 2004 with the IACHR on behalf of the appellants was in respect of alleged violations of the American Convention on Human Rights by the Government of Barbados. The application stated that the appellants were subject to the death penalty and requested provisional measures from the Inter-American Court on Human Rights pursuant to Article 63(2) of the American Convention on Human Rights and Article 25(1) of the Rules of Procedure.

[18] The Convention, which was signed on 22 November 1969 and entered into force on 18 July 1978, provides for a Commission and a Court. Barbados is one of the few member states of the Organization of American States that has ratified the Convention and accepted the jurisdiction of the Court. The Attorney-General has provided us with a summary, which outlines the procedure by which a petition has to be processed through the Commission before the Court can decide whether the case is admissible. The Attorney-General's eight point summary was as follows:

> "1. Under the rules of the *American Convention on Human Rights* an individual petition may be filed against a state party before the Inter-American Commission on Human Rights, as provided for in Article 44 of the *Convention*.
>
> 2. This petition must then be processed by the Commission. The Commission is expressly required to determine whether

the petition is admissible under Articles 46-47 of the *American Convention.*

3. If it is inadmissible the Commission is barred from considering the petition.

4. If it is found to be admissible by the Commission, the Commission must transmit that petition to the state so as to allow the state an opportunity to respond, as provided in Article 48.

5. The Commission then must attempt a friendly settlement with the State.

6. Only if this friendly settlement fails will the Commission draw up a report, as specified in Article 50, which it must transmit to the State.

7. The State then has a period to respond, following which the Commission may refer the matter to the Court (for those states that have accepted the latter body's jurisdiction), as indicated in Article 51.

8. At this point, however, the Inter-American Court of Human Rights must itself decide whether the case is admissible. In this regard the Court has the competence to declare the case inadmissible, in spite of a contrary determination by the Commission.

[19] On 17 September 2004, the IACHR by note informed the Government of Barbados of the appellants' petition and gave the Government a period of two months within which to provide a response in accordance with Article 30(3) of the Commission's Rules of Procedure. In view of the fact that the execution of the appellants was scheduled for 21 September 2004, the Commission addressed the Government in the following terms:

> "The Commission understands that warrants have been issued for the execution of Lennox Boyce and Jeffrey Joseph on 21 September 2004. According to the petitioner, both of these men were convicted on 2 February 2001 for the murder of Marquelle Hippolyte and sentenced to a mandatory death penalty. Subsequent domestic appeals have been dismissed.

> Given the imminence of the executions of Messrs. Boyce and Joseph, I wish to inform Your Excellency that the Commission is in the process of applying to the Inter-American Court of Human Rights for provisional measures to Article 74(1) of its Rules of Procedure to avoid irreparable damage to Boyce and Joseph.
>
> The Commission also requests that Barbados preserve the lives and physical integrity of Lennox Boyce and Jeffrey Joseph while it awaits the outcome of its application for provisional measures from the Inter-American Court of Human Rights. "

A communication, also dated 17 September 2004, from the Secretary of the Inter-American Court of Human Rights to the Barbados Ambassador to the Organization of American States, enclosed a copy of the Order that the President of the Court issued on the same day ordering that the State take all measures to preserve the lives and physical integrity of the appellants so as not to hinder the processing of their cases before the Inter-American system. The State was required to submit information and reports within a stipulated time frame. The State failed to comply with the Order.

[20] An Order of the full Inter-American Court was made on 25 November 2004 and signed by the President and other judges, including, we may add, a Barbadian judge of the Court. The material parts of the Order are set out below.

ORDER OF
THE INTER-AMERICAN COURT OF HUMAN RIGHTS
OF NOVEMBER 25, 2004

PROVISIONAL MEASURES REQUESTED BY
THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
REGARDING THE STATE OF BARBADOS

CASE OF BOYCE AND JOSEPH *VS.* BARBADOS

…

CONSIDERING:

1. That Barbados has been a State Party to the American Convention on Human Rights since November 27, 1982 and recognized the contentious jurisdiction of the Inter-American Court on June 4, 2000.

2. That Article 63(2) of the said Convention provides that [I]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

3. That Article 25 of the Rules of Procedure of the Court stipulates that:

> 1. At any stage of the proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, at the request of a party or on its own motion, order such provisional measures as it deems pertinent, pursuant to Article 63(2) of the Convention.
>
> 2. With respect to matters not yet submitted to it, the court may act at the request of the Commission.
>
> …

10. That the case under consideration is not before the Court, and the adoption of provisional measures, whose purpose in international human rights law is to protect fundamental human rights by seeking to avoid irreparable damage to persons, does not imply a decision on the merits of the controversy between the petitioners and the State. Upon ordering such measures, this Tribunal is ensuring only that it may faithfully exercise its mandate pursuant to the Convention in cases of extreme gravity and urgency.

11. That the Court is aware, as a result of the recent information provided by the representatives of the beneficiaries … that the High Court of Barbados has temporarily stayed the execution of the death warrants with respect to Messrs. Boyce and Joseph. The Tribunal considers

this a positive development and a crucial step on the part of the State to protect the fundamental human rights of the individuals in question, as well as to facilitate the processing of their cases in accordance with the requirements of the American Convention.

12. That the State has failed to submit, as of the date of this Order, the report required by the above-mentioned Order of September 17, 2004 …

13. That as a consequence of the above, the Court considers that the measures mandated by the President's Order of September 17, 2004 … must be maintained, and for this reason ratifies the Order in all of its terms.

NOW THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

In accordance with Article 63(2) of the American Convention and Article 25 of the Rules of Procedure,

DECIDES:

1. To ratify the President's Order of September 17, 2004 …and to require the State to adopt without delay all necessary measures to comply with that Order.

2. To require the State to inform the Inter-American Court of Human Rights, within 10 days of the notification of the present Order, regarding the steps it has taken in fulfillment of this Order.

3. To require the representatives of the beneficiaries of the present provisional measures to submit their observations on the State's report within five days of its reception, and to require the Commission to submit its observations on the State's report within seven days of its reception.

4. To require the State, after the submission of its first report, to inform the Court every two months regarding the measures it adopts, and to require the representatives of the beneficiaries of the present provisional measures and the

Commission to submit their observations on those State reports within four and six weeks, respectively, of the reception of such reports.

5. To notify the State, the Inter-American Commission, and the representatives of the beneficiaries of the present Order."

[21] ***Section 77*** of the ***Constitution*** provides for the proceedings of the BPC as follows:

"77.(1) The Privy Council shall not be summoned except by the authority of the Governor-General acting in his discretion.

(2) The Governor-General shall, so far as is practicable, attend and preside at all meetings of the Privy Council.

(3) Subject to the provisions of this Constitution, the Privy Council may regulate its own procedure.

(4) The question whether the Privy Council has validly performed any function vested in it by this Constitution shall not be inquired into in any court."

[22] Although the BPC may regulate its own procedure, no procedure has been published with regard to the manner in which reports of the international human rights organisations should be treated in relation to the exercise of the prerogative of mercy. It is against this background that we consider the submissions of the parties and the relevant case law.

[23] On 5 October 2004, ***Greenidge J*** ordered that the 2002 and 2004 motions be consolidated and granted the appellants leave to amend their 2004 motions. The relevant parts of the amended motions filed on 25 October 2004 relating specifically to the issue under consideration were as follows:

"4. A further declaration that the Mercy Committee is obliged when meeting to consider the Applicant's case referred to it pursuant to Section 78 of the Constitution to take into consideration the results of the Applicant's recourse to all legal remedies including his right to complain to all such International agencies which the Government of Barbados

has recognised and to give due weight and respect to any recommendation made by those agencies.

A further Declaration that any decision of the Mercy Committee in respect of the Applicant is null and void on the grounds that the Mercy Committee should only convene itself and advise on the exercise of mercy after the Applicant has exhausted all of his rights of appeal and other remedies available to him."

Each applicant in support of his application relied on the following grounds:

"5. The applicant was treated unfairly and/or in breach of the principles of natural justice in that:

…

d) He was not permitted to pursue his petition before the IACHR before the decision was made not to commute his sentence of death;

6. A warrant for the applicant's execution was issued and read to him in … September 2004 even though:

…

b) In the second instance, the authorities knew that the Applicant intended to and indeed had already petitioned the IACHR."

(b) Appellants' Submissions

[24] The appellants' counsel submitted that the case does not end when a person is convicted of murder and sentenced to death. It is always within the power of the Governor-General under section 78 of the Constitution to substitute a less severe form of punishment for that imposed on a person convicted of an offence. Further, section 78(3) makes it obligatory for a report of the case in which sentence of death has been passed, to be forwarded to the BPC so that it may advise the Governor-General whether to exercise any of the powers conferred on him. Section 78(3) and (4) provides as follows:

"(3) Where any person has been sentenced to death for an offence against the law of Barbados, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him on the exercise of the powers conferred on him by subsection (1) in relation to that person.

(4) The power of requiring information conferred upon the Governor-General by subsection (3) shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion."

[25] Counsel further submitted that the BPC has a duty to act fairly towards the appellants in deciding whether or not to advise the Governor-General to commute the sentence. ***Lewis***, referred to at paragraph [15] above, was relied on in support of the contention that the BPC must consider the report of the IACHR prior to deciding whether to exercise the prerogative of mercy. The relevant passage at ***page 85B*** from ***Lewis*** is as follows:

"In their Lordships' view when Jamaica acceded to the American Convention and to the International Covenant and allowed individual petitions the petitioner became entitled under the protection of the law provision in section 13 to complete the human rights petition procedure and to obtain the reports of the human rights bodies for the Jamaican Privy Council to consider before it dealt with the application for mercy and to the staying of execution until those reports had been received and considered."

(c) Respondents' Submissions

[26] The kernel of the Attorney-General's submissions was that the Constitution is the supreme law of Barbados and must prevail over any international obligations of the state that are not part of its domestic law. The respondents gave three principal answers to the appellants' submissions. First, there is no constitutional protection for international treaties that have not been incorporated into

domestic law. Secondly, ***Lewis*** is not binding authority on this Court, but persuasive only and thirdly, in any event, ***Lewis*** was wrongly decided on this issue. These submissions warrant careful analysis and discussion.

[27] The Attorney-General confirmed that when the BPC met on 13 September 2004, following the dismissal of the appeals by the JCPC, it did so merely to advise formally that the Order of the JCPC be carried out, but not to further consider the exercise of the prerogative of mercy, as a decision had already been made in 2002 to advise the Governor-General not to commute the sentences. She stated that the Government was merely required to carry out the Order of the JCPC, which was perfected on 27 July 2004 in the following terms:

> "THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the Appeal and humble Petition into consideration and having heard Counsel on behalf of the Parties on both sides and of the Intervenor Their Lordships do this day agree humbly to report to Your Majesty as their opinion that the appeal ought to be dismissed and the Judgment of the Court of Appeal of Barbados dated 27th March 2002 affirmed.
>
> HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed and carried into execution.
>
> WHEREOF the Governor-General or Officer administering the Government of Barbados for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly."

[28] The respondents in their written submissions stated that "the protection of the law provision in section 11 of the Constitution cannot be used to give effect to an obligation of the State in international law that is unincorporated into domestic law". In support of this contention the respondents relied on the passage in ***Lord Hoffmann's*** judgment in the JCPC decision of ***Boyce and Joseph*** at ***page 794E*** as follows:

> "[T]hat the mandatory death penalty is inconsistent with the international obligations of Barbados under the various instruments to which reference has been made. This does not of course have any direct effect upon the domestic law of Barbados. The rights of the people of Barbados in domestic law derive solely from the Constitution. But international law can have a significant influence upon the interpretation of the Constitution because of the well established principle that the courts will so far as possible construe domestic law so as to avoid creating a breach of the State's international obligations."

The respondents advanced the argument that the international treaties that Barbados has ratified do not create domestic obligations, "but are a mere tool of interpretation" and "cannot be elevated to form the basis of a legal and/or justiciable right".

[29] The respondents contended further that ***Lewis*** emanated from Jamaica and as such the "decision was not binding on the courts of Barbados, but merely persuasive". The courts were not obliged to grant a stay of execution "pending the outcome of an application to an international human rights body that is not recognised in the domestic laws of Barbados". There is no constitutional or other legal right conferred on an individual by the laws of Barbados to petition an international body or any right to have such a petition heard and determined prior to the execution of the individual being carried out by the state. The fact that the state does not obstruct the filing of such petitions does not elevate the said process to the status of a substantive legal right. Further, while the state through the executive may consider it desirable to afford this opportunity to an accused person such that the state may comply with its obligations under international law, it is not at liberty to do so where this action will bring it into conflict with domestic law, particularly the Constitution of Barbados.

[30] The Attorney-General has emphasised paragraph 10 of the Order quoted at paragraph [20] above, stating that the appellants' petition is not before the Inter-American Court. The Executive Secretary of the Commission by letter dated 26 January 2005 stated that the Commission had opened a case in respect of the petition, but had deferred "its treatment of admissibility until the debate and decision on the merits of the matter". However, that decision "does

not constitute a prejudgment with regard to any decision the Commission may adopt on the admissibility of the petition". In any event, the Attorney-General reiterated in correspondence her oral submissions "that even if a case in relation to the applicants was before the Commission or Court, this would not and could not create rights under the laws of Barbados. The Inter-American system of human rights is part of the international legal system. As such it creates rights and obligations for the State at the international level. Such rights and obligations are not binding in the law of Barbados. In fact it is only if Parliament chooses to expressly enact legislation or other measures that rights or obligations related to the Inter-American system can become part of the binding domestic law of Barbados. If Parliament chooses not to transform *(sic)* the State's international obligations, they can have no binding effect in the domestic legal order."

[31] Finally, the respondents relied on the Canadian case of ***Ahani v. R. 208 (2002), D.L.R. (4th) 66.*** In that case the Ontario Court of Appeal refused an injunction restraining an order upheld by the Supreme Court of Canada deporting an Iranian refugee, who was believed on reasonable grounds to be a terrorist and therefore a danger to the security of Canada. The appellant had exhausted his domestic remedies and filed a communication with the United Nations Human Rights Committee for relief under the Optional Protocol to the International Covenant on Civil and Political Rights, which Canada had ratified but had not incorporated into its domestic law. The Committee made an "interim measures" request that Canada stay the deportation order until it had considered the appellant's communication. The majority decision stated at ***page 81:*** "the principle that international treaties and conventions not incorporated into Canadian law have no domestic legal consequences has been affirmed by a long line of authority in the Supreme Court of Canada". It was further stated at ***page 83*** that the appellant's "right to remain in Canada ended with the Supreme Court of Canada's decision" and at ***page 85*** that "it is not for the courts, under the guise of procedural fairness, to read in an enforceable constitutional obligation and commit Canada to a process that admittedly could take years, thus frustrating this country's wish to enforce its own laws by deporting a terrorist to a country where he will face at best a minimal risk of harm". ***Laskin JA*** (***Charron JA*** concurring) considered the JCPC case of ***Thomas v. Baptiste [2000] 2 A.C.1,*** but distinguished that case at ***page 86*** as follows:

> "[53] Two key differences between *Thomas* and this case are immediately apparent. In *Thomas*, the two appellants had been sentenced to death; here, Ahani is to be returned to a country where he faces only a minimal risk of harm. Had Ahani faced the death penalty in Iran, different constitutional considerations may well have come into play in the Canadian court proceedings… Moreover, in *Thomas*, the two appellants petitioned the Inter-American Commission not the Committee, and unlike Ahani, had the benefit of orders of the Inter-American Court of Human Rights."

Rosenberg JA in his dissenting judgment at ***pages 97*** and ***105*** stated that he "accorded to the appellant a procedural right that the executive arm of government held out to him" to have his "petition reviewed by the Human Rights Committee free from any executive action that would render this review nugatory". On 16 May 2002, a majority dismissed an application for leave to appeal to the Supreme Court of Canada. However, the appellants in the present case, as in ***Thomas,*** also have the benefit of an order of the Inter-American Court as set out in paragraph [20] above.

(d) Discussion

[32] In the context of the submissions, it was held by the JCPC in ***Lewis*** at ***page 51D*** as follows:

> "(1) [T]hat, although there was no legal right to mercy and the merits of the decision of the Governor-General (acting on the recommendations of the JPC), on **the exercise of the prerogative of mercy** were not reviewable by the courts, that prerogative **should**, in the light of the state's international obligations, **be exercised by procedures which were fair and proper** and amenable to judicial review; that in considering what **natural justice required** it was relevant to have **regard to international human rights norms** laid down in treaties to which the state was a party, **whether or not they were independently enforceable in domestic law**; that, therefore, the condemned man was entitled to sufficient notice of the date when the JPC would consider his case for him or his advisers to prepare representations which **the JPC was bound to consider** before taking a decision, when **a report by an international human rights body** was

available the JPC should consider it **and give an explanation if it did not accept the report's recommendations**, and the condemned man should normally be given a copy of all the documents available to the JPC and not merely the gist of them; that **the defects in the procedures** adopted **in** relation to **the applicants' petitions** for mercy **had resulted in a breach of the rules of fairness and of natural justice**; **and** that, accordingly, **they had been deprived of the protection of the law to which they were entitled** either under section 13(a) of the Constitution or **at common law**." (Emphasis added.)

[33] It is helpful also to quote the passages from the majority judgment in ***Lewis*** delivered by ***Lord Slynn of Hadley,*** which form the basis for the JCPC's holding in the preceding paragraph. The passages are, with emphases added, as follows: "It is to their Lordships plain that the ultimate decision as to whether there should be commutation or pardon, the exercise of mercy, is for the Governor General acting on the recommendation of the Jamaican Privy Council. **The merits are not for the courts to review**. It does **not** at all follow that **the whole process is beyond review** by the courts. ***(Page 75E.)***

Although on the merits there is **no** legal right to mercy there is not the **clear-cut distinction as to procedural matters between mercy and legal rights** which Lord Diplock's aphorism that mercy begins where legal rights end might indicate. Is the fact that an exercise of the prerogative is involved per se a conclusive reason for excluding judicial review? Plainly not. ***(Page 77A.)***

Whether or not the provisions of the Convention are enforceable as such in domestic courts, it seems to their Lordships that the states' obligation internationally is a pointer to indicate that **the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subject to judicial review. The procedures followed in the process of considering a man's petition are thus in their Lordships' view open to judicial review.** In their Lordships' opinion it is necessary that the condemned man should be given notice of the date when the Jamaican Privy Council will consider his case. That notice should be adequate for him or his advisers to prepare representations before a decision is taken. ***(Page 79B-C.)***

When the report of the international human rights bodies is available that should be considered and if the Jamaican Privy Council do not accept it they should explain why. ***(Page 79E.)***

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**. In considering what **natural justice requires**, it is relevant to have **regard to international human rights norms** set out in treaties to which the state is a party **whether or not those are independently enforceable in domestic law."** ***(Page 80C.)***

It is the executive that is the treaty-making organ of government; the BPC as part of the executive cannot therefore ignore treaties which give rights to citizens and to which the executive has bound the state.

[34] We cannot accept that ***Lewis*** is not binding authority on this Court or that it was wrongly decided. The appellants' skeleton argument contained a comparative analysis in tabular form of the relevant sections of the Constitution of Barbados and Jamaica. For the purposes of this appeal, there are no material differences in Chapter III of the Constitutions of Barbados and Jamaica, both of which provide for fundamental rights and freedoms in similar terms. The JCPC has held that it will follow its previous decisions on appeals from another jurisdiction where the legislative provisions are analogous. Both Constitutions provide that every person has the right to "the protection of the law". It was also held in ***Lewis*** at ***page 51G*** as follows:

> "(2) [T]hat **the right to the protection of the law** under section 13(a) of the Constitution and **at common law was in effect the same as an entitlement to due process of law**; that, although ratified but unincorporated treaties did not ordinarily create rights for individuals enforceable in domestic courts, **when the state acceded to** such **treaties and allowed individuals to petition international human rights bodies the protection of the law** conferred by section 13 **entitled a petitioner to complete that procedure and to obtain the reports of such bodies for consideration** by the JPC **before determination of the application for mercy,**

> **and to a stay of execution until those reports had been received and considered; that where a petition had been lodged with such a body execution** of a sentence of death consequent upon a decision of the JPC made **without consideration of that body's reports would therefore be unlawful**." (Emphasis added.)

Lord Slynn stated at ***pages 84H*** and ***85A*** and ***E***:

> "It is of course well established that a ratified but unincorporated treaty, though it creates obligations for the state under international law, does not in the ordinary way create rights for individuals enforceable in domestic courts and this was the principle applied in the *Fisher (No. 2)* case. But even assuming that that applies to international treaties dealing with human rights, that is not the end of the matter. Their Lordships agree with the Court of Appeal in ***Lewis*** that "the protection of the law" covers the same ground as an entitlement to "due process". Such protection is recognised in Jamaica by section 13 of the Constitution and is to be found in the common law. Their Lordships do not consider that it is right to distinguish between a Constitution which does not have a reference to "due process of law" but does have a reference to "the protection of the law". They therefore consider that what is said in *Thomas v Baptiste* [2002] 2 AC 1 to which they have referred is to be applied mutatis mutandis to the Constitution like the one in Jamaica which provides for the protection of the law. … **Execution consequent upon the Jamaican Privy Council's decision without consideration of the Inter-American Commission report would be unlawful.**" (Emphasis added.)

[35] ***Pratt and Another v. Attorney-General for Jamaica [1994] 2 A.C. 1 ("Pratt and Morgan"),*** which held that prolonged delay, in particular, a period of five years, in carrying out a sentence of death constitutes inhuman punishment, was applied in ***Lewis. Lord Griffiths*** in ***Pratt and Morgan*** had posed the question at ***page 30B***, "whether the delay occasioned by the legitimate resort of the defendant to all available appellate procedures should be taken into account"**.** He answered the question by stating at ***pages 33D*** and ***35B*** that:

> "the application of the applicants to appeal to the JCPC and

> their petitions to the two human rights bodies do not fall within the category of frivolous procedures disentitling them to ask the Board to look at the whole period of delay…The final question concerns applications by prisoners to the IACHR and UNHRC. Their Lordships wish to say nothing to discourage Jamaica from continuing its membership of these bodies and from benefiting from the wisdom of their deliberations. It is reasonable to allow some period of delay for the decisions of these bodies in individual cases but it should not be very prolonged".

[36] The definitive answer to the Attorney-General is to be found in the JCPC decision in the appeal from this Court in ***Bradshaw v. Attorney-General of Barbados [1995] 1 W.L.R. 936 ("Bradshaw and Roberts").*** Counsel for the Attorney-General submitted in that case that the time taken for applications to be made to human rights organisations and for their consideration should be excluded in computing the period of delay between conviction and execution. The JCPC rejected the contention, applied ***Pratt and Morgan*** and held that the time taken was properly included in the five-year period**.** It follows that applications to and reports from human rights bodies form part of the timetable, prior to any execution being carried out. ***Lord Slynn of Hadley*** delivered the unanimous judgment and stated at ***page 941H:***

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

In the light of ***Bradshaw and Roberts,*** it may not be possible to contend that the BPC can lawfully advise that execution be carried out without regard to a pending petition before an international human rights organisation.

[37] We appreciate the difficulty created by the need to comply with the time frame of ***Pratt and Morgan*** and the delay in receiving the recommendations of the human rights bodies. ***Lord Goff of Chieveley*** and ***Lord Hobhouse of Woodborough*** in their dissenting opinion in ***Thomas*** highlighted the problem in relation to the delay of the international bodies at ***page 35F*** as follows:

> "The commissions (the I.A.C.H.R and U.N.H.R.C) espouse a policy of discouraging capital punishment wherever possible and, in accordance with that policy, appear to see postponement of an execution for as long as possible as an advantage since it may improve the chances of commuting the sentence or quashing the conviction…There is thus a direct conflict between the policy of the commissions and the enforcement of the law of the (country). The commissions appear to be unable or unwilling to alter their practices to accommodate the countries' requests for more speedy procedures."

[38] However, we are in agreement with the approach to international treaties enunciated by ***Lord Slynn*** in ***Lewis*** and quoted at paragraph [33] above. He stated that whether or not the provisions of the Convention are enforceable as such in domestic courts, the state's obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subject to judicial review. He further stated, that in considering what natural justice requires, it is relevant to have regard to international human rights norms set out in treaties to which the state is a party whether or not those are independently enforceable in domestic law. To hold that international treaties to which Barbados is a party, but which are not incorporated into domestic law, do not afford the appellants any procedural rights to fundamental justice is to imply that the work and meetings undertaken by the executive in and about the ratification of those treaties are futile, expensive and time-wasting exercises.

[39] Our finding on issue one in favour of the appellants effectively resolves the appeal, except that we have to discuss and decide on the manner in which the appeal should be disposed of. However, there are other issues affecting the fundamental rights and freedoms of the individual, on which we have heard submissions that also warrant our consideration.

VI. ISSUE TWO – EXERCISE OF THE PREROGATIVE OF MERCY

(a) Introduction

[40] The second issue that we have to decide is whether the

procedures adopted by the BPC in determining the exercise of the prerogative of mercy were fair and in conformity with the principles of natural justice.

[41] ***Section 76*** of the ***Constitution*** makes provision for the BPC as follows:

> "76. (1) There shall be a Privy Council for Barbados which shall consist of such persons as the Governor-General, after consultation with the Prime Minister, may appoint by instrument under the Public Seal.
>
> (2) The Privy Council shall have such powers and duties as may be conferred or imposed upon it by this Constitution or any other law.
>
> (3) The office of a member of the Privy Council appointed under this section shall become vacant
>
> > *(a)* at the expiration of fifteen years from the date of his appointment or such shorter period as may be specified in the instrument by which he was appointed;
> >
> > *(b)* when he attains the age of seventy-five years; or
> >
> > *(c)* if his appointment is revoked by the Governor-General, acting after consultation with the Prime Minister, by instrument under the Public Seal."

This section of the Constitution does not specify and no other section specifies the number or categories of persons who shall be members of the Privy Council, as in some other constitutions.

[42] ***Section 78*** of the ***Constitution*** provides for the exercise of the prerogative of mercy as follows:

> "78. (1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf –
>
> > (*a*) grant to any person convicted of any offence against the law of Barbados 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 on any person for such an offence; or

(*d*) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.

(2) The Governor-General shall, in the exercise of the powers conferred on him by subsection (1) or of any power conferred on him by any other law to remit any penalty or forfeiture due to any person other than the Crown, act in accordance with the advice of the Privy Council.

(3) Where any person has been sentenced to death for an offence against the law of Barbados, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him on the exercise of the powers conferred on him by subsection (1) in relation to that person.

(4) The power of requiring information conferred upon the Governor-General by subsection (3) shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion.

(5) A person has a right to submit directly or through a legal or other representative written representation in relation to the exercise by the Governor-General or the Privy Council of any of their respective functions under this section, but is not entitled to an oral hearing.

> (6) The Governor-General, acting in accordance with the advice of the Privy Council, may by instrument under the Public Seal direct that there shall be time-limits within which persons referred to in subsection (1) may appeal to, or consult, any person or body of persons (other than Her Majesty in Council) outside Barbados in relation to the offence in question; and, where a time-limit that applies in the case of a person by reason of such a direction has expired, the Governor-General and the Privy Council may exercise their respective functions under this section in relation to that person, notwithstanding that such an appeal or consultation as aforesaid relating to that person has not been concluded.
>
> (7) Nothing contained in subsection (6) shall be construed as being inconsistent with the right referred to in paragraph (c) of section 11 [namely, the protection of the law]."

The Attorney-General submitted that the parties agreed that the ***Constitution (Amendment) Act, 2002-14*** which added subsections (5) and (6), did not apply to the appellants because the death sentences were pronounced before the coming into operation of the Act. However, contrary to that view, it does seem to us that those subsections were applicable to the appellants from 5 September 2002, the date of commencement of the Act. Whereas the applicants were invited in April 2002 to submit representations in writing for the exercise of mercy; after 5 September 2002, they were given a specific constitutional right to submit written representations. They failed to avail themselves of either the invitation or the express right. Instead, they insisted on a right to be heard which they clearly never had, based on the authority of ***Lewis*** and which they were expressly not entitled to under subsection (5). It follows therefore that the appellants failed to exercise their right to submit written representation and sought an oral hearing to which they were not entitled. We should add that under subsection (6) no time limits under the Public Seal have been directed within which persons may consult human rights bodies; the time limits therefore remain the guidelines laid down in ***Pratt and Morgan.***

(b) BPC following Pratt and Morgan

[43] The position of the BPC as set out in paragraph [10] above was that procedurally it had complied with ***Pratt and Morgan*** by

convening after the Court of Appeal decision. The respondents' contention was that, the BPC having advised the Governor-General against commutation of the sentences, there was no need to re-open the matter thereafter.

[44] In view of this interpretation of ***Pratt and Morgan,*** we set out in some detail what ***Lord Griffiths*** said in that case and the context in which it was said. ***Pratt and Morgan*** were convicted of murder and sentenced to death on 15 January 1979. On 5 December 1980, their application for leave to appeal to the Court of Appeal was dismissed. In January 1981, they intimated to the Registrar of the Court of Appeal their intention to appeal to the JCPC. ***Lord Griffiths*** stated at ***page 20*** as follows:

> "It was at this stage, after the dismissal of their application by the Court of Appeal, that their Lordships would have expected the Governor-General to refer the case to the Jamaican Privy Council ("J.P.C.") to advise him whether or not the men should be executed in accordance with sections 90 and 91 of the Constitution…
>
> These sections are included in the Constitution against the background of the pre-existing common law practice that execution followed as swiftly as practical after sentence. They must be construed as imposing a duty on the Governor-General to refer the case to the J.P.C. and the J.P.C. to give their advice as soon as practical. In the ordinary course of events the Governor-General should refer a capital case to the J.P.C. immediately after the appeal is dismissed by the Court of Appeal…"

Sections 90(1) and 91(2) of the Constitution of Jamaica are identical to section 78 of the Constitution of Barbados. It was therefore in reliance on ***Pratt and Morgan*** that after the appeal was dismissed by the Court of Appeal on 27 March 2002, the BPC met on 24 June 2002 and fixed a date for execution for 2 July 2002.

[45] However, the passages quoted above do not conclude the matter. ***Lord Griffiths*** explained both the purpose of an early meeting of the JPC and the constraints of a swift carrying out of the death sentence. He stated at ***page 34C*** that an early meeting and fixing of a date for execution "would have provided the impetus for an immediate application to the JCPC which would have been

disposed of in the summer of 1981 and a new execution date set within a matter of weeks". He also recognised at ***page 34E*** that, "there may of course be circumstances which will lead the J.P.C. to recommend a respite in the carrying out of a death sentence, such as a political moratorium on the death sentence, or a petition on behalf of the appellants to the I.A.C.H.R. or U.N.H.R.C. or a constitutional appeal to the Supreme Court".

[46] ***Pratt and Morgan*** envisaged that the date for execution could be postponed. ***Lord Griffiths*** referred to the Instructions approved by the Governor-General in Privy Council dated 14 August 1962, for dealing with applications from or on behalf of prisoners under sentence of death for special leave to appeal to the JCPC. He stated at ***page 21B*** that the Instructions "are written upon the premise that the date for execution has already been set and will only be postponed if the prisoner adheres to the strict timetable contained in the Instructions. It is implicit in these Instructions that, by the time the prisoner has taken advice as to whether or not he should petition the JCPC in England, a decision will already have been taken by the J.P.C. as to whether or not he should be executed or reprieved." There are similar Instructions in Barbados contained in ***Rules*** dated 9 September 1967, made by the Governor-General on the advice of the Privy Council, to be observed for dealing with applications from or on behalf of persons under sentence of death for special leave to appeal to the JCPC: Subsidiary Legislation Supplement No. 62, Supplement to Official Gazette No. 78 dated 28 September 1967. In ***Bradshaw and Roberts*** at ***page 942E*** the respondents relied on the procedure contained in these Rules, which provide in rule 2 for a fixed execution date to be postponed, pending application to the JCPC, as follows:

> "2.(a) If intimation is received from or on behalf of a person condemned to death that it is intended to apply to the Judicial Committee of the Privy Council for special leave to appeal, the execution will be postponed and a date, three weeks later, will be fixed…"

[47] It may be noted that in ***Pratt and Morgan*** the Governor-General postponed the execution on two occasions without the court's intervention. The first execution was fixed for 24 February 1987, but on 23 February the Governor-General issued a stay of execution, seemingly as a result of a telegram from the U.N.H.R.C. urging a stay, as stated at ***page 23E.*** The second execution was

fixed for 1 March 1988, but on 29 February the Governor-General issued a second stay, apparently because of a further request from the U.N.H.R.C. not to execute until the Committee had completed its review of the case, as stated at ***page 24C***. The third date for execution was 7 March 1991, but this execution was stayed by the High Court following the applicants' constitutional proceedings, as stated at ***page 27C***.

[48] In summary, the position following ***Pratt and Morgan*** is as follows. The BPC should meet after any dismissal of an appeal by the Court of Appeal and consider whether or not to recommend commutation of the sentence. If the BPC decides to recommend commutation, the petitioner should be so informed and such recommendation may well obviate any further appeals. If, on the other hand, the BPC decides to recommend that the sentence be carried out, a date may be fixed for execution to accelerate the process, but account should be taken of any application for leave to appeal to the JCPC that the petitioner might be pursuing. Obviously, if the petitioner is earnestly and expeditiously prosecuting an application, the BPC should advise the postponement of any fixed date for execution, thereby avoiding the necessity and expense of an application to the Court. Similarly, the BPC, as we have discussed, should advise postponement of any date for execution, to take account of reports from human rights bodies. The procedure suggested in ***Pratt and Morgan*** has to be understood in the context of a procedure for expediting the appeal process to accommodate both completion of the domestic proceedings and any petitions to human rights bodies, taking into account the overriding objective that execution, if it is to occur, should follow as swiftly as possible after sentence.

(c) Notice, Disclosure and Hearing

[49] The appellants complained that they were not given notice of the hearings of the BPC, disclosure of all documents, and an opportunity to be heard. No notice of the date of hearing of the BPC was given to the appellants. This procedure was consistent with the BPC not requiring petitioners for mercy to be heard either in person or through counsel. In any event, as pointed out, the BPC met in 2004, not to consider the exercise of the prerogative of mercy, as it had already done so in 2002, but to formally advise that the JCPC Order be carried out.

[50] The BPC disclosed to the appellants the documents referred to in paragraph [6] above. The appellants made no representations in writing in respect of these documents, but instead insisted on a right to be heard and to be provided with legal funding to be represented at the hearing. For the purpose of this judgment, it is unnecessary to make any comment on the criticism of the judge's report. First, a trial judge should feel free to give a report to the BPC in the firm knowledge that the confidentiality of that report will not be breached except in the interest of justice. The same principle should apply to the other parties providing reports to the BPC. Secondly, in the circumstances of this case, we bear in mind that we have no power to review the merits of the advice tendered by the BPC to the Governor-General.

[51] The appellants were not entitled to an oral hearing. The legal position was made clear in ***Lewis*** at ***page 80B*** as follows:

> "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."

It follows that an oral hearing is not excluded if the circumstances warrant such a hearing. Nothing was disclosed by the appellants in their affidavits that called for an oral hearing, which could not have effectively been put to the BPC in writing. In any event, the appellants failed to avail themselves of the opportunity to make written representations to the BPC.

[52] The appellant's counsel have referred us to the recent decision of the ***House of Lords*** in ***R. (West) v. Parole Board [2005] 1 WLR 350***. ***Lord Bingham of Cornhill*** gave the following brief introduction to the case at ***page 353***:

> "1. [T]hese appeals concern the procedure to be followed by the Parole Board when a determinate sentence prisoner, released on licence, seeks to resist subsequent revocation of his licence. The appellant claimants contend that such a prisoner should be offered an oral hearing at which the prisoner can appear and, either on his own behalf or through

> a legal representative, present his case, unless the prisoner chooses to forego such a hearing. They base their argument on the common law and on articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms … The respondent Parole Board accepts that in resolving challenges to revocation of their licences by determinate sentence prisoners **it is under a public law duty to act in a procedurally fair manner**. It accepts that in some cases, as where there is a disputed issue of fact material to the outcome, procedural fairness may require it to hold an oral hearing at which the issue may be contested. It accepts, through leading counsel, that it may in the past have been slow to grant oral hearings. But it strongly resists the submission that there should be any rule or presumption in favour of an oral hearing in such cases, contending that neither the common law nor the European Convention requires such a rule or such a presumption." (Emphasis added.)

The ***House of Lords*** agreed with the Parole Board that there was no right to an oral hearing. However, ***Lord Bingham*** examined some of the characteristics of an oral hearing and found that the circumstances of the case of ***West*** entitled him to such a hearing, as "procedural fairness called for more than consideration of his representations on paper…" ***(page 366E).***

(d) Discussion

[53] We see nothing in the circumstances of the appellants' case that would have required an oral hearing before the BPC. However, we would not exclude the desirability of an oral hearing in all cases and for all times, for as ***Lord Bingham*** said in the unanimous JCPC decision of ***Hinds v. Attorney-General of Barbados [2002] 1 A.C. 854*** at ***865A,*** "the Constitution is to be read not as an immutable historical document but as a living instrument, reflecting the values of the people of Barbados as they gradually change over time". The appellants conspicuously failed to avail themselves of the opportunity to make written representations to the BPC. Further, the issues about which they complained, such as the difference between their punishment and that of their co-accused, could have been the subject of written representation, and was in any event part of the record of the proceedings. We can find no merit in the grounds of appeal discussed under issue two.

VII. OTHER ISSUES

(a) The Ouster Clause

[54] The respondents maintained that the ouster clause in section 77(4) of the Constitution, quoted in paragraph [21] above, is an absolute bar to these proceedings. They also submitted "that unlike Barbados, the Constitution of Jamaica has no expressed entrenched ouster clause". The appellants relied on the modern learning with regard to ouster clauses, namely, that a literal interpretation of the clause is no longer appropriate and the clause certainly does not inhibit the court's jurisdiction to examine a breach of the Constitution, especially one that affects the fundamental rights and freedoms of the individual.

[55] In ***Harrikissoon v. Attorney-General of Trinidad and Tobago [1980] A.C. 265*** at ***page 272E, Lord Diplock*** in the JCPC left open for future consideration, "whether (an ouster of jurisdiction clause) of the Constitution, despite its unqualified language, is nevertheless subject to the same limited kind of implicit exception as was held by the House of Lords in *Anisminic Ltd. v. Foreign Compensation* [1969] 2 A.C. 147 to apply to an ouster of jurisdiction clause in very similar terms contained in an Act of Parliament".

[56] Although ***Lord Diplock*** did not refer to ***Harrikissoon,*** in ***Attorney-General v. Ryan [1980] A.C. 718,*** another JCPC case decided six months later**,** he considered the effect of the ouster provisions of The Bahamas Nationality Act, 1973. In that case, the Minister refused an application for citizenship without giving the applicant a fair hearing and the JCPC invalidated his decision notwithstanding a provision in the statute that it "should not be subject to appeal or review in any case". ***Lord Diplock*** stated at ***page 730E*** as follows:

> **"**It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority. As Lord Selborne said as long ago as 1885 in *Spackman v. Plumstead District Board of Works* (1885) 10 App.Cas.229, 240: "There would be no decision within the meaning of the

statute if there were anything…done contrary to the essence of justice." See also *Ridge v. Baldwin* [1964] A.C. 40."

[57] ***Lord Diplock*** returned to ***Harrikissoon*** in ***Thomas v. Attorney-General of Trinidad and Tobago [1982] A.C. 115*** and stated at ***pages 134B*** and ***135E*** as follows:

"Finally, their Lordships turn to question (2): the effect of the "no certiorari" clause in section 102(4) of the Constitution. Whether that clause ousts the jurisdiction of the court to inquire in any circumstances into the validity of administrative orders made by the commission is a question that this Board deliberately left open in *Harrikission v. Attorney-General of Trinidad and Tobago* [1980] A.C. 265.

……

There is also, in their Lordships' view, another limitation upon the general ouster of the jurisdiction of the High Court by section 102(4) of the Constitution; and that is where the challenge to the validity of an order made by the commission against the individual officer is based upon a contravention of "the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations" that is secured to him by section 2(e) of the Constitution, and for which a special right to apply to the High Court for redress is granted to him by section 6 of the Constitution. Generalia specialibus non derogant (general provisions cannot derogate from specific provisions) is a maxim applicable to the interpretation of constitutions. The general "no certiorari" clause in section 102(4) does not, in their Lordships' view, override the special right of redress under section 6."

[58] It follows that in this case section 24 of the Constitution providing for a right to apply to the High Court for the enforcement of the protection of fundamental rights and freedoms is not ousted by section 77(4) of the Constitution. Further, it is plainly for the court to determine, on the true construction of the Constitution, whether there has been an error of jurisdiction or breach of natural justice or some misdirection which makes the ouster clause inapplicable: ***Ulufa'alu v. Attorney General (of Solomon Islands) [2005] 1 LRC 698 C.A.*** per ***Lord Slynn of Hadley P*** and ***Ward JA*** at page ***708g.***

[59] The BPC is an independent quasi-judicial body; it is not just an advisory body having a consultative role, but a decision-maker, as the Governor-General is required by section 78(2) of the Constitution to "act in accordance with the advice" of the BPC. It is now settled law that the court, in the exercise of its jurisdiction over bodies exercising quasi-judicial powers, such as the BPC, may, in appropriate proceedings either set aside a decision of the body or declare it to be a nullity: ***Lord Diplock*** in ***Ryan*** at ***page 730D***. Excess of jurisdiction has been widely defined to include a violation of the principles of natural justice. To interpret section 77(4) of the Constitution as ousting the jurisdiction of the court would be to deprive the appellants of their judicial remedy under section 24 of the Constitution.

(b) Funding

[60] The appellants in ground 2.2 of their appeal stated that the judge wrongly failed to hold that they were entitled to adequate funding in order that they may be properly represented before the BPC. One of the issues raised in correspondence by the appellants' attorneys-at-law was adequate funding to facilitate their representation before the BPC. Section 18(1) of the Constitution provides that a person charged with a criminal offence shall be afforded a fair hearing and by section 18(2)(d) shall be permitted to defend himself in person or by a legal representative, but by section 18(12) he shall not be entitled to legal representation at public expense. There is no constitutional right to counsel for those challenging their death sentences in post-conviction proceedings.

[61] The ***Community Legal Services (Tariff of Fees) Regulations, 2000, S.I. 2000 No. 73*** do provide a modest sum for advising on and preparing an appeal by a convicted person to the BPC, which sum the Attorney-General offered to double. ***Lord Bingham*** considered in ***Hinds*** the constitutional effect of a denial of free legal representation at a trial and stated at ***page 866D*** as follows:

> "First, and most importantly, while the Constitution does not entitle every indigent criminal defendant to free legal aid in every case, it does guarantee a fair hearing to every such defendant and there is nothing in section 18(2)(d) or section 18(12) which qualifies or undermines that right. It is indeed

one of the fundamental human rights and freedoms to which the people of Barbados have pledged allegiance in the preamble to the Constitution."

[62] The circumstances of this case do not warrant that we give our considered opinion to this ground of appeal, which is better reserved for future consideration on appropriate facts. However, the limited funding available to the appellants is a factor to be taken into account in the disposal of the appeal and we have so done.

VIII. THE DEATH PENALTY AND THE PREROGATIVE

(a) Death Sentence

[63] We summarise the legal position of a person who is convicted of murder. The law provides that such a person shall be sentenced to, and suffer, death by hanging. The convicted murderer generally has a right to appeal to the Court of Appeal and thereafter as from 8 April 2005 to the Caribbean Court of Justice, the replacement for the JCPC. After the appellant's rights to appeal have been exhausted, the appellant may petition international bodies with a view to obtaining a recommendation that the execution should not be carried out. The BPC must advise the Governor-General whether the execution should be carried out or the sentence commuted to life imprisonment and in so doing must take into account any report of an international body. If the BPC does not accept the report the BPC should explain why. However, the final decision rests with the BPC. The BPC in deciding on the advice it should tender must also take into account any written representations made by or on behalf of the convicted murderer, the reports submitted by local authorities and the lapse of time between the conviction and the likely date of execution. Provided that fair and proper procedures have been followed within the stipulated time frame, there is no lawful impediment to carrying out the death penalty. It follows, that as the law stands, convicted murderers remain liable to be hanged.

[64] It is helpful to explain our decision in the context of the JCPC judgment in ***Boyce and Joseph***. The appellants' only ground of appeal was that the mandatory death sentence was unconstitutional. It was not argued that the death penalty itself was unconstitutional, but that a mandatory or automatic sentence of death following a conviction of murder, irrespective of the circumstances of the murder, is inhuman or degrading punishment

and contrary to the fundamental rights provisions contained in section 15(1) of the Constitution.

[65] The majority opinion of ***Lords Hoffmann, Hope of Craighead, Scott of Foscote, Rodger of Earlsferry and Zacca J.*** in ***Boyce and Joseph*** and delivered by ***Lord Hoffmann*** at ***page 795*** stated:

> "Fundamental rights in Barbados
>
> 27 If their Lordships were called upon to construe section 15(1) of the Constitution, they would be of opinion that it was inconsistent with a mandatory death penalty for murder. The reasoning of the Board in *Reyes*, which was in turn heavily influenced by developments in international human rights law and the jurisprudence of a number of other countries, including states in the Caribbean, is applicable and compelling … it is the correct interpretation of the subsection.
>
> 28 Parts of the Constitution, and in particular the fundamental rights provisions of Chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions … The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning. The text is a "living instrument" when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life. Section 15(1) is a provision which asks to be construed in this way. The best interpretation of the section is that the framers would not have intended the judges to sanction punishments which were widely regarded as cruel and inhuman in their own time merely because they had not been so regarded in the past."

The dissenting opinion of ***Lords Bingham of Cornhill, Nicholls of Birkenhead, Steyn and Walker of Gestingthorpe*** nevertheless concurred with the majority in holding that a mandatory death sentence constitutes inhuman or degrading punishment contrary to section 15(1) of the Constitution.

[66] ***Boyce and Joseph*** was one of the three decisions of the Board comprised of the same members given on 7 July 2004; the other decisions referred to in paragraph [9] above were ***Matthew v. The State [2004] 3 WLR 812*** and ***Watson v. R. [2004] 3 WLR 841. Boyce and Joseph, Matthew*** and ***Watson*** followed another trilogy of decisions given by a unanimous Board on 11 March 2002; from Belize, ***Reyes v. R. [2002] 2 A.C. 235;*** from St. Lucia, ***R. v. Hughes [2002] 2 A.C. 259;*** and from St. Christopher and Nevis, ***Fox v. R. [2002] 2 A.C. 284,*** which also held that a mandatory death sentence violates the constitutional right to protection from inhuman or degrading punishment.

(b) Prerogative of Mercy not a Substitute for Judicial Sentence

[67] Barbados, unlike Trinidad & Tobago, did not concede that the mandatory death sentence was inhuman or degrading punishment: ***Boyce and Joseph*** at ***page 806G***. Instead the government argued that the power of the BPC to recommend a commutation of the death sentence militated against any harshness of the mandatory death sentence. The submission was set out in ***Lord Hoffmann's*** judgment at ***page 793D*** as follows:

> "The Government of Barbados has always accepted that the execution of everyone convicted of murder would be unacceptably harsh and undiscriminating – in fact, cruel and inhuman. But the government argues that the provisions for the application of the death penalty must be considered as a whole and that they include the power of the Governor-General, on the advice of the Barbados Privy Council, to commute the death sentence in any case in which it is thought appropriate to do so. The Constitution codifies and institutionalises the exercise of the royal prerogative of mercy… The government says that when one takes these powers into account and examines the operation of the death penalty in practice, it is not rigidly or arbitrarily applied. It argues that the mandatory sentence enables the law to

> achieve maximum deterrence while the power of commutation provides the necessary flexibility and humanity in its practical application."

[68] It has been accepted that the exercise of the prerogative is not a substitute for a process that determines the appropriate sentence after a conviction for murder. As has been pointed out in the JCPC cases, it is necessary to distinguish the judicial act of imposing sentence and the executive act of carrying it out. In ***Reyes,*** the JCPC rejected the argument that the Council, which advises the Governor-General on the exercise of the prerogative of mercy, "could be regarded as providing the necessary individualisation of the death sentence": ***Hughes*** at ***page 271D***. ***Lord Rodger*** stated at ***page 271E*** as follows:

> "While the act of clemency is, indeed, to be seen as part of the whole constitutional process of conviction, sentence and the carrying out of the sentence, it is an executive act and cannot be a substitute for the judicial determination of the appropriate sentence."

[69] The definitive passage on this matter is quoted in ***Boyce and Joseph*** at ***pages 793*** and ***794*** and is taken from the judgment of ***Lord Bingham*** in ***Reyes*** at ***page 257*** as follows:

> "44 [T]he Board is mindful of the constitutional provisions … governing the exercise of mercy by the Governor-General. 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. …The opportunity to seek mercy from a body such as the Advisory Council cannot cure a constitutional defect in the sentencing process."

(c) The Heightened Importance of the Prerogative

[70] The constitutional defect in the sentencing process cannot be remedied by the exercise of the prerogative, but the effect thereof can be mitigated by the BPC's scrupulous adherence to the highest standards of procedural fairness and natural justice. The BPC's advice in 2002 that the appellants be executed at a time when they had not exhausted their domestic remedies and had intimated their intention to appeal to the JCPC, which they did, was manifestly unfair to the appellants and a denial of natural justice. Similarly, the BPC's advice in 2004 that the JCPC's Order be carried out without regard to the appellants' expressed intention to petition the IACHR, which they did, was contrary to the binding authority of ***Lewis***, and therefore a denial of the appellants' rights. The death warrants were therefore improperly read to the appellants in both 2002 and 2004. It is in this context that we have to consider the appropriate manner in which this appeal should be disposed.

IX. DISPOSAL

(a) Protection of Fundamental Rights

[71] ***Lord Wilberforce*** in the much quoted passage from ***Minister of Home Affairs v. Fisher [1980] A.C. 319*** at ***page 328F*** gave some insight into the background of the constitutional guarantees for the protection of fundamental rights and freedoms to be found in the constitutions of most Commonwealth Caribbean territories, as follows:

> "Chapter 1 is headed 'Protection of Fundamental Rights and Freedoms of the Individual'. It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European

> Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations' Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."

This passage is as applicable to Barbados as it is to Bermuda as the fundamental rights provisions of both Constitutions spring from the same source: ***Boyce and Joseph*** at ***page 807D.***

[72] Helpful guidance on the approach to be adopted in interpreting the fundamental rights provisions in the Constitution is also to be found in the JCPC judgment of ***Lord Woolf*** in ***Huntley v. Attorney-General for Jamaica [1995] 2 A.C. 1*** at ***pages 12F*** and ***13B,*** as follows:

> "[A] technical approach is not the appropriate approach [to] Chapter III of the Constitution which deals with fundamental rights and freedoms. As was explained by Lord Wilberforce in *Minister of Home Affairs v. Fisher* …it calls "for a generous interpretation … to give to individuals the full measure of the fundamental rights and freedoms referred to." A person in the position of the appellant is therefore entitled to require the courts to adopt a non-rigid and generous approach to his rights …
>
> However in doing this the court looks at the substance and reality of what was involved and should not be over-concerned with what are no more than technicalities. The approach is the same whether this is to his benefit or disadvantage… In considering the requirements of fairness, the same broad approach is appropriate. The common law supplements a statutory procedure laid down by legislation so as to ensure that the procedure is fair in all the circumstances. As Lord Reid pointed out in *Wiseman v. Boreman* [1971] A.C. 297, 308, when applying a "fundamental general principle" the court does not resort to "a series of hard and fast rules". In

determining what fairness requires, the court should be concerned with the reality of what is involved."

[73] On 8 March 1951, the U.K. became the first member of the Council of Europe to ratify the European Convention, which came into force on 3 September 1953. In the same year the U.K. extended its obligations under the Convention to forty-two dependent territories, including Barbados: (1953) (Cmd. 9045). "The extension of the Convention meant that in virtually all British colonial territories, in theory at least, human rights were protected under the European Convention": ***Human Rights and the End of Empire*** by ***A.W.Brian Simpson (Oxford, 2004)*** at ***page 844***. It would therefore be a regression if the effect of our interpretation of the guarantees of the fundamental rights and freedoms of the individual under the Constitution accorded less protection to the individual after independence than that enjoyed prior to independence under the European Convention: ***Reyes*** at ***page 247D.*** This was one of the factors guiding the interpretation of the Jamaican Constitution in ***Pratt and Morgan; Lord Griffiths*** said at ***page 29B***, "the primary purpose of the Constitution was to entrench and enhance pre-existing rights and freedoms, not to curtail them". It is to be noted that the JCPC relied in the Barbados appeal of ***Bradshaw and Roberts,*** as stated at ***page 67h,*** on its opinion in ***Pratt and Morgan.*** The Constitution is a living instrument and by reason of ***section 117(11)*** thereof in conjunction with ***section 31*** of the ***Interpretation Act, Cap.1*** shall be construed as always speaking.

(b) Enforcement of Fundamental Rights

[74] Chapter III of the Constitution provides for the protection of fundamental rights and freedoms of the individual in sections 12 to 23. Section 24, pursuant to which the appellants filed their motions, provides for the enforcement of the protective provisions as follows:

> "24. (1) …if any person alleges that any of the provisions of sections 12 to 23 has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

(*a*) to hear and determine any application made by any person in pursuance of subsection (1); and

(*b*) to determine any question arising in the case of any person which is referred to it in pursuance of sub-section (3), and **may make such orders**, issue such writs **and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 12 to 23.**" (Emphasis added.)

In seeking declaratory relief under section 24, ***Lord Bingham*** in ***Hinds*** at ***page 868D*** described the section as conferring, "a wide-ranging power to grant constitutional relief where the need for it is shown".

(c) Commutation of Sentence or Stay of Execution

[75] The appellants in their amended originating motions seek an order commuting the sentence of death to a sentence of life imprisonment; alternatively, an order staying the execution of the sentence of death pending the hearing and determination of their applications to the IACHR. In ***Higgs v. Minister of National Security [2000] 2 A.C. 228*** at ***251E-G***, ***Lord Steyn*** dissenting, mentioned the two forms of relief, as follows:

> "The two applicants seek in the first place commutation of the death sentences imposed on them by reason of the prolonged periods for which they have been held on death row in The Bahamas, coupled with the conditions to which they have been subjected during those periods. ... I would advise Her Majesty that both appeals should succeed on this primary issue. In these circumstances the applicants' alternative claims for the lesser relief of a stay of execution of their sentences pending the decisions of the Inter-American Commission on Human Rights fall away and need not be considered. I do not, therefore, express any view on this aspect of the two appeals. Had it been necessary to consider the matter I would have wished to explore it in depth. And I would not have considered the matter as necessarily

concluded by ***Fisher v. Minister of Public Safety and Immigration (No. 2) [2000] 1 A.C. 434***."

Fisher held that the execution of the appellant, in the circumstances of that case, while his petition had been under consideration by the IACHR, did not infringe his right to life or constitute inhuman treatment under The Bahamas Constitution. ***Fisher*** was decided (5 October 1998) before ***Lewis*** (12 September 2000) and ***Lord Slynn of Hadley,*** who gave the judgment of the majority in ***Lewis,*** "distinguished" ***Fisher,*** in which he gave the dissenting opinion with ***Lord Hope of Craighead***. It may also be noted that ***Lord Hoffmann*** joined in the majority judgment in ***Fisher*** given by ***Lord Lloyd of Berwick***, but in ***Lewis*** he gave the sole dissenting opinion.

[76] We have taken the opportunity in this appeal to explore whether it is appropriate to commute the death sentences or to grant a stay of execution of the sentences pending the decisions of the IACHR. In view of our decision on issue one, these are the only two forms of relief open to us and we must exercise our discretion to grant the most appropriate relief in the individual circumstances of this case. It is stated in ***Lewis*** at ***page 55F*** that the Court of Appeal of Jamaica granted a temporary stay of execution to one of the appellants pending the determination of his case before the United Nations Human Rights Committee and its consideration by the Governor-General in Privy Council. However, the JCPC commuted the sentences of all of the appellants based on the delay since the periods of initial conviction. In four of the cases, as noted at ***page 87E,*** five years had elapsed since the first conviction and sentence and in one case nearly five years had elapsed. The issue was therefore resolved on the basis of the ***Pratt and Morgan*** guidelines on delay and all the sentences were commuted.

[77] In ***Thomas (and Hilaire),*** referred to in paragraph [31] above, the JCPC allowed the appeal, declared that it would be a breach of the applicants' constitutional rights to carry out the death sentences before their applications to the IACHR had been finally determined and the final decisions of the IACHR and the Inter-American Court had been duly considered by the authorities of Trinidad and Tobago and accordingly stayed the executions, as stated in the majority judgment of ***Lord Millett*** at ***pages 23E*** and ***29E*** and as further explained by him in the majority judgment of ***Briggs v. Baptiste [2000] 2 A.C. 40*** at ***page 46F.*** In ***Briggs,*** unlike ***Thomas,*** the

majority view was that the relief sought from the Inter-American system was not pending, but had run its course and therefore his appeal was dismissed. The appellant ***Thomas*** had filed his petition on 31 March 1998, two years and seven months before the five-year anniversary of his murder conviction on 15 November 2000, and the appellant ***Hilaire*** had filed his petition on 7 October 1997, also two years and seven months before the five-year anniversary of his murder conviction on 29 May 2000, as stated at ***page 19 C-D*** and ***G.*** In ***Thomas*** therefore, there were good prospects of the IACHR reporting within the time frame set out in ***Pratt and Morgan. Lord Steyn*** at ***page 36B*** concurred that the execution of the death sentences be stayed pending consideration of the reports of the IACHR. However, in his dissenting opinion on commutation of sentence, he was of the opinion that the correct disposal of the appeals would have been to commute the death sentences and to substitute terms of life imprisonment on the ground of delay coupled with his acceptance of the findings of fact of the trial judge in respect of ***Thomas',*** and by inference ***Hilaire's,*** inhuman treatment imposed in prison contrary to the Prison Rules.

[78] The five-year time frame set out in ***Pratt and Morgan*** was not intended to be a rigid timetable. ***Lord Griffiths*** at ***pages 34H*** and ***35G*** stated:

> "Their Lordships do not purport to set down any rigid timetable but to indicate what appear to them to be realistic targets… These considerations lead their Lordships to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'."

The principles established in ***Pratt and Morgan*** were explained by ***Lord Goff of Cheveley*** in ***Guerra v. Baptiste [1996] 1 A.C. 397*** at ***pages 413F*** and ***414H*** as follows:

> "[N]o fixed time is specified for the period within which execution should take place after conviction and sentence. On the contrary, the period is to be ascertained by reference to the requirement that execution should follow *as swiftly as practicable* after sentence, allowing *a reasonable time* for appeal and consideration of reprieve…It is to be observed that this (five-year) period was not specified as a time limit…It

follows that the period of five years was not intended to provide a limit, or a yardstick, by reference to which individual cases should be considered in constitutional proceedings."

Lord Goff further explained in ***Henfield v. Attorney-General of The Bahamas [1997] A.C. 413*** at ***page 421B-E*** that the five-year period was not to be regarded as a fixed limit, but rather as a norm:

> "[A]ttention has been concentrated on the five-year period specified in *Pratt v. Attorney-General for Jamaica.* This period has been treated as the overall period which, in ordinary circumstances, must have passed since sentence of death before it can be said that execution will constitute cruel or inhuman punishment. It has not however been regarded as a fixed limit applicable in all cases, but rather as a norm which may be departed from if the circumstances of the case so require. ...In *Guerra* ... the total delay amounted to four years and ten months. The Privy Council held that, following such delay, execution would constitute cruel and unusual punishment and so be unlawful. In so holding the Board had regard to the serious delay which had occurred and to the cause of that delay, and to the fact that, as a result, the overall lapse of time since sentence of death was close to the five-year period.

The position was summarised in ***Fisher*** by ***Lord Slynn of Hadley*** and ***Lord Hope of Craighead*** in their dissenting opinion at ***page 453D*** as follows:

> "[T]he decision in *Guerra* illustrates, the five-year period has in practice been treated not as a limit but as a norm, from which, as Lord Goff said in *Henfield's* case, the courts may depart if it is appropriate to do so in the circumstances of the case. The decision in *Reckley v. Minister of Public Safety and Immigration (No. 2)* [1996] A.C. 527, in which the petition for special leave to the Judicial Committee was dismissed more than five years after the passing of the death sentence, shows that there is room for some latitude either way in the application of the five-year period, depending on the circumstances."

[79] We should add that the five-year period has been further

refined. In ***Pratt and Morgan*** at ***pages 34G*** and ***35G Lord Griffiths*** stated:

> "The aim should be to hear a capital appeal within 12 months of conviction…In this way it should be possible to complete the entire domestic appeal process within approximately two years…it should be possible for the (United Nations Human Rights) Committee to dispose of (complaints) with reasonable dispatch and at most within 18 months."

In ***Guerra*** at ***page 415B, Lord Goff*** referred to the periods given in ***Pratt and Morgan*** as "realistic targets" and in ***Henfield,*** he elaborated at ***page 424D*** as follows:

> "It is true that, in formulating (the five-year) period, the Board made allowances both for domestic appeals (two years) and for petitions to the Human Rights Committee (18 months), the basic function of doing so being to ensure that the period so chosen accommodated target periods for both of these. But it is the whole period of five years…which constitutes the inordinate delay; and the choice of five years was chosen as being long enough…to accommodate the relevant appellate procedures, but also as being…long enough…to constitute inordinate delay."

[80] In this case, the five-year norm will expire on 2 February 2006. There is therefore another eight months within the five-year period during which a report could be received. However, in ***Thomas*** at ***page 27C, Lord Millett*** stated that "in allowing only 18 months to complete the international processes, the Board can with hindsight be seen to have been unduly optimistic" in ***Pratt and Morgan.*** In ***Bradshaw and Roberts*** at ***page 941D*** the respondents stated that "applications to the human rights bodies take on average two years", which would extend the period from the date of the petition to the IACHR in September 2004 to September 2006. The Attorney-General has pointed out that the delay in this case was indeed not attributable to the Barbados courts as the appeal to this Court was heard and determined one year and one month after the conviction. A period of two years elapsed between the application for special leave to appeal and the decision of the JCPC; this therefore exceeded the target period by one year. There is no doubt that the inability of the appellants to finance their appeals contributed to the delay of the appeal process to the JCPC. This happened in

Bradshaw and Roberts, where Government failed to respond to a request for funding, as stated at ***page 942G*** of that case.

[81] It should also be noted that Government failed to comply with the Order of the Inter-American Court dated 17 September 2004, to provide a report, as stated in its further Order dated 25 November 2004. In the circumstances, it is highly unlikely that a report would be forthcoming within the time frame of ***Pratt and Morgan.*** In ***Harewood and Murrell v. The Attorney-General (High Court cases Nos. 1529 and 1530 of 1995, unreported decision of 13 November 1996),*** which was surprisingly not cited to us, ***Garvey Husbands J*** was guided by ***Pratt and Morgan*** and ***Guerra*** in commuting the applicants' sentences of death to sentences of life imprisonment. The period between conviction and disposal of ***Harewood's*** JCPC appeal was four years and seven months and the period for ***Murrell*** was a few days short of the same. The judge held that he was in "no doubt that to execute the applicants after such a lapse of time would constitute inhuman and degrading punishment or other treatment in contravention of section 15 of the Constitution".

[82] However, apart from the serious delay, which is close to the five-year period and which is not attributable to the appellants, we are of the opinion that there is another factor in favour of commutation of the sentences in this case: the undesirability and inappropriateness of subjecting the BPC to directions of the court. The BPC has the right to regulate its own procedure, subject to judicial review of the procedural fairness of its decision-making. Judicial deference to the BPC and the limited time before the expiry of the five-year period therefore dictate that we should not order a stay of execution pending the report from the IACHR. In view of the time frame and the circumstances of this case, the proper order is to commute the sentences.

[83] On the other hand, in a case in which there is sufficient time within which to exhaust the domestic and international procedures, the court will have to consider whether in all the circumstances it is appropriate to order a stay of execution until the procedures have been completed. In such a situation, it may be necessary for the court to give directions. In our view, the recommendations of an international body to which the state has subscribed should be accorded due respect and reasons should be stated if it is intended to depart from those recommendations. The facts and circumstances

of each case require careful and detailed consideration in order to arrive at a just result, which will inevitably determine the applicant's right to life.

[84] We may add three further considerations that favour a decision to commute the sentences. First, the death warrants have already been read to the appellants on two occasions with an interval of two years between the readings. In ***Briggs*** at ***page 55B, Lord Millett*** stated that the repeated reading of the death warrant did not amount to cruel and unusual treatment, but was rather a matter to be taken into account in advising on the exercise of the prerogative of mercy. It would be undesirable to expose the appellants to a third reading of the death warrants and the likelihood of further court proceedings. Secondly, although we have no jurisdiction to examine the merits of the advice given by the BPC, we nevertheless may take into account all the facts and circumstances so as to determine the order that we should make under section 24 of the Constitution. The difference in punishment between the twelve year sentences for manslaughter given to the two co-accused of the appellants and the mandatory death sentences passed on the appellants is disproportionate; albeit that the appellants refused to accept the prosecution's offer of a guilty plea to the lesser offence of manslaughter. Thirdly, the appellants have no access to adequate funding to effectively pursue any further rights they may have, but instead are dependant on local and overseas lawyers, who are prepared to act for them *pro bono*.

[85] In ***Pratt and Morgan***, ***Lord Griffiths*** stated at ***page 34A,*** in relation to the power in section 25(2) of the Constitution of Jamaica:

> "The width of the language of this subsection enables the court to substitute for the sentence of death such order as it considers appropriate. The appropriate order in the present case is that the sentence of death of each applicant should be commuted to life imprisonment."

[86] In ***Bradshaw and Roberts,*** the appellants claimed that the delays between the sentences and the intended executions constituted a breach of section 15(1) of the Constitution, which prohibited the subjection to torture or to inhuman or degrading punishment or other treatment and that the remedy under section 24(2) of the Constitution for the breach should be commutation of the sentence of death to a sentence of life imprisonment. The JCPC

allowed the appeals from this Court and ordered that the sentences of death be commuted to sentences of life imprisonment.

[87] Similarly, in ***Lewis*** and ***Matthew***, following ***Pratt and Morgan,*** the JCPC commuted the sentence of death of all the appellants to sentences of life imprisonment. Therefore in ***Pratt and Morgan, Bradshaw and Roberts, Lewis*** and ***Matthew*** the sentences of death were commuted by the JCPC to sentences of life imprisonment. We are unanimously of the view that the appropriate and proportionate order to make would be the same as that made in the above cases. We therefore order that the appeal be allowed and that the sentences of death imposed on the appellants be commuted to sentences of life imprisonment.

(d) International Human Rights

[88] We would not wish to leave this judgment without stating that we understand the position taken by the Attorney-General on behalf of the Government. We are also cognisant of the public interest in having a lawful sentence of the court carried out. The appellants have exhausted their domestic remedies including their final appeal to the JCPC, which was dismissed on 7 July 2004. The BPC advised the Governor-General against the exercise of the prerogative of mercy in favour of the appellants, as it was entitled to do, and everything was therefore organised for the execution of the appellants on 21 September 2004. Yet, they have not been executed. What we have tried to make clear is that the appellants have enforceable rights not only under the Constitution, but also by reason of Barbados being a party to international human rights treaties, under which they acquired individual rights. It is these rights that the appellants now seek to exercise. The Attorney-General has very ingeniously argued that any international human rights that the appellants may have are subordinate to the state's domestic law and that there is no lawful impediment to the law taking its course. However, the legal authorities, which bind this Court, do not support that view. Further, such a view is contrary to the developing international human rights jurisprudence. It follows that it is not possible for us to consider human rights without regard to Barbados' international treaty obligations as set out in ***Boyce and Joseph*** at ***page 809, paragraph 81.*** In the circumstances, it is the responsibility of the judiciary as guardian of the Constitution to give meaning to its preamble by which the people

of Barbados proclaim “the dignity of the human person” and “their unshakeable faith in fundamental human rights and freedoms”.

[89] We have been greatly assisted by the submissions of the appellants’ counsel and by those of the Attorney-General and her counsel. The issues have been carefully and clearly presented thereby enabling us to readily resolve them.

[90] As to costs, this being a civil appeal of constitutional importance, we see no good reason to depart from the usual rule that costs should follow the event. We therefore order that the appellants should have their costs against the respondents jointly and severally, here and in the court below, each certified fit for two attorneys-at-law, such costs to be agreed or taxed.